MANAGEMENT
COUNSEL
Employment and Labour Law Update

ABC's of the WSIB:
Navigating Claims & Accounts

"LOE", "NEL", "WT", "PI"… To some employers, a Workplace Safety and Insurance Board ("WSIB") document can look like a random jumble of letters, further complicated by confusing medical terminology. Unfortunately, there can be serious cost consequences to misunderstanding or mishandling a WSIB matter. The good news is that taking charge of a WSIB matter need not be intimidating. The first step is understanding the WSIB system. The second is to implement best practices to contain WSIB costs.

The Basics

In Ontario, workers' compensation is a compulsory, no-fault insurance program administered by the province. Often referred to as an "historic trade-off", the basic framework of workers' compensation is that a worker forgoes the right to sue his/her employer for damages arising from a workplace injury, in exchange for which the worker receives benefits from a system that does not consider the fault of the employer or its ability to pay. While an employer is required to contribute premiums to the mandatory insurance scheme, in return the employer is insulated from potentially crippling liability.

An employer is required to report every workplace accident and illness to the WSIB if (1) health care is required; or (2) the accident or illness results in the worker not being able to earn full wages. Inability to earn full wages occurs when a worker has lost time due to absence from work, earns less than regular pay for regular work (*e.g.*, works partial hours), or requires modified work at less than regular pay. WSIB policy also requires an employer to report if a worker requires modified duties for more than seven calendar days, but only received first aid as opposed to health care. Thereafter, a worker has six months to claim WSIB benefits.

Upon receiving a claim, the WSIB evaluates the information to determine whether to allow *initial entitlement* which, if granted, opens the gateway for the worker to receive a wide range of benefits and services including:

- **Loss of Earning Benefits ("LOE"):** Awarded if a worker's earnings decrease as a result of his/her injury or illness.
- **Healthcare Benefits:** To cover healthcare services, prescription drugs, medical devices, orthotics, and travel expenses associated with receiving treatment for a workplace injury or illness.

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- **Non-Economic Loss Benefits ("NEL"):** After reaching Maximum Medical Recovery ("MMR"), NEL benefits are awarded to compensate for physical, functional, or psychological loss caused by a Permanent Impairment ("PI") arising out of a workplace injury or illness.
- **A Workplace Transition ("WT") Plan:** Which may include literacy, academic and vocational skills training to help the worker return to work with either the employer or elsewhere in the labour market. Note: A WT Plan replaces Labour Market Re-entry ("LMR").

Best Practices to Contain WSIB Costs

1. Get out your highlighter

Managing a WSIB claim or account requires careful review of each letter and decision from the WSIB as well as monthly cost statements and experience rating summaries. Upon receiving a cost statement ensure the list of workers is accurate and benefits received are consistent with the claim status. For example, is there a worker identified in the cost statement as receiving LOE benefits despite being offered or having accepted suitable modified duties. Contact the WSIB immediately to correct any discrepancies and submit additional information if required.

Upon receiving a letter or decision consider whether the information is accurate and complete, the position or steps taken make sense, and any decision made is supported by appropriate evidence. Respond immediately if you have any concerns. In the case of an unsatisfactory decision, consider filing an objection which will trigger the WSIB to reconsider its decision. Even if unsuccessful, filing an objection gives an employer access to the entire WSIB claim file and provides an opportunity to appeal to an Appeals Resolution Officer.

2. Ask for help

LOE is often the principle cost in a WSIB claim. An employer can avoid LOE costs by offering modified duties suitable to the worker's restrictions. To this end, it is important to have up-to-date information about a worker's workplace restrictions. In an ideal world, the worker should provide this information voluntarily and regularly. In reality, the employer may have to pursue it, so it is important to have in place a system to track, seek and update relevant medical information.

