Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2506/18

BEFORE: R. Nairn: Vice-Chair

HEARING: August 23, 2018, at Toronto
Oral

DATE OF DECISION: October 17, 2018

NEUTRAL CITATION: 2018 ONWSIAT 3255

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

APPEARANCES:

For the applicant(s)/co-applicant(s):	L. Castellucci, Lawyer
For the respondent(s)/co-respondent(s):	M. Miller, Lawyer
For the interested party:	G. Brar, Lawyer
Interpreter:	N/A

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") by the [defendant] in an action filed in Toronto, in the Ontario Superior Court of Justice as Court File No. CV-14-516065.

(ii) Issues

[2] The issue to be determined in this application is whether the respondent's/plaintiff's right of action with respect to the accident of November 13, 2012 is taken away pursuant to section 31 of the WSIA.

(iii) Background

[3] As the representatives acknowledged in the course of this hearing, many of the background facts in this case are not in dispute. The representatives accept the following:

- On or about November 13, 2012 the applicant (Mr. Henshaw) and the respondent (Mr. Thompson) were involved in a motor vehicle accident.
- At the time of the accident, Mr. Henshaw and Mr. Thompson were both employees of the interested party, P. Ltd.
- At the time of the accident, P. Ltd. was a Schedule 1 employer.
- The parking lot in which the accident occurred was under the care and control of P. Ltd.
- At the time of the accident on November 13, 2012, Mr. Henshaw was in the course of his employment. He was leaving the offices of P. Ltd., in order to meet with a colleague at P. Ltd.'s head office.
- On November 13, 2014 Mr. Thompson issued a Statement of Claim in the Ontario Superior Court of Justice as Court File No. CV-14-516065 against his insurance company and Mr. Henshaw for damages which he alleged arose out of injuries sustained on November 13, 2012. In the Statement of Claim, Mr. Thompson alleged that as he was entering the parking lot of P. Ltd., he was struck by the applicant's vehicle which was exiting the parking lot.
- Subsequently, Mr. Henshaw commenced this application, requesting an order that Mr. Thompson's rights of action with respect to the accident on November 13, 2012 are taken away, pursuant to section 31 of the WSIA.
- Mr. Brar, who was representing P. Ltd., did not call any witnesses or make submissions. He indicated that P. Ltd. supported the position taken by the applicant.

[4] Given the accepted facts as outlined above, the only remaining issue to be determined is whether, at the time of the accident on November 13, 2012, the respondent, Mr. Thompson, was in the course of his employment. If that question is answered in the affirmative, then it follows that his rights of action with respect to the accident are taken away.

(iv) Law and policy

[5] 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.

[6] 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.
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> **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.
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> **29(1)** This section applies in the following circumstances:
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> 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.

[7] 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.*

(v) The testimony of Mr. S.

[8] Under questioning from Ms. Miller, Mr. S. testified that at the time of the accident on November 13, 2012, he was an employee of P. Ltd. He worked as a sorter/team leader in its delivery business. Mr. S. testified that he regularly worked a seven hour shift from 4:30 p.m. to 11:30 p.m., from Monday to Friday. He testified that employees who worked an eight hour shift normally started at 4:00 p.m. and worked until midnight.

[9] Mr. S. testified it was not unusual for him to arrive at work around 1:30 p.m. in order to play dominoes with his co-workers before his shift started. There were often 10 to 12 people playing and others standing around watching. The games were played in the cafeteria of P. Ltd., and it was not unusual for Mr. S. to come to work early and play dominoes five days a week. He testified his usual practice was to stop playing dominoes five or ten minutes before the start of his shift, swipe in to work, and then go to his work station. Mr. S. testified there was no reason for one to swipe in early because regardless of what time you arrived, you were not paid until your shift started.

[10] Mr. S. testified he started with P. Ltd. in about 2005 and had been playing dominoes for eight or nine years. He played just about every day and the number of games going on depended on the number of people who were present. Four players were required to start a game. People would arrive at various times before they started working.

