# WSIB – What's it all about?

**OTLA Fall Conference – October 2013**

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## 1. INTRODUCTION

The Worker's Compensation scheme began in 1914 with the enactment of the so-called "historic trade-off": workers hurt in the course of their employment were entitled to benefits under the statutory scheme regardless of fault; in return, they gave up any right to sue their employers. Despite modifications to the workers' compensation legislation, the law still emanates from this initial historic trade-off. The workers' compensation scheme continues to operate to replace the tort remedy as between negligent parties that fall under the umbrella of the *Workplace Safety and Insurance Act, 1997*. In such instances, no right of civil action is available.

In Ontario, the statutory provisions regarding a worker's entitlement to benefits and right of action are set out in the *Workplace Safety and Insurance Act, 1997* ("WSIA"), which became effective January 1, 1998.

## 2. PRELIMINARY DETERMINATIONS

Prior to commencing an action seeking damages for personal injury, counsel is advised to undertake initial investigations to determine, as much as possible, answers to the following:

- Whether the parties involved (e.g. both your client and the target Defendant) are "workers" as defined by the Act?
- Whether the parties involved are "employers"?
- Whether or not the parties involved fall within employment described in Schedule 1 or Schedule 2 to the Act?
- Whether an "accident" occurred?
- Whether the accident involving a worker "arose out of and in the course of employment"?

See Appendix A for a checklist that can be used to determine whether your client's right of action has been removed by virtue of the WSIA.

### Definitions

<u>Worker</u>

Section 2 defines a "worker" as "a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:

1. A learner.
2. A student.
3. An auxiliary member of a police force.

4. A member of a municipal volunteer ambulance brigade.
5. A member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade.
6. A person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so.
7. A person who assists in a search and rescue operation at the request of an under the direction of a member of the Ontario Provincial Police.
8. A person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier of Ontario under section 7.0.1 of the *Emergency Management and Civil Protection Act* or by the head of council of a municipality under section 4 of that Act.
9. A person deemed to be a worker of an employer by a direction or order of the Board.
10. A person deemed to be a worker under s.12.
11. A pupil deemed to be a worker under the *Education Act*."

"Learner" is further defined as

> a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of the industry for the purpose of undergoing training or probationary work.

Individuals employed as part of the Ontario Works program are considered "learners". All accident costs are paid by the province in the event of the worker's injury. See Operational Policy Document No. 12-04-06.

"Student" is defined as:

> a person who is pursuing formal education as a full-time or part-time student and is employed by an employer for the purposes of the employer's industry, although not as a learner or an apprentice.

Only workers in certain specified industries, suffering accidents in certain places are covered under the WSIA. Workers employed in any business or undertaking outlined in **Schedule 1** to the Regulations are automatically covered. Workers in other industries (most notably office workers) are not automatically covered however, their employers can purchase coverage for their workers as can self-employed individuals. There are noticeable gaps in coverage (e.g. bank workers and law offices are not covered; architects are mandatorily covered). Schedule 1 includes the high-risk industries where most accidents occur and is broken down to include the following:

- Class A – Forest Products,
- Class B – Mining and Related Industries,

- Class C – Other Primary Industries (mostly farming and related),
- Class D – Manufacturing,
- Class E – Transportation and Storage,
- Class F – Retail and Wholesale Trades,
- Class G – Construction, Class H – Government and Related Services and
- Class I – Other Services.

Workers in **Schedule 2** industries are also covered. The difference between Schedule 1 and Schedule 2 employers is that the latter pay the cost of all claims directly, with a 15% administrative fee. In general terms, Schedule 2 is intended to cover the business of certain governmental entities and many activities subject to direct government regulation. For instance, Schedule 2 includes any trade or business within the meaning of section 68 of the Act (e.g. the trade or business of municipal corporations, including P.U.C.'s, library boards, school boards, fire departments, police departments, etc.). It also includes the construction and operation of: railways, streetcars, telephone lines (within the legislative authority of Federal Parliament), telegraph lines, boats, ships, vessels, bridges (between Ontario and other jurisdictions), to name a few, as well as certain airlines with regularly scheduled international passenger service. Schedule 2 also includes <u>any</u> employment by or under the Crown in right of Ontario or any employment by a permanent board or commission appointed there under.

