HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

David Lawson

Applicant

-and-

Workplace Safety and Insurance Board

Respondent

DECISION

Adjudicator: Brian Cook

Date: July 12, 2017

File Number: 2014-17115-I

Citation: 2017 HRTO 851

Indexed as: **Lawson v. Workplace Safety and Insurance Board**

APPEARANCES

David Lawson, Applicant	)	John McKinnon and Laura Lunansky, Counsel
Workplace Safety and Insurance Board, Respondent	)	Greg Bullen, Counsel

Introduction

[1] This Application alleges discrimination with respect to services because of disability contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The applicant is an injured worker. He is in receipt of full loss of earnings (LOE) benefits from the respondent as a result of a 2002 work-related injury. The applicant has a number of psychological conditions. The respondent has accepted that some of these conditions resulted from the workplace injury and that he has an injury-related permanent psychological impairment which is compensated by a 15% non-economic loss (NEL) award. In addition, the applicant has a permanent low back injury and associated pain disability that the respondent has found resulted from the work-related injury.

[3] In this Application, the applicant asserts that he has special needs related to his disabilities. He alleges that because of his special needs, he required accommodation in order to fully access the services provided by the respondent. He alleges that in the absence of accommodation, he was eventually unable to access some of the services that are provided by the respondent, particularly with respect to his entitlement to health care benefits under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, as amended ("*WSIA*").

[4] In the Application, the applicant alleged that he had been specifically discriminated against with respect to various decisions made by the respondent in the course of adjudicating his entitlement to benefits. These allegations were dismissed as having no reasonable prospect of success in Decision 2015 HRTO 850. That Decision did not dismiss the allegation that the respondent has failed to accommodate the applicant's disability in the way that it has dealt with him as an injured worker.

[5] A hearing to deal with this allegation was held on April 19 and 20, and May 3, 2017. On April 19, I heard evidence from Adam Starkman and Michael Docouto. Mr.

Starkman is an Assistant Director in the respondent's Secondary Entitlement department. He testified about the respondent's procedures for dealing with injured workers who may have mental health issues. Mr. Docouto is a Manager in the Permanent Benefits Services Branch. He testified about some of the events that occurred in the course of the respondent's adjudication of the applicant's claim. The applicant testified on April 20. On May 3, I heard evidence from Dr. Cobrin, who is a psychologist who has treated the applicant in the past.

Issues in this Application

[6] At the hearing, it was clarified that the basis for the allegation of discrimination is anchored in the concept of constructive discrimination – that the respondent discriminated against the applicant by treating him the same as other injured workers and failing to appreciate that because of his special needs this resulted in barriers to the applicant's access to the services provided by the respondent.

[7] In addition, the applicant alleges that the respondent failed to meet its procedural duty to accommodate the applicant when it did not properly respond to an accommodation request articulated by his representative in 2013.

The applicant's disability

[8] The applicant has a long history of low back problems. He has pain in his low back that radiates to his legs. He has required significant narcotic medication for pain control but has determined that the best strategy is marijuana and he has a prescription and license for this. He testified that he no longer takes narcotic medications. The WSIB has determined that the 2002 work-related injury was a factor that contributed significantly to the development of the current low back condition and he has been awarded an NEL award for this condition.

[9] The applicant also has significant psychological conditions. At the hearing, Dr. Cobrin testified about his diagnosis of the applicant. However, Dr. Cobrin explained, as discussed in more detail below, he has not assessed the applicant since 2012.

Nevertheless, he felt it very likely that the applicant's psychological condition has not changed appreciably since 2012. Dr. Cobrin testified that the applicant had 24 treatments with him between 2005 and 2012 and that in that period, the applicant's condition was basically the same.

[10] Dr. Cobrin testified that in his opinion, the applicant's psychological diagnoses include Anxiety Disorder, Depression marked by suicidal ideation, a Pain Disorder with psychiatric features, Personality Disorder and Attention Deficit Disorder.

[11] Dr. Cobrin reviewed the diagnoses that have been made by other psychologists and psychiatrists who have assessed the applicant. He said that they are similar to his diagnosis. However, other assessors have diagnosed Adjustment Disorder as a primary diagnosis and have not identified Depressive Disorder and Anxiety Disorder as separate diagnoses. He explained that the diagnosis of Adjustment Disorder would suggest that the applicant's symptoms of anxiety and depression are reactive to external factors and difficulty adjusting to change. In his view, if the applicant has Adjustment Disorder, he also has well-established Depression and Anxiety Disorders although the intensity of symptoms related to these disorders will vary based on external factors.

[12] In a report dated February 14, 2010, Dr. Cobrin discussed the applicant's psychological condition in the following terms:

> Of all of my clients over the years (probably in the thousands), Mr. Lawson's ability to cope with any stress is one of the most limited, if not the most limited, which I have encountered. He reacts extremely negatively when faced with stressful situations. This tendency makes all his other psychological problems worse, in that his depressive anxiety and pain related symptoms get magnified quite substantially during one of these episodes (which appear to occur on a regular basis).

[13] Dr. Cobrin testified that this summary is consistent with his overall assessment of the applicant's condition; however, he would now include a diagnosis of marked Personality Disorder. He said that this is manifest in particular with an inability to deal appropriately with authority figures, and lack of impulse control. He said that as a result,

the applicant often lashes out and says inappropriate things. Dr. Cobrin indicated that these symptoms have been particularly problematic in the applicant's dealings with the WSIB.

[14] These same issues have also affected the applicant's dealings with others, including physicians. Dr. Cobrin testified that he was aware that the applicant had filed or threatened to file complaints about doctors who he felt were not sufficiently supporting him with the College of Physicians and Surgeons. Dr. Cobrin said that the applicant had threatened to file a complaint about him to the College of Psychologists. Dr. Cobrin testified that this certainly strained the doctor-patient relationship and he expected that other doctors may have felt that complaints or threats of complaints could cause doctors to decide they could no longer treat the applicant. There are references to this problem in the WSIB claim file. Dr. Cobrin clarified that he does not know the specifics of any interactions the applicant may have had with other physicians. He noted that the applicant could have had legitimate complaints. Alternatively, the complaints and threats could be attributed to poor judgement, which is an aspect of the applicant's personality disorder.

[15] Dr. Cobrin testified that in his opinion, the applicant has symptoms that are comparable to symptoms associated with post-traumatic stress disorder. The applicant does not meet the Diagnostic and Statistical Manual of Mental Disorders (DSM) for post-traumatic stress disorder as he has not experienced the requisite trauma. However, in Dr. Cobrin's opinion, the applicant experiences an exacerbation of his psychological symptoms whenever he had dealings with the WSIB in the same way that a person with post-traumatic stress disorder may react when exposed to factors associated with the events that gave rise to the disorder. He said, for example, that a person who has suffered major injury in a motor vehicle accident may have symptoms if they travel by car. In the same way, the symptoms associated with the applicant's psychological conditions are exacerbated when the applicant has dealings with the WSIB.

