Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3214/16

BEFORE: B. Kalvin: Vice-Chair

HEARING: December 8, 2016, at Toronto
Oral

DATE OF DECISION: January 3, 2017

NEUTRAL CITATION: 2017 ONWSIAT 7

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

APPEARANCES:

For the applicant: J. Schwartzman, Lawyer

For the respondent: R. Morzaria and L. Charles, Lawyers

Interpreter: N/A

REASONS

(i) Introduction

[1] These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an application under section 31 of the *Workplace Safety and Insurance Act* (the "WSIA"). The application is brought by Mr. Hanna who is the defendant in a civil action filed in the Ontario Superior Court of Justice at Toronto, Ontario, as Court File No. CV-14-50983. The plaintiff in that action is Mr. Anton, who is the respondent to this application.

(ii) Background

[2] The facts giving rise to this application are not in dispute and are as follows.

[3] In September 2013, the applicant and the respondent were working for Supply Chain Management ("SCM") which is described in an Agreed Statement of Facts as "a warehousing/food distribution/logistics company."

[4] On September 16, 2013, the applicant and the respondent finished their work shifts at 11:30 p.m. Approximately 12 minutes later, at 11:48 p.m. the respondent was walking on a road when he was struck by a car driven by the applicant. The road on which the accident occurred was a private road leased by SCM. The road connects Mississauga Road, a public highway, with SCM's employee parking lot and entrance. A sign was posted on the road saying "Private Roadway Use At Your Own Risk." The road was not controlled by gates or a security checkpoint. It could be accessed by the public for the purposes of dropping off or picking up employees or for visiting SCM's premises. When the accident occurred, the applicant and the respondent were using the road to leave work.

[5] On July 30, 2014, the respondent filed a civil action against the applicant seeking damages for a personal injury sustained in the accident.

[6] The applicant filed a defence against the respondent's civil action. In addition, he brought an application to this Tribunal for a determination under section 31 of the WSIA that the respondent's right of action is extinguished by the WSIA. The applicant claims that at the time of the accident, he and the respondent were workers in the course of their employment and therefore, the respondent's right of action against him is taken away by the WSIA. The applicants seek a determination to that effect.

(iii) Issue

[7] As noted, the applicant responded to the respondent's civil action by bringing this application under section 31 of the WSIA. That provision reads as follows:

> 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
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> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

> (2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

[8] The applicant claims that the respondent's right to sue is taken away by section 28 of the WSIA. Sections 27 and 28 prohibit an injured worker who is entitled to benefits under the WSIA from suing, among other persons, a Schedule 1 employer and a worker of such an employer who was in the course of his or her employment. The relevant portions of these provisions read as follows:

> **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.
>
> ...
>
> **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.
>
> ...
>
> **(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.
>
> ...

[9] Subsection 13(1) of the WSIA entitles a worker to benefits for an injury if that injury results from an accident "arising out of and in the course of employment." Subsections 13(1) and (2) 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.
>
> **(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.

[10] In the present case, there is no dispute that on the day of the accident the applicant and the respondent were workers of a Schedule 1 employer, namely, SCM. Accordingly, the issue on which this application turns is whether or not the applicant and the respondent were in the course of employment at the time of the accident.

(iv) Analysis

[11] The Workplace Safety and Insurance Board (the "Board") has several policies which are instructive with respect to the issue of whether a worker's accident occurred "in the course of employment." While not binding on the Tribunal for the purposes of a right to sue application, the policies are nevertheless instructive. There are three Board policies that are germane to this case.

[12] The first policy is entitled *Accident in the Course of Employment* is set out in *Operational Policy Manual* Document No. 15-02-02. It reads as follows:

Policy

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.

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:

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.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

In all other circumstances, the time and place of the accident are less important. In these cases, the decision-maker focuses on the activity of the worker and examines all the surrounding circumstances to decide if the worker was in the course of employment at the time that the personal injury by accident occurred.

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.

