



TOOLS FROM THE DARK KNIGHT'S UTILITY BELT

WSIB Issues, WSIAT Hearings and Consideration in Accident Benefits

By

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Below may be used as a general guide to assessing whether an Applicant may be barred from claiming accident benefits under the *Statutory Accident Benefits Schedule* based on his or her entitlement to benefits under the *Workplace Safety and Insurance Act*.

1. Is There Entitlement to Claim WSIB?

61. (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the Workplace Safety and Insurance Act, 1997 or any other workers' compensation law or plan.

Statutory Accident Benefits Schedule — Effective September 1, 2010. O. Reg. 34/10

13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

2. Was the Worker in the Course of His or Her Employment?

“In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of place, time, and activity. . . .”

WSIB Operational Policy Manual Document 15-02-02: Work-relatedness: Accident in the Course of Employment:

“The worker is not necessarily out of the course of employment if engaged in activities to satisfy a personal need. Such examples include if the worker was engaged in an activity that was incidental to the employment or only in engaged in a brief interlude of personal activity.”

Workplace Safety and Insurance Appeals Tribunal, Decision No. 1600/08.

“[T]he Board’s practice in respect of accidents occurring on or off an employer’s premises centres on geographical location as a determining factor as to whether or not a worker was in the course of employment at the time of the accident. Location has been adopted as the line to be drawn between personal activities and work-related activities. For example, the Board considers entitlement in claims where a worker is injured when:

- travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer
- travelling to and from a convention and/or participating in convention activities”

Workplace Safety and Insurance Appeals Tribunal, Decision No. 1600/08.

“The Tribunal has held that, when a trip serves both business and personal purposes, it will be considered to be a business trip if a special trip would have been made to accomplish the business purpose. This is so even if that special trip could have been done by someone at some other time.”

Workplace Safety and Insurance Appeals Tribunal, Decision No. 199/94

3. Was the Worker Employed for a Schedule 1 or Schedule 2 Employer

Section 2(1), in this Act:

“employer” means every person having in his, her or its service under a contract of service

“worker” means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:

“independent operator”, subject to section 12.1, means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose

“Schedule 1 employer” means an employer in a class or group of industries included in Schedule 1 but does not include an employer who is a Schedule 2 employer (other than a Schedule 2 employer declared by the Board under section 74 to be deemed to be a Schedule 1 employer

“Schedule 2 employer” means an employer in a class of industries included in Schedule 2;

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

11. (1) The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer. However, it does not apply to workers who are,

(a) persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer’s industry; or

(b) persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person’s own home or on other premises not under the control or management of the person who gave out the articles or materials. 1997, c. 16, Sched. A, s. 11 (1).

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

“The Supreme Court of Canada considered the question of whether a person was a person was an employee or an independent operator in 71122 (sic) Ontario Ltd. V. Sagaz Industries Canada, Inc., (2001) SCC 59. and stated the following:

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cook J. in Market Investigations, supra. The central question is whether the person has been engaged to perform the services

is performing them as a person in business on his own account. In making the determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case."

Workplace Safety and Insurance Appeals Tribunal, Decision No. 155/11 (February 19, 2013).

4. Does the Worker Have a Valid Election to Pursue a Tort Claim?

61. (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the Workplace Safety and Insurance Act, 1997 or any other workers' compensation law or plan.

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the Workplace Safety and Insurance Act, 1997 if the election is not made primarily for the purpose of claiming benefits under this Regulation. O.Reg 34/10, s. 61(2).

(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the Workplace Safety and Insurance Act, 1997, no income replacement, non-earner or caregiver benefit is payable under this Regulation to the person in respect of any period of time before the person makes the election. O. Reg. 34/10, s. 61 (3).

Statutory Accident Benefits Schedule — Effective September 1, 2010. O. Reg. 34/10

Election, concurrent entitlements

30 (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to

commence an action against a person in respect of the injury or disease. 1997, c. 16, Sched. A, s. 30 (1).

Election

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected. 1997, c. 16, Sched. A, s. 30 (2).

Same

(3) If the worker is or was employed by a Schedule 2 employer, the worker or survivor shall also notify the employer. 1997, c. 16, Sched. A, s. 30 (3).

