Workplace Safety and Insurance Appeals Tribunal

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Ontario

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CONFIDENTIAL

Distribution List:
Ms. Jennifer J. Griffiths
Ms. Jacqueline Delanty
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WSIB

Decision No.:	**2178 18**
WSIAT #:	**2016-0001190**
WSIB File No.:	**27063242, 27057497, 27004023**
Case Name:	**Economical ats Delanty, P.**

Enclosed please find a decision made by the **Workplace Safety & Insurance Appeals Tribunal (WSIAT)** in this case.

A copy of this decision was also sent to the Workplace Safety & Insurance Board (WSIB) so that the WSIB can place the decision in the appropriate WSIB case file and if applicable, take the necessary steps to implement the decision.

Please note that if the decision requires the WSIB to take action, it may take at least one month for the WSIB to process the decision before implementing the Tribunal order(s). The WSIB may require additional information from you and if so, they will contact you directly.

If you have any questions concerning the implementation of this decision by the WSIB, please contact the WSIB officer or department handling the case file. You may contact the WSIB at 416-344-1000; toll-free within Ontario 1-800-387-0750 or TTY: 1-800-387-0050.

If the decision requires further action by the Tribunal (WSIAT) to process the case, a representative of the Tribunal (WSIAT) will contact you.

Yours truly,

Workplace Safety & Insurance Appeals Tribunal

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2178/18

BEFORE: R. Nairn: Vice-Chair

HEARING: June 4, 2019 at Ottawa
Oral

DATE OF DECISION: March 17, 2020

NEUTRAL CITATION: 2020 ONWSIAT 604

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

APPEARANCES:

For the applicants – Economical: Ms. J. Griffiths, Lawyer

For the Interested Party – H. Ltd.: Ms. M. Buccella, Lawyer

For the Interested Party – A. Ltd: Did not participate

For the Tribunal Counsel Office: Ms. K. Seyler, Lawyer

For the respondent – P.D. : K.R (Power of Attorney)

Interpreter: Not applicable

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") made to the Tribunal by the Economical Insurance Company ("Economical") in relation to a Statutory Accident Benefits ("SABs") claim made by P.D. pursuant to provisions of the *Insurance Act*. Therefore, Economical is the Applicant and P.D. is the Respondent in the matter before the Tribunal.

[2] The Applicant seeks a declaration and determination from the Tribunal that the Respondent's right to commence an action is statute barred by the operation of section 28 of WSIA. The Applicant also seeks a declaration that the Respondent is entitled to claim benefits under the WSIA.

(ii) Background to the hearing

[3] This application was originally scheduled to be heard before another Vice-Chair on July 25, 2018. When that matter convened however, only Ms. Griffiths, representing the Applicant, appeared. About two days prior to the hearing, the Tribunal had received notification from the Respondent's mother, K.R. that the Respondent would be unable to attend the hearing, scheduled for Toronto, on July 25, 2018. The hearing scheduled for that day did not proceed and the matter was adjourned. The Vice-Chair then issued *Decision No. 2718/18I* dated August 3, 2018 in which he concluded:

> [15] The matter is adjourned. The following post-hearing instructions are to be implemented:
>
> - The Respondent is directed to attend a future Tribunal hearing. The Respondent is required to provide testimony concerning this case. The matter will be re-scheduled for that purpose on a "peremptory" basis. This means that the Respondent has an obligation to attend the future hearing and if she does not attend a future scheduled Tribunal hearing, the adjudication of this application will proceed in her absence based on the available evidence, including testimony from any available witness, and submissions from the respective attending parties;
> - A future Tribunal hearing is to be scheduled for Ottawa, Ontario, which is the appropriate venue for this matter;
> - The Respondent is to provide the Tribunal with medical documentation as soon as possible with respect to any medical accommodation that may be required to facilitate her future attendance at a Tribunal hearing;
> - The Respondent is to notify the Tribunal immediately when, or if, she obtains legal representation in this matter. The Respondent can continue to be self-represented in this matter but a lack of future legal representation will not change her peremptory obligation to attend a future scheduled Tribunal hearing;
> - The Respondent's mother, Ms. R., is to immediately provide the power of attorney document concerning [Ms. P.D.] to the Tribunal;
> - Ms. [P.D.'s] claim file documentation (referred to as Item #3 in the Office of the Vice-Chair Registrar pre-hearing document list) is to be unsealed, added to the case materials, and provided by the Tribunal forthwith to the Applicant and Respondent;
> - [S.H.'s] claim file documentation (referred to as Item #4 in the Office of the Vice-Chair Registrar pre-hearing document list) is to be unsealed, added to the case materials, and provided by the Tribunal forthwith to the Applicant and Respondent;

