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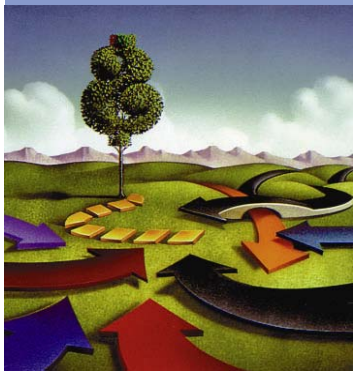

Employers Must Accommodate Injured Workers to the Point of Undue Hardship

The Ontario Human Rights Tribunal (OHRT) recently decided in *Boyce and Toronto Community Housing Corporation* (*Boyce*) that although an Ontario employer had, according to the WSIB, met its WSIB return to work and re-employment obligations in offering permanent, suitable, modified work to an injured worker, the employer had failed to accommodate the worker under the *Ontario Human Rights Code* (the *Code*). In most cases the WSIB asks an employer if it has "suitable employment" for the worker. This is a different question than whether the employer can accommodate the employee to the point of undue hardship. The fact that an employer has offered suitable employment under the Workplace Safety and Insurance Act (WSIA) may not satisfy the employer's duty to accommodate under the Code.

The WSIB Case Manager decided the worker had refused suitable work that was available with no loss of earnings, and therefore determined the worker was no longer entitled to receive loss of earnings benefits. The worker sent an objection letter to the Case Manager and *also* filed an application with the OHRT. The employer asked the OHRT to hold off on making a decision until after a final decision had been made by the WSIB, but the OHRT denied the employer's request and proceeded to hear the case. The OHRT decided the employer had breached its duty to accommodate the worker under the *Code*.

This decision is important because it demonstrates that injured workers have an alternative option for dealing with return to work situations other than through the WSIB and WSIAT appeal process. This is problematic because if a worker is able to pursue claims concurrently with the WSIB and the OHRT, the employer could potentially be penalized by both tribunals while the worker may receive remedies from both. In other words, the Boyce decision establishes that, in some instances, injured workers are free to attempt to concurrently pursue Human Rights Code remedies against their employer even if the WSIB has ruled in the employer's favour with respect to whether work is suitable.

Section 10 of the Code defines "disability" as "…an injury or disability for which benefits were claimed or received under the insurance plan established under the WSIA". Up to this point, it has been commonly misunderstood that a dispute in the return to work process falls exclusively within the jurisdiction of the WSIB; however, the *Boyce* decision makes clear the fact that the Code also applies to disabilities following a work-related injury and thus to the return to work process under the WSIA.

Given the decision in *Boyce*, it would be prudent for employers to keep their *Code* obligations to accommodate an injured worker in mind when approaching a return to work situation even if you do not have a re-employment duty. Simply offering suitable work is not enough to meet your accommodation obligation. Employers must abide by the *Code*'s requirement to accommodate injured workers up to the point of undue hardship. Employers therefore must consider and address *all* accommodation issues that present themselves in a return to work situation, and clearly and *fully document* the return to work activities that were offered, accepted and declined, where applicable. To determine undue hardship the employer must demonstrate that the expense to accommodate the workplace will cause undue hardship; however, the employer is still required to pay the expense up to that point. The WSIB may pay the remaining expenses if doing so allows the worker to return to employment within the worker's functional abilities and restores the pre-injury earnings.

Sources:
The OEA Update, November 5, 2010.
http://www.employeradviser.ca/stdprodconsume/groups/mol/@oea/documents/report/en_eb_jun_2010.pdf
Stringer Brisbin Humphrey, November 5, 2010.
http://www.sbhlawyers.com/uploads/2010_09_WSIB_Return_to_Work_Decisions_Human_Rights.pdf
Human Rights Tribunal of Ontario, November 5, 2010. *Randolph Boyce and Toronto Community Housing Corporation and Ontario Public Service Employees Union.* April 7, 2010.

Injured Workers Continued... What Employers Need to Know

1. Employers must not narrowly focus on decisions made by the WSIB. The Human Rights Code applies to the entire WSIB early and safe return to work process. A decision by the WSIB that work is suitable does not bind the Human Rights Tribunal who has very clearly stated that it is possible to comply with WSIB obligations and still contravene the Code in the context of return to work.

2. Employers must be in a position to establish that measures have been taken that would satisfy the high undue hardship burden required by the Code. It is clear that a finding by the WSIB that work is suitable or that no suitable work is available will not always be sufficient.

