

## New initiatives from the WSIB in 2013

By Kevin MacNeill, Samantha Seabrook and Daniel Mayer

The Workplace Safety and Insurance Board (“WSIB”) is in a state of flux, with many changes happening now and more on the horizon. In order to keep you up-to-date on the most recent workers’ compensation initiatives, this update provides:

- an overview of the new mandatory coverage in the construction industry policies;
- the latest on the 2012-2013 benefit policy review;
- information on rate changes for 2013; and
- an outline of proposed amendments to the *Workplace Safety and Insurance Act* (“WSIA”).

### 1. MANDATORY COVERAGE IN THE CONSTRUCTION INDUSTRY

Since January 1, 2013, subject to the exceptions discussed below, mandatory coverage under the WSIA generally applies to independent operators, sole proprietors, partners in a partnership, and executive officers of construction corporations. These individuals are now considered “workers” under the WSIA.

If no other workers are hired, the sole proprietorship, partnership or corporation is a deemed employer for the sole proprietor, partner(s) or executive officer(s).

All the rights and obligations of workers and employers under the WSIA extend to the above-noted deemed workers and employers.

Deemed employers are required to register with the WSIB and remit premiums based on their insurable earnings. Executive officers and partners whose businesses are already registered with the WSIB must report their own earnings and pay premiums.

A person operating a business alone as a sole proprietor with no workers or as a sole officer corporation is required to file a status declaration with the WSIB at the time of registration to

confirm their independent operator status. Their status will remain in force until a material change occurs. A material change is anything that may affect an individual’s classification and therefore their obligations to pay WSIB premiums. Changes in business activities or ownership are also considered material.

#### a. Exceptions

##### i. Home Renovation Construction Work

Mandatory coverage generally does not extend to independent operators, sole proprietors, partners in a partnership and executive officers that work exclusively in the area of home renovations.

Home renovation construction is considered to be any work undertaken at an existing private residence that is occupied or that will be occupied by the person who directly retains the contractor or by a member of the person’s family.

An existing private residence includes houses, condominium units, apartment units, and seasonal or recreational properties such as cottages, or incidental structures that are not used for commercial purposes, such as garages, sheds, fences and pools.

We see the home renovation construction exemption as very narrow and one which can be easily lost.

For example, if an independent operator hired a subcontractor, a clearance certificate would have to be obtained to avoid being deemed the employer of the subcontractor.

Further, if the independent operator hired workers, the independent operator is considered an employer under the WSIA and must register with the WSIB, which also means reporting the workers’ insurable earnings. The independent operator, though, would remain exempted.

The home renovation exception is also lost when a person not occupying the residence retains the contractor, or where the work is done on a structure on residential property that is used for commercial purposes.

Things get even more complicated when both exempt and non-exempt home renovation work is done. Independent operators, sole proprietors, partners in a partnership and executive officers are subject to mandatory coverage if non-exempt construction work is undertaken. Even though an independent operator performs home renovations and only some non-exempt construction work, earnings from both must be reported. Registration is mandatory for corporations and partnerships performing both too, even though one partner or executive officer may perform home renovation work exclusively.

An individual performing both exempt home renovation and non-exempt construction work can cancel coverage when the non-exempt construction work ceases. The individual must contact the WSIB to confirm that a change of circumstances has occurred. Advising the WSIB immediately is preferable because the exemption will not be applied retroactively. Also, a minimum coverage period of three months applies. For example, if an individual ceases non-exempt work after two months, he or she must remain covered for an additional month before coverage is cancelled. The minimum coverage rule does not apply to business closures.

#### ***ii. Exemption for a Partner or an Executive Officer***

The second exemption relates to partnerships, corporations with workers and corporations with no workers but more than one executive officer. The exemption does not apply to a corporation with only one executive officer and no workers.

One officer in a corporation or one partner in a partnership can apply for an exemption from mandatory coverage if the individual does not perform any construction work. Construction work includes any manual labour of any kind, skilled or unskilled, such as the operation of machinery, as well as the direct supervision of workers on-site. However, an exempted officer or partner can conduct periodic site visits, provided he or she does not carry out any construction work.

The selected partner or executive officer seeking the exemption must file a declaration by completing and submitting the applicable form with the WSIB. The WSIB reserves the right to grant or deny the exemption. If any material change occurs – for example, if the partner or executive officer engages in construction work – the WSIB must be notified within 10 days.

Non-exempt executive officers or partners who do not carry out any construction work may report their earnings under rate group 755 (currently at a rate of \$0.21/\$100 payroll).

#### **b. Clearance Certificates**

Any principal hiring a contractor or subcontractor generally must obtain a clearance certificate from the contractor or the subcontractor before any construction work begins. A principal is defined as anyone who grants a contract for construction work. Thus, an independent contractor hiring a subcontractor would be considered a principal. However, householders are not included and are not required to obtain clearance certificates.

