

Section 63 Agreements for Schedule 2 Employers/Workers

**Agreements Under Section 63 of the Workplace Safety and
Insurance Act, 1997**



Introduction

Section 63 of the *Workplace Safety and Insurance Act, 1997* (WSIA) is a unique provision in Canadian workers' compensation law which allows a special class of self-insured employers in Ontario, called Schedule 2 employers (note: Schedule 2 does not include employers covered under the *Government Employees Compensation Act*), to enter into agreements with their workers or survivors in which the worker or survivor agrees to accept a specified amount of money in lieu of, or in satisfaction of, receiving compensation benefits under the insurance plan.¹

Section 63 further provides that such an agreement is not binding upon the worker or survivor unless it is approved by the Workplace Safety and Insurance Board (WSIB).

In all cases, the WSIB is obligated to review the agreement, ensuring that all relevant requirements have been met, and that the agreement is fair and appropriate.

Section 63 of the WSIA provides:

- (1) *An agreement between a Schedule 2 employer and a worker or a worker's survivor,*
- a. that fixes the amount that the employer will pay to the worker or survivor under the insurance plan; or*
 - b. in which the worker or survivor agrees to accept a specified amount in lieu of or in satisfaction of the payments to which he or she is entitled under the insurance plan,*

is not binding upon the worker or survivor unless it is approved by the Board...

(3) *Nothing in this section authorizes the making of an agreement except with respect to an accident that has already happened and the payments to which the worker or survivor has become entitled because of it.*

Guidelines

Which WSIB benefits can be included in an agreement?

The WSIB only approves agreements respecting **compensation benefits**. The WSIB defines "compensation benefits," for the purposes of this document, as

- loss of earnings (LOE) benefits

¹ Where the injury/disease occurred prior to January 1, 1998, the relevant provision is section 19 of the *Workers' Compensation Act* (WCA) and the agreement is known as a section 19 agreement. Section 19 is substantially the same as section 63 and the requirements for both agreements are the same.

- for accidents prior to 1998, future economic loss (FEL) benefits, temporary total/partial disability benefits, permanent disability (PD) benefits, and section 147 supplements under the WCA
- loss of retirement income (LRI) benefits
- non-economic loss (NEL) benefits, and
- survivor benefits.

The WSIA does not permit the parties to 'contract out of' entitlement to Work Reintegration (WR), re-employment, health care or any other right, obligation or benefit under the WSIA. It is important for all parties to understand that the worker or survivor retains rights to these benefits/obligations and may claim them at any time. In addition, any LRI benefit which may have accrued up to the time of the agreement would not be impacted by the agreement and would continue to be payable by the WSIB in the normal manner.

Finally, a section 63 agreement must only deal with workers' compensation issues; the WSIB will not review or approve an agreement that addresses other issues between the parties such as human rights complaints, employment standards issues, and/or other labour relations issues as the WSIB does not have jurisdiction over these issues.

When is it appropriate to submit an agreement for approval?

The purpose of a section 63 agreement is to fix the amount a worker or survivor will receive in lieu of or in satisfaction of compensation under the insurance plan. An agreement should therefore only be submitted if initial entitlement has been accepted by the WSIB and compensation benefits have been paid in the claim. It is not open to the parties to use section 63 where initial entitlement is still in dispute. A section 63 agreement may also not be appropriate where entitlement (other than initial entitlement) is contested and comprises a significant amount of the sum being settled by the agreement.

Before the WSIB can determine whether the amount to be paid to the worker or survivor is appropriate, it must be able to determine, with a reasonable degree of certainty, the amount of the compensation benefits the worker or survivor would likely have been entitled to receive had he or she not entered into the agreement. Therefore, in the case of a worker, an agreement should not be submitted for approval until all of the following issues have been addressed in the claim:

- The worker has reached maximum medical recovery and his or her condition is not likely to change.
- Any NEL benefit has been calculated.

- If appropriate, a WR assessment and/or plan has been conducted and the WSIB is able to determine what the worker is capable of earning, if anything, in suitable and available work.

Where there is a reasonable possibility that the worker's work-related injury/disease may ultimately result in a claim for survivor's benefits, the WSIB will not consider a section 63 agreement. However, in appropriate circumstances the WSIB will consider a section 63 agreement between an employer and a survivor of a deceased injured worker.

Lastly, although the parties should have agreed on the content of the agreement, the WSIB should be provided with an unsigned draft of the agreement for approval. This will minimize inconvenience to the parties if amendments are necessary.

