CNESST – Transfer of Costs Under Section 326 of the Act Respecting Industrial Accidents and Occupational Diseases: Important Decision from the Tribunal

November 28, 2022

Employers subject to the personalized rate or retrospective rate regime know how important it is to control the costs related to occupational injury cases in order to limit the impact on their annual premiums.

One way to attain this objective is to apply for a transfer of costs under section 326 of the *Act Respecting Industrial Accidents and Occupational Diseases*. Indeed, the CNESST may, "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."

Traditionally, in cases involving the undue burdening of an employer, the CNESST would not process applications for transfers of costs under section 326 as long as the end date of the transfer period remained unknown. This could be detrimental to an employer's cash flow, especially if the application remained unprocessed and the situation continued to exist over several months, even worse, for years.

The recent *Corporation d'Urgences-santé*[1] decision could, in certain circumstances, provide employers with a tool to convince the CNESST to render decisions without an end date for the transfer period.

In this file, where Lavery Lawyers represented the employer, the worker could not be temporarily assigned to light duties because of his caregiver status. At the time of the hearing, the employee was still acting as a caregiver and the Tribunal was not in a position to know when the impediment might end.

When asked to rule on its jurisdiction and powers, the Tribunal accepted our proposal that the transfer be granted, but that it remains the CNESST's responsibility to determine the end date of the transfer period. The tribunal ruled that such date ultimately corresponds to the date on which the worker ceases to be incapable of undergoing temporary light-duty assignment due to his caregiver status.

Thus, in its decision, the Tribunal recognizes the employer's right to benefit from a transfer of costs

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since January 1, 2022, as a result of the employee's caregiver status. This allows the employer to reduce immediately its financial burden up and until the CNESST renders a decision to establish the date of the occurrence of the event giving rise to the end of the transfer.

This is the first decision to be rendered on the issue. It opens the door to a number of possibilities, including requiring the CNESST to make a ruling on a cost transfer application before the full transfer period can be determined. However, this type of application with the CNESST will require case-by-case analysis, as certain conditions must be met for the application to be admissible.

If you are dealing with a similar situation requiring special attention, do not hesitate to contact a member of our labour law department specializing in workers' compensation matters. They will be able to assist you with any questions relating to the management of these cases, whether or not they are the object of litigation.

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