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WSIB CHANGES ITS PRACTICE ON THE PAYMENT OF LOSS OF EARNINGS BENEFITS

Effective December 7, 2009, the Ontario Workplace Safety and Insurance Board (“WSIB”) changed its operational practice of paying loss of earnings (“LOE”) benefits even when a worker is no longer in the workforce and has no loss of earnings. This change in practice followed a series of successful employer challenges argued by Hicks Morley lawyers David Brady, Will LeMay and Liz Kosmidis. In this *FTR Now*, we discuss how the change will benefit all employers.

BACKGROUND

The WSIB’s practice on this issue and Hicks Morley’s involvement in challenging this practice have been the subject of previous Hicks Morley articles. Typically, the WSIB paid LOE benefits for new occupational disease claims that were diagnosed well after the worker had retired from the workforce. LOE benefits were also paid when a worker underwent surgery after retirement, despite the fact that the worker had no loss of earnings because he or she had voluntarily retired from the workforce.

In several decisions, two of which were successfully argued by Will LeMay and Liz Kosmidis, the Workplace Safety and Insurance Appeals Tribunal (“Tribunal”) concluded that the WSIB was incorrectly interpreting section 43 of the *Workplace Safety and Insurance Act, 1997* (“WSIA”) and that the WSIB did not have the statutory authority to award LOE benefits where the worker had no loss of earnings. However, the WSIB refused to follow these WSIAT decisions, and took the position that it was not bound by these legal precedents.

HICKS MORLEY CHALLENGES WSIB INTERPRETATION

On behalf of employers, Hicks Morley lawyers wrote directly to the WSIB’s Chief Operating Officer in June of 2009, and then filed a formal complaint with the Fair Practices Commission in August of 2009. Following this, the

WSIB approved a change to its practice for determining entitlement to LOE benefits in cases where there are no earnings on the date of adjudication. Now, in order to be entitled to LOE benefits, a worker must actually have a loss of earnings.

The WSIB issued an Occupational Disease and Survivor Benefits Program Practice Guideline on January 19, 2010. The Guideline acknowledges that the WSIB was incorrectly interpreting section 43 of the *WSIA* and that the interpretation adopted by the Tribunal was more consistent with the purpose of section 43 of the *WSIA*.

The successful challenge by Hicks Morley ends a WSIB practice that has been in effect since January 1, 1998.

GOING FORWARD

Employers with any pending appeals on this issue should bring the new Practice Guideline to the attention of the Appeals Resolution Officer at this time. However, the change in practice will not result in the termination of LOE benefits already in effect on December 7, 2009. In those cases, employers will still need to appeal the WSIB's decision to WSIAT.

If you wish to discuss any pending appeals involving this issue, please contact David Brady, Will LeMay or Liz Kosmidis, or your regular Hicks Morley lawyer.

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