

Recent ruling could benefit migrant farm workers injured on the job

Speakers:

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Tuesday, December 12, 2023

12-1:30pm

What you can expect today

Lunch and Learn Series

90 minutes in total (presentation and Q+A)

This is legal information, not legal advice.

The information is current as of today's date Dec 12, 2023

Recording and slides will be sent out afterward.

ASL Interpretation is available. Subtitles (closed captioning) have also been enabled.

Land Acknowledgement

CLEO's work takes place across the home and traditional territory of the Mississaugas of the Credit, the Haudenosaunee, and the Wyandot peoples, on land that many of us know as Ontario.

As we provide legal information today, we acknowledge the ongoing impact of colonization and anti-Indigenous racism, built into our laws and legal systems, resulting in devastating pain and inequality for Indigenous Peoples of every generation.

We also recognize the incredible amount of work that Indigenous Peoples contributed to the Calls to Action in the Truth and Reconciliation Commission report calling for Equity for Indigenous Peoples in the Legal System.

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workers injured on the job

IAVGO Community Legal Clinic

December 12, 2023

CLEO

Overview

- Part I: The Seasonal Agricultural Worker Program
 - A. Structure of the SAWP
 - B. SAWP and the impact of workplace injury
- Part II: The recent ruling
 - A. Overview of the cases
 - B. Future action