[13] The definition of "premises" is set out in the second policy of relevance, *Operational Policy Manual* Document No. 15-03-03 which is entitled *On/Off Employer's Premises*. It reads, in part, as follows:

Policy

A worker is considered to be in the course of employment on entering the employer's premises, as defined, at the proper time, using the accepted means for entering and leaving to perform activities for the purpose of the employer's business. The "In the course of employment" status ends on leaving the employer's premises, unless the worker leaves the premises for the purpose of the employment.

The employer's premises are defined as the building, plant, or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways, and roads controlled by the employer for the use of the workers when entering or leaving the work site.

[14] The third policy of significance, *Operational Policy Manual* Document No.15-03-04, deals specifically with "employer-owned private roads." It is entitled *Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries*. It reads, in part, as follows:

Policy

Workers are in the course of employment upon entering the employer's premises at the proper time, using an accepted entrance.

Workers are not in the course of employment when they leave the employer's premises, unless for the purpose of work …

Accidents on employer's premises arise out of employment, unless

- for personal reasons, the worker used an instrument of added peril, for example, an automobile, motorcycle or bicycle. (For exceptions, see parking lots, below.)
- the act causing the injury does not relate to work or employment obligations.

Guidelines

Employer's premises

Definition

The building, plant or location of work, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways and private roads.

Parking lots

The employer must own or lease the parking lot.

If driving, the condition of the employer's lot must cause the accident.

If walking, the condition of the lot need not be a contributing factor.

Workers are not entitled to compensation if injured by their own vehicle.

Employer-owned private roads

If part of the worker's journey to or from work takes place on a road that is completely controlled by means such as posted notices, warning signs, or opening or closing of gates, maintenance work or snow clearing, the worker is in the course of employment while using the roadway.

The worker is not in the course of employment while using a road open to the general public.

The condition of the employer's private roads must cause the accident.

[15] Having considered the evidence and the helpful submissions of both counsel, I find that the applicant and the respondent were in the course of their employment when the accident occurred. My reasons for this conclusion are as follows.

[16] There can be little doubt, in my assessment, that the accident occurred on the employer's premises. The accident did not occur on a public road; rather, it occurred on a private road that was leased by the employer for the purpose of connecting a public highway with its employee parking lot and employee entrance to the building. The road was controlled by the employer: it posted a sign saying that it was a private road and that it was to be used at a person's "own risk." The employer contracted with the lessor to do snow and ice removal from the road. In other words, it made arrangements, through its lease agreement, to have the road kept clear. The fact that the employer did not restrict members of the public from using the road does not mean that the road did not form part of the employer's premises. It is not uncommon for employers not to restrict public access to their premises. I find that the private road, leased by the employer to connect its parking lot with the public highway was a road "controlled by the employer for the use of the workers when entering or leaving the work site." It is part of the employer's premises.

[17] In my view, the criteria of place, time and activity, identified in Policy No. 15-02-02 are all satisfied in this case. With respect to place, the policy states that for workers with "a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment." In this case, the applicant and the respondent had a fixed place of employment and, for the reasons set out above, I find that the accident occurred on the "premises of the workplace."

[18] With respect to the criterion of time, the policy states that if a worker has fixed working hours an accident is regarded as having occurred within the course of employment if it occurs "during those hours or during a reasonable period before starting or after finishing work." In the present case, it appears the applicant and the respondent had fixed working hours, that is, a work

shift that ended at 11:30 p.m. and the accident occurred approximately 12 minutes after the end of that shift. In my view, the accident occurred during a reasonable period of time after the applicant and respondent had finished work, and thus, the "time" criterion is also satisfied.

