Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 125/18

BEFORE:	T. Mitchinson: Vice-Chair
HEARING:	June 20, 2019 at Toronto Oral
DATE OF DECISION:	June 26, 2019
NEUTRAL CITATION:	2019 ONWSIAT 1483

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the Applicant:	D. Himelfarb, Lawyer
For the Respondent:	A. Chapnik, Lawyer
For Interested Party #1:	T. Horton and J. Koifman, Lawyers
For Interested Party #2:	K. Pereira, Lawyer
Interpreter:	M. Gulati, Punjabi

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the *Act*) by an accident benefits insurance company on behalf of two of the defendants in an action filed in the Ontario Superior Court of Justice as Court File No. CV 17-588563, for a declaration and order to bar the plaintiff/respondent from maintaining a civil action against the defendants for damages stemming from an accident involving two motor vehicles and a pedestrian that occurred on November 18, 2015. The other defendants in the civil action are participating as interested parties and seek the same remedy.

[2] The application was heard in Toronto on June 20, 2019.

[3] The applicant, Northbridge Commercial Insurance Company (Northbridge), is represented by Daniel Himelfarb, a lawyer.

[4] The respondent, Samuel Sunday (SS), is represented by Allan Chapnik, a lawyer. SS was working for G4S Secure Canada (G4S) at the time of the accident.

[5] Interested party #1, Longline Logistics Ltd., carrying on business as Karmjit Trucking (Longline) and Robindeep Singh (RS), are represented by Tobin Horton and Justin Koifman, lawyers.

[6] Interested party #2, Roderick MacLeod (RM) and United Parcel Service Canada Ltd. (UPS), are represented by Kurt Pereira, a lawyer.

[7] At the start of the hearing, Mr. Chapnik made a number of concessions that reduced the scope of the application. He agreed that:

- Longline, G4S, and UPS are all Schedule 1 employers under the *Act*.
- Mr. Chapnik's client, SS, was a worker for G4S, and was in the course of his employment at the time of the November 18, 2015 accident.
- RM was a worker for UPS, and was in the course of his employment at the time of the November 18, 2015 accident.
- RS was a worker for Longline, and was in the course of his employment at the time of the November 18, 2015 accident.

[8] The only outstanding issue not encompassed by these concessions is whether RB was a non-resident worker of a non-resident employer at the time of the accident, as set out in Board *Operational Policy Manual* (OPM) Document No. 12-04-12.

[9] Mr. Pereira and RM, who were present at the hearing, were excused, given Mr. Chapnik's concessions.

[10] RS testified at the hearing. Punjabi interpreter, Manmohan Gulati, was in attendance to provide any required interpretation for RS, but his services were not needed.

[11] Mr. Horton, Ms. Himelfarb and Mr. Chapnik, all made oral submissions on behalf of their clients.

(ii) Applicable law

[12] The accident leading to the civil lawsuit and this section 31 application occurred in 2015. Therefore, the *Workplace Safety and Insurance Act, 1997* (the Act) applies.

(iii) Statutory provisions and Board policy

[13] Sections 28(1) and 31(1) of the Act reads as follows:

> 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.
>
> ...
>
> 31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[14] Board *Operational Policy Manual* (OPM) Document No. 15-01-05 sets out the policy and guidelines for determining whether the requirements of section 31(1) of the *Act* are present:

> **POLICY**
>
> The Act provides no fault loss of earnings benefits for injuries arising out of and in the course of employment in lieu of all rights of action that a worker or survivor may have against the worker's employer. In most cases any right of action is taken away by the Act. However, there are circumstances where a worker or survivor may have a right of action against a third party.
>
> **GUIDELINES**
>
> When all parties involved in the accident were in the course of their employment, the worker has no right of action against any Schedule 1
>
> - employer
> - director
> - executive officer, or
> - worker

[15] Section 2(1) of the Act defines worker as "a person who has entered into or is employed under a contract of service ... ."

[16] OPM Document No. 12-04-12, titled "Non-Resident Workers," deals generally with the status of workers under the *Act* who are employed in Ontario by a "non-resident employer." The term "non-resident employer" is not found in the statute, but it is reasonable to interpret it to refer to employers whose base of operations and primary business is conducted outside Ontario. The policy states:

Policy

A non-resident employer who employs an Ontario resident to work in Ontario is an "employer" under the Workplace Safety and Insurance Act or the Workers' Compensation Act (the Act). In all other cases, a non-resident worker or non-resident employer must have a substantial connection with Ontario in order to come within the scope of the Act.