Part I

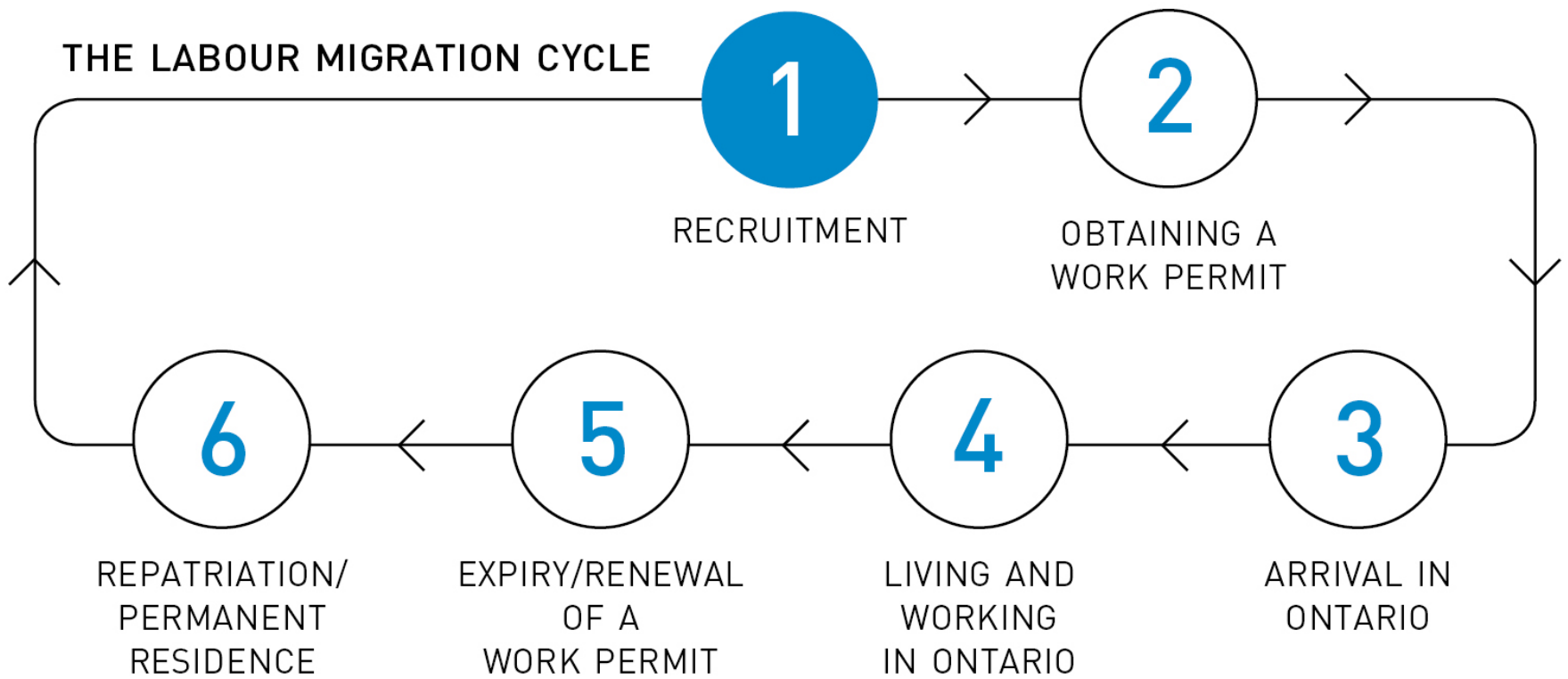
A. THE SAWP

9 - One of the first groups of Jamaican workers in Niagara (circa



Photo courtesy of I. Boese. Used with permission.

One of the first groups of workers in the SAWP, 1967



Fay Faraday, Made in Canada, p. 61

“In my community, I used to see guys travelling from US, Canada, back and forth, when they come back, build their, I said I want to do that, build house, provide for family.”

“I like farming ... and it give me opportunity to better myself and take care of my family...”

– Leroy, injured on his 16th year on the SAWP



SAWP Contract (2022)

clause I

.. the WORKER will serve the EMPLOYER at the place of employment ... such period of seasonal employment **not be longer than eight (8) months**

...

The EMPLOYER shall respect the duration of the employment contract signed with the WORKER(S) **and their return to the country of origin by no later than December 15th** with the exception of extraordinary circumstances (e.g. medical emergencies).

clause IX (1,2)

That the WORKER shall not be moved to another area or place of employment or transferred or assigned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of ESDC/SERVICE CANADA and the GOVERNMENT AGENT.

That the WORKERS approved under the Seasonal Agricultural Worker Program are authorized by their work permit **only to perform agricultural labour for the EMPLOYER to whom they are assigned.**

When I asked Mr. Speers what would happen if the SAWP didn't exist, he said simply, **“well, Canadian horticulture, as we know it, would cease to be.”**

Employer, quoted in McKarney, In Defense of a Livelihood at p. 45

“Everybody’s operation is dependent on them. It’s come to the point where it’s totally impossible to do without this offshore labour. I don’t know anybody that does. ... If it wasn’t for our offshore program, honestly, we would not be able to survive.

We could not operate without them, no chance.”

Employer, quoted in Basok, Tortillas and Tomatoes at p. 126



Hosein v. Ontario (Community Safety and Correctional Services), 2018 HRTO 298 (CanLII)

“They live in a climate of fear of losing their livelihood, including immediate repatriation without any appeal process, if they are deemed to be too assertive by their employer. They experience social and geographic isolation, and have little or no opportunity to discover information about potential redress for any grievance they might have.”

Part I

B. SAWP AND THE IMPACT OF WORKPLACE INJURY

Problems for migrant workers in workers compensation

- Often repatriated soon after injury or failed return to work
- Difficulties finding safe light work in home country
- Unable to return to work in Ontario on the SAWP
- Difficult to get good quality health care
- Difficult to gather evidence, esp. medical
- WSIB investigations slow and sub-par, & fail to recognize fear factor and widespread racism

Determining benefits for SAWP workers

- WSIB interpretation of *Workplace Safety and Insurance Act* :
 - Loss of earnings (LOE) payments (income replacement) for SAWP workers based on what they could earn in Ontario
 - But they aren't in Ontario and don't have legal status to work here (mostly repatriated soon after injury and can't return)

- WSIB “Adjudicative Advice Document”
 - Not a formal policy, but generally followed by WSIB
 - Repatriated workers “not able” to participate in retraining
 - Determines job workers can do based on fake jobs in local labour market where worker was injured in Ontario
 - Get 12 weeks of benefits
 - After that benefits “adjusted” to reflect Ontario job
 - They are left with **nothing** from the WSIB

Example: Leroy Thomas

- Suffered a back injury in 2018
- 16th year working in Ontario
- Unable to do the heavy labour in Ontario
- Lost his Jamaica livelihood as a barber
- Benefits ended because the WSIB said he could be a parking lot attendant in Ontario

Result of WSIB approach

- Injured SAWP workers deprived of WSIB help getting back to work – either in Ontario or at home
- Ignores devastating effect becoming disabled can have on ability to work in home country
- Treats them differently from Canadian workers
- Ignores reality that the injury caused repatriation and inability to come back

“For real... can’t get work ...
put you in depression, can’t
pay bills, mortgage, kids,
can’t find food.

