

Right to Sue Applications

1.0 This Practice Direction:

- governs the right to sue application process
- outlines the format and content for supporting materials and
- addresses summonses, withdrawals and other matters.

2.0 The Legislation

2.1 In an application regarding the right to sue, certain statutory provisions are applied in the Tribunal's determination of whether a right of action is taken away by the Act.

2.2 For accidents occurring after January 1, 1998, sections 26 through 29 of the *Workplace Safety and Insurance Act* (WSIA) are applied in making this determination.

2.3 For accidents occurring prior to January 1, 1998, sections 10(9) and 16, and its related sections under the *Workers' Compensation Act* 1990 (pre-1997 Act), as well as the predecessors of these sections under the earlier Acts, are applied in making this determination.

2.4 Section 126 of the WSIA requires the Tribunal to apply WSIB policy in appeals; it does not specifically refer to right to sue applications. Nevertheless, the Tribunal requests policy for right to sue applications filed with the Tribunal.¹

3.0 Who May Apply?

3.1 The WSIA, section 31(1) provides that the following may apply to the Appeals Tribunal for certain determinations:

- a party to an action, or
- an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act*.

¹ See *Decisions No. 755/02* and *No. 117/98*.

4.0 Available Determinations, Section 31 of the WSIA

- 4.1 A party to an action or an insurer from whom statutory accident benefits are claimed may apply to the Appeals Tribunal to determine:
- a) whether because of the Act, the right to commence an action is taken away
 - b) whether the amount that a person may be liable to pay in an action is limited by the Act or
 - c) whether the plaintiff is entitled to claim benefits under the insurance plan.
- 4.2 Section 31(2) of the WSIA provides that the Tribunal has exclusive jurisdiction to determine an application, as described in section 31(1).
- 4.3 Section 31(4) of the WSIA provides that a worker or survivor may file a claim for benefits within six months after the Tribunal's determination under section 31(1).

5.0 Interested Parties

- 5.1 Interested parties are normally the parties in the civil action and the plaintiff's employer.
- a) In applications by insurers from whom statutory accident benefits were claimed under section 268 of the *Insurance Act* there may be other interested parties.
 - b) Parties who are neither applicants nor respondents but have an interest in the application may contact the Tribunal Counsel Office.
 - c) Where a party submits that a company, organization or individual is the plaintiff's employer, the Tribunal will generally require that notice of the application is provided.

6.0 Materials

- 6.1 All Right to Sue Statements and other material to be relied upon in a right to sue application must be served on all interested parties to the application. The party filing the material must provide the Tribunal with an *affidavit of service* to prove notification to all other parties. In addition, three copies of these materials, one of which is not bound, must be filed with the Tribunal.

6.2 Applicant's Materials

The applicant shall prepare an "Applicant's Right to Sue Statement" containing the following information:

- (1) Table of Contents
- (2) A statement of the facts
- (3) The issues and arguments to be made
- (4) The law and
- (5) The determination sought
- (6) Documentary evidence to support the facts upon which the applicant intends to rely, including any relevant material from the Board file
- (7) Copies of the relevant portions of examinations for discovery, and copies of the relevant portions of transcripts of any previous proceedings, if applicable
- (8) A list of all witnesses who will give testimony and an outline of their testimony
- (9) All pleadings in the action and in any other matter arising out of the same set of facts.

6.3 Co-Applicant or Interested Party's Materials

- a) A Co-Applicant or an Interested Party may also file a Right to Sue Statement. The Co-Applicant or Interested Party's Right to Sue Statement shall be in the same form as the Applicant's Statement, but no material need be duplicated.
- b) The Co-Applicant or Interested Party's Right to Sue Statement must be served on all interested parties and filed with the Tribunal as soon as possible and no later than twelve weeks before the date of the hearing.

6.4 Respondent's Materials

- a) The Respondent's Right to Sue Statement shall be in the same form as the Applicant's Statement, but no material need be duplicated.

- b) The Respondent's Right to Sue Statement must be served on all interested parties and filed with the Tribunal no later than six weeks before the date of the hearing.

6.5 Reply Material

- a) The Applicant may prepare a Reply to the Respondent's Right to Sue Statement.
- b) The Applicant's Reply must be served on all interested parties and filed with the Tribunal no later than three weeks before the hearing date.

6.6 Correspondence

Parties must provide copies of all correspondence with the Tribunal to all interested parties.

6.7 Employer and Claim Status Information

Ten weeks before the hearing date, the Tribunal will forward status information regarding employer accounts and claim files to all interested parties.

6.8 Late Filing of Materials

- a) If a Respondent's Right to Sue Statement or an Applicant's Reply Statement is filed late, copies should be provided to the parties to the application in the manner outlined above.
- b) The admissibility of these materials will be the subject of a preliminary issue at the hearing; the Panel or Vice-Chair shall decide their admissibility.

7.0 Tribunal Process

7.1 Scheduling

Once the Applicant's Right to Sue Statement is received by the Tribunal, it will be reviewed by Tribunal Counsel. Tribunal Counsel may request clarification of the issues or request further documentation. The application will be referred to the Scheduling Department by Tribunal Counsel.

7.2 Adjournments

A request for adjournment should be made in writing to the Tribunal's Manager, Scheduling Administration as soon as possible. The request should set out the reasons for the

request and *include the consent of the parties*. A copy should be sent to the other parties. If an adjournment is granted, it will be several months before the matter can be rescheduled.

