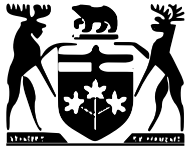
Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1183/16

BEFORE:	B. Kalvin	: Vice-Chair
	M. Christie	: Member Representative of Employers
	G. Carlino	: Member Representative of Workers

HEARING: August 7, 2019, at Toronto
Oral

DATE OF DECISION: August 14, 2019

NEUTRAL CITATION: 2019 ONWSIAT 1850

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer ("ARO") decision dated November 19, 2014

APPEARANCES:

For the worker: A. Meringolo, Lawyer

For the employer: The employer did not participate

Interpreter: N/A

REASONS

[1] These are the reasons for decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an appeal by a worker from a decision of the Workplace Safety and Insurance Board (the "Board") concerning the worker's entitlement to benefits following a workplace accident.

(i) Background

[2] The background to this appeal is as follows. On July 22, 2013, while working as carpenter/foreman, the worker was injured at work. While at a construction site, the worker drove his employer's forklift to a sandwich shop approximately 150 – 200 feet from the site to purchase coffee for himself and a co-worker. While driving back to the site, the worker lost consciousness and fell out of the forklift and struck his head. He also sustained a crush injury to his left hand which the forklift ran over. The worker was taken to a hospital and underwent emergency surgery on his hand.

[3] The worker had a prior history of seizures. He had had five previous seizures, last one of which occurred approximately eight years before the incident at work in July 2013. The worker had taken anti-seizure medication, but had stopped taking it about five years the workplace accident.

[4] As a result of the injuries sustained in this accident, the worker made a claim to the Board for compensation benefits. In a decision dated August 13, 2013, an Eligibility Adjudicator denied the worker's claim. The Adjudicator reconsidered the matter and in a decision dated June 24, 2014, confirmed the decision to deny the worker's claim for entitlement to benefits.

[5] The worker objected to the Adjudicator's decisions, and his objection was referred to an Appeals Resolution Officer ("ARO") in the Board's internal Appeal Services Division. In a decision dated November 19, 2014, the ARO denied the worker's objection.

[6] The worker now appeals to this Tribunal.

(ii) Issue

[7] The only issue to be decided on this appeal is whether or not the worker is entitled to benefits for injuries sustained in the accident of July 22, 2013.

(iii) Analysis

[8] We find that the worker is entitled to benefits for the accident at issue on this appeal. Our reasons for this conclusion are as follows.

[9] Entitlement to benefits is governed by section 13 of the *Workplace Safety and Insurance Act, 1997*. Subsections (1) and (2) of that provision read as follows:

> 13 (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **Presumptions**
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> (2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. 1997.

[10] What is plain from these provisions is that in order to be entitled to benefits for a personal injury, a worker must show two things: first, that the accident occurred "out of" the employment and, second, that it occurred "in the course of" the employment. Subsection 13(2) states that if the worker shows only one of these things, the other will be presumed "unless the contrary is shown."

[11] In the present case, there is no doubt that the worker was in the course of his employment when the accident occurred. He was on a job site and drove a short distance to pick up a coffee during the course of his regular work shift. The ARO did not take the position that the fact that the worker was returning from a brief interlude to buy a coffee removed him from the course of employment. We agree with the ARO's approach to this issue.

[12] What the ARO did find, however, was that the accident did not arise "out of" of the worker's employment. Further, the ARO found that since the seizure was likely caused by the worker's pre-existing condition, rather than by "anything in the worker's employment," the ARO concluded that the presumption that the accident occurred "out of" employment was rebutted. The ARO stated the following:

> Based on the evidence available, I find on the balance of probabilities that it is more likely than not that the worker sustained a seizure at work while driving the forklift on July 22, 2013.
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> ...
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> Section 13 (2) of the WS/A, provides that if an accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. In this case, I find that the Section 13 (2) presumption is rebutted. Based on the worker's testimony and the weight of the evidence on the record, I find the worker's seizure did not likely arise out of the employment nor was the worker's employment a significant contributing factor to the onset of the worker's medical condition. Therefore, I find accordingly that the presumption is rebutted based on the circumstances of this case.
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> I find the weight of the evidence does not indicate that the seizure arose out of the employment. The worker was not engaged in any particular activity that may have triggered the seizure and was simply driving the forklift outdoors, which the worker testified to doing on a regular basis. The worker also testified to essentially having no memory of the incident due to a medical condition, which I find in this case, was more likely than not, a seizure. This medical condition resulted in the worker falling out of the forklift, hitting his head on the ground, losing consciousness and sustaining a left hand injury. I find the evidence suggests the worker's prior history is significant for seizures, with the Hospital Discharge Report indicating possibly 10 prior seizures.
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> ...
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> I also find there is an absence of evidence or documentation to substantiate there was anything in the work the worker was performing for the employer before July 22, 2013 that would have triggered the worker's pre- existing medical condition or evidence that the seizure arose out of the worker's employment. I find it is likely that the worker's medical episode on July 22, 2013 was directly related to his pre- existing medical condition rather than related to anything in the worker's employment. I find the worker's pre-existing medical condition, in this case the seizure, ultimately caused the worker's fall from the forklift and his subsequent injuries.

