IN FACT AND IN LAW

Labour and Employment

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CSST Assessments and Third-Party Fault

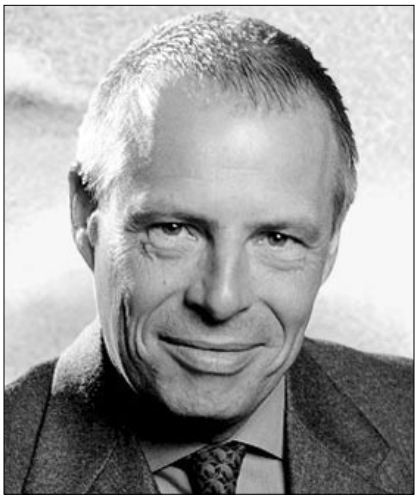
By Jean Beauregard

Many employers are rightly concerned about the significant amounts they are required to pay to the Commission de la santé et de la sécurité du travail in respect of employment injuries sustained by their employees.

The general rule underlying the financial system of the regime is that the cost of benefits paid following an industrial accident sustained by an employee is imputed to his employer's account, irrespective of whether the employer is at fault.

This no-fault regime encourages the employer to ensure that his work environment is safe in order to limit the cost of CSST assessments issued to him.

However, even a safe work environment offers no guarantee that industrial accidents will not happen. When such accidents occur, the employer must insure a proper follow up on absences related to occupational injuries, through both a temporary assignment program, which reduces the amounts imputed to his account for income replacement benefits, as well as medical control of the absences themselves.



In addition to these two administrative measures meant to reduce the amount of CSST assessments, there is a possibility for the employer to obtain a transfer of imputation, when circumstances justify it.

The transfer of imputation

The law provides for two main scenarios in which the general rule whereby the costs are imputed to the employer's account is set aside in whole or in part: section 326 of the *Act respecting industrial accidents and occupational diseases* (the "Act") allows for a transfer of the imputation of the costs referred to in that section where the industrial accident is caused by the fault of a third person; and section 329 of the Act does likewise where the worker was already handicapped when his employment injury appeared.

These two provisions have already been the subject of many decisions of the appellate tribunals, both the Commission des lésions professionnelles and the former Commission d'appel en matière de lésions professionnelles.

Among the powers conferred upon him, the president of the Commission des lésions professionnelles may, if he considers it expedient, owing to the complexity or importance of a proceeding, designate a panel of three commissioners to hear and decide a case involving section 326 or section 329 of the Act (section 429 of the Act).

It was in this context that on March 28, 2008, a panel of three commissioners issued a decision intended to clarify the conditions for the application of section 326 of the Act regarding transfers of imputation in the context of industrial accidents imputable to a third person.

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In their decision in this case, which involved the Ministère des Transports and the Commission de la santé et de la sécurité du travail, the commissioners proposed a structured approach that allows for a more organized understanding of the conditions for the application of section 326 of the Act.

In order to do so, they made an exhaustive review of the existing case law on the matter.

Section 326 of the Act reads as follows:

"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."

Under the approach proposed by the commissioners, the following questions must be answered:

1. Did an industrial accident occur?

Although this first question may appear obvious, one must remember that under the Act a worker may receive benefits not only because he has suffered an "industrial accident" but, more fundamentally, because he has suffered an "employment injury", which expression also includes an "occupational disease".

Furthermore, section 28 of the Act provides that an injury that happens at the workplace while the worker is at work is presumed to be an employment injury. In such circumstances, there is no necessity to establish whether the worker was the victim of an industrial accident within the meaning of the definition in section 2 of the Act. The commissioners thus indicated that the first question that must be answered is whether an industrial accident has occurred, the occurrence of such an accident being a condition required for section 326 of the Act to apply.

2. Is the industrial accident imputable to a third person?

The purpose of this question is to determine the cause of the accident. To begin the process of imputing to all the employers, the act or omission of the third person must have been the main contributing factor to the accident, which does not mean that there must not have been other contributing factors.

The accident is imputable to whoever mainly caused it by reason of the decisive role he may have had in the circumstances that caused it. The commissioners distinguished civil liability from the fault imputable to a third person and indicated that the sole fact that a third person may have been the main contributor to the industrial accident is sufficient for section 326 of the Act to apply.

