# The Personal Injury Lawyer's Guide to the Workplace Safety & Insurance Act

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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 WSIA. 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

Before we delve into a discussion of an injured worker's right of action and coverage under the WSIA, a few key terms need to be defined.

Employer

"Employer" is defined in section 2 of the WSIA as follows:

> "employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry and includes,
>
> (a) a trustee, receiver, liquidator, executor or administrator who carries on an industry,
> (b) a person who authorizes or permits a learner to be in or about an industry for the purpose of undergoing training or probationary work; or
> (c) a deemed employer.

See Operational Policy Document No. 12-01-01 for an expanded definition of "employer" and "deemed employer." For your reference, all WSIB Operational Policies are available at http://www.wsib.on.ca/wsib/wopm.nsf/home/opmhome.

Worker

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.

"Worker" does not include "casual" workers who are employed otherwise than for the purpose of the employer's industry (see for example, WSIAT Decisions No. 1267/05; 1529/03; 1292/03; 1413/03 and 511/02), certain home-based workers and, subject to s. 12 of the WSIA, executive officers of a corporation – s. 11 WSIA. An application to cover the worker as an executive officer may be made by the employer with the worker's consent. Note: WSIAT decisions are available at http://www.wsiat.on.ca/english/decisions/index.htm.

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).

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.

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.

Worker versus Independent Contractor

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 us 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.

Workers versus Executive Officers

Absent an application to cover the worker, the WSIA does not cover executive officers. Executive officers, Independent Operators, Sole Proprietors and Partners in a Partnership carrying on business in either Schedule 1 or 2 can opt into the Insurance plan (e.g. optional insurance) in which case the Workplace Safety and Insurance Board ("the Board") will declare these persons to be "Workers" – s. 12 WSIA. Otherwise, these people are strangers to the Act. See Operational Policy Document No. 12-03-03 for guidelines on who can obtain optional insurance. This policy also determines who is an executive officer according to employer type (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

Workers and their dependants are entitled to compensation for personal injuries arising out of and in the course of their employment upon the fulfillment of three conditions:

i) The worker is considered to be a worker as defined in the legislation;
ii) The worker's employer has coverage; and
iii) The injury occurs within the geographic limitations specified in 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. RIGHTS OF ACTION

A fundamental aspect of the workers' compensation scheme is the compromise that an injured worker makes in giving up his/her right to sue for work-related injuries in exchange for guaranteed no-fault compensation for accepted claims. Sections 26 to 31 of the WSIA determine whether or not a "right of action" is extinguished.

Section 31 of the WSIA in particular states:

> (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Workplace Safety Insurance Appeals Tribunal (WSIAT) to determine whether,
>
> a. because of this Act, the right to commence an action is taken away;
> b. the amount that a person may be liable to pay in an action is limited by this Act;
> c. the plaintiff is entitled to claim benefits under the insurance plan.
>
> (2) The WSIAT has exclusive jurisdiction to determine a matter described in subsection (1).

The Tribunal does not have appeal jurisdiction under ss. 26 to 30 – s. 123(2).

Although Board policies are not binding on the Tribunal in right to sue applications, the Tribunal still accords Board policies significant deference. See e.g. WSIAT *Decisions No. 814/06* (2006); *506/04* (2004); *755/02* (2002).

While any party to an action can bring Application to the Workplace Safety & Insurance Tribunal ("the Tribunal") for a ruling on whether or not a right of action is taken away, and while

that Application can be brought at any stage of a civil action, there are steps that Plaintiff's counsel can take to, at a minimum, educate themselves and "weed out" at an early stage any potential civil claims which are clearly statute-barred by virtue of the Act.

Counsel is well advised to familiarize themselves with sections 28 to 31 of the Act, which establish those actions that are statute-barred, and the procedure for bringing an Application to the Tribunal for a determination of whether a right of action is taken away. If reading dry statutory provisions is not your thing, get Butterworths' "Worker's Compensation in Ontario Service, by Dee, McCombie and Newhouse, from your local Law Library. This contains a good overview of these provisions of the Act as well as Tribunal decisions interpreting same.

## 5. ACTIONS BARRED BY STATUTE

Entitlement to workers' compensation benefits are in lieu of all statutory rights of action that a worker, worker's survivor, spouse or dependant may have against the worker's employer – s.26(2) (note – s. 26 does not bar an action for damages to personal property). Schedule 1 and Schedule 2 employers, directors, executive officers and workers are protected from civil actions in respect of a worker's injury or disease – s. 28(1) &(2). However, if one or more Schedule 1 workers were involved in the worker's injury, the worker's right of action is only extinguished if the workers were in the course of employment – s. 28(3).

The Supreme Court of Canada decision in *Beliveau St-Jacques v. Federation des employees et employes de services public inc.*, [1996] 2 S.C.R. 345, 136 D.L.R. (4th) 129 (S.C.C.), makes clear that once a right of action for compensatory damages is barred by the WSIA, no independent right of action exists for exemplary or punitive damages.

Broadly speaking, counsel should be aware of the following potential limitations to their rights of actions:

### i) Workers cannot sue their own Employers

A worker cannot bring action against her own employer for damages due to personal injury, be it a Schedule 1 or Schedule 2 employer – s. 28 WSIA. This prohibition only applies to workers

employed by employers whose industry is set out in Schedule 1 or 2 (the Schedules can be found in Ontario Regulation 175/98, which is available at the following link: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_980175_e.htm). Determine whether the employment your client was engaged in at the time of injury falls within Schedule 1 or 2. If, after reviewing Schedule 1 and 2, you cannot determine whether a certain employment or business is listed, telephone the local office of the W.S.& I.B. and provide the name and address of the target company you are inquiring about. The local Board can tell you whether or not that employer is registered with the Board and what Schedule the Board has it listed under. While this can offer some guidance, it will not necessarily be determinative of the issue as many employers breach the Act by not properly registering with the Board.

**ii) Schedule 1 workers cannot sue <u>any</u> Schedule 1 entity**

Schedule 1 workers <u>cannot</u> sue other Schedule 1 employers, nor their directors, executive officers or workers – s. 28(1) WSIA. This prohibition will serve to negate rights of action in many typical construction and industrial settings where workers from a number of employers are working (e.g. construction site involving a number of sub-trades). 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.

See *Decision No. 70/94* (Feb. 24, 1994), where the Tribunal found the injured party was not an "executive officer", as he asserted, but was in fact a "worker" and, as such, his right of action was extinguished; he was however entitled to be considered for benefits under the Act.

Provided that the appropriate election is made, a Schedule 1 worker is not precluded from bringing an action against any employer other than a Schedule 1 employer.

Section 28(1) of the WSIA, which extinguishes the right of civil action of a Schedule 1 worker against another Schedule 1 entity is, by virtue of 28(3) of the WSIA, restricted to apply only where both parties are "in the course of their employment" at the time of the accident.

Schedule 1 workers injured in the course of their employment have been permitted to sue Schedule 1 "Sole Proprietors" and Schedule 1 "Partners". Remember, the prohibition in s. 28(1) of the WSIA precludes a Schedule 1 "Worker" from suing his own "Employer", as well as any other Schedule 1 "Employer", "Director", "Executive Officer" or "Worker". Thus, Sole Proprietors and Partners operating in Schedule 1 industries, not being included in the list of precluded Defendants, have been found to be strangers to the Act as both Plaintiffs and Defendants and, therefore, civil claims against these entities have been permitted to proceed – see WSIAT *Decisions No. 372/94* & *847/93*.

Exceptions to "Worker"

The rights of employees, who are excluded from the Act's definition of "Worker", to sue their own employer are set out in Part X of the WSIA. Part X of the Act modifies and reduces the most restrictive elements of common law defenses of voluntary assumption of risk and contributory negligence– ss. 113 – 116 WSIA.

**iii) Schedule 2 Workers**

Schedule 2 Workers can sue anyone except their own Schedule 2 employer and its directors, executive officers and co-workers – s. 28(2) WSIA.

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 any employment by or under the Crown in right of Ontario or any employment by a permanent board or commission appointed there under.

**Practice Tip Example** – Several chat line inquiries deal with MVA collisions involving school buses. Assume your client is driving a motor vehicle in the course of his Schedule 1 employment when he is negligently struck by a school bus driver also in the course of his employment. If that tortious bus driver is employed by a private bus line hired to bus children to and from school, that defendant will likely be classified as a Schedule 1 employer under Class E – Transportation and Storage, para. 3, xiii "conveying passengers by automobile or trolley coach". In these circumstances, your Schedule 1 Plaintiff's claim is statute barred by the operation of s. 28(1) of WSIA. Assume the same fact scenario above, except that the defendant's bus is owned and operated directly by a municipal school board. In this second scenario, the Defendant is a Schedule 2 employer and the Plaintiff's right of action is preserved; he can elect to receive benefits pursuant to the W.S.& I.B. Accident fund or commence civil proceedings – s. 30 WSIA.