- The hearing of this matter should be scheduled on consecutive days with the companion case involving Ms. R.'s other daughter that was scheduled to take place on July 24, 2018; and
- Any other matter relating to the future processing and hearing of this application should be done in accordance with the Tribunal's Practice Direction entitled "*Right to Sue Applications*."

[4] As set out in *Decision No. 2178/18I*, this section 31 application was rescheduled for June 4, 2019. K.R., the Respondent's mother, appeared at that time but her daughter, the Respondent, did not. K.R. provided the Tribunal with another copy of a Power of Attorney for her daughter (marked as Exhibit #10) and advised that her daughter remained unable to participate in the proceedings. K.R. advised she wished to proceed with the hearing and would represent the interests of her daughter.

[5] As such, the hearing proceeded. No witnesses were presented. Submissions were provided by Ms. Griffiths and K.R.

(iii) Background to the claim

[6] The following background information is, generally speaking, not contested and I have relied on it in reaching my decision:

- A. Ltd. is a corporation offering residential and commercial moving services throughout Canada. According to information provided by the WSIB (and contained in Addendum #1) A. Ltd. is an active Schedule 1 employer with a coverage start date of April 10, 2000.
- As noted in Exhibit #12, the Respondent's sister, J.D., operated a sole proprietorship ("J Moving") which provided moving services. As noted in information provided by the WSIB (and contained in Addendum #1) at the time of the accident under consideration here, J Moving was an active Schedule 1 employer.
- On July 8, 2014, P.D. was working alongside her sister, J.D., completing a residential packing job.
- To assist with the packing duties, J.D. had rented a truck in her name through a corporate account with A. Ltd.
- On July 8, 2014, P.D. and her sister were standing near the rented truck when it was struck by a pickup truck being driving by S.H.. That truck was owned by H. Company, a landscaping business.
- P.D. sustained injuries as a result of this accident.
- The accident was reported by A. Ltd. to the WSIB and A. Ltd.'s Administrative Manger completed a Report of Injury/Disease (Form 7).
- On July 27, 2014, P.D. completed an Assignment of Workplace Safety & Insurance Benefits form and on September 12, 2014, the WSIB wrote to Economical, the insurer, confirming that the Board would honour the assignment noting though, that a WSIB Claim number had not yet been established.
- On September 26, 2014, the WSIB advised Economical that a claim number had been assigned and that the approved Assignment had been placed in the file.

- Economical then commenced these proceedings requesting a declaration that P.D.'s rights of action were taken away pursuant to section 31 of the WSIA and that she was entitled to claim benefits under the WSIA.
- In a related section 31 application I dealt with the issue of whether the rights of action of J.D. and K.R. were taken away with respect to this accident. In *Decision No. 2177/18* I concluded that J.D.'s right of action was taken away, finding that she was a "worker" of a Schedule 1 employer, A. Ltd.

(iv) Issues

[7] The issue to be determined in this application is whether P.D.'s right of action, with respect to the accident on July 8, 2014, is taken away pursuant to section 31 of the WSIA and whether she is entitled to claim benefits under the WSIA.

[8] In order to be successful in this application, the Applicant must establish that at the time of the accident, P.D. was a "worker" in the course of her employment with a Schedule 1 employer and that S.H. was also a "worker" of a Schedule 1 employer in the course of her employment.

(v) Law and Policy

[9] 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.

