FTR Now

Firefighters' Presumptive Legislation Now Applies To Volunteers

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Effective November 4, 2009, the Ontario Government has expanded its presumptive occupational disease coverage legislation for firefighters to volunteer and part-time firefighters and to fire inspectors. This coverage will apply on the same terms and for the same diseases, in accordance with the *Workplace Safety and Insurance Act* ("*WSIA*").

This change will have very significant cost impacts on some municipalities. In this *FTR Now*, we discuss the ramifications of this development.

BACKGROUND

In 2007, the Government of Ontario passed Bill 221, which introduced a presumption that various diseases suffered by firefighters were occupational diseases. Compensation under the *WSIA* would therefore 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. This presumption has now been extended to volunteer and part-time firefighters, and to fire inspectors on the same terms and for the same diseases.

The original rules for full-time firefighters were set out in section 15.1 of the *WSIA*, and in Regulation 253/07. The new rules for volunteer and part time firefighters and fire inspectors came into effect on November 4th, 2009, with the filing of Regulation 423/09 (the "New Regulation"), which simply amends Regulation 257 to expand its scope. In short, these rules are now in force, and municipalities can expect to be hearing from the WSIB with respect to individual claims in the near future.

THE NEW COVERAGE AND WHAT IT MEANS

Under the *Fire Protection and Prevention Act* ("*FPPA*"), "volunteers" are defined as firefighters who work on a voluntary basis, and receive either no compensation or nominal compensation. The New Regulation defines part-time firefighters as "a worker who is a firefighter and is not a volunteer firefighter or full-time firefighter". Therefore, this Regulation applies to anyone who is, or was, employed as a firefighter by a municipality in any capacity.

Heart conditions that arise within 24 hours of attending at a fire scene, or actively participating in a training exercise that involves a simulated fire emergency are considered occupational diseases. In addition, there are eight cancers that are covered by the Regulation as occupational diseases. They are:

a. Primary-site brain cancer;
b. Primary-site colorectal cancer;
c. Primary-site bladder cancer;
d. Primary acute myeloid leukemia, primary chronic lymphocytic leukemia or primary acute lymphocytic leukemia;
e. Primary-site ureter cancer;
f. Primary-site kidney cancer;
g. Primary non-Hodgkin's lymphoma; and
h. Primary-site esophageal cancer.

The new presumption does not just apply to occupational diseases diagnosed from November 4th, 2009 forward. The

presumption applies to any one of the listed diseases (including the heart conditions) where a diagnosis was made on or after January 1, 1960.

The effect of the new rules is that the Workplace Safety and Insurance Board ("WSIB") will now presume that any part-time or volunteer firefighter who was diagnosed with any of these cancers, or a heart condition, got that condition as a result of their work as a firefighter. Unless the municipality can rebut the presumption, they could be liable for significant claims costs.

Schedule 1 employers do not pay the costs of these claims directly. Instead, the costs of occupational disease claims are charged to the Municipal Rate group, and spread out amongst all of the Employers in the group. Occupational diseases are generally not included as costs on NEER statements either, although that does vary depending on the disease. Schedule 2 employers, on the other hand, do pay the costs of these claims directly. Our experience has been that, typically, these claims will have a total cost for Schedule 2 employers of in excess of $500,000.00 each.

CAN YOU CHALLENGE THE PRESUMPTION?

The presumption is rebuttable, and can therefore be challenged. However, challenging the presumption is difficult, and requires significant amounts of evidence in order to be effective or successful. From our experience, the type of evidence you will need to mount a challenge includes the following:

1. Records of the worker's primary employment. This may be important, as the primary employment may also be a source of exposure to cancer-causing agents.
2. Records of the work they have done for the municipality. How often have they responded to fires, and what type have they responded to? How long have they been a volunteer with the municipality?
3. The employee's smoking history. The employee may have a significant smoking history that may be a key cause of their cancer.
4. Records of the employee's training.
5. Medical literature on the causes of each type of cancer.

Should you wish to challenge the presumption in a particular case, we would suggest carefully reviewing the case with your Hicks Morley lawyer, or a member of our WSIB practice group, prior to initiating the challenge.

WHAT BENEFITS WILL BE PAID?

If a claim is allowed, the WSIB will pay the appropriate benefits, depending on the age of the claim. For example, a worker with a diagnosis date of 2002 would be entitled to health care benefits, as well as a Non-Economic Loss ("NEL") assessment, and Loss of Earnings benefits.

There are two issues that will arise. First, for firefighters who are employed at the time they are diagnosed with one of these conditions, there will be a question as to what earnings basis will be used to calculate their benefits. WSIB Policy 18-02-05 states that employees who are employed in concurrent employment will have all of their earnings taken into account. In other words, the municipality will be liable to pay benefits on everything that the employee earns. It should be noted that this calculation can change, depending on the nature of the employee's work.

The second issue flows from the benefits that may be payable to retirees. WSIB Policy 18-02-02 sets out additional guidelines for the calculation of Loss of Earnings ("LOE") benefits for occupational disease claims. Under this Policy, the WSIB calculates the average earnings to be the greater of the annual earnings of a fully qualified worker at the time of diagnosis, or the worker's annual earnings in the 12 months prior to the date of accident.

The WSIB has interpreted this Policy to pay benefits to retired firefighters, even when they do not have any earnings at the time they are diagnosed with the occupational disease. The Workplace Safety and Insurance Tribunal has adopted a different

interpretation, and stated the retirees are not entitled to LOE benefits unless they are employed and actually have earnings at the time of diagnosis. This issue was dealt with in our April, 2009 *FTR Now*, "Municipalities and Occupational Disease". Currently, the WSIB is engaged in a review of its practices on this issue, and the results of that review are expected soon.

It is unclear from the WSIB's existing policies and practices how benefits will be adjudicated for retired volunteer firefighters. It is possible that the WSIB will decide to pay retired volunteer firefighters full LOE benefits, even though they were not employed at the time that their occupational disease was diagnosed. This is an issue we will continue to monitor.

CONCLUSION

Municipalities will be faced with potentially significantly increased costs as a result of the expansion of the firefighters presumptive legislation. However, it will be possible to manage these costs to a certain extent. Should you wish further information, please feel free to contact your regular Hicks Morley lawyer.

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