Relying on Insurer Information Proves Dicey

In the *Berger v. Benson Group Inc*. decision, the Ontario Superior Court of Justice highlighted to employers the importance of making appropriate inquiries and giving adequate consideration to available options to accommodate disabled employees.

The employee worked as a shipper/receiver and counterperson at one of the employer's auto parts stores for fifteen (15) years. In December 2010, he developed health issues and went on a medical leave of absence. The employee was granted short-term and long-term disability benefits. Eventually, the Company's insurer wanted the employee to start a gradual return to work plan ("GRTWP") and required the employee to complete a Functional Abilities Evaluation in June 2013. The employer reviewed the report provided by the insurer (which contained erroneous information respecting the employee's abilities) and concluded that it could not accommodate the employee's significant medical limitations. The employee brought action against the employer for damages for breaches of the *Ontario Human Rights Code* ("Code").

In assessing whether the employer had met its duty to accommodate the employee, the Court found that the employer ought to have provided the employee with a clear and written explanation of what it understood to be his disability and why the Company could not accommodate his limitations. The Court noted that not only was there no such written letter, there was no evidence to demonstrate what accommodations the Company considered and why those accommodations would have caused undue hardship.

The Court concluded that the employer failed in both its procedural and substantive duty to accommodate the plaintiff, thereby breaching the Code. In addition to compensating the plaintiff for his lost wages for a period of ten (10) months, the employer was ordered to pay the employee damages for "compensation for injury to dignity, feelings and self-respect" in the amount of $5,000.00.

Key Takeaways: This decision serves as a cautionary tale to employers, and highlights some of pitfalls of relying on medical information or decisions made by insurers. As a best practice, we generally encourage employers that are making a decision respecting the accommodation process to request medical

information separate and apart from medical information provided by an insurer.

Further, an employer's assessment and efforts respecting a possible accommodation should be documented in writing. We also recommend that employers clearly communicate the accommodation plan in writing to the employee (or, alternatively, why accommodation is not possible and the efforts undertaken).

If you have any questions about the duty to accommodate and the return-to-work process, please do not hesitate to contact us to speak with an e2r® Advisor.