TOUGH ACTS TO FOLLOW

DIFFERENT BENEFITS UNDER FOUR DIFFERENT ACTS

By: Sarah Schumacher
Associate Counsel, WSIAT

Overview

• Overview of Acts
• Types of Benefits
• Phases of Compensation
• Other Acts
Overview of the Acts

• There are 4 Acts that may apply depending on the date of the accident

• Of the 4 Acts, 3 out of 4 have different schemes with different benefits. Two Acts use the same scheme.

The 4 Acts Are:

• Pre-1985 Workers’ Compensation Act (injuries before April 1, 1985)
• Pre-1989 Workers’ Compensation Act (injuries on or after April 1, 1985 and before Jan. 2, 1990)
• Workplace Safety and Insurance Act (injuries on or after Jan. 1, 1998)
Writing 1: Similarities in the 4 Acts

• For each Act, in order to be covered, there must be
  
  • a “worker”,
  
  • an “employer” and
  
  • an “accident” in Ontario

Writing 2: Similarities in the 4 Acts

• Definition of “accident” includes:
  
  • a wilful and intentional act, not being the act of the worker
  
  • a chance event occasioned by physical or natural cause
  
  • disablement arising out of and in the course of employment
    — (s. 1(1) (a) of pre-85, pre-89 Act, and pre-97 Act and s. 2(1) of WSIA)
Similarities in the 4 Acts

• Health Care Benefits
  • All WCAs → expenditures/measures that are deemed necessary or expedient by the Board
    → s.54 of pre-85 and pre-89 Acts and s. 52 of pre-97 Act
  • WSIA → necessary, appropriate and sufficient health care
    → s. 32-34

Similarities in the 4 Acts

• Vocational Rehabilitation (VR) and Medical Rehabilitation (MR) → all WCAs
  → s.54 of pre-85 & pre-89 Acts & s. 53 of pre-97 Act

• Under WSIA split VR into:
  (a) Early & Safe Return to Work (ESRTW)
    → Modified work with the Accident Employer plus initial recovery times (s. 40)
  (b) Labour Market Reentry (LMR)
    → Board program involving LMR Assessment and help getting back to work (s. 42)
Similarities in the 4 Acts

• Recurrences
  – “Recurrence” is a term used in Board policy to refer to a disability attributable to a previous accident, rather than an identifiable new accident.
  – Term not defined in WSIA or WCA
  – Recurrences track back to the original accident which means the benefit scheme from the original accident applies

Benefits Under the Pre-1985 & pre-1989 Acts

• Temporary Benefits
  – Temporary Total (TT)
    • Physically disabled (can’t do any work)
  – Temporary Partial (TP)
    • Full TP benefits = TT Benefits (cooperating in VR/MR)
    • Temporary Partial benefits if RTW with a wage loss
Benefits Under the Pre-1985 & pre-1989 Acts

• Pensions or Permanent Disability (PD) Awards
  – Based on physical or functional loss using average unskilled worker
  – Lifetime award
  – Rated using the Permanent Disability Rating Schedule
    • s. 43 of the pre-85 Act and s.45(1) of the pre-89 Act

Benefits Under the Pre-1985 & pre-1989 Acts

• Supplements
  – Compensate for actual wage loss of particular worker
  – Must have a Pension (PD) award first
  – Supplements change on July 26, 1989 to:
    • s.147(2) → VR Supplement
    • s.147(4)→wage loss partially related to accident & unlikely to benefit from VR
  – Post January 1, 1995→add s.147(14)
Benefits Under the Pre-1997 Act

• Still have Temporary Benefits
  – s. 37(1) Temporary Total Disability Benefits
  – s. 37(2) Temporary Partial Disability Benefits
  – Calculated using 90% of pre-injury earnings

Benefits Under the Pre-1997 Act

• FEL and NEL replace Pension award
  – FEL compensates for future economic loss (wage loss)
    • only up to age 65
  – NEL compensates for non-economic loss (permanent impairment)
    • lump sum (sometimes monthly for life if larger NEL)
Benefits Under the Pre-1997 Act