### iii) Dependant, Survivorship and *Family Law Act* Claims

Section 26(2) of the WSIA also restricts the rights of a worker's survivor or a worker's spouse, child or dependant to bring an action against the worker's employer or an executive officer of the worker's employer. "Survivor" is defined under section 2 of the Act as "a spouse, child, or dependant of a deceased worker."

Section 27(2) of the Act extinguishes rights of action pursuant to section 61 of the *Family Law Act* ("FLA"). Both dependant claims and survivorship claims are extinguished if the injured party's claim is also barred by virtue of section 28. Family members of an injured worker who elect to receive benefits still retain their right of action under the FLA. See e.g. *Decision No. 234/03* (2003), 66 W.S.I.A.T.R. 154 (Ont. W.S.I.A.T.). See also *Kuzmich v. Trakas* (2005), 2005

CarswellOnt 1968 (S.C.J.) (where the rights of claimants to sue under family law legislation were not extinguished by surviving spouse's election to take statutory benefits).

For accidents occurring prior to January 1, 1998, the Appeals Tribunal retains jurisdiction to hear appeals from Board decisions. For accidents occurring after January 1, 1998, applicants must seek judicial review. Note that the Tribunal's jurisdiction is restricted under the WSIA to determining whether an estate's right of action has been taken away. See WSIAT *Decision No. 1396/08* (2008), 2008 ONSWIAT 2645. It does not extend to whether a cause of action exists under the FLA. *Meyer*, [1988] O.J. No. 299, 38 O.A.C. 398 (C.A.), rev'g in part, [1986] O.J. No. 511, 15 O.A.C. 202 (Div. Ct.). See also *Decision No. 432/88* (1988), 9 W.C.A.T.R. 306 (Ont. W.C.A.T.) (tribunal having jurisdiction to determine worker's spouse's right of action only if worker deceased; as rights of spouse falling to be determined under Family Law Act, issue being outside jurisdiction of tribunal).

Despite the broad wording, neither s. 26(2) nor 27(2) of the WSIA prohibit a civil action by a non-dependant family member that is not a spouse or child of the deceased. See WSIAT *Decisions No. 2109/03* (2004) and *11/02* (2003).

### iv) Rights of action are only extinguished where injury "arose out of and in the course of employment"

"Arising out of" and "in the course of employment" are causal requirements which must be satisfied to establish the "work relatedness" of an accident/injury. There is currently no Board policy statement on injuries/accidents "arising out of employment" but there are policies for specific situations e.g. food poisoning or mental stress. The requirement that both aspects of the test must be separately met, before compensation is payable, is considerably modified by the "presumption" in s. 13(2) of the WSIA which provides:

> If the accident arises out of the worker's employment, it is presumed to have occurred in the course of employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

The Tribunal's interpretation of the standard of proof required to rebut this presumption was recently considered in the Supreme Court of Canada decision in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, where it was held that there is only one standard of proof in civil law and that is the balance of probabilities. See *Decisions No. 1672/04*, 2009 ONWSIAT 150, 88 W.S.I.A.T.R. (online), and *1225/09*, 2009 ONWSIAT 1964. *Decision No. 1225/09* noted that Tribunal decisions have not necessarily imposed a higher standard of proof to rebut the presumption; rather they have found that in reversing the question the nature of inquiry changes, so that the evidence must demonstrate that it is probable that the accident did not arise out of employment.

An injured party's right of action is not extinguished if his injury does not occur "in the course of employment". For day to day practice, counsel is advised to gather as many facts about what both the client/victim and the tortfeasor were doing at the time of the injury, their respective employers and the job titles and duties. Counsel is also well advised to familiarize themselves with the following Board Operational Policy Documents which outline broad principles of W.S.& I.B. adjudication as these provide guidance as to the Board's decision-making process. Note that these policies deal with "in the course of employment" concerns rather than "arising out of" concerns.

<u>Accident in the Course of Employment (Operational Policy Document No. 15-02-02)</u>

The Board is directed to consider facts and circumstances surrounding "Time", "Place" and "Activity" to make initial determinations of work-relatedness of an accident. Thus, taking into account these factors, a personal injury occurs in the course of employment if the accident was "work-related".

With respect to "time" and "place", an accident occurring on the premises of the workplace during work hours while the worker was doing a work-related duty or an activity reasonably incidental to work, considered to have occurred in the course of employment. In WSIAT *Decision No. 2922/00* (2000), 56 W.S.I.A.T.R. 197, the Panel held that arriving at the employer's premises one and one-half hours before starting work was not a reasonable time. A

more appropriate time would be in the range of 15 minutes to half an hour prior to a scheduled shift. See WSIAT *Decision No. 336/06* (July, 2006), unreported.

Note Operational Policy Document No. 15-03-08, "Personal Activities/Removing Oneself From Employment" which provides that:

> Compensation benefits are not payable to workers who voluntarily take themselves out of the employment. Such situations may include:
>
> - doing something outside their allotted duties, such as transacting personal business, or
> - going places having nothing to do with their employment or doing something not reasonably expected of them.

A brief interlude of personal activity does not necessarily take the worker out of the course of employment. See e.g. WSIAT *Decisions No. 984/02* (November, 2002), unreported; *476/04* (August, 2004), unreported (where shopping was an acceptable brief interlude of personal activity). Factors considered in the determination of what is acceptable include: the duration of the activity, the nature of the activity, and the extent to which the activity deviated from regular employment activities; the focus is usually on the activity of the worker at the time of the accident.

Counsel should make note of the nature of the employee's work and work environment as well as the customs and practices of the workplace in determining whether an activity was incidental to employment.

<u>On/Off Employers' Premises (Operational Policy Document No. 15-03-03)</u>

Generally, once a worker reaches the employer's premises or place of work (e.g. construction work site), s/he is considered to be in the course of employment. Consequently, when the worker leaves the premises, s/he is no longer in the course of employment. "Employer's premises" are defined as:

> the building, plant, or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways, and roads

> controlled by the employer for the use of the workers when entering or leaving the work site.

In *Decision No. 163/91*, [1992] O.W.C.A.T.D. No. 359, the worker left work at 5 p.m. and walked to a nearby convenience store to buy a personal item. He returned to pick up his briefcase and to retrieve his car in his employer's parking lot. As he was exiting, he was injured by an acidic mist emanating from his employer's premises. The Panel found that the worker was not in the course of employment since he had completed his day's work and was heading home, an activity not generally covered by the Act. Further, the risk in this case was a risk common to all neighbouring premises and was outside the contemplation of the WSIB regime.

Employer's Premises, Parking Lots, Roads, Plazas, Malls, Boundaries (Operational Policy Document No. 15-03-04)

Counsel may encounter difficulties in determining what constitutes an employer's premises when the situs of injury involves construction sites, access roads, parking lots and boundaries in multi-storey buildings (e.g. office buildings, shopping malls). Accidents on employers' premises arise out of employment unless for personal reasons, the worker used an instrument of added peril (e.g. an automobile, bicycle) or if the act causing the injury does not relate to employment obligations. The "instrument of added peril" doctrine has been "virtually ignored" by Appeals Tribunal panels. WCAT *Decision No. 764/91* (1991), 21 W.C.A.T.R. 348. Thus, riding a bicycle to work for the purpose of getting to work would not constitute use of the bicycle for "personal reasons". See WSIAT *Decision No. 643/02* (June, 2002), unreported.

In order for an accident in a parking lot to be considered in the course of employment, the employer must own or lease the parking lot; and, if driving, the condition of the employer's lot must cause the accident. Workers are not entitled to compensation if injured by their own vehicle. See WSIAT *Decision No. 1684/04* (November, 2004), unreported.

A worker is in the course of employment while using private roads that are employer-owned and controlled (e.g. with posted notices, warning signs) and not open to the public; the condition of the employer's private road must cause the accident. WCAT *Decision No. 733/87* (1988), 8 W.C.A.T.R. 183, was an access road case where the Panel found that the physical boundaries of

the employer's premises were vague; it preferred to decide the course of employment issue based upon the activity of the two workers involved at the time of the accident. Consequently, employer control of an area or the worker will be more important than a precise property line.

In WCAT *Decision No. 738/87* (April, 1988), unreported, two workers were involved a car accident on an access road. The Panel disapproved of the "instrument of added peril" facet of Board policy, stating that all employees must use some means of transportation to get to work and so long as the risks are not "unusual", motor vehicles should be considered "part of the act of arriving at work which is incidental to one's job".

Travelling (Operational Policy Document No. 15-03-05)

Travelling for work purposes or to and from work where the worker is required to drive a vehicle for purposes of that employment satisfies the requirement of being in the course of employment except when a distinct departure on a personal errand is shown. Travelling to or from a convention is considered to be in the course of employment (Operational Policy Document No. 15-03-03). While there is no entitlement if the worker is engaged in personal activity, coverage does extend to accidents in hotels where the employer is paying the worker's overnight expenses.