Workers in Federal undertakings have coverage under the authority of the *Government Employees Compensation Act*. That Act reflects an agreement between the Federal government and WSIB whereby the WSIB administers the Act to Federal workers and the Federal government is treated as a Schedule 2 employer.

<u>Worker versus Independent Contractor</u>

Many disputes pertain to whether the injured party was a "worker" or an "independent contractor". Board policies on this issue closely parallel common law principles. To differentiate a "worker" from an "independent contractor", Board Policy dictates use of the **"organizational test"**, the focus being on control and opportunity for the individual to experience profit/loss and be part of the employer's organization. See Operational Policy Document No. 12-02-01. There is extensive WSIAT jurisprudence on this subject. This area is very problematic for taxi drivers, timber workers, and truck drivers. The approach of the Appeals Tribunal to the worker/independent contractor issue has extended the organizational test to the **"business reality test"** which considers the following factors in determining whether an individual is an independent contractor:

- the intention of the parties to create a non-employment relationship;

- the extent of capital investment by the individual seeking independent operator status;
- the extent to which the individual controlled is her day-to-day business activities; and
- whether the individual seeking independent operator status had the freedom to work for others, or to hire others to work for him or her.

WSIAT *Decision No. 1310/97I* (1998), 47 WSIATR 33, at para. 23. See also the Supreme Court of Canada's examination of this issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.).

Operational Policy Document No. 12-02-01 compares the characteristics of workers and independent contractors and is reproduced in Appendix B.

Accident

Section 2 of the WSIA defines an "accident" as including:

(a) a wilful and intentional act, not being the act of the worker,
(b) a chance event occasioned by a physical or natural cause, and
(c) disablement arising out of and in the course of employment.

The word "includes" denotes the statutory definition is open-ended. As noted by the Tribunal in WCAT *Decision No. 42/89* (1989), 12 WCATR 85 at p. 40:

> The ... definition of "accident" is not an exhaustive definition, but a definition that is intended merely to make it clear that the general concept encompasses the three particular categories of injuring processes listed in the definition.

*Decision No. 1672/04*, 2009 ONWSIAT 150, 88 W.S.I.A.T.R., considered the effect of Board policy on prior Tribunal caselaw regarding how the statutory definition of "accident" should be interpreted. The Tribunal is now required to apply Board policy. Current Board policy defines an accident in the nature of a "chance event" as an identifiable event which causes an injury and states that the injury itself is not a chance event. A "disablement" is defined as a condition that emerges gradually over time or is an unexpected result of work duties. Given these policy definitions, the view in some earlier cases that the injury itself can constitute the "accident" is no longer open to the Tribunal.

More recent Tribunal decisions have interpreted a "chance event" more broadly. In order to be consistent with the Act, *Decision No. 1672/04* reasoned that the "disablement" definition in Board policy must refer to an unexpected result of work duties that is not otherwise a chance

event. “Disablement” may refer to injuries that occur over a short period of work duties, such as a shift, but in the absence of a discrete triggering event.

Personal Injury

The term “personal injury” is not defined in the WSIA. The following definition has been used by the Worker’s Compensation Board in its *Claims Adjudication Branch Procedures Manual*, Document No. 32-02-14:

> Personal injury is the physical damage to the body, with medical support for the injury. It includes damage to the extensions of the body (enhancing bodily functions) which are worn and damaged at the time of the injury.

Note that this definition has not been carried forward into the Operational Policy Manual.

## 3. COVERAGE UNDER THE WSIA

Most employers provide workers’ compensation coverage as a result of Schedules 1 and 2 of the WSIA. These employers are accorded protection from civil actions by employees for work related injuries. Schedule 1 employers also have added protection from actions against workers of other Schedule 1 employers. An employer who is not mandatorily covered under these Schedules may apply for coverage under section 74 of the WSIA. See Operational Policy Document No. 12-01-02.

Workers of Schedule 1 or 2 employers are entitled to claim WSIB benefits if they suffer an injury or illness that arose out of or in the course of their employment, even if their employer has not registered with the WSIB. The fact that an employer may not be up to date with its contributions to the Accident Fund does not disentitle an injured worker to benefits nor create a right of action against the employer. For the injured party, the only concern is whether the type of business is covered and whether he or she is a “worker” as defined by the legislation.

## 4. MAKING A CLAIM

Q How is a claim for Worker’s Compensation started?