• Future Economic Loss (FEL) benefits
  – Entitlement based on wage loss
  – Usually receive benefits after 12 months of temporary disablement
    • s. 43 of the Act (amended by s. 107 of WSIA)

Benefits Under the Pre-1997 Act

• Future Economic Loss (FEL) benefits
  – January 1, 1998 (WSIA) changed:
    • the review dates went from fixed times (D1, R1 and R2) to material change in circumstances/yearly review up to 60 months after D1 (old R2)
  – After Nov. 26, 2002 and after July 1, 2007 can review after 60 months in certain circumstances
Benefits Under the Pre-1997 Act

• FEL Supplements
  – Cooperating in VR/MR (now LMR) then entitled to a supplement
    • s. 43(9) of the Act (amended by s. 107(4) of WSIA)

• Non Economic Loss (NEL) Benefit
  – Entitled to a NEL if you suffer a permanent impairment (no need for a wage loss)
  – Start using the AMA Guides, 3rd edition to rate the level of impairment
    • s. 42(1) of the Act (amended by s. 106 of WSIA)

Benefits Under WSIA

• Non-Economic Loss (NEL) Benefits
  – s. 46 of WSIA

• WSIA has Loss of Earnings (LOE) Benefits (s.43 of WSIA)
  – replacing Temporary and FEL benefits
  – Compensates for loss of earnings resulting from the injury
Benefits Under WSIA
When do you get LOE?

• LOE is 85% of pre-accident earnings payable until:
  • Age 65
  • 2 years after injury if you are 63 or older when injury occurred
  • Day no longer impaired by the injury
  • Day where loss of earnings ceases

• LOE can be partial or full and can start from day one

Benefits Under WSIA
LOE Review

• LOE Review occurs:
  – every year, or
  – after a material change in circumstances up to 72 months post-injury

• Can only review LOE after 72 months in certain circumstances → three important dates to remember:
  – January 1, 1998
  – November 26, 2002
  – July 1, 2007
Benefits Under WSIA
LOE Review After 72 Months

• As of January 1, 1998, under s. 44 of WSIA you can only review after 72 months if:
  – The worker fails to notify of a material change in circumstances before the 72 month period expires
  – The worker engages in fraud or misrepresentation
  – NOTE: Due to s. 107(2), a s. 44 review also applies to FEL after final FEL (60 months after initial FEL determination)

Benefits Under WSIA
LOE Review After 72 Months

• As of November 26, 2002 you can only review after 72 months if:
  – NEL redetermination
  – The worker was provided with an LMR plan that is not completed when the 72 month period expires
  – Reasons for review listed as of January 1, 1998 (see previous slide)
Benefits Under WSIA
LOE Review After 72 Months

• As of July 1, 2007, you can only review after 72 months if:
  – Significant deterioration resulting in an initial NEL determination
  – Significant deterioration that will likely result in a NEL redetermination
  – The worker suffers a temporary deterioration in his condition
  – When the 72 month period expires the worker was cooperating in ESRTW or health care (only for LOE not FEL)
  – Reasons for review listed as of November 26, 2002 and January 1, 1998 (see 2 previous slides)

Phases of Compensation for LOE Purposes

• Early and Safe Return to Work (ESRTW) now Work Reintegration (WR)
• Labour Market Reentry (LMR) Assessment now Work Transition (WT) Assessment
• LMR Plan now Work Transition (WT)
Early and Safe Return To Work

• ESRTW/WR refers to the period during which the employer and the worker attempt to find suitable employment for the worker
  – Worker may receive medical treatment during ESRTW/WR

• WSIA imposes cooperation duties on parties in this time frame to facilitate ESRTW/WR

Early and Safe Return to Work

• Section 40 requires cooperation from both the worker and the employer by contacting the other party “as soon as possible” after the injury occurs. The workplace parties must also “maintain communication” throughout the worker’s “recovery and impairment.”