[19] In my opinion, the "activity" criterion is also met. The applicant and the respondent were using the employer's private road in order to leave work soon after their shift had ended. There are numerous Tribunal decisions which stand for the proposition that being in an employer's road or parking lot for the purpose of arriving at or leaving work is an activity that is reasonably incidental to employment. Some of these decisions are referred to in *Decision No. 2415/08* as follows:

> The question of whether a worker injured by a vehicle in an employer's parking lot is in the course of employment has been addressed on numerous occasions by this Tribunal. A general consensus is evident in the jurisprudence. If the worker is in the 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. Being in a parking lot for the purpose of coming to work or leaving work is regarded as reasonably incidental to employment. This test is referred to as the "premises test" and is described in *Decision No. 643/02* as follows:
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> > The majority of Tribunal decisions on accidents occurring in parking lots have favoured what is referred to as the premises test. The premises test, which emphasises the geographic location of the accident, has been treated as establishing that a personal injury by accident sustained on the employer's premises occurs in the course of employment—unless the worker's activity is sufficiently remote from normal employment functions that the activity and resulting injury cannot be characterised as reasonably incidental to employment.
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> *Decision No. 643/02* involved a worker who was injured when he fell off his bicycle in his employer's parking lot. Applying the "premises test" set out above, the Panel held that the worker was in the course of employment at the time of the accident:
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> > In this case, the worker's use of a bicycle to travel to the workplace for a pre-scheduled shift was an activity reasonably incidental to his employment. Entitlement under the *WSIA* is available to workers whose injuries arise out of or in the course of employment. The worker suffered an accident while on the employer's premises for an activity reasonably incidental to his employment. Therefore, the worker has entitlement under the *WSIA*.

[20] Similarly, I find that when the applicant and the respondent were using the employer's road for the purpose of leaving work after their shift had ended, they were engaged in an activity that was reasonably incidental to their employment. Accordingly, for the reasons set out above, I find that all the criteria set out in the *Accident in the Course of Employment* policy are satisfied in this case.

[21] Further, I am of the view that the provisions of the *On/Off Employer's Premises* also strongly suggest that the applicant and the respondent were in the course of their employment when the accident occurred. This policy states that an accident is considered to be in the course of employment if it occurs on the employer's premises while workers were "using accepted means for entering and leaving to perform activities for the purpose of the employer's business." For reasons already stated, I find that the accident occurred on the employer's premises. It occurred while the applicant and the respondent were using the road, that is, the "accepted means" for leaving the employer's premises, after having performed work related to the employer's business.

[22] The third of the relevant Board policies, namely Policy No. 15-03-04 entitled *Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries*. The policy begins by endorsing the principle that a worker is in the course of employment "upon entering the employer's premises at the proper time, using an accepted entrance." The policy then deals specifically with employer-owned private roads as follows:

> **Employer-owned private roads**
>
> If part of the worker's journey to or from work takes place on a road that is completely controlled by means such as posted notices, warning signs, or opening or closing of gates, maintenance work or snow clearing, the worker is in the course of employment while using the roadway.
>
> The worker is not in the course of employment while using a road open to the general public.
>
> The condition of the employer's private roads must cause the accident.

[23] Counsel for the respondent takes the position that, since the accident occurred on a road that was open to the general public, and since there is no evidence the condition of the employer's private road caused the accident, the workers must be found not to have been in the course of their employment. For the reasons that follow, I do not agree.

[24] I note, incidentally, as was pointed out by counsel for the applicant, the private road in question was not "owned" but rather was leased by the employer. More importantly, however, I am not persuaded that the last two provisions of the policy quoted above, which, admittedly do suggest that the workers were not in the course of their employment, override the general and well-established principles set out in the two preceding policies and in Tribunal jurisprudence, that a worker is in the course of employment while on the employer's premises and engaged in an activity reasonably incidental to employment. Further, I find that the reasons that I provided in *Decision No. 501/13* are applicable to the present case. *Decision No. 501/13* involved a nurse who was returning to the hospital building in which she worked after completing her break. She was injured "on a road on the hospital grounds" when she was struck by a vehicle. The road was part of the employer's premises, but was one which was open to the public.