A Typically, a claim to the W.S.I.B. is initiated either by the employer sending its report of accident (Form 7) or by a health care provider sending in his or her report (Form 8) to the WSIB. The employer is only obliged to report an accident to the W.S.I.B. where the injured worker has missed time from work or had to seek medical treatment (ie. something other than attending for minor first aid with the employer). Once the W.S.I.B.

is notified of the incident you will be sent a Worker's Report of Injury (form 6) to complete and return.

To obtain copies of the various forms an Injured Worker may have to fill go to http://www.wsib.on.ca/wsib/wsibsite.nsf/public/FormsWorkers At this link you can also scroll to the various forms that Employers and Health Care practitioners have to fill out from time to time.

In order for the W.S.I.B. to properly consider a claim they usually require the initial reported forms completed by the worker, employer and initial health care provider.

Q What types of injuries are covered?

A The W.S.I.B. will grant entitlement in a worker's claim where the worker suffers an injury due to 'accident'. 'Accident' is defined to include:

- A 'wilful and intentional act' so long as it is not the act of the injured worker. For example: 'Worker A' who is assaulted at the workplace by Co-Worker B and suffers injury as a result, can claim for Worker's Compensation benefits. There are specific rules which can disentitle Worker A from making a claim, (ie. if he was the aggressor and provoked the fight OR if he willingly engaged in horseplay).

- A 'chance event', occasioned by a physical or natural cause. This would include the most common, clear-cut types of 'accident'. Typical examples of 'chance event' type injuries include: a Motor Vehicle crash while in the course of employment, a back injury while lifting at work, a fall at work, getting one's hand caught in a piece of machinery.

- A 'disablement' arising out of and in the course of employment. A typical disablement scenario would include a factory line worker who performs a repetitive motion at work and goes on to develop a Repetitive Strain Injury ('R.S.I.') such as carpal tunnel syndrome, tendonitis ('tennis elbow'), etc. These types of claims often are problematic for the W.S.I.B. Claims Adjudicators as there is no clear-cut 'incident' that has led to the injury complained of.

  Workers who believe their repetitive duties at work are causing them injury should maintain detailed journals noting the nature of their job duties, how frequently a certain action is performed, the size and weights of items being handled and any changes to their job (ie. pace of production line speeding up OR increased hours due to overtime work OR an increase in the size or weight of items being handled on the production line).

Such workers should also be sure to follow closely with their family doctors as the condition develops and ensure the doctor notes when the symptoms arose and the worker's comments about the connection between the workplace duties and the onset of the symptoms. As 'disablement' claims develop over time, there is rarely a clear 'Date of Accident' and so the W.S.I.B. Claims Adjudicator will often request the family doctor's records to see how long the condition has been present and whether the worker has identified a connection between the work duties and onset of symptoms.

Of the claims the W.S.I.B. often turns down, a great many are 'disablement' type injuries. Once again, where the worker cannot point to a clear-cut 'incident' on a specific date, the Claims Adjudicator will have more difficulty in granting entitlement than with a 'chance event' type of injury. Should such a claim be denied by the Claims Adjudicator, there is an Appeals Process available to the injured worker (see below).

Q What if a person is diagnosed with a disease that her doctor thinks was caused by her workplace?

The W.S.I.B. will also grant coverage to workers who are injured by 'Industrial Disease'. A detailed discussion of the process for approving a worker's claim on account of 'industrial disease' is beyond the scope of this paper. Needless to say, such claims are often even harder to prove than 'disablement' type injuries. Usually such claims are approved as a result of exposure to or the regular handling of some type of chemical or material in the workplace. If a worker believes her workplace is making her sick, once again, she should report it to the employer and her family doctor immediately.

If co-workers are also getting sick and exhibiting the same symptoms as the client, there is a good chance there is some sort of chemical exposure at the workplace which is causing the illness.

For more information on employer obligations regarding the handling of hazardous materials and for workplace hazards in general, both workers and employers are encouraged to contact the following agencies:

Industrial Accident Prevention Association (IAPA). Their website is:

http://www.iapa.on.ca/

The Ontario Ministry of Labour. Their website is:

http://www.labour.gov.on.ca/english/index.html

The Occupational Health & Safety branch of the Ministry of Labour will respond to complaints of unsafe workplaces and can investigate worksites for, among other things, exposure to hazardous materials. Ministry investigators can also charge employers for offences involving improper handling of hazardous materials or the failure to proper train workers in the handling of such materials.

