Interplay between Occupational and Non-Occupational Disability cases

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What to expect for the next 2 hours

- A review of the right to sue provisions under the Workplace Safety and Insurance Act, 1997
- A review of those provisions of the Statutory Accident Benefits regulation to the Insurance Act that apply to WSIA cases
- A discussion of how short term and long term disability plans and sick leave plans under collective agreements complicate the management of WSIA claims
- A midway break for refreshments, change in posture, and relief measures
- A review of typical Schedule 2 benefit advances and wage continuation schemes (especially those set out in collective agreements) and an explanation of the payroll and income tax complications arising out of the advance of benefits
- An analysis of strategies for claim resolution and settlement of cases involving multiple insurance schemes
Occupational or non-occupational?

- Did the worker’s condition arise from the employment or from some other cause?
  - The answer may be in dispute.
  - The answer may be “both”.
- Does your approach to managing the case change turn on the answer?
- What liabilities, other than WSIA costs, arise?
When can the worker sue someone else?

- *Workplace Safety and Insurance Act, 1997* (the WSIA) explains a worker’s rights to sue a third party for a work-related injury

  - a worker can never sue his/her own Schedule 2 employer, or any “director, executive officer, or worker” of that employer: **section 26(2)**

  - a worker **can sue** any other person, including other Schedule 2 or Schedule 1 employer or any other individual not mentioned in s. 26(2)
How does the worker exercise the right to sue?

- The worker must elect to claim benefits under the WSIA or to commence the action: **section 30(2)**
- The worker must notify the WSIB and the Schedule 2 employer of the election: **section 30(3)**
- The election must be made within three months of the accident, or such longer time that the WSIB allows: **sections 30(4) and (5)**
  - WSIAT case law establishes that a worker may only re-elect to commence an action after electing benefits if his/her Schedule 2 employer consents to the re-election
- If there is no election, the worker is deemed to have chosen not to claim benefits under the WSIA: **section 30(6)**
What happens if worker elects benefits?

- The Schedule 2 employer is **subrogated** to the rights of the worker or survivor in respect of the action: section 30(11)

- The Schedule 2 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**

- If, in the action, the Schedule 2 employer recovers more than the cost of pursuing the action and the cost of providing benefits to the worker, the **surplus is paid to the worker** and any future benefit entitlement is reduced by the amount of the surplus: section 30(12)
What happens if the worker elects to sue?

- The worker is not entitled to benefits under the WSIA for the injury until the action is resolved.
- If the action is resolved, the worker may be entitled to benefits under the WSIA to the extent that the value of benefits exceeds the worker’s settlement funds/damages (less costs of pursuing the action) IF
  - In a judgment, the amount awarded to the worker is less than he/she would have received in benefits under the Act. (NOTE: a “judgment” can arise out of a resolution agreement between the parties to litigation if the court endorses that resolution in the form of a judgment.) **Section 30(14)1.**
  - In a settlement, a worker is only entitled to further benefits under the WSIA if Board has approved the settlement before it is made (NOTE: the WSIA does not state that the Schedule 2 employer must approve the settlement) **Section 30(14)2.**
How do we calculate the amount of benefits the worker may receive after the judgment or settlement?

- The amount of the judgment or settlement includes any benefits the worker has or will receive from any other source if those benefits reduce the liability of the defendant. **Section 30(15)a.**

- Benefits from **any other source** might include:
  - CPP disability benefits
  - *Employment Insurance Act* benefits
  - Statutory Accident Benefits under the *Insurance Act*
  - Other disability benefits, including a disability pension, long and short term disability, sick leave benefits under a collective agreement, or benefits payable for another claim under the WSIA
Where are disputes about the right to sue resolved?

- The WSIAT has the **exclusive jurisdiction** to hear applications from a party to an action (or an insurer of statutory accident benefits) regarding the right of a worker to sue in the circumstances of the case. **Section 31.**

- The application can be brought at any stage of the litigation, including after the trial.

- The Superior Court of Ontario does not have the jurisdiction to make a right to sue determination under the WSIA, however a party to an action can bring a motion to strike out pleadings where there is no cause of action. It is not unusual for parties to seek to do this, despite the court’s limited jurisdiction.
Right to sue when employer is the Federal Government.

