

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

TORONTO POLICE SERVICES BOARD

(the “Employer”)

- and -

TORONTO POLICE ASSOCIATION

(the “Union”)

**AND IN THE MATTER OF A GRIEVANCE OF
THE TORONTO POLICE SERVICES BOARD**

O.B. SHIME, Q.C.

SOLE ARBITRATOR

APPEARANCES:

MICHAEL HINES
BETH SYMES

COUNSEL FOR THE EMPLOYER
COUNSEL FOR THE ASSOCIATION & TR

Hearings were held in Toronto, Ontario on this matter on
July 7, August 23 & 24, 2005; September 21, 2007;
March 19, April 25, June 3, October 15 & 30, November 3, 10, 19 & 25, 2008;
February 3, June 3, August 19, 20, 26 & 27, November 16 & 17, 2009
May 13 & 14 and June 23 & 24, 2010

In this matter, the Toronto Police Services Board (the “TPS”) seeks an Order that TR, a former police officer, be required to pay the TPS an overpayment of her compensation benefits (“WSIB benefits”) including top up and sick benefits that TR had received from December 11, 2001 forward. No claim has been made for WSIB benefits paid to TR before December 11, 2001. The TPS’s claim is made on the basis that while TR was in receipt of benefits, she had attended both University and Teachers’ College. The TPS contends that work was available for her at the TPS which could have been provided and that TR was therefore not entitled to either WSIB benefits or sick benefits in these particular circumstances.

The Workers Safety and Insurance Board (WSIB) determined that TR was not entitled to benefits from December 11, 2001 forward until November 17, 2003 because she had failed to notify the WSIB of a material change in her circumstances, namely, that she had gone to Trent University and to Teachers’ College. TR’s appeal from that decision was dismissed by the Workers’ Safety and Insurance Appeal Tribunal (WSIAT) on March 27, 2007.

The TPS’s original claim was for \$116,636.26 which the TPS was legislatively required to pay TR, however, the WSIB reimbursed the TPS for \$71,764.87 of that amount on October 23, 2003, leaving an outstanding claim in the amount of \$44,871.39. Counsel for TR acknowledges that the parties are bound by the decision of the WSIAT.

This matter is further complicated because TR filed an assignment in bankruptcy on September 29, 2005 and was discharged from bankruptcy on September 13, 2006. The Bankruptcy and Insolvency Act that was in force between September 28, 2005 and June 21, 2007 was amended. Generally, the discharge of a bankrupt releases the bankrupt person from his/her debts and liabilities with certain exceptions outlined in the Bankruptcy Act and Insolvency Act, one of those exceptions being “any debt or liability for obtaining property by false pretences or fraudulent misrepresentation”. The TPS claims that TR obtained WSIB benefits by false pretences or fraudulent misrepresentation which is the narrow issue in these proceedings.

Overview

This is a sad and difficult case. TR testified that in 1987 at age 18, she was hospitalized because of an eating disorder resulting from a difficult and abusive home environment. In September 1987, TR attended Trent University and graduated in 1992 with a degree in political science. In 1990 she took a year off as a result of a sexual assault by an acquaintance. She had her first child on April 20, 1994 and joined the TPS on December 19, 1995. She had a second child on September 4, 1997 and took a six month leave.

In March, 1998, TR was arrested for shoplifting at Eaton's. TR was not charged by Eaton's, but Superintendent Bamford suspended her and reinstated her the next day on restricted duties. However, TR was convicted of discreditable conduct under the Police

Services Act on December 15, 1998 and reprimanded. In June of 1998, TR was driving a police cruiser and was involved in an accident. She struck her face on the steering wheel and went to the hospital. The incident was reported to the WSIB.

On April 17, 1999, TR gave birth to a son and went on maternity leave. While on leave she learned of a position in Traffic Services and returned to work after four months to apply for the position. In October 1999 she was awarded a position in Traffic Services. On September 11, 1999 prior to commencing in Traffic Services, TR was involved in another accident while a passenger in a police cruiser. TR struck her head on the gun rack and the side panel and was off work for two days. TR claims she was emotionally affected by the accident. Upon her return to work, TR learned that another female officer had experienced a similar accident and suffered serious back and neck injuries which TR claims also had an emotional effect on her.

In December 1999, TR began to see Dr. J. Rosenberg, a psychologist, as a result of the stress in raising three children and also marital problems. There were also work related difficulties because of allegations at work that TR had failed to file a large number of traffic reports. TR acknowledged that she was not coping and was struggling with the job in Traffic.

In March of 2000, TR returned to 42 Division where she originally had worked. Some of her colleagues refused to work with her. Also, her marriage was deteriorating. On June 7, 2000, TR attended the funeral of a young female OPP Officer who was killed

on duty. In so doing, she missed a court date. TR testified that she was extremely upset by the death of the Officer notwithstanding that she did not know her. Approximately five days after the funeral a female colleague with whom she had been on shift suffered minor injuries in a car accident. TR had booked off early because of child care issues and realized if she had not booked off, she would have been in the accident car. TR did not cope well after the accident. She claimed to have nightmares, was irritable and had sleep problems. She saw Dr. K. Mendelssohn, a family doctor, on June 28, 2000 and explained that she was tired, emotional and overwhelmed. She did not connect her emotional distress to the series of accidents in which she and others were involved. TR lost weight, her personal hygiene declined, she was continually late for work, did not bring her entire uniform to work, did not iron her uniform and was unkempt. She claimed that she did not think of leaving policing.

On July 24, 2000, TR forgot her boots and was sent to the Medical Advisory Services (MAS) by her Supervisor who was concerned for her mental health, but she did not admit she needed help. MAS was aware that TR's Supervisor and colleagues were concerned about her marital conflict, her loss of weight, her neglected appearance and personal hygiene and that she was not coping and, accordingly, required a doctor's note for her to return to work. On July 24, 2000 she received a clearance to return to work from Dr. Mendelssohn.

TR was not happy at 42 Division and on August 6, 2000, she applied to York Regional Police, was interviewed for a job and found out in mid September that she had not been selected.

On September 28, 2000, TR was again arrested for shoplifting. She was distraught and her husband was angry. He found her with a bottle of pills and took her to the hospital. She was admitted to the psychiatric unit and released on October 1, 2000. MAS was advised that TR was in the crisis unit at Ajax-Pickering Hospital and that she had been charged with shoplifting with the result that she was suspended from the TPS. She saw Dr. Mendelssohn on October 6, 2000 and was referred by Dr. Mendelssohn to Dr. D. O'Dea, a psychiatrist, who saw her mid October. Dr. Mendelssohn completed a WSIB form for TR on October 27, 2000 in which she diagnosed TR as having severe depression.

On November 11, 2000, TR, after an argument with her husband, took a handful of pills and went to Loblaws where she was involved in another shoplifting incident. That evening she was admitted to hospital. Dr. O'Dea recorded that she suffered from "major depression recurrent in type with anorexia nervosa" and an "obsessional personality". TR was discharged from the hospital on November 14, 2000 and began group therapy at a psychiatric day program on December 4, 2000. She saw Dr. Mendelssohn on December 5, 2000. On or about December 24, 2000, TR had a seizure and woke up lying in a snow bank. In January 2001, she was referred to an eating disorder program at Toronto General Hospital. She was also facing criminal and Police

Services Act charges for her shoplifting. Also in November of 2000, TR was charged with a number of charges of discreditable conduct arising out of her work performance.

On August 29, 2001, TR was seen at Women's College Hospital at the request of the WSIB by Dr. S. Shapiro, a psychiatrist, and Dr. R. Michael Bagby, a psychologist. Dr. Shapiro's report concluded that TR suffered with Post Traumatic Stress Disorder (PTSD), Chronic (Mild); major depressive disorder, eating disorder, panic disorder and Agrophobia, The report recommended that "[TR]" is also to return to work at this time, however, she should be restricted from riding in a police cruiser and from carrying a firearm". It was also recommended that TR continue with her current treatment with a psychiatrist and psychologist.

On November 21, 2001, TR met with Dr. Davids, a medical advisor to the TPS, and Mr. Ray Hainsworth, her Association representative. TR did not inform Dr. Davids that she had explored going to Teachers' College. Mr. Hainsworth advised Dr. Davids that TR would not be returning to work on the advice of her doctors and requested approval for sick benefits.

On December 4, 2001, the TPS, by letter offered TR a position in fleet management on Jane Street, the Central garage, where police vehicles are taken for repair after they have been in accidents. However, TR did not respond because she felt that returning to the Central garage where police vehicles, which have been in accidents, are repaired was totally inappropriate. She also claimed her doctors were telling her that she

could not return to work. She made no effort to seek alternate or modified employment at the TPS and as a result her WSIB benefits were terminated as of December 10, 2001.

As a result of a conversation with the Director of the Education Program at York University, TR applied to Trent University to upgrade her undergraduate marks so as to improve her chances as a candidate for Teachers' College. She was admitted to Trent University on January 10, 2002 and took two English courses – one for three hours on Wednesday mornings and another on Thursday evenings. She received an A in each of the courses. She testified that at that time she had no future in policing and was trying to get her life on track. She was rejected from Teachers' College in April, 2002, but was finally accepted in June, 2002 to start in the 2002 fall term.

In the spring of 2002, TR attended a program for cognitive behavioral therapy at Toronto Western Hospital once a week for ten weeks. She also attended an anger management program at Rouge Valley. On May 2, 2002 she was referred by Dr. Rosenberg, her psychologist, to the addiction division at Homewood in Guelph for a gambling addiction. She began the in patient program at Homewood on June 26, 2002 and completed it on July 23, 2002. Dr. Davids acknowledged that TR would not have been able to work while she was an in patient at Homewood.