Mandatory requirements for approval

1. The agreement must be a formal, written agreement which indicates that it is made under the authority of section 63 of the WSIA, or section 19 of the WCA.
2. The employer referred to in the agreement must be a Schedule 2 employer.
3. The agreement must include the claim number to which it relates, along with a statement setting out the background facts and circumstances which gave rise to the claim.
4. The agreement must include a statement of how much money the worker or survivor is to receive, when he or she is to receive it, and the date on which the payment of WSIB benefits to the worker will end.
5. The agreement must include a provision which states that the total amount being paid to the worker or survivor is in lieu of all future compensation benefits to which the worker or survivor might be entitled under the WSIA, **including benefits relating to any future recurrence or significant deterioration of the work-related injury/disease**, and that he or she will not apply for or accept any further compensation benefits from the WSIB in relation to the claim.
6. The agreement should contain a provision that directly addresses the worker or survivor's right to obtain independent legal advice in support of an agreement under section 63.

The purpose of requesting independent legal advice is to assure that the worker

- *has an appreciation of the nature and consequence of proceeding with a section 63 agreement*
- *understands its potential impact on current and future entitlement*

- *is aware that the reasons for entering into the agreement for the worker and the employer may differ, and*
- *has an understanding of the outcome of the agreement which is informed, genuine and uncoerced.*

Acknowledgement that the worker has received independent legal advice is considered best evidence that the worker understands the nature of the agreement

Guiding principles for approval

It is within the sole discretion of the WSIB whether to approve an agreement or not. Before approving an agreement, the WSIB must determine whether the agreement is in the best interests of the worker or survivor. The following principles will guide the WSIB when making this determination:

1. The WSIB considers all of the relevant facts and circumstances including, but not limited to,

- the severity of the worker's work-related injury/disease
- whether the worker's work-related injury/disease is medically stable and unlikely to deteriorate or whether surgery, for example, may be required at some point in the future
- the worker's vocational characteristics and prospects, including whether the worker will have a stable source of income in the future
- the worker's age and general health
- the worker's family support obligations, and
- special circumstances such as whether the agreement will allow an older worker to take advantage of an early retirement option.

2. The WSIB considers whether the agreement is appropriate

Determining whether a section 63 agreement is appropriate requires the WSIB to carefully consider whether the amount a worker or survivor will receive in lieu of or in satisfaction of compensation under the insurance plan is a fair amount given the present value of the amount he or she would have received in the absence of **an agreement, including any amounts he or she would have received for loss of retirement income**. In order to assess whether or not an amount is fair, the worker or survivor's entitlement to compensation must be known with reasonable certainty; appeals pertaining to compensation benefits should therefore be resolved before an agreement is submitted for the WSIB's consideration. For

example, if entitlement to some compensation has been approved by the WSIB but other compensation benefits have been appealed, the WSIB will only consider a section 63 agreement where the majority of the compensation benefit entitlement has been settled.

3. The WSIB carefully examines any unusual vulnerability or competency issues

Determining whether a section 63 agreement is in the worker or survivor's best interests requires the WSIB to carefully consider any unusual competency or vulnerability issues, in addition to ensuring that the worker or survivor has received independent legal advice or acknowledges that he or she has been advised of his or her right to obtain legal advice and has waived the right. Therefore the WSIB takes steps to ensure that

- the worker or survivor is old enough or has enough life experience to fully appreciate the likely effects of the agreement, including the effects on family members to whom the worker has support obligations (if any), and
- the worker or survivor is mentally competent to make a decision about a section 63 agreement, and if not, that there are adequate protections in place to ensure the money will be used to benefit the worker or survivor.

Appeals

While an agreement under section 63 of the WSIA does not permit the parties to contract out of any objection or appeal rights they may have under the WSIA, parties should be aware of the impact such an agreement will have on a future appeal for compensation benefits. For example, if the WSIB denies entitlement to a benefit, the worker or survivor retains the right to object to this denial, in the normal fashion, despite entering into a section 63 agreement. If the appeal relates to compensation benefits covered under the agreement an appeal may be brought but, regardless of the outcome, no compensation benefits would be paid even though other entitlements may be granted or impacted, for example health care or work transition (WT) benefits or services. Because the approval of a section 63 agreement is an administrative function of the WSIB, and not a decision-making function (which determines rights and obligations under the WSIA), the determination whether to approve the agreement is not itself an appealable decision.

