

The Employer's Voice

Volume 1, Issue 5

September 2009



EXCLUSIVE INTERVIEW

WITH THE CHAIR OF WSIB,
the Hon. Steven W. Mahoney

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Ontario's leading source of Occupational Health and Safety, Prevention and Disability News for Employers

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REGULAR FEATURES

Executive Director's Message

Hot off the Press!

The following is information obtained recently from WSIB. I felt it was important to share with all EAC members, even though not all the pieces or answers are in place as of yet.

As you know, the WSIB New Service Delivery Model (NSDM) was introduced in September 2008; initially launched in the Ottawa area followed by other regions across the Province.

According to WSIB sources and as part of the NSDM implementation, the continuous (improvement) identification of need for specific functions continues to evolve, and as such the area of **Second Injury Enhancement Fund (SIEF) was identified as an area of opportunity for the WSIB to address.**

Starting **Monday September 21st 2009**, the WSIB launched a pilot project to deal with SIEF claims. The SIEF team was formed under the leadership of Kim Murphy, Assistant Director, Hamilton office.

This specialty team consists of 9 Case Managers working out of the Hamilton office; all SIEF claims from across the province will flow through this team. The objective of this group, according to WSIB sources, is to: create consistency of decisions within existing policies, accuracy, fairness in rendering decisions and improve responsiveness to clients.

At this point, there is no further information to share with you as this pilot has just started. I will keep you informed with further progress as things unfold.

Fred Spiro
Executive Director

Welcome - New EAC Members

Bakernet Inc.
Bartek Ingredients
Cameron Landscaping Inc.
Canadian Printing Resources Inc.
Foyer Richelieu Welland
Great Lakes Fish
Kenaidan Contracting Ltd.
Kenworth Truck Centres
Precision Technologies
Research in Motion

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Ask the Expert

Question:

Barbara Wallace, Marks Supply Inc.

"Do you know if it is mandatory for companies to have a Pandemic Policy or if it will be mandatory in the next year?"

Answer:

Suzanne Bernier, Former Emergency Management Program Coordinator, WSIB

At this time, it is not mandatory for companies to have pandemic plans in place. However, certain businesses within highly-regulated industries such as banks, are required to develop business continuity and pandemic plans to ensure they fulfill their own legislative requirements. Regardless, all companies are strongly encouraged by WSIB, the province of Ontario and the federal government to demonstrate due diligence by developing such plans.

Meanwhile, Under Ontario's Emergency Management & Civil Protection Act, all government ministries, as well as designated agencies, boards and commissions, are required to develop business continuity and pandemic plans to ensure continuity of services during a pandemic or other emergency.

While the federal government has not yet made it mandatory for all companies to develop pandemic plans, they have recently announced a joint initiative with the International Centre for Infectious Diseases in Winnipeg, to develop tools and strategies to help small and medium sized businesses plan for a pandemic.

As we are now in the midst of a global pandemic and could be facing a second wave in the fall, all companies are encouraged to develop pandemic plans to ensure protection of their own employees and effective continuity of operations during a heightened pandemic.

Tip of the Month

Report all material changes in circumstances

Employers and workers are obligated to report a "material change in circumstances" to the WSIB within 10 days of the occurrence or be liable to a fine or imprisonment for the offense. Material changes in circumstances include any change that may affect an employer's obligations under the Workplace Safety and Insurance Act. A change in business activity, business name and business address are a few common material changes.

Courtesy of Michael Zacks, Office of the Employer Adviser

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EAC Safety Group Update

The three Safety Groups:

Multi-Sector, Magna and the Canadian Vehicle Manufacturers' Association (CVMA)

The Safety Groups' fall meetings are in full swing; we have completed four out of the five meetings for this year. Thanks to the members, the sharing of ideas/experiences at the meetings has been exceptional. For example, we discussed recent Ministry of Labour (MoL) visits to members. It appears that companies are responsible for reporting all critical injuries at work, including non-employees—like the public visiting your store—who suffered a heart attack.

WSIB rebates will be issued to all qualified members in November and at the final meeting we will be selecting (or short-listing) the group element for next year.

For more information on the potential of receiving up to 6% premium rebate from the WSIB Safety Group Program, call us at 1.888.663.4929 or to [download a brochure and application form](#) at www.EACforEmployers.org.

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Ministry of Labour - Court Bulletins

October 2, 2009

Lockerbie & Hole Eastern Inc. Fined \$250,000 After Worker Killed

Toronto, ON - Lockerbie & Hole Eastern Inc., a Brantford Construction firm, was fined \$250,000 on September 29, 2009, for a violation of the Occupational Health and Safety Act (OHSA) after a worker was killed.

