

Court File No. CV-14-502348-
OCCP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PIETRO CASTRILLO

Plaintiff

- and -

WORKPLACE SAFETY AND INSURANCE BOARD

Defendant



Proceedings under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario Lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer, or where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, and file it, with proof of service, in the Court Office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period of serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days,

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: April 16, 2014

Issued by:



M. Ramganesh
Registrar

Local registrar

Address of court office:
393 University Avenue
Toronto, Ontario, M5G 2P7

TO: Workplace Safety and Insurance Board
200 Front Street West 14th Floor
Toronto, Ontario
M5V 3J1

CLAIM

1. The Plaintiff claims:
 - (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as the representative plaintiff for the Class (defined below);
 - (b) a declaration that the Defendant breached its duty to act in good faith to the Plaintiff and Class in its handling of their claims for Non-Economic Loss awards;
 - (c) a declaration that the Defendant perpetrated a misfeasance in public office with respect to how it handled the claims of the plaintiff and Class for Non-Economic Loss awards;
 - (d) a declaration that the Defendant is liable to the Plaintiff and Class for the damages caused by its breach of duty to act in good faith and for misfeasance in public office;
 - (e) a declaration that the Defendant is liable to the Plaintiff and Class for the legal fees, disbursements and other expenses they incurred in administrative proceedings overturning the Defendant's decisions with respect to their claims for Non-Economic Loss awards;
 - (f) damages in the sum of \$1,000,000 for the Plaintiff and Class for the breach of duty to act in good faith and for misfeasance in public office;
 - (g) damages in the sum of \$1,000,000 for the Plaintiff and Class for legal fees, disbursements and other expenses incurred by the Plaintiff and the Class;
 - (h) punitive, aggravated and exemplary damages in the sum of \$1,000,000.00 for the Plaintiff and Class;
 - (i) special damages, in an amount that will be provided prior to trial, resulting from the expenses incurred by the Plaintiff and Class;
 - (j) in the alternative, a declaration that the defendant is liable to the Plaintiff and Class for

- damages in negligence in the sum of \$1,000,000;
- (k) pre-judgment and post-judgment interest pursuant to the provision of the *Courts of Justice Act*, R.S.O. 1980, c. 43 and amendments thereto;
 - (l) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity to the Plaintiff;
 - (m) the costs of notice and of administering the plan of distribution of the recovery in this application, plus applicable taxes, pursuant to section 26 of the *Class Proceedings Act*, 1992, S.O., 1992, c.6; and
 - (n) such further and other relief as this Honourable Court shall deem just.

THE PARTIES

2. Pietro Castrillo (the “Plaintiff”) is a sixty-one year old individual, who resides in the City of Brampton, in the Province of Ontario.
3. The Workplace Safety and Insurance Board (the “Defendant”), is a provincial body corporate, administering the workers’ compensation insurance scheme under the *Workplace Safety and Insurance Act* S.O. 1997, c. 6, Sch. A (the “WSIA”) in the Province of Ontario.

THE CLASS

4. The Plaintiff brings this action pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, on his own behalf and on behalf of the following class of persons:
 - a) All workers whose Non-Economic Loss (“NEL”) awards for workplace injuries were reduced by the Defendant due to pre-existing medical conditions that were not impairments negatively impacting upon their pre-accident functioning; and

- b) who also incurred expenses pursuing administrative appeals of the Defendant's decision to reduce their NEL awards.

FACTS

The Representative Plaintiff

5. The Plaintiff worked as a kitchen helper and manager for approximately 20 years prior to 2001, when he commenced employment as a concrete finisher and pipe layer for residential and commercial buildings and road construction. His job was physically demanding requiring lifting, bending, twisting and repetitive use of both arms. In his job, he used shovels, floats, trowels, tampers, hand saws and hammers. The work involved cutting pipes, building forms, pouring and finishing cement, and excavating to install sewers.
6. On October 3, 2011 the Plaintiff was injured in a workplace accident when he slipped while climbing stairs (the "accident"). The Plaintiff sustained a rotator cuff tear on his left shoulder as a result of the accident.
7. The Plaintiff successfully claimed workers' compensation benefits under the WSIA from the Defendant for the injuries he suffered in the accident.
8. Medical tests performed for the Defendant as part of the Plaintiff's claim revealed that he had moderate to severe osteoarthritis in his left shoulder.
9. However, it is a fact that prior to the accident the Plaintiff did not suffer any impairment that negatively affected his functioning related to the osteoarthritis or any other cause.
10. The Plaintiff underwent a surgical procedure on February 2, 2012, to repair the rotator cuff tear.

