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Employer contributions not part of pre-injury pay: Court

Dissension among decision-makers on whether benefits should be part of earnings for workers' compensation

| BY STEPHEN SHORE |

ONTARIO EMPLOYERS paying Workplace Safety and Insurance Board (WSIB) premiums may have avoided making increased payments thanks to a recent decision by the province's Workplace Safety and Insurance Appeals Tribunal (WSIAT) that was overturned and then reinstated in higher courts.

Joe Rodrigues, an employee of Highgate Metal Erectors, a sheet metal company in Oakville, Ont., challenged the WSIB's longstanding policy of excluding an employer's contribution to a health and benefit plan from the calculation of the employee's "pre-accident earnings," a challenge that could affect the amount of WSIB premiums paid by employers.

The Workplace Safety and Insurance Act (WSIA) provides benefits to a worker injured in the course of employment. The benefits compensate the worker for wage loss if the injury prevents the worker from returning to her regular job. The amount of the benefit is calculated as a percentage of a worker's earnings before the accident that caused the injury — also referred to as the worker's "earnings basis."

Historically, and in accordance with WSIB policy, the calculation of pre-accident earnings has not included contributions made by an employer on account of a health and benefit plan. In *Rodrigues v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, Rodrigues challenged this exclusion by claiming his pre-accident earnings should include his base wage rate plus the amount Highgate contributed to an employee health and benefit plan on his behalf. He argued it was the government's intention that employer contributions be included in the calculation and pointed to certain government statements to this effect. If correct, the compensation paid to Rodrigues by the WSIB would increase by almost $5.50 an hour — almost 15 per cent.

Exclusion of employer-paid benefits supported by tribunal and court

The WSIAT rejected Rodrigues' argument, preferring instead the WSIB policy and practice. However, the Ontario Divisional Court, in a 2-1 decision, sided with Rodrigues. The court found the tribunal's failure to consider the legislative history was a "reviewable error" and ordered the case back to the tribunal for reconsideration.

The Divisional Court's decision was appealed to the Ontario Court of Appeal, which, in another 2-1 split, restored the decision of the tribunal. The Court of Appeal ruled the tribunal's decision was neither unreasonable nor had it committed a

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Federal government on hiring spree

LAST YEAR, the federal government offered jobs to more than 4,200 post-secondary graduates and plans to continue to ramp up recruitment efforts this year, according to a report from Canada's top bureaucrat.

In his annual report on Canada's public service, the Clerk of the Privy Council Kevin Lynch wrote the government exceeded its goal to make offers to at least 4,000 graduates in 2008-2009, the same number of offers in 2007-2008.

In the 2009-2010 fiscal year the government will continue to recruit new graduates through career fairs on university and college campuses, wrote Lynch. There will also be more efforts to recruit mid-career professionals.

"Effective recruitment is really about getting the right people in the right jobs at the right time to meet the business needs of public sector organizations," wrote Lynch.

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Case could lead to legislative changes

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reviewable error in failing to consider legislative history.

Looking forward

In one respect, the Court of Appeal's decision is not surprising. In the history of the WSIAT and its predecessor (the Workers' Compensation Appeals Tribunal), the Divisional Court has rarely interfered with WSIAT decisions. Moreover, each time the Divisional Court has set aside a decision of the WSIAT, the Court of Appeal has restored the tribunal's decision. This unblemished record of the WSIAT is astonishing considering the thousands of cases it has decided.

Despite the unsuccessful court challenge, injured worker advocates may try to convince lawmakers to amend legislation to include employer benefit contributions in the calculation of pre-accident earnings.

Rodrigues filed a motion for leave to appeal to the Supreme Court, which was denied May 7, 2009.

The denial of the leave to appeal is also not surprising, as the Supreme Court has a record of directing lower courts to show deference to administrative tribunals. However, despite the unsuccessful court challenge, advocates for injured workers may try another tactic — convincing lawmakers to amend the legislation so it clearly includes employer benefit contributions in the calculation of pre-accident earnings.

If successful, this may have a profound effect on the cost of WSIB premiums, as well as trigger a considerable transfer of wealth from employers to workers — the beneficiaries of the workers' compensation system.

One final note: The WSIA provides that employers, in most circumstances, must continue benefit contributions during the first year of injury. As such, the decision in *Rodrigues* only applies to the calculation of pre-accident earnings for workers who remain injured after the first 12 months of being unable to work because of injury.

For more information see:

•*Rodrigues v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 CarswellOnt 6107 (Ont. C.A.).

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A split decision by the Ontario Court of Appeal

Two of the three judges of the Ontario Court of Appeal disagreed with the Ontario Divisional Court's finding that the WSIAT should have considered the WSIA's legislative history in order to make a reasonable decision on the definition of "earnings." The legislative history was not necessary to reach a reasonable and informed verdict if other factors were considered, said the appeal court majority.

The one dissenting judge supported the lower court's finding. The dissenter felt the legislative history on the meaning of "earnings" was important and the Workplace Safety and Insurance Appeals Tribunal should have given consideration to it.

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