Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1317/10

BEFORE: J. Josefo: Vice-Chair

HEARING: June 11, 2010 at Kitchener
Oral

DATE OF DECISION: August 19, 2010

NEUTRAL CITATION: 2010 ONWSIAT 1895

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant:	Mr. B. Wagner, Barrister and Solicitor
For the co-applicant:	Mr. D. Greenside, Barrister and Solicitor
For the respondent:	Mr. P. Hosack, Barrister and Solicitor
For the interested party (employer of the respondent):	Ms. E. Kosmidis, Barrister and Solicitor
Interpreter:	Not applicable

REASONS

(i) The right to sue application—the parties

[1] This is an application brought under section 31 of the *Workplace Safety and Insurance Act 1977* (the "WSIA") by the civil action defendants Robert Felton ("Felton") and Chai-Na-Ta Farms Ltd., ("Farms"), in an action filed in the Ontario Superior Court of Justice with court file #194/04. The defendants Felton and Farms, the applicants in this within proceeding, are represented by Mr. Wagner.

[2] The applicants seek to remove the right to sue of Ms. Ehmeele Toney, the plaintiff in the civil action identified above and the respondent in this within proceeding. The respondent is represented by Mr. Hosack.

[3] Other parties participating include the co-applicant, the Royal and SunAlliance Insurance Company of Canada, represented by Mr. Greenside. The co-applicant, naturally, supports the position of the applicant that the right to sue of Ms. Toney be removed. The then employer of Ms. Toney, the Children's Aid Society of Haldimand and Norfolk ("CAS") is represented by Ms. Kosmidis.

(ii) The issues

[4] What I must determine is whether Ms. Toney was a worker of a Schedule 1 employer, and in the course of her employment, on November 5, 2002 when she unfortunately was involved in a motor vehicle accident ("MVA"). Mr. Hosack did not concede but did not vigorously contest that the CAS was a Schedule 1 employer as of November 5, 2002. It was not contested that Ms. Toney was a worker of and employed by the CAS as of the date in question.

[5] What is in dispute is whether, on November 5, 2002, Ms. Toney was in the course of her employment or engaged in a reasonably incidental activity thereto, or if she had made a "distinct departure on a personal errand" and thus was, at the time of the MVA, not in the course of her employment. If I find that Ms. Toney was engaged in such a "distinct departure on a personal errand" at the relevant time, Ms. Toney maintains her right to sue. If, however, I conclude that Ms. Toney was either in the course of employment or was engaged in a reasonably incidental activity, then the application is granted, and Ms. Toney's right to sue is removed. In that event, Ms. Toney would be able to claim Workplace Safety and Insurance Board (the "Board") benefits pursuant to the relevant sections of the WSIA.

[6] It was not disputed that Felton, the driver of the other vehicle involved in this MVA, was a worker of Farms, which was also agreed to be a Schedule 1 employer. It was further agreed that Felton was in the course of his employment at the time of the MVA on November 5, 2002.

(iii) Background Overview

[7] Ms. Toney and her fiancé moved to Ontario in or about June 2002. She relocated to Ontario from Nova Scotia in order to accept employment with the CAS in the role of a child protection worker. Ms. Toney was based in its office in Simcoe, Ontario. It is not disputed that Ms. Toney had to have use of a motor vehicle in order to effectively perform her job duties, which often involved out of office meetings into the evening hours.

[8] It is in dispute as to whether or not Ms. Toney was required, as an obligation of her employment with the CAS, to attend training, perhaps more elegantly described as "professional development". Whether or not such training was mandatory, it is clear that on November 5, 2002 Ms. Toney was travelling at least in part for the purpose of attending a training session in London, Ontario. It is not in dispute that she was travelling on highway 59 near Norwich when the MVA occurred. What I must determine is whether Ms. Toney was travelling directly to and mainly for the purpose of attending a training session in London, Ontario, if she was engaged in an activity reasonably incidental to that main purpose, or if Ms. Toney had, at the time of the accident, been engaged in a "distinct departure on a personal errand".

[9] The final phrase in the above sentence has been so far in these reasons in quotation marks because it is the wording used in Document No. 15-03-05 of the Board's *Operational Policy Manual* ("OPM"). The policy document provides in part as follows:

Policy

> As a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work.

Guidelines

Travel on employer's business

> When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must obligate the worker to be travelling at the place and time the accident occurred.

Proceeding to and from work

> The worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place enroute.
>
> "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.