Same

(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death. 1997, c. 16, Sched. A, s. 30 (4).

Same

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so. 1997, c. 16, Sched. A, s. 30 (5).

Same

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan. 1997, c. 16, Sched. A, s. 30 (6).

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

5. Has the Worker's Right to Sue Been Taken Away?

28. (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

Same, Schedule 2 employer

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

Restriction

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

Exception

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment. 1997, c. 16, Sched. A, s. 28.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

6. If the Insurer Disputes Entitlement has the Applicant Submitted an Assignment of Benefits Form Authorized by the Board?

61(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 34/10, s. 61 (5).

Statutory Accident Benefits Schedule — Effective September 1, 2010. O. Reg. 34/10

7. Applying to the Workplace Safety and Insurance Appeals Tribunal Application

31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;

(b) whether the amount that a person may be liable to pay in an action is limited by this Act;

or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

Same

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

WSIAT PRACTICE DIRECTION

Right to Sue Applications**1.0 This Practice Direction:**

- governs the right to sue application process
- outlines the format and content for supporting materials and
- addresses summonses, withdrawals and other matters.

2.0 The Legislation

- 2.1** In an application regarding the right to sue, certain statutory provisions are applied in the Tribunal's determination of whether a right of action is taken away by the Act.
- 2.2** For accidents occurring after January 1, 1998, sections 26 through 29 of the *Workplace Safety and Insurance Act* (WSIA) are applied in making this determination.
- 2.3** For accidents occurring prior to January 1, 1998, sections 10(9) and 16, and its related sections under the *Workers' Compensation Act* 1990 (pre-1997 Act), as well as the predecessors of these sections under the earlier Acts, are applied in making this determination.
- 2.4** Section 126 of the WSIA requires the Tribunal to apply WSIB policy in appeals; it does not specifically refer to right to sue applications. Nevertheless, the Tribunal requests policy for right to sue applications filed with the Tribunal.¹

3.0 Who May Apply?

- 3.1** The WSIA, section 31(1) provides that the following may apply to the Appeals Tribunal for certain determinations:
- a party to an action, or
 - an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act*.

¹ See *Decisions No. 755/02* and *No. 117/98*. RIGHT TO SUE APPLICATIONS 1 RIGHT TO SUE APPLICATIONS 2

4.0 Available Determinations, Section 31 of the WSIA

4.1 A party to an action or an insurer from whom statutory accident benefits are claimed may apply to the Appeals Tribunal to determine:

- a) whether because of the Act, the right to commence an action is taken away
- b) whether the amount that a person may be liable to pay in an action is limited by the Act or
- c) whether the plaintiff is entitled to claim benefits under the insurance plan.

4.2 Section 31(2) of the WSIA provides that the Tribunal has exclusive jurisdiction to determine an application, as described in section 31(1).

4.3 Section 31(4) of the WSIA provides that a worker or survivor may file a claim for benefits within six months after the Tribunal's determination under section 31(1).

5.0 Interested Parties

5.1 Interested parties are normally the parties in the civil action and the plaintiff's employer.

- a) In applications by insurers from whom statutory accident benefits were claimed under section 268 of the *Insurance Act* there may be other interested parties.
- b) Parties who are neither applicants nor respondents but have an interest in the application may contact the Tribunal Counsel Office.
- c) Where a party submits that a company, organization or individual is the plaintiff's employer, the Tribunal will generally require that notice of the application is provided.

6.0 Materials

6.1 All Right to Sue Statements and other material to be relied upon in a right to sue application must be served on all interested parties to the application. The party filing the material must provide the Tribunal with an *affidavit of service* to prove notification to all other parties. In addition, three copies of these materials, one of which is not bound, must be filed with the Tribunal. **RIGHT TO SUE APPLICATIONS 3**

6.2 Applicant's Materials

The applicant shall prepare an "Applicant's Right to Sue Statement" containing the following information:

- (1) Table of Contents
- (2) A statement of the facts
- (3) The issues and arguments to be made
- (4) The law and
- (5) The determination sought
- (6) Documentary evidence to support the facts upon which the applicant intends to rely, including any relevant material from the Board file
- (7) Copies of the relevant portions of examinations for discovery, and copies of the relevant portions of transcripts of any previous proceedings, if applicable
- (8) A list of all witnesses who will give testimony and an outline of their testimony
- (9) All pleadings in the action and in any other matter arising out of the same set of facts.