In the fall of 2002, TR commenced a full-time program at Teachers' College at York University. Her transcript for that period indicates that in seven of her nine courses she received a grade of A, and a B plus, and C plus in the remaining two courses. She

received her Bachelor of Education in 2003. From September to December, 2003, TR took specialist courses in education and also volunteered in her childrens' classrooms. During that time she also continued treatment for mental health issues. She obtained a full time teaching position in September 2004.

TR appealed from the decision in December, 2001 to terminate her WSIB benefits. She was assessed at CAMH on March 6 and 17, 2003. Dr. Shapiro, who had seen TR in an initial assessment on August 29, 2001, reported that TR did not "see herself ever returning to the police force". On March 27, 2003, Drs. Shapiro and Bagby diagnosed TR as having "Major Depressive Disorder, Recurrent; Eating Disorder in Partial Rescession, and features of Post Traumatic Stress Disorder". Dr. Shapiro also reported that "it is highly unlikely that [TR] would be able to return to her work as a police officer" and along with Dr. R.M. Bagby and L.S. Miller, a psychometrist concluded that TR was disabled from returning to her former work as a police officer. Based upon these assessments, on April 15, 2003 TR was granted both retroactive WSIB benefits to December 11, 2001 and also future benefits. She testified that she was under the impression the WSIB was aware she was going to school since her doctors had been asked about her progress, but acknowledged she had no information that her doctors had advised the WSIB she was going to school.

On September 29, 2003, Mr. Indart, a claims adjudicator at the WSIB, after receiving a report from the Psychological Trauma Program (PTP) indicating that "Teachers' College appears to be an appropriate direction" for her, contacted TR who

advised him that she had attended Teachers College from September 2002 to May 2003 and successfully graduated in June 2003. TR also advised Mr. Indart that she was taking a special education course at York University.

Mr. Indart, in a letter dated November 4, 2003, informed TR that her full time studies at Teachers' College constituted a "significant material change" and that TR had failed to inform the WSIB of that material change until their conversation on September 29, 2003, contrary to Section 23(3) of the Workplace Safety and Insurance Act. Mr. Indart asked the PTP to review their March 2003 recommendations in the light of the new information. The PTP reported that "purely from the perspective of PTSD and aggravation of major depression, [TR] was capable of working for the Toronto Police Service and as a school teacher."

Mr. Indart concluded from all the circumstances that TR was not totally disabled at least from December 2001 onwards. The only work related medical precautions at that time were not to ride in a police cruiser and not to carry firearms and since the TPS had offered TR a suitable job in December 2001, Mr. Indart inactivated TR's loss of earning benefits and created a recoverable overpayment. Mr. Indart also denied TR any entitlement to the cost of her post-graduate studies at York University or for courses taken at Trent University in 2002, nor would the WSIB cover the cost of psychotherapy treatment for the year 2003.

Counsel for TR asserted that the WSIB determined that she was not entitled to benefits from December 11, 2001 forward (benefits ceased on November 17, 2003) because she had failed to disclose a material change in circumstances, namely that she had gone to Teachers' College. Her appeal was dismissed by the WSIAT on March 27, 2007. A careful reading of the WSIAT decision, in my view, indicates that the main issue before the WSIAT was "whether the worker is entitled to ongoing loss of earnings benefits from December 2001."

The WSIAT made a number of findings about TR's conduct and concluded that she was not entitled to benefits after December 2001 and while the parties agreed that I was bound by that decision, I propose to deal with both the WSIAT decision and independently with the facts. I determine that TR fraudulently obtained WSIB benefits, while attending Trent University and Teachers' College and that there was work available that she could have performed at the TPS.

Analysis

This case has two separate themes running throughout. The first, asserted by Counsel for the TPS, is that TR is fraudulent and deceitful and that she deceived the WSIB and fraudulently received benefits. Counsel also asserts that TR's overall conduct is reflective of a pattern of fraud and deceit. The second theme which is proposed by Counsel for TR is that she is a person who suffers from a multiplicity of medical issues, that she relied on others and there was never an intention on her part to fraudulently

misrepresent her situation to the WSIB. Counsel for TR also maintains, in the alternative, that TR suffered from PTSD, major depression, anxiety or panic disorder, eating disorder and compulsive gambling and was disabled by mental illness and unable to work and unable to return to policing in any capacity and was therefore entitled to sick benefits.

In my view, the separate themes enunciated by counsel are both accurate. TR suffered from numerous illnesses, however she is a person who has engaged in a pattern of deceitful conduct. TR is also a very intelligent person. She entered university on a scholarship. She completed an undergraduate degree in political science and then successfully completed Teachers' College and became a teacher. Initially, she performed well as a police officer but subsequently her performance as a police officer deteriorated.

Medical Evidence

I now turn to consider the medical evidence. Briefly, no claim is made prior to December 11, 2001 for benefits TR received to that date. At that time, it was determined by the WSIB and their medical consultants that TR could return to work with restrictions, such as not driving a police vehicle and not carrying fire arms. TR did not return to work and as a result her benefits were stopped. TR and the Police Association objected and filed an appeal claiming that TR suffered from PTSD and could not return to work. Neither TR nor the Association sought alternate modified work pending the appeal. After being medically examined by CAMH as a result of a reference by the WSIB, the appeal

by TR and the Police Association was upheld on the 15th day of April, 2003 and TR received both retroactive benefits to December 11, 2000 and future benefits.

On the 4th day of November, 2003, as a result of a prior discussion with Mr. Indart, in which TR had informed him that she had and was attending Teachers' College, she was denied benefits and appealed from that decision. TR was again referred by the WSIB for a medical assessment and it was medically determined because she had gone to Teachers' College she also could have returned to work. She appealed that decision and on March 27, 2007 the WSIAT found, inter alia, as follows:

Having had the opportunity to consider the testimony provided and to review the material on file, we find ourselves in agreement with the conclusion reached by Dr. Dorian in his September 8, 2003, report that the worker's "pattern of lying, deceit, impulsivity, affective instability, gambling, shoplifting and past history of eating disorder" is indicative of "significant character pathology". In our view, it is this significant character pathology, rather than the compensable PTSD, which was responsible for the worker's alleged total disability.

In summary, we are satisfied that the balance of evidence supports a finding that as of December 10, 2001, the worker was only partially disabled by her compensable PTSD. By refusing to even attempt the modified duties offered by the employer, the worker violated her obligation to cooperate in an early and safe return to work. We do not accept the worker's submission that her compensable PTSD made it impossible for her to work in any capacity with the accident employer. The accepted restrictions involved riding in a police cruiser and using a fire arm. As was clear in the testimony from BM and TF, this was a large employer who, in the past, has been able to accommodate virtually every type of conceivable limitation. While they undoubtedly have their disagreements, it was clear from the testimony provided that the parties are normally able to work together to come to some resolution on the question of accommodation. By not responding to the employer's offer of modified duties, the worker effectively eliminated a whole range of other employment options which could likely have been made available.

In her testimony, the worker was quite candid that she was looking for a “new identity” at Teachers’ College, given that it was unlikely she would be returning to police work. After reviewing the information before us, we are satisfied that in December 2001, this worker had made a decision that she would not be returning to police work and instead, would be pursuing a new identity elsewhere. As Dr. Rosenberg had noted in his clinical notes of March 6, 2002, the worker had expressed a “fear of notice by others/being judged” and a “fear of criticism by co-workers”. Similarly, in his clinical notes of August 12, 2002, Dr. Rosenberg had noted the worker had advised “I am really concerned about them forcing me back to work-no way I can work for the [employer]”. There is also a note that the worker’s lawyer was concerned that the worker’s “going back to school jeopardizing”. Once again, given the pressures which had existed at the workplace, it is not surprising that the worker would choose not to return but rather would pursue another career.

In any event, after considering all the information before us, we are satisfied that the Board was correct in terminating the worker’s loss of earnings benefits in December 2001 on the grounds that the worker was partially impaired and refused suitable work which had been offered by the employer. Instead, the worker chose to pursue alternative employment with another employer, in another field.

The Panel finds itself in agreement with Dr. Dudley that given the worker’s ability to successfully complete Teachers’ College, undertake special education courses, work as a full time teacher and raise a family on her own, that the impairment imposed by her compensable PTSD is “minimal”. Given our earlier comments, it does not seem unreasonable to conclude that any ongoing psychiatric treatment which the worker required after September 2002 was, more likely than not, the result of her pre-existing and non-compensable stressors.

The WSIAT medically determined that TR was only partially disabled by her PTSD and that her impairment caused by her PTSD was “minimal” and she could have returned to work.

In addition to the WSIB medical evidence, there is the testimony of Dr. Davids a medical advisor to the TPS. Dr. Davids was qualified as an expert on PTSD through his past medical experience and he is also qualified as an expert in occupational medicine.

Dr. Davids testified that he had reviewed all the medical reports and had interviewed TR on one occasion and was of the opinion that TR could have returned to work at the TPS. He admitted that TR had PTSD but maintained that her condition did not prevent her from returning to work. Dr. Davids was aware of the different work that was available for TR with the TPS and consistent with the various WSIB medical opinions claimed that given her full time attendance at Teachers' College there was work available for her at the TPS which she could have performed.

The basis of TR's claim was that as a result of various motor vehicle accidents there was a delayed onset of PTSD which prevented her from working and entitled her to WSIB benefits. The reliance on the motor vehicle accidents as an underlying cause of PTSD does not appear to have been medically conceived. In a memorandum dated May 10, 2001 John Fotheringham, a claims adjustor with the WSIB, reported a conversation by speaker phone with TR, her husband and Mr. Hainsworth. Under the heading PTSD the following comment is included.

