WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 941/16

BEFORE: S. Martel: Vice-Chair

HEARING: January 24, 2017 at Timmins
Oral

DATE OF DECISION: February 15, 2017

NEUTRAL CITATION: 2017 ONWSIAT 498

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

APPEARANCES:

For the applicants: R. Squires, Lawyer

For the respondents: D. Wallbridge, Lawyer

Interpreter: N/A

REASONS

(i) Introduction

[1] The plaintiff (the respondent in this application) commenced a civil action (Court File No. 18965/14 in Cochrane) against an air services company (hereinafter referred to as "CA") and its pilot following a plane crash in which the plaintiff was a passenger.

[2] The applicants, CA and the pilot's estate, seek a determination under section 31 of the *Workplace Safety and Insurance Act* (WSIA) that the respondent's right to commence an action is taken away.

[3] CA's base manager testified for the applicants. The respondent testified on his behalf. Both representatives made submissions. I also considered eight documents entered as exhibits.

(ii) Background and Issues

[4] The respondent was injured in a plane crash on May 25, 2012. At the time of the accident, he was returning home from a remote location by way of a float plane. He had been working as a casual employee of CA for eight days, preparing cabins/camps for the arrival of fishing and hunting guests. On the day of the accident, he had completed his tasks and was returning home. He and another individual were picked up by a float plane, piloted by the defendant pilot, an employee of CA. They were to be flown back to CA's home base. The float plane lost control upon landing. The respondent survived the crash but the pilot and the other passenger died. The respondent suffered injuries as a result of the accident.

[5] At the time of the accident, the respondent was also a full-time employee of a government ministry. Since the accident occurred on his last day of employment with CA, the respondent did not have a wage loss as a result of his work with CA. He had a wage loss as a result of the lost time he incurred from his full-time position with the government ministry.

[6] CA and the respondent completed reports of injuries for the Workplace Safety and Insurance Board (the Board). The Board paid the respondent lost time benefits as a result of the loss of earnings from his concurrent employment with the government ministry for the period of time that he was off work, from May 2012 until he returned to work in September 2012.

[7] The respondent now submits that the benefits paid by the Board were paid in error because he was not a worker in the course of his employment at the time of the accident.

[8] This application raises two main issues:

1. Was the respondent a worker at the time of the accident, or was his employment of a casual nature and he was employed otherwise than for the purposes of the employer's industry?

2. Was the respondent in the course of his employment at the time of the accident?

(iii) Evidence

[9] CA's then-base manager and the respondent testified. Most of their evidence was not significantly different.

[10] The base manager explained CA's business. It essentially operates a tourism and air charter service. While it offers some air charter services, the bulk of its business activity consists

of offering fly-in-fishing and hunting at a number of remote camps, which it operates from approximately May to October every year. The remote camps are only accessible by float plane, and CA operates a number of float planes in order to bring guests to the camps. In 2012, CA operated about 25 camps.

[11] Prior to the arrival of the first guests in May, CA hired the respondent, a carpenter by trade, to perform maintenance and repairs at some of its cabins. The respondent, along with the other passenger who was killed in the plane crash, spent seven to eight days every spring preparing the cabins and doing some fishing. They were hired for this purpose for a number of years prior to 2012, and the practice continued in the spring of 2012. The respondent took vacation from his full-time employment in order to work for CA and to fish.

[12] In 2012, the respondent worked on one camp for eight days. He testified that he worked approximately six to eight hours per day and fished the rest of the time. He was paid $150 per day. On the day of the accident, he and his colleague were picked up by float plane in order to return to the base camp. The plane crashed on landing at the base camp lake. The respondent was the only survivor of the crash.

[13] The base manager testified that the work done by the respondent was an essential part of CA's business to ensure that the cabins were ready for the first tourists of the season.

(iv) Law and policy

[14] 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.

[15] 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.
>
> **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.

[16] In *Decision No. 1460/02,* the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications because section 126 of the WSIA 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) Conclusion

[17] There is no dispute that CA is a Schedule 1 employer and that the pilot operating the float plane was a worker of a Schedule 1 employer in the course of his employment. It is also not in dispute that the respondent was a casual employee. There is a dispute as to whether the respondent was in the course of his employment and whether he was employed otherwise than for the purposes of the employer's industry.

(a) Was the Respondent Employed Otherwise Than for the Purposes of the Employer's Industry?

[18] Section 11 of the WSIA states that the insurance plan applies to every worker who is employed by a Schedule 1 or Schedule 2 employer, but provides some exceptions, one of which states:

> Persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer's industry.

[19] It is not in dispute that the respondent's employment was of a casual nature. The respondent submits that he was not employed for the purposes of the employer's industry. He submits that the pith and substance of CA's business activity is tourism and that he was not involved in receiving guests and taking them to their vacation site.

[20] With respect, I disagree with the respondent's submission. I find that the respondent's duties with CA were a regular part of CA's business activities. Repair and maintenance of the cabins was required every spring. Different cabins needed different work depending on the cabin and year. That spring, the respondent worked on one particular cabin, but his work was necessary in order to accommodate the first guests of that season. His activities in repairing, maintaining, and cleaning the cabin were an integral part of CA's tourism business. CA also hired other employees during the rest of the season to perform maintenance and cleaning activities for the benefit of incoming guests. While the respondent only performed these repair and maintenance duties for one week at a time in the spring, it was a necessary task every year in order to open the cabins and make them ready for guests. It was an integral part of CA's activities, which is why the respondent performed these activities every spring for many years, even prior to 2012.

[21] I conclude that at the time of the accident, the respondent was a worker employed for the purposes of his employer's industry.

(b) Was the Respondent in the Course of His Employment?

[22] The respondent argued that on the day of the accident, his work was finished and that the accident occurred on his way home, many miles away from where he had been working.

[23] *Operational Policy Manual* Document No. 15-03-05 entitled "Travelling" states that "in the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer.

[24] CA had a main base on a lake close to the worker's home and from which CA operated its flights. CA operated a number of fly-in fishing and hunting camps in remote locations. The respondent was hired to perform repairs, maintenance, and cleaning at the camps. The only method of transportation to reach these camps is by float plane. As a result, CA flew the respondent in and out of the remote camp and required no payment from the respondent in order to do so.

[25] As noted in Board policy and Tribunal case law (see for example, *Decision No. 1929/09*), a significant factor in determining whether a worker is in the course of his employment while travelling to and from work is the degree of control exercised by the employer over the transportation arrangements. In this case, CA exercised all of the control. It provided the only available mode of transportation to reach its remote locations and also hired the pilot to operate the float plane. I conclude that the respondent was in the course of his employment at the time of the accident.

[26] Pursuant to Section 28(1) of the WSIA, the worker is not entitled to commence an action against a Schedule 1 employer or a worker of a Schedule 1 employer.

DISPOSITION

[27] The application is allowed. The respondent is not entitled to commence an action against the applicants.

DATED: February 15, 2017

SIGNED: S. Martel