[16] As discussed below, the history of the applicant's dealings with the WSIB have featured a number of occasions when the applicant has expressed suicidal ideation and, on fewer occasions, threats of harm to others. Dr. Cobrin testified that these expressions of possible harm to the applicant or others are manifestations of the applicant's psychological symptoms in the face of stress related to the applicant's dealings with the WSIB and other authority figures. He testified that he does not believe that the applicant would actually cause harm to himself or others. However, he noted that the applicant's history includes two suicide attempts and so his comments must be treated seriously. He agreed that he has a longer term relationship and therapeutic relationship with the applicant and that others hearing the applicant's threats could very well have serious concerns.

[17] During a preliminary hearing in this case before me, the applicant made comments that appeared to be threats of self-harm and possible harm to others. From the context of those comments, I was concerned that they were perhaps made in an attempt to manipulate the proceedings in his favour. Some of the respondent's staff have expressed similar concerns in memos in the claim file. Dr. Cobrin testified that in his opinion, the applicant would not consciously threaten to manipulate. Instead comments of this nature are manifestations of lack of impulse control, personality disorder, and anxiety disorder. However, Dr. Cobrin agreed that others who know the applicant less well might suspect that the threats might be somewhat manipulative.

[18] On this point, I should note that in his testimony, the applicant denied that he had ever made threats of harm to others. He said that he certainly would never harm anyone.

How the respondent deals with injured workers who may have mental health conditions

[19] Mr. Starkman testified about procedures that the respondent has for dealing with injured workers who may have mental health conditions. Mr. Starkman has been with the WSIB for about 28 years. In his present position, he oversees a number of

adjudication teams. One of these is the “Psych/CPD” team. It deals with the adjudication of claims for benefits for psychological and chronic pain disability. The adjudicators on this team receive special training from experts in the diagnosis of psychological conditions. Mr. Starkman clarified that this team is primarily responsible for making entitlement decisions and the team members do not generally interact with claimants.

[20] Mr. Starkman was asked about training that is provided to Case Managers or other staff who deal directly with injured workers. He said that all board staff are trained about the *Human Rights Code* and specifically the duty to accommodate disability.

[21] Mr. Starkman testified that the respondent has recently renewed its commitment to “core corporate values” of fairness, integrity and trust, and that all staff are expected to treat all workers with dignity and respect.

[22] Mr. Starkman agreed that front line adjudicators have large caseloads and may not have the time or resources to deal with demanding workers. He said that every front line adjudicator has an experienced manager who can assist in dealing with any claim. Each team of front line adjudicators also has access to a Nurse Consultant who has medical training including training regarding psychological disabilities.

[23] Mr. Starkman reviewed the protocol the respondent has developed for dealing with “crisis calls” that may be received by the respondent’s staff in which a worker may express distress or suicidal ideation. The protocol advises front line staff to listen, obtain details, show empathy, provide assurance that the call will be transferred to someone who can help, and to transfer the call to a Nurse Consultant.

[24] The protocol provides more detailed guidelines for Nurse Consultants. This includes how to assess the degree of risk, when to call 911, how to de-escalate the crisis, and how to document the call.

[25] Mr. Starkman also reviewed the respondent’s Threats Protocol. It deals with threats that are received from injured workers to the respondent’s staff, including threats

of harm to the individual staff member, or to other staff, or the public. The protocol establishes that the health and safety of the respondent's own staff is always important and that steps will be taken to ensure the health and safety of the respondent's own staff. Depending on the severity of the threat, the protocol provides that a warning letter may be sent to the person who made the threat. Alternatively, a "restriction" letter may be sent. The restriction could include that the worker is only permitted to communicate with the respondent's staff in writing and is not permitted to attend the respondent's premises. A restriction letter of this sort was issued to the applicant in this case.

[26] Mr. Starkman testified that if a worker has expressed suicidal ideation or attempted suicide, this information would be recorded in the claim file. Most of the claims the respondent deals with now have electronic files. Until December 2016, there was still a screen that was referred to as the "jacket". Mr. Starkman testified that a suicide risk would be noted on the first page of the jacket, which typically has three pages. The crisis protocol indicates that this information would be recorded on the third page of the jacket, which was the page accessed by Nurse Consultants. In December 2016, this system changed and there is no longer a "jacket".

[27] In the present case, the record includes copies of page 3 of the jacket of the applicant's claim file and it does not include any mention of a suicide risk. Since the old jacket no longer exists, it is not known if such information was recorded on the first page of the old jacket.

Earlier Application

[28] This Application is the second Application that the applicant filed with the Tribunal against the respondent. The first Application was settled between the parties under the Tribunal's mediation/adjudication model. Although Minutes of Settlement are generally confidential between the parties, in this case the parties agree that the Minutes of Settlement are quite relevant to the issues in the present Application. I also agreed and directed the parties to provide a copy of the Minutes of Settlement.

[29] The Minutes of Settlement include an agreement that the respondent would set up direct deposit of the applicant's LOE benefits instead of having them delivered by mail. The Minutes also included a "release":

> In consideration of the performance of the undertaking [in preceding paragraphs] the Applicant hereby releases and forever discharges the Respondent… [and its] employees, from any and all actions, causes of action, applications claims, demands and proceedings of whatever kind for damages, indemnity, costs, compensation or any other remedy which the Applicant… may now have, or may have in the future arising out of, or in any way related to the allegations contained in this Application and/or the circumstances leading to the filing of these human rights complaints.

[30] At the hearing before me, the applicant testified that the agreement that the applicant be paid his benefits by direct deposit was important to the applicant because he had experienced frustration because of late or missing payments in the past when he received cheques in the mail. At the hearing, it in fact became apparent that this is still a significant issue for the applicant even though in the time from 2010, when the direct deposits started, to present, there has been a problem on only two occasions.

[31] In Decision 2015 HRTO 850, I dealt with allegations related to alleged continuing problems with direct deposit and found that there was no reasonable prospect of success that the applicant could show that the delays in receiving his cheques in the period after 2010 were discriminatory or that they had occurred because of reprisal. At the hearing, I heard testimony from the applicant and Dr. Cobrin regarding the continuing impact on the applicant about concerns he has about his payments. I clarified that while the applicant could not argue that any delay in payment that may have happened since 2010 was itself discriminatory, he could testify about the impact of any delays as part of the general argument that the discrimination in this case arises from the applicant's difficulties in coping with the respondent's processes and systems without accommodation.

[32] The applicant concedes that the release language in the Minutes of Settlement means that he cannot now seek liability from the respondent for things that happened

before October 2010, when the Minutes of Settlement were signed. However, I agreed with the applicant that it was necessary to hear evidence about those prior events as background to the present Application.

Events prior to 2010

[33] The work-related injury occurred on November 22, 2002. The WSIB established a claim but determined that more investigation was necessary. The investigation lasted until March 2003, when the Claims Adjudicator denied entitlement for the injury on the grounds that there was no proof of accident. The applicant's objection to that decision was heard by an Appeals Resolution Officer in September 2003. The Appeals Resolution Officer allowed the objection. However, as a result, the fact that the applicant had sustained a work-related injury was not recognized for almost one year.

[34] The WSIB determined that the applicant's low back injury meant that he could not return to his pre-injury job as a construction worker. He was referred for labour market re-entry (LMR) services. An LMR Plan was developed. Starting in January 2004, the applicant would attend educational upgrading courses followed by a computer service technician program which would be completed in September 2006.