Guidelines

A non-resident worker who works in Ontario normally has a substantial connection with Ontario unless the worker's Ontario employment is so minimal that it is merely incidental to the worker's employment in another jurisdiction.

To decide whether a worker has a substantial connection with Ontario, the decision-maker considers all the surrounding circumstances. In most cases, the major consideration is the amount of time that the worker spends working in Ontario. If an injured non-resident worker claims benefits under the Act, the decision-maker considers the amount of time the worker had spent working in Ontario in the year immediately preceding the date of the accident.

Although each case must be decided on its own facts, it is generally considered that a worker who works in Ontario for

- 5 or fewer days in the course of a year usually does not have a substantial connection with Ontario
- 6 to 10 days in the course of a year may have a substantial connection with Ontario if the surrounding circumstances suggest that such a connection exists
- 11 or more days in the course of a year usually has a substantial connection with Ontario.

When applying these time frames, the decision-maker considers whether the worker worked in Ontario for the entire day or for only several hours.

Other factors include

- whether the worker also makes similar trips to other jurisdictions outside the home jurisdiction
- whether trips to Ontario are regularly scheduled or anticipated
- whether the worker simply passes through Ontario or actually performs employment functions in the province
- whether trips to Ontario are strictly for employment purposes or whether they also have a personal component
- the place where the contract of employment was made
- the place where the worker is paid, and
- whether, if Ontario residency status is doubtful, the worker would have worker status under workers' compensation legislation in another jurisdiction.

(iv) Background

[17] While working as a Security Guard for G4S on November 18, 2015, SS was injured at a UPS distribution centre. He was in the process of inspecting a truck operated by RM and owned

by UPS, when he was pinned between that truck and another truck operated by RS. RS's truck was leased to Longline and insured by the applicant, Northbridge.

[18] SS submitted an Application for Accident Benefits to Northbridge, and the Workplace Safety and Insurance Board (the Board) approved the assignment of SS's benefits under the *Act*.

[19] On May 3, 2016, Mr. Himelfarb, on behalf of Northbridge, brought an Application under Section 31(1) of the *Act*, maintaining that the right of SS to commence an action arising from the accident on November 18, 2015 was taken away by the operation of section 28(1) of the *Act*, thereby entitling SS to claim benefits under the *Act*. On December 16, 2016, Mr. Himelfarb filed a Supplementary Section 31 Application.

[20] On December 5, 2017, Mr. Chapnik, on behalf of SS, filed a Section 31 Respondent's Statement.

[21] The Application was scheduled for hearing at the Tribunal on January 16, 2018. At the time of scheduling, Mr. Chapnik had not advised the Tribunal that SS had commenced a civil action with respect to the November 18, 2015 accident. However, on January 15, 2018, one day before the scheduled hearing, Mr. Chapnik provided the Tribunal with a copy of SS's Statement of Claim, dated October 31, 2017. The defendants named in the claim were RS, Longline, RM and UPS. To this point, RM and UPS had not been considered as Interested Parties to the Application and had not received notice of it. In addition, RS and Longline, although identified as Interested Parties in the Application, were not represented by counsel.

[22] At the January 16, 2018 hearing, Mr. Chapnik confirmed that SS's Claim had not yet been served, but that this would take place shortly.

[23] The Vice Chair at the hearing expressed concern regarding these late developments, but decided that the Application could not proceed. He concluded that until pleadings in the civil action were closed, and all of the defendants notified of this Application and offered the opportunity to participate, the Application was not heading-ready. In the Vice Chair's view, an adjournment was necessary for reasons of procedural fairness.

[24] SS's claim was then served on the defendants, and RS/UPS decided to participate in the Application as an Interested Party (Interested Party #2). RS/Longline, decided to become more active as a participating Interested Party (Interested Party #1).

[25] On March 18, 2919, Mr. Horton, submitted a Section 31 Application of Interested Party #2; and on March 28, 2019, Mr. Pereira submitted a corresponding Section 31 Application of Interested Party #1.

(v) Testimony

[26] RS testified that he has been a Class 1 licensed truck driver for more than 4 years, and began working in that capacity for Longline in June 2015. He held a similar position for other trucking companies before starting work with Longline.

[27] RS confirmed a number of facts that are covered by Mr. Chapnik's concessions. He was hired as a full-time driver by Longline, did not own his own truck, and worked under the direction of Longline staff. He considered himself to be a worker, not an independent operator.