3. An employer must be able to document what duties and potential modifications were considered. The reality is that it may be months or even years before the employer's representatives are required to give evidence before the WSIB or Human Rights Tribunal if litigation arises.

4. The development of a written return to work plan which is approved by the WSIB Return to Work Specialist is a key part of successfully managing claims and minimizing humans rights litigation. Having a written return to work plan establishes that a process was in place for managing accommodation issues.

5. It is critically important that the worker's input be sought and considered as part of the process. There is no question that workers will cite specific positions or duties which they believe would be suitable with the WSIB and/or the Human Rights Tribunal. An employer must be able to demonstrate why the positions suggested by the worker represent an undue hardship.

6. The reality is that employers face the risk of both human rights and WSIB litigation in context of the return to work process. The best defense against such litigation is to have a process in place which proactively complies with both WSIB and Code requirements.

The Ontario Human Rights Commission's "Policy and Guidelines on disability and the duty to accommodate is found here: http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2. For the full decision of *Boyce and Toronto Community Housing Corporation,* 2010 see this website http://www.canlii.org/en/on/onhrt/doc/2010/2010hrto520/2010hrto520.pdf

Bill 168 Update: New Workplace Duties are now Law

From Stringer Brisbin Humphrey Management Lawyers

Bill 168 took effect June 15, 2010 and is now law. This Bill amends the *Occupational Health and Safety Act* and imposes sweeping new duties on employers aimed at reducing the risk of violence and harassment in the workplace.

Employers are now required to:

1. Conduct assessments of the risk of violence in their workplace;
2. Implement policies and programs to deal with workplace violence and harassment;
3. Instruct and inform employees as appropriate on the contents of the policies and programs;
4. Warn employees about risks of violence in the workplace; and
5. Take measures in certain circumstances to protect employees from domestic violence occurring in the workplace.

If your organization is not yet compliant with Bill 168, it should act soon. Ministry of Labour inspectors are tasked with enforcing Bill 168 and can be expected to require employers to demonstrate compliance. These inspectors have broad powers under the *Occupational Health and Safety Act* and do not require a search warrant to enter a workplace and require production of documents to demonstrate compliance with the Act.

Employers need to take compliance with Bill 168 seriously. Failure to comply with the Act may result in compliance orders from a Ministry inspector and possibly fines. Charges under the Occupational Health and Safety Act could also result if, for example, an employee were injured because an employer or supervisor failed to warn the employee about a risk of workplace violence.

Compliance with Bill 168 need not be an onerous task. Bill 168 is quite flexible in terms of what employers are required to do and how they may design their policies and programs. However, employers will need to carefully consider what approach will work best for their organizations and be easy for their employees and management to follow.

Source:
UPDATE an electronic publication of Stringer Brisbin Humphrey http://www.sbhlawyers.com/index.php

Employment Insurance Premiums to Rise in 2011

Minister of Finance Jim Flaherty recently announced that the freeze on employment insurance premiums that has been in effect for two years will end in the coming budget, which means premiums will soon rise.

EI premiums were frozen at $1.73 per $100 of insurance earnings for 2008, 2009 and 2010, as part of Canada's Economic Action Plan. Now that the economy and jobs picture has improved, Flaherty announced that Ottawa has no plans to continue the freeze for the coming fiscal year.

A new panel created by the federal government initially proposed to increase EI premiums by the maximum amount allowed (15 cents per $100 of insurable earnings) on January 1; however, in the wake of warnings from Canadian Economists that Canada's job market is not ready to absorb higher premiums, Finance Minister Jim Flaherty announced that the premium increase will be less than the maximum allowed, according to the *Globe and Mail*. The rate increase set by the Canada Employment Insurance Financing Board is $1.78 per $100 of insurable earnings, five cents higher than the current rate. This rate increase will take effect on January 1, 2011.

These announcements have not come without criticism. Ontario Premier Dalton McGuinty remains skeptical, noting that the state of Canada's economic recovery is still relatively unknown and that we need to tread carefully during this period of slow economic growth and uncertainty.

Sources: CBC News. September 9, 2010. *EI premiums will rise: Flaherty;*
The Globe and Mail, September 9, 2010. *Panel moves to raise EI premiums to maximum*
Hicks Morley Hamilton Stewart Storie LLP, November, 2011. Federal Government to Set Limits on EI Premium Rate Increase for 2011

Specialty Drugs

Specialty drugs are used to treat serious or chronic medical conditions such as multiple sclerosis and rheumatoid arthritis. They are typically injectable and can be administered by a patient or doctor. Specialty drugs, also called Biologics, are derived from the metabolic activity of living organisms through the use of animals or microorganisms (vs. chemically synthesized drugs).