"Mr. Hainsworth said that Ms. [TR's] condition was not expressed as PTSD until he met with her in October – he pointed out the traumatic events and thought she might be suffering from PTSD."

In a subsequent memorandum dated June 1, 2001 referring to an earlier phone call with TR's husband Mr. Fotheringham's notes state the following:

"TR said that, while speaking to her husband the previous day, I had noted that the diagnosis of PTSD had never been mentioned by her doctors until brought up by Ray Hainsworth, her representative.

She wanted me to know that Dr. Rosenberg had noted it in the summer of 2000 and that she had had spoken to Dr. Rosenberg. He told her that it should be indicted in his notes.

I have reviewed Dr. Rosenberg's notes filed in the 'NOA' section, and reviewed them in a memo of 17 May 01, filed in the 'Med' section. The earliest reference that I could find relating to a PTSD related incident was 17 Nov. 00".

Dr. Rosenberg's notes of October 19, 2000 reflect that TR became aware she would receive WSIB benefits if she could "prove it was directly related to her job". Dr. Rosenberg had seen TR on twenty-two separate occasions since January 2000 and the first time that the motor vehicle accidents appear in his notes is briefly on November 7, 2000 and again on November 17, 2000 just after TR became aware that receipt of benefits was directly related to her job.

Neither Dr. Rosenberg nor Mr. Hainsworth was called to testify. Based on the notes it appears that the diagnosis of TR's PTSD was first suggested by Mr. Hainsworth, who is not medically trained, in October 2000, prior to Dr. Rosenberg's reference on November 7, 2000. But the failure of both to testify raises a number of important questions. First, was there any communication between Mr. Hainsworth and Dr. Rosenberg in the fall of 2000? What weight, if any, did Dr. Rosenberg give to the MCMI test of October 9, 2000 prepared for Dr. H. Frazer, his associate, which recorded that TR reported no symptoms associated with PTSD? Why if Dr. Rosenberg referred to a PTSD related incident on November 7 and 17, 2000 did Dr. Rosenberg not diagnose or mention PTSD in his report to MAS on December 13, 2000, although he did mention "Depression; work stress" under the heading of diagnosis? Also, Dr. Rosenberg in a letter dated January 18, 2001 to Dr. Woodside at the Eating Disorders Clinic also made no mention of PTSD under the heading "History". Further, in a Release of Member's

Medical Information to MAS which appears to be in early February, 2001, Dr. Rosenberg's diagnosis is "depression-stress-anorexia nervosa" and again no mention of PTSD. How did Dr. Rosenberg select the motor vehicle accidents as the source of PTSD when his notes indicate that TR was suffering from multiple issues including marital and job related problems?

Notwithstanding the foregoing, in a letter dated February 8, 2001, to Mr. Hainsworth, Dr. Rosenberg provided a detailed outline of the various accidents in support of a diagnosis of PTSD. It is also difficult to understand Dr. Rosenberg's statement in the letter that TR "never raised the issue of her MVA", but in retrospect our sessions occasionally focused on the MVA as the "precipitant to her difficulties". If the issue of the MVA was never raised, how could Dr. Rosenberg have "focused" on the MVA?

I find that the failure of Mr. Hainsworth and Dr. Rosenberg to testify leaves a significant gap as to the original diagnosis of PTSD and creates some doubt as to whether the motor vehicle accidents were the cause of her PTSD as opposed to other stressors in her life. I now turn to the testimony of TR's doctors. Dr. D. O'Dea, a psychiatrist, and Dr. K. Mendelssohn, a family doctor, both of whom treated TR were called in her support. Other doctors who treated her were not called but notes and reports from them were filed.

Dr. O'Dea testified that TR was suffering from PTSD and he had recommended that TR not go back to any type of police work because it would exacerbate her various

difficulties. In January of 2003, Dr. O'Dea noted that TR was going to Teachers' College and testified it was not a secret. He stated that if TR returned to policing her prognosis would be very poor and she had a tremendous block about going back to policing. Dr. O'Dea claimed that someone with TR's medical issues and facing charges of discreditable conduct and trust issues with supervisors would not be enthusiastic about returning to work. The first indication that TR was having nightmares was on May 15, 2001. Dr. O'Dea testified based on the criteria for diagnosing PTSD, i.e. 1. re-experiencing, 2. avoidance and 3. hyperarousal, that he could not have diagnosed PTSD prior to May 15, 2001, since there was no evidence of avoidance prior to that date nor was there any reporting of nightmares to that date. TR's diagnosis was based on self reporting. Dr. O'Dea acknowledged that he does not practice psychotherapy including exposure therapy which is designed for PTSD, and any cognitive behavioral therapy was done by Dr. Rosenberg. He claimed that TR's difficulties with her supervisor added to her PTSD and because she was not motivated to return to policing and wanted to explore other vocational options, there was no point in subjecting her to exposure therapy. TR did not receive exposure therapy from Dr. Rosenberg.

When cross examined, Dr. O'Dea was surprised to learn that TR had attended Trent University in 2002 because she was so stressed out. When told she had received a mark of eighty percent in both courses, he expressed further surprise because she was so fragile and it was at the nadir of her depression. When told about TR's insurance fraud and the importance of self reporting, he candidly admitted he would have to consider the validity of TR's self reporting. He repeated he would not have recommended she go to

Trent University or return to police work unless her PTSD was treated and there was no point in treating her because she was not motivated to return to policing. He also acknowledged that PTSD is a temporary condition and is treatable.

Dr. O'Dea was asked if it would assist TR if she would not be assigned back to the same police station. He replied it would be a great help if she were assigned to another police station or a more benign police environment or to some ancillary service. However, according to TR, none of these options was available to her. Dr. O'Dea understood she would have to return to the same division and stated,...“that was a significant factor in my decision not to go back to TPS”, and was based on her assumption she would return to the same division.

When re-examined he claimed her PTSD was very severe because of the issues at work and her tremendous conflict with her supervisors. He also referred to the car accidents, which TR claims are a significant factor in her PTSD, as a red herring.

Dr. K. Mendelssohn is a family physician who treated TR. I note that on June 28, 2000, TR advised Dr. Mendelssohn that she was thinking of leaving her job. Dr. Mendelssohn was aware that TR was a police officer and on July 24, 2000 in order to enable TR to return to work advised the TPS's Medical Advisory Service (MAS) that TR was “emotionally stable” and that her prognosis was “excellent, fit to return to work immediately – full duties” and she could return to “normal work.”.

Dr. Mendelsohn testified that when she speaks to patients she uses certain abbreviations to record the interviews. The letter "A" stands for both assessment and diagnosis. Between July 24, 2000 and February 21, 2001, Dr. Mendelsohn recorded ten patient visits. Dr. Mendelsohn referred to various matters affecting TR including, her relationship to her work and to her husband, panic attacks, depression and on one occasion sleeping problems. TR reported on October 6, 2000 that she was unable to function in her workplace, her concentration was impaired, she was not able to focus and felt worthless and incompetent. She also reported her career was in jeopardy and she was planning to get out of policing due to stress at work. On October 27, 2000 Dr. Mendelsohn filed a report with the WSIB where under "Diagnosis", she stated "severe depression". There was no mention of PTSD. On December 5, 2000, Dr. Mendelsohn's notes show that TR had issues "related to work, death of a fellow police officer June 2000, had motor vehicle accident August, 1999, partner had her accident June 2000". On January 17, 2001 and February 21, 2001, the notation under "A" is "coping". At no time prior to February 18, 2001 under "A", which includes diagnosis, is there any mention of PTSD. On April 24, 2001, Dr. Mendelsohn's diagnosis under A is "major life stressors" and the first mention of PTSD in Dr. Mendelsohn's notes occurred on July 27, 2001 as a result of a telephone call to Dr. O'Dea. TR was also diagnosed with an eating disorder and referred to a clinic at Toronto General Hospital in early 2001.

Dr. Mendelsohn's notes on December 5, 2000 are the first indications by TR that prior motor vehicle accidents may have had any impact on her. TR's reporting of dreams about motor vehicle accidents began after being informed by Mr. Fotheringham, a claims

adjustor at the WSIB, about the basis for obtaining benefits. Mr. Indart's notes at the WSIB indicate between November 16, 2000 and December 5, 2000 that both TR and Mr. Hainsworth were made aware that TR could return to work with the restrictions that she not ride in a police cruiser or carry firearms. Both TR's knowledge that she was required to return to work with restrictions and that the PTSD was the only diagnosis accepted by the WSIB pertaining to her loss of earnings (LOE) benefits just prior to December 5, 2000 are important, particularly as it relates to Dr. Mendelsohn's observations and notes on December 5, 2000. Again, the notes on that date do not indicate that Dr. Mendelsohn diagnosed TR as having PTSD.

On December 13, 2000 there is a further note by Dr. Mendelsohn that she hadn't heard from Mr. Hainsworth and on December 14, 2000, Dr. Mendelsohn's notes indicate that TR is experiencing lots of stress at home and her assessment was that TR has not improved. Dr. Mendelsohn also reports on that day that TR's marriage may not last and that her mood is depressed. In summary, until December 14, 2000 despite a number of visits there is no mention of PTSD in Dr. Mendelsohn's notes.

Dr. Mendelsohn's notes record that in late November into December that the Police Association became involved, followed by a letter to her from Mr. Ray Hainsworth, Education Coordinator with the Toronto Police Association on December 15, 2000 which is as follows:

"I am writing as the authorized representative of Ms. TR regarding her claim for benefits from the Workplace Safety and Insurance Board ("WSIB"). I would like you to provide your professional opinion regarding Ms. TR's medical/psychological condition.