3. But who may this third person be?

After noting the divergent opinions expressed on this issue in the existing case law, the commissioners concluded that a third person, within the meaning of section 326 of the Act, is [translation] "any natural or legal person, other than the injured worker, his employer and the other workers who work for the same employer". For the Commission, a school student, a client of a business, or a beneficiary in the case of a hospital centre, are third persons within the meaning of section 326 of the Act. Therefore, if any such person was the main contributor to the industrial accident, this condition required under section 326 is met.

4. Does the imputation have an undue effect on the employer?

According to the commissioners, the fairness of any imputation is based on the taking into account of the associated risk for each employer.

The cause of the imputation must not be confused with its consequence. The cause is the reason for the imputation of the costs to the employer's account while its consequence is the fact of the employer having to bear such imputation.

Therefore, the employer must demonstrate that the imputation to him of the costs of the industrial accident that is imputable to the fault of a third person would have the effect of making him unduly support the cost of the benefits payable as a result of the accident.

The commissioners dismissed the proposition that the simple fact that the accident is the result of the fault of a third person is sufficient to create the undue effect of the imputation.

This minority opinion in the existing case law, which did not require the employer to establish the undue nature of the imputation, was therefore rejected in favour of the requirement that the undue nature of imputation to the employer must be established.

5. But when is the imputation undue?

The commissioners were of the view that one must apply the concept of "inherent risks" (or related risks) to the business of the employer to appreciate the due or undue effect of an imputation made under the general rule. According to the commissioners, this reference to the activities of the employer, on the basis of which his contribution is determined (unit of classification), is not only appropriate but essential.

Therefore, the cost of the benefits due as a result of an industrial accident, the causes of which do not relate to a particular risk inherent or related to the injured worker's employer's activities taken as a whole, should be imputed to others since the application of the general rule in such a situation would result in an undue effect.

6. What is this concept of "inherent risks"?

All employers are assigned to a classification unit based on the nature of their business. A general assessment rate applies to employers in each of these classification units. It is based on this rate that the experience of the employer is calculated. This rate is based on the risks inherent to the nature of the business activities.

Inherent risks are those closely and necessarily related to the activities of the employer or those that cannot be separated from such activities since they are an essential part thereof. This concept is therefore not to be understood as comprising all risks that may possibly materialize.

According to the commissioners, an unusual, exceptional or abnormal circumstance is not an inherent risk. They are thus of the view that the strict application of the criterion of inherent risks to the activities of the employer is inadequate and even unfair.

Foul play, a trap, a criminal act, an unexpected aggression, a social phenomenon or exceptional, unusual or uncommon circumstances would therefore generally result in a transfer of imputation being granted.

In short, in addition to the criterion of the risk inherent to the activities of the employer taken as a whole, the commissioners must consider any other relevant external factor to correctly judge whether the effect of imputing the cost of the benefits related to the accident in question to the employer would have a due or undue effect.

The commissioners expressed their views as follows:

> [Translation] **"[339] It follows from the foregoing that under section 326 of the Act many factors may be considered to determine whether the imputation under the first paragraph would have the effect of causing an employer to support unduly the cost of the benefits payable as a result of an industrial accident imputable to a third person, that is:**
>
> **- the risks inherent to the activities of the employer taken as a whole, the former being evaluated in comparison with the risk insured and the latter being considered, among other things, in light of the description of the classification unit to which the employer belongs;**
>
> **- the circumstances that played a decisive role in the occurrence of the accidental fact, on the basis of their extraordinary, unusual, rare and/or exceptional nature, such as the cases of foul play, a trap, a criminal act or some other breach of a legislative or regulatory rule or good practices;**
>
> **- the probability that a similar accident will occur, taking into account the particular context of the worker's duties and conditions of employment."**

Conclusion

This decision of the Commission des lésions professionnelles has the merit of precisely setting out the scope of section 326 of the Act and the conditions for its application.

To obtain an imputation of the costs to a third person, the employer must not only demonstrate that the accident was mainly caused by such third person (who can be anyone other than a co-employee, the injured employee or the employer himself), but also prove that imputation to the employer under the general rule would be unfair. Such unfairness is to be evaluated, among other things, on the basis of the risk insured by the employer.

We hope that this decision, issued by a panel of three commissioners of the Commission des lesions professionnelles, will be followed not only by all the commissioners, but also by the Commission de la santé et de la sécurité du travail.

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