

--SUMMARY--

Decision No. 3817/17

02-Feb-2018

J.Smith

- Right to sue

No Summary Available

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References: Act Citation

- WSIA

Other Case Reference

- [w1318n]

Style of Cause: Duckworth v. Toronto (City)
Neutral Citation: 2018 ONWSIAT 409



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3817/17

BEFORE: J.E. Smith: Vice-Chair

HEARING: December 5, 2017 at Toronto
Written

DATE OF DECISION: February 2, 2018

NEUTRAL CITATION: 2018 ONWSIAT 409

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

APPEARANCES:

For the applicant State Farm: P. Baker, Lawyer

For the respondents, M. and M.P. Duckworth: S. Seibel, Lawyer

For the interested party, City of Toronto: N. Kolos, Lawyer

For the interested parties R. Vanderlaan and Walters Inc.: T. Kaczmarczyk, Lawyer

Workplace Safety and Insurance
Appeals Tribunal

505 University Avenue 7th Floor
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Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction

[1] These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the “WSIA”). The application is brought by State Farm Automobile Insurance Company, a defendant in an action filed in Toronto in the Superior Court of Justice, as File No. 16-5705.

(ii) Background

[2] By way of background, this application arises out of a motor vehicle accident (MVA) which occurred on May 29, 2014 on the Gardiner Expressway in the City of Toronto. At the time of the MVA, M. Duckworth (“Mr. Duckworth”) was operating a vehicle owned by Sharples Greenhouse Corporation (“Sharples”). The accident involved another vehicle operated by R. Vanderlaan (“Mr. Vanderlaan”) which was owned by Walters Inc.

[3] The applicant, State Farm Mutual Automobile Insurance Company (“State Farm”), is the insurer of the vehicle owned by Sharples. Mr. Duckworth applied to State Farm for accident benefits. Mr. Duckworth also commenced a civil action against the City of Toronto which has jurisdiction and authority over the Gardiner Expressway. In the action, Mr. Duckworth’s spouse, Mrs. Duckworth, claimed damages under the *Family Law Act*. The City of Toronto commenced a Third Party Claim against Mr. Vanderlaan and Walters Inc.

[4] In its application to the Tribunal, State Farm requests a declaration that Mr. Duckworth’s right of action is taken away by the WSIA.

(iii) Law and policy

[5] 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.

[6] 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.

[7] 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*.

(iv) Analysis

[8] This application was scheduled for an oral hearing on December 5, 2017. On November 17, 2017, the Tribunal received communication from the parties providing an agreed

statement of fact and a proposed disposition of the application. The parties agree on the following facts and submissions:

- On May 29, 2014, Mr. Duckworth was involved in a motor vehicle accident on the eastbound Gardiner Expressway in the City of Toronto. Mr. Duckworth was driving a truck owned by his employer, Sharples.
- Mr. Duckworth's vehicle was involved in that accident with another vehicle, a truck owned by Walters Inc. and operated by Mr. Vanderlaan.
- Mr. Duckworth and his spouse commenced an action in the Superior Court of Justice, Toronto Court File No. 16-57505, against the City of Toronto as a defendant. The City of Toronto subsequently commenced a Third Party Claim, Toronto Court File No. 16-57505 A1, against Mr. Vanderlaan and Walters Inc.
- Sharples is a Schedule 1 employer under the WSIA.
- Walters Inc. is also a Schedule 1 employer under the WSIA.
- Mr. Duckworth was in the course of his employment with Sharples at the time of the accident.
- Mr. Vanderlaan was also in the course of his employment at the time of the accident.
- Sections 28 and 29 of the WSIA are applicable to this case.

[9] The parties, on consent, request a declaration that Mr. Duckworth's right of action is taken away pursuant to section 28, as well as declarations under section 29.

[10] I am satisfied that the documentary evidence in the case materials supports the agreed upon facts and submissions noted above. Accordingly, I find that both Mr. Duckworth and Mr. Vanderlaan were workers in the course of employment at the time of the accident. Further, I find that both Sharples and Walters Inc. were Schedule 1 employers under the WSIA at the time of the May 29, 2014 accident.

[11] On the basis of those findings, the application is granted as follows.

[12] Mr. Duckworth's right of action is taken away pursuant to section 28 of the WSIA.

[13] Pursuant to section 29(2) of the WSIA, should Mr. Vanderlaan, Walters Inc., or another employee of Walters Inc. be determined to be at fault or negligent with respect to the events underpinning the civil action, then neither Walters Inc. nor any of its employees will be liable to pay damages to Mr. Duckworth or his spouse, or to contribute to or indemnify another party who is liable to pay such damages.

[14] Pursuant to section 29(3) of the WSIA, the court shall determine what portion of the plaintiffs' loss or damage, if any, was caused by the fault or negligence of Walters Inc. or Mr. Vanderlaan.

[15] Pursuant to section 29(4), no damages, contribution or indemnity are recoverable by the plaintiffs for the portion of the loss or damage, if any, caused by the fault or negligence of Walters Inc. or Mr. Vanderlaan.

[16] Pursuant to s. 31(4), Mr. Duckworth may file a claim for benefits with the Board within six months after the s. 31 determination is made by the Tribunal, if he has not already done so.

DISPOSITION

[17] The application is granted.

[18] Mr. Duckworth’s right of action in respect of the May 29, 2014 accident is taken away by the WSIA.

[19] Pursuant to section 29(2), should Mr. Vanderlaan, Walters Inc., or another employee of Walters Inc. be determined to be at fault or negligent with respect to the events underpinning the civil action, then neither Walters Inc. nor any of its employees will be liable to pay damages to Mr. Duckworth or his spouse, or to contribute to or indemnify another party who is liable to pay such damages.

[20] Pursuant to section 29(3) of the WSIA, the court shall determine what portion of the plaintiffs’ loss or damage, if any, was caused by the fault or negligence of Walters Inc. or Mr. Vanderlaan.

[21] Pursuant to section 29(4) no damages, contribution or indemnity are recoverable by the plaintiffs for the portion of the loss or damage, if any, caused by the fault or negligence of Walters Inc. or Mr. Vanderlaan.

[22] Pursuant to s. 31(4), Mr. Duckworth may file a claim for benefits with the Board within six months after the s. 31 determination is made by the Tribunal, if he has not already done so.

DATED: February 2, 2018

SIGNED: J.E. Smith