Refining the "Historic Trade Off": No Additional Damages for a Compensable Workplace Injury

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No employer wants to deal with a workplace accident, injury or disease. Not only does such an incident typically mean a worker has been injured, but it may also trigger a claim for benefits from the Workplace Safety and Insurance Board (WSIB) or a visit from a Ministry of Labour Inspector. Ultimately, it may lead to orders and/or charges under the Occupational Health and Safety Act.

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These, however, are not the only potential liabilities at play. A workplace accident, injury or disease may also lead to a lawsuit from a worker and a grievance filed by a union for an alleged violation of the worker's health and safety rights.

No Right to Sue

The basic premise of the Ontario workers' compensation system is that a worker injured in a workplace accident may file a claim with the WSIB for benefits but may not sue his or her employer for damages suffered. This is often referred to as the 'historic trade off' – the worker trades the right to sue his or her employer in exchange for quick and easy access to income replacement and other benefits.

If an employee sues an employer civilly for damages arising from a workplace injury, the employer can bring an application to the Workplace Safety and Insurance Appeals Tribunal (Tribunal). If the Tribunal decides the claims made by the worker in the civil action have been (or could be) made in support of an application for WSIB benefits, the worker will be barred from continuing with his or her civil claim. The claim will be dismissed, leaving the worker without recourse beyond a claim for WSIB benefits.

Refining the Historic Trade Off

While the 'historic trade off' seems straight forward in theory, it can be more complicated in practice. There are circumstances in which a party has still been able to proceed with all or part of a claim arising from a workplace injury. For example, in unionized workplaces, a grievance for alleged health and safety violations is often filed after a workplace accident, injury or disease. In most cases, the union relies upon a general health and safety provision in the collective agreement to support its argument that the worker ought to be entitled to additional compensation as a result of an alleged breach of the collective agreement, even where the grievor is already be in receipt of WSIB benefits.

In the recent case of OPSEU v. Ontario, the Ontario Court of Appeal weighed in on this issue. It decided that there is little difference between a civil claim for damages for an otherwise compensable workplace injury and a grievance filed under a collective agreement – and therefore a grievance for damages relating to a workplace injury should be barred.

Ontario Public Service Employees Union v. Ontario

Between 1991 and 2008 the Ontario Public Service Employees Union filed 235 grievances against the Ontario Ministry of Community Safety and Correction Services and the Ministry of Children and Youth Services for alleged violations of the health and safety provisions of the collective agreement. Specifically, the Union claimed that by not taking steps to prevent exposure to second-hand smoke in the homes employees were required to visit, the employer had failed to make reasonable provisions to protect and promote the health and safety of its employees. Some employees covered by these grievances also alleged their exposure to second-hand smoke had caused an adverse effect on their health and safety and sought compensation from the WSIB.

In a lengthy decision, Vice Chair Owen Gray of the Grievance Settlement Board found that "the proper question is whether an injury or illness … would be or would have been compensable under the applicable statute if proven." He then decided that he could not award damages for a compensable illness or injury for which the WSIB awarded damages. Essentially, like a civil claim, the grievances were statute barred.

The Union appealed.

On March 12, 2012 the Divisional Court upheld Vice Chair Gray's decision and determined that it was "thorough and carefully considered, logical and intelligible, justifiable and transparent." It also "fell within the range of acceptable and rational outcomes and was reasonable."

Not to be deterred, the Union appealed to the Ontario Court of Appeal.

On May 29, 2013 the Ontario Court of Appeal agreed with both the Divisional Court and Vice Chair Gray, finding that "it makes no difference whether the claim is framed in tort or in contract. It is the substance of the claim that matters. The Vice Chair was correct in his conclusion that the Board could not award damages under the collective agreement for compensable injuries to which the [workplace compensation legislation] would have applied."

What this Means for Employers

The Ontario Court of Appeal's ruling confirms the very purpose of WSIB coverage is to compensate a worker for his or her losses as a result of a workplace injury. Regardless of how or why the worker is injured, the worker cannot seek additional damages, except in *very limited* circumstances.

In the event of a workplace injury, an employer should be mindful of the following considerations:

1. **Stay involved:** With all workplace accidents, injuries or diseases, it is critical to actively participate in any resulting investigation, WSIB claims and return to work efforts. Staying involved ensures that issues are dealt with appropriately as they arise. If served with a civil claim or a grievance is filed, you will immediately recognize the case and be able to act quickly and effectively.

2. **Speak up:** If an injured worker who has received WSIB benefits brings a civil claim or grievance, don't hesitate to challenge the claim. Doing so immediately may decrease any unnecessary costs.

3. **Be strategic:** In some instances, a workplace injury is not reported or entitlement to benefits is challenged. Apart from the overarching obligation to report work-related injuries, in some cases it can prove more cost effective to have the WSIB deem a worker's injury or disease to be work related and will prevent a future civil claim or grievance.

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