*Government Employees Compensation Act* applies

- No claims against the Crown or against any employee, agent, director or officer of the Crown **section 12**
- Election to claim benefits to commence an action must be made within three months of the accident, or a longer period allowed by the WSIB **Section 11**.
  - There is no “deemed election” in the GECA
  - If worker elects benefits, the Crown is subrogated
  - Any amount recovered by the Crown in excess of the benefit entitlement is payable to the worker, and reduces any future benefit entitlement by the amount of the excess
  - Settlements of the worker must be approved by Minister if worker seeks additional benefit entitlement after settlement
Work related automobile accidents

- The right to sue restrictions in the WSIA and GECA apply to motor vehicle accidents that arise out of the employment.
- The worker would ordinarily have a right to statutory accident benefits (SAB) under the *Insurance Act* for injuries from a motor vehicle accident. There are restrictions, however, that apply where a right to claim benefits under the WSIA exists:
  - An insurer is not required to pay SAB to a person who is entitled to receive benefits under the WSIA or any other workers’ compensation law or plan: *Insurance Act, subsection 61(1)*
  - The insurer is liable to pay SAB if the person elects not to receive benefits under the WSIA, provided that the election is not made for the sole purpose of receiving SAB but not for the period prior to the election *Insurance Act, subsections 61(2) and (3)*
Disability benefit plans and Sick leave benefits

- Fully insured short term and long term disability benefits
  - Premiums paid in full or part by employer
  - Premiums paid in full by worker

- Self insured short term and long term disability plans
  - Administrative services only (ASO) provided by third party (usually insurance company) for adjudication of benefit entitlement
  - Entitlement adjudicated in-house by employer (usually only for short term portion)

- Sick leave benefits
  - Accrued sick leave entitlement
  - Retirement gratuities
Eligibility criteria

Long term disability

- Totally disabled from performing the essential duties of **own occupation** (typically first 24 months)
  - Is accommodation to be able to perform the essential duties of one’s own occupation possible?

- Totally disabled from performing the essential duties of **any occupation** for which the claimant is suited by training, education and experience (typically for the period beyond the first 24 months)
  - Generally accepted by the courts to mean a job that is similar in nature and remuneration to the pre-disability employment
Eligibility criteria

Short term disability and sick leave

- Eligibility criteria varies depending on plan, the administration of the plan, and the culture of the workplace
- For short term plans, typically the criteria is similar to that for the “own occupation” period under an long term plan
- Employer- adjudicated plans and sick leave plans depend very much on the practice and culture of the workplace, the employer’s disability absence management strategy, and the language of the plan or collective agreement
Exclusions from coverage and deductions from benefits

- Exclusion: the injury arose out of the employment or occupation, except if the person is self-employed or otherwise exempt from workers’ compensation coverage.
  - This exclusion does not ordinarily appear in a long term disability plan, but is more common in a short term disability or weekly indemnity plan
  - The intent is for the insured to be disentitled to benefits for injuries or illnesses for which there is coverage under the WSIA

- Deduction: any other benefit received by the insured which is payable as a result of the same illness or injury
  - Benefits payable under the WSIA would then be deducted from disability insurance benefits.
What happens when illnesses or WSIA and disability income replacement plans overlap

- Non-WSIA benefits may arise while the cause of an illness or injury is in dispute or in the process of adjudication.
  - Inconsistent approaches to occupational as opposed to non-occupational illnesses or disabilities depending on the payor of the benefit can have a negative outcome if, in the end result, the employer becomes the payor.

- The worker might have multiple injuries or illnesses, some of which are related to the employment, some of which are not related to employment, and some of which are related both to employment and other factors.
  - Disability insurance plans might exclude pre-existing or work-related illnesses or injuries or apportion liability
  - WSIA does not apportion liability, provided that workplace injury or illness is a significant contributor to the inability to work.
Overlap between the WSIA and the collective agreement

- Sick or disability benefits can arise directly out of the collective agreement
- The agreement will expressly or impliedly also address workplace accommodation
- Disputes over such benefits or workplace accommodations can be the subject of grievances, mediations and grievance arbitrations in the context of a live WSIA claim for benefits
- Are WSIB liabilities and risks considered when resolving labour relations disputes?
Break

- Ergonomically sound stretching may commence.
- Body hydration and fluid disposal activities are encouraged.
Salary continuation versus tax consequences
Part 1.