[10] 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.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

29(1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[11] In *Decision No. 1460/02,* 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.*

(vi) Analysis

(a) Was P.D. a "worker" of a Schedule 1 employer?

[12] Section 2 of the WSIA defines a "worker" as follows:

"worker" means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:

1. A learner.

2. A student.

3. An auxiliary member of a police force.

4. A member of a volunteer ambulance brigade.

> 5. A member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade.
>
> 6. A person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so.
>
> 7. A person who assists in a search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police.
>
> 8. A person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier under section 7.0.1 of the *Emergency Management and Civil Protection Act* or by the head of council of a municipality under section 4 of that Act.
>
> 9. A person deemed to be a worker of an employer by a direction or order of the Board.
>
> 10. A person deemed to be a worker under section 12 or 12.2.
>
> 11. A pupil deemed to be a worker under the Education Act. ("travailleur") 1997, c. 16, Sched. A, s. 2 (1); 1999, c. 6, s. 67 (2-4); 2002, c. 18, Sched. J, s. 5 (1); 2005, c. 5, s. 73 (2-4); 2006, c. 13, s. 4 (1); 2007, c. 3, s. 1; 2008, c. 20, s. 1; 2014, c. 10, Sched. 5, s. 1; 2017, c. 7, s. 6 (1).

[13] Section 2 of the WSIA defines "independent operator" as "a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any worker's for that purpose".

[14] *Operational Policy Manual* Document No. 12-02-01 entitled "Workers and Independent Operators" provides further assistance to adjudicators in determining whether individuals should be classified as "workers" or "independent operators" for WSIB purposes. The policy provides in part:

> **Policy**
>
> The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires), to gather information to help determine if a person is employed under a "contract of service." The questionnaires reflect the principles of the organizational test (see below). Persons employed under a contract of service are workers. Independent operators are not employed under a contract of service.
>
> The WSIB has the authority to determine who is a worker or an independent operator under the *Workplace Safety and Insurance Act*
>
> **Guidelines**
>
> **General**
>
> A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.
>
> Workers – those who work under contracts of service – are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.
>
> A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.
>
> Independent operators – those who work under contracts for service – are not automatically insured or entitled to benefits unless they voluntarily elect to be considered

> "workers" and apply to the WSIB for their own account and optional insurance. (See 12-03-02, Optional Insurance.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.
>
> **Organizational test**
>
> The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business. (…)

[15] In this case, the Applicant has taken the position that at the time of the accident in July 2014, P.D. could be considered a worker of either A. Ltd. or J Moving. In her submissions, K.R., on behalf of her daughter, did not agree that P.D. was employed by A. Ltd. but acknowledged her daughter was working for J Moving at the time of the accident.

[16] While I acknowledge the position of K.R., having had the opportunity to consider all of the evidence before me, I find, on a balance of probabilities, that at the time of the accident on July 8, 2014, P.D. was a "worker" of the Schedule 1 employer, A. Ltd.. In my view, the fact that P.D. was being paid by J.D./J Moving at the time of the accident, does not necessarily lead to a conclusion that P.D. cannot be considered a worker of A. Ltd.,

[17] In my view, the relationship between A. Ltd, J.D. (J Moving) and P.D., in this case is analogous to situations in agency law where the principal is responsible for the actions of the agent, and therefore P.D.'s employment would be with the principal employer, here A. Ltd.. A similar fact situation was addressed in *Decision No. 82/93*. In that case, T was the sole shareholder of T Trucking. He paid his wife for bookkeeping services. At the time of his heart attack, T was hauling logs for M Trucking. A Board Hearings Officer concluded that T was an "employer" since he employed his wife and therefore could not be considered a "worker" of M Trucking. The Panel, in *Decision No. 82/93*, granted the appeal and concluded that T was still a worker of or employee of M. Trucking, even though he had hired his wife to perform bookkeeping services for him. The Panel indicated in part:

> In this case, as we have discussed, the Board took the view that Mr. T was not a "dependant operator" like the other subcontractors, because he hired help in the form of Mrs. T.
>
> It seems clear that but for the fact that Mrs. T was on the payroll of T Trucking, Mr. T. would have been considered to be a "worker" of M Trucking by the Board.
>
> (…)
>
> This Panel agrees with the statement quoted earlier from the Discussion Paper. In our view, the focus of the inquiry should be on the employment relationship between the contractor or principal and the subcontractor. If the principal contracts with a subcontractor to do work, then the nature of the employment relationship is defined by that contract. If the subcontractor, in turn hires others, the employment relationship between the contractor and subcontractor may be altered by the fact that the subcontractor is then further "contracting out" labour. In that situation, the subcontractor is supplying more than his own labour, he is also supplying the labour of others.
>
> In our view, a situation where a subcontractor hires workers to perform -in this case logging work - is a qualitatively different situation than if the subcontractor "employs" his spouse to do the books. As suggested by the discussion paper, it is difficult to see how the fact that a spouse "does the books" alters the employment relationship between the subcontractor and the principal.

> For this reason, we conclude that the fact Mrs. T "did the books" is not sufficient to differentiate Mr. T's employment relationship with M Trucking from the employment relationship between M Trucking and any of the other subcontractors employed by M Trucking, with the possible exception of Mr. N (the subcontractor who employed three other workers). The other subcontractors were deemed to be "workers" by the Board.
>
> (..,)
>
> In summary, it is our view that for workers' compensation purposes, the focus of the inquiry should be on the substance of the employment relationship between the subcontractor and the contractor. In our view, the substance of the employment relationship between M Trucking and Mr. T was that of contractor and subcontractor. We find nothing significantly different about Mr. T's status as compared to the other subcontractors.
>
> Since the other subcontractors were considered to be workers, so should Mr. T. Accordingly, Mr. T was a "worker" at the time of his fatal heart attack.

[18] I agree with the reasoning of the Panel in *Decision No. 82/93* and applying it to the facts of this case, I find that the fact that J.D. may have paid her sister to assist her with the moving does not, in and of itself, lead to a conclusion that J.D/J Moving was an employer of P.D.. Rather, in the circumstances of this case, the primary focus of the inquiry should be on the relationship between J.D. and A. Ltd which, in *Decision No. 2177/18*, I concluded was one of worker and employer. In *Decision No. 2177/18,* I found that while J.D. had established a sole proprietorship, at the time of the accident on July 8, 2014 she was not operating a business on her own account. J. Moving did not advertise or solicit clients of its own. The balance of evidence in that case established that since starting a contract with A. Ltd in 2010, J.D. worked almost exclusively for it. A. Ltd., through its dispatcher, would provide J.D. with the names of the customers and directions as to when and where the packing jobs were to be performed. Packing was part of the larger moving services provided by A. Ltd. to its customers. J.D. had the customers sign an A. Ltd. packing slip once the job was completed and she in turn, would submit these documents to A. Ltd. for payment. She was paid regularly, twice a month, by A. Ltd. based on an agreed upon rate of commission. I concluded in *Decision No. 2177/18* that J.D. was employed under a contract of service where A. Ltd. had the right to control what work was performed, where, when and largely how, it was done. Given these findings, the fact that J.D. may have paid P.D. to assist with the moving job would not, in and of itself, warrant classifying J.D. as the employer in this case for WSIB purposes.

[19] In my view, the balance of evidence before me supports the conclusion that the relationship between P.D. and A. Ltd. was one of employee/employer or a "contract of service" where P.D., through her sister, agreed to work for A. Ltd. and A. Ltd. had the right to control what work was performed, where, when and how the work was performed. In reaching that conclusion, I have taken particular note of the following:

- P.D. did not participate in these proceedings. As such, there is no evidence of substance before me that would support a conclusion that she was working as an independent operator.
- The case materials (Exhibit #1) include a transcript of an examination conducted by an Adjuster N.C., on September 8, 2014. Also taking part in that examination were the Respondent's mother (K.R.) and her sister (J.D.). With respect to the status of the Respondent, the statement noted:

NC You would do the packing, you would do the lifting of the boxes and putting them in the?