[More](#)

Jackson Builders Supply Limited Fined \$55,000 After Worker Critically Injured

Morrisburg, ON - Jackson Builders Supply Limited, an Iroquois manufacturer of wood pallets and containers, was fined \$55,000 on September 29, 2009, for a violation of the Occupational Health and Safety Act (OHSA) after a worker was critically injured.

[More](#)

[To read more Court Bulletins](#)

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EAC October 2009 Events Calendar

October 2009

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2
	6	7	8	9	10
	13	14	15	16	17
18	19	20	21	22	24
	26	27	28	29	

Business Summit

On
Workplace Safety & Insurance
November 5, 2009

Mississauga

For more info or to register visit
www.EACforEmployers.org

Register

ONLINE

AND SAVE

Details
And
Registration

October 15, 2009:
Experience Rating NEER
Scarborough (8:00 am - 12:00 noon)

October 20, 2009:
Workplace Safety & Insurance Appeals Workshop
Mississauga (8:00 am - 12:00 noon)

October 20, 22, 2009:
"Tool Box" for Claims and Disability Management Workshop
London - October 20 (8:00 am - 4:00 pm)
Toronto - October 22 (8:00 am - 4:00 pm)

October 20, 22, 2009:
How to Manage a Ministry of Labour Visit Workshop
Ottawa (8:00 am - 4:00 pm)
Burlington (8:00 am - 4:00 pm)

October 28, 2009:
Workwell Audit
Kitchener (8:00 am - 4:00 pm)

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EXCLUSIVE INTERVIEW

Exclusive Interview with the Hon. Steven W. Mahoney Chair, WSIB



An open discussion with Chair Mahoney of the WSIB

Interview by Maria Dagninis

Q: Mr. Chair, can you please begin by giving us a brief summary of the WSIB challenges and successes?

A: I think our biggest challenge is the fact that we have so many diverse stakeholders such as organized labour and employer groups who all have different opinions and ideas.

One success is the consultation that I've led this summer. I have had 46 meetings so far with stakeholder groups and I think that it will produce some very good ideas; although these are not my ideas, I will be promoting them in my report.

The report will have some recommendations in it that I am sure will cause anxieties for both employers and organized labour. After I listen to everybody and take into account their concerns, I have to be able to make recommendations that I and the folks at WSIB think will work; that is the biggest issue.

I think it has been a successful endeavour...we are not just sitting here listening or pretending to listen but that we are actually conducting meaningful consultations on what the issues are

We have made some changes in Experience Rating...might upset some folks but we cannot implement a Road to Zero and have zero tolerance for injuries and illnesses in the workplace and ignore things like fatalities while continuing to reward companies that experience a tragedy.

Another success is the Safety Groups...I know that your group has been actively involved

I think one of the first orders if you will, that I gave, was that we needed to lift the cap on the Safety Group rebates and that was done; was a successful venture. Believe it or not, I think we have successfully managed...the unfunded liability... even though it has grown we have been on top of it. We now publish our quarterly budgets on our website—open and transparent so people can see exactly what is going on. We have opened up the WSIB much more to a culture of transparency..there is some risk in that because there are people who will just take pot shots at you.

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We recognize that 2014 is not an achievable date and we have to face up to that and employers have to face up to that, but at the same time we don't need to panic...need to develop a new long range plan which I am hoping my report will lead us to

As much as the unfunded liability has grown there are clear definable reasons for its growth like the loss of 15.4% in our investment portfolio which is substantially better than other investment portfolios in the country, but still a loss. Indexation is another one of the various things that has caused our unfunded liability to grow and I am not commenting negatively on that, I am just saying it is a reality.

We have maintained our administration costs at 11% of our total budget and it is the lowest of all compensation boards in Canada; also we have managed to keep premium rates flat for 4 years with a vast majority of employers

During the first 3 years of my administration the premiums were kept flat or reduced and this last year we targeted rate groups that are seeing the increases; if you are in a rate group that is performing well than you are going to benefit by having your premiums kept at the same rate as in '09. Given the recession and the financial difficulties that we, like everyone else are facing, I think that is a major accomplishment to go 4 years in a row by managing the premium rates.

I am hoping that we will be able to continue to keep future rates down and my letter gave fair warning that we may have to increase in the future even though that is not my plan and not my goal contrary to some of the reaction

We are not setting up a position where we can increase them because we know that WSIB premiums are an important factor in the competitiveness of employers so we want to manage that.