Q How long does a person have to make a claim for Worker's Compensation?

A The *Workplace Safety & Insurance Act*, the law that governs Worker's Compensation in Ontario, states that a claim must be filed as soon as possible and but in no case more than 6 months of the Date of Accident. Obviously, it is in the worker's interest to file his claim as soon as possible. Sometimes, as with 'disablement' or 'industrial disease' type claims the Date of Accident is unclear. It then becomes important to claim as soon as the worker or his doctor makes a connection between the illness complained of and the workplace duties thought to be responsible for the medical condition. In such situations, detailed reporting to the family doctor and the worker's own notes can help in the claims process.

Q What if the claim is denied? What if after initially accepting the claim, the W.S.I.B. terminates benefits but the worker is not able to return to work?

A In either scenario the worker has the right to 'Object' to the decision. The W.S.I.B. will typically communicate its decision in a letter to the worker. The worker must then file an Intent to Object form in the prescribed format identifying the decision with which he disagrees and brief reasons for the disagreement. The worker can then pursue the appeal through the various levels of appeal. To properly lodge an objection to a decision of the W.S.I.B., injured workers should be aware the objection to the W.S.I.B. must:

- be in writing;
- state why the W.S.I.B.'s decision is incorrect or why it should be changed.
- be filed within the prescribed time limit. Most decisions must be appealed within 6 months, however, decisions by the W.S.I.B. concerning Work Transition ('WT') plans must be filed within 30 days of the W.S.I.B.'s decision.

More information on the appeals system is set out below.

## 5. BENEFITS

Q What types of benefits are available under the W.S.I.B. system?

A If an injured worker misses time from work, he is entitled to Loss of Earnings (LOE) benefits. The employer is obliged to pay full wages and benefits on the Date of Accident as if the injury had not occurred. Thereafter, for continuing lost time from work, the

W.S.I.B. pays LOE benefits which are approximately equal to 85% of 'take-home', or after-tax pay. As well, the W.S.I.B. will fund medical/rehabilitation treatment necessary as a result of the compensable injury (ie. physiotherapy, chiropractic, surgical intervention, etc.). A request for approval of such treatment should be forwarded to the W.S.I.B. from your family doctor. If the worker cannot return to the pre-accident job, Work Reintegration ('WR')/Work Transition services are available to help re-enter the labour force.

Q What if the worker suffers a permanent injury as a result of a workplace accident?

A Workers who suffer a permanent impairment are entitled to a Non-Economic Loss (NEL) benefit. Sometimes referred to as the 'pain and suffering award', this is not entirely accurate. For instance, a worker may suffer a significant injury, and experience pain and suffering but then make a full recovery within, say, 12 months; in this circumstance no NEL benefit would flow. The NEL award is only granted where an injured worker suffers permanent physical or functional abnormality. For instance, if a knee injury permanently affects the worker's range of motion and ability to stand, walk, run, etc., then an NEL is in order. The NEL award is typically paid out as a single lump sum.

## 6. WORKER'S COMPENSATION AND CIVIL LAWSUITS

Q Can I also sue my employer if I'm injured at work?

A Typically, the answer to this question is 'no'. If you suffer an injury at work and your employment is in a field that is covered by the Worker's Compensation system, you cannot also pursue a civil claim (ie. a lawsuit) seeking damages through the Court system. All of the industries which are the highest risk for workplace injuries (ie. mining, farming, manufacturing, construction, for instance) are mandatorily covered under the Worker's Compensation system.

There are many situations where an injured worker may have a 'concurrent' entitlement. That is, the worker may have the right to make a claim for Worker's Compensation benefits OR may have the right to sue for pain and suffering and economical loss through the Court system in a civil lawsuit. Such scenarios arise quite regularly and include a situation such as the following: A worker who is employed as a truck driver whose vehicle is struck by another, at-fault driver where the other driver is not also working at the time (ie. a homemaker returning from grocery shopping at the supermarket). If the truck driver is working at the time (ie. on delivery, for example), is not at-fault for the accident, is struck by a party who is not working (ie. someone returning home from the grocery store) and suffers injuries, the injured truck driver can make an 'Election' to either claim Worker's Compensation benefits OR sue the at-fault driver in the civil Court system.