JD That is right

NC And so you were at a moving job when this happened?

JD Correct

NC Okay – I am starting to get the whole thing and thank you for the explanation because I had no idea.

KR Well they work all year but…

NC Yea

KR If they hired you for July, August, September and October there are not enough hours right?

NC It is high season

KR November, December, January, February, March – you work every week but you might work three days this week, four days that week and it depends. You could make ah you could do 25000 lbs this week and do 15but overall you make $200,000.00 over a year.

NC Did you get paid by a job?

KR The weight on the job

NC Okay so it not by the hour?

KR No her sister (?) is paid by the hour but not her. She is paid by the job.

NC Oh sorry, there is a different classification of jobs or?

JD She works to rule, yes

NC Oh okay, okay

JD She is my helper. She helps me

NC Okay so you sort of get a contract?

JD Yea

NC Okay

JD She is a contractor

NC And then you send that subcontract out?

JD Yea and then she brings her own worker's to help on the job

NC You get paid for the job and then you pay your own employees out of your pocket for that job?

JD Yes

KR She only has her sister. She doesn't hire other – her and her sister do all the…

NC Okay so suffice to say, you hold a valid driver's licence but you don't have regular use or operation of anyone else's automobile. You have a vehicle of your own but it hasn't been insured in years correct?

JD Yea

NC What type of car is it anyway?

JD It's an old pickup – like an INAUDIBLE.

- The case materials (Exhibit #1) contain a September 25, 2014 transcript of a statement provided to an adjuster by M.F., a representative of A. Ltd. In that statement, M.F. indicated that J.D. was a "contractor" and that "she has her own company called [J Moving] and that is the company that we pay". M.F. also indicated that J Moving was paid "based on the job" and that A. Ltd. paid WSIB premiums on behalf of both J.D. and P.D.

[20] For the reasons noted above, I find that at the time of the accident on July 8, 2014, P.D. was a worker of a Schedule 1 employer – A. Ltd. The available evidence establishes that A. Ltd. paid J.D. /J Moving on a per job basis and J.D. in turn, paid her sister for her work.

(b) Was P.D. in the course of her employment?

[21] In her submissions, K.R. took issue with the Applicant's suggestion that her daughter could be considered to have been in the course of her employment at the time she was injured. She submitted that since her daughter was outside having a cigarette on a public street when the accident occurred, she could not be considered to have been in the course of her employment.

[22] While I acknowledge the position put forward by K.R., I cannot agree with it. *Operational Policy Manual* Document No. 15-02-02 entitled "Accident in the Course of Employment" notes that "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". The policy also provides:

> **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.

[23] With respect to the criteria of "place", the policy provides that when a worker is normally expected to work away from a fixed workplace (as would be the case here), 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 expected to be while engaged in work-related activities".

[24] In this case, as noted earlier, J.D. and her company were paying her sister as a "helper" to assist with this particular packing job on July 8, 2014. In order to assist with the completion of that job, J.D. had rented a truck that was parked out in front of the residence in question.

[25] In his September 25, 2014 statement to the Adjuster, M.F. noted in part:

Yes they were parked right on the street, on a residential street and they arrived at the apartment at around 9:00 and they went out to the van and the van was not illegally parked. It was parked right in front of the residence and they van was parked there and at

> about 11:00 they went out and got more material out of the truck and opened the back door and the vehicle coming the other way basically speeding and just hit the vehicle dead on and ran [J.D.] over.

[26] The statement provided by M.F. is consistent with the contents of P.D.'s Form 6 in which she described the mechanics of the accident as "I was standing on a city street when a woman drove down the wrong side of the street and hit the parked van I was standing behind".

[27] In my view, the place where this accident occurred (i.e. near the moving van) is a place where the worker would have reasonably been expected to be while engaged in work-related activities.

[28] With respect to the criteria of time, the above-mentioned statement from M.F. notes that the accident occurred about 11 a.m. on July 8, 2014, around 2 hours after the worker and her sister had arrived at the residence in question. There was no evidence of substance before me suggesting that this accident, which occurred near mid-day, occurred outside the times P.D. would normally have been at work.