It is also important to request information in a manner that does not contravene human rights or privacy laws. Absent consent from the worker, an employer should not request medical information directly from a healthcare professional, but rather should request the worker obtain the information. The purpose of the information is to determine when the employee is able to return to work and what, if any, accommodation is required. An employer should therefore only inquire into the nature of the worker's injury or illness, medical restrictions, and prognosis for recovery, not the diagnosis. Using a WSIB functional abilities form ("FAF") can help identify the medical information required.

If the worker refuses to provide medical information or accept modified duties, an employer is entitled to ask the WSIB claims manager for assistance. If the worker fails to cooperate this may lead the claims manager to deny or discontinue benefits and close the file.

Although often initiated by the WSIB, an employer can ask the WSIB to conduct a Return to Work ("RTW") meeting. Typically, this is an excellent opportunity to learn more about why the worker objects to the proposed modified duties and demonstrate to the WSIB that the proposed accommodation meets the worker's medical restrictions. If the worker returns to work and is paid at his/her regular wage rate, or refuses suitable modified duties, LOE should end.

3. Are you fitting in?

An employer's WSIB premium rate depends on the rate group and classification unit assigned by the WSIB. Logically, an employer in an industry with greater health and safety risks is charged a higher premium. However, do not assume a workplace has been correctly classified. With the assistance of experienced WSIB counsel, assess whether the workplace has been properly classified by reviewing the WSIB's Employer Classification Manual. If a workplace is being charged too high a premium it may be appropriate to file a rate group appeal.

An employer need not, and should not, blindly accept WSIB expenses as an uncontrollable cost... an employer can take steps to control and manage WSIB costs.

It is also important to verify the rate group is still appropriate whenever there is a material change in an employer's operations. Examples include a change in ownership, new employer contact information, disposition of all or part of a business, change in business activities, closure, bankruptcy and receivership. Not only does an employer have a duty to report a change within 10 calendar days, the change may be sufficient to move the employer into a lower rate group.

But be aware: just because the WSIB agrees a workplace should be in a different rate group, doesn't mean the result will always benefit the employer. The WSIB may place the workplace in a rate group with an even higher premium. Accordingly, be sure to discuss possible rate group changes with experienced counsel and thoroughly canvass potential classifications and how best to report a 'material change'.

Final Thoughts

An employer need not, and should not, blindly accept WSIB expenses as an uncontrollable cost. By carefully scrutinizing WSIB-related documents, communicating with the WSIB and worker, offering modified duties when appropriate, and objecting to unfavourable decisions, an employer can take steps to control and manage WSIB costs.

To learn more, join us at our February HReview *Breakfast Seminar (details on the back page of this newsletter).*

Ontario Labour Relations Board Has Jurisdiction to Hear Claim Arising From Safety Issues in British Columbia

The Ontario Labour Relations Board ("Board") recently confirmed an Ontario-based employer must take reasonable precautions to protect its workers even when those workers are temporarily assigned to work outside the province[1].

What happened?

Mr. Escudero, an employee of Diversified Transportation Ltd./ Pacific Western Group of Companies ("Diversified"), filed an application under section 50 of the Ontario *Occupational Health and Safety Act* (the "*Ontario Act*"), which prohibits an employer from reprising against a worker because the worker has acted in compliance with or sought enforcement of the *Ontario Act*.

Though he lived in Ontario, throughout the course of his first year of employment with Diversified, Mr. Escudero worked in both Ontario and British Columbia. He was then permanently transferred to Ontario before being temporarily assigned to British Columbia as a warehouse supervisor.

While in British Columbia, Mr. Escudero allegedly observed several serious health and safety violations including forklifts operated by untrained volunteers at high speeds, no mirrors or marked pedestrian walkways, no first aid kits, and obstructed exits. He reported this to his mentor in British Columbia, to no avail. Shortly thereafter Mr. Escudero was contacted by his Operations Manager in Ontario and asked to return to his home province. Roughly two weeks later his employment was terminated.

The arguments

Mr. Escudero claimed Diversified violated section 50 of the *Ontario Act* by terminating his employment as a reprisal for having raised health and safety concerns relating to the warehouse in British Columbia.