Which option to choose will most definitely require the advice of an experienced personal injury lawyer. Workers injured in circumstances where they have such an Election must choose either to pursue a civil lawsuit or to claim for Worker's Compensation within 3 months of the Date of Accident. Also, in even more limited circumstances, an injured worker can received worker's compensation benefits AND also sue for damages through the civil Court system. Such cases are very rare, will require the written consent of the W.S.I.B. or the employer, and will result in the repayment of the value of all W.S.I.B. benefits received from any civil settlement or Court judgment; these claims will most certainly require the involvement of an experienced personal injury lawyer.

## 7. RETURN TO WORK

Q What are the obligations to an employer while a worker is off work due to injury? Do she have to provide them with medical information?

A The *Workplace Safety and Insurance Act* imposes an obligation on both the employer and the injured worker to maintain contact with one another immediately following the injury in an attempt to effect an Early and Safe Return to Work ('ESRTW'). The worker must keep the employer aware of any ongoing limitations or restrictions that should be in place to guide the worker's return to work. Similarly, the employer must try and identify suitable modified work that may help the injured worker return to the workplace. In order to be kept apprised of the injured worker's progress and treatment, the employer can ask that the worker have her physician fill out a Functional Abilities Form (FAF) from time to time. The worker is obliged, at reasonable intervals, to have her doctor fill out an FAF which identifies any ongoing limitations or restrictions necessary to permit a return to work. A copy of the FAF is provided to the employer, the worker, and the W.S.I.B.

Q Does the employer have to hold a job for an injured worker while off work due to injury?

A Some employers have an obligation to re-employ injured workers, others do not. The law states that where the injured worker has been employed continuously for at least one year prior to the date of accident, then the employer must offer to re-employ the worker. There is an exception to this rule, however, in that smaller employers (ie. those that regularly employ fewer than 20 workers) are not subject to this re-employment obligation. Furthermore, the re-employment obligation is time limited. An employer that is subject to the re-employment obligation only has to offer to re-employ the injured worker until the earliest of :

- two years from the date of accident,
- one year after the worker is deemed medically able to perform the essential duties of his or her pre-accident job, or
- the date the worker reaches 65 years of age

Q What if the employer refuses to accommodate a return to work?

A Most workplace injuries are not so severe that the injured worker will never work again. Injured workers should remember the Worker's Compensation regime is designed to return them to work. The first goal of the W.S.I.B. is try and return the injured worker to his usual, pre-accident job. If that cannot be accommodated, the next goal is to try and find suitable modified work for the partially disabled worker. If the worker believes the employer could do more to accommodate the return to work, she can request the services of a W.S.I.B. Return to Work Specialist.

The Return to Work Specialist will meet with the parties (ie. worker and employer), attend at the job site to view the various potential jobs and, if necessary, can request the assistance of a W.S.I.B. Ergonomics Specialist. An 'Ergonomist' is someone with expertise in assessing work sites to see if accommodations can be made based on physical limitations imposed by the worker's injury. The Ergonomist can also suggest changes to the workplace (ie. raising or lowering the height of a work bench, provide a sit/stand stool for a worker, changing the way work is performed to lessen the impact on an injured worker's particular injury, providing other assistive devices or co-workers to help the worker perform the job function).

Q What if the worker cannot return to the regular job and the Employer cannot offer modified work?

A If attempts to effect an ESRTW have failed, the employer cannot find suitable modified work, and the Return to Work Mediator services have not succeeded, the W.S.I.B. may offer the injured worker Work Transition ('WT') services. WT services are designed to assist the workplace parties in identifying suitable and sustained work opportunities first with the Accident Employer.

If the workplace parties are unsuccessful in arranging a return to suitable and sustained work with the Accident Employer, the W.S.I.B. will provide a Work Transition Assessment. This assessment will determine what assistance an injured worker requires in order to return to work with the Accident Employer or identify a Suitable Occupation ('SO') that is available in the labour market. When determining an SO, the W.S.I.B. will consider the other jobs available with the Accident Employer and may provide the injured worker with direct placement, accommodation or retraining.

If ultimately, the Accident Employer is unable to offer any employment, even with upgrading and/or retraining, the W.S.I.B. considers opportunities in the injured worker's local labour market when identifying an SO. There must be labour market demand for the job prior to proceeding with a WT Plan.