I think that probably the thing that we have done best is serve those workers who are legitimately injured on the job and helping them to become whole again; our biggest goal is to serve the injured worker and get them back to work

Q: If you could get all employers to work together, on the same level, what would you ask them to do?

The biggest thing I would ask of employers is to realize how important this system is to their overall competitiveness

A: There are some both in the political class and in the employer groups who think that opening this up to the private sector is some kind of silver bullet. When you look at the growth in the premium costs, administration costs and the lack of benefit costs that come out of insurance companies, I think that that is quite clear that it would be a mistake.

I also think employers need to understand that the value of being protected from the court system is almost immeasurable

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If workers were able to sue for every injury minor or major, the legal bills alone could put could put people out of business and the awards that might end up coming out of these things could be catastrophic and so there is a real benefit out of the WSIB that just gets lost in all the noise

Q: In regards to the "You can never be too safe" Social Marketing Campaign, what is the impact to-date that the campaign has contributed to injury/illness reduction?

A: I don't know that you can actually measure the short term effects. I've been there a little bit over 3 years and 3 years is not a long enough window to change attitudes and to change culture. I do know that our fatality rate has gone down by about 20% and our overall injury rate has come down by about 25%. I would not presume to take credit for that or lay credit at the foot of the social marketing campaign. However, I think employers have rolled up their sleeves, have worked with unions and they have taken great strides and efforts to ensure their workplaces are safe.

I think everybody involved in that deserves the credit however the one thing the social marketing campaign has done, is created top of mind attitude to health and safety in the province

Everywhere I go, which is everywhere in the province, it is a water cooler topic of conversation probably because of the graphic nature of the ad but also because it surprises people and it leads people to ask questions and to investigate more; then we see the number of hits in the millions we get on our website, our preventit.ca website, and it shows us that in fact these things are working.

When we did our Ipsos Reid analysis of the Social Marketing Campaign we found that 87% of employers and something like 85% of workers had actually seen the ads and therefore they're succeeding in reaching out to people but I don't think you change attitudes around issues like drinking and driving...all of these bigger social attitudes...overnight, it takes time and you have to be committed to that. Although in fairness I think we are well on our way to that.

So my message to employers would be to obviously work together

Let's recognize that we have come through the worst recession / depression since the 20s and 30s... that's not the only problem we have to face. We need to develop plans that will see the system be in place 100 years from now to the benefit of all.

I am usually singing to the choir, to those who wouldn't be in the audience if they were not somehow involved in health and safety. So it is the general public and the general employer that we have to be able to get to; the ones who don't get up in the morning and think health and safety first because they think about opening the shop, about getting their product shipped, about making sure the quality of the product is up, about the profit line of their business, about survival, about interest rates...taxes, about all of these things—health and safety may be way down the list.

The CFOs and CEOs leave it generally to the health and safety people in their organization to deal with this stuff so I think we still have a long way to go to convince the senior people in business of the value of health and safety as a value add to their business

[More](#)

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FEATURE ARTICLES

Accessing Pornographic Material and Violating Code of Conduct Sufficient Evidence for Summary Judgment of Wrongful Dismissal Claim

BAKER & MCKENZIE

By Lisa Stam, Baker & McKenzie LLP

**Lisa Stam is an employment, labour and human rights lawyer at Baker & McKenzie LLP and can be reached at 416-865-6924 or by email at lisa.stam@bakernet.com.*

The Alberta Court of Appeal has recently upheld an employer's decision to dismiss an employee because he had accepted free landscaping services from a client and because he had used the company's computers to access pornographic and racist material: *Poliquin v Devon Canada Corporation*, 2009 ABCA 216. As an appellate level court decision, **this case will apply to Ontario employment law.**

Key Facts Not In Dispute

The employee had been with the company for over twenty years, and at the time of dismissal, managed the gas properties and heavy oil departments. He supervised 20-25 employees, some of whom were supervisors that were junior to him.

The key facts surrounding the dismissal were undisputed. It was undisputed that the employee had solicited and accepted landscaping services at his home from a client of the company, and that he knew that he would not be billed for the services.

It was also undisputed that the employee had been previously warned in writing that he was not to access pornographic or racist material from his company computer. Notwithstanding the warning, the employee continued to access inappropriate material on his computer, and the employer produced some 881 pages of emails and related photo attachments from the employee's computer. While some were clearly pornographic, others were obscene or inappropriate, but all were prohibited under the company's Code of Conduct.

Code of Conduct and Industry "Norms"

The company successfully relied on their Code of Conduct to establish that it did not tolerate conflicts of interest and/or accessing inappropriate material on the company computers.