So you know, when - you
can’t come to terms when
you have injury. **How do
you come to terms when
you need food?”**

— Leroy



Questions?

Part II

A. THE RECENT RULING

The challenge

- Four migrant workers – including Leroy – argued together that the WSIB approach was wrong and contrary to the law
- The workers also challenged the WSIB approach as discriminatory under section 15 of the Charter and Ontario *Human Rights Code*

The challenge

- The workers were supported by a large group of migrant workers, advocates and organizers who observed the zoom hearing



The win

- The workers convinced the WSIAT that the WSIB's practice was contrary to workers' compensation law
- Their benefits will be based on their ability to earn in suitable and available employment in Jamaica

The rulings

- Found that the workers' disabilities prevented the workers from returning to work in Ontario and so caused their ongoing loss of earnings
 - Jobs as cashiers, parking lot attendants, and customer service agents are not available to them as required by law
- Disagreed with the WSIB's assertion that the income losses of the migrant farm workers were not caused by their injuries but only by "global economic disparities"

The rulings

- Said that “payment of compensation benefits to foreign workers was contemplated from the inception of the workers’ compensation regime in Ontario”
- Recognized the **unique vulnerabilities** facing migrant farm workers
- Decided that it was appropriate to take judicial notice of **anti-Black racism** in Ontario when weighing evidence and interpreting the statute

The win

- This decision ran contrary to previous WSIAT decisions sanctioning the WSIB practice of treating migrant workers like they could work in Ontario
 - WSIAT previously said the Act was only intended to provide compensation based on employment conditions in Ontario
 - it wasn't practicable to expect WSIB to get information about labour markets outside of Ontario
 - WSIAT previously treated migrant workers from the Global South differently from those from other provinces

Key elements of the win

- Evidence about the reliance of Ontario employers on migrant workers
- Social science evidence that injured workers cannot re-qualify for the SAWP
- Evidence about the Jamaican labour market
- The increasing **public conversation** about migrant workers



Part II

B. FUTURE ACTION

Next steps

- WSIAT cannot order the WSIB to change its practice / policy
- But the WSIB has announced it is doing a 6-month review “to ensure [it is] taking a consistent and fair approach that recognizes the realities of people’s local labour markets after they return home”
- And workers can appeal to the WSIAT

Impact on other migrant workers

- Ruling directly addressed only workers in the SAWP
- But may also affect the claims of workers injured while participating in other foreign worker programs



Basic advice

- Report workplace injuries, even if late
- If injured in past years but not healed, follow up with WSIB
- [Appeal](#) bad decisions by WSIB
- Cooperate in return to work if safe and suitable
- Get ongoing health care (WSIB should pay for health care and travel)

Basic advice

- If assisting a worker file a claim to WSIB/ respond to WSIB
 - Help workers get health care
 - Help workers connect with other supports
 - Help workers connect with WSIB (interpreters and translation should be provided by WSIB)
 - Help workers send [intent to object forms](#) to meet time limits (usually 6 months, some 30 days)
- Consider connecting to Justicia for Migrant Workers – WhatsApp 519-903-7376, harvestingfreedomcampaign@gmail.com; [Injured Workers Action for Justice](#) Cell/Text/SNS/WhatsApp: 647-832-1514
- For legal advice on WSIB, workers can contact IAVGO – 416 924 6477
 - all steps including advice on initial report of injury & helping send intent to object forms & advice and representation in appeals

Questions?

Steps to Justice

[Migrant Workers](#)

[I came to Canada to work on a farm. What are my rights?](#)

[I came to Canada to pick and harvest crops. What are my rights?](#)

[I am a temporary foreign worker. What are my rights?](#)

[Injured at work](#)

Includes information on WSIB Benefits, harassment at work and reporting an injury.