[35] In January 2005 the applicant's entitlement to LMR services was revoked after he failed a number of the educational upgrading courses. The applicant's LOE benefits were reduced as a result of this. The applicant advised the Claims Adjudicator and the LMR service provider that he has a learning disability which was confirmed by school records. However, the LMR service provider determined that this was not a factor in why the applicant failed the courses.

[36] On February 21, 2005, the Claims Adjudicator determined that the applicant was entitled to full benefits, noting that it appeared that the applicant had been put in an LMR upgrading program that he did not "have the ability to participate in." A new LMR plan was developed, which would lead to employment as a health and safety representative. This plan had lower anticipated earnings than the first plan. The

applicant was able to complete this program by approximately August 2006. His LOE benefits were then reduced based on deemed earnings as a health and safety representative. The applicant had no earnings as he was unable to find any employment.

[37] The applicant's objection to these decisions was heard by an Appeals Resolution Officer who issued a decision dated January 28, 2008. This decision was referred to with approval by Mr. McKinnon in his submissions to me. I agree with Mr. McKinnon that the Appeals Resolution Officer accurately appreciated the nature of the applicant's relationship with the WSIB and some of the consequences of that relationship. The Appeals Resolution Officer said in part:

> The record Illustrates that Mr. Lawson has been troubled at times and has a heightened emotional reactivity to stress that is part of an adjustment disorder he has gone on to experience in response to his accident and WSIB claim. A number of assessors, including the CAMH professionals, have recorded that the worker has varying degrees of anxiety and depressed mood whenever confronted with stressful situations.
>
> To this end, the claim file record shows that Mr. Lawson has had bitter and tumultuous relationships with many WSIB staff and has made threats in the past. As well, he has made a number of suicide threats, some which required emergency medical Intervention. Typically, Mr. Lawson has difficulties coping with feelings that he has been victimized and is the target of abuse by those in authority such as WSIB decision makers. In terms of his WSIB claim, Mr. Lawson has a history of demanding Immediate attention when benefit cheques are late or when there are unresolved Issues in relation to his entitlement or benefits. This behaviour, and the reasons for it, was discussed at great length in the comprehensive 25 page CAMH report. At no time did the assessors state or imply that Mr. Lawson's heightened emotional reactivity that makes it more difficult for him to cope with stressors was a deliberate attempt at manipulation, despite appearances to that effect.
>
> When asked how the post-accident episodes of psychological problems relate to his accident, Mr. Lawson described intense feelings of disappointment and betrayal that began when he was first told that entitlement was being denied. Mr. Lawson spoke of anxiety and depression and of frequent crying bouts that continue to date. He testified that these responses follow frequently when he thinks about how his life has changed because of his accident. Mr. Lawson described a happy and fulfilled life when he was fully employed and living common-law with his

> five stepchildren that he came to consider his own. Following his injury, he was no longer able to be a participant in domestic activities […] and he presented as very disabled, all of which was upsetting and contributed to his separation from his common law spouse and family.
>
> …
>
> When he was asked about the changes in his life brought about by his workplace accident, he wept at times and required several breaks In order to regain his composure.

[38] The Appeals Resolution Officer determined that the applicant was competitively unemployable "due to the combination of physical and psychological impairments that are a direct result of his workplace accident", and determined that the applicant was entitled to full loss of earnings retroactive to August 2006 when benefits were reduced, and continuing. In December 2008, the applicant's entitlement to 100% LOE benefits was made permanent to age 65.

[39] The "bitter and tumultuous" relationship between the applicant and WSIB adjudicators referred to by the Appeals Resolution Officer included a number of occasions when the applicant made threats of self-harm and also of harm to others, including WSIB staff. In November 2006, the applicant was advised:

> As a result of your behaviour, future telephone calls will be immediately terminated and voice-mails will not be responded to. You may communicate with the WSIB through correspondence only.

[40] The letter indicated that the restriction would be in place for two years "unless superseded" and that the applicant could then ask to have the restriction removed.

[41] In October 2007, the applicant left a voice message for his Case Manager advising that he had suffered an acute exacerbation of his back pain and required approval for a medication that had been prescribed.

[42] The WSIB Security Manager sent the applicant a letter reminding him that he was not allowed to leave voice messages and informing him that if this behaviour

continued, his communications with the WSIB could be further restricted allowing him to communicate only through a representative, even in writing.

[43] As noted above, the applicant filed an earlier Application with this Tribunal in March 2009. In that Application, the applicant outlined his version of the difficulties he had experienced with the WSIB. The Application was settled between the parties with Minutes of Settlement dated October 15, 2010. The Minutes of Settlement included a release with respect to all matters prior to October 2010.

[44] Since 2010, the applicant's interactions with the respondent have involved occasions when there was a problem with the direct deposit system and issues concerning entitlement for medications and health care.

Issues about payments

[45] After the respondent set up direct deposit for the applicant's benefits there have been problems with the system on a few occasions. On two occasions, the problem occurred after the applicant changed banks. He provided updated banking information but it is not clear from the record when this was received by the respondent and if it had been received in time to make the change. The applicant noted that with other benefit providers he is able to change banking information over the phone. However, he cannot do that with the respondent because he is not allowed to speak to WSIB staff. On these occasions, Mr. McKinnon contacted the respondent to help sort things out. The respondent's solution was to send a cheque by courier. The applicant believed that as a result of the settlement of his first Application, he should only be paid by direct deposit and on one occasion he refused to accept the cheque.

[46] On another occasion, the applicant's benefits were inexplicably reduced. This was quickly corrected. On another occasion, deposit of the payment was delayed because the deposit day fell on a holiday. The respondent has since modified its direct deposit system so that deposits that are due on a holiday are made before the holiday instead of after.

[47] The applicant's benefits are deposited every other Monday. The applicant testified that, except for the situations described above, the deposit is always there by 6:00 AM. He testified, however, that on the Sunday before the deposit is due he always suffers from severe anxiety and a fear that the deposit will not be made. He said that often his sleep is disturbed because of the anxiety.

[48] Dr. Cobrin testified that this anxiety reaction is related to the applicant's various psychological conditions. He noted that the deposit of the cheque represents for the applicant a bi-weekly form of contact with the respondent which triggers the symptoms that Dr. Cobrin indicated are comparable to symptoms of post-traumatic stress disorder.

Entitlement to health care benefits

[49] Under section 33 of the *WSIA*, a worker is entitled to health care that is necessary, appropriate and sufficient as a result of the injury. Section 33(7) provides:

> 33(7) The Board shall determine all questions concerning,
>
> (a) the necessity, appropriateness and sufficiency of health care provided to a worker or that may be provided to a worker; and
>
> (b) payment for health care provided to a worker.

[50] The definition of "health care" in section 32 includes "professional services provided by a health care practitioner" and drugs.

[51] It is important to recognize that the issue under section 33 is not whether a worker can take a medication or have prescribed treatment. It is whether the WSIB will pay for the health care.