The court pointed to the employee's supervisory position and the resulting reasonable expectations of the company that the employee should adhere to the Code of Conduct.

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With respect to the inappropriate computer use, the court held that it was not just the frequency of the emails or the fact that most of the emails were *received* but not forwarded on by the employee, but the long duration and failure to stop the receipt of emails that posed a problem. Further, the fact that there were no complaints from other employees did not relieve the company of its responsibility to enforce its own policies.

Finally, the court rejected the employee's argument that because the company is in small-town northern Alberta in the heart of the oil patch, the industry atmosphere and culture was relaxed with respect to emails of "questionable content". The court held that the employee's conduct was not to be measured against the lowest common standards in an industry, but rather, to the reasonable standards to which the company requires compliance through its Code of Conduct.

Summary Judgment of Claim Allowed

After the former employee had initiated the lawsuit, the employer filed an application for summary dismissal of the action on the basis that there was no merit to the claim and no genuine issue to take to trial.

The trial judge had found that there were sufficient facts to support the employee's claim to warrant a trial. The Court of Appeal, however, overturned that decision and held that given the uncontroverted evidence regarding the employee's alleged behaviour that triggered the dismissal, there was no genuine issue of material fact requiring a trial. It was thus "plain and obvious that Poliquin's wrongful dismissal action cannot succeed". Summary judgment was granted and the action was dismissed.

Comments for Employers

Appropriate use of a workplace computer highlights the ongoing tension between an employee's privacy and the employer's right to supervise activity on its premises and property.

Employers should advise employees in writing that all activity on their workplace computer may be monitored. An employer is then entitled to rely on its internal code of conduct policies as the standard by which to measure an employee's behaviour, rather than an external industry "norm". In this case, the court relied on the fact that employees were required to acknowledge at various times that they have read, understood and accepted the terms of the policy. It is important to regularly update the policies and to apply them consistently, particularly in the case of supervisors.

Furthermore, this case emphasizes the value of documenting all steps when progressively dismissing an employee. In addition to pointing to the code of conduct standards, the court relied heavily on the fact that the employee had already been warned in writing.

For a company facing a former employee's claim of a wrongful dismissal, an application for summary judgment may be a good method to have the action dismissed without going to trial. To successfully achieve summary judgment, the employer requires a strong case that the employee was terminated for cause, based well documented, undisputed facts.

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Safety First / Privacy Second: Proposed Amendments to the Occupational Health and Safety Act



By George A. Leibbrandt, Keyser Mason Ball LLP

Bill 168 proposes to amend the *Occupational Health and Safety Act* to designate violence and harassment as workplace health hazards, and seeks to introduce measures to prevent and protect workers from workplace violence and harassment.

Employers have become conditioned to the necessity of keeping private and confidential, personal information they collect from their employees. In today's world, for example, what employer would freely and "with no questions asked" disclose the contact or health information of an employee, upon receiving a request for same from an outside source? Employers even contact us about requests for employee information from law enforcement agencies, to ensure that they will not run afoul of privacy or other legislation by providing the requested information.

This hesitancy is the result of a developing public consciousness regarding personal privacy, supported by an ever-expanding regime of privacy legislation. Employers are wise to proceed cautiously before disclosing personal information without employee consent, not only because of the potential penalties and fines that may be imposed for improper disclosure, but also because of the negative impact upon employee relations that such disclosure may cause.

In at least one respect, however, personal privacy takes a backseat. This is where public safety would be jeopardized by failing to disclose personal information. Privacy legislation, including the provincial *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*, and the federal *Personal Information Protection and Electronic Documents Act*, has always included a general exemption permitting the disclosure of personal information where the health or well-being of an individual or individuals is at risk.

However, proposed amendments to the *Occupational Health and Safety Act* go far beyond this. In fact, the amendments which aim to address workplace violence and harassment by placing positive duties on employers, appear to be the first of their kind in Canada. Bill 168 proposes to amend the *Occupational Health and Safety Act* by including, in part, the following provisions:

Domestic violence

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

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Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence.

Information

- (2) An employer shall provide a worker with,
- (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and
 - (b) any other prescribed information or instruction.

Provision of information

- (3) **An employer's duty to provide information to a worker under clause 25 (2) (a) and a supervisor's duty to advise a worker under clause 27 (2) (a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,**
- (a) the worker can be expected to encounter that person in the course of his or her work; and
 - (b) the risk of workplace violence is likely to expose the worker to physical injury.