In a preliminary motion, Diversified argued that because the alleged safety matters occurred in British Columbia, the Board had no jurisdiction to inquire into them; the matters could only be dealt with under the British Columbia *Workers Compensation Act*.

Mr. Escudero disagreed, arguing that because he was employed by Diversified in Ontario and reported to Diversified's Ontario Operations Manager, Mr. Escudero's temporary assignment to British Columbia did not relieve Diversified from its duty to protect its workers under the *Ontario Act*.

The Board's decision

The Board agreed with Mr. Escudero, holding the Board had the authority to adjudicate the reprisal complaint even though the workplace was in British Columbia. The basis for the Board's decision was as follows:

- Section 25(2)(h) of the *Ontario Act* provides that *an employer shall take every precaution reasonable in the circumstances for the protection of a worker*. The application of the *Ontario Act* is not restricted to Ontario workplaces, but to employers governed by the *Ontario Act*.
- An Ontario-based employee has a right to require his or her employer to take reasonable precautions to protect him or her regardless of where he or she works. By contrast, a safety standard applicable to a non-Ontario workplace (*e.g.*, first aid kits on-site) is not within the Board's jurisdiction.
- Section 28(1)(d) of the *Ontario Act* requires a worker to report to his or her employer or supervisor any contravention of the *Ontario Act* or the existence of any hazard. Mr. Escudero was therefore required to report the alleged hazards under the *Ontario Act*.

Said the Board:

> *The Ontario legislature does not have the authority to establish … the substance of workplace health and safety standards applicable to work performed in British Columbia. … Those standards and their enforcement – forklift training requirements and the speed at which forklifts may travel in a warehouse … are the responsibility of the legislature of the province of British Columbia.*
>
> *However, Mr. Escudero, as an employee of [Diversified] permanently based in Ontario, had the right, when he was temporarily assigned by [Diversified] to a workplace in [British Columbia], to require [Diversified] to ensure that every precaution reasonable in the circumstances had been taken to protect him. That right existed independently of the substance of any applicable health and safety standard establish by the legislature of British Columbia.*

Lessons learned for employers

Although the substance of the reprisal complaint has not yet been determined, the Board's decision on this preliminary issue confirms an Ontario-based employer must take reasonable precautions to protect its workers even when those workers are temporarily assigned to work outside the province. Practically speaking, this includes taking reasonable steps to ensure the temporary workplace complies with relevant safety requirements, and any report of a hazard is taken as seriously as if it were made about an Ontario workplace.

To learn more, or for assistance with any occupational health and safety matter, contact the professionals at Sherrard Kuzz LLP.

[1] *Escudero v Diversified Transportation Ltd./Pacific Western Group of Companies,* 2015 CanLII 50878 (OLRB)

DID YOU KNOW?

Based on the most recent Statistics Canada data, Ontario's gender wage gap ranges from 12-31.5%, and personal incomes would be $168 billion higher each year if women in Canada had the same labour market opportunities as men (Royal Bank of Canada). To try to address this problem the Province of Ontario has authorized a **Gender Wage Gap Steering Committee** to assess ways in which government, business, labour and other organizations, can address the conditions and systemic barriers that contribute to this issue.

Please join us at our next HReview Breakfast Seminar:

HReview *Seminar Series*

WSIB Claim Management:

Avoiding costs and obtaining rebates

Effective WSIB claim management is critical to meeting *Human Rights Code* obligations, controlling claim costs and making informed decisions about your workforce. Join us at this *HR*eview and learn about:

- Experience ratings
- Entitlement, recurrence, aggravation and pre-existing conditions
- Accommodation, return to work efforts and documentation
- Resignation and termination
- The clash of jurisdictions (WSIB, WSIAT, human rights and arbitration)

DATE: **Wednesday February 3, 2016; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn Toronto Vaughan**, 3201 Hwy 7 West, Vaughan ON

COST: Complimentary

RSVP: **By Friday January 22, 2016 (spaces limited) at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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