[52] It is also important to recognize that the issues in this Application do not include oversight of the adjudicative decisions that the respondent made about whether prescribed medications or treatments were or were not necessary, appropriate and sufficient. For reasons explained in more detail below, those decisions fall under the

exclusive jurisdiction of the WSIB and the Workplace Safety and Insurance Appeals Tribunal (sections 118 and 123 of the *WSIA*).

[53] Instead, the allegations relating to health care benefits concern the manner in which the respondent made its decisions and communicated them to the applicant. Specifically, the allegation is that the applicant's psychological profile is such that the decision-making and communication problems that arose in his case affected him significantly more than it would affect other injured workers, effectively creating barriers to his access to the adjudicative service the respondent provides and eventually causing him to stop seeking entitlement for health care benefits.

[54] The respondent has developed guidelines regarding specified drugs or types of drugs. These are intended to be evidence-based guidelines, developed in consultation with an advisory panel. The guidelines are posted on the respondent's website, and include decisions about whether a drug or group of drugs will form part of WSIB drug formularies, including the reasoning behind the decision.

[55] Mr. Dacouto explained that in addition to these guidelines, the respondent has a protocol for claims in which narcotics and other specific medications are prescribed. These are intended to reflect the negative implications of some medications, such as abuse and addiction.

[56] In this case, the applicant was prescribed various narcotic medications over an extended period of time. Mr. Dacouto testified that under the narcotic drug protocol, if it is determined that the narcotic is necessary as a result of the injury, entitlement for the drug is usually granted for a limited time frame (usually a few months). At the end of the time frame, the WSIB will ask for an updated report from the prescribing physician. Entitlement is then reviewed, and if approved, another time frame is established. Mr. Dacouto indicated that similar processes may be applied for medications other than narcotics. Mr. Dacouto testified that for the most part, decisions about whether a worker has entitlement for medications is made by Nurse Consultants, although they may ask for guidance from medical consultants who are physicians.

[57] In this case, problems arose because the protocols and the basis for them was not communicated to either the applicant or his doctors. The imposition of the protocols without explanation caused frustration for the applicant and for Dr. Watterud, his family doctor, who felt that her professional opinion about the treatment of the applicant's complex pain and psychological disorders was being ignored. According to the applicant, this, together with what seemed to him to be a constant requirement for completion of detailed forms and preparation of comprehensive reports, caused his doctor to refuse to treat him.

[58] In addition, in this case, there was sometimes a great deal of confusion about what medications were approved and for what periods. The applicant testified that he typically found out that medications that had been approved were no longer approved when he went to the pharmacy to get prescriptions refilled. Most pharmacists have a direct billing arrangement with the WSIB which provides information about what medications have been approved at any given time.

[59] From time to time the WSIB issued a "Drug Verification Services" form letter to the applicant. The Drug Verification Services Form has a space in which medications may be listed and indicates the date up to which entitlement for the medication has been granted. The form letter indicates that if the applicant wishes to claim entitlement for the medications listed beyond the specific date, a medical report is necessary from the prescribing physician that includes the following information:

- The diagnosis of your work-related injury
- A list of all medications you are currently taking
- Response to medications to date including pain scores if available
- Current functional abilities
- Treatment goals and anticipated/ongoing benefits from the use of this medication(s)
- What side effects if any have been experienced as well as any action required as a result

- The dosage, strength and quantity of the medication(s) and expected medication changes/dosage increases

- An estimation of how long you will need to use this medication(s)

[60] The letter indicates that the doctor will be paid a standard fee for completing this required report.

[61] I note that these forms are not sent to make an initial decision about whether a prescribed drug is necessary as a result of the injury. They are sent to determine whether a prescribed drug that has already been approved is still necessary approximately every three months. It is not clear why the rather comprehensive information set out in the form is necessary for this purpose approximately every few months.

[62] In addition to the Drug Verification Services form letters setting out what drugs have been approved and the date to which they had been approved, the applicant often received reminder letters about the need to have his doctor provide the comprehensive information specified in the Drug Verification Services form letter. These were sometimes sent out monthly. The reminder letters did not set out the medications that had been approved.

[63] The Drug Verification Services form letters were sent to the applicant only and not his doctor. His doctor was from time to time sent an Opioid Assessment Form which asks different questions than the ones specified in the form letter.

Summary of the decision making process about health care

[64] A summary of the key events and issues in the decision making process between October 2010 and January 2014 is as follows:

- Inconsistent Drug Verification Services form letters were issued. On one occasion, two were sent on the same day listing different medications.

- Medications that had been approved for entitlement by a Nurse Consultant were sometimes not listed on the form letter.

- Dr. Watterud prescribed or proposed to prescribe medications on a number of occasions. If these were rejected, no explanation was provided to her. The applicant was informed that the medications were not approved but not given a reason. The memos from the Nurse Consultants indicate that it was determined that they were rejected because they were not included in WSIB formularies.

- One of the medications that Dr. Watterud wished to try was Cymbalta. She indicated in October 2010 that this could help get the applicant off his long-term dependency on narcotics. This request was not addressed until January 2011, when funding for a two-month trial only was approved. This was conditional on stopping coverage for Lyrica during the trial. The applicant had been taking Lyrica for some years by that time. These decisions were communicated to the applicant but no reasons for why entitlement was limited to a two-month trial or for why Lyrica was no longer approved were provided.

- Dr. Watterud wrote to the WSIB in April 2011 again recommending Cymbalta. She was not advised that Cymbalta had in fact been approved until June 2011. She then said that in her opinion, if coverage of Cymbalta was limited to two months there was no point in trying it. Dr. Watterud did prescribe Cymbalta in January 2012, but the pharmacist discovered that it was not covered, even though it had in fact been approved.

- Mr. McKinnon told the WSIB of the effect that this decision making process was having on the Applicant. On May 11, 2011, he advised:

> The file also documents that Mr. Lawson develops extreme anxiety and increased pain while he is interacting with the WSIB. Each interaction with the WSIB represents, to Mr. Lawson, the pending cut of WSIB benefits. For example, Mr. Lawson requires his current medications to control the pain from his compensable disability. For several months now, his medication has only been renewed on a temporary basis pending further investigation by the WSIB which he believes could result in a refusal to cover the medications prescribed by the treating physician. He advises me that this uncertainty as to whether he will have the medication he requires is very distressing to him and exacerbates his pain and related disability.

There was no response to this letter.

- In January 2012, Mr. McKinnon advised a Nurse Consultant that Dr. Watterud was no longer willing to deal with the WSIB. The Nurse Consultant told Mr. McKinnon that he should ask for a copy of Dr. Watterud's consult notes and send them to the Case Manager for review of entitlement for the new medication. Mr. McKinnon indicated that he did not think that was a viable solution. According to her memo, the Nurse Consultant told Mr. McKinnon:

  > The WSIB has very specific policies with the funding of narcotic medication. One of which is that the prescriber must send in medical documentation indicating what drugs are being prescribed for the work related accident. If policies are not followed then the drugs cannot get authorized.

- The applicant continued to receive Drug Verification Services forms and reminder letters stipulating that the comprehensive information required in the form be provided or coverage would expire.