Limit on disclosure

- (4) **No employer or supervisor shall disclose more personal information in the circumstances described in subsection (3) than is reasonably necessary to protect the worker from physical injury.**

As indicated above, the proposed amendments would impose a statutory duty on employers to, among other things, **disclose personal information regarding an employee's propensity for violence to fellow employees where the employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace.**

Needless to say, the proposed amendments are highly controversial. The consequences for employers of "getting it wrong" are apparent. For example, if an employer withholds from co-workers personal information about an employee with a history of violent behavior, and it is later determined that the timely disclosure of this information would have prevented harm or injury, aside from any penalties or fines that may be imposed upon the employer, the impact upon the employer's reputation or upon employee morale may be devastating.

On the other hand, if an employer discloses personal information and it is later determined that the employer did not have sufficient reasonable grounds to do so, again aside from any penalties that are imposed, the employer's business interests may be seriously undermined. The position of the employee whose personal information was improperly disclosed, may be permanently compromised in the workplace, leading to human rights complaints, resignations followed by claims of constructive dismissal etc. In turn, the employee's co-workers may be unwilling to work with the employee in the future, fearing that the employee may be disposed to violent behavior.

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Bill 168 has only passed First Reading in the Legislature. However, the amendments to the *Occupational Health and Safety Act* are expected to come into force later this year. At the very least, they underscore the importance of proceeding cautiously and ideally, seeking legal advice, before disclosing personal information about any employee to other employees or third parties who do not, in the normal course, have access to such information.

Should you have any questions regarding the proposed amendments to the *Occupational Health and Safety Act* or privacy issues in the workplace, we would be pleased to assist you. For further information please contact:

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HR COLUMNIST



Ron Guest, co-founder of TwoGreySuits, www.twogreysuits.com is an experienced and sought after recruiter and pioneer of behavior based interviewing. He has interviewed over 5000 candidates with an outstanding placement record. He can be reached at rquest@twogreysuits.com

Interviewing: Getting Beyond the Canned Answer By: Ron Guest

While behavior-based interviewing is not a panacea for complex recruitment and retention challenges, it is a time-tested methodology for improving hiring results. It has been studied, evaluated and practiced for more than 30 years and is a central component of selection strategy at some of the world's best known companies. However, becoming an expert at this is not as easy as you might think.

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Interviewing: Getting Beyond the Canned Answer

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Behavioral interviewing requires candidates to respond with specific examples of past experiences rather than generalized or hypothetical responses. At the root of this interview style is the belief that past performance is the most accurate predictor of future performance. Typical behavior based questions begin with, "Tell me about a time when..." or "Give me an example of..." Highly skilled interviewers look for specific details in the answers and probe to get to the root of their behaviors. As an example, you should be looking for person, place and time in the candidate's responses, this way you can also easily verify the example in a reference check.

Behavior interviewing done properly will effectively eliminate candidates who are "good at the interview game", but fall short on real life examples on specific behaviors you are looking for. Learning how to conduct a behavioral interview is a good place to start. However, actually doing them is where the real learning comes from. At first it will seem very awkward and not very comfortable for the candidates or you. There will be nervous silent periods as candidates are put on the spot to try and recall a specific work example. A candidate must be able to back up their claim of having a certain behavior by providing very specific examples which can be verified via reference checking.

There will be a strong tendency to go back to your original style of interview because this is what you are comfortable with. Once you are used to doing behavioral based interviews, you can help the candidates with coming up with an example by suggesting certain things to stimulate their thinking or in some cases telling them you will return to the question at the end of the interview. One client of mine asked why they could not simply give the candidate the behavioral questions and have them complete them and return. The short answer is that it is always better to be able to probe and ask further questions to get at very specific behaviors the candidate has used or not used.

Research suggests that we judge people more by what they look and sound like vs. what they are actually saying. In a non-behavioral interview, a candidate can present as very professional, polished and easy to converse with, when the real story may be that they would not at all fit in your company or in the job because they have a different way of thinking or behaving than what is required. I know of one company that insists candidates must have a certain sense of humor about them; they even have this stated in their own values. So, if a candidate does not present some sense of humor, they would not fit with the culture of the company and likely would not be hired.

How do you know which competencies or behaviors to interview for? This is critically important as this will reflect the culture of your company and also will reveal which competencies are critical to the point of being used as a screening tool. I use an assessment tool which asks you to rank questions, then rank these answers aligned with which behavior it represents and to which degree. Sound complicated? It really isn't, if you do it right....but it HAS to be done right, otherwise you are interviewing for the wrong competencies.