Based on my interview with Ms. TR I believe that her current symptoms arise from at least three traumatic events that arose out of and in the course of her employment as a police officer for the Toronto Police Service. The WSIB statute and policy recognize entitlement to acute mental stress that arises as an acute reaction to a sudden and unexpected traumatic event. The policy further recognizes entitlement to mental stress even though there may be a delayed onset of several months. As long as the worker experiences a traumatic event, the worker's psychological history of mental stress or illness is not a bar to entitlement for WSIB benefits. Finally, I should note that there is no entitlement when the mental stress is due to an employer's decisions or actions that are part of the employment function, such as discipline. In brief, the WSIB recognizes an acute stress reaction but does not recognize a chronic stress condition.

As you are aware, Ms. TR has experienced both traumatic events and events, which would be defined by the WSIB as part of a chronic stress condition due to the employer's actions. In addition, Ms. TR has had a history of pre-existing psychological problems, which require some comment. In the final analysis, what is required is a review of her recent medical/psychological history, which caused her to lay-off work on September 28, 2000. To that end, could you please provide your professional opinion and findings regarding the following questions:

1. What is your current diagnosis regarding Ms. TR?
2. Ms. TR informs me that she experienced three incidents that could be described as traumatic in terms of the WSIB definition. These include:

- a traffic accident in which she was involved that occurred on or about August 19, 1999. She reports that this was a very serious accident in which she could easily have been killed but that she escaped injury very narrowly. Nevertheless the incident did weigh heavily on her mind for a long period of time.
- exposure to television footage of the death of Ontario Provincial Police officer, Marg Eaves, who was killed on highway 401 while investigating a serious multi-vehicle accident. Ms. TR tells me that this TV coverage which was shown at her Division "hit her like a ton of bricks". She subsequently attended the funeral of Constable Eaves with other Toronto police officers and was very seriously affected by the event, especially her inter-action with the Eaves family. These events occurred in mid-June 2000.
- on June 18, 2000 PC TR's partner was very seriously injured in an on-duty traffic accident when her vehicle was hit by a drunk driver. PC

TR viewed her partner's smashed vehicle and later visited her partner in the hospital. She was greatly affected by her partner's brush with death, and less than a week later she found that her sleep was affected, she could not eat, she had problems inter-acting with her family and she eventually visited and was prescribed anti-depressants for the stress reaction.

Is it your professional opinion that these events, on their own, or cumulatively, constituted traumatic events which could have produced a mental stress reaction? Do your office notes indicate whether the stress reaction was immediate or had a delayed onset? Is a delayed reaction common in these circumstances?

3. PC TR also related to me that she was involved in a work-related dispute with her immediate supervisor as well as a criminal charge for shoplifting.

- The work-related events appear to have started around March 2000 when she was questioned about some missing accident reports. Since she believed she was the victim of erroneous information, she responded to the questions by asking for a complete investigation into the matter. Apparently, Toronto Police Service management for several months initiated no investigation. However, on October 14, 2000 she was informed that she would be subject to disciplinary action regarding the alleged missing reports. It is evident that the incidents involving the missing reports was also stressful to PC TR in that they questioned her professional competence.

- in the fall of 2000 PC TR was arrested for shoplifting and is currently facing criminal charges. This event also constituted a source of stress for her.

It is clear that PC TR has experienced a significant amount of stress over the past two years. I would appreciate receiving your professional opinion regarding which factors – the three traumatic events noted above – or the labour relations and criminal charges, made the most significant contribution to the mental stress condition that Ms. TR currently suffers and which has disabled her from work? In your professional opinion what contribution has any pre-existing psychological problem made to the onset of her current disability?

I thank you very much for the time required to prepare this report and, should it be necessary, the Toronto Police Association would be pleased to pay a fee for the report based on your usual and customary fee schedule”.

On December 22, 2000, Dr. Mendelssohn replied to Mr. Hainsworth as follows:

"Thank you for your request for information on Mrs. TR. Mrs. TR is suffering from depression and an anxiety disorder. I believe that both conditions are related to post-traumatic stress from traffic accidents that occurred in her line of work.

TR has been complaining of depressive symptoms since I saw her on June 28, 2000 and at that time she had begun Paxil 20mg at bedtime and was seeing a psychologist on a regular basis. She was not able to pinpoint the cause of distress and at that point was somewhat perplexed that she was not coping well. On the 24th of July she also complained of similar symptoms and advised that she was continuing the Paxil and seeing a psychologist.

I next saw her October 6, 2000 when she advised me that she had been hospitalized at Ajax Pickering Hospital for depression. At that time she had been found with Tylenol #3 in her hand but she had not consumed any. She advised me that she had been arrested for shoplifting at Zellers. She advised me that she was not shoplifting intentionally and that her concentration was so impaired that she forgot about several items in her cart. As a result of the incident, she was suspended with pay from the police force. I was very concerned about her emotional state. When I reassessed her October 10, 2000, she was worse so I referred her to the Crises Unit at Centenary Health Centre to see a psychiatrist, Dr. O'Dea.

I saw her again October 19, 2000 and she reported worsening of her depressive symptoms and ongoing anxiety attacks. She advised me that Dr. O'Dea increased her Paxil to 30mg. She was seen again on October 27, 2000. She felt that her concentration was minimally improved and she was continuing to have panic attacks. Throughout all of these visits she was not really able to pinpoint a specific reason for her severe depression and anxiety symptoms, however she felt that they were multifactorial as she described problems within her marriage as well as stress at work.

She was seen again December 5th and was still complaining of depressive symptoms. She had begun to develop more insight into her depression and realized that she had been denying anxiety symptoms for a long time that had resulted from the following events which I will quote from your letter: "a traffic accident in which she was involved that occurred on or about August 19, 1999. Exposure to television footage of the death of Ontario Provincial Police officer, Marg Eaves, who was killed on highway 401 while investigating a serious multi-vehicle accident. On June 18, 2000 PC TR's partner was very seriously injured in an on duty traffic accident when her vehicle was hit by a drunk driver." My impression at that time was that this was very significant insight on TR's behalf and

explained the severity of the symptoms which were out of proportion to the work related stress and the intramarital stress.

I am of the opinion that these incidents are very significant and play the major role in her current mental illness. In my opinion her emotional stress caused by the first accident and exacerbated with each additional one. She presented to the office just 8 days after the third accident and became progressively worse from then on. I believe the stress reaction was therefore immediate. It is very common to not be able to recognize the cause of the anxiety and depression when the trauma has been so severe. I am not surprised that it required months for TR to identify the stressful events. It can take others years or a lifetime.

I believe that she would be handling the work-related and marital stress and able to continue with work if she was not also suffering from post-traumatic stress. She has a past history of depression, however, she was always able to cope and continue to work with medication and supportive psychotherapy. I believe that this situation is different because the main cause of her current disability is related to the emotional trauma sustained from the motor vehicle accidents.”

Mr. Hainsworth’s letter is extremely skillful in that he not only requested an opinion as TR’s authorized representative regarding her claim for WSIB benefits, but he also outlined the parameters for WSIB benefits and provided a suggested diagnosis by stating that he believes “her current symptoms arise from at least three traumatic events that arose out of and in the course of her employment as a police officer ...” and that the WSIB recognizes delayed onset mental stress. Further, Mr. Hainsworth goes on to describe the three motor vehicle incidents in which TR was involved which she first reported to Dr. Mendelssohn on December 5, 2000 and which he states “could be described as traumatic in terms of the WSIB definition”.

I note that Mr. Hainsworth’s letter of December 15, 2000 states that TR was greatly affected by her partner’s brush with death in a traffic accident on June 18, 2000

and less than a week later found that her sleep was affected, she could not eat, had problems with her family and was prescribed anti depressants for the stress reaction. Notwithstanding Mr. Hainworth's claim that TR's sleep was affected not less than a week after June 18, 2000, there is no mention of poor sleep in Dr. Mendelssohn's notes until October 19, 2000 which is two months after the incident. There is also a note as I previously indicated by Dr. Mendelssohn to the Medical Advisory Services on July 24, 2000 stating that TR is emotionally stable with an excellent prognosis, and that she is fit to return to work and full duties immediately. Further, there is Dr. Mendelssohn's note to the WSIB on December 9, 2000, that TR is suffering from severe depression but without any mention of poor sleep or PTSD.

When cross-examined, Dr. Mendelssohn acknowledged her assessment of PTSD was made without consulting either Dr. O'Dea, or Dr. Rosenberg, TR's psychologist. Dr. Mendelssohn testified that two of three necessary symptoms for PTSD were not present and while TR had some attacks she did not have recurrent flashbacks of the incidents, nor was there any avoidance in the sense that she stopped driving. Dr. Mendelssohn did not treat TR for PTSD, nor was there any attempt by Dr. Mendelssohn to relate the many medical issues affecting TR as being a possible or major cause of her symptoms. Essentially, Dr. Mendelssohn relied on TR's self reporting.

Dr. Mendelssohn confirmed Dr. O'Dea's testimony that TR's performance at Trent University was incompatible with the level of cognitive impairment she was claiming at that time. Dr. Mendelssohn was not aware TR was attending Trent

University and stated that based on TR's marks at Trent, she erred in determining TR's level of concentration for the purposes of her Global Assessment. She was also surprised that TR had received marks of eighty percent because of the various stressors in her life and acknowledged that in retrospect, TR may not have been totally disabled.

In May of 2002, Dr. Mendelssohn again reported that TR was not fit to return to police work. Dr. Mendelssohn testified that as her family doctor she was not responsible to co-ordinate TR's health problems and this was done by others. Dr. Mendelssohn agreed she had not been contacted by the TPS and was not aware of the various or different job descriptions available nor was she aware of the strategies at the TPS of job modification. Dr. Mendelssohn had a single telephone conversation with Dr. O'Dea on July 27, 2001 in which he indicated there was a recurrence of PTSD. She admitted to not having any expertise in PTSD, nor did she engage in positive therapy with TR although she was familiar with treatment options for PTSD. She also stated that she was confident in Dr. O'Dea's opinion and that is why she referred TR to him.