6.3 Co-Applicant or Interested Party's Materials

- a) A Co-Applicant or an Interested Party may also file a Right to Sue Statement. The Co-Applicant or Interested Party's Right to Sue Statement shall be in the same form as the Applicant's Statement, but no material need be duplicated.
- b) The Co-Applicant or Interested Party's Right to Sue Statement must be served on all interested parties and filed with the Tribunal as soon as possible and no later than twelve weeks before the date of the hearing.

6.4 Respondent's Materials

- a) The Respondent's Right to Sue Statement shall be in the same form as the Applicant's Statement, but no material need be duplicated.**RIGHT TO SUE APPLICATIONS 4**

- b) The Respondent's Right to Sue Statement must be served on all interested parties and filed with the Tribunal no later than six weeks before the date of the hearing.

6.5 Reply Material

- a) The Applicant may prepare a Reply to the Respondent's Right to Sue Statement.
- b) The Applicant's Reply must be served on all interested parties and filed with the Tribunal no later than three weeks before the hearing date.

6.6 Correspondence

Parties must provide copies of all correspondence with the Tribunal to all interested parties.

6.7 Employer and Claim Status Information

Ten weeks before the hearing date, the Tribunal will forward status information regarding employer accounts and claim files to all interested parties.

6.8 Late Filing of Materials

- a) If a Respondent's Right to Sue Statement or an Applicant's Reply Statement is filed late, copies should be provided to the parties to the application in the manner outlined above.
- b) The admissibility of these materials will be the subject of a preliminary issue at the hearing; the Panel or Vice-Chair shall decide their admissibility.

7.0 Tribunal Process

7.1 Scheduling

Once the Applicant's Right to Sue Statement is received by the Tribunal, it will be reviewed by Tribunal Counsel. Tribunal Counsel may request clarification of the issues or request further documentation. The application will be referred to the Scheduling Department by Tribunal Counsel.

7.2 Adjournments

A request for adjournment should be made in writing to the Tribunal's Appeals Administrator as soon as possible. The request should set out the reasons for the **RIGHT TO SUE APPLICATIONS 5**

request and *include the consent of the parties*. A copy should be sent to the other parties. If an adjournment is granted, it will be several months before the matter can be rescheduled.

7.3 Summons to Witness and Production of Documents

Any party to a right to sue application may make a request for a summons to the Tribunal.

- b) A summons request should be made as soon as possible and at least six weeks before the date of the hearing.
- c) The party requesting the summons must provide the witness's name and address information to the Tribunal.
- d) All summons requests will be reviewed by the Tribunal. If the Tribunal agrees that the person's testimony is necessary and will be useful to the proceeding, and that a summons is required, the Tribunal will prepare the summons.
- e) The summons will be delivered to the party making the request. That party will be responsible for serving the summons and paying the expenses according to Tariff A of the *Rules of Civil Procedure*. That party will provide the Tribunal with an original affidavit of service.
- f) If the Tribunal declines to issue a summons, the party may require that the summons request be placed before a Vice-Chair or Panel of the Tribunal. The Vice-Chair or Panel will decide on this request on the basis of written submissions.
- g) Where the Tribunal issues a summons on its own initiative, the Tribunal will serve the summons and pay the expenses.
- h) A request for a summons for the production of documents is usually referred to a Vice-Chair or Panel for instructions. When documents are in the control of one of the parties, the parties are required to explore the release and exchange of documents.

7.4 Withdrawals and Orders on Consent

- a) If the parties to the application have settled the action, the applicant shall notify the Tribunal in writing, prior to the scheduled hearing date, to indicate that the application has been withdrawn. This letter shall be copied to **RIGHT TO SUE APPLICATIONS 6**

all interested parties. Last minute withdrawals waste both Tribunal and parties' resources so parties should provide as much notice as possible of withdrawals.