[29] With respect to the criteria of "activity", Board policy notes that an accident will be deemed to have occurred in the course of one's employment if at the time, the worker was engaged in "the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment".

[30] In her submissions, K.R. acknowledged that the only reason P.D. was at this particular location on July 8, 2014, was to assist her sister with the packing and moving. There is no evidence of substance before me to suggest that P.D. was on those premises at that time satisfying a personal need. K.R. acknowledged she had not come to that location simply to visit with her sister. As suggested by the Applicant's representative, I find that had P.D. not been assisting her sister with this particular packing/moving contract, she would not have been at that location on July 8, 2014.

[31] In her submissions, K.R. indicated that the reason P.D. was at the truck at the time of the accident was not in furtherance of the packing and moving that was going on but rather, to take a break and have a cigarette. Setting aside for the moment the fact that there is no evidence of substance before me confirming this particular version of events, OPM Document No. 15-02-02 provides that "engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment". Even if one accepts, for the sake of argument, that P.D. was taking a cigarette break at the time the accident occurred, this would not in my view, change the overall character of the activities she was performing that day.

[32] For the reasons noted above, I find that the accident on July 8, 2014 occurred in the course of P.D.'s employment.

(c) S.H. and H. Ltd.

[33] Information provided by the WSIB (and included in Addendum #1) provides that at the time of the accident on July 8, 2014, H. Ltd. was an active Schedule 1 employer with a coverage start date of April 20, 2001.

[34] My review of the evidence also satisfies me that at the time of the accident, S.H. was a worker of H. Ltd. In reaching that conclusion, I note:

- The case materials include a Form 7 filed by B.B. of H. Ltd. in which he noted that S.H. was a "seasonal" worker paid $14.00 per hour.
- In a written statement (marked as Exhibit #11) B.B noted that H. Ltd. "paid WSIB premiums [for her] as well as for 8-15 additional employees. In addition, source deductions for income tax purposes were made for all our employees".
- B.B. also advised the S.H. "was one of my employees and had been for approximately two summers, between the end of April until the end of October, approximately".
- There is no evidence of substance before me contradicting B.B.'s evidence to the effect that S.H was a worker or employee of H. Ltd. at the time of the accident under consideration here.

[35] My review of the available evidence also satisfies me that at the time of the accident on July 8, 2014, S.H. was in the course of her employment. In reaching that conclusion, I note:

- In his July 20, 2018 written statement (Exhibit #11) B.B. advised:

  > [S.H.] was in the course of employment on July 8, 2014 at the time of the accident. Her duties at the time consisted of attending approximately 20 homes per day to apply weed spray & fertilizer. In addition to these services [H.Ltd.] also does weekly mowing, sodding, top dressing & garden bed restoration.
  >
  > On July 8, 2014, at the time of this accident, I was doing an estimate a few house down the street, I observed our spray truck come around the turn from [an adjoining street]. (...)
  >
  > Unfortunately, [S.H.] did not quite make this full bend & she hit the front of the parked van on the opposite side of the road.(...)

- The case materials (Exhibit #1) include a copy of the police Accident Report which notes that the vehicle being driven by S.H. was owned by H. Ltd.
- There is no evidence of substance before me suggesting that at the time of the accident on July 8, 2014, S.H. was engaged in an activity which was not reasonably incidental to her employment with H. Ltd.

[36] For the reasons noted above, I find that at the time of the accident on July 8, 2014, S.H. was a worker of a Schedule 1 employer and was in the course of her employment.

[37] Given my conclusions that both P.D. and S.H. were workers of Schedule 1 employers and were in the course of their employment at the time of the accident on July 8, 2014, the application is allowed and the P.D.'s right of action is taken away.

DISPOSITION

[38] The application is granted.

[39] The Respondent's right of action with respect to the accident on July 8, 2014 is taken away.

[40] A claim with the WSIB may be filed in this regard within 6 months of the date of this decision pursuant to section 31(4) of the WSIA.

DATED: March 17, 2020

SIGNED: R. Nairn