CLEO's Guided Pathway

[Draft an Open Work Permit](#)



Community Legal Clinics

[IAVGO Community Legal Clinic](#)

IAVGO has prioritized the WSIB cases of migrant farmworkers since 2005. We prioritize these cases because the WSIB refuses to correct the systemic barriers and discriminatory policies that prevent migrant workers from obtaining equal access to Ontario's workers compensation system.

[Know Your Rights Resources](#) for Migrant Workers from IAVGO (in multiple languages)

[Windsor-Essex Bilingual Legal Clinic](#)

This clinic also runs the [CARE program para Trabajadores Internacionales/ International Workers](#). They assist Temporary Foreign Workers in understanding and exercising their legal rights and promote their overall health and wellness in collaboration with 10 community partners.

[Find your free Community Legal Clinic](#) in Ontario

Community and Legal Resources

Legal Aid Ontario

[How do I apply for Legal Aid?](#)

[Legal Aid Eligibility for immigration and refugee law services](#) (H+C applications on pages 2+3)

Call Monday to Friday, 8 a.m. to 5 p.m.

1. [416-979-1446](tel:416-979-1446) (Greater Toronto Area)
2. [1-800-668-8258](tel:1-800-668-8258) (toll-free)



Government Resources

Government of Canada

[Seasonal Agricultural Worker Program Overview](#)

Government of Canada

[Temporary Foreign Worker Program](#)



Community supports for migrant workers

Justice for Migrant Workers

Justicia for Migrant Workers (J4MW) is a volunteer-run political collective. J4MW strives to promote the rights of migrant farm workers (participating in agricultural streams of the Temporary Foreign Worker Program, including the Seasonal Agricultural Worker Program) and farm workers without a formal immigration status.

Email: harvestingfreedomcampaign@gmail.com

Migrant Workers Alliance for Change call or text at 905-324-2840

Migrant Workers Alliance for Change is building a member-led organization of migrant farmworkers, care workers, students and more to win worker and immigration justice

Agricultural Workers Alliance United Food and Commercial Workers Union

Community supports for migrant workers

C.A.R.E for International Workers, contact by phone at 519-253-3526 or by using WhatsApp at 226-935-7772

Grand River Community Health Centre (GRCHC) international agricultural worker primary health care clinics. Drop-ins, What's App, Mobile clinic, virtual appointments.

Caregivers Action Centre The Caregivers' Action Centre (CAC) is a grassroots organization of live-in caregivers, former caregivers, newcomers and their supporters.

FCJ Refugee Centre (Toronto) — **information sessions/webinars** for communities and front-line workers serving vulnerable newcomer, non-status and precarious migrant populations.

Workers' Action Centre phone line 1-800-531-0778 free, confidential. Multiple languages.

Community supports for migrant workers

Injured Workers Action for Justice

Injured Workers Action for Justice (IWA4J) is a grassroots organization of injured workers and their families who fight and organize with injured migrant workers and seasonal agricultural workers for fair compensation and respect from the WSIB.

Cell/Text/SNS/WhatsApp: [647-832-1514](tel:647-832-1514)

Facebook Group: www.facebook.com/justiceforinjuredworkers

[Resources, Know Your Rights Posters, Information for migrant farm workers](#)

[WSIB Information Poster](#)

Campaigns

Justicia/Justice for Migrant Workers (J4MW)

[Status Now! Harvesting Freedom Campaign](#) - a call on the Canadian government to allow migrant farm workers in Canada to access Permanent Immigration Status.

Migrant Rights Network

Demand permanent resident status for all undocumented people, migrant students and workers.

[Status for All!](#)

[Justice for Caregivers](#)

Calls to action: Truth and Reconciliation

- [Truth and Reconciliation Commission of Canada: Calls to Action](#)
- [Settlers Take Action](#)

Education

- [Indigenous Canada - Free Course](#)

Whose Land?

Learn about where you are situated, information for land acknowledgements and learn about the treaties and agreements signed across Canada (Turtle Island).

- [Whose Land?](#)

Thank you for joining us!

Subscribe to [CLEO Connect](#) for updates on new legal information and upcoming webinars.

Steps to Justice – [Steps to Justice](#)

Contact me! Karen Dick at CLEO
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