[11] Under questioning from Ms. Castellucci, Mr. S. testified that he was in the cafeteria playing dominoes on November 13, 2012, but could not remember what time he arrived. He recalled that he was playing dominoes when a co-worker came into the cafeteria advising that there had been an accident in the parking lot. Mr. S. testified he did not know any details about the accident and could not provide any assistance with respect to either when he arrived at work that day or when the accident happened.

[12] Mr. S. testified that there was no discussion about work while they were playing dominoes. They had never been advised by P. Ltd. to stop playing dominoes.

[13] Mr. S. was questioned about a document (contained in Exhibit #5) provided by P. Ltd., which suggested his start time between September 2012 and January 2013 was 4:00 p.m. Mr. S. was adamant that his start time was 4:30 p.m. Mr. S. testified he would not go in to play dominoes if he were not working. He did not believe Mr. Thompson would have done that either.

[14] Under questioning from Mr. Brar, Mr. S. testified he would normally be in uniform while playing.

(vi) The testimony of Mr. Thompson

[15] Under questioning from Ms. Miller, Mr. Thompson testified that he is no longer employed by P. Ltd. At the time of the accident he was working as a sorter and had worked in that capacity, at the same location, since 2000. He testified that he drove his car to work and the drive normally took him 20 to 25 minutes.

[16] Mr. Thompson testified that on November 13, 2012, he was working his regular shift that started at 4:30 p.m. He worked from Monday to Friday. He testified that he left his house around 2:00 p.m. that day and went straight to work. He left early so that he could play dominoes in the lunch room. He played dominoes just about every day unless he had another appointment to attend before he started work. He estimated there might be between 15 and 20 people playing dominoes at any particular time.

[17] Mr. Thompson testified that he arrived at work around 3:00 p.m. that day, and while he was in the parking lot going to park his car, his vehicle was struck by another vehicle.

[18] Mr. Thompson testified his plan that day had been to play dominoes until just before his shift started. He would normally stop playing dominoes around 4:25 p.m., and then punch in to work and go to his work station. He would only be paid from 4:30 p.m., regardless of when he might have punched in. He testified there were some employees who came to work as much as three hours early to play dominoes. One particular employee was the organizer. The games were not organized by P. Ltd. He would generally arrive around 3:00 p.m. or perhaps even 2:30 p.m., Mr. Thompson testified there would be a number of other employees in the lunch room watching. There was nothing work-related about what was happening. It was an opportunity for the employees to relax before they started work and their discussions centered solely on dominoes and were not about work. Mr. Thompson testified there were occasionally one or two supervisors who might also come by and play for a period of time. He testified that the clock where he checked in to work was located right beside the lunch room. Mr. Thompson reiterated that he left for work that day around 2 p.m. He drove straight to work and it was his intention to go right to the cafeteria to play dominoes. He would not be paid until the start of his shift at 4:30 p.m.

[19] Under questioning from Ms. Castellucci, Mr. Thompson confirmed that the accident on November 13, 2012 occurred in the parking lot of P. Ltd. His vehicle was struck as he was driving to the area he normally parked. It was his understanding that Mr. Henshaw, who was also an employee of "P" Ltd., was leaving the lot at that time. He did not know Mr. Henshaw.

[20] Mr. Thompson testified that if he was not working on a particular day, then he would not be playing dominoes. He looked forward to playing dominoes because it added some pleasure to his job and helped build up relationships between co-workers.

[21] Mr. Thompson was questioned about the time he left his home that day and testified it was possible he left at some point after 2 p.m., perhaps 2:30 p.m. He testified the accident occurred around 3 p.m.

[22] Mr. Thompson testified that after the accident he talked to Mr. Henshaw for five or ten minutes and then parked his car. He went in to report the matter to his supervisor and testified this may have taken another five to ten minutes. He eventually started his work shift but could not remember what time that was. He began to feel unwell at work and left early, but could not remember exactly when. He then proceeded to the Motor Vehicle Collision Reporting Centre and reported the accident around 5 p.m. It was about a 25 minute drive to that location. Mr. Henshaw did not go with him. He was not certain when Mr. Henshaw attended that facility.