> I turn now to the last of the policies set out above, namely, *Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries*. I note that this policy again reiterates the general principle that "workers are in the course of employment upon entering the employer's premises at the proper time, using an accepted entrance." With respect to provisions of the policy dealing with employer-owned private roads, the policy indicates that if an accident occurs on a private road that is completely controlled by the employer, then it will have occurred during the course of employment. In my view, the evidence establishes, on balance, that the road on which the accident occurred was completely controlled by the employer. While the employer did not restrict use of its road, it was a road that was on its premises and was not within the jurisdiction of the city. Accordingly, although no evidence was led on this specific point, I infer that the employer was responsible for arranging for the snow clearing and maintenance of the road, and for making decisions such as whether or not to have speed bumps on the road, and what the driving speed limit would be. Since the road did not fall under the jurisdiction of the municipality in which the hospital is located, and since the road was a private road that formed part of the employer's premises, it seems to me reasonable to infer that the road was completely controlled by the employer. The fact that the employer chose not to exercise its control by restricting access to the road does not diminish its control over the road for the purposes of the Board's policy, in my assessment.

> I acknowledge that the provision in the policy that a worker "is not in the course of employment while using a road open to the general public" appears to suggest that the worker in this case may not have been in the course of her employment. But in my view, this provision must be read to refer to "public roads" rather than private, employer-controlled roads, to which public access is not limited. If this provision is interpreted so as to apply to private, employer-controlled roads to which the general public has unrestricted access, then, in my view, this provision is at odds with the general principles outlined in all the policy provisions referred to earlier. In other words, in my opinion, it cannot be correct, for example, that a hospital worker, who, in the midst of a shift, and as part of his duties is pushing a patient in a wheelchair across the road at issue in this appeal, is not in the course of his employment simply because the road "is open to the general public." In my view, the worker in the example cited above is unquestionably in the course of employment while using a private road, that is, on the employer's premises, notwithstanding the fact that the road may be "open to the general public."
>
> Similarly problematic is the provision in the policy that if the road is an employer's private road, then the condition of the road "must cause the accident." Again, in my view, this provision is difficult to reconcile with the general principle enumerated at the outset of this policy, as well as with the principles and commentary in the policies referred to earlier. Again, using the example cited above, it seems inconceivable that a hospital worker, who, during his shift, and as part of his duties, is run over while pushing a patient in a wheelchair along a private road on the employer's premises, would not be in the course of employment, unless it can be established that the condition of the road caused the accident. In my opinion, the worker in this example, like the worker in the present case, is in the course of employment because the accident in question happened on the employer's premises, during the worker's regular working hours, while performing an activity that was part of, or reasonably incidental to the employment.

[25] I find the reasoning outlined above applies to the facts in the present case. I reiterate that if Policy No. 15-03-04 is read to stand for the principle that a worker who is injured while performing her work-related duties, during her work-shift, while on her employer's privately owned road, is not in the course of employment simply because the road is open to the public, then this principle is at odds with principles set out in Policy Nos. 15-02-02 and 15-03-03.

[26] Counsel for the respondent referred to *Decision No. 1210/12*. That case concerned a worker who was employed by Queens University who was injured when she fell on a sidewalk. The sidewalk was located on the university campus, but was owned by the Corporation of the City of Kingston. Although the university did not own or have responsibility for the sidewalk, it did make efforts to inspect it and keep it clear of snow and ice. The Vice-Chair in that case found that the worker was not in the course of her employment at the time of the accident.

[27] In my view, this case is of little assistance to the respondent. In distinguishing the facts in *Decision No. 1210/12* from cases cited to him which the workers were found to be in the course of employment, Vice-Chair Mitchinson stated that in "contrast" to those cases the Queen's University "does not own" the sidewalk in question. Thus, the Vice-Chair concluded that the accident "did not occur on the employer's premises." In the present case, the accident occurred on a private road that was leased by the employer and over which the employer exercised control. For this reason I have found that the road is part of the employer's premises. Accordingly, I find that *Decision No. 1210/12* is not particularly helpful for the purposes of resolving the present application.

[28] In short, for the reasons set out above, I find that the applicant and the respondent were in the course of their employment when the accident giving rise to this application occurred. Since they were also both workers of a Schedule 1 employer, the respondent's right of action against the applicant is extinguished by the WSIA.

DISPOSITION

[29] The application is allowed:

The right of Mr. Anton to commence an action against Mr. Hanna with respect to injuries sustained by Mr. Anton in an accident on September 16, 2013, is taken away by the WSIA.

DATED: January 3, 2017

SIGNED: B. Kalvin