The Court of Appeal sets the record straight on applications for assignment of costs

March 13, 2018

On January 24, the Quebec Court of Appeal[1] released a very important decision on the application of section 326 of the *Act respecting industrial accidents and occupational diseases*[2] ("**A.I.A.O.D.**"), thereby setting the record straight on the true effect of this provision.

An employer will no longer be permitted to rely on the first paragraph of this provision to seek a partial assignment of costs on the basis that there is no "direct connection" between the benefits paid to a worker and the worker's industrial accident.

The employer will now have to base its application on the fact that it "has been unduly burdened" and meet the requisite burden of proof. However, the Court of Appeal declined to resolve the controversy in the case law regarding that burden.

We have every reason to believe that this decision will put an end to the current moratorium placed on these applications[3] by the Commission des normes, de l'équité, de la santé et de la sécurité du travail ("**Commission**") and that a significant number of cases will be decided in the next few months.

In the interim, employers should review their pending applications and take appropriate action or adopt the appropriate positions in light of this development.

It should also be noted that the Court of Appeal states, in passing, that the one-year time limit set out in the last paragraph of section 326 A.I.A.O.D. for submitting an application for an assignment of costs begins to run on the date on which the right to apply for the assignment arises, thereby ending a controversy which had previously existed in the case law.

The Facts

The facts of this case are relatively simple. In August 2011, an employee of Supervac 2000 suffered an industrial accident which rendered him unable to perform the duties of his employment. The Commission subsequently found that the worker was entitled to the benefit from the compensation scheme created by the A.I.A.O.D.

A few months later, the employer temporarily assigned the worker to another position and the latter ceased to receive benefits under the Act.

A few months after that assignment began, the employer dismissed the worker for disciplinary reasons. The worker subsequently began receiving benefits under the Act once again.

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It was in this context that the employer filed an application with the Commission pursuant to section 326 A.I.A.O.D. The employer argued that it has been “unduly burdened” by having the benefits paid to a worker that it had dismissed attributed to its file, especially given that it could no longer temporarily assign work in order to reduce its costs.

In the alternative, the employer argued that, contrary to the general principle established by the first paragraph of section 326 A.I.A.O.D., in this case the worker entitlement to an income replacement indemnity was not “as a result of an industrial accident”, but was instead due to the termination of the temporary assignment, which was itself caused by the termination of the employment relationship. In this context, the employer took the position that it was entitled to an assignment of costs under the first paragraph of section 326.

Section 326 A.I.A.O.D.

It is useful for our purposes to reproduce section 326 A.I.A.O.D. in full:

> *326. The Commission shall impute to the employer the cost of benefits payable by reason of an industrial accident suffered by a worker while in the employ of the employer.*
>
> *It may also, on its own initiative or on the application of an employer, impute the cost of benefits payable by reason of an industrial accident to the employers of one, several or all units if the imputation under the first paragraph would have the effect of causing an employer to support unduly the cost of benefits due by reason of an industrial accident imputable to a third person or unduly burdening an employer.*
>
> *Any application under the second paragraph must be filed in writing by the employer within the year following the date of the accident, and state the reasons for the application.*

The first paragraph of this provision establishes the general principle that the Commission will attribute the cost of the benefits payable due to an industrial accident involving one of its workers to an employer’s file. That attribution will ultimately have an impact on the employer’s contribution to the regime.

The second paragraph of section 326 A.I.A.O.D. states that an employer can be exempted from the general principle by requesting the Commission assign the cost of the benefits associated with an industrial accident to all of the employers in its unit or all units of classification where it is able to show (1) that it is “unduly burdened” by a particular situation, or (2) that it is unduly supporting the cost of benefits paid due to an accident which is attributable to a third person. The text of section 326 A.I.A.O.D. states that an application for an assignment of costs must be filed by the employer “within the year following the date of the accident”.[4]

It should be noted that there are two lines of cases on the question of the employer’s burden of proof must meet in order to show that it has been “unduly burdened”. The first line of cases requires proof of a situation in which there is unfairness for the employer and a significant financial burden caused by that unfairness, while the second requires only that the employer prove unfairness.