[13] There is a substantial body of Tribunal jurisprudence dealing with cases in which a worker has suffered a syncope episode in the workplace. In some instances, benefits have been claimed for the syncope or seizure condition itself, whereas in others, such as in the present case,

benefits were claimed for injuries following and resulting from the loss of consciousness. The Tribunal's jurisprudence is summarized and analyzed in *Decision No. 1361/16* as follows:

(vi) Tribunal jurisprudence

There are several Tribunal decisions that have considered entitlement for injuries that follow after a seizure or syncope (fainting) episode. I have categorized these decisions into four groups.

(a) Work-related seizure or syncope episode

Some Tribunal decisions, upon consideration of the evidence, conclude that the seizure or syncope episode was, on a balance of probabilities, a result of a work-related injuring process (such as exposure to chemicals). In these cases, both the seizure / syncope and ensuing injuries are held to be compensable (see for example *Decision Nos. 336/06, 347/07, 2348/14,* and *1955/15*). In these cases, it is generally considered that the seizure / syncope episode is a compensable chance event caused by work-related factors.

(b) Application of the presumption

In other cases, the cause for the seizure or syncope episode remains unknown. In some of these cases, Panels and Vice-Chairs apply the statutory presumption (section 13(2) of the WSIA) which provides that where the accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment. Where there is no evidence regarding the cause of a worker's seizure to rebut the section 13(2) presumption, the presumption is applied and a finding is made that the worker has entitlement for the injuries flowing from the accident (see for example *Decision Nos. 1683/13, 418/09* and *413/07*). Mr. Barnes submits that the facts of the current case fall into this category because no definitive diagnosis explaining the cause of the worker's seizure / syncope episode has been identified.

(c) Entitlement where the seizure or syncope is unrelated to employment

Alternatively, Mr. Barnes submits that the facts of this case fall into another category of Tribunal decisions wherein the cause of a worker's seizure / syncope episode is found to be unrelated to work but entitlement to injuries sustained following the episode are compensable. In *Decision No. 366/14*, the Panel found that while it was more likely than not that the worker's pre-existing non-compensable health condition caused his fall from a ladder at work, that finding did not preclude initial entitlement. The Panel found that a worker is not disentitled to benefits even if it is shown that a non-compensable pre-existing condition caused or contributed to the injury. The Panel found that the issue is whether the workplace made a significant contribution to the accident. In the case before them, the Panel found that the fact that the worker was on a ladder for work-related purposes at the time of the syncope episode played a role in the injuries he sustained. His injuries would not have been as severe had he not fallen from a ladder. The Panel found that Tribunal case law supports a conclusion that workers are entitled to benefits for injuries arising from such accidents even though they are not entitled to benefits for the underlying condition. In *Decision No. 1814/05*, a worker on a scoop tram fainted and suffered facial injuries when he struck his face on a rock as he fell to the ground. The Panel granted entitlement for the facial injury because the seriousness of the injury was due to the fact that the fall occurred on a rock.

(d) No entitlement

Finally, in the fourth category of decisions, entitlement for injuries following a seizure or syncope episode is denied where the seizure / syncope is not work-related and there is no "added peril" in the workplace. *Decision Nos. 464/11* and *2538/11* denied entitlement for spontaneous falls in the workplace caused by a seizure unrelated to the employment. In these cases it was held that there was no "added peril" such as the operation of heavy machinery or a fall from a height to make the injuries work-related.

> *Decision No. 178/09* also questioned some of the Tribunal jurisprudence on fainting. It found that the application of the s. 13(2) presumption was troubling because it contrasted with how the Tribunal assesses other injuries in which the cause is not easily identified. It held that some cases seem to treat fainting as a separate injury as opposed to a symptom of an injury. *Decision No. 178/09* noted that in accordance with the WSIA, a worker must establish that he or she has a personal injury by accident and that the injury by accident arose out of and in the course of employment. The Panel opined that a non-work-related fainting episode causing an accident takes a worker out of the employment context. Fainting in itself is not a chance event. Nevertheless, based on the facts of that case, the Panel granted entitlement for the worker's injuries caused in a truck roll-over because there was another incident after the worker began feeling faint. The worker started feeling unwell and as a result attempted to stop on the highway shoulder. In the midst of his attempt to stop the truck, the ground underneath the truck collapsed, which constituted a chance event.

