Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3203/18

BEFORE: R.E. Basa: Vice-Chair

HEARING: November 8, 2018 at Toronto
Oral

DATE OF DECISION: February 20, 2019

NEUTRAL CITATION: 2019 ONWSIAT 501

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

APPEARANCES:

For the applicant: G. Shu, Lawyer

For the respondent: A. Meringolo, Lawyer

Interpreter: N/A

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (the WSIA) by the defendant Mills in an action filed in Barrie, in the Ontario Superior Court of Justice as File No. 15-0996.

(ii) Issue and preliminary matter

[2] The issues in this application are whether Spring's right of action is taken away pursuant to section 31 of the WSIA and whether Spring is entitled to claim benefits under the WSIA. There is no dispute that both Mills and Spring were workers for a Schedule 1 employer, or that the applicant Mills was in the course of employment at the time of the motor vehicle accident (MVA) on November 29, 2013. The only issue in dispute is whether the respondent Spring was in the course of employment at the time of the accident.

[3] At the outset of the hearing, the applicant's lawyer asked for a ruling that no oral evidence be permitted. It was the applicant's position that the material facts were uncontested; the respondent failed to file an affidavit in response to the application; and the issue could be decided based on the presumed proof of pleadings in Spring's Statement of Claim.
The respondent's lawyer objected to the applicant's request that no oral evidence be permitted. He argued that a denial of the respondent's right to call evidence would offend natural justice and procedural fairness, and that there was no requirement for the respondent to file an affidavit prior to the hearing. After considering the parties' opening statements, I decided that oral evidence was necessary to decide the issue before me. In particular, I was persuaded that the material filed, and in particular, the transcript of Spring's examination for discovery on March 23, 2016, did not provide the evidentiary basis required in order for me to decide whether Spring was in the course of employment at the time of the MVA on November 29, 2013.

(iii) Background

[4] At approximately 10:20 a.m. on November 29, 2013, Mills and Spring were involved in a MVA. According to Spring's Statement of Claim filed on August 20, 2015, Mills rear-ended Spring's vehicle.

[5] At the time of the accident, both Mills and Spring were self-employed independent operators in the construction industry and were subject to mandatory coverage.

[6] There is no dispute that Mills was on his way from one job to another at the time of the accident, and as such, he was in the course of employment at the time of the accident.
The parties dispute whether Spring was in the course of employment at the time of the accident.

(iv) Law and policy

[7] Section 31 of the WSIA provides that a party to an action or an insurer from whom statutory accident benefits (SABs) are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether: a right of action is taken away by the Act; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the Act.

[8] Sections 26 through 29 of the WSIA provide the following:

26(1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

27(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.

2. A director, executive officer or worker employed by any Schedule 1 employer.

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.

2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

29(1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

> **(3)** The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.
>
> **(4)** No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[9] In *Decision No. 1460/02,* the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement. Therefore, Board policy continues to be relevant in right to sue applications. See *Decision No. 755/02.*

[10] In determining this application the Vice-Chair has considered the following Board documents from the Board's *Operational Policy Manual* (OPM):

- OPM Document No. 15-02-02, "Accident in the Course of Employment"
- OPM Document No. 15-03-05, "Travelling"

(v) Submissions

[11] The applicant's lawyer, Ms. Shu, submitted that the Spring's testimony was not credible as it was inconsistent with the evidence given at his examination for discovery. She submitted that I should prefer the worker's evidence given at his examination for discovery over his oral testimony given at the hearing before me. Ms. Shu submitted that *Decision No. 2631/16* is comparable to the facts of the present case, because like the personal support workers (PSWs) in that case, the respondent Spring does not have a fixed time or place of work. She submitted that Spring's self-employment require him to drive and that his home is essentially his office such that he should be considered to be continuously in the course of employment. She submitted that the fact that the worker claims to have been on his way to get a coffee while waiting for stone to be delivered does not equate to a deviation significant enough to remove him from the course of employment. She relied on OPM Document No. 15-03-05, "Traveling," in support of her position.

[12] The respondent's lawyer, Mr. Meringolo, submitted that the applicant has not discharged the evidentiary burden to establish that Spring was in the course of his employment when the MVA occurred. He submitted that Spring's testimony establishes that he was on personal time running a personal errand, and that travelling to work sites is not incidental to the worker's specific employment requirement to operate an excavator. He relies on *Decisions No. 2212/13* and *1651/14* and asks that the application be denied.

(vi) Analysis

[13] The application is denied. I find that Spring was not in the course of employment at the time of the MVA on November 29, 2013. My reasons follow.

[14] I accept Spring's uncontradicted testimony at the hearing before me as credible and reliable. I find that the subject matters upon which the worker was questioned at his examination for discovery did not directly relate to the issue before me, and therefore I find the evidence taken at the discovery to be of limited assistance in determining the issue before me. At Spring's discovery, much time was spent reviewing the extent of his claimed damages. Spring was also

asked questions about the work he planned to perform on the day of the accident and about the details of the accident itself. There was, however, no line of questioning which directly related to whether the worker was in the course of employment at the time of the MVA.