The purpose of the clearance certificate is to ensure that the contractor or the subcontractor is in compliance with their obligations under the WSIA. Failure to obtain a clearance certificate or beginning construction before one is issued are offences under the WSIA. The clearance certificate must be valid for the entire period during which construction is undertaken. Clearance certificates are only valid for 90 days, but are subject to renewal. Principals and contractors must keep copies of clearance certificates for a period of three years.

To have a clearance certificate issued, the contractor's account with the WSIB must be in good standing. For example, a contractor must have an open account with the WSIB and not have outstanding amounts owing. A clearance certificate can be issued when an account is not in good standing in some circumstances; for example, if the outstanding amounts owed by the contractor are paid by the principal or if a payment plan is put in place.

Obtaining a clearance certificate absolves the principal from any liability arising from potential outstanding amounts owed by the contractor to the WSIB. Through the clearance certificate program, the WSIB is effectively waiving its right to pursue payment from the principal for any outstanding amounts owed by a contractor or subcontractor. When a contractor has payment obligations towards the WSIB, the principal can only be liable for a maximum amount equivalent to the labour costs under the contract.

#### **c. Offences and Penalties**

The WSIB will not enforce or prosecute anyone for failing to register with the Expanded Compulsory Coverage in Construction Requirements until January 1, 2014. However, the WSIB will fully prosecute anyone who makes false or misleading statements or representations to the WSIB or wilfully fails to report a material change in circumstances which disentitles someone to an exemption (e.g. a home

renovator wilfully fails to advise the WSIB that he or she has undertaken a commercial contract). If non-compliance persists beyond January 1, 2014, the WSIB reserves the right to take into account any non-compliant period between January 1, 2013 and December 31, 2013.

The suspension of prosecutions notwithstanding, independent operators, sole proprietors, partners in a partnership and executive officers in a construction corporation are legally required to comply with the new mandatory coverage rules. The WSIB can still make any adjustment to an individual's account, as well as charge interest on outstanding amounts.

Once prosecutions begin in January 2014, penalties for non-compliance with the new rules are hefty. If an individual commits an offence, the penalty is a fine not exceeding \$25,000 or imprisonment not exceeding six months, or both. If a corporation commits an offence, the penalty is a fine not exceeding \$100,000.

#### d. Further Reading

The foregoing is only a summary of a complex and significant development in the area of WSIB law. We strongly encourage you to consult the specific wording of the WSIA and applicable WSIB policies in any given case. You will want to review the following WSIB policies in particular:

[12-01-06, Expanded Compulsory Coverage in Construction](#)

[14-02-18, Insurable Earnings - Construction](#)

[14-02-19, Clearance Certificate in Construction](#)

[22-01-10, Offences and Penalties - For Compulsory Coverage in Construction](#)

## 2. BENEFIT POLICY REVIEW

In January 2012, the WSIB announced its new [Policy Framework for Development and Renewal](#) (the "Framework"). The Framework establishes a process to review and revise WSIB policies. The WSIB also outlined its [2012-2013 Policy Review Agenda](#) with four key benefit policies for review:

- Recurrences
- Work Disruptions
- Permanent Impairments
- Aggravation Basis

In July 2012, the WSIB released its [Discussion Paper](#) which outlines the purpose of each policy and concerns cited by the WSIB and workplace parties regarding the application of each policy. Workplace parties and the general public were invited to participate in the review process by making written submissions to the WSIB's [Consultation Secretariat](#) or attending public hearings scheduled throughout the province. [Public consultations](#) ended in November 2012.

The Chair of the Benefits Policy Review, Jim Thomas, held an information sharing session with stakeholders in February 2013, which included an overview of what he had learned from them and next steps in the consultation process. We understand that he aims to release his final report in the early part of 2013. The final Report should contain recommendations for revisions to the above policies.

## 3. PREMIUM RATES HAVE BEEN SET FOR 2013

WSIB premium rates will increase by 2.5% for all employer rate groups in 2013. The WSIB describes the increased rate as "a necessary step to reducing the WSIB's unfunded liability (UFL), which has grown to \$14.2 billion." WSIB Chair Elizabeth Witmer says that the decision to increase rates "will enable the WSIB to meet the government's requirement that the WSIB be 60% funded by 2017."

The rate increase comes less than a year after the Arthurs Report recommended significant changes to the WSIB's practice and processing of rate group premiums. In particular, Professor Arthurs rejected the notion that rates should be "affordable", stating that:

"[i]nsurance costs what it costs. If employers do not want to pay what it costs, they should address their concerns not to the WSIB but to the Ontario legislature...The political marketplace...should be conducted at Queen's Park, not on Front Street."

Further, the Arthur's Report recommends that employers should pay more in rate group premiums to begin paying down the UFL. It is not clear from the WSIB's press release whether the 2013 rate increase includes a portion for UFL payment.