For injured workers aged 55 and over who require a WT Plan to obtain employment with a new employer have two options:

· participating in the WT Plan developed by the W.S.I.B.; or

· choosing a 12 month Transition Plan ('TP') focused on a self-directed Work Reintegration ('WR')

In any event, WR/WT services do NOT guarantee that the W.S.I.B. will in fact find the re-trained worker an actual job; the W.S.I.B. will merely provide the necessary skills to permit re-entry into the labour market in suitable, alternative employment.

## 8. THE APPEALS PROCEDURE

Q How does the appeals procedure work?

A As noted above, workers (and indeed, even employers) who disagree with a decision made on their claim can appeal the decision by first filing an Intent to Object with the Claims Adjudicator.

Q Will the claimant have to go to court?

A No. Appeals in the Worker's Compensation system are not dealt with through the Court system. The Worker's Compensation system has its own system of appeals. Generally speaking, there are three levels of appeal which are as follows:

1. <u>Intent to Object to the Case Manager</u>.

As noted above, in response to a decision from the WSIB that a claimant disagrees with, he (or his lawyer) must file an Intent to Object with the WSIB. He will then receive a copy of the claims file and an Appeals Readiness Form. Once all relevant evidence is gathered in support of the appeal (ie. Medical reports), the Appeals Readiness Form is submitted identifying, once again, the impugned decision, (ie. "Claims Adjudicator's decision of October 14th which denied my claim"), states what the desired outcome is (ie. "grant initial entitlement in my claim, pay Loss of Earnings benefits and reimburse medical expenses") and references any additional evidence supplied in support of the Objection (ie. "see reports from family physician, Dr. Jones, dated November 12th and Orthopaedic Specialist, Dr. Smith, dated November 23rd"). Many lawyers specializing in Worker's Compensation appeals will also providing a detailed written submission

explaining the client's position, referencing the additional evidence submitted (ie. medical reports, witness statements, etc.) and quoting the applicable legislation and W.S.I.B. policy which governs the issue that is the subject of the particular appeal. The Appeals Readiness Form (ARF) and all the supporting evidence and argument is then forwarded to a Case Manager on the Objection Intake Team. The documentation is reviewed to ensure all required information is contained in the ARF and the matter is then forwarded to the Appeals Branch.

2. Appeals Branch of the W.S.I.B.

The Appeals Branch of the W.S.I.B. is operated out of the Toronto office of the W.S.I.B. When an objection is received at the Appeals Branch, it will be assigned to an Appeals Resolution Officer (ARO). Unlike an initial Objection to a Claims Adjudicator, the ARO is someone who is completed new to the worker's claim, not having been involved in any prior decisions on the worker's claim. The Appeals Branch will vet the appeal and determine whether the appeal should proceed by way of an 'oral hearing' or via written submissions. If it is determined an oral hearing is necessary, a formal hearing will be scheduled. The worker can attend represented by her lawyer, the worker can give evidence, other witnesses can be summoned to testify and the lawyer can make additional submissions and argument in support of the worker's claim.

Workers should be aware that their employer at the time of the accident is also entitled to participate in all appeal proceedings. So, if the appeal is being dealt with at the initial Objection stage as noted above or by way of written submissions, the employer and its lawyer can submit fresh evidence and make argument as to why the worker's appeal should not be granted. If the appeal is proceeding to a formal hearing, the employer (or a representative on behalf of a corporate employer) can attend with legal counsel, call witnesses to testify and make submissions to the ARO in response to the worker's claim.

Whether the proceedings before the ARO are by written submissions or by an oral hearing, the ARO will render a written decision. If the worker still disagrees with this decision she can file a further appeal to the:

3. Workplace Safety & Insurance Tribunal or 'W.S.I.A.T.'

An appeal to W.S.I.A.T. is the final appeal in the Worker's Compensation process, and must be submitted to W.S.I.A.T. within 6 months of the final decision of the W.S.I.B. Appeals Resolution Officer. The W.S.I.A.T. is completely separate from the W.S.I.B. The W.S.I.A.T. also offers a mediation service, the Alternative Dispute Resolution ('ADR') office, for certain cases that meet the ADR office's qualifying criteria; for instance, cases will usually only be dealt with by the ADR office where both parties are participating and consent to having the matter dealt with by alternative dispute resolution.