[15] To the extent that there is any inconsistency between the worker's testimony at the hearing before me and at his discovery, of which I am not persuaded, I prefer the worker's testimony at the hearing as it directly relates to whether or not Spring was in the course of employment at the time of the MVA. With respect to the alleged "inconsistency" in testimony, I note that the worker was not specifically taken to the point in the transcript which purportedly was inconsistent with his testimony at the hearing before me. My review of the transcript revealed the following line of questioning, which may be the basis for the applicant's submission that the worker's testimony was inconsistent with his examination for discovery:

> Q. And you drove away from the accident scene?
>
> A. Yes.
>
> **Q. You mentioned earlier you were going to that job?**
>
> **A. Yes.**
>
> Q. Did you go to the job from the accident scene?
>
> A. No.
>
> Q. Where did you go?
>
> A. I went to the doctor's office.
>
> [Emphasis added].

[16] I do not find this line of discovery questioning to be assistive in determining whether Spring was in the course of employment at the time of the MVA. It provides no detail upon which I can determine whether Spring was in the course of employment at the time of the MVA.

[17] In contrast, at the hearing before me, Spring testified that he has been an excavator/heavy equipment operator in the construction industry for over 30 years. He testified that he did not own any excavation equipment. He explained that he starts earning income when he is in the seat of the heavy equipment, and there is no other place than the work site where he can perform his work as an excavator operator, including in his pick-up truck or at a coffee shop. He testified that he is not paid to travel to his work sites. Just prior to the MVA, he testified that he was at his mother's house to meet with an exterminator. He estimates he was there at 10:00 a.m. After he left his mother's house, he was headed to a coffee shop, located west of where the MVA occurred. He planned on going inside the coffee shop to have a coffee and sandwich. The MVA occurred at approximately 10:20 a.m. on his way to the coffee shop.

[18] The worker also testified that on the day of the accident he was expecting to start a job building a retaining wall to widen a driveway. He testified that he had previously ordered stone for this job, and that it was arranged to arrive at 11:00 a.m. on November 29, 2013. He expected to receive a telephone call to advise that the stone was at the work site. He explained that if the stone was not delivered by 11:00 a.m. as arranged, he would not have called to inquire about the status of delivery. He explained that in his line of work, trucking companies are always late and that he has no control over the trucks. He testified that he lives one mile away from the coffee shop and he would have gone home to wait for the call if he did not receive the call while at the coffee shop. He also explained that if he did receive the call, it was not required that he attend at

the work site right away. The contractor who hired him to do the driveway/retaining wall could have received the stone.

[19] There was no evidence before me in this appeal that in any way contradicts Spring's testimony about what he was doing just prior to the MVA, or about what he had planned to do had the MVA not occurred. I therefore accept Spring's testimony before me in its entirety. Based on Spring's testimony, I find that at the time of the MVA, Spring was not traveling to his worksite; he was travelling from his mother's house to a coffee shop for a meal. I further find that Spring had not yet commenced work at the time when the MVA occurred. The purpose of Spring's travel at the time of the MVA has no occupational flavour or characteristic. I therefore find that Spring was not in the course of employment when the MVA occurred on November 29, 2013.

[20] I further find that *Decision 2631/16* does not assist the applicant in this case. In *Decision No. 2631/16*, the respondent PSW was on her way to but had not arrived at the location of her first patient/client. In that case, the Vice-Chair noted the general rule that a worker is not in the course of employment when traveling to and from work. OPM Document No. 15-03-05 sets out some exceptions to that general rule. The Vice-Chair applied OPM Document No. 15-03-05 based on his finding that it was "clearly obligatory for D.H. to travel from one client to the other in order to do her job." In effect, the Vice Chair found that notwithstanding the general rule that a worker is not in the course of employment until she reaches the employer's premises, exceptional circumstances applied to consider the respondent as being in the course of employment while travelling to work.

[21] In the present case, exceptional circumstances do not apply. Spring was not travelling to the "place of work" as provided in OPM Document No. 15-03-05; he was travelling from one personal errand (meeting an exterminator) to another (enjoying a meal) when the MVA occurred. The applicant's submissions – that Spring ought to be considered continuously in the course of employment on the basis that (i) Spring's home is the "employer's premises;" (ii) a condition of his employment is that he regularly travel away from the "employer's premises" to various job sites; and (iii) another condition of his employment is that he is *required* to drive a vehicle to all work sites – do not address directly the general rule set out in the Guidelines of OPM Document No. 15-03-05. This policy provides that "as a general rule, a worker is considered to be in the course of employment when the person reaches the employer's premises place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work." Since Spring was not travelling to the "place of work" at the time of the MVA, the exceptions to the general rule set out in this policy are not applicable to the case before me.

DISPOSITION

[22] The application is denied.

DATED: February 20, 2019

SIGNED: R.E. Basa