As we enter a new decade, we transition from a decade of blockbuster drugs for common conditions such as high-blood pressure and ulcer/reflux to a decade of high cost specialty drugs used, among others, for treating specialty neurologic disorders, autoimmune disorders, and certain types of cancer. Specialty drugs are quickly increasing in utilization and cost per prescription. In 2009 approximately 50% of new drugs that entered the market were high cost specialty drugs. If specialty drugs continue to grow at their current rate of 14% per year, by 2014 they will account for one-third of total drug spend.

New Research

Drug manufacturers focus the majority of their research on cancer drugs, followed closely by specialty neurologic and autoimmune drugs used for multiple sclerosis and rheumatoid arthritis. In the traditional drug category, the majority of research is being focused on drugs used for clotting disorders, Alzheimer's disease, and diabetes.

Cost Per Prescription

According to a recent drug trend report, the average cost per prescription for specialty drugs in 2009 was approximately $1,100 and includes drugs that cost upwards of $100,000 per patient per year.

Increased Utilization

Treatments for rheumatoid arthritis and anticancer therapies continue to drive specialty drug utilization. For example, Humira is a biologic for treatment of rheumatoid arthritis and it is estimated that by 2016 Humira will be the #1 selling drug in the world. Also, private sector payers are seeing an increase in oral cancer specialty drugs as patients who require these drugs can now be treated at home (with oral agents) rather than in-hospital injected drugs.

Specialty Drug Solutions

Managing specialty drugs within your group benefit plan will become increasingly important with increased utilization as well as the number of high cost drugs entering the market every year. Using Prior Authorization as a benefit management strategy is currently the most effective way to control specialty drug costs. Prior Authorization is a system that involves several steps toward the path of appropriate reimbursement. Prior Authorization will help reduce wasteful spending, will prevent inappropriate drug use, and will ensure the drug is being used only for approved conditions.

Specialty Drugs Continued...

Finally, the hope of Subsequent-Entry Biologics (SEBs) may help ease the burden of cost for specialty drugs payers. SEB is a term used by Health Canada to describe "a biologic product that is similar to and would enter the market subsequent to an approved innovator biologic product." However, due to risks involved in the production of biologics careful attention is paid to the process. A number of biologics will come off-patent worldwide in the next five years and The Biologics and Genetic Therapies Directorate (BGTD) is working on developing a comprehensive regulatory framework for SEBs, addressing the regulatory, legal, and scientific issues related to SEBs.

Sources: ESI Canada 2009 Drug Trend Report;
Health Canada http://www.hc-sc.gc.ca/dhp-mps/brgtherap/activit/fs-fi/fs-fi_seb-pbu_07-2006-eng.php

What Employees Need to Know When Travelling Out of Country

No matter where someone travels, or for how long, it's a safe assumption that nobody wants to deal with a medical emergency while on vacation. If, however, you do encounter a medical emergency, it's important to understand your travel coverage.

Before traveling, you will want to know your coverage details and any conditions and limits that apply. You will also want to make sure you know the number to call in the event of an emergency. If you are unsure, contact your insurer as typically there can be more than one number.
If your plan does not provide travel assistance (24/7 toll free number to call for payment assistance coordination with your provincial health plan) you may wish to consider purchasing supplementary insurance.

What to do in a medical emergency

You or someone with you must call the Travel Assistance 24-hour operations centre as soon as possible. The toll free numbers are located on your travel card, on the back of your ID card or in your travel pamphlet.
You will be asked to provide details of the emergency and the type of assistance you need. Provide as much detail as possible. The medical assistance coordinator will also ask for particulars on the plan member (i.e. as indicated on their benefit card) including:

- Emergency Travel Assistance ID number;
- Group / plan number;
- Plan member's full name;
- Plan member's certificate number;
- Caller's name (if not the plan member) and patient's name (if not the plan member);
- Provincial health insurance number;
- The location and contact specifics as to where the patient is being treated;
- Your hotel or other current telephone number.

Things to keep in mind

Depending on the nature of the emergency - the health care provider may request payment up front. Some plans will request that you pay for the services if the amount charged is approximately $500 or less.
Failure to notify the Travel Assistance Provider could result in your claim being reduced or declined.
Stay in touch with the Travel Assistance Provider throughout the medical emergency until they confirm that you no longer need to do so.