[23] Under questioning from Mr. Brar, Mr. Thompson testified that while a supervisor might drop by and play a game or two, this was not a regular occurrence. He confirmed that he had been playing dominoes since he started at P. Ltd.

(vii) Analysis

[24] On behalf of the applicant, Ms. Castellucci takes the position that at the time of the accident on November 13, 2012, Mr. Thompson was in the course of his employment. In support of that position, Ms. Castellucci noted, among other things, that the accident occurred in the employer's parking lot and she submitted that being in that parking lot was an activity reasonably incidental to the worker's employment. She submitted that Mr. Thompson should be treated the same way as any other employee who had been injured in the parking lot, noting that he would not have been in that location were he not working. Ms. Castellucci also submitted that a relationship could be drawn between the playing of dominoes and the employment, and that the former helped build workplace relationships and helped improve morale. At the very least, Ms. Castellucci submitted that the playing of dominoes was not a distinct departure from Mr. Thompson's reason for being in the parking lot, i.e., to go to work.

[25] With respect to the timing of the events on November 13, 2012, Ms. Castellucci submitted that I should place the greatest weight on Mr. Thompson's Examination for Discovery evidence which was provided in June 2016. The transcript of that testimony (contained in Exhibit #1) has Mr. Thompson indicating he left his home that day about 2:30 p.m., with a plan to play dominoes beginning at 3 p.m. before starting his shift at 4 p.m. It was Ms. Castellucci's position that in light of that time line, Mr. Thompson could not be said to have taken himself out of the course of his employment.

[26] *Operational Policy Manual* Document No. 15-02-02 entitled "Accident in the Course of Employment" provides that "a personal injury by accident occurs in the course of employment if the surrounding circumstances relating to ***place, time,*** and ***activity*** indicate that the accident was work-related". The policy also provides:

> Guidelines
>
> In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of place, time, and activity in the following way:
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> Place
>
> If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A

personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work- related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

[27] With respect to the criteria of "place", OPM Document No. 15-03-04, entitled "Employers' Premises, Parking Lots, Roads, Plazas, Malls, and Boundaries" provides that as a general rule, "workers are in the course of employment upon entering the employer's premises at the proper time, using an accepted entrance". The employer's "premises" are defined as "building, plant, or location of work, including entrances, exits, stairs, elevators, lobbies, parking lots, passage ways and private roads". In this case, the parties have accepted for the purposes of this application that the parking lot in which this accident occurred was part of the premises of the employer, P. Ltd.

[28] While I am prepared to accept that the circumstances surrounding the "place" where the accident occurred indicated that it might be work-related, I note that with respect to the criteria of "time" the policy provides that "if a worker has fixed working hours [as Mr. Thompson had in this case], a personal injury by accident generally will have occurred in the course of employment, if it occurred during those hours, or during a reasonable period before starting or

after finishing work". Given the contents of Board policy, the issue to be determined is whether the accident in question occurred during a "reasonable period" before Mr. Thompson started work. Reviewing the Tribunal jurisprudence provided by the representatives, it is apparent, as noted in Tribunal *Decision No. 1380/01*, that in deciding whether a worker arrived at work within a "reasonable period" before starting work, the Tribunal has been "loath to establish a fixed and firm time line, as we recognize that each case must be determined on its own facts. What might be reasonable in one case may well be excessive in another".

[29] Given that this accident occurred in 2012, some six years ago, it is not surprising that there may be some difficulty confirming with certainty, a time line of what occurred. In his testimony at this hearing, Mr. Thompson indicated that the accident took place around 3 p.m., about 90 minutes before his scheduled start time of 4:30 p.m. Ms. Castellucci submitted that rather than accepting the worker's testimony with regards to the timing of this incident, I ought to rely on his 2016 Examination for Discovery evidence in which he testified he was starting work at 4 p.m. Ms. Castellucci submitted that the worker's memory of what occurred on the day of the accident would likely have been better in 2016 than it was in 2018.

