DID YOU FORGET SOMETHING? *AN APPLICATION TO WCAT*

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Most counsel involved in personal injury litigation are probably aware that section 28 of the *Workers' Compensation Act*, 1994-95, c. 10 ("*WCA*"), includes a statutory bar to actions. Generally speaking, the bar precludes recovery by a worker injured under circumstances "arising out of or in the course of the worker's employment" against a covered employer or another worker. Even the most clearly made out case of negligence against an employer or another worker can be derailed if the injured party was hurt in an accident covered by the *WCA* (except for certain motor vehicle accidents). Assuming the bar applies, the worker is probably limited to his or her benefits under the *WCA*. The purpose of this article is to point out some steps counsel should take where the statutory bar has potential application.

Questions concerning the statutory bar come up in an ever-expanding array of factual settings. It is easy to say that a worker who suffers a slip and fall accident at work cannot sue a covered employer. However, what if a worker was en route to, but not at, an employer's premises when an accident occurred? What if a worker was injured while attending an employer-sponsored social function away from the workplace? Sometimes it is not clear where the workplace (and work) begins and ends. Of course, that is what makes life and the practise of law interesting.

Informed practitioners will know that applications may be made to the Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT" or the "Tribunal") to determine if the statutory bar applies. WCAT is the adjudicative agency having exclusive jurisdiction to determine such questions. This can be overlooked, for example, in a case where the Workers' Compensation Board finds that an injury is not work related and refuses to award benefits under the *WCA*.

In the past, the application and rules of practice before WCAT were *ad hoc*. However, WCAT has recently provided greater guidance for practitioners by posting its Practice Manual and Notice of Section 29 Application form on its website. (These may be found at: http://www.gov.ns.ca/wcat). An effort has been made to keep these materials concise, understandable and practical. Summaries of Tribunal decisions concerning the statutory bar are to be posted in the near future. If complete decisions are required, they are available in a searchable database available by subscription from the Department of Environment and Labour.

The application process is straightforward. An action must be filed prior to making an application. Filing a completed application form is now the basic requirement for initiating an application to the Tribunal. Any named party to an action may apply to the Tribunal to determine if a right of action is barred. There is no need to serve copies of the application in person; regular mail will do. However, care should be taken to provide copies of the

application, along with required accompanying documents (such as pleadings), to all other "potential participants". Participants may include the Workers' Compensation Board, employers, the injured worker and anyone else with an interest in the matter.

Timing of the application with WCAT tends to elude some counsel until the proverbial eleventh hour. This is unfortunate for a number of reasons, not the least of which is the possibility of truncating litigation and costs. If counsel delays too long in filing an application, discovery or trial dates may have to be postponed. As a practical matter, the Tribunal needs some time to process an application for hearing by either a single Appeal Commissioner or a panel of three Commissioners. Often, pre-hearing conference calls with the Tribunal's Registrar are required. Participants are encouraged to provide an agreed upon statement of facts to expedite the hearing process. The actual hearing is conducted informally under relaxed rules of evidence. In some cases, it is handled entirely by written submissions.

While it is not a prerequisite to an application to have previously given notice of an injury to the Board, it may be a prudent step. If the Tribunal ultimately finds a claim to be statute barred, an injured worker's sole recourse is usually with the Board. However, section 83(1) of the *WCA* requires that notice be given to the Board as soon as practicable, but not more than 12 months after an accident. If less than 5 years have elapsed from the date of the accident, the Board has the discretion to extend the notice period. A "perfect storm" could occur where an injured worker is statute barred from both a right of action and benefits from the Board. Therefore, the better practice is to give notice and make an application without delay.