7.3 Summons to Witness and Production of Documents

- a) Any party to a right to sue application may make a request for a summons to the Tribunal.
- b) A summons request should be made as soon as possible and at least six weeks before the date of the hearing.
- c) The party requesting the summons must provide the witness's name and address information to the Tribunal.
- d) All summons requests will be reviewed by the Tribunal. If the Tribunal agrees that the person's testimony is necessary and will be useful to the proceeding, and that a summons is required, the Tribunal will prepare the summons.
- e) The summons will be delivered to the party making the request. That party will be responsible for serving the summons and paying the expenses according to Tariff A of the *Rules of Civil Procedure*. That party will provide the Tribunal with an original affidavit of service.
- f) If the Tribunal declines to issue a summons, the party may require that the summons request be placed before a Vice-Chair or Panel of the Tribunal. The Vice-Chair or Panel will decide on this request on the basis of written submissions.
- g) Where the Tribunal issues a summons on its own initiative, the Tribunal will serve the summons and pay the expenses.
- h) A request for a summons for the production of documents is usually referred to a Vice-Chair or Panel for instructions. When documents are in the control of one of the parties, the parties are required to explore the release and exchange of documents.

7.4 Withdrawals and Orders on Consent

- a) If the parties to the application have settled the action, the applicant shall notify the Tribunal in writing, prior to the scheduled hearing date, to indicate that the application has been withdrawn. This letter shall be copied to

all interested parties. Last minute withdrawals waste both Tribunal and parties' resources so parties should provide as much notice as possible of withdrawals.

- b) If the parties have settled the action but continue to seek a determination from the Tribunal with respect to issues raised in the application, they must attend on the scheduled hearing date with an agreed statement of fact, which is supported by available documentation.
- c) The Tribunal is not bound by the agreed statement of facts of parties to an application. Therefore, parties in the situation described in paragraph 7.4(b), are required to be prepared to speak to the matter on the scheduled hearing date and respond to any questions or concerns raised by a Tribunal Panel or Vice-Chair.

7.5 Costs and Expenses

The Tribunal does not award costs. (See *Practice Direction: Representatives' Fees and Costs*.)

The Tribunal does not reimburse expenses of parties to an application.

7.6 Reconsiderations

Decisions of the Tribunal are final (WSIA section 123(4)). Nevertheless, the Tribunal has the discretion to reconsider a decision (WSIA section 129). Reconsiderations, however, are rarely granted. (For pre-1998 injuries and decisions, see the pre-1997 Act, sections 92 and 70, and section 123(1) and Part IX of the *Workplace Safety and Insurance Act*.)

A reconsideration involves two steps:

- (1) The Tribunal must decide whether it is advisable to reconsider the decision. This is called the threshold test.
- (2) If the threshold test is met, the Tribunal must decide whether the previous decision should be changed and, if so, how it should be changed. This is called the decision on the merits.

Additional information about the threshold test is available in the *Practice Direction: Reconsiderations*; however, the process for a request arising from a right to sue application is set out here. Most requests are decided on the basis of

written submissions although the Tribunal may require an oral hearing. The usual process is described below.

7.7 Limited Time to Apply for Reconsideration

Unlike most Tribunal proceedings, right to sue applications do not result in a final determination of rights. The party seeking to sue faces further proceedings in court or before the Board. There is a great need for finality, so that all parties can pursue the appropriate proceedings. There is also a significant potential for abuse of process in requests to reconsider section 31 applications. Unlike the courts, the Tribunal cannot award costs. (See *Practice Direction: Representatives' Fees and Costs*.)

The Tribunal has determined that as a matter of general practice, it is not advisable to reconsider Right to Sue Applications, unless a completed request to reconsider, including any supporting materials, is received by the Tribunal and the other parties within 40 days of the date of decision. This timing does not apply to a request for clarification.

The Tribunal Chair may exercise the statutory discretion to assign a late reconsideration request to a Vice-Chair or Panel. In exercising this discretion, the Tribunal Chair will consider any relevant factor, including:

- a) Whether the request raises a significant issue which has a reasonable prospect of meeting the threshold test
- b) Whether there is a reasonable explanation for the delay, and
- c) Whether there is any prejudice to any party.

7.8 Reconsideration Process in Applications Regarding the Right to Sue

- a) A party who wants a reconsideration (the Applicant) must complete the Reconsideration/Clarification Request form and explain why the decision should be reconsidered or clarified. Additional submissions and any supporting documents should be attached to the form. Forms are available on the Tribunal's website at www.wsiat.on.ca.
- b) The completed Request for Reconsideration/Clarification form and any additional submissions and supporting documents should be sent to the Tribunal and to the other parties (Respondents) to the original decision.

- c) The completed request and any supporting materials should be received by the Tribunal and the Respondents within 40 days of the date of the decision.
- d) If the completed request and any supporting materials are not received by the Tribunal and the Respondents within 40 days of the date of the decision, the Applicant should include submissions on why the time should be extended with the request.
- e) The Respondents will have three weeks to respond.
- f) Respondents must complete the Reconsideration/Clarification Response form, available on the Tribunal's website at www.wsiat.on.ca. Additional submissions and any supporting documents should be attached to the form. If the request to reconsider was not received within 40 days of the date of the decision, Respondents should include submissions on whether the time should be extended with the response. The completed response should be sent to the Tribunal and to any other parties.
- g) Submissions are then complete and will be assigned to a Vice-Chair/Panel for decision on the threshold test.
- h) If the threshold test is met, the case will be reconsidered and a new decision made on the merits. The Tribunal may give instructions about the procedure to be followed on the decision on the merits.

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Workplace Safety and Insurance Appeals Tribunal