The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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The 4 ½ Minute Overview

Significant developments in Ontario Workers' Compensation

OTA 77'th Annual Convention Edition

Trucking Premium Rates

In 2003, premium rates shot up from $5.61 to $5.94 (+5.9%), even though the Board at first wanted over a 10% rate hike. Further rate hikes were expected for 2004. In July, 2003, following intervention by OTA and other employer groups, the WSIB agreed to a "net zero" increase for 2004, meaning that while there would be movement within individual rates, the aggregate average premium would not budge from 2003. The 2004 trucking rate will actually decline 1.9% to $5.83. The Board will still be collecting about $182 million from the trucking industry in 2004 (about $5 million less than in 2003). What the future holds is unknown. It is unlikely however that the slight drop in 2004 premiums is the start of a new trend. WSIB long term funding issues remain on the table. The Board has committed to reviewing increased medical costs, labour market re-entry program costs and administrative costs, along with the Board's long-term funding strategy with the business community. However, it seems as if there are serious long term funding pressures on the system.

Experience Rating Reform

Experience rating [NEER] is being changed slightly effective January 1, 2004, making it more powerful. The Board is presenting two options, "Option A" and "Option B" and will be making its policy decision in December on which to choose. Rebates and surcharges will both be higher, although more money will be returned to the industry regardless of which option is chosen. For Rate Group ["RG"] 570 (General Trucking), based on the 1999 benchmark year, ER returned approximately 5.4% (of the total NEER premium) in a net rebate. Under "Option A" this would increase to approximately 6.9% and under "Option B" to approximately 7.2%. The Board's proposed changes will benefit the industry overall no matter which Option is chosen. RG 570 enjoys an approximate $6.1 million net rebate based on an initial NEER premium of $112.6 million. The net rebate under proposed Option A would increase to $7.77 million. Both the magnitude of the rebates and surcharges will increase under Option A. The rebates would increase from $10.2 million to $13.0 million and the surcharges from $4.07 million to $5.23 million. Under Option B, the net rebate is increased from $6.1 million to $8.14 million. As with Option A, the rebate and surcharges are enhanced over the present formula. The rebates would increase to $13.98 million from $10.18 million and the surcharges would increase to $5.8 million from $4.07 million. It is impossible to predict precisely how the proposed changes will impact the industry, as these projections are for illustrative purposes only, and they assume a constant performance based on 1999 standards. 1999 has been chosen as that is the most recent year available for a full NEER issue. The bottom line: work place safety and insurance cost exposures are on the rise. **See September 12, 2003 issue of The Liversidge *e*-Letter, "WSIB Plans to Reform Experience Rating".**

The effect of a Liberal Government

Workplace safety and insurance [WSI] was not a campaign issue and has dropped off the political radar screen since 1995, when it was hot. In fact, in the 1995 election, the Liberals had a position very similar to the Conservatives **[see September 30, 2003 issue of The Liversidge *e*-Letter, "Will a Liberal Government change workplace safety and insurance?"]**. While the present government did not campaign on WSI reform, there are several issues heating up, not the least of which are compensation for disease and the long-standing question of universal coverage (independent operators). The Board's coverage recommendations are still sitting on the Minister of Labour's desk and are more likely to be revived under the current government **[see June 26, 2002 issue of The Liversidge *e*-Letter, "Coverage Under the WSIA: WSIB Releases Coverage Discussion Paper]**. The issue of WSI coverage for independent operators will very likely be addressed within this Government's first mandate. The construction industry is committed to revive this issue **[see June 26, 2002 issue of The Liversidge *e*-Letter, "Coverage Under the WSIA: Coverage for Independent Operators]**.

Many key appointments to various labour focused boards, commissions and tribunals will be coming due soon, including key slots at the WSIB and WSIAT. The Liberals do support an independent audit of the WSIB operations and will study whether to index benefits to inflation (they are now partially linked).