• Both parties are also charged with the task of finding “suitable and available employment”
Labour Market Re-entry (LMR) s.42

• Note while section 42 discusses Labour Market Re-entry, the Board policies in 2011 have switched the language to Work Reintegration (WR) and Work Transition (WT)

LMR/WT Assessment

• LMR/WT Assessment – determines if worker requires an LMR plan
• LMR/WT assessments are provided if:
  – Nature of injury prevents return to employer;
  – Accident employer unable to arrange suitable work; or
  – Accident employer not cooperating in ESRTW
LMR/WT Goals

– Ensure that workers have skills, knowledge and ability to re-enter the labour market;
– At job consistent with the worker’s functional abilities; and,
– Reduces or eliminates the loss of earnings resulting from the workplace injury.

LMR Assessment

• The Board conducts an assessment to determine the worker’s Suitable Employment or Business (SEB) now called Suitable Occupation (SO)
• SEB or SO is a category of jobs suited to worker’s transferable skills and functional abilities and reduces/eliminates loss of earnings from injury
• after assessment, Board decides if LMR plan is required so that worker can re-enter the labour market
LMR Plan

• An LMR/WT plan involves some form of retraining or upgrading in order to get the worker back to work
• When the LMR/WT plan is complete, it is determined that the worker will be able to earn a living in that SEB/SO and a worker’s LOE benefits will be adjusted to reflect the wages he/she should be able to earn in the SEB/SO

Other Changes in WSIA

• 6 month time limit to appeal decisions (s. 120 and s. 125) – Note only 30 days to appeal LMR plan decision at the Board
• Note due to s.112(3), the time limit applies to pre-1998 injuries but only from January 1, 1998 – if the decision was prior to January 1, 1998, a worker/employer could appeal that decision by June 30, 1998
Other Changes in WSIA

• Under s. 126 of WSIA, the Tribunal is obliged to apply Board policy
• As of January 1, 1998, the obligation to apply Board policy applies to Tribunal decisions under all Acts
• Note - the application date in Board policy may lead to a retroactivity issue – see Decision Nos. 396/08R and 878/06R.

Other Acts - Government Employees Compensation Act (GECA)

• Under section 4 of GECA, federal government employees working in the province and their dependents are entitled to receive compensation at the same rate and under the same conditions as provided by the provincial Act.
• Disputes may be brought about whether GECA has incorporated particular provisions of the provincial Act.
Other Acts – GECA

- *Martin v. Alberta*, 2014 SCC 25 – Supreme Court of Canada found that Alberta’s definition of accident and policy on entitlement for psychological stress claims did not conflict with GECA

- NOTE – A *Charter* challenge was not brought in this case and the SCC specifically stated that the constitutionality of the provisions were not before them

Other Acts – *Maritime Liability Act*

- *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44
  - Families of the Ryan brothers sued the boat designer, builder and inspector pursuant to maritime negligence law and the MLA after boat capsized. SCC held families couldn’t sue due to provincial workers’ compensation regime (historic trade-off)
  - Level of intrusion into federal power not sufficient to trigger interjurisdictional immunity

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Need More Information?

• Visit the Workplace Safety and Insurance Board
  www.wsib.on.ca for:
  – Copies of WSIA and Policy
  – Guidelines
  – Brochures
  – Claim forms and bulletins

• Visit the Workplace Safety and Insurance Appeals Tribunal
  www.wsiat.on.ca for:
  – Appeal procedures
  – Forms
  – Practice Directions
  – Tribunal Decision Database
  – Medical Discussion Papers

Need More Information?

• Visit Ontario Workplace Tribunals Library
  http://www.owtlibrary.on.ca/ for:
  – Resources and research assistance on issues in
  labour relations, employment standards, pay
  equity and workers' compensation

• Visit Office of the Employer Advisor
  www.employeradviser.ca for:
  – General information for employers
  – Glossary of terms etc.
Need More Information?

• Visit Office of the Worker Advisor
  www.owa.gov.on.ca for:
  – Information on filing a claim, benefits, returning to work and appeals

• See online “Workers' Compensation: A Manual for Workers' Advocates” from CLEO/IAVGO
  www.cleo.on.ca/english/wcManual/cover.htm

Need More Information?

• *Ontario Workplace Safety and Insurance Act and commentary* by Dee and Newhouse
  (copies available in library on 7th floor of 505 University Ave)
Questions?