Attached as "Appendix A" to this document is a sample section 63 agreement.

SAMPLE OUTLINE FOR A S.63 AGREEMENT

AGREEMENT PURSUANT TO SECTION 63* OF THE WORKPLACE SAFETY AND INSURANCE ACT

between

[WORKER'S NAME]
(the "Worker")

and

[EMPLOYER'S NAME]
(the "Employer")

Preamble:

The Worker suffered a work-related injury on [insert date] while employed by the Employer and is currently receiving workplace safety and insurance benefits under Claim Number [insert claim number],

[Here it is useful to provide some details of the surrounding circumstances. For example, the worker may wish to take advantage of an early retirement option being offered by the employer. If it is part of a larger settlement of issues between the worker and employer, it is useful to mention that here.]

The Worker and the Employer wish to enter into an agreement under s.63 of the *Workplace Safety and Insurance Act* to fix the amount that the Worker is entitled to under the insurance plan. They request that the Workplace Safety and Insurance Board exercise its discretion to approve this agreement.

The Employer and the Worker agree as follows:

(suggested content for provisions in the Agreement)

1. The Agreement must set out the details of what compensation benefits the Worker has been receiving and what the Worker will receive as a result of the Agreement.

* for pre-1998 injuries, reference should be to s.19 under the *Workers' Compensation Act*; for pre-1989 injuries, the reference should be to s.17 under the *Workers' Compensation Act*. Corresponding changes should be made to refer to workers' compensation benefits, instead of workplace safety and insurance benefits.

For clarity's sake, it may be useful to set out what is meant by 'compensation benefits' in the particular claim. For instance, for a Bill 99 claim, it might say: "Compensation benefits" means loss of earnings (LOE) benefits, non-economic loss (NEL) benefits and any loss of retirement income (LRI) benefits that might accrue after the date on which the Worker ceases to be entitled to receive further LOE benefits under this Agreement.

2. The Agreement should contain provisions that are either similar to the following or that address the same issues, where relevant:
 - The payment of the amounts set out in this Agreement is in lieu of and in satisfaction of all future compensation benefits to which the Worker might otherwise be entitled under the *Workplace Safety and Insurance Act*. The Worker will not apply for, or accept, any further compensation benefits in relation to Claim Number [insert claim number].
 - Nothing in this Agreement takes away the Worker's right to appeal a decision of the Board although the Worker will not be entitled to receive any additional compensation as a result of the appeal.
 - Nothing in this Agreement takes away the Worker's entitlement to health care and work reintegration benefits in relation to his/her claim.
 - On the date that the Workplace Safety and Insurance Board approves this Agreement [or some later date], the Worker will cease to be entitled to receive any further compensation benefits in relation to Claim Number [insert claim number].
 - The Worker acknowledges that he/she has received independent legal advice and understands that the effect of entering into this Agreement is that he/she is not, and will not be in the future be, entitled to receive any further compensation in relation to Claim Number [insert claim number].
3. Consideration must also be given to the type of benefits being received by the Worker and the types of situations that may arise in the future that may affect future entitlements:
 - Where funds are being set aside to fund an LRI benefit for the worker, the Agreement should state:

On the date that the Workplace Safety and Insurance Board approves this Agreement [or such later date if LOE ends on a different date], no further funds shall be required to be set aside by the Workplace Safety and Insurance Board under s. 45 of the *Workplace Safety and Insurance Act* to fund a benefit for the LRI benefit for the Worker. Nothing in this Agreement affects the Worker's right to receive an LRI benefit in the future based on amounts that have been set aside up to the date that the Workplace Safety and Insurance Board approves this Agreement [or a later date if that is appropriate].

- If the Worker received a benefit for non-economic loss, what happens if the worker experiences a significant deterioration?
- What happens if the Worker experiences a recurrence or requires further surgery for the work-related injury?
- The Agreement should also specify that the worker will continue to be entitled to health care and work reintegration benefits under the Act.

Signatures

The parties to this agreement have hereunto set their hands and seals this [day] day of [month], 20[year].

Worker's name and signature

Employer's name and signature

Pursuant to s.63 of the *Workplace Safety and Insurance Act*, the Workplace Safety and Insurance Board approves this Agreement between [Worker's name] and [Employer's name], fixing the amount of compensation to which [Worker's name] is entitled under Claim Number [insert claim number].

Workplace Safety and Insurance Board
Per:

August 25, 2014