Although the Board's policies provide useful guidelines, the Tribunal is of course the final arbiter of whether or not an accident occurred "in the course of employment" – s. 31 WSIA. Either party to a civil action can bring an Application to the Tribunal seeking a ruling on whether or not the right of action is extinguished. Typically, Defendants bring the Application, although Plaintiffs are not barred from doing so. Regardless of which party applies, the Applicant will bear the onus of proving the right of action is lost or preserved – *see Decisions No. 259/98, 559/98I, 609/89, 942/91, 305/92, 776/92, 183/94, 699/93I, 11/93 and 1170/01.*

**The Tests for "Work Relatedness"**

The Tribunal employs a number of tests to determine the "work relatedness" of a particular activity and, in turn, whether an action is statute barred. Among these tests are:

- The "Reasonably Incidental" Test;

- The "Dual Purpose" Test (e.g. where an activity is beneficial to both the Employer and the Individual in his personal capacity);
- The "Dominant Purpose" Test (which is an extension of the Dual Purpose test);
- The "Predominant Risk" Test;
- The "But For" Test;
- The "Distinct Departure" Test; and
- The Tribunal will also examine facts to determine whether a worker, by his conduct, has "taken himself out of the course of employment".

"Reasonably Incidental" Test

No single test predominates in determining "work-relatedness" of an activity; rather the Tribunal will apply multiple tests in making its determination. The starting point of the Tribunal's inquiry should involve application of the "Reasonably Incidental" Test. That is, was the worker's activity at the time of the injury "reasonably incidental" to her work duties?

*Decision No. 262/04* (July 5, 2004), involved an injury at a golf tournament. The defendant was employed as a business development manager by a company that provided financing for the purchase or lease of commercial heavy equipment. The plaintiff was a territory sales manager for a company that manufactured and distributed heavy equipment. The plaintiff was injured in July 2001 when the golf cart, in which he was a passenger and which was driven by the defendant, overturned. The defendant applied to determine whether the plaintiff's right of action was extinguished.

The Tribunal found that the defendant was in the course of his employment at the time of the accident. Golfing at the tournament was reasonably incidental to his employment. It was clearly a work-related activity in that it helped the defendant build relationships that could be a future source of business for him and his employer. The defendant's employer paid for the defendant and his guests to participate in the tournament, indicating the importance of this type of social activity in developing the employer's business interests.

The Tribunal found that the plaintiff was also in the course of his employment. The plaintiff's participation was of less direct benefit to his employer than that of the defendant but was nonetheless, of benefit. The tournament was sponsored by an organization of which the plaintiff's employer was a member. Employees had previously attended trade shows held by this organization. The tournament provided networking opportunities to the plaintiff that would be of benefit to the employer. Although the plaintiff's customers were end-users of the equipment he sold and not the financing companies (e.g. the defendant's business) used by the end-users, financing was an important part of completing deals, and it was of benefit to the plaintiff's employer that its representatives be familiar with those who could provide financing. Both the plaintiff and defendant were in the course of employment at the time of the accident and, accordingly, the plaintiff's right of action was extinguished.

Certain activities may, on their face, appear incidental to employment, however warrant further examination to determine their true "work-relatedness". In *Decision No. 2310/03* (April 29, 2004), the injured party was a police court case manager for the police department in a northern Ontario town. In December 1997, the worker slipped in a parking lot while on her way to her vehicle after spending a Christmas lunch with her assistant.

The Christmas lunch was not an activity that was reasonably incidental to the worker's employment. There may have been some marginal benefit to her employer from the lunch with her assistant, but there was no evidence that the employer knew of the lunch, much less required or encouraged it. The worker submitted that she was on call throughout her lunch. However, the Panel found that the worker was not called upon during that time. The fact that her supervisor knew of her whereabouts did not mean that the supervisor was exercising control and supervision over the worker. A police officer will not be considered to be on duty 24 hours a day simply by reason of being on call. The worker was found not to be in the course of employment at the time of the accident.

Even where a worker has completed her shift when the injury occurs, she still can be found to be "in the course of her employment". In *Decision No. 2175/03* (December 16, 2003), the plaintiff, a part-time worker at the defendants' seasonal tourist and fishing camp, was injured in a propane explosion in her trailer at the camp.

On Friday afternoons, a school bus would drop the plaintiff off at the camp. She would do some work on Friday evenings and on Saturdays from about six in the morning until three in the afternoon after which her parents would then pick her up to take her home. After completing work on a Saturday afternoon while waiting for her parents, the worker went back to the trailer where she was staying and started heating some water to wash her hands when the explosion occurred.

The Tribunal found the accident occurred during a reasonable period after completion of her work duties. The plaintiff's activities (cleaning up after work on premises controlled by the Employer) were "reasonably incidental" to her employment. The plaintiff was in the course of employment at the time of the accident and accordingly her right of action was extinguished.

"Dual Purpose" Test

In WCAT *Decision No. 420* (1986), 3 W.C.A.T.R. 168, the Panel adopted the American concurrent cause principle or what we refer to as the "dual purpose" principle (p.174):

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken even if it had not coincided with the personal purpose.

Many motor vehicle collision claims will arise out of circumstances where the would-be plaintiff is traveling to further both his personal interests (e.g. visiting a friend) and that of his employer (making a delivery of company product). The Tribunal considered this situation in *Decision No. 199/94* (Sept. 25, 1994), applied the "Dual Purpose" Test and found the injured party's trip had both a personal and business purpose. The Tribunal applied its general rule that, where a trip serves both business and personal interests, it will be considered a business trip if a special or additional trip would have been required to effect the business purpose (e.g. "Did the employment create the need for the trip?"). The worker was delivering a shipment of shoes and also intended to stop and visit his sister. The accident occurred at a location on the highway that was en route to both destinations. Based on the oral testimony, the Tribunal also found the worker intended to visit his sister after delivering the shoes and thus was, in fact, engaged in the

business component of his trip at the time of the collision. Consequently, the right of action was extinguished.

The "Dominant Purpose" Test

In *Decision No. 437/00* (May 5, 2004), the plaintiff, who generally worked from 8 am to 4 pm., case was injured in a motor vehicle accident in February 1993. The accident occurred after 4 pm. The plaintiff was asked by his supervisor to deliver a file to him at the head office. The plaintiff picked up the file and had it in his car at the time of the accident. At the time of the collision, however, he was proceeding to a grocery store to do personal shopping. The Tribunal found that delivering the file was personal and not work-related and that the plaintiff was going to deliver it as a favour on a volunteer basis. Even if there was a dual purpose in the worker traveling at the time, the dominant purpose was to go grocery shopping. Further, the Tribunal found that the plaintiff's activity was not reasonably incidental to his employment. As the plaintiff was not in the course of employment, his right of action was not taken away. *Decision No. 437/00* includes a good review of the decisions involving delivery drivers whose trips involved a "dual purpose" as well as the application of Part X of the Act regarding Uninsured Employment (ie. "casual" workers).

In *Decision No. 866/96,* [1996] O.W.C.A.T.D. No. 1079, the worker was a cashier at a grocery store in a shopping mall. She had finished her shift, did some personal shopping at the grocery store, and went to the parking lot where she was struck by a car. On appeal, the Panel found that she was not in the course of her employment because the accident occurred after work hours when she was performing personal activities.

Application to Family Businesses

As counsel are well aware, injured parties working in family businesses provide unique challenges in that job titles, duties and remuneration often vary and are not well papered internally. See *Decision No. 146/93* (Nov. 23, 1993), involving a woman who, two weeks prior to the date of accident, had been laid-off from the family business which was seasonal in nature. Although the woman was no longer on the company payroll, the Tribunal nonetheless found her

to be a "worker" within the meaning of the Act. The payroll records were held not determinative of the issue, particularly in the context of a family business. At the time of the accident, the plaintiff was driving to the bank. She did personal as well as business banking and was intending to do personal shopping afterwards.

The Panel applied the dual purpose test in determining whether the plaintiff was in the course of employment. In this case, the primary purpose of the plaintiff's travel activity was personal. The plaintiff was going to do personal banking and shopping. The business banking was a secondary task which could have been done by telephone (e.g. no "special trip" for business purposes was required – see *Decision No. 199/94* above) and, consequently, the right of action was not extinguished.

The "Predominant Risk" Test

In *Decision No. 733/87, McFadden et al. v. Viti et al.*, [1998] O.W.C.A.T.D. No. 375, the Panel considered the predominant risk test in the context of travel to and from work. Where the predominant risk is that of the driving public, as opposed to that of an employee, then the WSIB scheme does not apply. In this decision, one of the teachers involved in the accident was driving a student home in order to mark his project. That teacher was considered to be in the course of employment.

The second teacher on the other hand was driving home and had become a member of the driving public. She had left the scope of her employment and the risk that she bore as a member of the driving public had no connection to her status as an employee. The hazards to the driving public were predominantly "driving hazards" as opposed to "employment hazards". Hence, her right of action was not taken away.