Dr. Mendelssohn testified there is an overlap between PTSD and depression and PTSD is distinguished by a persistent recollection of events, anxiety associated with the recollection and by reliving the events the patient becomes disabled. Dr. Mendelssohn conceded that when she wrote her letter of December 22, 2000 in response to Mr. Hainsworth she did "not know if [she] agreed with everything he said". She stated it was reasonable for her to communicate with Dr. O'Dea and Dr. Rosenberg but she did not.

Dr. Mendelssohn acknowledged that PTSD includes persistent recollections of nightmares or flashbacks that are intrusive and impair day to day activities, and also includes avoidance such as not driving if the person was involved in a motor vehicle accident. Dr. Mendelssohn agreed that apart from TR's attendance on December 5, 2000, there was no evidence of nightmares or intrusive flashbacks and no subsequent complaints or flashbacks and no evidence of avoidance since TR was driving. Dr. Mendelssohn was of the view that TR could not drive a police cruiser although she was amenable to exposure therapy. Dr. Mendelssohn admitted that TR's eating disorder did not keep her from working and her depression was under control. Dr. Mendelssohn acknowledged that she was sympathetic to TR who was unhappy with her workplace, did not want to return to policing and was looking for an alternate career.

Dr. Mendelssohn agreed that she first referenced PTSD after a conversation with Dr. O'Dea on July 21, 2001 but did not treat TR for PTSD. When told that TR was convicted for insurance fraud and shoplifting, she admitted the convictions would cause her to suspect that TR might be fraudulent as opposed to having a medical disorder. Dr. Mendelssohn also confirmed that TR was not motivated to obtain treatment but acknowledged that if TR's duties at the TPS were modified she would be optimistic that TR could return to work full time, but was not certain.

Dr. Mendelssohn admitted that TR could return to work and perform office duties, such as answering the phone or coordinating volunteers and also admitted to being influenced by both Dr. Rosenberg's and Dr. O'Dea's opinions that TR should not return

to police work. Dr. Mendelsohn testified that changing careers would be in TR's best interest and her strong preference was to change careers. Dr. Mendelsohn could not say that TR could not go back to policing unless she saw the results of TR being treated, but that her preference was for TR to change careers.

Dr. Mendelsohn, when advised that TR was getting A's and B's at Teachers' College agreed that TR had a significant degree of functional ability and agreed that TR could have worked for the TPS. In retrospect, Dr. Mendelsohn agreed it was impossible to say that TR was incapable of returning to modified duties at TPS until she had undergone some form of therapy. At the time she was treating TR, there was no reason to conclude TR was malingering. Dr. Mendelsohn stated that in December of 2000, it would not have been appropriate for TR to work in the police garage where motor vehicles involved in accidents were repaired because it related to her PTSD and mental condition.

In considering the viva voce evidence it is apparent that there is agreement in a number of areas between Dr. O'Dea and Dr. Mendelsohn. Both doctors were surprised when told that TR had attended Trent University because her attendance was not consistent with her self reporting, which suggests her self reporting was exaggerated. Both doctors, when confronted with TR's insurance fraud and her shoplifting questioned TR's self reporting. Dr. O'Dea expressed a concern about the validity of her self reporting and Dr. Mendelsohn stated "it would cause her to suspect that TR might be fraudulent as opposed to having a medical disorder". Both testifying doctors agreed that

TR did not consistently display all of the three necessary factors based on the criteria for diagnosing PTSD, neither of the doctors treated TR for PTSD, neither doctor was aware of the work situation at TPS and the possibility of modified work, neither claimed any expertise with respect to PTSD and both acknowledged TR did not want to return to policing.

Dr. O'Dea also referred to the car accidents as a red herring which undermines TR's and the Association's theory of the case that the motor vehicle accidents were the source of her PTSD. Dr. O'Dea stated TR's PTSD was severe because of her issues at work, while Dr. Mendelssohn acknowledged that her Global Assessment of TR might not have been accurate which casts doubt on her diagnosis. More specifically, Dr. Mendelssohn when advised of the available modified work at TPS and TR's marks at Teachers' College conceded that TR had a significant degree of functional ability and admitted that she could have performed certain duties at the TPS but not at the police garage. Dr. O'Dea testified he was not aware that there was other work available other than 42 Division and also agreed that TR could work at another police station or in a more benign environment or at some ancillary service.

I also briefly note Dr. Padden, a psychologist, to whom TR was referred by Mr. Clewey, a lawyer for the Association, because of a shoplifting charge, on December 19, 2003 after reviewing all of the medical reports concluded that TR had PTSD. She also reported that she was not sure what TR's final grades were at university but that TR completed the course. She further stated,

“However she was not an A student nor did her graduating grades reflect this. Some of her courses, she barely got by in and I believe she was graded with a low C graduating average.”

Of course, those grades as reported by Dr. Padden were incorrect since TR received seven “A’s” in nine courses and a “B+” and “C” in the other two courses. Dr. Padden did not testify but it would appear that TR’s self reporting was again exaggerated.

I find that TR’s self reporting was selective and exaggerated and I further determine that TR and the Association’s theory of the motor vehicle accidents being the source of TR’s PTSD is undermined by the evidence. Dr. O’Dea testified that TR did not have symptoms of PTSD prior to May 15, 2001 and referred to the accidents as a red herring. Dr. Mendelssohn acknowledged that “she did not know if [she] agreed with everything Mr. Hainsworth said”. Dr. Mendelssohn also admitted she was sympathetic to TR’s situation and relied on her self reporting. Her clinical notes prior to December 5, 2000 do not indicate any symptoms of PTSD, nor do her clinical notes prior to her letter of December 22, 2000 to Mr. Hainsworth expressly mention PTSD. Further, after considering all of her testimony, there does not appear to have been an independent and objective diagnosis as to whether TR’s PTSD and alleged total incapacity may have resulted from the other stressors in her life. Accordingly, based on her acknowledgement that she may not have agreed with everything Mr. Hainsworth said, when considered against the background of her clinical notes, her reporting and her testimony, it appears that Dr. Mendelssohn was unduly influenced by Mr. Hainsworth’s letter and I am not prepared to accept her evidence indicating the motor vehicle accidents as opposed to the

other stressors in her life were the source of TR's PTSD and her alleged total incapacity to perform modified work.

Also, on December 15, 2000, the very day that Mr. Hainsworth referred to the motor vehicle accidents as a possible source of TR's PTSD and sought opinion letters from Dr. Mendelssohn and Dr. Rosenberg, TR's psychologist, there is an objective report by Dr. Foa to the WSIB who reported TR had no symptoms associated with PTSD. Just two days prior, on December 13, 2000, Dr. Rosenberg reported to MAS that TR suffered from "Depression, work stress", and there is no mention of PTSD. There is also what appears to be an objective MCMI test and report to Dr. Frazer, with whom Dr. Rosenberg is associated, on October 9, 2000, which is consistent with Dr. Foa's report that TR reports no symptoms associated with PTSD. Thus, the documented evidence, prior to and immediately after December 15, 2000, does not support the theory suggested by Mr. Hainsworth in his letter of December 15, 2000 that the motor vehicle accidents were the cause of TR's PTSD.

I further find the testimony of Dr. O'Dea and Dr. Mendelssohn is more supportive of the position taken by Dr. Davids and the doctors who advised the WSIB than that of TR. Their evidence does not support the medical claims made by TR and the Association that she was incapable of performing any work at the TPS. Both admitted TR could have returned to work. I therefore conclude, based on the viva voce evidence of Dr. O'Dea and Dr. Mendelssohn that their testimony tilts in favour of the TPS and I conclude, based on their evidence and the evidence of Dr. Davids and the doctors associated with the WSIB

that TR could have returned to modified work which was available to her other than at 42 Division and the police garage.

In her final argument, Counsel for TR stated the following:

“By September 2002, [TR] had made sufficient progress that her disability from her mental illnesses no longer prevented her from activity, such as full time attendance at Teachers’ College. Given [TR’s] success during this program, it could be concluded that [TR] may have been able to return to modified duties at TPS. But given the comments of the Unit Commander “she could never under any circumstances ever be considered for rehire” it seems unlikely that any position at TPS would have been found.”

The comments of the Unit Commander are contained in two memos dated March 21, 2001 and March 26, 2002. On March 31, 2001, James Bamford, Unit Commander of 42 Division in response to TR’s application to the TPS’s Central Sick Leave Bank filed a statement which contained the following comments. When asked if restricted duties/modified work was available for TR, Unit Commander Bamford stated “no” and explained that,

“The officer is deceitful and untrustworthy. I am not aware of any officer at No. 42 Division that is willing to work with her.”

He further stated in response to various questions as follows:

“Officer does not meet the core values of the Service and is not suited to be a police officer.”

“Officer is presently involved in an internal discipline dealing with the work performance issues, deceit and insubordination.”

“The officer is facing police act charges.”

“Co-workers refuse to work with officer. Presently before trials as indicated previously.”

“As a police officer and Unit Commander of No. 42 Division, I cannot speak on the officer’s medical status. However, her performance in the six months prior to her going off sick has lead to three separate internal investigations resulting in numerous police act charges. She does not represent the core values and in my opinion is not suited to hold the position of police constable with the Toronto Police Service. It is my understanding that she is still presently before the courts.”