11. Following the surgery, Dr. Taromi reported that the Plaintiff's left shoulder had a full range of motion, a strong rotator cuff, and negative impingement.
12. However, on October 4, 2012, the Defendant's Physiotherapy and Rehabilitation Centre concluded that: "...the Plaintiff had less than a full range of motion in his shoulder."
13. Pursuant to its obligation to administer the workers compensation scheme under the WSIA, the Defendant carried out a "Non-Economic Loss Analysis" of the Plaintiff's condition. The purpose of this analysis is to determine whether an injured worker is entitled to a NEL award. NEL awards are provided to workers who suffer permanent impairments from a work-related injury or illness to compensate them for the physical, functional, or psychological loss caused by the impairment.
14. The Defendant determined that the Plaintiff was entitled to a 6% NEL award.
15. However, the Defendant also determined that the Plaintiff's NEL award should be reduced by 50% pursuant to its Operational Policy 18-05-05 (Effect of a Pre-Existing Impairment). The Defendant's rationale for this reduction was the fact that the Plaintiff suffered from osteoarthritis, which was defined as a "non-measurable pre-existing condition".
16. As a result of this 50% reduction, the Defendant awarded the Plaintiff a 3% NEL that amounted to a lump sum payment of only \$1,229.50, not including interest.
17. The Plaintiff states, and it is a fact, that the decision to reduce his NEL award was the result of a "secret policy" adopted by the Defendant and revealed in an internal "Orientation" article intended for its staff. The Defendant's "secret policy" was to aggressively reduce legitimate NEL awards by interpreting Operational Policy 18-05-05

(Effect of a Pre-Existing Impairment) to allow for reductions due to pre-existing conditions that had no negative impact or impairment on a worker's pre-accident functioning.

18. Operational Policy 18-05-05 allowed the Defendant to discount NEL awards to injured workers on account of pre-existing "impairments" that were "measurable". This was done by calculating the clinical impairment before the injury and performing a subtraction from the post-injury impairment. However, if the impairment was not measurable, if the Defendant's policies allow it to define the medical significance of the pre-existing "disability" in accordance with the Defendant's Secondary Injury and Enhancement Fund ("SIEF") Policy. It could adjudicate an up to 50% NEL reduction for a major pre-existing impairment. The Defendant has wrongly expanded the SIEF Policies in relation to NEL awards to include "conditions" in addition to "disabilities".
19. The Plaintiff states, and it is a fact, that the Defendant had no legal authority upon which to decrease NEL awards on account of a pre-existing condition in the absence of a pre-existing impairment/disability. The Plaintiff further states that the actions of the Defendant in this regard were, in fact, illegal as being contrary to the WSIA and its regulations.
20. The prescribed schedule for rating NELs, employed by the Defendant, is the American Association *Guides to the Evaluation of Permanent Impairment*, 3rd edition revised (the "AMA Guides"). According to Ontario Regulation 175/98, the Defendant is legally compelled to follow the this edition of the AMA Guides.

21. Although the AMA Guides never defines the term “condition”, the Defendant equates it to the term “impairment”. The Defendant equates these terms to in order to utilize SIEF Policy to allow discounting for pre-existing “conditions” in addition to discounting for pre-existing “impairments”. However, the Defendant has no authority to expand the definition to discount for non-measurable pre-existing conditions. The AMA Guides does not equate “impairment” with “condition”.
22. According to the AMA Guides, an “impairment” is what is wrong with a body, a body part, or organ system and its functioning.
23. From a medical perspective, a “condition” is a non-specific term that does not necessarily denote any change in a person’s health status. In contrast, an “impairment” is a term that does denote a specific change in the health status of an individual. As noted above, the Defendant has no policy that equates “impairment” with “condition”, or granting it the authority to do so.
24. The Defendant’s Operational Policy 11-01-15, defines a “pre-accident impairment” as a “condition which has produced periods of impairment/illness requiring health care and has caused a disruption in employment.” The term “condition”, in the absence of a related impairment/disability, is not an “impairment” as defined by the AMA Guides, or according to the Defendant’s governing Operational Policies.
25. By reducing NEL awards for pre-existing conditions without a pre-existing impairment, the Defendant’s actions contravene the internal regulations as well as the AMA Guides and are, therefore, illegal as contrary to Ontario Regulation 175/98.

26. The Plaintiff states that the Defendant's actions were motivated by a desire to reduce costs. The Plaintiff further states the Defendant knew it was acting illegally and that its actions would harm the Plaintiff and Class. The Defendant's actions were, therefore, malicious in nature.
27. The Plaintiff appealed the reduction of his NEL award through the Defendant's internal procedures.
28. The Plaintiff argued, in part, that for a pre-existing condition to reduce a NEL award there must be evidence of a pre-existing disability which negatively impacted on the injured worker's pre-accident functioning. The Plaintiff's appeal further argued that the Defendant was "malicious" in its decision to reduce the Plaintiff's NEL award.
29. The Defendant's Appeal Resolution Officer accepted the Plaintiff's appeal and overturned the reduction of his NEL award.
30. The Plaintiff's solicitor rendered an account to the Plaintiff on December 11, 2013 for the sum of \$663.99. The account was for legal services associated with appealing the reduction of his NEL award.
31. The Defendant does not have the authority to award legal costs to the Plaintiff.

The Class

32. The Plaintiff was just one of the many injured workers whose NEL awards were wrongly reduced by the Defendant in the manner described above.
33. The other members of the Class suffered workplace injuries covered under the workers' compensation insurance scheme established pursuant to the WSIA.

