

## Fink & Bornstein Professional Corporation Workers' Compensation Newsletter

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### CLASS ACTION AGAINST THE WSIB

#### What is a Class Action?

Class actions are procedures whereby one or more representative plaintiffs commence a civil action on behalf of a larger group, or "class". The representative plaintiff is the named party who files the case and represents the class throughout the proceeding. Before a class action may proceed, the court must certify it as such. The class must raise common issues that may be determined for the class as a whole and the court must determine that the class proceeding is the preferable procedure for the resolution of the claims. In determining if a class action is the preferable procedure, the courts consider whether the proposed action will promote access to justice, judicial economy and behaviour modification.

Joining a class action is a way to have ones disputes resolved in a low-risk, low-cost manner. Joining requires little effort on each individual class members part. In most circumstances, they will not be required to provide any documentation until the case has been resolved. Successful suits may be resolved by settlement or award, at which point they would be required to file a claim form. The law firm would then collect its fee as a percentage of the money that the court orders the defendant to pay.

In Ontario, a class action is commenced by a statement of claim, in which the proposed representative plaintiff identifies an intention that the action proceed as a class action. The judicial determination of whether a proceeding is the appropriate procedure is made on a certification motion. At this stage, the onus is on the plaintiff to demonstrate that the test for certification has been met.

#### The Class Action Suit

Recently, Fink & Bornstein lawyer, Richard A. Fink, launched a multi-million dollar lawsuit on behalf of injured workers against the Workplace Safety and Insurance Board (the "WSIB") alleging misfeasance in public office, on behalf of its Client Pietro Castrillo.

The lawsuit seeks a declaration from the Superior Court of Justice that the WSIB acted in bad faith and committed a misfeasance when it reduced Non-Economic Loss (NEL) awards for thousands of injured workers in Ontario, without legal authority. The lawsuit seeks damages from the WSIB for its behaviour, as well special damages for all expenses incurred by workers in the process of challenging decisions on their NEL claims.

#### Discounting Non-Economic Loss Awards

NEL awards are granted by the WSIB to injured workers who suffer permanent impairments from a work related injury or illness to compensate them for the physical, functional, or psychological loss caused by the impairment. Ontario Regulation directs the WSIB to employ the AMA Guides to the Evaluation of Permanent Impairment in determining a percentage rating resulting in a monetary value for the award. The lawsuit alleges that the WSIB acted illegally by reducing legitimate NEL claims because of the workers' pre-existing medical conditions that had not previously caused a disruption in employment.

The WSIB's Operational Policy No. 18-05-05 allows the WSIB to discount NEL Awards granted to injured workers on account of pre-existing "impairments" that are "measurable". The policy states that if both impairments affect the same area of the body, and the pre-existing impairment is measurable, the WSIB rates the total impairment to the area, determines the rating for the pre-existing impairment, and subtracts the rating for the pre-existing impairment from the total

impairment rating to get to the rating for the new work-related impairment. For example, if a worker could move his knee beyond an 80% of normal range before the injury, and 50% of normal range after the accident, the WSIB would deduct 40% from the otherwise allowed NEL:  $(Total\ 100) - (Accident\ loss\ 80 - 50 = 30) \div total\ loss\ (50) \times 100\% = 40\%$ . If the pre-existing impairment is not measurable, the WSIB could define the pre-existing medical condition in accordance with the WSIB's SIEF policy to adjudicate up to a 50% NEL reduction for a major pre-existing impairment.

The further reduction of workers' NEL awards came in the wake of a secret move by the WSIB in 2012 to aggressively deduct 25-50% of NEL awards, pursuant to an unpublished policy that was revealed in an internal "Orientation" article intended for its staff.

The WSIB has a published policy concerning the reduction of NEL awards for pre-existing "impairments" - defined as medical conditions that negatively impaired workers' earning capacity. However, the unpublished "secret" policy directed the WSIB officials to equate "impairments" with "conditions". "Conditions" were defined as not having previously impaired the workers' earning capacity. After the WSIB's adoption of the "secret" policy, NEL awards were to be discounted in cases where there was a pre-existing impairment and also where there was a pre-existing medical condition with no actual pre-existing impairment.