- b) If the parties have settled the action but continue to seek a determination from the Tribunal with respect to issues raised in the application, they must attend on the scheduled hearing date with an agreed statement of fact, which is supported by available documentation.
- c) The Tribunal is not bound by the agreed statement of facts of parties to an application. Therefore, parties in the situation described in paragraph 7.4(b), are required to be prepared to speak to the matter on the scheduled hearing date and respond to any questions or concerns raised by a Tribunal Panel or Vice-Chair.

7.5 Costs and Expenses

The Tribunal does not award costs. (See *Practice Direction: Representatives' Fees and Costs.*)

The Tribunal does not reimburse expenses of parties to an application.

7.6 Reconsiderations

Decisions of the Tribunal are final (WSIA section 123(4)). Nevertheless, the Tribunal has the discretion to reconsider a decision (WSIA section 129). Reconsiderations, however, are rarely granted. (For pre-1998 injuries and decisions, see the pre-1997 Act, sections 92 and 70, and section 123(1) and Part IX of the *Workplace Safety and Insurance Act.*)

A reconsideration involves two steps:

- (1) The Tribunal must decide whether it is advisable to reconsider the decision. This is called the threshold test.
- (2) If the threshold test is met, the Tribunal must decide whether the previous decision should be changed and, if so, how it should be changed. This is called the decision on the merits.

Additional information about the threshold test is available in the *Practice Direction: Reconsiderations*; however, the process for a request arising from a right to sue application is set out here. Most requests are decided on the basis of **RIGHT TO SUE APPLICATIONS 7**

written submissions although the Tribunal may require an oral hearing. The usual process is described below.

7.7 Limited Time to Apply for Reconsideration

Unlike most Tribunal proceedings, right to sue applications do not result in a final determination of rights. The party seeking to sue faces further proceedings in court or before the Board. There is a great need for finality, so that all parties can pursue the appropriate proceedings. There is also a significant potential for abuse of process in requests to reconsider section 31 applications. Unlike the courts, the Tribunal cannot award costs. (See *Practice Direction: Representatives' Fees and Costs.*)

The Tribunal has determined that as a matter of general practice, it is not advisable to reconsider Right to Sue Applications, unless a completed request to reconsider, including any supporting materials, is received by the Tribunal and the other parties within 40 days of the date of decision. This timing does not apply to a request for clarification.

The Tribunal Chair may exercise the statutory discretion to assign a late reconsideration request to a Vice-Chair or Panel. In exercising this discretion, the Tribunal Chair will consider any relevant factor, including:

- a) Whether the request raises a significant issue which has a reasonable prospect of meeting the threshold test
- b) Whether there is a reasonable explanation for the delay, and
- c) Whether there is any prejudice to any party.

7.8 Reconsideration Process in Applications Regarding the Right to Sue

- a) A party who wants a reconsideration (the Applicant) must complete the Reconsideration/Clarification Request form and explain why the decision should be reconsidered or clarified. Additional submissions and any supporting documents should be attached to the form. Forms are available on the Tribunal's website at **www.wsiat.on.ca**.
- b) The completed Request for Reconsideration/Clarification form and any additional submissions and supporting documents should be sent to the Tribunal and to the other parties (Respondents) to the original decision.

- c) The completed request and any supporting materials should be received by the Tribunal and the Respondents within 40 days of the date of the decision.
- d) If the completed request and any supporting materials are not received by the Tribunal and the Respondents within 40 days of the date of the decision, the Applicant should include submissions on why the time should be extended with the request.
- e) The Respondents will have three weeks to respond.
- f) Respondents must complete the Reconsideration/Clarification Response form, available on the Tribunal's website at www.wsiat.on.ca. Additional submissions and any supporting documents should be attached to the form. If the request to reconsider was not received within 40 days of the date of the decision, Respondents should include submissions on whether the time should be extended with the response. The completed response should be sent to the Tribunal and to any other parties.
- g) Submissions are then complete and will be assigned to a Vice-Chair/Panel for decision on the threshold test.
- h) If the threshold test is met, the case will be reconsidered and a new decision made on the merits. The Tribunal may give instructions about the procedure to be followed on the decision on the merits.

Effective date: July 1, 2014

Workplace Safety and Insurance Appeals Tribunal