Again, on March 26, 2002, the Unit Commander filed a statement with the Central Sick Leave Bank of the TPS. The statement essentially reported what he had said in his previous statement and contained the following additional statement:

“Officer has not been at this unit in two years. When she left on sick, she was facing criminal charges and numerous Police Act charges related to non performance. She should not be a police officer and there is no position available for her at No. 42 Division. She does not represent core values of the Service.”

However, TR was not interested in returning to policing as of September 2, 2002, because just three weeks prior, on August 12, 2002, TR met with Dr. Rosenberg, who noted the following:

“Lawyer concerned that TR’s going back to school – jeopardizing ‘I’m really concerned about them forcing me back to work. No way I can work for the Toronto Service’.”

Accordingly, despite Counsel’s assertion that the TPS might not have rehired TR, it is quite clear that TR did not want to return to policing at the TPS and she did not advise and would not have advised the TPS of the change in her circumstances because to do so would have jeopardized her WSIB benefits and forced her back to work.

I am also unable to agree with the candid acknowledgement by Counsel for TR that it could be concluded that by September 2, 2002, TR may have been able to return to

modified duties at TPS but for the comments of the Unit Commander. TR could have returned to TPS prior to September 2, 2002, however, the position taken by TR and the Association from December 11, 2001 and thereafter that she was unable to return to policing at the TPS precluded any consideration by the TPS of suitable alternate modified employment. Certainly, based on all of the evidence, the TPS would have provided her with modified paid work rather than gratuitously paying for her WSIB benefits without receiving anything in return. Indeed, the TPS offered TR modified work in December 2001 which was after the Unit Commander's comments on March 21, 2001 and there is no reason to consider that the TPS would not have offered her work after the March 2002 memo. Also, the memos indicate that the Unit Commander would not offer her work at 42 Division but that did not preclude work in other areas.

I also note that as of September 2, 2002 if her alleged mental illness had subsided to the point where it no longer prevented her from performing modified duties she was obligated pursuant to the Workplace Safety and Insurance Act to notify the WSIB of a material change in her circumstances. The relevant sections of the Act provide as follows:

s.23(3)

Persons who are receiving benefits, or who may be entitled to benefits, must notify the WSIB of a material change in circumstances in connection with their entitlement within 10 days of the change occurring.

s.149(2)

Persons who willfully fail to inform the WSIB of such a material change within 10 days of the change are guilty of an offence.

Given the mandatory obligation of TR as “a person who may be entitled to benefits” to inform the WSIB of a material change in circumstances, it does not lie with TR, having unlawfully withheld information of a material change while pursuing her appeal, to blame the TPS for her not returning to work. I am satisfied, given the position of the TPS throughout including offering her work in December 2001, that the TPS would have provided her with work had it known she could return to modified work. Moreover, it is quite likely with her medical improvement that the range of modified work available would have expanded.

In summary and based on all of the evidence, particularly that of Dr. Davids, and the WSIB doctors, I determine that TR had PTSD but that it was “minimal”. She was capable of returning to modified work as of December 11, 2001, and thereafter. It is also apparent that TR was not prepared to return to the TPS at all relevant times, and made no effort to seek treatment for her PTSD. Neither TR nor the Association made any effort contrary to their legal obligation to co-operate in obtaining modified work. By taking the position that she was incapable of performing any work, TR and the Association precluded any further efforts by the TPS to find suitable modified work that she was capable of performing and that was available to her. TR was at all relevant times medically capable of performing modified work at the TPS and instead chose to attend university and Teachers’ College. In so doing she wrongfully claimed WSIB benefits.

Further, it is admitted that I am bound by the decision of the WSIAT. The WSIAT after considering the medical evidence found that TR’s PTSD was minimal and

there was work available that she could have performed, that she failed in her legal obligation to assist in finding modified work, that attending Teachers' College was evidence that she could have worked at TPS and that she was medically able to perform work at TPS. Those issues have been decided and are binding on me; while I have independently arrived at the same conclusion as the WSIAT, the medical evidence upon which I have relied is consistent overall with the medical evidence relied upon by the WSIAT. I am bound, as Counsel for TR acknowledges, by the medical assessment contained in the WSIAT decision.

Credibility

After reviewing the evidence and the submissions, I determine that TR was not a credible witness for the following reasons.

On August 6, 2000, TR submitted an application for employment to the York Regional Police. As part of that application TR signed a declaration on August 28, 2000 which stated,

"That the information provided in that document is true and correct to the best of my knowledge. I understand that a false statement may disqualify me from further consideration".

TR also completed a number of questions on the Candidate Information Form. That Form contained the following questions,

38. Have you ever been convicted of a provincial offence? Paying of a fine is considered a conviction, provincial offences include but are not limited to violating the Trespass to Property Act or the Police Services Act.

To that question TR checked the “no” box which was false and contrary to the declaration which she had made. Her signifying “no” was a deliberate falsehood, since she had been convicted under the Police Service Act for shoplifting earlier and reprimanded. Further, I find that her explanation that she was counseled to fill out the form in the way that she did by the person receiving the application as not being credible. It is most unlikely that a member of a police force or someone working for the police force would counsel her to lie about convictions for a provincial offence. Nor is her testimony credible in the face of clear wording in the form that she thought the question was confined to Criminal Code matters. Certainly TR who was a police officer would be aware of the distinction between the Criminal Code and provincial offences.

On April 8, 2002, TR filed a Disability Claim (Waiver) with the Clarica Life Insurance Company. In that claim she was asked “What jobs are you currently unable to do?”, to which she replied “Due to PTSD symptoms unable to return to work at present, in any capacity”. She also indicated that her “medical condition has prevented me from working since 28/09/2000”. That response ignores the earlier letter to TR indicating that she could return to work subject to certain restrictions. But of greater significance is TR’s response to the following questions and answers under the title Education and Training –

Specify any courses or programs you have completed at university, college or trade school that have not already been described in the above sections (Please attached list if insufficient space). To that question TR responded “further university courses”.

The very next question is as follows –

Are you currently participating in any retraining courses, educational studies or professional development? To which the TR responded “no”.

That last response was not true. TR was in attendance at Trent University “currently” taking two “educational” courses and had not written the exams. There is a clear distinction between the two questions. The first question asks about courses “completed” while the second question asks about courses and studies in which a person is “currently participating”. The distinction was patently obvious, and should have even been more obvious to a person with an undergraduate degree and to a person who at the time was taking English courses. Her response to the courses or studies that she was currently participating in was false. Also, given TR’s educational background and her obvious intelligence, I reject her testimony that she thought by answering the prior question about courses completed that was sufficient. If it was sufficient there was no need to respond to the second question at all, but by responding “no”, it was obvious that TR understood the question.

I also do not accept her testimony that her response to the question by Clarica which required information about attendance at school was not relevant. It is not for TR to decide relevance, the question was quite simple. As I have indicated TR is well educated and no doubt understood the question. While Clarica is not the TPS, it is an insurer retained by the TPS to deal with negotiated benefits for employees or members of the Police Association and therefore there was some risk because of Clarica’s relationship to the TPS, that by properly answering the question about her current

schooling that information potentially could come to the knowledge of the TPS and undermine TR's position that she was totally disabled from working.

Also, on the same form TR was asked which of her activities were limited and to what degree as a result of her disability to which she replied that there was some limitation with respect to her reading. When asked to describe the limitation she responded "limited concentration". Since TR at that time had attended Trent University and had taken two English courses where reading was required which no doubt was more intense than normal, I find her response to her reading limitation not to be credible. Accordingly, based on that document and TR's testimony and demeanour as a witness, I reject her testimony and find that TR's intent in falsely responding to the questions referred to was an attempt to deceive Clarica and the TPS about her situation and is direct evidence of her deceitfulness and lack of credibility.

Mr. Indart's notes of September 30, 2003, with TR are also an indication of her deceit. In his report which was filed Mr. Indart reports the following conversation with TR, which is in part as follows:

"I called Mr. Ray Hainsworth, WKR's Rep. He stated that he was not aware about the WKR's studies.

After my conversation with Mr. Hainsworth the WKR returned my call. She stated that she started her attendance at Teachers' College at York University in Sep. 02, as full time student. She is now taking a "specialist course Level 1" (in special education) at your University: She attends to 2-hour lectures on Tuesdays and Thursdays.

I asked the WKR why she never informed me about her post-graduate studies. She replied that it was because we seldom communicated with each other. I stated that it is her responsibility to inform the WSIB of a

material change and, in this case, her attending Teachers' College is a significant material change. *I asked the WKR if she told anyone at the PTP about her studies; she replied that she is not sure whether she did or didn't. I advised that the PTP reports do not mention her studies and that if she had informed them it would be mentioned in their reports. The WKR replied that perhaps she advised them about her studies but either they forgot to include in the reports or considered it not important enough to do so.*

[emphasis added]

The WKR stated that she did mention her studies at York University to her therapists and to her psychiatrist. *I indicated that a report from her then psychiatrist, Dr. O'Dea, dated 31 Oct 02, does not mention her studies even though by then she had already started the teaching certificate program. I added that Dr. O'Dea's report was in response to my correspondence of 19 Jul 02 wherein I specifically asked about "the client's ability/motivation to return to regular/modified work". The WKR replied that Dr. O'Dea was going through some personal problems and perhaps he was not as thorough as he should have been when writing the report".*

[emphasis added]

These recorded responses further reflect TR's deceitfulness. For example, TR stated that she was "not sure whether she did or didn't" advise the PTP about her studies. Her equivocal answer, in my view, relieved her of any responsibility should she be confronted with a denial by the PTP. When confronted by the reports of the PTP not mentioning her attending Teachers' College she again equivocated that "**perhaps** she advised them about her studies but either they forgot to include in the reports or considered it not important enough to do so". TR's attempt to blame the PTP and deflect any blame away from herself is further corroborative evidence of her deceitfulness.

