

## WORKERS' COMPENSATION FOR INSURERS

Shawn O'Connor, partner Kelly Santini LLP, Ottawa

The workers' compensation laws in place across Canada are the original no-fault insurance system. In 1913, The Meredith Report led to the implementation of the *Workman's Compensation Act* in Ontario in 1915. The heart of The Meredith Report was the trade off of the removal of the rights of workers to sue employers in exchange for guaranteed compensation. Ontario's present *Workplace Safety and Insurance Act* maintains this concept, and similar legislation has been implemented in all provinces.

Insurers who are handling personal injury claims should consider at the start of the file whether the legislation removes the right to sue in the claim being made against their insured. While the wording of the legislation varies with each province, the questions for an adjuster to ask are the same:

1. Is my insured an employer who is required to be enrolled with the provincial workers' compensation program, or with the federal equivalent, the *Government Employees Compensation Act*?
2. Is the third party an employee?
3. Did the loss occur in an employment context?

If the answer to all three is yes then there is a good possibility the right to sue has been removed, and the only remedies for the third party are the benefits under the workers' compensation legislation. If only questions two and three are answered yes, an insurer should investigate whether the third party has applied for and received benefits under the workers' compensation system, as this may assign the right of action to the compensation board who would have to authorize an action.

The restriction on the right to sue is not always well understood by litigation lawyers and the adjuster should not assume that plaintiffs' counsel has examined the issue. It is also possible that the compensation claim has been made without the lawyers' participation. I have had a case where plaintiffs' counsel was unaware that the plaintiffs' union had successfully appealed an earlier denial of benefits by the workers' compensation system. This fact was only revealed by the presence of a compensation claim number on a medical report produced on the eve of trial.

### Digging Deeper

Question One- In Ontario the legislation makes participation in the system mandatory for most industries and business activities. There are exceptions  law offices, insurance companies, as well as some which may be surprising, such as call centres. It is necessary to understand the full scope of operations of the insured and then consult the employer classification system to determine if the participation is mandatory. Ontario's system creates coverage even if the employer did not actually register with the Board. Further some non-mandatory industries can choose to enrol under the optional coverage provisions.

Question Two- The Ontario legislation provides coverage to “workers” which is broader than the term “employee”. It includes volunteer emergency personnel, persons supplying services in exchange for things of value such as free rent, work experience placement students, and even unpaid probationary workers. Many of the “right to sue” cases involve the examination of whether the plaintiff is an employee or an independent contractor. The substance of the relationship will be more important than the paperwork in determining whether the act applies.

Question Three- The loss must occur in the third party’s course of employment to give rise to an entitlement to workers’ compensation benefits. Generally speaking, if the loss occurs on the premises of the third party’s employer, it will be found to be in the course of employment. Typically, driving to and from work will not be considered to be in the course of employment. Of course exceptions to this apply, and obtaining statements as to the circumstances and the job duties will be necessary to provide advice. In some circumstances, the worker may have the right to elect to sue instead of claiming benefits. In order for the right to sue to be taken away, the insured must be an employer who is required to participate in the workers’ compensation system and the claim must arise in the course of the insured’s business activity.

### Some Ontario Examples

The Workplace Safety Insurance Appeals Tribunal has exclusive jurisdiction in Ontario to decide the right to sue questions under the Act. The following are case summaries prepared by and published by the Tribunal on its website:

#### 1. Independent Contractor?

**Decision No. 765 09**

**24-Nov-2009**

**B. Doherty**

The plaintiff in a civil suit was a truck driver. He used to own his own truck but sold the truck to the defendant. He continued to drive the truck, and was injured when a piece of equipment on the truck malfunctioned. The defendant applied to determine whether the plaintiff’s right of action was taken away.

There were a few indicia that the plaintiff was an independent operator. He had incorporated a numbered company to provide his driving services. The intent of both the plaintiff and the defendant was to characterize their relationship as that of an independent operator and principal. However these indicia were outweighed by other indicia of a worker status at the time of the accident. The plaintiff drove the truck owned by the defendant, for an hourly rate, with little opportunity for profit or loss. The defendant paid all expenses of operating the truck. The plaintiff did virtually all of his driving for the defendant under the defendant’s licence and using the defendant’s logo.

The plaintiff was a worker in the course of employment at the time of the accident. His right of action was taken away.

## 2. In the Course of employment?

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a support worker for an employer that operated a number of group homes. The worker's shift was scheduled to end at 10 am. The accident occurred at 9:45 am, as the worker, using her own vehicle, was driving a resident of the group home to attend a workshop at another location. The worker had never driven the resident in her personal vehicle prior to the accident. However, the collective agreement provided for the employer to reimburse support workers for mileage when using their vehicles for work-related purposes.

Considering the criteria of time, place and activity, the Vice-Chair concluded that the worker was in the course of employment at the time of the accident. Her right of action was taken away.

## 3. Worker? Employer?

**Decision No. 1584 08**

**06-Feb-2009**

**B. Kalvin**

The plaintiff in a civil case worked on the defendant's farm, doing chores and training horses. She also gave riding lessons. The lessons were conducted on the defendant's farm, but the plaintiff was not paid for giving those lessons by the defendant. Rather, she billed the students directly. The plaintiff was injured while training a horse, when the horse became startled and she was thrown from the horse. The defendant applied to determine whether the plaintiff's right of action was taken away.

The evidence was overwhelming that the plaintiff was a worker of the defendant and that this work was the main source of her income. She also had a small independent business giving riding lessons. The accident occurred while she was in the course of her employment with the defendant training horses.

The plaintiff's right of action was taken away.

**Decision No. 1130 05**

**15-Aug-2005**

**V. Marafioti - B. Young - F. Jackson**

The defendant bus company operated a school transportation company, including transportation of disabled children. The plaintiff was employed by the bus company as bus monitor for the disabled children and occasional bus driver. The plaintiff was injured in a motor vehicle collision while working as a bus monitor. The plaintiff brought an action against the bus company and the driver of the bus. The defendants applied to determine whether the plaintiff's right of action was taken away.

The bus company was a Schedule 1 employer. The plaintiff was a worker of the bus company. Her employment was for the purposes of the employer's industry. She was not a casual worker. The employer's industry was transportation of students. The worker's job as a bus monitor could not be considered to be educational work, which would be excluded from mandatory coverage.

The plaintiff was a worker of a Schedule 1 employer. Her right of action was taken away.

### Procedure

Each province has its own procedure for determining whether the right to sue is removed by its workers' compensation legislation. In Ontario the Tribunal will receive an application from any party to an action or from an insurer who has received an application for accident benefits. The application may even be made after a civil trial. The parties exchange written arguments and relevant documents and a hearing date is set by the Tribunal. While discovery transcripts may be filed with the Tribunal, parties are expected to lead evidence from witnesses. A written decision is rendered in three months in most cases.

RMC member firms are able to assist insurers with the complexities of this sometimes overlooked no fault process and we look forward to helping adjusters explore the issues that may help resolve a claim at an early stage.