[10] Even though the Board's policies are not binding in a right to sue application, in contrast to an appeal, it is appropriate that these policies be referenced and relied upon in order to maintain consistency in decision-making. As these policies were before all counsel participating in this within application, I see no reason not to reference and rely upon the Board's applicable policy when considering the evidence in this matter.

(iv) Discussion of the evidence and conclusions

(a) The status of the CAS

[11] Ms. S. Chevrier, the Director of Services for the CAS, and a 19 year serving employee, testified. This witness confirmed that the CAS has been, since 1964, paying WSIB premiums,

and has been a Schedule 1 employer for that length of time. Exhibit #7 of the materials before me contained a memo dated October 30, 2008 from a Tribunal employee to the Vice-Chair, referencing the WSIB employer "status check results". That memo confirmed that the CAS of Haldiman-Norfolk is "an active Schedule 1 employer with a coverage start date of February 26, 1964".

[12] In my view, the testimony of Ms. Chevrier, a long-servicing senior manager of the CAS, coupled with the status check information, leads me to conclude that, on the balance of probabilities, the CAS was indeed an active Schedule 1 employer as of the November 5, 2002 MVA.

(b) The status of Ms. Toney

[13] I had the benefit of hearing Ms. Toney's testimony in response to questions from her counsel as well as in response to cross-questioning from other counsel. I also had the benefit of Ms. Toney's earlier testimony taken under oath when she was examined for discovery in the within civil action. In coming to my conclusions, I have carefully considered all of the oral testimony, the helpful oral and written submission provided by counsel, as well as the myriad of exhibits before me.

[14] When considering Ms. Toney's testimony I am cognizant of the fact that she is an "interested witness", given that she very much has something to gain or lose depending upon my decision. I thus must approach the testimony which Ms. Toney gave cautiously, as I assess her credibility. Assessing credibility is a difficult, although important, issue. See, for example, Tribunal *Decision No. 684/04* which addresses the approach followed in the assessment of credibility:

> I have carefully considered the worker's testimony as to her modified work duties, and the alleged lack of assistance she received from the accident employer. While no doubt intending to be a sincere witness, the worker is also indisputably an interested party in this matter. It is thus necessary to assess her credibility. A useful discussion with respect to the weight to be accorded to the testimony of an interested party is found in Tribunal *Decision No. 1832/00* as follows:
>
> We turn now to the worker's own testimony. Assessing credibility is a delicate exercise. Often, there is genuine disagreement as to facts or their interpretation. An individual may, quite naturally and honestly, wish to provide his or her perspective in the best possible light. This is by way of acknowledging that there are situations where strikingly different versions of events can be presented without loss of credibility to any of those offering a perspective. However in the case before us, certain versions must be preferred as more likely and/or more plausible than others. This is so because certain aspects of the events for the time in question are mutually exclusive and, even allowing for an individual shading of memory or emphasis, cannot all be true. It follows that the Panel must carefully explain why it prefers the evidence that it does.
>
> The assessment of the credibility of interested witnesses has been discussed as follows in the following decision of the British Columbia Court of Appeal, *Faryna v. Chorney* (1951), 4 W.W.R. (N.S.) 171, (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[15] Considering all the evidence and applying the above-described test, I find that Ms. Toney wanted to very much "put her best foot forward" as she related what she now perceives and believes were important aspects of her activities on that date in November nearly eight years ago. Yet memory is often quirky. These events in question occurred over seven and a half years before Ms. Toney testified before me. I also must take into account that one of her claimed areas of injury is to the brain, thus leaving her even more vulnerable to the potential for failures of memory than other witnesses.

[16] Thus, the testimony which Ms. Toney gave when she was examined under oath for discovery on December 5, 2005 would, as it was much closer in time to the events in question, likely be more reliable than is her testimony before me, given nearly a further five years elapsed after she was examined for discovery and before this within hearing. I also find reliable the documents which Ms. Toney herself prepared in response to questions from the MVA insurer and others, which documents were created quite close in time to the MVA. Obviously, testimony given and documents prepared closer in time to an event are more likely to be accurate and reliable, reflecting what really occurred, before the intervention of other factors. Other factors may include any personal interest, plus concerns of fading and finite memory, particularly in a witness who, because of the injuries purportedly suffered at the time, may be particularly vulnerable.

[17] Before me Ms. Toney testified that it was not really mandatory that she undergo certain specific training (professional development) for her role at the CAS. She also emphasized that she had a significant number of overtime hours banked and was thus encouraged to take time off "here and there" in order to reduce her overtime to a more manageable level. Ms. Toney also testified that, because of the high volume caseload which she carried, she was not given all that many opportunities to complete her training.