Her deflection of blame for the non disclosure occurs again when she is confronted with Dr. O'Dea's report and responds that Dr. O'Dea was "going through some personal problems and **perhaps** he was not as thorough as he should have been

when writing the report”. There is again the equivocal perhaps and the shifting of blame. Of course, those comments have the effect of negatively reflecting on the earlier reports that Dr. O’Dea wrote on TR’s behalf, as well as reflecting on Dr. O’Dea who was called to testify on TR’s behalf.

Moreover and of greater significance is that her reference to the PTP was made at a time closer to Mr. Indart’s discovery of her attending Teachers’ College and was not raised by TR in her testimony. In my view, TR’s attempt to deflect any blame from herself is similar to her attempt to deflect blame in connection with her testimony which blamed someone else for her false application to the York Region Police.

In the result, based on the foregoing, I determine that TR is not a credible witness and that her conduct at all relevant times was fraudulent and deceitful. I further find that she was fully aware that any revelation she was attending Teachers’ College would jeopardize her WSIB benefits and she at all relevant times attempted to conceal her attendance at Teachers’ College for fear of losing her benefits.

There is a further but independent ground for evaluating the credibility of TR, one that concerns her admission of a number of shoplifting incidents as well as being convicted of fraud for submitting false claims to the Clarica Insurance Company for which she received a conditional discharge. I was hesitant to consider the various criminal charges, particularly for shoplifting since it is necessary to be cautious when considering prior convictions. However, since the issue of similar fact evidence was

strenuously argued, I propose to consider it. The admission of similar fact evidence requires a balancing between whether the evidence is legally probative or legally relevant and whether the evidence is oppressive or unfair. Admissibility is not an issue in this matter since counsel for TR introduced the evidence of her criminal record during her examination in chief. That evidence is now before me. Counsel for TR maintains that based on TR's admission the evidence was introduced for the purpose of demonstrating TR's credibility. The issue of credibility has been determined above, however the evidence of TR's conviction for insurance fraud is also legally relevant. Once the evidence is admitted, it is my view that it is capable of consideration for all purposes and any suggestion that an inquiry or examination into the evidence be truncated is rejected. Also, I determine that in civil matters, as Lord Denning MR. stated the courts have "not been so chary of admitting" similar facts. **Mood Music Publishing Co. Ltd. v. De Wolfe Ltd.** [1976] All ER 763 at p. 766 (Ct. of App).

TR was convicted for submitting false insurance claims to Clarica Insurance. In the other insurance matter, which was referred to earlier, in order to obtain benefits from Clarica, she was also fraudulent in suppressing her attendance at Trent University and to that extent her insurance claim was fraudulent. Her claim in this case to secure benefits from the WSIB and ultimately the TPS is also a fraudulent claim against an insurance fund. The probative force of two additional instances of attempting to obtain benefits by fraud against an insurance fund sufficiently resembles the instant case such that it is unlikely that what occurred in this case is a mere coincidence. Based on the pattern of

resemblance, I determine that TR's claims from the WSIB and the TPS based on her PTSD being totally incapacitating were not credible.

Accordingly, I find that this prior conviction for insurance fraud reflects on TR's credibility in a negative way and may be considered in assessing her credibility and based on that specific ground alone, I conclude the insurance fraud negatively reflects on TR's credibility.

Fraud

In the fall of 2000 there was a confluence of a number of factors. TR was involved in two shoplifting incidents that were likely to have serious job repercussions for her since she had been convicted in December 1998 of an earlier charge in December 1999 under the Police Services Act, as the result of a shoplifting incident, for which she had received a reprimand. There were also problems with her work performance which resulted in a number of charges in November 2000 for discreditable conduct under the Police Services Act. She had met with Ontario Hydro for a position in security in late June or early July, 2000 and had informed Dr. Rosenberg on July 5, 2000 that she had "definitely decided I'm moving on". In August 2000, she applied to the York Police but was rejected in September. In mid November, TR made inquiries about going to Teachers' College.

In October 2000, she learned that any WSIB benefits needed to be directly tied to her job and, in my view, given her bleak job prospects it was not a coincidence that the first manifestation of symptoms resulting from the motor vehicle accidents began in late 2000 – first on November 17, 2000 with Dr. Rosenberg and then on December 5, 2000, with Dr. Mendelssohn.

When she was asked to return to work with restrictions in December 2001 she did not return and claimed she was unable to return to work in any capacity because of her PTSD symptoms. She made no attempt to seek alternate modified employment with the TPS, at any time, nor did she seek treatment for her PTSD, but appealed the WSIB decision to terminate her benefits because of her refusal to perform modified work at the TPS. She also continued her studies both at Trent University and at Teachers' College which reflected on her capacity to perform work. In August of 2002 she stated to Dr. Rosenberg there was "no way" she would work for the TPS. In April 2002, in her disability claim to Clarica she hid her attendance at Trent University when she stated that she was not currently participating in educational studies. I determine she was not motivated to return to the TPS but was motivated to seek another occupation and to be funded by WSIB benefits while returning to school.

I am satisfied from the evidence that TR's attendance at Trent University and Teachers' College while rejecting and not seeking alternate modified employment at the TPS, coupled with both hiding her attendance at Trent University as she did in the Clarica application and not divulging her attendance at these educational institutions is, in and of

itself, fraudulent conduct. She was not a credible witness and I determine she was aware, at all relevant times, as reported by Dr. Rosenberg that her educational pursuits jeopardized her WSIB benefits. In **Tapp v. Lee (1803), 3 Bos. & P. 367, 127 E.R. 200** Chambre J. stated his now famous dictum at p. 203,

“Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood”.

Appvd. **Freeman v. Pearlman (1999) 169 D.L.R. (4th) 133 (B.C. C.A.)**; see also **Nippon Photo Ltd. v. Okusabo, 110 A.C. W.S. (3d) 635 (BCSC)**.

Also, an “impugned statement need not be positive for there to be an artful omission”. **Freeman v. Pearlman, supra**. I therefore conclude that the totality of TR’s conduct including both her overt conduct and her cunning silence constitutes fraudulent conduct.

There is overt conduct in the form of Mr. Hainsworth’s letter of March 10, 2003 to Mr. Indart, a claims adjudicator with the WSIB. That letter is of considerable significance. That letter contained false representations about TR’s attendance at Teachers’ College. Mr. Hainsworth was at all material and relevant times the Association’s representative for TR. He communicated with her doctors, attended meetings at the WSIB and communicated with and represented her at the WSIB. In support of her appeal from a decision denying TR benefits, Mr. Hainsworth wrote the following letter:

Dear Mr. Indart:

"As you are aware, [TR] has appealed your decision denying benefits from December 2001 onwards. This issue was to be considered by ARO A. Lacivita on March 4, 2003 but the hearing was stayed pending the further psychological assessment you recommended [TR] attend with the Psychological Trauma group. While our position is that this referral is not necessary since there is already sufficient medical on file to confirm a permanent impairment and total disability, I nevertheless agreed to stay the hearing and to advise [TR] to participate in this referral.

In the meantime, however, I am writing to ask you to clarify your decision regarding entitlement in this claim. It is clear that entitlement was granted for mental stress arising from on the job motor vehicle accidents. However, it is also clear that you in memo #66 have denied entitlement to an aggravation of her pre-existing conditions, specifically the eating disorder and depression, as a result of the compensable post-traumatic stress disorder. This determination has not been communicated to the worker. In any case, I am not sure on what basis you arrived at this conclusion since even Dr. Helwig in memo #46 only says it is "unclear whether any of her prior conditions have been aggravated by her accidents under the present claim". His response should have prompted further enquiries.

Our position is that the matter of aggravation is in fact very clear. She was asymptomatic in the first half of 1999 and had been largely asymptomatic throughout her police career as her limited use of her sick bank demonstrates. (See attached.) However, she became increasingly symptomatic after the August 1999 accident and more so after the June 2000 incidents involving a coworker and an OPP officer. This process of aggravation of pre-existing conditions is clearly documented by Dr. Mendelssohn, Dr. Rosenberg, Dr. Mollekin (report of 25-2-2, p.3), and significantly, your own assessor, Dr. Bagby (report 21-8-01, p. 7)

I therefore request that you allow entitlement to the eating disorder and depression, on an aggravation basis, caused by the compensable PTSD. It is our position, further, that not only was she totally disabled by the PTSD in December 2001, but that she was also totally disabled by these conditions which were previously asymptomatic and were only made symptomatic as a result of the PTSD.

Furthermore, regarding the PTSD in January-February 2002, you state in memo #66 that "moreover any aggravation of the PTSD symptoms were likely caused by non-compensable car accidents: on 19 Jan 02 ... and in the summer of 2001 ...". I submit that while it is our position that the work-related PTSD was still totally disabling, you have nevertheless incorrectly applied WSIB policy regarding the acceptance of the other

non-work-related car accidents. I refer you to Operational Policy 03-04-04 "Non-Work-Related". I submit that the last paragraph applies in this case. It states that "if the work-related disability is not at, or near, complete recovery ... the aggravation of the work-related disability may be accepted with medical concurrence". [TR] was still considered to be totally disabled the summer of 2001 and regarding the January 2002 accident, it is obvious that an injured worker whose psychiatrist says cannot return to any type of police work is not at or near complete recovery. Accordingly, the two non-work-related car accidents, which may have further aggravated [TR's] PTSD are allowable in the circumstances and LOE should be recognized on this basis alone.

