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The Tribunal administratif du travail Rules on the Application of a CNESST Policy

Update: A review carried out under section 49 of the *Act to establish the Administrative Labour Tribunal* was requested by the CNESST on September 14, 2016. We will keep you informed of any developments in this matter. (November 4, 2016)

We wish to draw your attention to the important decision rendered July 4, 2016 (in French only) by Administrative Judge Claire Burdett of the *Tribunal administratif du travail*, Health and Safety Division (the "TAT").

The decision *C.P.E. Petits semeurs* and *Beyrouti* and *CNESST* (2016 QCTAT 4183) clarifies the application of the guidelines, first adopted in April 2015, by the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (the "CNESST"), providing that in cases of consolidated employment injuries without any permanent impairment or functional disability, the income replacement indemnities ("IRIs") expire at the date of the CNESST's decision recognizing the worker's capacity to resume work, and not at the date of the medical consolidation recorded in the file.

More specifically, the April 2015 guidelines adopted by the CNESST provide that it may recover the IRIs paid to the worker and the medical aid benefits ("MABs") in conciliation cases where the parties had the worker's date of ability to return to work retroact to a date prior to that previously accepted by the CNESST. The IRIs and the MAPs received without entitlement could then be claimed from the worker or in many cases from the employer, since the employer was substituted for the worker under the terms of any agreement. In addition, the employer's file remained indebted for the amounts paid to the worker. The parties were thus at a standstill, since they no longer dared to conclude any settlements that might prove costly in the event of a possible claim by the CNESST.

Judge Burdett held that the *Act respecting industrial accidents and occupational diseases* (the "Act") does not subject the termination of IRI payments to the notification of the worker of the CNESST's decision on ability to work, but rather to the time when the worker is once again actually capable of returning to work. The IRIs received between that time and the date of the decision on ability having been received in good faith, the Judge decided that the CNESST's guidelines were misguided in suggesting that the CNESST could recover the IRI overpayments from the worker in that specific case. She therefore found that it is possible to back-date the ability to work date.

This decision is highly important for employers, because since the adoption of the new CNESST guidelines in April 2015, it had become risky to embark upon any conciliation process, given that the workers, or the employers when they were substituted for the workers, might be obligated to repay any IRI resulting from an agreement specifying a retroactive date of ability. Under those circumstances, various cases had to be brought to the TAT, when they could have been the subject of lawful agreements between workers and employers with respect to the retroactivity of ability dates.

The fact that the TAT does not consider itself bound by the policies and internal guidelines of the CNESST is nothing new, but in specific cases, the decision restores the possibility of having recourse to conciliation in certain cases which lend themselves to it, without the workers or their employers fearing that they may eventually have to reimburse the CNESST for any IRI. However, this decision did not hinder any claim that the CNESST may bring regarding the MAB received after the consolidation date, notwithstanding the fact that the worker received the treatments in good faith. Therefore, although this question is currently being challenged before the TAT in other cases, in application of this decision, any

agreement backdating the ability to work date could still place the worker (or the employer if subrogated) at risk of having to reimburse the MAB, in application of the Act.

It goes without saying that the decision is one more step towards a flexible, nuanced interpretation of the Act, one which fosters conciliation between the parties and a just imputation of sums to the employers, without regard to the costs resulting from the administrative time required for processing decisions on ability to work, in the ordinary course of processing cases. However, the debate surrounding reimbursement of the MABs will have to be followed closely.

Since the decision has been handed down only recently, it would not be surprising if the CNESST sought its review. Nevertheless, Judge Burdett's ruling is supported and her reasoning is clear and eloquent. For that reason, we anticipate that the decision should be maintained by any higher decision-making body.

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