The "But For" Test

In certain limited circumstances, the Reasonably Incidental test and the Dominant Purpose test are not useful in determining whether, at the time of the injury, the worker was "in the course of employment". The Tribunal will, on rare occasion, apply the "But For" test to assist in its adjudication. *Decision No. 550/93* (February 2, 1994) involved a sole proprietor of a

bookkeeping business who had purchased personal W.S.& I.B. coverage. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a single parent with two children living at home. During a typical day she regularly alternated between business and personal responsibilities. On the day of the accident, the plaintiff arrived at her office at 7:30 in the morning. She went to a business meeting at an industrial mall at 8:30. When the meeting concluded at 10:30, the plaintiff intended to perform a number of personal errands before going to her next business meeting at her office at 2:30. The plaintiff was involved in the collision just as she turned from the driveway of the industrial mall onto the roadway.

The "reasonably incidental" test was not helpful in this case since the plaintiff was coming from a business appointment and going to personal errands. Her intention was also not helpful since, aside from evidentiary problems, she could have been focusing on her personal errands even while clearly in the course of employment.

The Panel adopted a "but for" test. This test dovetailed with Board guidelines which require that the employment obligate the worker to be traveling at the place and time the accident occurred. In order to determine whether the plaintiff would have been at the accident site at that time "but for" her employment obligation, it was necessary to look carefully at the route traveled and anticipated to be traveled on the day in question. In this case, it was held that the plaintiff would not have been on that stretch of roadway <u>but for</u> her business appointment. Accordingly, the plaintiff was in the course of employment and her right of action was extinguished.

See *Decisions No. 585/89*, [1989] (unreported) and *470/88* (1988), 9 W.C.A.T.R. 315, where the "but for" test was not applied. Both decisions involved employees and "personal activities" with their vehicles e.g. getting out of the car or walking to the car when injury occurred. The Panel found using a "but for" test would be too broad and if applied, almost everything occurring on the employer's premises would attract compensation.

The "Distinct Departure" Test

As a general rule, Board policy and Tribunal jurisprudence holds that a worker commuting to work (in her own car) is in the course of employment when she arrives at the Employer's premises or place of work (e.g. construction site) and is not in the course of employment when she leaves the premises or place of work.

"In the course of employment" will, in certain circumstances, extend to a worker's daily commute when, for instance, she drives a vehicle provided to her by the Employer. Note however the finding in *Decision No. 609/94* (November 2, 1995), wherein the Tribunal ruled that use of a company vehicle is not, in and of itself, determinative of the issue of whether or not a plaintiff is "in the course of his employment" at the time of a Motor Vehicle collision.

*Decision No. 556/02I* (June 12, 2002) involved a plaintiff who worked for a company that provided automobile windshield repair, installation and maintenance. The plaintiff drove a company van which contained replacement windshields and tools. He spent about 80% of his work day in the van. The company permitted and encouraged the plaintiff to use the van to commute to and from work. This enabled the plaintiff to attend service calls directly from home without first having to drive to the employer's premises. The plaintiff was also called occasionally to do emergency work in his off hours.

While proceeding home at the end of a work day, the worker stopped at a convenience store. He was then proceeding home when the collision occurred. The worker was in the course of his daily commute in the vehicle that was the principal tool of his employment. The use of the van by the plaintiff to commute to and from work was a benefit to the employer. The stop at the convenience store was an incidental activity in which he engaged while operating the company van. It did not constitute a distinct departure from the course of employment. The Tribunal concluded that the plaintiff was in the course of employment at the time of the accident and, consequently, the right of action was extinguished.

The Distinct Departure test will almost certainly be applied where a worker's duties require him to travel from site to site within a work day. In *Decision No. 62/94* (May 3, 1996), the plaintiff

was required to travel on a regular basis for his employment. He went home around noon then drove to see his wife at her place of employment. He had no prior arrangement to drop in to see his wife. He would drop in on his wife on an irregular basis, sometimes just for a brief visit or a cup of coffee.

In arriving at its decision, the Tribunal referenced the well established rule that where a worker's employment requires that he drive most of the day, stops for coffee breaks, even if they involve minor detours, are not considered distinct departures that take the worker out of the course of employment. The same applied for lunch stops, unless a personal errand takes the worker considerably out of the way, in which case it would be considered a "distinct departure".

The Tribunal found the plaintiff could not remember his planned employment route for the afternoon, there was no other evidence to indicate his route and, accordingly, the stop to see his wife was similar to a short coffee break. In these circumstances, the Tribunal concluded that a distinct departure had not been established, the plaintiff was in the course of employment and his right of action was extinguished.

Contrast *Decision No. 62/94* above with the finding in *Decision No. 833/95* (December 21, 1995) where the plaintiff was proceeding in his employer's van at lunch time from the work site to his home where he was going to have lunch with his wife. The plaintiff's job duties required him to travel to various job sites for service calls and, by agreement with the employer, he had use of the van for work purposes and for personal use at other times. At the time of the accident, the plaintiff was not engaged in any activity to benefit the employer and the sole purpose of the trip was personal. The activity involved a distinct departure from employment-related activity, the plaintiff was not in the course of employment and his right of action was maintained.

**Actions which take a worker "out of the course of employment"**

As noted above, counsel is advised to consider the criteria of "Time", "Place" and "Activity", as per Board Operational Policy Document No. 15-02-02, in considering the "work relatedness" of an injury. If accidents occur during work hours (time) and at the employer's work site (place), a strong presumption exists that the injury occurred "in the course of employment". However, a

number of Tribunal decisions set out the circumstances in which workers, due to their activity at the time an incident occurs, take themselves out of the course of their employment; intoxication, misconduct (fighting and horseplay) and sleeping on the job are several examples.

In WCAT *Decision No. 405/90* (1990), 16 W.C.A.T.R. 244, the Panel looked beyond the Board policy on fighting, horseplay and larking, noting the following factors as helpful in determining whether initiation of horseplay amounts to a significant deviation from the course of employment (p. 6):

- the extent and seriousness of the deviation;
- the completeness of the deviation;
- the extent to which horseplay had become an accepted part of employment;
- the extent to which the nature of the employment may be expected to include some such horseplay.

Section 17 of the WSIA provides:

> If an injury is attributable solely to the serious and willful misconduct of the worker, no benefits shall be provided under the insurance plan unless the injury results in the worker's death or serious impairment.

As a consequence of the difficulty in proving serious and willful misconduct, the Board has rarely applied this provision and no operational policies exist on the topic. The Appeals Tribunal articulated the following three-part approach in WCAT *Decision No. 120* (1986), 1 W.C.A.T.R. 194:

1) Was the accident solely attributable to the serious and willful misconduct of the worker?
2) Was the action of the worker serious and willful misconduct?
3) Did the injury caused by the accident result in serious disablement?

The definition of "accident" in section 2 includes willful and intentional acts, not being the act of the worker; that is, innocent workers or bystanders assaulted by co-workers can collect benefits under the W.S.& I.B. insurance plan as the injuries are considered compensable. See Operational Policy Document No. 15-03-11, "Fighting, Horseplay and Larking". However, such workers can also elect, pursuant to s. 30 of the Act, to sue their assailants as such conduct by defendant

workers has been found to take them out of the course of their employment; recall, the prohibition against suing co-workers applies only when both parties are "in the course of employment" – s. 28(3) WSIA.

In *Decision No. 1688/03* (January 29, 2004), the plaintiff and defendant were co-workers. The defendant assaulted the plaintiff at work during working hours as a result of a work-related discussion. The defendant applied to determine whether the plaintiff's right of action was taken away. In related criminal proceedings, the defendant was charged with assault and entered a guilty plea.

The Tribunal quoted the Supreme Court of Canada decisions in *CUPE v. City of Toronto (2003 CLLC 220-073)* and *Ontario v. OPSEU (2003 CLLC 220-0272)* which confirmed that administrative tribunals are required to give full effect to a criminal conviction (even though estoppel is not applicable) and that the criminal conviction may not be re-litigated in the administrative law proceeding.

All Tribunal decisions in the area of assault cannot be reconciled. The Panel followed the dissent in *Decision No. 804/89* and decisions applying it, and held that there is a point where the nature of the offending act is such that it, in itself, breaks the employment nexus. The initial focus should be on the offending or harmful activity to determine whether the activity, by its very nature, breaks the employment connection. In this case, the Panel found that the assault broke the employment nexus, the defendant took himself out of employment and accordingly the plaintiff's right of action against the co-worker was maintained. Note that in such cases, while an action may be maintained against the co-worker, the action will still be barred against the accident employer. See e.g. WSIAT *Decisions No. 494/04* (2004) and *2084/01* (2003).