[28] RS described his working pattern with Longline. He would pick up a load from one of Longline's customers in Alberta and drive it to an Ontario destination. After a brief rest, he

would then pick up a new load and deliver it back to either Alberta or Saskatchewan on Longline's behalf. It would take him two days to reach Ontario, and an additional two days to travel from the Manitoba border to the drop-off location, generally in Mississauga, Brampton or Peterborough. He would rest overnight after reaching the Ontario drop-off point, usually in his truck cab. On some occasions he would spend time with a friend in Ontario during the rest day and would occasionally stay overnight at this friend's home.

[29] RS described activities that occurred on November 18, 2015. He left Calgary with a load on November 12, and arrived in Ontario on November 15. He slept in Longlac and Beaverton along the way. He dropped the load in Peterborough, spend the night sleeping in his truck, and then drove to Mississauga on November 17 to pick up the new load for delivery back to Alberta. The pick-up location for the new load was the UPS distribution centre. The accident occurred while he was at the UPS centre. He stayed over an extra night due to the accident, and picked up a different load on November 19 and drove back to Alberta.

[30] RS testified that he made a number of similar trips for Longline during the 6-month period prior to the accident. According to RS, he made between 3-4 trips per month, all following the same pattern as the trip when the accident occurred. He continued to work for Longline after the accident, performing the same job functions, until July 2016. This included regular trips to Ontario.

[31] In response to cross-questioning by Mr. Chapnik, RS confirmed that his contract with Longline was executed in Alberta and he was paid in Alberta.

[32] Mr. Chapnik pointed RS to his log book entries for the November 2015 trip that were included in the application materials. RS explained that logs were keep for all days during delivery routes, including when he was off duty. One copy of each log entry was given to Longline and he keep a second copy. RS also testified that bills of lading and other delivery-related documents were provided to Longline, but he did not keep a copy of them.

[33] Mr. Chapnik also pointed RS to a document evidencing the addition of his name on Longline's insurance policy, which indicates that he had 3 years of driving experience as of July 2015. RS was unable to explain why this figure was different than the driving history set out in his earlier testimony.

(vi) Mr. Horton's position

[34] Mr. Horton submits that the evidence of the working relationship between Longline and RS is sufficient to establish that both parties had a substantial connection to Ontario, as required in order to meet the requirements of OPM Document No. 12-04-12.

[35] As far as Longline is concerned, Mr. Horton relies on the company's amended insurance policy form, dated July 16, 2015, which states that 10% of Longline's business activity would be conducted in Ontario. He also references an Alberta government registration document indicating that the vehicle driven by RS was licensed for operation in Ontario.

[36] Turning to RS, Mr. Horton submits that RS spent a substantial amount of time in Ontario as part of his job duties with Longline. He relies on RS's testimony, and the absence of any contradictory evidence, to support his position that the work activity bringing RS to Ontario was frequent, anticipated, scheduled, and regularly undertaken during the period of RS's employment, both before and after the November 18, 2015 accident. In Mr. Horton's view, the

reason for RS's visits to Ontario was commercial in nature and for professional purposes, and any personal time spent with friends was merely incidental.

[37] Mr. Horton submits that regardless of whether RS's recollections of the amount of time spent in Ontario are totally consistent, there should be no dispute that he spent more than the minimum amount of time set out in OPM Document No. 12-04-12 as sufficient to establish a substantial connection to Ontario.

[38] Mr. Horton identified a number of prior Tribunal Decisions (*Decisions Nos. 842/16*, *1383/13*, *2157/04*, and *1531/00*) which set out jurisprudence describing when connection to activity in Ontario is and is not considered to be substantial, and in his view, the facts of the current application mirror those decisions which identified a substantial connection.

(vii) Mr. Himelfarb's position

[39] Mr. Himelfarb submits that the 1-year work history period set out in OPM Document No. 12-04-12 should not be seen as an impediment to characterizing RS as a non-resident worker. He had only been working for Longline for 6 months before the November 18, 2015 accident, and his experience during that time should be sufficient to establish a consistent pattern of work in Ontario. Mr. Himelfarb also points out that RS continued to work for Longline after the accident, and testified that his work patterns remained the same.

[40] Mr. Himelfarb also submits that the fact that RS's contract was executed in Alberta and he was paid in Alberta are relevant factors to consider, but that they are not sufficient to establish RS's status. He also points to the fact that RS purchased gas in Ontario as evidence that the work activity contributed to Ontario's economy.

(viii) Mr. Chapnik's position

[41] Mr. Chapnik suggests that I should be cautious in accepting RS's evidence about the amount of time he spent in Ontario while driving for Longline. He points to inconsistencies between RS's testimony and time estimates in some documentary evidence, and submits that RS's evidence on this aspect of the application is nothing more than guesswork on his part.