- A medical report setting out the comprehensive information indicated in the Drug Verification Services form was never received. Extensions past the approved date were granted on several occasions by Nurse Consultant, usually after a pharmacist called to report that a prescription renewal had not gone through. In June 2011, a Nurse Consultant noted that the applicant had been taking OxyContin, Oxcocet and Lyrica for some years and approved coverage of these drugs until May 2013. Despite this further Drug Verification Services forms and reminder letters for these same medications continued to be sent out.

- In February 2012, Mr. McKinnon asked on the applicant's behalf for coverage for Toradol injections for pain management. Mr. McKinnon sent a reminder letter in August 2012. The request was not reviewed until January 2013 - almost one year after the request was first made. At that time, a Nurse Consultant advised that if entitlement for Toradol was extended, it would be for short-term therapy only with a maximum of 7 days in any 90-day period and that entitlement could not be considered unless the prescribing doctor provided a report explaining the diagnosis, why the medication was being prescribed, the dosage and the estimated time the drug would be required. Toradol was never actually approved.

- The applicant has not requested entitlement for any medications since January 2013.

[65] The applicant testified that one reason he has not sought further entitlement for medication is that he no longer has a family doctor. He testified that Dr. Watterud had treated him in the past and agreed to take him on again as a patient when he returned to the area in about 2010. However, he testified that she cautioned him that she could not treat him if he required excessive paperwork from the WSIB. He testified that she eventually told him that she could not respond to the repeated requests for forms because they took too long to complete and because there did not seem to be any point since her professional opinion about his medication needs seemed to be ignored.

[66] The applicant testified that he has stopped taking narcotic medications because of the side effects. Dr. Watterud prescribed medical marijuana and he has a license to grow his own plants. He has not requested entitlement for this medication from the respondent. The respondent advised that it does not currently grant entitlement for medical marijuana unless directed to do so by the Workplace Safety and Insurance Appeals Tribunal, although in principle any request would be considered on its individual merits.

The applicant's requests for entitlement for psychological treatment

[67] Dr. Cobrin testified that he has seen the applicant about 25 times over the years, starting in 2005. He has asked for entitlement to cover further treatments but this has been denied.

[68] As discussed at the hearing, there is a general issue about entitlement to ongoing therapy that is considered to be required only on a "maintenance basis". The respondent's witnesses explained that once a worker has recovered from the acute effects of the injury, entitlement for further therapy is generally granted only if there is evidence of a further temporary or permanent worsening of the condition. Despite this guideline, a request for treatment in other circumstances would be considered on the merits of the request.

[69] In this case, a course of ten treatments by Dr. Cobrin was authorized in 2009. He requested a further course of ten treatments in 2010. This was eventually granted. However, it appears that the applicant only had two of the ten treatments. Neither the applicant nor Dr. Cobrin was clear on the reasons for this. Dr. Cobrin treated the applicant on one occasion in 2011, believing that there were unused sessions that had not been used. He was initially told that he would not be paid for that treatment but eventually he was.

[70] Dr. Cobrin called on January 2013 and spoke to a Nurse Consultant. According to her memo, Dr. Cobrin indicated that the applicant required psychological treatment on an "emergency service" basis. The Nurse Consultant advised Dr. Cobrin that an up to date progress report was required before entitlement for further psychological treatment could be considered. Dr. Cobrin informed the Nurse Consultant that his assessment of the applicant would be the same as it had been a year earlier when he last sent a report. However, the Nurse Consultant confirmed that a formal report was required.

[71] Dr. Cobrin sent a report dated February 15, 2013. He advised in part:

> As discussed in previous reports Mr. Lawson has almost no internal resources to deal with stressful situations. As also mentioned previously Mr. Lawson's psychological problems are complex and varied, in that he suffers from an anxiety disorder, major depression, a pain disorder with a medical condition and psychological factors, a personality disorder and attention deficit disorder.
>
> Given the long standing and very serious nature of Mr. Lawson's difficulties, the best that I can do to help Mr. Lawson, given very limited resources, is to help him put out the fires, so to speak, to meet with him every few months when his stress levels peak, and he requires someone to listen and help him calm down so that he can regain a small modicum of sanity. Based on our short phone conversation, with Mr. Lawson complaining vehemently about home and WSIB related issues, it appears that this type of intervention is again needed.

[72] The respondent did not reply to this letter.

[73] At Mr. McKinnon's request, Dr. Cobrin prepared an extensive seven-page report about the applicant dated May 11, 2013. He noted that the applicant no longer had a family doctor and had stopped trying to have medications paid for because of the frustrations of dealing with the WSIB. He reiterated that "over the years, what has triggered and exacerbated Mr. Lawson's myriad psychological difficulties the most has been his problematic relationship with the WSIB." He added that the applicant's complaints about the WSIB were often "quite ferocious in intensity." Dr. Corbin suggested that the best thing for the applicant would be to find some way that he would no longer have to deal with the WSIB. He suggested that a lump sum payment that would forever sever the applicant's relationship with the WSIB would be of tremendous benefit for the applicant's psychological function.

[74] Dr. Cobrin's request for entitlement to further psychological treatments, which he first made in January 2013, was denied in a decision from a Nurse Consultant dated July 9, 2013. She noted that in July 2010, a medical consultant had reviewed the file and indicated that continued psychological treatment would not provide further benefit. She noted that Dr. Cobrin's reports indicated that the applicant's condition had not changed over the past four years.

The applicant's formal request for accommodation

[75] On May 25, 2013, Mr. McKinnon wrote to the respondent's Chief Operating Officer. The letter started with this request:

> I am writing to ask for a meeting to discuss how the WSIB will meet its duty under the Ontario Human Rights Code to accommodate Mr. Lawson's compensable psychological disability which is exacerbated to dangerous and harmful levels by dealing with the WSIB.

[76] Mr. McKinnon attached to his letter a copy of Dr. Cobrin's May 2013 report. He reviewed some of the history of the applicant's dealings with the WSIB and some of the sources of frustration for the applicant arising from those dealings. Mr. McKinnon noted that there had been occasional difficulties with the direct deposit of benefits and

explained how upsetting those were for the applicant. Mr. McKinnon pointed out that the applicant was still subject to the order that he was not permitted to speak to any WSIB employee. Mr. McKinnon noted that he had frequently had to intervene to solve what would otherwise be routine "administrative matters". He noted that representation of an injured worker at this level should not be necessary and was not really within the mandate of a community legal clinic.

[77] Mr. McKinnon concluded:

> I look forward to hearing the WSIB's views on meeting its duty to accommodate Mr. Lawson's disability. I would be pleased to meet with you or your staff to discuss this matter.

[78] Mr. McKinnon's letter was forwarded to a Manager in the Permanent Benefits Services Branch. She responded on June 27, 2013, approximately one month after Mr. McKinnon's letter. She addressed some of the specific issues raised in the letter and explained why she felt that all of these issues had been appropriately dealt with by the WSIB decision-makers. She did not address the request for accommodation or offer to meet as Mr. McKinnon had requested.

[79] Mr. Dacouto was asked about Mr. McKinnon's letter. He agreed that it appeared to be a request for accommodation under the *Code*. He said that he cannot recall ever personally receiving a request for accommodation under the *Code*. He said he is not aware of any WSIB protocol for how such requests should be handled.