In WSIAT *Decision No. 1607/03* (2005), despite the finding that the worker had removed himself from the course of employment when he assaulted another worker, the assailant's employer was still entitled to rely on the protections against civil suit found in subsection 28(1) of the WSIA.

**Schedule 1 Employer not vicariously liable for its worker's assault**

An interesting, related decision is found in *Decision No. 977/03, July 14, 2003*. Here, the plaintiff was a worker of a Schedule 1 employer. The plaintiff was assaulted by a defendant who was an executive officer, director, shareholder and worker of the same employer. The plaintiff brought an action against his own employer and the personal defendant, a co-worker. The defendants applied to determine whether the plaintiff's right of action was taken away.

The plaintiff was a worker in the course of employment at the time of the accident. The personal defendant was the aggressor. He was convicted of assault causing bodily harm for the incident. The Tribunal found that the personal defendant took himself out of the course of employment when he assaulted the plaintiff and the claim against the personal defendant could proceed.

Section 26(2) of the WSIA provides that entitlement to benefits is in lieu of all rights of action that a worker has against the worker's own employer or an executive officer of the employer. Section 28(1) provides that a worker of a Schedule 1 employer is not entitled to commence an action against any Schedule 1 employer or executive officer of any Schedule 1 employer. Section 28(3) provides that if workers of one or more employers were involved, subsection (1) applies only if the workers were acting in the course of their employment.

The plaintiff submitted that that, in accordance with s. 28(3), the right of action was not taken away against the defendants. The Tribunal noted that s. 28(3) clearly only restricts application of s. 28(1). The plaintiff's right of action against his employer was barred by s. 26(2). Section 28(1) takes away the right of action against other Schedule 1 employers. The plaintiff was a worker in the course of employment at the time of the accident. While the personal defendant was an executive officer of the employer, the action against him was probably in his personal capacity rather than as an executive officer (note the Tribunal's finding that perpetrating the assault took the defendant out of the course of his employment). Accordingly, the action against the personal defendant was not barred but the right of action against the employer was extinguished, not by section 28 of the Act, but by virtue of the general prohibition contained in s. 26(2). Although *Decision No. 977/03* does not specify the grounds for recovery pleaded in the civil action as

against the employer defendant, presumably it was in the nature of vicarious liability in permitting a situation to exist where a co-worker was allowed to assault the plaintiff.

### v) Products Liability Exception

Counsel is also reminded of s. 28(4) of the Act which restricts the application of the bars to action contained in sections 28(1) and (2). The so-called Products Liability exception applies where an employer, other than the injured worker's employer, supplies a motor vehicle, machinery or equipment without also supplying workers to operate the motor vehicle, machinery or equipment.

The phrase "motor vehicle, machinery or equipment" has been interpreted to be something that is capable of being operated. The Tribunal has determined the following not to be equipment:

- tires – *Decision No. 1186/87* (August, 1998);
- steel – *Decision No. 599/87* (February, 1988);
- paint – *Decision No. 503/87* (1988), 8 W.C.A.T.R. 156;
- kitchen cabinet – *Decision No. 876/96I* (July, 1997);
- scissor lift – *Decision No. 170/97* (September, 1997);
- oil refinery tower and cradle – *Decision No. 280/99* (April, 1999);
- sophisticated step ladder – *Decision No. 1707/03I* (November, 2003)

On the other hand, the following were considered to be equipment:

- propane heater – *Decision No. 93/89* (March, 1990);
- self-operated elevator – *Decision No. 775/89* (June, 1990);
- trolley boom – *Decision No. 618/05I* (May, 2005);
- luggage cart – *Decision No. 2652/01* (April, 2003).

In WSIAT *Decision No. 369/06* (February, 2006), the plaintiff/respondent was a passenger involved in a motor vehicle collision while in the course of employment. He initially received workers' compensation benefits, then sought to re-elect when his benefits were terminated. The

defendants brought a section 31 application to determine if the plaintiff's right of action, and subsequently, the FLA claims, were taken away by virtue of section 28. Although the Tribunal found that the plaintiff's action was taken away as against the driver, Plante, who was also a Schedule 1 worker of the same employer, section 28(4) applied to the rental car company which supplied the rental vehicle to Plante without workers to operate it. Therefore, the plaintiff's right of action against the rental car company was not taken away.

It is not sufficient to provide the motor vehicle, machinery or equipment unless it was on a purchase or rental basis. The existence of a contract related to the machinery or equipment that caused the injury must be shown. In *Decision No. 886/02* (2002), 62 W.S.I.A.T.R. 289, the words "on a purchase or rental basis" were noted and it was found that the vehicle involved had been supplied to the defendant on an informal basis, without charge. An informal lending arrangement did not bring an employer within the scope of the Act.

This interpretation of "purchase or rental basis" under the old Workers' Compensation Act was found to be equally applicable to section 28(4) of the WSIA. See WSIAT *Decision No. 1684/06, Sharman v. Loeb Canada Inc.* (January, 2007). In *Sharman*, the defendant/applicant in an action for damages brought a section 31 application. The plaintiff/respondent was a truck driver delivering bottled water to the defendant's warehouse. While unloading, the plaintiff was injured, using a powered lift wagon supplied by the defendant. The defendant submitted that the equipment was not supplied to the plaintiff on a purchase or rental basis. The Tribunal agreed, finding that there was no contract for the use of the equipment or that the work done by drivers unloading their trucks constituted "rent". As section 28(3) also was found not to apply, the plaintiff's action against the defendant was barred by section 28(1).

An action against the lessor of a leased vehicle clearly falls within the product liability exception as does an action against a company/dealership that sells a vehicle that is involved in an accident. See *Decisions No. 314* (January, 1988); *147/05* (2007); *41/88* (August, 1988).

### vi) Multiple Defendant Issues

Sub-sections 29(3) and (4) of the WSIA restrict the right to recover damages:

> (3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.
>
> (4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

Those defendants not protected by the Act from lawsuits are at least protected against liability for the negligence or fault of the defendants, or potential defendants, who are protected. *Decision No. 436* (April, 1987); WSIAT *Decision Nos. 1097/05* (2006); *2197/05* (2006); *2295/06* (2007). The courts, not the Tribunal, determine what portions of the plaintiff's loss or damages are caused by defendants protected from civil action. *Decision No. 436* (April, 1987).

## 6. ELECTION BY WORKER

Section 30 of the WSIA applies where a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan and is also entitled to commence an action against a third party with respect to the worker's injury or disease. The worker or survivor must elect whether to claim benefits or to commence the action and accordingly, must notify the WSIB of the option elected – s. 30(2).

The election must be made within 3 months after the date of accident or death of the worker – s. 30(4). Where no election is made or if notice of election is not given, the worker or survivor will be deemed to have elected not to receive workers' compensation benefits – s. 30(6). The Board retains discretion to extend the time for making an election if it considers it just to do so – s. 30(5).

With concurrent entitlements, the Board should provide the worker with an Election. Many times such injuries will be reported to the W.S.& I.B. and adjudicated upon as any other claim without the worker being provided the Election Form. Thus, in cases of concurrent entitlement, you are well advised to ensure the worker was provided the proper Election Form; if not, you may have grounds to request the matter be removed from the W.S.& I.B. regime.

If the worker or survivor elects to commence an action instead of claiming benefits, the following rules apply (s. 30(14)):

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph three below.
2. If the worker or survivor settles the action and the WSIB approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph three below.
3. The amount is the cost of the benefits that would have been provided under the insurance plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action.

Claims for compensation and health care must be made within 6 months from the date of accident/death – s. 22(1), although the Board may permit a claim to be filed after the 6 month period expires if it is just to do so – s. 22(3). In considering whether clients should pursue a civil action, counsel should note that the time limit for filing a claim for benefits with the Board is extended until six months after the Appeals Tribunal has ruled regarding a worker's right to pursue a legal action against a third party – s. 31(4). See Operational Policy Document No. 15-01-03.

Workers who elect to proceed by way of civil action are not entitled to health care coverage as a result of the definition of "insured service" in section 1 of the *Health Insurance Act*, R.S.O. 1990, c.H.6. *Minister of Health for Ontario v. Clements* (1989), 70 O.R. (2d) 569.

Whereas in civil actions, the plaintiff is required to prove his case on a balance of probabilities, the WSIA requires the worker to be given the benefit of doubt when the evidence on an issue is equally weighted – s. 124(2).

**Deemed Elections**

In *West v. Workplace Safety and Insurance Board* (2005), 78 O.R. (3d) 270 (Div. Ct.), the worker of a hydro company fell 30 feet after the platform he was working on collapsed. The Board determined that the worker's receipt of benefits constituted a "deemed election." In the worker's application for judicial review, the Divisional Court found that the Board did not follow

required procedure and failed to advise the worker of his right to make an election where there was a possible third party claim. The worker had no idea that receiving benefits would forfeit his rights against the third party. As a result of the Board's error, the Divisional Court decided that the worker could not be deemed to have made an election and thus, he retained control over the action against the third party. Of note is the Board's admission that the worker offered to repay all benefits received from WSIB upon reaching a settlement in the tort action which the Board refused, citing that since *Sutor v. Workplace Safety and Insurance Board*, [2003] O.J. No. 311 (C.A.), the Board no longer accepts undertakings to repay benefits.

