WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1178/09

BEFORE: J. P. Moore: Vice-Chair

HEARING: June 10, 2009 at Toronto
Oral

DATE OF DECISION: July 20, 2009

NEUTRAL CITATION: 2009 ONWSIAT 1721

APPLICATION: For an order under Section 31 of the *Workplace Safety and Insurance Act* by the Defendants Action filed in the Ontario Superior Court of Justice in the City of Newmarket, as Action No. CV-08-087342-00

APPEARANCES:

For the applicant: N. Rosenthall, Lawyer

For the respondent: Not participating

Interpreter: Not applicable

REASONS

(i) Introduction

[1] On March 14, 2007, Mr. M. Masson was involved in a motor vehicle accident with the respondent, Ms. S. Cheema. Ms. Cheema claims to have sustained injuries in the accident.

[2] On May 17, 2007, Ms. Cheema completed an application seeking statutory accident benefits from the applicant, Western Assurance Company. On May 18, 2007, Ms. Cheema signed a form provided by the Workplace Safety and Insurance Board (the "Board") in which she elected to claim benefits under the Insurance Plan. On July 13, 2007 Ms. Cheema executed an assignment of benefits form in which she indicated that, if she received benefits from the Insurance Plan, such benefits could be assigned to Western. The document was signed by Ms. Cheema, by a representative of Western, and by a representative of the Board.

[3] On January 16, 2008, Ms. Cheema initiated a lawsuit against Mr. Masson and Mr. Masson's employer.

[4] The insurance company for Mr. Masson's employer commenced an application under section 31 of the *Workplace Safety and Insurance Act* ("WSIA") seeking a declaration that Ms. Cheema's action was barred by section 28 of the Act. Western joined in that application as a co-applicant.

[5] Ms. Cheema's action against the applicants was subsequently dismissed for failure to comply with a Court order. The action was, therefore, not dismissed on the merits. The applicants subsequently withdrew their section 31 application.

[6] However, Ms. Cheema continued to receive statutory accident benefits. The co-applicant, Western, has, therefore, continued the section 31 application seeking the following declarations:

1. that Ms. Cheema is barred from taking legal action against the former applicants by virtue of section 28 of the Act;
2. that Ms. Cheema is entitled to benefits from the Insurance Plan;
3. that Ms. Cheema is to reimburse Western Assurance in accordance with the assignment she executed on July 13, 2007.

[7] What follows is the Tribunal's decision on those matters.

(ii) The issues

[8] The issue in this application is whether the co-applicant, Western Assurance, is entitled to the declarations described above.

(iii) The decision

[9] On the evidence and submissions presented to me, I am persuaded that the following declarations should issue in this application:

1. Ms. Cheema's right to take legal action against the other parties involved in the accident of March 14, 2007 is barred by section 28 of the Act;
2. Ms. Cheema is entitled to benefits from the Insurance Plan to the extent determined by the Board.

3. The matter of reimbursement of previously paid statutory accident benefits is not a matter over which this Tribunal has jurisdiction.

(iv) Analysis

(a) The facts

[10] The facts in this case are not disputed. The respondent, Ms. Cheema, was notified of the application. In addition, the record indicates that the co-applicant made a number of efforts to issue a summons to Ms. Cheema to compel her attendance at the hearing of this application, but were unsuccessful.

[11] However, the evidence on file contains a number of documents, including documents written or completed by Ms. Cheema, that enable me to make findings of fact dispositive of this application. Those documents establish the following facts:

- On March 14, 2007, at approximately 5:55 a.m., Mr. Masson, a defendant in Ms. Cheema's lawsuit, was driving a van in the course of his employment for MacDonald Steel Limited.
- At the time, Mr. Masson was in the course of his employment when he drove his vehicle into a parking lot with the intention of attending a coffee shop.
- At the same time, Ms. Cheema was engaged in her employment as a bus driver when she parked her bus on the street in front of the same coffee shop and began walking to the coffee shop through the parking lot in which Mr. Masson was driving.
- Ms. Cheema was struck by Mr. Masson's vehicle as she approached the coffee shop.
- The bus driven by Ms. Cheema was owned by a transportation company that provided the bus and an operator to a regional transportation authority.
- According to a letter dated February 29, 2008 from the Board, Mr. Masson's employer and Ms. Cheema's employer were each registered as active Schedule 1 employers at the time of the accident in issue.
- After the accident, Ms. Cheema and her employer filed appropriate forms with the Board reporting the accident to the Board.
- As I noted above, Ms. Cheema subsequently filed election forms provided by the Board in which she confirmed that she elected to receive benefits under the Insurance Plan rather than take legal action and in which she assigned any benefits she received from the Insurance Plan to reimburse her statutory accident benefits provider.
- Ms. Cheema subsequently initiated legal action.