#### 4. PROPOSED AMENDMENTS TO THE WSIA: LOE REVIEW AFTER 72 MONTHS, AND SURVIVOR BENEFITS BASED ON AVERAGE EARNINGS

On October 22, 2012, the Ontario Ministry of Labour ("MOL") announced two proposed amendments to the WSIA to "promote the long-term stability of the workers' compensation system." The proposed changes would allow the WSIB to:

- Review Loss of Earnings ("LOE") benefits after 72 months.
- Base survivor benefits on the average earnings of the deceased worker's occupation or trade rather than the statutory minimum currently mandated under the WSIA.

Under the current LOE policy, benefits are generally "locked-in" after 72 months, even if the injured worker's condition improves or they re-join the workforce. The WSIB can only review an injured worker's LOE benefits after the 72-month period if the worker experiences a significant deterioration in his or her condition. The proposed amendment appears to allow the WSIB to apply the "material change in circumstances" criteria at any point during receipt of LOE benefits. Currently,

Ontario is the only province that "locks in" LOE benefits after 72 months.

With regard to survivor benefits, current WSIB policy provides that the minimum amount of payment for full LOE is the lesser of the minimum for the year of the accident/disease or the worker's net average earnings before the accident or disease. The minimum LOE payment for 2012 is \$17,042.48.

It is anticipated that these amendments will be introduced during the current session of the Legislative Assembly of Ontario.

#### 5. CONCLUSION

As the WSIB continues to implement recommendations from both the Arthurs Report and the KPMG Value-For-Money Audit, employers can expect more changes to Ontario's workers' compensation system. The WSIB has already forged ahead with some momentous changes to coverage in the construction industry. However, we have yet to feel the full effects of the WSIB's benefit policy review. Employers are well-advised to expect significant changes in the four benefit policies currently under review.

#### CONTACT ▼



**Kevin MacNeill**  
Partner  
kmacneill@heenan.ca  
Toronto 416 360.2602



**Samantha Seabrook**  
Associate  
sseabrook@heenan.ca  
Toronto 416 777.4176



**Daniel Mayer**  
Associate  
dmayer@heenan.ca  
Toronto 416 777.4199

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## CONTACTS

### ONTARIO



**Cheryl A. Edwards\***

416 360.2897  
 cell 416 452.4958  
 cedwards@heenan.ca



**Douglas G. Gilbert**

416 360.3535  
 dgilbert@heenan.ca



**Kevin D. MacNeill**

416 360.2602  
 cell 647 200.5326  
 kmacneill@heenan.ca



**Jeremy Warning\***

416 643.6946  
 cell 647 407.5732  
 jwarning@heenan.ca



**Dan Palayew**

613 236.6970  
 cell 613 296.8830  
 dpalayew@heenan.ca



**Lia Chiarotto**

416 643.6854  
 lchiarotto@heenan.ca



**Christina Hall**

416 643.6843  
 cell 416 616.3503  
 chall@heenan.ca



**Julie Thibault**

613 236.2161  
 cell 613 866.2111  
 juthibault@heenan.ca



**Rhonda Shirreff**

416 643.6858  
 rshirreff@heenan.ca



**Shane Todd**

416 643.6958  
 stodd@heenan.ca



**Charlotte Willson**

416 643.6909  
 cwillson@heenan.ca



**Julie-Anne Cardinal**

416 643.6939  
 jcardinal@heenan.ca



**Samantha Seabrook**

416 777.4176  
 sseabrook@heenan.ca



**Daniel Mayer**

416 777.4199  
 dmayer@heenan.ca



**Simon Laberge**

514 846.7248  
 slaberge@heenan.ca



**Marie-Josée Hétu**

819 373.4274  
 mhétu@heenan.ca



**Rhéaume Perreault**

514 846.2306  
 rperreault@heenan.ca



**Gilles Rancourt**

418 649.5493  
 grancourt@heenan.ca



**Virginie Vigeant**

514 846.2285  
 vvigeant@heenan.ca

### BC/ALBERTA



**Andrea Zwack**

604 891.1161  
 azwack@heenan.ca



**Jillian Frank**

604 891.1160  
 jfrank@heenan.ca



**Loretta Bouwmeester**

403 234.1256  
 cell 403 831.2252  
 lbouwmeester@heenan.ca



**Najeeb Hassan**

604 891.1164  
 nhassan@heenan.ca

### QUEBEC



**Francine Legault**

514 846.2348  
 flegault@heenan.ca



**Lucie Guimond**

514 846.2304  
 lguimond@heenan.ca



**Danielle Gauthier**

819 346.8073  
 dgauthier@heenan.ca



**Jean Boulet**

819 373.4370  
 jboulet@heenan.ca



**Christian Drolet**

418 649.5480  
 cdrolet@heenan.ca

\* Former OHS Prosecutor