



Workers Do Not Have the Right to Sue for Injuries in Workplace Accidents and Are Captured by the Historic Bargain (no fault workers compensation system)

By: Gary Majesky, *WSIB Consultant & Executive Board Member*



This year I received several claims where members were injured in various accidents and wanted to sue their employer. In a recent case a trench collapsed because of alleged inadequate shoring, while the member was in the trench. In another, a member was in a new house under construction when the stairs collapsed causing the worker to fall 15 feet onto the basement concrete floor. Or the accident where a load of drywall fell over landing on the member. In each claim the member was in the course of employment and suffered serious injuries.

In some instances the employer did not follow health and safety procedures, and orders were written by the Ministry of Labour (MoL), with charges pending under the *Occupational Health & Safety Act*. In other situations, the employer was not responsible for the accident, but another trade who failed to properly install the stairs, or loaded the drywall haphazardly, that caused the accident. There was also the bizarre case of a member in a porta-toilet when it was struck by a forklift driven by another tradesperson. It's important for members to understand that the MoL, and by extension, the Crown, has jurisdiction and prosecutorial discretion to file charges, and not the union.

In some claims, the accident employer seeks transfer of costs asserts they were not responsible for the accident, but another employer. It is important to understand that transfer of costs to another employer does not impact the injured workers rights and entitlements to benefits under the WSIA.

Members, and family members, frequently tell me that "they want to sue the employer" which prompts my reply that the law, generally, prohibits the workplace parties from opting out of the *Workplace Safety and Insurance Act*, or sue a third party because they are captured by what is referred to as the "historic bargain" which has been the cornerstone of our workers compensation no-fault system since its introduction in 1915.

There are limited exceptions on the right to sue, such as MVAs, but when the first *Workmen's Compensation Act* was introduced, workers gave up the right to sue for mandatory no fault coverage for industrial accidents.

The WSIA in turn removes the right of workers to sue their employers for workplace injuries and provides for benefits paid for, directly or indirectly, by their employer. The statutory scheme created the general principle that workers injured on the job are to be compensated through the WSIA and not in the courts.

When workers are employed by a contractor, your right to bring a civil action against your employer for damages due to personal injury arising from an accident or occupational disease is presumptively taken away by Section 28(1) of the WSIA.

In accordance with the scheme of the WSIA, and "the historical bargain" referred to above, this bar on civil actions applies even if the cause of the injury was the negligence of the Employer, such as a failure to perform and follow proper safety protocols.

The Ministry of Labour

The MoL enforces the *Occupational Health and Safety Act* (OHSA) and its regulations. The purpose of the Act is to protect workers from injury and illness in the workplace. After a serious accident, the MoL will commence an investigation, and even visit you in the hospital, assuming you are not in a diminished physical or mental capacity to respond to questions.

What is the MoL's roll in the event of a serious workplace injury?

Under the OHSA, the employer must contact the MoL immediately after a worker is critically injured while at work. Generally, an investigation begins right away but may take up to a year to complete.

Once the investigation is complete, the MoL's Legal Services Branch will assess whether charges are appropriate against workplace parties such as employers, supervisors or workers, or other parties outside the workplace. The MoL has one year from the date of the accident to lay charges under the OHSA.

Before charges are laid, the MoL will not discuss the details of its investigation except as required or permitted by law. It is important to emphasize, that the Crown (MoL) has prosecutorial discretion whether to lay charges.

When is the MoL's investigation report available?

The MoL's investigation report is available after the MoL's Legal Services Branch has completed its review and determined that charges are not warranted under the OHSA. If charges are laid, the investigation report is available after court proceedings have been completed. To obtain a copy, a request should be made to the MoL's Freedom of Information and Privacy Office @ (416) 326-7786.



If charges are laid, will the MoL advise worker of the court date?

The MoL representative will let you know when charges are laid and will provide you with the name and telephone number of the prosecutor. You will also be notified when the matter is scheduled to go before the courts.

Can the Worker or Family Sue – Rights of the Worker

As a general matter, Ontario’s workers’ compensation system, as set out in the *Workplace Safety & Insurance Act*, provides for comprehensive, no fault compensation to workers for injuries suffered in the course of employment. Section 28(a) of the WSIA states:

Certain rights of action extinguished

29. (1) A worker employed by a Schedule 1 employer, the worker’s survivors and a Schedule 1 employer are not entitled to commence an action against the following person in respect of the worker’s injury or disease

1. Any Schedule 1 employer
2. A director, executive officer or worker employed by any Schedule 1 employer.

Spouses and Dependants

The same bar on civil actions also extends to family members. Section 26(2) of the WSIA provides that:

Entitlement to benefits under the insurance plan is in lieu of all rights and action (statutory or otherwise) that a worker, a worker’s survivor or a worker’s spouse, child or dependant has or may have against the worker’s employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer [emphasis added]

This section is intended to take away the right of a “worker’s survivor, ...spouse, child or dependant” against the workers employer.

Gary Majesky

WSIB Consultant
Direct Line (416) 510-5251
gary_wsib@ibew353.org

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