34. Each member of the Class had their NEL awards reduced by the Defendant because of pre-existing medical conditions even though those conditions did not impair their pre-accident earning potential.
35. The Defendant's actions in reducing the NEL awards of the Class were similarly illegal to that of the decision in the Plaintiff's case: the decisions were based on a secret policy to illegally reduce NEL awards in a malicious attempt to cut costs, knowing such actions were without legal foundation.
36. Each member of the Class incurred legal fees, disbursements and other expenses appealing the NEL decisions through the Defendant's administrative processes.

Misfeasance in Public Office

37. The Plaintiff relies upon the facts as plead above and below with respect to the issue of misfeasance in public office.
38. The Defendant reduced NEL awards pursuant to a "secret policy" in an attempt to cut costs.
39. The Defendant acted contrary to the WSIA and its regulations.
40. The Defendant acted deliberately and in secret, knowing its actions were illegal and likely to cause harm to the Plaintiff and Class.
41. The Defendant is a public body and its employees while implementing the secret policy were at all material times public office holders.
42. The Plaintiff states that the Defendant is both directly and vicariously liable for the bad faith acts and omissions of its employees.

43. The Defendant's actions were malicious in nature.
44. The Plaintiff states that the actions of the Defendant amount to misfeasance in public office.
45. The Plaintiff and the Class suffered damages, including legal fees, disbursements and other expenses as a result of the Defendant's actions for which it remains liable.

Breach of Duty to Act in Good Faith

46. The Plaintiff relies upon the facts as plead above and below with respect to the issue of its duty of good faith.
47. At all material times the Defendant owed a duty of good faith to the Plaintiff and Class.
48. The Plaintiff and Class as injured workers were in a vulnerable position and dependent upon the Defendant to appropriately exercise its statutory responsibility in good faith.
49. The Plaintiff states that the Defendant and its employees have a duty to act in good faith in exercising their statutory responsibilities.
50. The Plaintiff states that the Defendant is both directly and vicariously liable for the bad faith acts and omissions of its employees.
51. The Defendant reduced NEL awards pursuant to a "secret policy" in an attempt to cut costs.
52. The Defendant acted contrary to the WSIA and its regulations.
53. The Defendant acted deliberately and in secret, knowing its actions were illegal.
54. The Defendant's actions were malicious in nature.
55. The Plaintiff states that the actions of the Defendant and its employees violated the duty of

good faith imposed upon the defendant by statute.

56. The Plaintiff and the Class suffered damages, including legal fees, disbursements and other expenses as a result of the Defendant's actions for which it remains liable.

Punitive Damages

57. The Plaintiff relies upon the facts as plead above and below with respect to the issue of punitive damages.
58. The Defendant, and its employees, breached their statutory and public duties to the plaintiff and Class in a harsh, vindictive, reprehensible and malicious manner.
59. The Plaintiff and the Class were treated in a manner that could only result in aggravated and increased mental stress and anxiety for vulnerable, injured workers.
60. In these circumstances, the Plaintiff and the Class request aggravated and punitive damages to demonstrate to the Defendant that such willfully irresponsible behavior will not be tolerated and will act as a deterrence to other public bodies in Canada that are in the position of compensating workers injured during employment.

Negligence

61. If it is determined that the Defendant did not commit a misfeasance in public office or breach a duty of good faith, which is not admitted, the Plaintiff pleads in the alternative that the Defendant was negligent in how it reduced the NEL awards of the Plaintiff and the Class.
62. The Defendant owed the Plaintiff and the Class a duty of care arising from the relationship created when the Plaintiff and Class became recipients of benefits under the compulsory

workers compensation scheme established pursuant to the WSIA and administered by the Defendant.

63. The Defendant breached the duty of care and failed to meet the requisite standard of care it owed the Plaintiff and Class when it negligently decided that Operational Policy 18-05-05 (Effect of a Pre-Existing Impairment) allowed for the reduction of NEL awards due to pre-existing conditions that had no negative impact or impairment on a worker's pre-accident functioning.

64. As a result of the Defendant's negligence, the Plaintiff and Class suffered damages, including legal fees, disbursements, and other expenses, for which the Defendant is liable.

65. The Plaintiff pleads and relies upon:

- a) The *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and
- b) The *Workplace Safety and Insurance Act*.

66. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario.

Date: April 16, 2014

Fink & Bornstein Professional Corporation
Barristers and Solicitors
466 Dupont Street
Toronto, Ontario M5R 1W6
Tele: (416) 537-0108
Fax: (416) 537-1604

Richard A. Fink
LSUC # 16759G
Alan G. McConnel
LSUC # 36808V

Lawyers for the Plaintiff

PIETRO CASTRILLO and **WORKPLACE SAFETY
AND INSURANCE BOARD**
Plaintiff Defendant

Court File No. **CV-14-502348-ecp**

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

Fink & Bornstein Professional Corporation
Barristers and Solicitors
466 Dupont Street
Toronto, Ontario
M5R 1W6
Tele:(416)537-0108
Fax: (416) 537-1604

Richard A. Fink LSUC # 16759G
Alan G. McConnell LSUC # 36808V

Lawyers for the Plaintiff