[18] Yet, whether the training was mandatory, or had to be completed within a certain period of time, are not issues which are particularly relevant. The relevant question is whether Ms. Toney was indeed travelling on November 5, 2002 for mainly a work-related purpose. In other words, even if Ms. Toney chose to go to this training session in London because she wanted to better develop her skills, this matters little. The underlying question of whether Ms. Toney was accordingly travelling for work purposes, which would be the purpose of attending the training in London, is what is critical. Was the purpose of the trip indeed mainly work-driven, or was there that all-important "distinct departure on a personal errand" on November 5, 2002?

[19] In her examination for discovery of December 5, 2005, at question number 747 Ms. Toney stated the following:

> We all had to go through a period of training, the new workers that were hired at the same time.

[20] Subsequently, at questions number 749 and following through to question 751 Ms. Toney was asked the following questions and gave the following answers:

> Q. Was this trip to London actually part of that training?
>
> A. Yes.
>
> Q. Just asking?
>
> A. I'm sorry, we already talked about that.
>
> Q. Yah, but that was one example of the sort of ongoing training that new workers would have?
>
> A. New worker training, correct.
>
> Q. Okay. Alright, and how long would the new worker training normally have continued?
>
> A. There were 11 modules.

[21] Thus, it is clear that Ms. Toney was, on November 5, 2002 travelling to London, Ontario for a work-related purpose: to participate in training, specifically one of the modules, which she had yet to complete. Exhibit #14 lists Ms. Toney's "participant history" in training and the various modules that she took over her employment with the CAS.

[22] In her testimony in chief before me, Ms. Toney did not dispute that one of the reasons she was travelling to London was to attend a training course. Yet she said that it was her intention to arrive at the course late, possibly leave early, and before she got there in the first place to get a special blend of tea and then go shopping for various household items. Ms. Toney testified that her supervisor urged her to reduce some of her banked overtime hours by taking some personal time. Ms. Toney stated that the trip to London, Ontario would be an ideal way to accomplish that objective while also participating to a limited degree in the training program.

[23] If I had accepted this testimony then, pursuant to the above excerpt from Document No. 15-03-05 of the OPM, I would have concluded on the balance of probabilities that Ms. Toney had engaged in a distinct departure on a personal errand, given that her main reason for travelling was unrelated to work. While there was a work component, attending to a limited degree some of the training offered, if I accepted Ms. Toney's evidence I would have concluded that she was mainly taking a fair amount of time off work to drive to several retail stores for household items as well as for some clothing for a special dinner planned, essentially "squeezing in" the seminar between her various personal errands. If Ms. Toney's testimony was thus consistent with the surrounding probabilities, I would have dismissed the application and she would have maintained the right to sue.

[24] Referencing my earlier discussion about the quirkiness and thus unreliability of memories of events long passed, absent some corroboration of Ms. Toney's testimony before me, I am unable to simply accept it as likely accurate and reliable. The transcripts of her examination for discovery, and the documents that she completed in her own hand, moreover, not only do not corroborate her testimony before me, her earlier evidence given under oath and the documents which she herself created very much contradict her testimony.

[25] The April 18, 2003 application for accident benefits completed by Ms. Toney (found in exhibit 5) set out the accident details in part as follows:

> Accident location: highway 59, south of Norwich.
>
> ...
>
> Give a brief description of the accident ...:
>
> I was driving on highway 59 near Norwich, going toward London, on my way to training for CAS. **There were no stops**. It was about 8:15 a.m. It was sunny and a warm fall day, on November 5, 2002 ...[*emphasis added*].

[26] There is no mention in that document of any intention to do anything other than participate in a work-related activity. There is no discussion of going shopping, stopping for a particular type of tea, or anything along those lines. In fact, she writes that "there were no stops" and does not indicate any intention of there being a stop. I note that this report was completed less than six months after the MVA, and thus while the events and also her intentions of that day were likely quite fresh in Ms. Toney's mind.

[27] Ms. Toney testified before me that she told her then fiancé of her intentions to go shopping in Woodstock before attending the training session in London. Yet, the then fiancé, with whom Ms. Toney testified she has maintained some degree of contact, was not summonsed to testify. Thus, the only evidence I have that Ms. Toney was going to go shopping is that of her uncorroborated testimony before me at the hearing, which is, as indicated, significantly contradicted by her near-contemporaneous application for accident benefits, written in her own hand, as well as by her evidence given under oath when she was discovered for discovery.