[14] The facts in *Decision No. 1361/16* were very similar to those in the present case. A truck driver lost consciousness while driving his vehicle resulting in an accident and musculoskeletal injuries. Because the cause of the worker's loss of consciousness was not determined, the Vice-Chair concluded, as did the ARO in the present case, that the presumption of that the seizure arose "out of employment" was rebutted. Nevertheless, the Vice-Chair ruled that while the seizure itself was not compensable, the injuries sustained in the accident were compensable because the fact that the worker was operating a truck when the accident occurred meant that there was "an employment related 'added peril'." The Vice-Chair reasoned as follows:

> With respect, I disagree with the applicant's submission that the presumption applies in this case because there is no definitive medical diagnosis to explain the cause of the worker's seizure / syncope episode. While there is no definitive medical explanation, the standard of proof in workers' compensation cases is the balance of probabilities. A definitive diagnosis is not necessary to rebut the presumption. In this respect, I agree with the comments of *Decision No. 178/09* that the presumption should not be applied just because the cause of a seizure / syncope episode is not easily identified. With the presumption, the question becomes whether it has been shown, on the balance of probabilities, that the worker's seizure did not arise out of his employment. The presumption may be rebutted based on evidence that satisfies the balance of probabilities. The evidence to rebut the presumption does not have to be "definitive."
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> In the facts before me, there is a persuasive opinion from a specialist in occupational medicine, Dr. Razavi, that the worker probably had a complex partial seizure that may be related to cerebrovascular disease. His opinion references various medical investigations. There is also no evidence of any work-related cause for the worker's seizure. In my view, Dr. Razavi's opinion relating the worker's seizure to cerebrovascular disease is sufficient to rebut the presumption. On the balance of probabilities, the seizure the worker experienced on February 12, 2014 did not arise out of his employment.
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> I find, however, that the facts of this case fall into the third group of cases described above. While the worker's seizure was not related to his employment and the worker has no entitlement for his seizure disorder, the physical injuries arising out of his motor vehicle accident are compensable. In this case, the worker suffered his seizure during the course of his regular duties while operating a tractor trailer on the highway. In essence, the operation of a tractor trailer on the highway was an employment-related "added peril." The extent of the worker's injuries was causally related to the work environment. As noted by Mr. Barnes, the chance event in this case can be described as the multiple collisions that the worker had with inanimate objects before his truck came to a stop on the side of the highway.
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> I appreciate the concerns expressed in *Decision No. 178/09* regarding the application of the presumption in fainting cases and treating fainting as a separate injury as opposed to a

> symptom of an injury. I agree that care should be exercised in the application of the presumption, which, as held earlier, does not require definitive proof that the accident did not arise out of employment. The standard of proof in rebutting the presumption is the balance of probabilities. Nevertheless, I am persuaded that the majority of Tribunal decisions have found that entitlement for injuries flowing from a seizure / syncope episode may still be granted even where the seizure / syncope episode is not employment-related *if* there is an "added peril" in the workplace. Entitlement may be granted for such injuries if the employment significantly contributed to such injuries when the seizure / syncope episode occurred.

[15] We agree with and adopt the approach set out in *Decision No. 1361/13*. We find that the facts of the present case fall into category "c" set out in that decision, namely, where the seizure or syncope is unrelated to employment. In such circumstances, while presumption that the seizure or syncope arose out of employment is rebutted, and seizure itself will not be a compensable condition, other injuries sustained in an ensuing accident will be compensable if the evidence shows that the worker's duties amounted to an "added peril." In the present case, the fact that the worker was driving a forklift during the course of his employment when the seizure and accident occurred is sufficient, in our view, to satisfy the requirement that there be an element of added peril related to the claimant's duties at work. Accordingly, we find that the worker is entitled to benefits for injuries he sustained in the accident at work on July 22, 2013.

DISPOSITION

[16] The appeal is allowed:

The worker is entitled to benefits for the accident of July 22, 2013. The quantum and duration of benefits are to be determined by the Board, subject to the usual rights of appeal.

DATED: August 14, 2019

SIGNED: B. Kalvin, M. Christie, G. Carlino