The behavior interviewing experience will really open up your eyes to the value of these kinds of questions. You will be able to hire significantly better people by using this method. As members of EAC, you have access to the HR Power Centre section of our website, where you can learn more about behavior based interviewing. If you need the URL to get in, please contact us at info@twogreysuits.com

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POINTS OF INTEREST

Introducing the Return to Work Specialist: A New Role at the WSIB

Over the past year, the Workplace Safety and Insurance Board (WSIB) has launched a New Service Delivery Model (NSDM) that supports its strategic plan, *The Road to Zero*, representing the WSIB's ongoing commitment to the elimination of all workplace injuries and illnesses.

Part of the mandate of the NSDM is to renew the WSIB's focus on preventing injuries and illnesses and on improving return to work outcomes for workers and employers. To help achieve this, new roles were introduced, including the Return to Work (RTW) Specialist. The role was created following extensive research which indicated that early intervention in the return to work process contributes significantly to better outcomes.

While the WSIB Case Manager develops a case plan and monitors its progress, the workplace parties may require assistance in developing solutions to help achieve and sustain RTW. There are a wide variety of situations which would benefit from the assistance of a RTW Specialist: for example, if an injured worker is not progressing as expected, or if there are questions regarding the suitability of the modified work offered, a RTW Specialist can examine the situation and provide guidance.

At the request of the Case Manager, the RTW Specialist will arrange a visit to the workplace. While at the worksite, the RTW Specialist will likely want to view the pre-injury job and as such will inquire in advance about the appropriate safety protection required at the job site.

RTW Specialists are proactive, analytical problem-solvers. Their goal in visiting the worksite is to assist workers and employers to develop or adapt a RTW plan. Upon arrival at the workplace, they introduce themselves, explain their role, and then invite all workplace parties, including worker or employer representatives where appropriate, to participate in a collaborative discussion about the issues and obstacles that are getting in the way of a successful return to work outcome.

RTW Specialists are trained in leading these discussions. They use facilitation, negotiation, and analytical skills to generate options, discuss possible solutions and identify activities or interventions that would help overcome RTW obstacles.

Following the collaborative discussion, the RTW Specialist will help the workplace parties to create and implement a RTW plan that has clear goals and agreed-upon actions. A copy of this plan and summary of the meeting is sent to the Case Manager, who will monitor the plan until its successful completion.

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Introducing the Return to Work Specialist: A New Role at the WSIB

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The role of the RTW Specialist in helping workplace parties discuss issues face to face in a spirit of cooperation has proven to be one of the strengths of the NSDM. The RTW Specialist brings a wealth of experience and sound advice to the table, and is focused on a positive RTW outcome that benefits all workplace parties.

If you would like to learn more about this new role at the WSIB, or have questions about the services and benefits of a RTW Specialist, please contact Jeff Farwell, Manager, Service Delivery, at 416-344-5505.

For more information on the NSDM and other roles within the WSIB, please visit www.wsib.on.ca.

Law Commission of Ontario Study on Disabilities

Courtesy of Michael Zacks, Office of the Employer Adviser

The Law Reform Commission of Ontario (LCO) is undertaking a broad based consultation project on the law as it affects persons with disabilities.

This will likely include disabled workers under the WSIB system, which is referenced a number of times in the LCO's preliminary consultation paper; [to read the consultation paper click here](#).

Here is a statement from its backgrounder:

The intent of this Project is to develop a coherent approach to this area of the law. It will not focus on reform of any one specific issue; rather, its purpose is to develop a principled analytical framework for this area of the law that can be used as a tool for shaping legislative initiatives that affects persons with disabilities or reforming current law. Current laws, policies and programs may be used as examples in developing and illustrating the framework.

The final document may have an impact on how WSIB law and policy will be developed in the future, and how the WSIAT may adjudicate cases. EAC will be monitoring the project and will let you know of any significant developments.

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The Employer's Voice

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September 2009

Bill 118: Ontario's New Law Prohibiting the Use of Hand-Held Cell Phones and Other Hand-Held Devices

Please note Important Date Below!
Message brought to you by the Government of Ontario

Effective October 26, 2009, Ontario's new law prohibiting the use of hand-held cell phones and other hand-held communication and entertainment devices while driving will come into effect.

Once the new law is in place, drivers who text, type, email, dial or chat using any hand-held device will face fines of up to **\$500** upon conviction. Hands-free use will still be permitted.

Driving is a task that requires your full attention every time you get behind the wheel. As a driver, you must always remember to reduce driver distractions and focus on the driving task. Your first responsibility is road safety!