If ADR is unavailable or has not produced a negotiated result, the matter can then proceed to a hearing. Like proceedings before the W.S.I.B., some appeals can be heard by way of a 'paper review' (ie. without an oral hearing). If it is determined an oral hearing is necessary, the case will be heard by a panel of either one or three W.S.I.A. Tribunal Vice-Chairs. Like proceedings before a W.S.I.B. Appeals Resolution Office, workers are expected to testify and should have proper representation to ensure all evidence and arguments are properly presented.

## 9. CONCLUSION

Workers who suffer an on-the-job injury in Ontario are entitled to generous benefits; to replace their lost income, cover health care and prescription drug costs, compensate for permanent impairment and, where necessary, re-train them for new employment if they cannot return to their old job. The Worker's Compensation process can be a long and complicated one. The W.S.I.B. makes many bad decisions that deny injured workers their lawful entitlements. Since the law permits injured workers to receive income replacement up to age 65, the cost to an injured worker of an unjustly denied or terminated claim can run into the hundreds of thousands of dollars.

Counsel are well-advised to conduct thorough investigations at the outset of a file with a view to obtaining as much information as possible about both the client's and the tortfeasor's work activities at the time of the injury. At a minimum, counsel is advised to determine: Whether plaintiffs are "workers" and whether defendants are "workers, directors, executive officers" as defined by the Act? Whether the defendant is an "employer"? Whether or not the parties involved fall within employment described in Schedule 1 or Schedule 2 to the Act? Whether an "Accident" occurred? And, whether, at the time of the accident, both the plaintiff and the defendant were "in the course of employment"? Hopefully these investigations will identify, at an early stage, which claims will remain within the Worker's Compensation regime and which may proceed by way of a civil action.

## Appendix A

Determining whether a cause of action is extinguished means first and foremost identifying the players involved. At a minimum, prior to commencing an action seeking damages for personal injury, Counsel is advised to undertake initial investigations to determine, as much as possible, answers to the following:

**Q1.** Is the Client a:

- ☐ Worker – s.2?
  - ☐ If yes, go to Q2.
- ☐ Sole proprietor or Independent Contractor or Partner in a Partnership?
  - ☐ If yes, has the Client purchased optional insurance under the WSIA that deems him to be a worker?
    - ☐ If yes, go to Q2.
    - ☐ If no, there is no coverage under the WSIA.
- ☐ Worker in a federal undertaking?
  - ☐ If yes, coverage is provided under *Government Employees Compensation Act*.

**Q2.** Is the target Defendant(s) a(n):

- ☐ Employer – s.2?
  - ☐ If yes, go to Q3.
- ☐ Worker – s.2?
  - ☐ If yes, go to Q3.
- ☐ Executive Officer/Director employed by an employer?
  - ☐ If yes, go to Q3.

**Q3.** Do the parties involved fall within the scope of:

- ☐ Schedule 1 employment
  - ☐ 9 industry classes – O. Reg. 175/98:
    - ☐ forest products
    - ☐ mining and related industries
    - ☐ other primary industries
    - ☐ manufacturing
    - ☐ transportation and storage
    - ☐ retail and wholesale trades
    - ☐ construction
    - ☐ government and related services and other services (including financial, hospitality)
  - ☐ If yes, then action against Schedule 1 employer, director, executive officer or worker is statute barred – s.28(1).
  - ☐ If other party is a Schedule 1 worker, go to Q4.
  - ☐ If other party is an employer (other than Client's Schedule 1 employer), go to Q5.
- ☐ Schedule 2 employment

- O. Reg. 175/98:
  - provincial and municipal governments
  - Crown corporations
  - telephone companies licensed by the federal government
  - airlines and railways
- If yes, then action against Schedule 2 employer, director, executive officer or worker is statute barred – s.28(2).
- If other party is an employer (other than Client's Schedule 2 employer), go to Q5.

- None of the above - "stranger" to the Act
  - If yes, then action is not statute barred– see below.

**Q4.** Did the accident involving the parties:

- Arise out of and in the course of employment?
  - If yes, then action against Schedule 1 entity is statute barred – s.28(3).
    - Except that Schedule 1 workers may sue Schedule 1 Sole Proprietors and Partners.
  - If no, then action is not statute barred – proceed to Q6.
    - Except Schedule 1 employer is not vicariously liable for its worker's assault.

