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THE INTERFACE BETWEEN WSIB AND ACCIDENT BENEFITS

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THE INTERFACE BETWEEN WSIB AND ACCIDENT BENEFITS

BY LISA D. BELCOURT

Personal injury lawyers are regularly asked to provide advice on the compensation rights of clients who have been injured in motor vehicle accidents while on the job.

Clients are often surprised to learn that a worker injured in a MVA in Ontario may be barred from claiming both statutory accident benefits from their own insurer and bringing a claim for tort damages, because the *Workplace Safety and Insurance Act* (WSIA) governs entitlement to benefits for workers.

Even when a worker is able to elect benefits under the Statutory Accident Benefits Schedule (SABS), there may be restrictions to those benefits. Advising clients on the best course of action has been further complicated with the introduction of the new SABS regime on September 1, 2010.

Under section 59 of the SABS, an insurer is not required to pay benefits where the insured person is entitled, as a result of that accident, to receive benefits under any workers compensation plan. An injured victim can opt out of workplace benefits, but only if the election is not made primarily in order to claim SABS benefits. One of the main reasons an injured worker would chose to opt out of WSIA benefits is because he or she wishes to pursue a tort action. The SABS does not seem to require the insured to actually commence a tort action in order to receive or continue to receive benefits under the SABS. As usual, there are many things to consider when deciding whether or not to pursue any litigation that have nothing to do with the actual right to bring an action.

Opting out of the WSIA scheme does require that a worker show that his or her right to start an action for damages has not been taken away under section 28 of the WSIA, which bars workers from commencing an action against Schedule 1 and Schedule 2 employers and directors, officers and employees of those employers.

When advising a client, it is important to determine early on (1) whether her or his occupation falls into Schedule 1 or 2 under the Act; (2) whether the tortfeasor is a worker in an occupation that falls under the same Schedule as your client; and (3) whether your client and the tortfeasor were *both* in the course of their employment at the time of the accident. If the answer to all three of those questions is “yes”, and there is a substantial connection to Ontario, your client is most likely barred from bringing an action for damages, and is bound to the WSIA scheme. If there is doubt, either party or their insurers can apply under the WSIA for a determination of the issue.

The WSIA may also apply to accidents that happen outside Ontario. The Act and case law make it clear that where there is a substantial connection to Ontario, employees will be entitled to WSIB benefits even for accidents occurring outside of Ontario. In this way, the WSIA has a somewhat extraterritorial effect, similar to the SABS.

However, the Ontario WSIA and SABS provisions do not necessarily apply to bar a SABS claim or right of action for a collision occurring outside of Ontario. Take, for instance, the situation where a Schedule 1 truck driver of an Ontario company is involved in a collision in Pennsylvania with a truck driver from Indiana. The WSIA does not necessarily reach that far. The case law suggests that in order for the action to be barred, the tortfeasor must have a substantial connection to Ontario.

Where the workplace accident happens outside of Ontario, the client will likely have the choice of (1) claiming WSIB only and foregoing a claim for damages and benefits from his own insurer; (2) claiming SABS from his own insurer and having the choice of commencing an action for damages; or (3) claiming no-fault benefits from his own insurer under the regime of the location where the accident happened and having the choice of commencing an action for damages.

There are some restrictions that your client needs to know very soon after an accident about opting out of the workplace insurance scheme and into the SABS. For instance, the insurer is not required to pay weekly benefits for any period of time before an election is made. You may have success, however, in having the insurer retroactively pay benefits where the insurer advised the insured of the need to make an election and encouraged the insured to seek legal advice in that regard, but failed to advise the insured of the consequences of a delay in making that election.

The new SABS regime also poses new challenges. The pre-September 1, 2010 regime often provided better and easier access to statutory benefits for the client, as long as they had another valid reason for opting out of the WSIA scheme. With SABS benefits substantially reduced under the new regime, particularly for minor injuries, it is less clear which plan–WSIB or SABS–will provide the best benefits option for injured workers. Lawyers will have to carefully consider, for example, how the injury will be classified under the new SABS and whether the client has purchased any optional benefits under their auto plan, before recommending they opt out of WSIB benefits.

Another potential pitfall is the cost to the client to “de-elect” from WSIB. In many cases, WSIB will ask for repayment of the amounts paid to the client under the plan before permitting the client to de-elect. Depending on the client’s situation, this could be prohibitive to making a de-election.

Personal injury lawyers need to keep all of these considerations in mind when advising clients who have been injured in motor vehicle accidents while on the job in order to protect their rights and ensure that they receive the best compensation possible.