(b) Law and policy

[12] The co-applicant, Western Assurance, seeks a declaration pursuant to subsection 31(1), which stipulates:

> 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.

[13] The co-applicant is seeking a declaration that Ms. Cheema's right to commence legal action as a result of the accident of March 14, 2007 is barred by section 28 of the Act and that Ms. Cheema is entitled to benefits under the Insurance Plan.

[14] Section 28 of the Act stipulates, in part:

> 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.

[15] The co-applicant also cites and relies on subsection 13(1) of the Act which stipulates:

> 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.

[16] I am persuaded on the evidence presented to me that, at the time of the accident in issue, Ms. Cheema was a worker of a Schedule 1 employer. I am also persuaded on the basis of that evidence that the other party to that accident, Mr. Masson, was a worker of a Schedule 1 employer at the time of the accident. Subsection 28(1) would seem, therefore, to apply to the facts of this case.

[17] However, subsection 28(1) is qualified by subsection 28(3):

> 28(3) If the worker's of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection 1 applies only if the worker's were acting in the course of their employment.

[18] In my view, that subsection raises what I see as the contentious issue in this application: whether Ms. Cheema and Mr. Masson were in the course of their employment when the accident in issue occurred.

[19] The Workplace Safety and Insurance Board (the "Board") has policy that addresses that issue. Although the Tribunal is not required to apply Board policy when considering an application under section 31, such policy provides useful guidance. Three policies from the Board's *Operational Policy Manual* ("OPM") are relevant: Document No. 15-02-02 ("Accident in the Course of Employment"), No. 15-03-03 ("On/Off Employers Premises"), and No. 15-03-05 ("Travelling").

[20] Read together, those documents provide that the course of employment ends on leaving an employer's premises unless the worker leaves the premises for the purpose of employment. Once a worker is off the employer's premises, determining whether an accident occurred in the course of employment involves considering the circumstances of place, time, and activity.

[21] Regarding place, the policy stipulates that an accident will generally 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. (OPM Document #15-02-02)

[22] Regarding time, the policy directs the Board to look at a worker's usual hours of work.

[23] Regarding activity, the Board looks at whether the activity in questions was "reasonably incidental to" the employment.

[24] Where a worker is travelling on an employer's business, the worker will be considered to be in the course of employment continuously "except when a distinct departure on a personal errand is shown".

[25] Tribunal case law in this area reflects the Board's policy. The case law generally accepts that a worker who is injured while travelling away from the employer's premises will be in the course of employment provided that, at the time he/she was injured, he/she was engaged in an activity reasonably incidental to employment, and in a place he/she might reasonably have been expected to be while engaged in work-related activities. As a rule, if a worker is injured in a motor vehicle accident while travelling on an employer's business, he/she will be in the course of employment.

[26] The Tribunal's case law on "lunch breaks" has commonly found that a lunch break is a personal activity constituting a "distinct departure" from the employment. Case law has generally been consistent in finding that, where a worker has been based at his employer's premises and then leaves the premises for a lunch break, he ceases to be in the course of employment (see for example, *Decisions No. 280/91*, *597/87,817/87* and *2142/89*). *Decision No. 817/87* (August 28, 1987) offered the following rationale for that position, at page 8 of the decision, where the Panel stated that the worker's half-hour lunch break in that case:

> … exposed [the worker] to a type of risk type different from and additional to that to which he would be normally exposed in the course of his … work.…

[27] Similar reasoning was found in *Decision No. 2142/99* (February 8, 2000), at paragraphs 35-36:

> A review of Tribunal cases dealing with workers injured while on a lunch break during the work day indicates that the general rule is that lunch is considered a personal activity, and not an employment-related activity. This is so even though the worker would not have been at lunch at the place of the injury but for employment. In general, workers who are on a lunch break during the working day are considered to be members of the general public, and subject to the general risks to which members of the general public are exposed (see, for example *Decision No. 775/98* 47 W.S.I.A.T.R. 185). In the same way, the general rule is that workers who are injured while travelling to and from employment are not covered even though they would not have been travelling (and thus not injured) but for the employment.
>
> The exception to these general rules is when the worker is doing something reasonably incidental to employment at the time of the accident. For example, a worker injured at lunch while driving a company-owned vehicle may be found to be in the course of employment, but only if the worker is engaged in an employment-related activity (see, for example *Decision No. 833/95).* A worker injured while at lunch may be covered if the worker was also engaged in a work-related activity, such as banking or purchasing supplies needed for work (see for example *Decision Nos. 823/96, 1/94*).

[28] There have been several decisions that found that a worker taking a meal break while travelling as part of his duties remained in the course of employment: *Decisions No. 276/90*, *585/93* and *678/02*. At page 4 of *Decision No. 276/90* (January 24, 1991), the Panel stated:

> Both Counsel cited a number of Tribunal decisions dealing with accidents which occurred during lunch periods. These decisions indicate that workers are generally not in the course of their employment if they are injured during a lunch break and they are not on their employer's premises when they are injured. However, if the worker's

> employment requires him/her to be travelling at the place and time the accident occurred, or where the employer benefits in some way from the activity the worker was engaged in at the time of the accident, the worker has, in some cases, been found to be "in the course of employment".
>
> In each case, Panel's have weighed the employment features and the personal features of the particular case and decided which predominate.

[29] In that decision, the Panel found that a worker was in the course of his employment when injured in his vehicle after taking a lunch break. The Panel stated:

> In our view, the fact he had lunch after delivering a package does not change the fact that he was in the course of his employment at the time of the accident.
>
> It is clear that, at the time of the accident, Mr. Lisicky had returned to the part of the route which he would have taken if he had returned to the office directly after delivering the package for the employer. We therefore do not need to decide whether having lunch was reasonably incidental to the employment task of delivering a package.…

[30] *Decision No. 1/94 (May 4, 1994)* contains a summary of prior case law that addressed the question of whether a worker was in the course of employment while on a personal/lunch break. Most of those cases appear to involve situations where workers were injured in a motor vehicle accident while en route or returning from a personal break. The Panel in *Decision No. 1/94* noted in particular *Decision No. 62/89*, in which a worker was injured during an unpaid lunch period at a remote location. The Panel in *Decision No. 62/89* applied the "reasonably incidental activity" test. In the case before it, the Panel in *Decision No. 1/94* found that the worker was not in the course of her employment because the accident occurred "at a geographical location resulting from her personal plans for that particular lunch hour".

[31] In *Decision No. 585/93* (November 15, 1993), a Tribunal Panel found that a worker who drove a garbage truck was in the course of employment when injured during a lunch break. The Panel stated at page 6:

> We find that, given the nature of the Plaintiff's employment, it was impractical to return to the employer's depot for lunch. The reality of the job situation dictated that the two workers eat lunch en route. The Plaintiff's trip to the washroom occurred while making a regular lunch stop. The routine followed by the two workers was, in our view, an efficient use of their time and was made in accordance with the limited discretion granted to these workers by the Schedule 1 employer. It was to the mutual advantage of the Schedule 1 employer and the two workers to follow this routine to effect an efficient completion of the route. Where the activity is reasonably incidental to employment, a worker is in the course of employment while carrying out that activity. It is our finding that the lunch break and the work route were intertwined sufficiently to make the lunch routine, including the trip to the restaurant washroom, reasonably incidental to the Plaintiff's employment.

[32] Finally, I note *Decision No. 678/02* (May 14, 2002) in which a Vice-Chair found that a travelling worker was in the course of his employment when he was injured on a lunch break after completing a delivery for his employer. The Panel found at paragraph 33:

> In my view, in circumstances involving travelling employees such as Mr. Davidson, having lunch on the road is incidental to their employment especially where the purpose for their being in the area is related to their employment.