**Q5.** Did another employer (other than Client's employer):

- Supply a motor vehicle, machinery or equipment to the Client?
  - If yes, was it supplied on a purchase or rental basis?
    - If no, action is statute barred.
  - If yes, were other workers supplied to operate the motor vehicle, machinery or equipment?
    - If yes, action is statute barred.
    - If no, products liability exception applies and action is not statute barred – s. 28(4).

**Q6.** If worker is entitled to benefits and right to action:

- Election must be made within 3 months after date of accident or death of worker – s. 30(4).
- Claims for compensation and health care must be made within 6 months from the date of accident/death – s. 22(1).
- Claim for benefits with the Board must be made within 6 months after the Appeals Tribunal has ruled regarding a worker's right to pursue a legal action against a third party – s. 31(4).

# Appendix B

## Characteristics of workers and independent operators

Operational Policy Document No. 12-02-01

| | Workers | Independent Operators |
|---|---|---|
| **Instructions** | Comply with instructions on what, when, where, and how work is to be done. | Work on their own schedule.<br><br>Does the job their own way. |
| **Training/ supervision** | Trained and supervised by an experienced employee of the payer.<br><br>Required to take correspondence or other courses.<br><br>Required to attend meetings and follow specific instructions which indicate how the payer wants the services performed. | Use their own methods and are not required to follow instructions from the payer. |
| **Personal service** | Must render services personally.<br><br>Must obtain payer's consent to hire others to do the work. | Often hires others to do the work without the payer's consent. |
| **Hours of work** | The hours and days of work are set by the payer. | Work whatever hours they choose. |
| **Full-time work** | Must devote full-time to the business of the payer.<br><br>Restricted from doing work for other payers. | Free to work when and for whom they choose. |
| **Order or sequence of work** | Performs services in the order or sequence set by the payer.<br><br>Performs work that is part of a highly coordinated series of tasks where the tasks must be performed in a well-ordered sequence. | Performs services at their own pace.<br><br>Work on own schedule. |

| | Workers | Independent Operators |
|---|---|---|
| **Method of payment** | Paid by the payer in regular amounts at stated intervals.<br><br>Payer alone decides the amount and manner of payment. | Paid by the job on a straight commission.<br><br>Negotiates amount and method of payment with the payer. |
| **Licenses** | Payer holds licenses required to do the work. | Person holds licenses required to do the work. |
| **Serving the public** | Does not make services available except on behalf, or as a representative, of the payer.<br><br>Invoices customers on employer's behalf. | Has own office.<br><br>Listed in business directories and maintains business telephone.<br><br>Advertises in newspapers, etc.<br><br>Invoices customers on own behalf. |
| **Status with other government agencies** | Terms of the relationship are governed by a collective agreement.<br><br>Canada Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form "Request for a ruling as to the status of a worker under the CPP or EIA".)<br><br>Collects and pays GST and other applicable taxes on payer's behalf.<br><br>Payer deducts EI, CPP, insurance, income tax, etc. from pay. | Terms of the relationship not governed by a collective agreement.<br><br>Canada Revenue Agency has made an official ruling that the person is not a worker under the CPP and the EIA.<br><br>Collects and pays GST and other applicable taxes on own behalf.<br><br>Takes no deductions from pay for EI, CPP, insurance, income tax, etc. |

**Employer Types and Executive Officers**

Operational Policy Document No. 12-03-03

| EMPLOYER TYPE | DESCRIPTION | EXECUTIVE OFFICERS |
|---|---|---|
| Limited liability companies | legally incorporated with share capital | - members of the board of directors<br>- chair and vice-chair of the board of directors<br>- corporate president, chief executive officer (CEO), chief operating officer (COO), chief financial officer (CFO), vice-president, general manager of the corporation, corporate secretary and treasurer |
| Non-Profit | non-incorporated, or legally incorporated without share capital | - directors of the governing board or the equivalent thereof |
| Municipalities | incorporated and non-incorporated, including cities, towns, villages and native bands | - all elected officials (e.g. mayors, city councillors) and temporary appointees to elected positions |
| Boards or commissions | public health service facilities (e.g. hospitals), utilities, municipal agencies, school boards, colleges and universities | - members of the governing board, either appointed or elected or the equivalent thereof |
| Provincial government | | - deputy ministers |