Decision of the Commission des lésions professionnelles

Relying on a number of relatively marginal decisions, the CLP concluded that the second paragraph of section 326 A.I.A.O.D. was drafted in such a way that it covered only applications for an assignment of costs of all of the benefits paid to a worker as a result of an industrial accident, which was plainly not the situation in this case.

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On that basis, the CLP allowed the employer's application for partial transfer, applying the general principle of attribution set out in the first paragraph of section 326 A.I.A.O.D., concluding that [TRANSLATION] "any imputed benefit that is not paid as a result of the industrial accident should be removed from the employer's financial file".[5] Accordingly, having found that the cost of the benefits paid to the worker due to the interruption of his temporary assignment was not directly related to his accident, and was instead due to his dismissal, the CLP concluded that the amounts paid to the worker after his dismissal should not be attributed to the employer.

The CLP's decision had a significant impact on employers and initiated a line of cases that subsequently authorized an employer to apply for an assignment of the cost of benefits paid to a worker where there was no "direct connection" with the accident, but without requiring that unfairness or financial prejudice be shown.

Recall that the Superior Court of Quebec did not intervene , holding that the decision of the CLP was "reasonable".[6]

Decision of the Quebec Court of Appeal

Since all good things must come to an end, the Court of Appeal stepped in on January 24, 2018, to overturn the CLP's decision. Justice Vézina, writing for the Court, shed an interesting light on the effect of section 326 A.I.A.O.D.

The Court held that a worker's right to the compensation provided by the Act cannot arise from any source other than the accident, whether or not the worker has been dismissed. It therefore rejected the CLP's reasoning regarding the employer's right to an assignment of costs under the first paragraph of section 326 A.I.A.O.D. In the opinion of the Court, that first paragraph sets out no more than the general rule that the total cost of compensation for employment injuries must be attributed to the employer.

The Court also noted that there is an exception to every rule, and as such, the second paragraph of section 326 A.I.A.O.D. allows the employer to apply for an assignment of costs if it proves that attribution to its file would have the effect of "unduly burdening" the employer. The Court concluded that the CLP had erroneously adopted an overly literal interpretation and it was on this basis that it had held that the exception could not apply in the case of a partial assignment of costs. There is therefore nothing to prevent an employer from applying for a partial assignment of costs under section 326 paragraph 2 A.I.A.O.D.

However, that is not all. The Court of Appeal also held that the one-year time limit set out in the third paragraph of section 326 A.I.A.O.D. is not a mandatory limit[7] and that it does not begin to run until the date on which the right to apply for an assignment of costs arises. In *Supervac 2000*, the limitation period therefore started running on the date of the dismissal and not "within the year following the date of the accident" as set out in section 326 A.I.A.O.D.

However, that is not the end of the matter: the Court declined to rule on the facts of the case, that is, whether Supervac 2000 was actually unduly burdened, within the meaning of the second paragraph of section 326 A.I.A.O.D., by the attribution of the benefits paid to the worker after he was dismissed to its file. That question will have to be analyzed by the Administrative Labour Tribunal (which has replaced the CLP) from the perspective of determining whether the employer has been "unduly burdened".

Conclusion

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With this judgment, the Court of Appeal has put an end to the debate by providing a complete picture of what it considers to be the correct interpretation of the three paragraphs of section 326 A.I.A.O.D.

The Court has therefore put a damper on employers' enthusiasm for shared imputation applications under the first paragraph of section 326 A.I.A.O.D. based on the absence of a connection between the accident and the payment of benefits.

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1. *Commission de la santé et de la sécurité du travail v. 9069-4654 Québec inc*., 2018 QCCA 95. This decision follows on the October 2013 decision of the Commission des lésions professionnelles ("**CLP**") in *Supervac 2000*:[1] *Supervac 2000*, 2013 QCCLP 6341
2. CQLR A-3.001
3. http://www.csst.qc.ca/lois_reglements_normes_politiques/orientations-directives/Documents/Moratoire-demandes-transfert-imputation.pdf
4. 326, para. 3 A.I.A.O.D
5. *Supervac 2000*, 2013 QCCLP 6341, para. 123
6. *Commission de la santé et de la sécurité du travail* v. *Commission des lésions professionnelles*, 2014 QCCS 6379
7. Section 352 A.I.A.O.D.

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