Finally, I am submitting to file two new medical assessments, which demonstrate that [TR] continues to be totally disabled as a result of her PTSD. The first is from her psychologist, Dr. Joel Rosenberg, who, pace Dr. Helwig, is in fact a registered clinical psychologist (British Columbia # 1443) and is appropriately supervised by Dr. Hank Fraser. The second report is from Dr. W. Jacyk from the Homewood Health Centre in Guelph to which she had been referred for an addiction that resulted from her untreated PTSD. I have also included the detailed clinical notes. This report recommends further treatment for PTSD. These reports substantiate that her PTSD continues to be totally disabling. *(Please note that the desire to attend teachers' college, noted in the clinical notes, remains just that, a future career goal. This goal has not yet been acted upon due to her continuing total disability. [emphasis added])*

Since it is clear from all the medical on file that [TR] cannot return to any type of police work, I therefore request that, at the appropriate time, she (a) be referred for a non-economic loss assessment and (b) that she be considered for a labour market re-entry program.

I would appreciate your prompt attention to this correspondence and the new medical information".

In argument, Counsel for TR referring to Mr. Hainsworth's letter stated that TR was at Teachers' College when this letter was written and she was copied on the correspondence and TR

"did not call Hainsworth to tell him of her error and that she was presently at Teachers' College and he did not learn that she had been to Teachers' College until he was called by R. Indart on September 30, 2003." [TR] did not call or write to Indart correcting Hainsworth's mistake. It is not

clear that [TR] carefully read the two page complex letter and even noticed Hainsworth's error. It would have been preferable had [TR] advised Hainsworth and Indart that they were in error and that she was currently at Teachers' College. But is that omission fraudulent misrepresentation?"

And after referring to two cases about silence in land transactions, Counsel concludes that,

"no court in Canada has held a person responsible if they did not come forward to correct a misstatement made by another in a letter." "Requiring [TR] to respond affirmatively to Hainsworth's error assumed that [TR] carefully read the lengthy letter, notices Hainsworth's error in the second page, realized its significance and chose not to correct the error. Mr. Hines asked no questions in this area. Therefore, none of this has been established. The failure of [TR] to correct Hainsworth's error is not fraudulent misrepresentation."

Counsel for the TPS, submitted that the letter is a clear case of fraudulent misrepresentation by TR's agent and the inference is that TR was aware of the contents of the letter.

While Counsel for TR stated that Mr. Hainsworth was not aware that TR was in attendance at Teachers' College, he was her agent, and the representations were made on her behalf for the purpose of reinstating her WSIB benefits. As a result of the totality of the representations made, TR received both retroactive and future benefits, and since Mr. Hainsworth acted on her behalf as her agent before the WSIB, his representations must be attributed to her. The representation was false and I conclude that it deceived the WSIB, which if it had known the truth would have rejected TR's appeal and not granted her both retroactive and future benefits.

Second, the representation reflects TR's **personal** "desire" to attend Teachers' College and refers to her **personal** 'future career goal', which is not merely Mr. Hainsworth's opinion, but TR's **personal** plans and desire. I therefore conclude that it is a reasonable inference that the personal information in the letter was obtained from TR, since as alleged by Counsel for TR, Mr. Hainsworth had no knowledge about her attendance at Teachers' College; he therefore would not have plucked those personal statements about Teachers' College out of thin air. Since TR was aware that revealing her attendance at Teachers' College, as Dr. Rosenberg's notes indicate, might jeopardize her WSIB benefits, and since Mr. Hainsworth was not aware of her attendance, I conclude on the balance of probabilities that TR advised him that it was a future career goal both so that her attendance at Teachers' College would not be revealed and also to deflect any information that might conceivably arise resulting from her attendance.

Third, during the proceedings, Counsel for TR objected to revealing any conversation between TR and Mr. Hainsworth who, although not a lawyer, as her bargaining agent representative was entitled to the same privileged communication in a collective bargaining regime as that of a lawyer. Counsel for TR also objected to providing any documents possessed by Mr. Hainsworth and submitted that while the letter was received by TR there was no evidence to support a finding that TR read the letter or that she had any obligation to correct the letter and since the TPS had the burden of proof it had not demonstrated that TR read the letter. I agree that the overall burden of proof in this matter lies with the TPS to prove fraud but that does not relieve TR from the different evidentiary burden of adducing evidence of facts or matters peculiarly within

her knowledge. Since TR acknowledges receiving the letter whether she had read or not read it was peculiarly within her knowledge and, accordingly, she had the burden of adducing evidence as distinct from the burden of proof. She did not deny reading the letter and I conclude that she read it and was aware that it was false and that her failure to correct the letter which was actively submitted on her behalf is fraudulent conduct.

And finally, Mr. Hainsworth was not called to testify. While communications with TR are privileged, Mr. Hainsworth could have testified that his knowledge of TR's "desire" and "future career goal" did not come from TR and that he had received that information elsewhere. For example, he might have gleaned it from the clinical notes that he referred to in his letter. Since Mr. Hainsworth was not called to testify, I am prepared to draw the negative inference that if he had been called to testify, he would have indicated TR as the source for the information. Accordingly, I find that the source of the personal information in the letter was TR.

There is a further ground for drawing a negative inference from Mr. Hainsworth's failure to testify. While communication with counsel/representative in a collective bargaining context may be privileged, fraudulent statements to counsel or a representative are not shielded by the doctrine of privilege. Nor are fraudulent statements made by a client for the purpose of having another person make a fraudulent submission on his/her behalf entitled to privilege. Mr. Hainsworth's representations about TR's desire and future career goals were fraudulent and not privileged. The failure of Mr. Hainsworth to testify again leads to the inference that had he been called as a witness, he would have

implicated TR. In effect, a fraudulent public assertion is not shielded by the doctrine of privilege.

Finally, since the parties are agreed that I am bound by the decision of the WSIAT, I turn to consider that decision. The WSIAT found that TR's PTSD was minimal, that there was work available that TR could have performed, that TR ignored the offer by the TPS of modified work, that TR failed in her statutory obligation to assist the TPS in identifying suitable employment and by not responding to the TPS's offer of modified duties TR eliminated a whole range of other available employment options. The WSIAT also found that given TR's ability to successfully complete Teachers' College, undertake special education courses, work as a full time teacher and raise a family that the impairment imposed by her compensable PTSD was "minimal".

Counsel for TR and the Association argue that the WSIAT did not find fraud. I disagree. To repeat, in its decision the WSIAT arrived at the following conclusion.

"Having had the opportunity to consider the testimony provided and to review the material on file, we find ourselves in agreement with the conclusion reached by Dr. Dorion in his September 8, 2003, report that the Worker's 'pattern of lying, deceit, impulsive affective instability, gambling, shoplifting and past history of eating disorder', is indicative of 'significant character pathology, rather than the compensable PTSD, which was responsible for the Workers' alleged total disability.'"

There are two obvious comments to be made arising from the foregoing paragraph. First, the WSIAT's reference to her "alleged total disability" implies non acceptance of her submission by the WSIAT that she was totally disabled from working. That non-acceptance is further emphasized in the next paragraph where it is stated:

“We do not accept the Worker’s submission that her compensable PTSD made it impossible for her to work in any capacity with the accident employer.”

Second, the WSIAT confirms that it was TR’s “significant character pathology... which was responsible for the Worker’s alleged total disability” and that significant character pathology is defined in part as a “pattern of lying, deceit, ...”. Thus, her pattern of **lying and deceit** were, in part, responsible for TR’s **alleged** total disability. The Dictionary of Canadian Law defines deceit as follows:

“DECEIT – Fraud, a false statement made knowing that it was false or without any belief in its truth or recklessly, without caring whether it was true or not (and therefore without any genuine belief in it), and intending that the plaintiff should rely upon it and that the statement was relied upon by the plaintiff and caused damage.”

Deceit and fraud are synonymous, with the result that I conclude that the WSIAT did not accept that she was totally disabled and her allegation of total disability resulted, in part, from her pattern of lying and deceit. Therefore, I conclude, since the parties have agreed that I am bound by the WSIAT decision, that the issues before me including the issue of fraud have all been properly resolved by the WSIAT.

TR was a discharged bankrupt, however Section 178 (1)(e) of the Act reads as follows:

178(1) An order of discharge does not release the bankrupt from
(e) any debt or liability for obtaining property by false pretences
or fraudulent misrepresentation.

TR’s representations that she was completely disabled were false and were made knowingly without belief in the truth or were made recklessly as to the truth and were

intended to induce the WSIB and the TPS to act on it. As a result the WSIB and/or the TPS suffered a loss or damage. **Re: Horowitz (1984) 52 C.B.R. (N.S.) 102, affmd, (1985), 53 C.B.R. (N.S.) 275 (Ont C.A.).**

In summary, I find that TR's conduct both by overt acts and also by cunning silence constituted false pretences or fraudulent misrepresentation within the meaning of s.178(1)(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, C.B.3. Her conduct in claiming she was totally disabled was a false pretence and her overall conduct which I have described above including overt acts of deceit also constituted fraudulent misrepresentations within the meaning of the Act.

Since the false pretences and fraudulent misrepresentations of TR has induced and resulted in an overpayment by the WSIB and the TPS, I determine that her discharge from bankruptcy does not erase the debt that is owing, arising from both the WSIB and the TPS payments and the TPS sick bank. Accordingly, TR is liable to the TPS for the WSIB benefits and the sick bank benefits paid to her after December 11, 2001 in an amount to be agreed upon. However, there were certain periods which are admitted by Dr. Davids that TR was legitimately ill and accordingly there shall be deducted from the amount owing the equivalent of sick bank entitlements to which she was entitled during her stay at Homewood, as well as sick bank entitlements for her eating disorder when she attended the eating disorder clinic. The issue of final compensation is referred to the parties to be agreed upon and I shall remain seized in the event the parties are unable to agree.

The grievance is allowed.

Dated at Toronto this 11th day of August, 2011.

OWEN B. SHIME, Q.C.