The Tribunal in *Decision No. 1782/04* (2007), 2007 W.S.I.A.T 229, found *West* instructive and held that workers who were not alerted to their legal rights against third parties may not have validly decided to receive benefits in lieu of pursuing legal action. The Tribunal acknowledged that there may be situations in which it may be appropriate to deem a worker to have made an election to claim benefits although an election was not formally made, stating at paragraph 35:

> Rather than relying on a single factor, such as the receipt of benefits, the circumstances of the case should be subject to a multifactorial analysis, in which all the relevant circumstances are considered. In determining whether the worker is deemed to have made an election, the Panel finds it relevant to consider:
>
> - the worker's age and work experience;
> - the nature of the accident (this goes to whether the potential liability of a third party would be apparent from the nature of the accident);
> - the length of time the worker received benefits from the Board;
> - the severity of the injury caused by the accident and how it may affect the worker's ability to consider the legal implications of the receipt of benefits;
> - whether the worker received information from the Board which would enable him to make an informed choice to receive benefits;
> - whether the worker had the benefit of legal advice following the accident;
> - the complexity of the legal situation, for example, the technical nature of assessing the liability of a third party;
> - any exceptional circumstances relevant in making a decision on the merits and justice of the case – in this appeal, the Panel finds that the Claims Adjudicator's advice to the worker's solicitors in January 1997 is a factor that must be taken into account.

Whether the deemed election principles applies or not can only be determined once the facts of each case have been considered. See *Ververk v. Ontario (W.S.& I.B.)*, 2009 CarswellOnt 3622 (Div. Ct.).

**Withdrawal of Election**

Generally, a worker cannot change his/her mind and de-elect WSIB benefits after having received payments although the Tribunal retains discretion to allow the worker to change his/her election. The Board's likely concern is its ability to recover benefits paid, the viability of the civil action and resources of the worker to maintain the action.

In *Decision No. 704/99* (February, 2000), the deceased worker's widow was found to have received inaccurate information from the Board and was allowed to de-elect her right to sue and claim workers' compensation benefits. A Schedule 2 employer may also allow a worker to de-elect. See WSIAT *Decision Nos. 1853/04* (2006) and *137/04* (2004).

The Tribunal does not have jurisdiction regarding the validity of a worker's original election to claim benefits or the Board's denial of a worker's request to withdraw the original election and sue instead. The worker's only remedy, if he wishes to challenge the Board's decision regarding his request to withdraw his election, is an application for judicial review. See *Decision No. 1062/09*, 2009 ONWSIAT 1494.

**Subrogation**

Schedule 1 workers

Where workers' compensation benefits have been paid to a Schedule 1 worker, any right of civil action is wholly subrogated to the WSIB under section 30(10) of the WSIA. Thus, the worker of a Schedule 1 employer does not have authority to pursue an action independently of the Board – s. 30(10). The Board retains sole authority to commence, continue or abandon the action and decide whether to settle it and upon what terms it essentially "steps into the shoes of the worker". The worker does not retain a residue of right against the tortfeasor for any head of damage or amount of damage which goes beyond the Board's interest – s. 30(10). See also *Toronto Railway*

*Co. v. Hutton* (1920), 50 D.L.R. 785 (S.C.C.); *MacIntosh v. Gzowski* (1979), 15 C.P.C. 14 (Ont. C.A.); *Licata v. Royal Insurance Co.* (1986), 54 O.R. (2d) 397 (Div. Ct.).

Despite the Board's right to control the conduct of the action where the worker elects to receive benefits, the Board still has an obligation of fairness and good faith in its dealings with the worker concerning the settlement of the action. See *Bard v. Longevity Acrylics Inc.*, [2002] O.J. No. 1373 (S.C.J.) (where the Board's unilateral conduct entering into a settlement constituted a breach of duty to act fairly toward the plaintiffs; it was found that the Board could not ignore the FLA claims of the employee's wife and children. Consequently, settlement was not binding on the plaintiffs.).

Schedule 2 workers

For workers of Schedule 2 employers, if the worker elects to claim benefits under the plan, it is the employer, not the Board that is subrogated to the rights of the worker or survivor in respect of the action. The employer is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms – s. 30(11).

A Schedule 2 employer is only able to pursue an injured worker's claim for damages against a defendant. The claim is as if the worker did not elect to claim benefits and is pursuing damages in court based on claim that defendant was negligent. See *Decision No. 413/92*, (1992) 23 W.C.A.T.R. 328. A Schedule 2 employer is not subrogated to the right of a worker's dependant under s. 60 of the *Family Law Reform Act* (now s. 61 of the FLA). *Lewis v. Low* (1984), 2 O.A.C. 218 (Ont. C.A.).

Although the employer becomes subrogated to the worker's right against third parties after the worker has elected to claim benefits, it is still open to the employer to allow the worker to withdraw his election and no third party is entitled to intervene. See *Toronto Railway*, *supra*. Workers of Schedule 2 employers who wish to withdraw a claim for benefits must seek and obtain the consent from their Schedule 2 employer, not from the WSIB. The scope of authority conferred on the Schedule 2 employer is comprehensively broad and includes the right to determine how and who shall pursue a legal action arising out of a workplace accident. Neither

the WSIB nor the defendant is in a position to interfere with the employer's exercise of its subrogated rights. *Decision No. 137/04,* (2004), 71 W.S.I.A.T.R. 134.

Where the recovery exceeds the amount of the Board or the employer's interest (including legal and administrative costs), section 30(12) requires the Board or employer to pay the surplus to the worker. Any such surplus made to the worker offsets the Board's future liability on the WSIB claim until the amount of benefits payable exceeds the value of the surplus paid to the worker – s. 30(13).

The subrogation of the right to sue includes subrogation of the right to sue a future tortfeasor involved in providing treatment to the injured worker. See WSIAT *Decisions No. 463/04* (November, 2004) and *2969/00* (March, 2003).

**"Top up" of benefits**

Workers who proceeded by way of civil action and who receive less than they would have had they elected WSIB benefits can seek a "top up" of benefits through WSIB but only if the terms of settlement in the civil action have received the *prior* approval of the Board – s.30(14). Counsel should be prepared to provide the Board with proposed settlement amounts within a reasonable time frame to allow an informed approval to be given by the Board.

## 7. EMPLOYER'S OBLIGATION TO RE-EMPLOY

Workers employed for more than a year before the accident, where the employer regularly employs more than 20 workers, may benefit from the employer's obligation to re-employ under Section 41, although the employer's obligation is limited – s. 41(1) & (2).

These employers are obliged to return the worker to her pre-accident job (assuming she is able to do the essential duties of that job) or to provide the worker with comparable work when it becomes available. The obligation continues for, at most, two years from the date of the accident. If an employer re-employs a worker after an injury and then terminates the worker within six months, there is a presumption that the termination violates the employer's obligation to re-employ. Given the foregoing presumption in the Act, a "section 41 complaint" is often an easy

way to secure ongoing Loss of Earnings benefits for a terminated worker as the Board typically penalizes employers up to one year's worth of Loss of Earnings benefits, which will usually be paid over to the worker.

The duration of the re-employment obligation is only until the earliest of (s. 41(7)):

- the second anniversary of the date of injury, or
- one year after the worker is medically able to perform the essential duties of the pre-accident employment, or
- until the worker reaches age 65.

Within these timeframes, the employee must be medically able to perform suitable work or the essential duties of his or her pre-injury employment – s. 41(4) & (5). The duty to accommodate must not place undue hardship on the employer – s. 41(6). Suitable work is defined under Operational Policy Document No. 19-02-02 as:

- within the worker's functional abilities,
- the worker has, or is able to acquire, the necessary skills to perform,
- does not pose a health or safety risk to the worker or coworkers, and
- if possible, restores the worker's earnings.

Termination within six months of re-employment creates a rebuttable presumption that the employer has not fulfilled its obligations – s. 41(10). The presumption is rebutted if the employer can prove the termination was not related to the worker's injury. See WSIAT *Decision No. 433/05* (October, 2006, unreported).

**Early and Safe Return to Work (ESRTW) and Labour Market Re-Entry Assessments (LMR)**

The Board's hierarchy of objectives to return in injured worker to employment is as follows: 1) return the worker to the pre-accident job, 2) return the worker to the pre-accident job, modified according to the needs of the worker; or 3) return the worker to the pre-accident employer, in suitable, alternative work. This mandate is referred to as **Early and Safe Return to Work (ESRTW)** processes.