(c) Findings and conclusions

[33] On the evidence before me, I am persuaded that, at the time of the accident, both Ms. Cheema and Mr. Masson were engaged in employment that necessarily kept them away

from their employer's premises for the bulk of their workday. In essence, the vehicles that they operated constituted their employment premises.

[34] I am also persuaded, and find as a fact, that the only way in which Ms. Cheema and Mr. Masson could take lunch or coffee breaks was by doing so on the road rather than by returning to their employer's premises. In my opinion, taking a coffee break at the nearest available coffee shop at an appropriate time was an activity that was reasonably incidental to their employment, given the fact that they were travelling at the behest of their employer. In my view, the present situation is identical to that addressed in *Decision No. 585/93*, cited above, in which the Panel stated:

> It is our finding that the lunch break and the work route were intertwined sufficiently to make the lunch routine, including the trip to the restaurant washroom, reasonably incidental to the Plaintiff's employment.

[35] I am persuaded, therefore, that, at the time of the accident in issue, both Ms. Cheema and Mr. Masson were in the course of their employment. I am also persuaded that the location of the accident, although a public parking lot, was necessarily a place where the course of their employment would take them in order to take a lunch or coffee break. Finally, I am persuaded that the activity of taking a coffee break at that time was an activity that was reasonably incidental to their employment.

[36] For these reasons, I conclude that both Ms. Cheema and Mr. Masson were in the course of their employment at the time of the accident in issue and that the restriction set out in subsection 28(3) does not apply.

[37] Consequently, I issue a declaration that Ms. Cheema, as a worker employed by a Schedule 1 employer, was not entitled to commence an action against Mr. Masson or his employer as Mr. Masson was, at the time of the accident, also a worker of a Schedule 1 employer.

[38] I further declare that Ms. Cheema sustained a personal injury by accident arising out of and in the course of her employment and, as such, she is entitled to benefits under the Insurance Plan, in accordance with subsection 13(1) of the Act.

(d) Reimbursement of statutory accident benefits

[39] The co-applicant seeks reimbursement of statutory accident benefits in accordance with the assignment executed by Ms. Cheema on July 13, 2007. As I noted above, that document was also signed by representatives of the Board and of Western Assurance.

[40] The content of the document stipulates that the document is one that is executed by Ms. Cheema as a "claimant" of benefits from the Insurance Plan. The document further indicates that the document is issued in furtherance of the "worker's election under the *Workplace Safety and Insurance Act, 1997*".

[41] The election referred to in that document is an election authorized by section 30 of the WSIA, which stipulates at subsections 30(1) and (2):

> 30(1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.
>
> (2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

[42] As I noted above, Ms. Cheema initially elected to receive benefits under the Insurance Plan but then commenced legal action nonetheless.

[43] In my view, the "assignment" executed by Ms. Cheema is a matter that falls within the purview of section 30 of the Act. In my opinion, any determinations made with respect to that section, including the execution and enforcement of the assignment is a matter that falls within that section or, alternatively, is a matter of contract among the parties. In either circumstance, the Tribunal does not have jurisdiction to enforce the assignment.

[44] The Tribunal has no jurisdiction over a private contract among the parties.

[45] Insofar as the assignment is an element of the election process set out in section 30 of the Act, I note that section 123 of the WSIA, which establishes the Tribunal's jurisdiction, specifies that the Tribunal does *not* have jurisdiction to hear, among other issues:

> 123 (2) … an appeal from decisions made under the following … provisions: …
>
> 2. sections 26 to 30.…

[46] Given that provision, I conclude that there is no jurisdiction in the Tribunal to address any issues arising out of the worker's election, including the assignment she completed in favour of Western Assurance, and the enforcement of that assignment.

DISPOSITION

[47] The application is allowed in part.

1. The respondent, Ms. Cheema, is barred from pursuing legal action with respect to injuries she sustained in the course of her employment on March 14, 2007 as against the other party involved in that accident, M. Masson, and his employer.
2. Ms. Cheema is entitled to benefits from the Insurance Plan, pursuant to section 13 of the WSIA.
3. The Board is directed to re-open Ms. Cheema's claim.
4. The attention of the Board is directed to the assignment executed by Ms. Cheema on July 13, 2007, which document is found in the Board file.

DATED: July 20, 2009

SIGNED: J. P. Moore