

ONTARIO HEALTH PREMIUM (OHP) UPDATE: ARE EMPLOYERS BEING FORCED TO PAY?

Jamie Knight wins Ontario Health Premium arbitration -
Walker Exhausts v. U.F.C.W., unreported dated November 9, 2004 (Samuels)

Initial fears that dormant collective agreement provisions relating to O.H.I.P. premiums would saddle employers with liability for the OHP are beginning to subside. Despite a rocky start (see the Barrett decision below), at least four subsequent decisions have held that the employer was not obliged to pay the OHP. The most recent of these decisions – won by FWTA's Jamie Knight – has helped to cement the view that the OHP is a tax for which employers never agreed to pay.

In the first decision on the issue, Arbitrator Anne Barrett ruled that Lapointe Fisher Nursing Home must pay its employees' health premiums. In that case, the collective agreement between the Nursing Home and the U.F.C.W. required the Nursing Home to pay a percentage of its employees' "O.H.I.P. premiums". The Arbitrator ruled that the Ontario government did not abolish O.H.I.P. premiums. It was open to the government to re-introduce O.H.I.P. premiums at any time. The Arbitrator decided that the U.F.C.W. bargained to keep the O.H.I.P. premium article in the collective agreement in case the government re-introduced health premiums. She determined that the obligation to pay "O.H.I.P. premiums" was broad enough to cover the new OHP. The Nursing Home has applied for judicial review of the Arbitrator's decision.

The second decision reached the opposite result. Arbitrator Martin Teplitsky ruled that Jazz Air Inc. was not required to pay its employees' health premiums. He found that the parties could not have contemplated the new OHP at the time they negotiated their collective agreement. The Arbitrator noted that parties always specifically identify and bargain for benefits. The parties did not turn their minds to the OHP during bargaining. In addition, no employer would agree to pay a tax based on outside sources of income.

In a third decision (the *College Compensation and Appointments Council v. OPSEU*), Arbitrator Owen Shime agreed with Arbitrator Teplitsky that the parties would not have contemplated this surcharge when they were negotiating the collective agreement. Arbitrator Shime held that the colleges were not liable for the OHP. The colleges' collective agreements provided that the colleges would "resume" paying "individually paid premiums for health insurance". The Arbitrator ruled that the legislation showed that the OHP was intended as a tax on individuals, and not an insurance premium. A premium is usually based on risk and cost associated with the insured group. The OHP was based on income. The new legislation did not change the health tax system back to a premium system, like O.H.I.P., but rather imposed an additional surcharge on the existing system. Therefore, the colleges did not need to "resume" paying "individually paid premiums for health insurance."

Similarly, Arbitrator Mary Lou Tims found that Goodyear Canada Inc. did not have to pay the OHP because it was a tax and not premium. OHP was not a premium because there was no relationship between the payment of the OHP and access to health benefits. It was not in the

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nature of an insurance premium. Therefore, OHP fundamentally differed from O.H.I.P. premiums.

Most recently, an employer, represented by Jamie Knight, prevailed in *Walker Exhausts v. U.F.C.W.* As stated by Arbitrator Samuels, the *Lapointe Fisher Nursing Home* decision was "simply wrong". Instead, Arbitrator Samuels followed the three decisions by arbitrators, Teplitsky, Shime and Tims, in holding that the OHP is a clearly a tax and therefore not payable by the employer under the collective agreement. In part, the Arbitrator relied on the fact that there is nothing in the legislation that will require the government to use OHP funds for health care. Also of importance was that failure to pay OHP does not disentitle a citizen from receiving health care. Arbitrator Samuels endorsed the statement from *Jazz Air Inc.* that "No employer would agree to pay the tax on income earned in outside employment".

While the final result will always turn on the wording of the collective agreement, the general (and employer-favourable) trend is to find that the employer is not responsible the OHP.