- Circumstances that might give rise to a continuation of salary after a workplace injury:
  - Employer pays advances to the worker while the adjudication of the claim is delayed
  - Worker exhausts sick leave entitlement or sick bank while adjudication or appeal is delayed
  - Collective agreement provides for a top-up to the benefit entitlement
Salary continuation versus tax consequences
Part 2

- Continuation of pay for a worker can be a continuation of the full gross salary OR a payment of the net value of the benefit (as an advance or in satisfaction of the Schedule 2 employer’s obligation to pay benefits) plus a gross top-up

  - Considerations as to which approach can be taken will depend on administrative capabilities, including adequate payroll systems to differentiate between gross and net payments to a worker

  - Collective agreement language or practices between negotiated collective agreements may dictate the approach
Salary continuation versus tax consequences
Part 3

- The approach selected can have significant income tax consequences for both the employer and the worker

- Continued payment of a gross salary includes deductions from pay for income tax, employment insurance premiums (both worker and employer) and Canada Pension Plan contributions (both worker and employer)
Salary continuation versus tax consequences
Part 4

- Canada Revenue Agency (CRA) policy does not permit a re-characterization of the payment by the employer after the deductions are withheld and remitted

- The worker, however, when filing the annual income tax return is allowed to treat the net WSIB benefit portion as non-taxable

- The effect: the employer pays more than is necessary and the worker gets a tax refund in addition to his/her full net pay from the employer.
Salary continuation versus tax consequences
Part 5

- How did this absurdity begin?

  - Mr. Fraser, a firefighter from Cornwall, challenged his income tax assessment taking his appeal all the way to the Federal Court of Appeal

  - As a reward for his persistence, he ended up with more income by remaining off work than he would have received had he been able to continue to work at full time and full regular wages

  - The CRA created its current policy in response to the Federal Court of Appeal decision
Salary continuation versus tax consequences

Part 6

- Two Quebec employers, hospital Cité-de-la-Santé de Laval and Quebec City have challenged this approach, with some success, in two separate cases.

- In 2004, the hospital sought judicial review of a decision of the Tax Court of Canada. In that case, two pregnant employees were reassigned work as a precautionary measure. For a period with each, there was no work but the hospital continued to pay full wages though no work was performed.

- The wage loss for the period of no work was insured by the CSST under the Act respecting industrial accidents and occupational diseases. The hospital was reimbursed for the advances paid.
Salary continuation versus tax consequences
Part 7

- Quebec City appealed its payroll assessments by the CRA for the years 2000, 2001 and 2002. A judgment was issued by the Tax Court of Canada in 2007.

- The Court specifically considers the CRA policy created after the Fraser decision and applies its analysis to the City’s process which was:
  - An injured worker would be paid his/her full pay following an accident but before a decision by the CSST.
  - Amounts were deducted by the City for income tax, CPP and EI.
  - When the benefits were approved by the CSST and reimbursed to the City, a retroactive adjustment to the payroll (including the issuance of an amended retroactive T4 if necessary) was made.
  - The CRA ruled that this was not permissible under its policy.
Salary continuation versus tax consequences

Part 8

• Quebec City succeeded. The language of the collective agreement was notable, but not determinative. It expressly provided for the following:
  - A worker was entitled to full NET pay during an absence due to a workplace injury or illness.
  - The amount of this payment equal to the CSST benefits was an “advance”.
  - The employer was to issue a revised T4 statement reflecting the portion that was an advance and, therefore, a non-taxable statutory benefit.

• The Tax Court recognized that the worker in such a case, following the CRA’s policy, would receive a higher income as compared to a person who was actually working. It concluded that this result was “absurd”.

Salary continuation versus tax consequences
Part 9

- There was no appeal to the Federal Court of Appeal in the Quebec City case. The result is that the Fraser decision, which is a Court of Appeal decision is in some conflict with the Quebec City decision, which is a Tax Court of Canada decision.

- The CRA has not changed its policy despite the Quebec City decision.
Recommendations to minimize the payroll tax liability

- Consider how workers are paid advances – is it a gross salary payment with deductions at source at the time of the payment?
- Can the system be changed – are the payroll systems in place to alter this approach?
- Consider the language of the collective agreement.
  - Does it speak to a payment of the net amount of pre-injury wages (with or without a top-up)?
  - Does it describe the payment as an “advance”?
  - Does it contemplate or mandate the issuance of a revised T4 statement after WSIA benefits are allowed?
  - Is the payroll practice consistent with the language of the collective agreement?
Sample language – good or bad?