[28] At question number 320 of her examination for discovery and continuing to question number 324, Ms. Toney was asked the following questions and gave the following answers:

> Q. Okay, let's talk about the accident for a while. The accident happened on November 5 of 2002?
>
> A. Right.
>
> Q. Where were you going?
>
> A. I was going north on highway 59.
>
> Q. Right, and where were you going to?
>
> A. I was going to London Children's Aid Society.
>
> Q. Right, was there an event there?
>
> A. Yes, training.
>
> Q. So this would have been related to your work?

A. Right. ...

[29] Further, at question number 327, Ms. Toney was asked the following question and gave the following answer:

> Q. You drive to London for this trip and then back, it would have been there and back on the same day, was that the plan or were you going to stay there for a few days?
>
> A. No, there and back.

[30] In response to the question posed as to where Ms. Toney was going, Ms. Toney did not at that time indicate that she was going shopping, picking up some household items and an item of special clothing for a pending dinner, or anything of the sort. Rather, in response to that open-ended question of where she was going, Ms. Toney stated clearly that she was going to the London's Children's Aid Society, and subsequently stated that she was doing so for the purpose of attending training. There was then no mention whatsoever of any personal errands or non-work-related activities even at the time seemingly contemplated by Ms. Toney.

[31] Further in Ms. Toney's examination, at question number 449 she was asked whether she was concerned about being late or whether she had lots of time. Her answer was that she was "never concerned about being late because our educator, she is really sweet" and further added that if she was late "it was never an issue". Again, there was no mention of any intention to be late, or to be involved in activities other than those strictly and solely related to work. This was consistent throughout her examination for discovery.

[32] While Ms. Toney may now remember matters differently for various reasons, the evidence is in my view compelling that there was no purpose other than a work-related purpose for Ms. Toney's activities on November 5, 2002. Ms. Toney was travelling on highway 59, and indeed she indicates that this was the direction she intended to travel to attend the training when she completed the previously referenced application for accident benefits.

[33] In my view, it is not necessary that Ms. Toney's accident would have taken place only after the hour when she normally arrived at her job, as Mr. Hosack seemingly submitted. In this case, while Ms. Toney was not going to her desk first thing in the morning, she was clearly travelling solely for work-related purposes, as I have found, and which purposes would benefit not only her by given her greater skills to do her job, but such enhanced skills would also be a benefit to her employer.

[34] Ms. Toney was being paid her normal salary for the day and also would have been entitled to claim mileage for her travels. Even if she had stopped to have a tea or a coffee, in my view such minor deviation would be reasonably incidental to the main purpose of her trip. Again, that purpose, which I find indeed was the sole purpose, was to attend the training session in London.

[35] In this matter, considering the evidence which I found most reliable and probative, Ms. Toney was on the day in question a worker in the course of employment who was not engaged in a distinct departure on a personal errand. Nor do I find, based upon the balance of probabilities, that Ms. Toney at the time ever intended to be engaged in a distinct departure on a personal errand on November 5, 2002.

[36] Indeed, the evidence is compelling that Ms. Toney was, on November 5, 2002, travelling toward London, Ontario for the sole purpose of attending a work related seminar, which she was encouraged to attend in order to complete her new worker training. While on her way, Ms. Toney unfortunately was involved in an MVA. Pursuant to Document No. 15-03-05 of the OPM, Ms. Toney was required to travel away from the employer's premises. Thus, Ms. Toney is considered to be in the course of her employment when she was engaged in such travel.

[37] Mr. Hosack referred me to a number of Tribunal decisions as, indeed, did all counsel. Mr. Hosack referred me specifically to Tribunal *Decision No.1586/05*, which decision made the following observation:

> The right to sue is an ancient common law right that has existed long before the right to collect Workers' Compensation, and the "historic bargain" that led to the limits on this common law right. ...

[38] While that is correct, the legislature clearly provides for cases where the right to sue must be barred. I find this to be one of those cases where Ms. Toney, based upon her activities on the day in question, pursuant to the relevant sections of the Act and the applicable Board policy referenced above, has no right to sue. Instead, she may, if she wishes, claim WSIB benefits within the time limits provided when civil actions are found to be statute-barred.

[39] I wish to express my appreciation to all counsel who participated in this hearing for their effective and thorough presentation of this matter.

DISPOSITION

[40] The application is granted. Ms. Toney does not have the right to sue, given that she was in the course of her employment at the time of the November 5, 2002 MVA.

DATED: August 19, 2010

SIGNED: J. Josefo