

--SUMMARY--

Decision No. 402/23

27-Mar-2023

N.Perryman

- In the course of employment (travelling)
- Right to sue (statutory accident benefits)

No Summary Available

5 Pages

References: Act Citation

- WSIA

Other Case Reference

- [w1923n]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 15-02-02; 15-03-05
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 83/19, 2019 ONWSIAT 1156 refd to; Decision No. 1285/14, 2014 ONWSIAT 1465 refd to; Decision No. 2903/17, 2014 ONWSIAT 1465 refd to; Decision No. 2053/16, 2018 ONWSIAT 715 refd to

Style of Cause:
Neutral Citation: 2023 ONWSIAT 484



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 402/23

BEFORE: N. M. Perryman: Vice-Chair

HEARING: March 22, 2023 at Toronto
Oral by Videoconference

DATE OF DECISION: March 27, 2023

NEUTRAL CITATION: 2023 ONWSIAT 484

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

APPEARANCES:

For the applicant(s)/co-applicant(s): D. Greenside, Lawyer

For the respondent(s)/co-respondent(s): J.S., Self-Represented

Interpreter: None

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REASONS

(i) Introduction

[1] The insurer, (herein referred to as the applicant) has filed an application under section 31 of the *Workplace Safety and Insurance Act* (the WSIA) for a declaration that “J.S.” (herein identified as the respondent) is entitled to claim benefits under the insurance plan, and thus, is statute barred from claiming statutory benefits under the *Insurance Act*, R.S.O. 1990, c. I. 8.

[2] The respondent was involved in a motor vehicle accident on July 29, 2021. He was operating a vehicle owned and maintained by his employer, a stone retailer and manufacturer, herein referred to as “X”. At the time of the collision, the respondent was travelling to meet a client.

[3] The other vehicle involved in the collision on July 29, 2021 was operated by “H.D.”. H.D. was operating a vehicle owned by his own numbered company with a trailer attached owned by a separate transport company, herein referred to as “Y”.

[4] At the time of the collision, both X and Y were Schedule 1 employers in good standing with the Workplace Safety and Insurance Board (WSIB or “the Board”).

[5] It is the applicant’s position that both the respondent and H.D. were in the course of their employment at the time of the accident and as such, the respondent is entitled to claim benefits under the insurance plan.

[6] At the outset of the hearing, the respondent was reminded of the nature of the application before the Tribunal and the remedy sought. The respondent advised that he did not have a position with respect to this application and did not wish to participate in this proceeding beyond providing his testimony. In addition, I note that no written materials were received from the respondent, including a section 31 statement. Accordingly, the respondent was permitted to disconnect from the hearing after the completion of his oral testimony.

(ii) Analysis

[7] The application is allowed. Pursuant to section 31(1)(c) I find the respondent is entitled to claim benefits under the plan and is barred from proceeding with a claim for statutory accident benefits from the applicant. The reasons for this decision are set out below.

[8] 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.

[9] In *Decision No. 1460/02*, 2003 ONWSIAT 297, the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act 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*, 2002 ONWSIAT 1488.

[10] In determining this application I have considered *Operational Policy Manual (OPM)* Document No. 15-02-02, “Accident in the Course of Employment” and 15-03-05, “Travelling.”

[11] Further to the principles set out in OPM Document No. 15-02-02, “Accident in the Course of Employment,” OPM Document No. 15-03-05, “Travelling” states:

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.

[12] In addition to Board policy, I have also considered all of the materials on file and Tribunal case law including *Decision No. 83/19*, 2019 ONWSIAT 1156 and *Decision Nos. 1285/14*, 2014 ONWSIAT 1465; *2903/17*, 2014 ONWSIAT 1465 and *2053/16*, 2018 ONWSIAT 715 referenced by the Applicant in his materials, in determining the issues in this application.

(a) The status of X and Y

[13] The WSIB performed a status check on the above-noted companies, the results of which were provided in a memorandum dated June 27, 2022.

[14] Based on the contents of the memorandum, I am satisfied that both of the above-named companies are active Schedule 1 employers with coverage start dates of December 7, 2010 and June 29, 1995 respectively.

(b) H.D. was in the course of his employment at the time of the accident

[15] H.D. is a driver for Y.

[16] H.D. was operating a vehicle, with a trailer on the back at the time of the accident. The trailer, attached to the back of the vehicle, was owned by Y.

[17] H.D.’s company owned the vehicle but the plates, gas and insurance were all provided by Y.

[18] H.D. does not use this vehicle for personal use. When not in use, it is parked on a property owned by Y.

[19] The use of H.D.’s vehicle is exclusive to Y.

[20] H.D. is not provided with a T4 but is paid for his mileage.

[21] Y, according to H.D.’s evidence, pays WSIB premiums on his behalf.

[22] At the time of the accident, H.D. was delivering the trailer to Y’s Toronto yard.

[23] Based on H.D.’s oral testimony, some of which is highlighted above, I am satisfied that he is a worker within the meaning of the WSIA. H.D. assumes no significant risk in the relationship between him and Y and is not responsible for any expenses in relation to the operation of his vehicle.

[24] Having regard for all of the evidence in this case, I find that the nature of the relationship between H.D. and Y for the purposes of this application is one of an employer and employee.

[25] Moreover, at the time of the accident, I am satisfied that H.D. was in the course of his employment in accordance with OPM Document No. 15-03-05, “Travelling.”

[26] Accordingly, I am satisfied that H.D. was a worker within the meaning of the WSIA and was in the course of his employment at the time of the motor vehicle accident of July 29, 2021.

(c) The respondent was in the course of his employment at the time of the accident

[27] The material on file indicates that the X submitted an Employer’s Report of Injury or Disease (Form 7) in August 2021 for the above-noted motor vehicle accident. The claim was accepted and the worker was provided with health care benefits. This is reflected in a decision letter dated August 25, 2021.

[28] In regards to the events of July 29, 2021, the respondent’s statement, dated August 26, 2021 and provided to an adjuster on behalf of the insurance company, indicates that the respondent was operating a vehicle that was owned and maintained by X at the time of the accident. The respondent was on his way to a client at the time of the accident. The respondent was coming from his office. The respondent was paid for his travel time to visit clients.

[29] The worker confirmed that the contents of the statement provided in August 2021 were accurate. He confirmed that he was operating a vehicle owned and maintained by X. He confirmed that he was in the course of his employment at the time of the accident.

[30] Consequently, there was no evidence of significance before me that the respondent was on a personal errand at the time of the accident or deviated from his route to meet the client at the time of the accident.

[31] I find that these facts fit squarely within the parameters of OPM Document No. 15-03-05, “Travelling.” As such, I find that the respondent was in the course of his employment at the time of the accident and is entitled to claim benefits under the plan.

DISPOSITION

[32] The application is allowed. The respondent is entitled to claim benefits under the insurance plan pursuant to section 31(1)(c). As such, the respondent is statute barred from collecting statutory accident benefits under the *Insurance Act* in relation to the July 29, 2021 motor vehicle accident.

DATED: March 27, 2023

SIGNED: N. M. Perryman