EXAMPLE 1  If Loss of Earnings (LOE) benefits are receivable under the Workplace Safety and Insurance Act, an employee may choose, at the time of reporting the accident, to have such benefits increased to 100% of his net pay, for which a deduction of one-eighth (1/8) day's accumulated sick leave shall be made for each day's benefit paid, provided the employee has made proper notification to the Corporation, as outlined in the appropriate departmental procedures. In order to continue receiving his regular net salary and benefits, the employee shall assign his/her LOE benefit to the Corporation. The Corporation shall indicate the amount received from the Workplace Safety and Insurance Board.

If he chooses to top up his LOE benefits to 100% of his net pay, an employee, absent from work as a result of an accident or an occupational illness incurred in the performance of his duties, shall be paid (in addition to LOE benefits) the difference between LOE benefits and his net normal rate of pay, such that his take-home pay will be neither more nor less than would be the case were the employee at work, and his income tax deductions will be adjusted accordingly.
EXAMPLE 2  If a member is absent from work as a result of compensable accident, the Board or the [Employer], as the case may be, shall pay the difference between the amount paid pursuant to the Workplace Safety and Insurance Board and their normal salary or wages, for a period of one (1) year.

When either amount paid under this provision is exempt from income tax, the total amount paid to the member for the pay period shall not be more than their normal salary or wages in the pay period, less the proportionate amount of income tax. The provisions of this clause do not apply in the case of pensionable injury. Except as otherwise provided in 11.04, no sick leave shall be paid in cases where the member is eligible for Workplace Safety and Insurance Board compensation.
EXAMPLE 3  An employee covered by this Agreement who suffers an injury while in the course of his duties, and who is in receipt of a wage or salary award from the Workplace Safety Insurance Board, shall be paid by the Corporation for a period not to exceed one (1) month for each separate injury, the difference between the said wage or salary award and his current wages or salary.

For absences in excess on one (1) month, the injured employee shall be paid directly by the Workplace Safety Insurance Board.
EXAMPLE 5  Where an employee is absent by reason of personal injury, accident or illness, or who suffers from occupational disease, arising out of and in the course of employment with the Corporation, the employer will pay the employee, in addition to the amount of compensation award by the Board, the difference between the amount of the employee’s net regular salary or wages and the amount of the award for the period of temporary disability. This is to ensure that the employee’s net salary and benefits based upon the employee’s normal working hours at the employee’s regular rate of pay are not reduced by reason of the temporary disability.

The Corporation and the Association agree that the “Net Salary” provision takes into account the non-taxable nature of Workers Compensation payments, and that the income tax deductions will be based on the Employer paid portion of the employee’s pay to ensure that an employee who has been on Workers Compensation received no less, but no more, net salary than if the employee had been working.
Risk management

- Review all collective agreements and disability plans.

- Communicate with other members of organization with responsibility for resolution of grievances, disability claims, sick leave plans, workers’ compensation/occupational health and safety, and payroll administration.

- Assess possibility of litigation (by worker or employer) involving third parties. Weight the benefits and costs of proceeding with a subrogated claim.
• Establish consistent processes for management of WSIA claims and disability/sick leave plans.

• Review payroll processes and corresponding collective agreement language surrounding the payment of advances, salary continuations, and top-up to benefits.

• Eliminate, where possible, excess income tax, CPP and EI remittances where worker is or may become entitled to LOE benefits under the WSIA.

• Improve collective agreement language, through negotiation, to enhance the process in keeping with the Quebec City decision
Settlement of disputes and claims

- Take steps to co-ordinate the settlement of disability claims or grievances with a careful analysis of WSIA liabilities

- WSIA liabilities cannot simply be settled between the worker and employer
  - An agreement between a worker and employer to waive or to forego any benefit to which the worker is or may become entitled is void.  **Section 16**
  - An agreement between a Schedule 2 employer and a worker
    (a) that fixes the amount that the employer will pay to the worker; or
    (b) in which the worker agrees to accept a specified amount in lieu of or in satisfaction of the payments to which he or she is entitled, is not binding upon the worker unless it is approved by the Board.  **Section 63.**
Settlement of claims

- Consider the best time to settle a claim

- Contemplate how to include all concurrent liabilities relating to employment, collective agreement, human rights, and disability insurance in any final settlement

- Create a strategy to deal with the unwaivable rights of a worker

- Consider the utility of the section 63 process or whether there is a mechanism that does not require the approval of the Board