Take for example, the case of the class action's Representative Plaintiff. The worker injured his left shoulder at work in 2011. At the time of the accident he was a construction labourer, who had experienced no prior problems in his left shoulder. The worker filed a claim with the WSIB for insurance benefits pursuant to the worker's compensation scheme established under the WSIA. The WSIB then carried out a "Non-Economic Loss Analysis" of the worker's condition. The purpose of this analysis is to determine whether an injured worker is entitled to a NEL. The WSIB concluded that the worker would ordinarily be entitled to a 6% NEL Award for his permanently injured left shoulder. However, the WSIB decided to discount the worker's NEL to 3% because of a pre-existing medical condition noted on an MRI scan. The worker successfully appealed the NEL decision through the WSIB's administrative process. The NEL was then increased due to the

reversal of the discounting for the pre-existing condition.

The WSIB explained its rationale for discounting the NEL award for a pre-existing condition in a letter to the worker's legal representative. The letter stated:

"We are satisfied that our policy document 18-05-05 in conjunction with the AMA guides does allow our decision makers to adjust NEL award by offsetting an appropriate amount to reflect the extent of a pre-existing condition/impairment. Our application of the policy is intended to ensure we are only compensating workers for their work-related impairment."

Starting in 2012, the WSIB employed the definition of "condition" in the Second Injury and Enhancement Fund Relief ("SIEF") Operational Board Policy 14-05-03 to define pre-existing "impairment" in the case of discounting NEL awards. The WSIB's unpublished 2012 SIEF Policy denoted that for a pre-existing "condition" to be employed by the WSIB for an application of SIEF, there must be a pre-existing "disability" i.e. impairment. This, however, was allegedly ignored when determining reduction in NEL values.

It is therefore alleged that this reduction is being done contrary to Official Policy governing regulations, and the *Workplace Safety and Insurance Act*. The WSIB's Operational Board Policy 11-01-15, specially defines a "pre-accident impairment" as a "condition which has produced periods of impairment/illness requiring health care and has caused a disruption in employment". There is no policy that equates impairment with condition, or gives the WSIB the authority to do so. Regulation 175/98 compels the WSIB to use the AMA Guides' Rating Schedule. The Board believes this gives them authority to use the AMA Guides definition of "impairment" to judge when a discount of the NEL Award can be made. However, the AMA Guides never defines "condition", nor does it equate the term "condition" with "impairment".

In 2013, the WSIB published a document titled "The Benefit Policy Proposals", which implicitly admitted that there was no previous policy allowing deductions for pre-existing "conditions" by explicitly allowing such deductions for the first time.

## The Claims

The Representative Plaintiff and the Class members seek general damages for the legal fees they were forced to incur to overturn the WSIB's allegedly illegal decision through administrative procedures, along with damages for the alleged breached torts of law.

The claim alleges that the decisions to reduce NEL awards for pre-existing medical conditions is actionable because it constitutes a misfeasance of public office, a break of duty to act in good faith and negligence.

### Misfeasance of Public Office

The common law provides a remedy where a plaintiff is harmed by an abuse of power by the holder of public office, known as misfeasance in public office. Two general components of the tort of misfeasance in public office have been identified as: 1) deliberate and unlawful conduct by a public officer, and 2) knowledge that the unlawful conduct will likely injure the plaintiff.

According to the claim, it is alleged that the WSIB's actions are illegal and contrary to their governing law. The actions seem to be aimed to reduce costs, and targeted vulnerable, injured workers in the process. The WSIB took these actions secretly while knowing the harm that would be inflicted.

### Bad Faith

According to the law in Canada, there is a duty of good faith on the part of insurers, independent to the breach of a contractual duty to pay the owed loss. Good faith means carrying out governing statutes in accordance with their intent. It is alleged that the WSIB breached its obligation to treat the injured workers in good faith by essentially denying injured worker basic rights that they are legally entitled to by statute.

### Negligence

The basic elements of an action in negligence are stated as follows: the plaintiff must show that the defendant owed a duty of care to the plaintiff; the defendant failed to meet the requisite standard of care; and, the defendant's failure to meet the standard of care caused the plaintiff injury. It is alleged that the WSIB negligently carried out its obligations when it determined that the NEL benefits should be reduced in cases of pre-existing conditions that never amounted to impairments.

### Where are we now?

The Statement of Claim has been issued at the Superior Court of Justice. The Representative Plaintiff and Fink & Bornstein Professional Corporation are in the process of applying to the Class Proceedings Committee and the Class Proceedings Fund for assistance in funding the class action. Both the Committee and the Fund were established by the *Law Society Act* in 1992. The Class Proceedings Fund provides financial support for approved class action plaintiffs for disbursements and indemnifies plaintiffs for costs that may be awarded against them in funded proceedings.

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