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Constitutional Issues and the WSIB

Division of Powers: Jurisdiction of the WSIB on Federal Undertakings

In **W.S.I.A.T.** ***Decision No. 1005/01*** **(March 25, 2002)**, the Appeals Tribunal (the independent and final level of appeal in the Ontario WSI scheme) held that the WSIB "Workwell" Program (a health and safety audit) was not applicable to federal undertakings. The employer was a federally-regulated inter-provincial busing company. The Board assessed a penalty against the employer under the Workwell program. It was not disputed that the Workwell program was a constitutionally valid program as it applied to provincial companies. It was also not disputed that the WSIA, to the extent that it was legislation with respect to compensation for injured workers, applied to federal undertakings. The issue was whether the Workwell program, which was adopted under a more general provision of the WSIA, intruded on the vital and essential operation of the federal undertaking.

A number of audit items required the evaluator to assess whether requirements of the federal Canada Labour Code had been met. When the federal legislation sets a higher standard than the provincial legislation, the Panel questioned the basis on which a provincial body could become the enforcer of that higher standard. The Panel also questioned aspects of the program that reflected the fact that the Ontario Occupational Health and Safety Act had a higher standard than the Canada Labour Code. In these instances, the Workwell program had the effect of requiring the federal undertaking to comply with a provincial standard when the federal legislation had not imposed that standard. The Panel had concerns about the validity of portions of the audit that required the evaluator to judge the level of knowledge of workers of their rights and obligations under federal legislation.

Reasoning that every decision of the Tribunal involves an interpretation of the WSIA and is therefore a decision under s. 52(1) of the Constitution Act [the Constitution is the supreme law of Canada], the Tribunal had the jurisdiction to determine if any provision of the WSIA is applicable to a federal undertaking. The test on the constitutional question was whether the impact of the provincial legislation on a federal undertaking affected a vital part of the management operation of the undertaking. The test was not merely whether the intent of the legislation was compensation or health and safety. Even if the intent was health and safety, the issue was the impact on the management, working conditions and labour relations of the undertaking.

The Panel found that the Workwell program did intrude on the vital and essential operations of the federal undertaking. By its essential nature, it was aimed at affecting the behaviour of senior management and all managers, supervisors, workers and contractors in an ongoing way. The Panel concluded that the Workwell program did not application to federal undertakings.

Application of the Charter

In October, in ***Nova Scotia (WCB) v. Martin*****, [2003] S.C.J. No. 54**, the Supreme Court of Canada has changed and clarified the law with respect to an administrative tribunal's ability to address constitutional questions, and in so doing, has struck down provisions of the Workers' Compensation Act of Nova Scotia which limited benefit entitlement for workers suffering from chronic pain. This case will have profound implications for Ontario.

The appellants suffered from chronic pain attributable to a work-related injury. Section s. 10B of the *Workers' Compensation Act* (Nova Scotia) exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits are available. It was argued that this provision infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms* [equality under the law].

The Nova Scotia Appeals Tribunal held that it had jurisdiction to apply the *Charter* and allowed the appeal on the merits, holding that the Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations were not justified under s. 1 [subject to reasonable limits]. The WCB appealed the Appeals Tribunal's *Charter* conclusions and jurisdiction.

The Supreme Court of Canada held that section 10B of the Act and the Regulations in their entirety infringe upon s. 15(1) of the *Charter* and the infringement is not justified under s. 1. The challenged provisions are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. The general declaration of invalidity is postponed for six months from the date of this judgment.

The Constitution is the supreme law of Canada and, by virtue of s. 52(1) of the *Constitution Act, 1982*, the question of constitutional validity inheres in every legislative enactment. From this principle of constitutional supremacy flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. To allow an administrative tribunal to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the

general invalidity of a legislative provision for all future cases.

Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision.

The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case. The legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part."