Further issues in 2014

[80] By March 2014, the applicant had lost confidence in Mr. McKinnon and ended the retainer.

[81] In July 2014, the applicant repeated a request he had made on a few earlier occasions that the restriction on him contacting the WSIB be lifted. He was sent a letter dated July 25, 2014, stating that after a review of his interactions with the WSIB it had

been decided to remove “the no-trespass restriction allowing you to enter WSIB offices to conduct business.”

[82] In fact, the respondent had never issued a no-trespass restriction to the applicant. The restriction imposed was only with respect to communicating by telephone.

[83] Mr. Dacouto testified that although the July 25, 2014 letter did not mention the restriction against communication by telephone, that restriction was removed in July 2014. He agreed that the applicant was not informed of this.

[84] On September 24, 2014, the applicant wrote a letter raising various issues about his claim with the WSIB. These concerns were addressed in a letter for the Case Manager dated October 31, 2014. One of the concerns was the request for entitlement for psychological treatment from Dr. Cobrin. The Case Manager advised that before entitlement could be considered, an updated assessment from Dr. Cobrin was required. The Case Manager said that the WSIB would pay Dr. Cobrin for the assessment and the report. I note that this was the first time that the respondent said that it would pay for the assessment and report that was required in order to assess entitlement for further psychological treatment.

[85] On November 3, 2014, the Case Manager wrote to Dr. Cobrin and explained that in order to consider entitlement for further treatment, an updated report was necessary addressing the following:

- A detailed description of his current symptoms and mental status
- A diagnosis using DSM-IV multi-axial classification
- A description of treatment type, frequency and estimated duration of treatment
- Prognosis
- A listing of his social stressors, and pre-existing problems

- A narrative report that includes details regarding each of the following criteria:
    - Social functioning
    - Activities of Daily Living
    - Concentration, Persistence and Pace
    - Adaptation of Stressful Circumstances.

[86] It appears to me that this was a request for a very comprehensive assessment and not a request for an update of a patient that Dr. Cobrin had seen many times over a period of some years, and for whom he had already provided detailed information, including most of the information requested in this letter.

[87] In his letter to Dr. Cobrin the Case Manager did not say that the WSIB would pay for the cost of the assessment, but mentioned only payment for the report. Mr. Dacouto testified that since it appears that the level of the applicant's disability had not deteriorated, if Dr. Cobrin had provided the necessary report entitlement to further treatment would likely have been denied on the basis that it was maintenance treatment.

[88] By 2014, Dr. Cobrin's treatment practice had changed and he would not have been in a position to treat the applicant even if treatment had been approved.

[89] It appears that after 2014, the applicant stopped communicating with the WSIB. He testified that this is because he found communications too stressful. He then focussed on the Application to this Tribunal.

Tribunal's jurisdiction

[90] It is by now well established that the WSIB provides a "service" within the meaning of section 1 of the *Code*, which provides:

1. Every person has a right to equal treatment with respect to services,

> goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[91] In *Seberras v. Workplace Safety and Insurance Board*, 2012 HRTO 115 ("*Seberras*"), a Panel of the Tribunal concluded that the benefits that the WSIB provides are themselves a "service" (paragraphs 15-24). In other decisions, it has been held that the service that a workers compensation board provides is the "administration of the compensation scheme" (*O'Quinn v. Nova Scotia Workers' Compensation Board*, 1995 CanLII 4179 (NS CA).

[92] It is further clear that the *Code* applies to the provision of the service by the WSIB and that the service must therefore be provided without discrimination on any of the grounds identified in the *Code*. If an injured worker cannot access the services of the WSIB, the Board has a duty to try to accommodate the worker to the point of undue hardship. This duty arises under section 17 of the *Code*:

> 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
>
> (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[93] A worker who believes that his or her rights under the *Code* have been infringed as a result of a decision of the WSIB can object to that decision and raise the *Code* issue in the Board's internal appeal system and the external independent WSIAT.

[94] This Tribunal has determined that in certain circumstances, this Tribunal has concurrent jurisdiction and that a worker who believes his or her rights under the *Code* have been infringed may either pursue the matter here or through the WSIB/WSIAT

system. In most cases where an injured worker has filed an Application alleging discrimination by the WSIB, the Tribunal has found that it does not have jurisdiction because the allegations really relate to dissatisfaction with a decision about entitlement to benefits. As the Panel in *Seberras* said:

> This Tribunal does not have the power to review decisions under benefit programs, including those based on disability, to determine if they are correct under the legislation, regulations, or policies governing the program. An Application related to a denial of benefits should be dismissed if there is not an allegation of discrimination under the *Code*. A *Code* application alleging merely that a decision-maker misapplied the rules of a program or misinterpreted medical documentation cannot be reasonably considered to amount to a *Code* violation and has no reasonable prospect of success. In addition, under s. 45.1 of the *Code*, the Tribunal cannot reevaluate the substantive or procedural correctness of a decision under another statutory scheme.

[95] The Supreme Court of Canada has indicated that in most cases, the alleged violation of the *Code* should be raised before the tribunal which has the jurisdiction to provide the service: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513 at paragraphs 48-50. This is so even in cases where a human rights tribunal may also have jurisdiction.

[96] In the case of the WSIB, the *WSIA* provides that the WSIB has exclusive jurisdiction to deal with all matters arising under *WSIA*. Section 118 provides:

> 118 (1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

[97] Section 123 provides a comparable exclusive jurisdiction provision in regards to WSIAT.

[98] In *Seberras*, the Panel found that the Tribunal had jurisdiction to hear an Application alleging that a provision of the *WSIA* excluding certain work-related stress conditions was discriminatory. In that case, the allegations were not that a particular decision was discriminatory, but rather that the legislation and associated WSIB policies

were discriminatory. The issue of whether the provisions in *WSIA* were in fact discriminatory under the *Code* was not pursued by the applicant in that case.

[99] In *Seberras*, the Panel noted that if the alleged discrimination did arise from a particular decision of an adjudicator at another tribunal, the principle of adjudicative immunity might limit the person's ability to bring the allegation of discrimination to this Tribunal.

[100] In addition, to these limitations, the Supreme Court has explained that if a decision has been made at one tribunal, it may not be appropriate for the person to then pursue the matter at human rights tribunal instead of pursuing the matter at the first tribunal. In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 *("Figliola")*, the Court said that in that event, the principle of issue estoppel may prevent the matter proceeding at a human rights tribunal.

[101] In *Frankson v. Workplace Safety and Insurance Board*, 2011 HRTO 2107 ("*Frankson")*, the Tribunal found that it had the jurisdiction to deal with an allegation of discrimination arising out of a Labour Market Re-entry (LMR) program. The program featured an extensive educational upgrading component. After the worker started the program, it was discovered that he had a significant learning disability. The WSIB LMR adjudicator determined that the LMR program needed to be changed and apparently did not consider the possibility of accommodating the worker in the original program. It was this failure to consider this possibility that was found to be discriminatory. The Tribunal adjudicator in *Frankson* noted that the Tribunal did not have the jurisdiction to determine if in fact the worker should have been accommodated as this would be a matter under the exclusive jurisdiction of the WSIB. In *Frankson* it was also noted that the worker could not reasonably have appealed the decision to change his LMR program as he was required to continue to co-operate in the new program in order to continue to be entitled to benefits.