If this procedure fails, the goal is to return the worker to another employer in a comparable job. If this fails, the Board may consider re-training or re-education to return the worker to the workforce. This process is known as **Labour Market Re-entry (LMR)** and usually starts with a **Labour Market Re-Entry Assessment (LMRA)**, followed by a one-shot **Labour Market Re-entry Plan (LMRP)**, culminating with the Board determining the injured worker's residual earning capacity by a "deeming of wages" at the end of the Plan.

With the proclamation of Bill 99 in January 1998, the Board radically withdrew from active involvement in this whole process be establishing the ESRTW process. It legislated that the worker and the employer had to co-operate in the ESRTW process with the Board intervening only in the event of a dispute between the parties.

In practice, the Early and Safe Return to Work process is notoriously problematic. There are many disagreements as to what the return to work plan is; what the functional requirements of the modified job offered actually are; the worker's actual level of disability, and so on. Problems often arise when Claims Adjudicators simply accept employer's bald assertions that they can offer suitable modified work without really investigating the functional requirements of the job.

The Board has designed a Functional Abilities Form (FAF) to be completed by a worker's physician, although there are no guidelines as to how often these forms may be completed. The purpose of the FAF is to give both employer and worker guidance as to the worker's abilities and functional limitations. The form leaves no room for a doctor to declare a worker totally disabled nor room to set limitations to function based solely on pain. It elicits comments only on functional abilities.

Similarly, with LMR Plans, there are many disputes. The worker often has little input as to what plan is adopted. The Board policy setting the criteria to be considered when offering a LMR Plan directs Claims to consider, for instance: the worker's education, training, experience, and the functional limitations imposed by any compensable permanent impairment; nowhere is the worker's wishes included as a criterion to be considered. The Board will often over-estimate the wages in the identified **Suitable Employment or Business (SEB)**, the area of re-employment targeted by the LMR Plan. LMR Plans often fail for a variety of reasons, including: a worker's

intellectual inability to complete a course, recurrence of compensable disability, occurrence of a non-compensable event, and many other reasons. Many times an LMR Plan will fail with the Board terminating benefits and closing out the claim. The issues noted above often provide fodder for appeals.

## 8. NON-RESIDENT WORKERS/EMPLOYERS

Problems arise where the injury arises outside of Ontario or where a non-resident worker sustains an injury here. Subject to sections 18 to 20, a worker not employed in Ontario is generally not entitled to benefits under the WSIA – s. 13(3).

Pursuant to section 18 of the WSIA, if the worker resides in and is usually employed in Ontario and if the employer's place of business is Ontario but the accident happens while the worker is employed outside of Ontario, the worker is entitled to benefits if the duration of employment outside of Ontario is less than six months. Alternatively, upon prior application by the employer, the Board may declare that the insurance plan applies to a worker whose employment outside of Ontario lasts or is likely to last six months or more. Operational Policy Document Nos. 15-01-11 and 15-01-08.

A non-resident employer is an employer under the WSIA if it employs an Ontario resident to work in Ontario. Operational Policy Document No. 12-04-12. Non-resident workers who are employed in another jurisdiction and who are working temporarily in Ontario may or may not be covered by the Act. The Board and the Appeals Tribunal apply a "substantial connection" test to determine whether or not the worker will have coverage. See WSIAT *Decision No. 612/92* (1992), 24 W.C.A.T.R. 297.

Board Policy provides the following in determining the period of time a worker works in Ontario for:

- 5 or fewer days in the course of a year usually does not have a substantial connection with Ontario;

- 6 to 10 days in the course of a year may have a substantial connection with Ontario if the surrounding circumstances suggest that such a connection exists;
- 11 or more days in the course of a year usually has a substantial connection with Ontario.

When applying these time frames, the decision maker considers whether the worker worked in Ontario for the entire day or for only several hours and Board policy contains a list of other factors to take into consideration including (Operational Policy Document No. 12-04-12):

- whether the worker also makes similar trips to other jurisdictions outside the home jurisdiction
- whether trips to Ontario are regularly scheduled or anticipated
- whether the worker simply passes through Ontario or actually performs employment functions in the province
- whether trips to Ontario are strictly for employment purposes or whether they also have a personal component
- the place where the contract of employment was made
- the place where the worker is paid, and
- whether, if Ontario residency status is doubtful, the worker would have worker status under workers' compensation legislation in another jurisdiction.

If an accident occurs outside of Ontario and either the worker resides outside of Ontario or the employer's place of business is outside of Ontario, the worker may still be able to claim compensation from the Ontario Board if the worker's usual place of employment is in Ontario – s. 19(1) and (2). See WSIB *Operational Policy Manual*, Document No. 15-01-08 (03-Mar-2008).

Accidents outside of Ontario are dealt with in section 19 of the WSIA and in the Operational Policy Document No. 15-01-11.

If the worker resides in Ontario and the accident takes place outside of Ontario on a vessel the worker is entitled to claim benefits if the vessel is registered in Canada or the chief place of business of the vessel's owner or the person who offers it for charter is in Ontario – s. 19(3). Similarly, if the accident happens outside of Ontario on a train, aircraft, or vessel, or on a vehicle used to transport passengers or goods, the worker is entitled to benefits under the insurance plan if he or she resides in Ontario and is required to perform his or her employment both in and outside of Ontario – s. 19(4).

Workers who travel to work within Canada from Ontario are subject to an inter-jurisdictional agreement that allows an Ontario-based worker to either claim benefits from the Ontario Board or from the jurisdiction where the worker is injured. Coverage extends to and from the destination point for a worker normally resident and employed in Ontario where the worker is sent to another province. Operational Policy Document No. 15-01-08.

Under the inter-jurisdictional agreement employers are only required to report their worker's earnings in the jurisdiction where the worker is working. Operational Policy Documents No. 15-01-11 and 14-02-12. An election is required and there are time limits and notification requirements that apply to the election – s. 20. The Board must be notified of the election and so must the employer if the employer is a Schedule 2 employer. The deadline for electing is three months after the accident occurs, or, if the accident results in death within three months after the date of death. The Board has discretion to extend the time limits. Unless the contrary is shown, failure to elect leads to a presumption that the worker has elected not to receive benefits from the Ontario Board – s. 20. Operational Policy Document No. 15-01-09.

The receipt of benefits from another jurisdiction is likely to be taken by the Board as an election not to receive benefits in Ontario. The Ontario WSIB is not required to advise a foreign jurisdiction of an election, or the disposition of a claim.

The workplace insurance authority in the jurisdiction where the claim and the election form are filed adjudicates the claim according to its own workplace insurance laws and policies. Operational Policy Document No. 15-01-09.

## 9. INTERPLAY BETWEEN WSIB, ACCIDENT BENEFITS, STD, LTD, CPP, ODSP AND E.I. BENEFITS

Where a worker is in receipt or entitled to payments from other sources, counsel should be wary of attempts to double deduct by paying parties.

<u>Accident Benefits</u>

Workers' compensation benefits are intended to be the first source of recovery; accident benefits become available only where the insured worker intends to commence a tort claim. Section 59(1) of the *Statutory Accident Benefits Schedule,* O. Reg. 403/96 ("*SABS*") provides that an insurer is not required to pay benefits to an insured who is entitled to receive workers' compensation benefits as a result of an accident. An insured however, is entitled to elect out of workers' compensation benefits so long as the election is not made primarily for the purpose of claiming accident benefits. See s. 59(2). See also s. 61, O. Reg. 34/10, filed February 26, 2010 and effective September 1, 2010. Unless the insured elects to bring an action against the tortfeasor, the insured cannot receive accident benefits.

In the recent decision of *Mahjourian v. TD Home Auto Insurance Company*, FSCO A08-001115 (August 6, 2009), the insured, a school bus driver who was injured while exiting the bus, failed to elect workers' compensation benefits. Accident benefits were sought within a few weeks of the accident but no tort claim was commenced. Attendant care benefits were denied and housekeeping and home maintenance benefits were terminated May 9, 2007 (date of accident: July 6, 2006). Arbitrator Richards made an adverse finding about her motive to sue the manufacturer of the bus, given that the action was filed one day after the limitation period expired, giving the appearance of issuing a claim in an effort to receive accident benefits.

An issue which has arisen in previous years is whether the Tribunal has jurisdiction where the worker has received statutory accident benefits (SABs) under the *Insurance Act* but no court action has been commenced. The issue arises because section 31(1)(c) of the WSIA provides that an insurer can apply to the Tribunal to determine whether a "plaintiff" is entitled to claim benefits under the insurance plan. While some earlier cases found that there was no jurisdiction, two decisions considered more extensive submissions and found that the Tribunal has jurisdiction, but for somewhat different reasons. *Decision No. 1362/06I*, 2006 ONWSIAT 2253, concluded that "plaintiff" should be interpreted broadly to include a person who has claimed statutory accident benefits from an insurer.