There are a number of potential driver distractions and these may include:

- **technology devices such as cell phones, laptops and hand-held organizers;**
- **reading maps or other material;**
- **grooming activities;**
- **eating or drinking;**
- **conversing with passengers;**
- **tending to children or pets; and**
- **adjusting in-vehicle controls (radio, climate control and CD player)**

Police can charge drivers with careless driving if they do not pay full attention to the driving task. If you are convicted of careless driving you will automatically receive six demerit points, fines up to \$1,000 and/or a jail term of six months. In some cases, your license may be suspended for up to two years. This is one of Ontario's toughest rules of the road.

The following are some tips to help reduce driver distraction:

- **Put reading material in trunk if tempted to read.**
- **Attend to personal grooming and plan route before leaving.**
- **Identify and preset your vehicle's climate control, radio and CD player.**
- **Make it a habit to use your cell phone only when parked, have a passenger take the call or let the caller go to voice mail.**
- **Do not engage in emotional or complex conversation.**
- **When hungry or thirsty, take a break.**

[More on News Release](#)

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Ontario Health and Safety System Realignment?

By Steve Jackson, Vice President, Prevention, WSIB

At its February 2009 Board of Directors meeting, the WSIB approved the Business Case to restructure the Safe Workplace Associations (see link below). Effective January 1, 2010, the 12 existing Safe Workplace Associations (SWAs), previously granted designation pursuant to ss. 6(1) of the *Workplace Safety and Insurance Act, 1997*, are to be succeeded by 4 new Safe Workplace Associations.

Since the WSIB Board approval, significant progress has been made to advance the initiative and the realignment of Ontario's Health and Safety System. Key to the progress has been the establishment of Transition Boards of Directors for each of the 4 new entities with representation from the amalgamating organizations, as well as the recruitment of CEOs to run the new entities. International Search Firm Ray & Berndtson/Lovas Stanley has been leading the recruitment for each of the 4 new SWAs: Safe Workplace Promotion Services Ontario, (IAPA, OSSA and FSA); Workplace Safety North (MASHA, OFSWA, PPHSA), Government Services Health and Safety Association (OSACH, MHSAO, ESAO), and the Sectoral Infrastructure Safety Association (CSAO, EUSA, THSAO).

Please Note: The above names were established for Incorporation purposes and are not necessarily the names that the SWAs will operate under.

To date, CEOs for three of the new SWAs have been confirmed: Elizabeth Mills, Safe Workplace Promotion Services Ontario (SWPSO), Candys Ballanger-Michaud, Workplace Safety North (WSN), and Louise Logan, Government Services Health and Safety Association (GSHSA). Interviews have been conducted and a decision pending for the Sectoral Infrastructure Safety Association.

Consolidated Business Plans and budgets for 2010 are being finalized for submission to the WSIB from each of the new SWAs.

A key objective of the realignment is that the SWAs work together collaboratively as aligned system partners to improve health and safety outcomes for all workplaces across all sectors, building effective relationships within and across the new organizations. This will be an immediate priority in 2010, as will ensuring greater consistency in service delivery across all sectors including product and service access, quality, availability, pricing and duration.

More details will be available once all four new CEOs are in place and 2010 Business Plans have been finalized and approved by the WSIB by the end of the year.

[More](#)

[Link to Business Case](#)

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Who is CREIDO?



Dr J. David Cassidy, PhD, Dr. Med Sc, Director of CREIDO

Dr. Sophie Soklaridis, PhD

The Centre of Research Expertise in Improved Disability Outcomes is partially funded through the WSIB and administered through the University Health Network (UHN); also affiliated with the University of Toronto. The director of CREIDO is Dr. David Cassidy.

CREIDO's goal is to collaborate with workers, workplaces, insurers, researchers and other stakeholders to share existing information on work disability prevention and build collaborative research projects that are relevant to real-world work disability issues

What can CREIDO do?

CREIDO understands that all workplaces, particularly, small and medium workplaces, face challenging moments with managing work disability and return to work. CREIDO would like to reach out and support these workplaces through research; together can bridge the gap between research and practical recommendations that workplaces can actually carry out to manage work disability and return to work, without putting a strain on their existing resources.

Examples of on-going projects:

- What are the economic costs that employers sustain when returning an injured worker back to work?
- How do supervisors decide on work accommodations?
- What are some of the organizational factors that influence returning an injured worker back to work?
- How important is co-worker support in the return to work process?
- The five-steps of successful return to work

CREIDO is always interested in hearing from workplaces.

Feel free to contact Dr. Sophie Soklaridis (ssoklari@uhnresearch.ca) should you have any ideas that, through research, CREIDO can assist with in finding the answers.

For more information please visit our website at www.creido.ca.