The potential impact for Ontario: An un-proclaimed section of the Ontario WSIA [s. 14] limits benefits for chronic pain "subject to such limits and exclusions as may be prescribed". While it was doubtful that these provisions would ever be proclaimed for political considerations, the *Martin* decision effectively and firmly shuts the door. However, in Ontario benefits for occupational stress (other than traumatic stress) is not compensable [WSIA, s. 13(4)] and it is likely that we will soon see a *Martin* argument on a stress related case. Undoubtedly, a stress case will receive attention by the WSIAT and the courts.

A scan of significant WSIAT decisions

Employer Rate Group Classification

Even though a company's business activities predominately involve trucking, if that trucking relates to preparing sites for construction, the company will be assessed as an excavating company and not a trucking company **[W.S.I.A.T. *Decision No. 2230/01* (October 29, 2001)]**.

Independent Operator

The lack of submission of the WSIB questionnaire will not be determinative on the questions of worker versus independent status. Rather, the Tribunal held that Board policy did not deem owner-operators to be workers until the questionnaires were filed. Instead, Board policy, correctly read, does not allow for independent operators to apply for personal coverage without submission of the questionnaire. The employment relationship is decided based on the substance of the relationship, not the filing of WSIB forms **[W.S.I.A.T. *Decision No. 3133/00I* (March 19, 2001)]**.

Tribunal decisions have been consistent in focusing on the business reality of the relationship while considering all the circumstances without relying on any one criterion. While some elements of a relationship may be suggestive of an employment relationship, if the prevailing character or substance of the relationship was more in harmony with the relationship of an independent operator and principal than with a worker and employer, the individual will be deemed an independent operator. Particularly persuasive elements of the relationship are: an agreement signed by the parties, which clearly intends that the claimant be treated as an independent operator; the claimant's ability to hire employees; ownership and maintenance of the independent operator's own vehicle; and the lack of any express provision prohibiting the claimant from driving for other companies **[W.S.I.A.T. *Decision No. 2150/00* (February 28, 2001)]**.

A truck driver who entered into a lease-to-own arrangement with his carrier, was deemed to be a worker as the driver had little opportunity for other work. He drove for one company and was neither at risk or loss or increased profits through independent business decisions **[W.S.I.A.T. *Decision No. 1079/01* (May 14, 2001)]**.

Where the intent of a contract is to obtain the labour of a truck driver and not the services of a truck and driver, an employment relationship is established **[W.S.I.A.T. *Decision No. 2801/01* (February 5, 2002)]**.

Independent Operator proceeds with action against shipper

Because such individuals frequently operate their trucks exclusively for one transportation company, characterization of the owner-operator's status can be difficult. Generally, Tribunal decisions have focused on the business reality of the relationship in light of all the circumstances. No single criterion is determinative. Considerable significance will be given to the extent of an individual's capital investment and emphasis on the stated intention of the parties. Where the evidence has established a substantial capital investment and a clear intention to have an independent arrangement, panels have found that an employment contract had not been created. An independent courier without personal coverage was free to proceed with an action against the principal's customer **[W.S.I.A.T. *Decision No. 1146/02* (October 7, 2002)]**.

Disablement due to vehicular vibrations

A life-long long-distance truck driver was granted entitlement for a disc prolapse and nerve root irritation as a result of vehicular vibration from his work as a truck driver **[W.S.I.A.T. *Decision No. 2627/00* (November 30, 2000)]**.

Even where the driving did not cause the development of an underlying degenerative back condition, long-distance driving is an aggravating factor **[W.S.I.A.T. *Decision No. 1095/02* (September 30, 2002)]**.

Properly performed surveillance may be material evidence to stop payment of unwarranted benefits

A former truck driver had his claim for benefits reduced as a result of surveillance evidence which established that the worker was not as disabled as alleged. The Tribunal found that the worker had some level of impairment, however, based on the surveillance evidence, the worker was capable of general activities of daily living without assistance. As a result, the worker was not entitled to the services of a full attendance allowance **[W.S.I.A.T. *Decision No. 2021/01* (January 29, 2002)]**.