[102] In *Frankson,* at paragraph 84, the adjudicator found that the decision of the WSIB Claims Manager was not an adjudicative decision that was subject to adjudicative

immunity and not a decision to which issue estoppel might apply. In more recent decisions, the Tribunal has found that decisions of front line adjudicators may be adjudicative decisions for the purpose of section 45.1 of the *Code* (for example, *Devouge v. Griffith Laboratories Limited*, 2014 HRTO 1536).

[103] The Tribunal has also found jurisdiction to consider an allegation that a refusal to pay benefits of a person with mobility restrictions by direct deposit instead of by cheque was discriminatory (*Hayes v. Workplace Safety and Insurance Board*, 2012 HRTO 2126) This would also not be something that a worker could necessarily appeal within the WSIB system, as it is not a decision about entitlement to benefits.

[104] In the case before me, I conclude that I do not have jurisdiction to determine or review any of the decisions about the applicant's entitlement to health care benefits that I have outlined in this decision. In my view, decisions of this nature fall under the exclusive jurisdiction of the WSIB/WSIAT.

[105] However, I find that I do have the jurisdiction to deal with the allegation that the manner in which the WSIB dealt with the applicant resulted in a barrier that eventually meant that he could not access the service and benefits that he was entitled to as an injured worker. This allegation is not about any specific decision of the WSIB. In my view, the principles of issue estoppel and adjudicative immunity do not therefore apply. The applicant could not reasonably pursue an objection or appeal in regard to this issue because it does not involve a specific decision about entitlement to benefits under the *WSIA*.

[106] I find that I have the jurisdiction to consider the applicant's allegation that the respondent discriminated against him by creating barriers to his access to the services provided by the respondent and that the respondent failed to adequately accommodate the applicant to allow him to access those services.

The Legal Framework

[107] The applicant submits that to a large extent, the discrimination in this case arose because the respondent dealt with the applicant in the same way it treats other workers and that in so doing, it failed to appreciate that he is a person with special needs. The applicant submits that section 11 of the *Code* applies. Section 11 prohibits "constructive discrimination". It provides:

> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[108] The Supreme Court has explained the concept of constructive discrimination in a number of cases. For example, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paragraph 72, the Court explained that in order for a deaf person to have equal access to the health care system, it is necessary that interpreters be provided.

[109] In *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, the Court explained that seemingly neutral standards or requirements can result in discrimination if they result in the exclusion of people who are identified by a *Code* ground.

[110] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Court considered an aerobic standard established by the Government of British Columbia for its firefighters. The Court found that the result of the standard discriminated against women by failing to consider that women have a different physiology and could safely work as firefighters on a lower aerobic standard than might be required for men.

[111] *Meiorin* was an employment case and the Court outlined the following test:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Analysis

[112] The application of the legal framework to this case establishes that the issue is whether requirements or factors existed that resulted in exclusion of the applicant from the *WSIA* benefits entitlement scheme because of disability. If the applicant establishes that otherwise neutral requirements or factors resulted in such exclusions, I must then consider whether the requirements or factors were reasonable and bona fide, and, if they were, whether the applicant's disability-related needs could have been accommodated without undue hardship.

[113] In my view, the applicant's experience in seeking entitlement for health care benefits would have been frustrating for most people. As I have detailed, the experience

included contradictory requests for information, contradictory information about what was allowed and what was not, very extensive delays, lack of explanation for various decisions that were made, and seemingly arbitrary and excessive demands for information that was not necessary.

[114] Some of the frustration in this case resulted from the decisions themselves, for example that he was not entitled to payment for various prescribed medications or treatment. For the reasons explained earlier, I do not have the jurisdiction to consider whether those various decisions were correct. However, in my view, I do have jurisdiction to consider the impact of how those decisions were conveyed (or not conveyed) to the applicant and to consider whether, because of the applicant's limited capacity to deal with stress, the fact that the decisions were conveyed in the same manner as such decisions are conveyed to other injured workers resulted in barriers for this applicant.

[115] In addition, it is clear that some of the frustration and stress resulted from administrative systems that were in place, such as the respondent's protocols for assessing whether the medications prescribed were necessary as a result of the injury.

[116] As noted, that protocol features a standard Drug Verification Services form letter. The form letter identifies drugs that have been approved and the period for which they are approved. It also states that in order for the drugs to be approved beyond the end date, a very comprehensive medical report would be required. As discussed earlier, the supposed purpose of this report is only to determine if approval for a drug that has already been prescribed and approved should be continued. In this case, the applicant was sent these forms about every three months, with reminders about every month.

[117] The form letter was never sent to the applicant's doctor. Instead, she was from time to time asked to complete a form that asks for different information than the information required according to the Drug Verification Services letter.

[118] The evidence shows that these forms caused considerable stress for the applicant. The stress was compounded when contradictory information was provided in the form letters. In addition, the applicant understandably had some difficulty understanding what drugs had been approved. He usually found out when he went to the pharmacy to get medications refilled.

[119] The drugs that were the subject of this process were mostly narcotics. There is a bona fide need for the respondent to have processes in place when these medications are prescribed to ensure that they are not abused or do not result in additional disability that may arise from long-term use and addiction. However, in this case, the evidence shows that a comprehensive report of the nature required by the Drug Verification Services form letter was never provided and was not in fact required. When the prescribing physician was asked for information, the request was in a form with boxes to check and did not include the comprehensive information specified in the Drug Verification Services form letter. The Drug Verification Services form letters and regular reminder letters were sent every few months even when approval for the drugs for an extended two-year period had been granted.

[120] These are the things that happened for the three of four medications that the applicant was regularly prescribed in the period from 2010 to 2014. The situation with respect to other medications and treatments that were proposed was more erratic. As noted, this included situations where approval was granted for medications but where the approval was not implemented and where contradictory information was required in order to assess the request. The request for Toradol was not addressed for almost one year.

[121] It also included situations where approval was granted but on a basis that the applicant's physician felt was not appropriate for the applicant but with no explanation of the basis of the decision. To take one example, when the request for coverage for Cymbalta was addressed (several months after the request was made), no explanation was provided for why coverage was for only a two-month trial and why approval was conditional on stopping coverage for Lyrica, which the applicant had been taking for

years. These seemingly arbitrary decisions were stressful for the applicant. When his doctor expressed her frustration about why her medical judgements were not respected, there was no response or explanation for decisions that had been made.

[122] In addition to the issue of entitlement for prescribed drugs, there was also the issue of entitlement for psychological treatments. The request for treatment was conveyed by the applicant's representative and on two occasions by Dr. Cobrin. When Dr. Cobrin spoke to a Nurse Consultant in January to explain that the applicant required treatment on an "emergency basis" he was told that he must provide a report. When he did provide a report in February, the request for further treatment was not addressed until June, following a further and more comprehensive report in May.

[123] When the issue of entitlement for psychological treatments came up again in 2014, the information required before the request could be considered would have required a very comprehensive medical report including information that was already well-established.