[30] While I would agree that a witness' recall of what occurred in a particular incident is likely to be more accurate the closer in time it is to that particular incident, I note that the most contemporaneous reporting on file is the Self-Reporting Collision Report completed by Mr. Thompson around 5:10 p.m. on the day of the accident. That report states that the accident occurred at 3 p.m. (or 15:00) on November 13, 2012. The contents of this report, completed only a few hours after the accident, are consistent with the worker's testimony at this hearing that the accident occurred around 3 p.m.

[31] With respect to the time that the worker started his shift, Ms. Castellucci has suggested that I should rely on the worker's Examination for Discovery testimony that he started at 4 p.m., rather than his testimony at this hearing which suggested it was 4:30 p.m. In his testimony at this hearing the worker was adamant that his start time was 4:30 p.m. and I accept that testimony, given that it is consistent with the contents of an April 26, 2018 email from the Human Resources Coordinator of P. Ltd., indicating that the worker "was scheduled to begin his shift at 4:30 p.m." For the reasons noted above, I find that the accident on November 13, 2012 occurred as the worker was arriving at his workplace about 90 minutes prior to his scheduled start time. In my view, in determining whether or not these 90 minutes constituted a "reasonable" period before his start time, one must also take into account the "activity" being performed by the worker. As the Panel noted in *Decision No. 1380/01*, "depending on the facts of a specific case, workers who attend reasonably early and for the specific purpose of meeting their employment obligations, could probably be in the course of employment should an accident occur".

[32] While I appreciate the position of the applicant that Mr. Thompson would not have been in the parking lot on November 13, 2012, had he not been scheduled to work that day, I find that is not determinative of the matter. The evidence of both Mr. Thompson and Mr. S was consistent in suggesting that the only reason Mr. Thompson came to work 90 minutes before his scheduled start time was to play dominoes. While the games were played in the company lunch room, I do not accept that this activity can be described as incidental to one's employment. Playing dominoes was not reasonable incidental to Mr. Thompson's job sorting packages. The only relationship between playing dominoes and the employment was that it occurred in the workplace and it was employees who participated. It was, in essence, a social activity participated in by some of the employees prior to starting work. The employees were not paid

while they were participating in this activity. The testimony of the witnesses was consistent in suggesting that there was no discussion about work while the games were being played.

[33] I have reviewed the Tribunal jurisprudence provided by the representatives, and while they confirm that issues of this nature are always very fact-specific, I find the conclusions of the Panel in *Decision No. 1380/01* to be instructive. In that decision, the Panel concluded:

> [39] The purpose of this worker attending early is also particularly germane to our decision. In this case the worker did not attend to meet an employment obligation, as that phrase is used in Document No. 03-02-02 of the *Operational Policy Manual*. His attendance at work 70 minutes prior to the start of shift had nothing to do with meeting the needs of his employer, preparing for production or anything of that nature. Rather, the worker attended early in order to confirm a social arrangement with a co-worker who was on the earlier shift.
>
> [40] Thus, the purpose of the worker attending earlier had nothing to do with the course of employment. There was no work relatedness to it whatsoever.
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> [41] It is unfortunate that the worker had an accident when he fell off the rail upon which he was perched while waiting for his co-worker. But the accident did not occur in the course of the worker's employment. Accordingly, initial entitlement must be denied.

[34] As noted in *Decision No. 1468/11,* it is now accepted as a general rule in Tribunal jurisprudence that if a worker is injured in an employer's parking lot for reasons which are reasonably incidental to his or her employment, then the worker will be regarded as being in the course of employment. Given that Mr. Thompson arrived at work about 90 minutes early so that he could play dominoes with his colleagues before starting work, I find that while the accident occurred in the employer's parking lot, his reasons for being there at that time were not reasonably incidental to his employment. As such, I find that Mr. Thompson was not in the course of his employment at the time of the accident on November 13, 2012. As a result, his right of action with respect to that accident is not taken away.

DISPOSITION

[35] The application is dismissed. Mr. Thompson's right of action is not taken away by the WSIA.

DATED: October 17, 2018

SIGNED: R. Nairn