*Decision No. 14/06*, 2007 ONWSIAT 339, relied on section 31(1)(a) which enables an insurer to apply to the Tribunal to determine whether the right to commence an action is taken away. In 2009, *Decision No. 897/09I*, 2009 ONWSIAT 2323, considered an application by a SABs insurer

in circumstances where only section 31(1)(c) could apply. *Decision No. 897/09I* agreed with *Decision No. 1362/06I* that there is jurisdiction under section 31(1)(c) and that interpreting "plaintiff" narrowly would lead to strange and anomalous results. The legislative drafters could not have intended that disputes about compensation law should be decided by arbitrators at the Financial Services Commission (FSCO) rather than the Tribunal. *Decision No. 897/09I* also noted that this view is consistent with FSCO caselaw which indicates that the Tribunal has jurisdiction.

In *Decision No. 1288/08* (2008), 2008 CarswellOnt 8202 (Ont. W.S.I.A.T.), the worker, a passenger involved in a motor vehicle accident, elected to pursue an action against the driver of the vehicle but did not actually commence an action. The accident benefits insurer applied to determine whether the worker's right of action was taken away. The insurer was found to have standing to apply for the determination of whether the right to commence an action was taken away since "action" includes situations in which a right is conferred but not actually triggered or acted upon. But see *Decision No. 2035/05* (2006), 2006 CarswellOnt 5728 (Ont. W.S.I.A.T.), where the Tribunal did not have jurisdiction to determine the insurer's application as to whether the driver was entitled to claim benefits under the Act because the driver was not a plaintiff in the action.

Counsel should ensure clients make their election to sue or receive workers' compensation benefits relatively early on. The application process as set out in section 32 of the *SABS* was described in *Primmum v. Totic*, FSCO Appeal P03-00033 (July 26, 2004), as follows:

1. A person seeking statutory benefits shall notify the insurer of his or her intention to apply for a benefit.
2. The insurer must provide the person with, among other things, information to assist the person in applying for benefits.
3. The applicant shall submit an application for the benefit within 30 days after receiving the application forms.

<u>Short Term (STD) and Long Term Disability (LTD) Benefits</u>

WSIB is again the first source of recovery here. In Ontario, claimants must exhaust entitlement under private or group disability insurance policies for both short and long-term disability benefits before auto insurers will be obliged to pay income replacement and other classes of weekly benefits (caregiver, non-earner benefits). Where the STD or LTD benefits have been denied, SABS may be payable and amounts shall be repaid upon recovery from the LTD insurer.

Most STD/LTD policies deal with other benefits under the "offset" or "co-ordination of benefits" provisions. The purpose of such provisions is to reduce, where possible, the amount of STD/LTD benefits the insurer will be required to pay out.

In *Neves v. Mutual Life Assurance Company of Canada*, [2002] N.S.J. No. 3 (C.A.), receipt of temporary workers' compensation benefits and CPP disability benefits offset the disability benefit entirely. The combination of the other benefits exceeded the amount of monthly disability benefits and the insurer sought to apply the excess to subsequent disability benefit payments to delay payment of those benefits until after temporary workers' compensation benefits had ceased. The Nova Scotia Court of Appeal held that the offset should be calculated on a monthly basis and any excess offset could not be applied to future months.

There are instances where disability insurers have attempted to deduct other collateral benefits from disability payments where the insured is eligible to receive such benefit and does not apply. A common issue is whether an election by a worker to commence an action and LTD benefits instead of WSIB benefits allows the LTD insurer to deduct WSIB benefits where the worker was entitled to receive them. In *Abdulrahim v. Manufacturers' Life Insurance Co.*, [2003] O.J. No. 2592 (S.C.J.), the claimant was receiving workers' compensation benefits but then de-elected to receive those benefits in order to pursue a tort claim. The insurer continued to offset workers' compensation benefits (even though the benefits had ceased upon the claimant's re-election) on the basis that the claimant was "entitled to receive" workers' compensation benefits. The court held that once the claimant had exercised the right to sue in tort, he was no longer entitled to nor was he in receipt of those benefits and thus, the insurer was not entitled to offset those benefits. Should the claimant lose in tort and return to workers' compensation, the insurer retained subrogation rights under the disability policy to have repayment of benefits paid.

Contrast *Richer v. Manulife Financial*, (2007), 85 O.R. (3d) 598 (C.A.) which offers a different analysis of the phrase "entitled to receive". There, the plaintiff was injured in a motor vehicle accident while in the course of his employment on January 7, 1999. He sustained serious injuries to his left leg and suffered post-operative complications. He was employed as a truck driver and loader by the city of Toronto. His immediate redress was LTD benefits provided through the employer. The policy included a benefit plan that provided that if a city employee became totally disabled and met the criteria set out in the plan, the administrator would pay a monthly benefit on behalf of the city.

Following the accident, the plaintiff initially applied for WSIB benefits but then elected to proceed with a civil action. As such, the WSIB claim was not processed further. Had the plaintiff actually received the benefit, it would have been offset against the basic monthly benefit under the LTD policy.

Following the commencement of the action, Manulife brought a motion for determination of the plaintiff's entitlement to LTD benefits after electing to proceed with a civil action and any offset amounts of WSIB benefits the plaintiff would have received had he not elected to sue. The motions judge decided the plaintiff was not entitled to receive any LTD benefits. In so holding, he contrasted *Abdulrahim* with *Richer*, concluding that subrogation rights did not exist in the latter by reason of s. 267.8 of the *Insurance Act*, R.S.O. 1990, c.I.8. He held that extending *Abdulrahim* to the policy would result in the insurer funding an unrecoverable liability which the policy was not designed to cover.

The Court of Appeal reversed, holding the plaintiff was in fact, eligible to receive LTD benefits under the policy because the plaintiff's application for WSIB had been made but not finally determined, leaving open the possibility of receiving WSIB benefits.

With respect to the issue of whether the LTD benefits were subject to an offset of the amount of WSIB benefits the plaintiff would have received, the Court of Appeal understood the Supreme Court of Canada's interpretation of the phrase "entitled to receive benefits" in *Madill v. Chu* (1976), [ 1977] 2 S.C.R. 400 (S.C.C.) to mean:

> … that the amount of reduction of payments under the plan for WSIB benefits which the [plaintiff] is "entitled to receive" is not the amount of WSIB benefits that the [plaintiff] receives but the amount of such benefits that the [plaintiff] could have received had he exercised his entitlement for them. In this case, the amount by which the monthly benefit payable to the employee is reduced "by any payment to which the disabled Employee is entitled for that month" refers to the amount of WSIB benefits to which the appellant would have been entitled had he not elected to proceed with his civil action. This interpretation gives effect to the observation of Ritchie J. in *Madill v. Chu*, at 410, that an insurer's obligation under the policy should not be "varied adversely to its interest after the happening of the event insured against by the independent act of the insured". [emphasis in original]

Despite its factual similarity to *Abdulrahim, supra*, the Court of Appeal ruled the plaintiff insured was eligible to receive LTD benefits under the policy in an amount reduced by the amount of WSIB benefits which he would have received had he not elected to commence an action. It declined to consider whether Manulife had a right of subrogation.

To date, *Richer* has only been considered/ cited in one decision pertaining to an insurer's right to appeal to the Tribunal. See *Decision No. 987/07*, 2007 W.S.I.A.T. 1667. Although the decision concerned an accident benefits insurer's standing to appeal to the Tribunal, the Tribunal found the Court of Appeal's decision in *Richer* consistent with *Decision No. 1231/01* wherein the Tribunal found the injured worker was entitled to claim benefits under the Insurance Plan. Such matters were concluded to be appropriately addressed by courts.

Canada Pension Plan (CPP)

CPP disability (CPPD), survivor (CPPS) and retirement (CPPR) benefits all interact with workers' compensation benefits. WSIB offsets 100% of the CPP disability benefits paid but only to deduct contributor portions and not the amount allocated the CPP dependents. See Operational Policy Document No. 18-01-13. Under the WSIA, workers entitled to CPPD benefits must inform WSIB within ten days of the material change to avoid serious consequences. See Operational Policy Document No. 22-01-02.

It is pertinent to note that CPPD benefits employ a different definition of disability (severe and prolonged and must prevent the individual from being able to work at any job on a regular basis)

than WSIB. While CPPD considers all of an individual's health problems, WSIB considers only work-related health problems. Hence, it is possible to be eligible for CPPD benefits even if WSIB has determined an individual is able to work. Note however, if WSIB has enrolled an individual in a labour market re-entry program, CPPD may presume the individual is capable of working, thereby denying him CPPD benefits. On the flip side, applying for CPPD benefits while partaking in a labour market re-entry program by WSIB may imply an inability to work resulting in possible termination of benefits by WSIB.

ODSP and E.I. Benefits

Upon approval of a worker's WSIB claim for benefits, any monies received from ODSP or E.I. must be repaid.

## 10. CONCLUSION

Counsel is 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, claims which could be barred by the provisions of the *Workplace Safety and Insurance* Act and preclude an unwarranted commitment of time and resources.

# 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 |