[124] These processes and systems, including the manner in which decisions were communicated are not, in themselves, evidence of discrimination. While the history here certainly does not provide a picture of excellent service delivery, there is no indication that the applicant was treated differently than other injured workers because of a *Code*-protected ground. In fact, according to Mr. McKinnon, the applicant was treated the same as other workers.

[125] The processes and systems become discriminatory because of the failure to appreciate their effect on this particular injured worker because of his multiple disabilities and special needs.

[126] In coming to this conclusion, I am quite aware that the applicant's sometimes extreme reactions to stress can make it very difficult to deal with him. On the occasions when the applicant was self-represented in this proceeding, it was often very difficult to proceed with the adjudication of the issues.

[127] However, this does not mean that the applicant's difficulties can be simply ignored without consideration of his limited capacity to deal with stress.

[128] The fact that the applicant experiences higher levels of frustration and severe stress was well-established in the respondent's claim file.

[129] The 2008 decision of the Appeals Resolution Officer found that the applicant had "a heightened emotional reactivity to stress that is part of an adjustment disorder he has gone on to experience in response to his accident and WSIB claim."

[130] These issues were well-documented in the medical reporting, including reports from assessments arranged by the respondent. One such assessment was at the Centre for Addiction and Mental Health (CAMH) in 2008. The comprehensive report included the following comments:

> His thought form was circumstantial with frequent deviation to issues related to compensation. His thought content was predominated by ruminations about the WSIB with persecutory themes associated with chronic suicidal ideation without intent or plan…
>
> Over the course of his claim he has reported prominent mood and anxiety problems associated with recurrent suicidal threats and behaviour triggered by an adversarial relationship with [the WSIB].

[131] It was known that the applicant had expressed suicidal ideation including actual attempts and that these episodes were in part triggered by frustration arising from his dealings with the WSIB.

[132] In a September 2009 report, Dr. Cobrin advised:

> It is clear that Mr. Lawson has few internal resources to deal with stressful situations. When stressed (as is recently happening as a result of dealings with the WSIB) feelings of panic lead him to have an extremely negative evaluation of this circumstances and himself. Given that he suffers from an anxiety disorder, major depression, and a pain disorder with a medical condition and psychological factors (in that he acknowledges that the pain gets worse when he gets stressed out), these feelings of panic appear to

> be making an already tenuous psychological situation even worse (for example, note the presence of intense and recurrent suicidal thoughts).

[133] It appears to me that at various times, individual WSIB decision-makers did try, and often successfully, to assist the applicant. This is evident in some of the earlier memos in the claim when the applicant was still permitted to speak to the respondent's staff. There are, for example, several examples of conversations between the applicant and nurse case managers where the applicant was allowed to vent and was responded to in an empathetic manner, allowing him to calm down and address his concerns more rationally.

[134] The impact of the processes and communication of decisions on this applicant were amplified by the fact that for most of the time relevant to this decision, he was not allowed to communicate verbally with any member of the respondent's staff.

[135] After the restriction there were no more conversations between the applicant and the respondent's staff, so there was no opportunity to have the more positive interactions that had sometimes occurred previously.

[136] There is no doubt at all that the respondent, like any other public organization, is entitled to impose restrictions on people who are abusive. Indeed, as an employer, the respondent has a duty to protect its own employees and to ensure that the workplace is safe.

[137] However, there are different ways that abuse can be dealt with. In this case, the applicant asked on a few occasions that the restriction be lifted. He was told that it could not be lifted and that "there are not avenues of appeal except for the fact that we will reconsider our decision after two years if no further incidents of concern to staff safety occur." When he left a non-threatening voice message, the term of the restriction was extended for a further two years. While there may not have been a punitive intent behind this extension, it is not clear that it was designed solely to ensure staff safety.

[138] From a *Code* perspective, the obligation to provide a safe workplace for employees must still be reconciled with the obligation to accommodate disability-related barriers to access of services. This is done by assessing whether, in the particular circumstances, the impact of continuing to provide services would be an undue hardship in light of health and safety considerations and whether, if so, it would be possible to provide some form of modified services that both address legitimate health and safety concerns but continue to allow for the provision of services.

[139] Whether or not the restriction was appropriate or could have been handled in a better way, it had ongoing implications for the applicant's interactions with the WSIB. In particular, it meant that he was unable to call to clarify even relatively straightforward issues.

[140] The restriction was imposed in 2008 and so before the October 2010 Minutes of Settlement were signed. The applicant is therefore precluded from arguing that the restriction itself was discriminatory. However, the fact that the restriction remained in place in the years after 2010 is a factor in understanding what happened in this case.

The request for accommodation

[141] In my view, Mr. McKinnon's letter of May 25, 2013 to the respondent's Chief Operating Officer represented an important opportunity to address the impact on the applicant of the respondent's systems and communications. The letter was specifically framed as a formal request for a meeting "to discuss how the WSIB will meet its duty under the Ontario *Human Rights Code* to accommodate Mr. Lawson's compensable psychological disability which is exacerbated to dangerous and harmful levels by dealing with the WSIB."

[142] This letter was responded to, but only with respect to some of the specific benefit-entitlement issues that were provided in the letter as examples of the applicant's difficulties in dealing with the respondent.

[143] At least with the advantage of hindsight, it appears to me that many of the issues that I have canvassed in this decision could possibly have been positively addressed if the request for a meeting to discuss how to accommodate the applicant's psychological disabilities had been granted.

[144] One reason for this is that at the time, the applicant was represented by a well-respected advocate who, at least at that time, had the applicant's trust. I would say that the request for a meeting to discuss accommodation under the *Code* was at the least a missed opportunity to address important issues.

[145] I would not say that the respondent is always required to fully engage just because a request is framed as a request for accommodation under the *Code*. However, I would say that when a request is made for accommodation under the *Code*, the respondent should have a process in place to determine if there is an issue under the *Code* that does require attention. This would be part of the obligation that any service provider has to respond procedurally to a request for accommodation because of a *Code*-protected ground.

Conclusions

[146] In conclusion, I accept the evidence of the applicant and Dr. Cobrin that the applicant experiences a significantly heightened level of stress and frustration because of his various disabilities. I accept Dr. Cobrin's evidence that the applicant has a very limited capacity to deal with stress and that his dealings with the WSIB in particular result in acute exacerbation of his disability, including suicidal ideation. I accept that these symptoms eventually caused the applicant to not seek entitlement to health care benefits, including entitlement for treatment for acute psychological crisis.

[147] I find that the respondent failed to consider the impact of its administrative processes and poor communication of decisions on the applicant in light of the special needs he has as a result of his disabilities.

[148] I conclude that these circumstances mean that the respondent infringed the applicant's rights under the *Code*.

NEXT STEPS

[149] The hearing of this Application was bifurcated, meaning that I did not hear submissions about possible remedies in the event that I found that there had been an infringement of the applicant's rights under the *Code*. I have now found that the applicant's rights under the *Code* were infringed. The Registrar will schedule a one-day hearing to hear submissions about possible remedies under the *Code*.

Dated at Toronto, this 12th day of July, 2017.

"Signed by"

_____

Brian Cook
Vice-chair