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OHS & Workers' Compensation

Heenan Blaikie LLP

Courtesy of Cheryl A. Edwards, Heenan Blaikie LLP

Ontario Court of Appeal Upholds Sanctity of Solicitor Client Privileged Internal OH&S Accident Investigation Reports

[More](#)

Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)

Courtesy of Michael Zacks, Office of the Employer Adviser

I would like to draw your attention to an important decision of the Ontario Court of Appeal called Rodrigues. It is rare, given the number of appeals at the WSIAT, for one of its decisions to be challenged in the Ontario Divisional Court on a judicial review application. It is even rarer for the Tribunal to lose, and then appeal the case to the Court of Appeal. To make this case even more unusual, it is perhaps the first time, that I am aware of, of a WSIAT decision going to the Supreme Court of Canada. That in itself is noteworthy.

The case is **Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)**. It (*Decision No.855/03*) concerns a worker's appeal that the WSIB improperly calculated his average earnings by not including the value of the employer's contributions to a multi-employer benefit plan after the first year of LOE benefits. Multi-employer benefit plans are generally found in the construction industry and provide that a group of employers that usually bargain with a particular union will make contributions to a union managed benefit plan that provides medical, dental and other insurance coverage for the union members. In Mr. Rodrigues' case, it was the sheet metal workers.

Section 25 of the WSIA requires that these plans be structured so that they pay injured workers the plan benefits for up to a year, if necessary, after a workplace accident. Under a collective agreement that establishes multi-employer plans, an employer must make a contribution per hour of work to the union towards the plan. Mr. Rodrigues argued at the Tribunal that once the year of pre-paid benefits expired, the amount the employer contributed to the plan while the worker was employed should be included in the worker's recalculated average earnings. In the case of a single employer benefit plan, the employer and the worker make contributions to the plan during the period the worker is off work because of the accident or illness.

The relevant parts of s. 25 read as follows:

25. (1) Throughout the first year after a worker is injured, the employer shall make contributions for employment benefits in respect of the worker when the worker is absent from work because of the injury. However, the contributions are required only if,

- (a) the employer was making contributions for employment benefits in respect of the worker when the injury occurred; and
- (b) the worker continues to pay his or her contributions, if any, for the employment benefits while the worker is absent from work.

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Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)

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(4) Subsection (1) does not apply to an employer who participates in a multi-employer benefit plan in respect of the worker if, when the worker is absent from work because of the injury during the first year after it occurs,

(a) the plan continues to provide the worker with the benefits to which he or she would otherwise be entitled; and

(b) the plan does not require the employer to make contributions during the worker's absence and does not require the worker to draw upon his or her benefit credits, if any, under the plan during the absence.

(5) Every multi-employer benefit plan shall contain or be deemed to contain provisions that are,

(a) sufficient to enable all employers who participate in the plan to be ex-empted under subsection (4) from the requirement to make contributions; and

(b) sufficient to provide each worker with the benefits described in sub-section (4) in the circumstances described in that subsection.

The WSIAT held that WSIB policy excluded employer contributions from inclusion into the average earnings calculation. The Divisional Court overturned that decision because the WSIAT decision did not consider the extensive arguments made by the worker's representative about legislative intent. Rodrigues argued that when s. 25 was introduced into the legislature as part of Bill 162, comments by the government of the day indicated that the employer contributions were only to be excluded from average earnings for the time that the worker was getting the advantage of the benefits. Mr Rodrigues argued that after the 12 months, the employer contributions should be included in the worker's average earnings. The WSIAT appealed this Divisional Court decision to the Ontario Court of Appeal which in its October 2008 decision supported the Tribunal and overturned the lower court ruling. I have attached that decision for your reference. The ruling was not unanimous.

The majority concluded that the Tribunal's decision was not unreasonable. The Tribunal fulfilled its task to determine the meaning of earnings according to the Act and Board policy. The Tribunal's failure to refer to legislative history did not render its decision patently unreasonable. The majority held the Tribunal considered the proper evidence, and applied Board policy in finding the employer's contributions for employment benefits should not be included when calculating pre-accident earnings.

The worker applied to the Supreme Court of Canada for leave to appeal. In a decision without reasons the Court dismissed the application for leave to appeal on May 7, 2009. However, the issue is still alive at the WSIAT. A similar case is currently before the Tribunal. The case involves the same union, but a different local agreement and group of employers. If the worker is successful, it will mean that all workers who have employer benefit plans and are off work for more than a year will be asking to have their average earnings recalculated to include the employer's contributions to the plans.

[More](#)

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The Employer's Voice

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Thank you to our Partners:

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