

FTR Now

Municipalities and Occupational Diseases

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Occupational disease claims can be very expensive for Schedule 2 employers, particularly those that have a fire department. However, the Workplace Safety and Insurance Tribunal (WSIAT) has recently provided employers with some relief from the costs of occupational disease claims.

BACKGROUND

In 2007, the Provincial Government passed Bill 221, which introduced a presumption that various diseases suffered by firefighters were occupational diseases. Compensation under the *Workplace Safety and Insurance Act (WSIA)* therefore would be payable unless the employer could rebut the presumption and show that there was a non-occupational reason that the employee had contracted the disease. Most of the diseases cited are either cancers or heart conditions, and rebutting the presumption is a very difficult and time consuming exercise.

These claims are very expensive for Schedule 2 employers, who are required to pay the actual costs of benefits (plus a percentage as a WSIB administrative fee), to the WSIB. One occupational disease claim can cost municipalities upwards of \$500,000.00 in total. These costs may include benefits such as Non-Economic Loss (NEL) awards, health care costs, Loss of Earnings (LOE) benefits, and in some tragic cases burial expenses and survivor pensions.

CASE LAW DEVELOPMENTS

The WSIB has been paying these benefits for retirees as well as for active employees. However, the WSIAT has recently issued three decisions in which it has limited the payment of LOE benefits for retirees.

To understand the reasons for the decisions, reference must be made to the wording of section 43(1) of the *WSIA*, which says in part that “a worker who has a loss of earnings as a result of the injury is entitled to payments.” It is clear that a worker needs to have a loss of earnings before entitlement to LOE benefits can be triggered.

The WSIB’s policy on the payment of benefits for occupational disease (Policy #18-02-02) states that the average earnings of workers who have a long latency occupational disease will be based on the greater of:

1. The annual earnings of a fully qualified worker at the time of diagnosis or accident engaged in the same trade, occupation, profession or calling to which the worker's disease is due.
2. The worker's annual earnings in the 12 months prior to the date of accident.

The WSIB has been interpreting this policy as providing LOE benefits at the collective agreement rate in effect at the date that a firefighter is diagnosed with an occupational disease, even if at the time of diagnosis the firefighter has retired, and has been completely out of the workforce. It has been applying the same interpretation of the policy to other employees who have suffered occupational diseases.

This policy has been challenged in three cases before the WSIAT, two of which involve firefighters. In a case argued by Will LeMay of our office, the WSIAT was dealing with an employee who had been out of the workforce, retired and drawing a pension for a period of five years when he was diagnosed with cancer. The WSIB had allowed full LOE benefits from the date of diagnosis to the date that the worker passed away.

The WSIAT rescinded this entitlement, and quoted the following passage from another decision:

By definition, entitlement to LOE benefits is only available to workers who suffer a loss of earnings as a result of an injury or disease. Workers who are completely retired from the workforce and have no intention to return to the workforce for reasons unrelated to the injury or disease cannot reasonably be considered to have any loss of earnings as a result of the injury or disease.

In other words, the WSIAT will not give LOE benefits to workers who have retired from the workforce and are not actually losing any earnings. However, the WSIB is continuing to provide LOE benefits to retired workers, regardless of whether they have any actual loss of earnings flowing from the occupational disease. Therefore, municipalities that have these types of cases should consider appealing the LOE awards made by the WSIB (which can be in excess of \$100,000.00) to the WSIAT.

There is also a question about survivor benefits. Those benefits are set out in section 48 of the *WSIA*. Generally, the survivor's benefits are calculated using the same income that the WSIB used to calculate the workers' LOE benefits. This means that, in the case of workers who are retired, the WSIB has been calculating the survivor's benefit using the same methodology that the WSIAT has rejected for LOE benefits.

Again, this calculation has been challenged successfully in at least one case. Therefore, municipalities that have a case where survivor's benefits were awarded should consider appealing the WSIB's decision to the WSIAT.

However, part of section 48 states that where a worker has no loss of earnings, the spouse will be paid a statutory minimum of \$15,312.51 per year. Therefore, municipalities that are going to appeal a spousal benefit should be aware that this minimum amount may be payable regardless of the outcome of any appeal to the WSIAT.

This is a very complex and costly area for municipalities. Should you have any questions about this issue, you should contact William M. LeMay (Toronto) at 416.864.7276 or your regular Hicks Morley lawyer.

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