[42] Mr. Chapnik appears to accept that even the fewest number of days spent in Ontario emerging from the evidence would exceed the minimum time set out in OPM Document No. 12-04-12, but he submits that inconsistencies call all time-based evidence into question.

[43] Turning to Longline, Mr. Chapnik submits that there is insufficient evidence to determine whether the company's work establishes a substantial connection to Ontario. The only log book entries00 provided by Longline are for the November 2015 trip when the accident occurred, despite the fact that the company would have log book entries for an extended period. In Mr. Chapnik's view, there is also no evidence that the 10% Ontario business activity estimate set out in the amended insurance coverage accurately reflects the actual activity of the company. However, Mr. Chapnik accepts that if the company actually spent 10% of its business activity in Ontario, that would be sufficient to represent a substantial connection to the province.

[44] Finally, Mr. Chapnik submits that there is no evidence of the number of drivers working for Longline, making it impossible to determine whether RS's activities were a trivial or a substantial part of overall business activity.

[45] Mr. Chapnik takes the position that neither RS nor Longline have a substantial connection to Ontario. His application materials include prior *Decision No. 2071/12R2*, which he submits supports a similar finding in this application.

(ix) Analysis and findings

[46] I have reviewed all the various prior Tribunal decision provided by Mr. Horton and Mr. Chapnik. Although they are helpful in setting out the Tribunal's approach to the interpretation of OPM Document No. 12-04-12, in my view, a determination of this nature is highly fact-specific and dependent on the evidence of the employment and job activity relationship of the parties in particular circumstances of this application.

[47] I find on the evidence that RS and Longline both have a substantial connect with Ontario. I have reached this conclusion for a number or reasons.

[48] It is clear from the amended insurance coverage record submitted by Longline in July 2015 that the company was conducting business in Ontario and wanted to ensure that their exposure included activity in that province. Although the majority of business activity took place in Alberta, an estimate of 10% of the company's business would involve activities in Ontario. I accept Mr. Chapnik's submission that estimated activity levels do not necessary equate to actual activity, but I find it reasonable to conclude that Longline would not have taken the step of expanding insurance coverage, with corresponding increased premium costs, unless the actual activity was to be undertaken. There is no evidence to suggest that Longline's business activity did not correspond to the coverage estimate, and Mr. Chapnik has acknowledged that 10% of actual activity would be sufficient to establish a substantial connection.

[49] As far as RS's connection is concerned, Mr. Chapnik's main argument is that I am not in a position to understand the actual amount of time spent by RS in Ontario, based on conflicting evidence from testimony and documents contained in the application materials. On this point, I found RS to be straightforward in his testimony, trying his best to reflect back 4 years to his work activity while at Longline. While some time estimates were not totally consistent, it is significant that even using the lowest estimate of days spent in Ontario exceeds the 11-day minimum set out in OPM Document No. 12-01-12, even when only considering the 6-month period of work prior to the November 18, 2015 accident. I am not persuaded that the inconsistencies identified by Mr. Chapnik are serious enough to call all of RS's testimony on this issue into question.

[50] I also agree with Mr. Himelfarb that the fact that RS's contract was executed in Alberta and that he was paid in Alberta are not definitive indicators of status. Given other evidence, including the fact that RS made regularly scheduled trips to Ontario, and that his activity in the province was strictly professional, outweigh the factors relied on by Mr. Chapnik in the circumstances of this application.

[51] In conclusion, I find that RS was not simply passing through Ontario when he was involved in the November 18, 2015 accident. He was in the process of completing regularly a scheduled delivery route between Alberta and Ontario, as he had done on several prior occasions. His activity and that of Longline were commercial in nature, and any personal connection RS may have had was incidental to his work activities.

[52] As such, I find that the Application is granted, and SS is barred from proceeding with his civil law suit against all defendants, including RS, Longline, RM and UPS.

DISPOSITION

[53] The application is granted.

[54] Longline, UPS and G4S Secure Canada were all Schedule 1 employers at the time of the November 18, 2015 accident.

[55] SS, RM and RS were all workers of these Schedule 1 employers in the course of the employment at the time of the November 18, 2015 accident.

[56] RS and Longline each had a substantial connection to Ontario.

[57] SS's is barred for proceeding with his civil action pursuant to section 28(1) of the Act against all defendants, including RS, Longline, RM and UPS.

DATED: June 26, 2019

SIGNED: T. Mitchinson