

WSIB Completes Its Review Regarding Foreign Agricultural Workers

By: Rubina Husain, Employer Representative

Ontario fruit and vegetable growers employ approximately 20,000 seasonal and temporary foreign workers through the government-regulated Seasonal Agricultural Worker Program (SAWP) and the agricultural stream of the Temporary Foreign Worker (TFW) program every year. ¹

On May 15, 2024, The Workplace Safety and Insurance Board (WSIB) confirmed that their foreign agricultural worker review was complete. This review was conducted following leading decisions of the Workplace Safety and Appeals Tribunal (WSIAT) regarding 4 Jamaican temporary foreign workers who were injured while working in Ontario through the SAWP. This review was to address how accident claims filed by seasonal farm workers would be handled following these WSIAT decisions.

The WSIAT decisions regarding these foreign agricultural workers involved 4 workers who came to Ontario under the SAWP. These workers are allowed to come to work for a maximum of 8 months and are then required to return to their home country. They can re-enter the same program if they are hired again. SAWP workers in Ontario are covered by the WSIB if injured, but these workers will still be repatriated due to the expiry of their work permits. In the past, the WSIB deemed these injured migrant workers to be able to find suitable and available work in Ontario, despite them not being in Ontario. In addition, benefits for loss of earnings (LOE) were restricted to 12 weeks with no additional labour market services provided. Affected workers challenged these WSIB practices.

Prior to the leading WSIAT cases, there were differing views on how to determine suitable and available work for an injured or ill migrant worker after returning to their home country. A line of prior WSIAT cases found that the economic disparities between the two labour markets were entirely unrelated to the workplace accident while another line of cases found that long term LOE benefits for migrant agricultural workers ought to be determined based on their ability to earn in their actual local labour market rather than deemed wages in Ontario. The WSIAT leading cases found in favour of the latter approach.

The WSIB's past practice relating to benefits for SAWP workers came from a WSIB adjudicative advice document created to guide WSIB decision-makers. This document was not a WSIB policy and WSIAT declined to apply this non-binding document in the 4 leading cases. In coming to their

¹ Ontario Fruit and Vegetable Grower's Association and Statistics Canada [Table 32-10-0218-01 Temporary foreign workers in the agriculture and agri-food sectors, by industry](#) (customize table to see Ontario statistics).

decision, the WSIAT found the adjudicative advice document inconsistent with the language and purpose of the Workplace Safety and Insurance Act, 1997 (WSIA) or WSIB policy.

In the 4 appeals, the WSIB stressed their concerns over the financial costs and constraints in the administration of WSIB services outside Ontario. The WSIB cited their obligation to accomplish the purposes of the WSIA in a financially responsible and accountable manner as justification for their past practice.

The WSIAT did not accept these arguments as sufficient to override the benefit-conferring provisions of the WSIA and was critical that the WSIB did not quantify these financial costs in support of their arguments. The WSIAT found that it was not appropriate to limit entitlement to long-term LOE benefits to 12 weeks in every case without regard for individual circumstances and entitlement to labour market assessment and services. The WSIAT determined that the evidence did not show that offering labour market assistance to SAWP workers in their home countries was impracticable or impossible to implement. WSIAT went further in its decision and found the existence of racism and the precarious employment status of SAWP workers was relevant context for decision-making in migrant worker appeals.

Based on its review, effective May 15, 2024, the WSIB will change how it determines suitable work available in the job market for SAWP workers to reflect a person's home job market. The WSIB will be reviewing more than 50 impacted claims dating back to 2007. The precise costs to implement these changes in each impacted claim has not yet been communicated; in addition, so far employers have not been provided with information on how these changes may impact premium rates in future.

Based on its review, the WSIB has put in place a new Foreign Agricultural Worker Strategy. This strategy will also involve supporting employers in their role. Its focus involves three pillars:

1. Offer prevention and compliance resources for enhanced job safety and return-to-work
2. Improve communication and engagement between interested stakeholders to better support injured SAWP workers
3. Implement a case management focus on better recovery and return to work outcomes recognizing migrant workers' local labour markets upon return home

This is not the last you will hear of this topic, as the worker community maintains concerns over unfairness in the adjudication of injured migrant worker claims. Also in the news, the Senate has reviewed Canada's Temporary Foreign Worker Program. The Senate's report published May of this year provided specific recommendations including phasing out employer-specific work permits. This could lead to more changes on how WSIB determines return-to-work options for SAWP workers.