

**Workplace Safety and Insurance
Appeals Tribunal**

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**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

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23-Dec-2016

CONFIDENTIAL

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Mr. Jason Jagpal
Legal/Policy Analyst, Legal Branch, WSIB



Decision No.: 3338 16
WSIAT #: 2015-0002324
WSIB File No.: 26716353, 26716188, 26715792, 26707764, 26716223, 25415206, 21749609,
21602357, 20379265, 26565177, 26239467, 25970316, 24620340, 24359912,
22264784, 21847139, 21672479
Case Name: Economical Insurance ats Doyle et al

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 1-800-387-5540; or 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

This decision contains confidential information. It does not name the worker. Do not reveal the identity of the worker to anyone, either inside or outside your organization, except to people who need to know it for workplace purposes.



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3338/16

BEFORE:

M. Crystal: Vice-Chair

HEARING:

December 22, 2016 at Toronto
Oral

DATE OF DECISION:

December 23, 2016

NEUTRAL CITATION:

2016 ONWSIAT 3570

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

APPEARANCES:

For the applicant

Ms. T. Zigomanis, Lawyer

For the respondent Mr. S. H.

Mr. J. Jagpal, Lawyer

For the respondent Mr. A.D.

Self-represented

Interpreter:

Not applicable

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REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (the WSIA) by an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act*. The respondents are Mr. A.D. and Mr. S. H., who were involved in a motor vehicle accident on August 13, 2013, and who, as a result of the accident, claimed statutory accident benefits from the applicant insurer. The applicant was represented by Ms. Tanya Zigomanis, lawyer. The respondent, Mr. S.H., appeared and was represented by Mr. Jason Jagpal, lawyer. The respondent Mr. A.D. also appeared and was self-represented.

[2] In this application, the applicant is seeking an order pursuant to section 31(1)(c) of the WSIA declaring that the respondents, Mr. S.H. and Mr. A.D. are entitled to claim benefits under the Board's insurance plan. Mr. Jagpal indicated on behalf of Mr. S.H. that he was consenting to an order declaring that Mr. S.H. is entitled to claim benefits under the insurance plan. Mr. A.D. also indicated on his own behalf, that he was consenting to an order declaring that Mr. A.D. is entitled to claim benefits under the insurance plan. At the hearing, oral submissions were provided by Ms. Zigomanis and Mr. Jagpal.

(ii) Issues

[3] The issue in this application is whether the respondents, Mr. S.H. and Mr. A.D. are entitled to claim benefits under the WSIA. In order to determine this issue, the following questions must be answered:

1. Were Mr. S.H. and Mr. A.D. "workers" within the meaning of the WSIA at the time of the accident on August 13, 2013?
2. Were Mr. S.H. and Mr. A.D. in the course of their employment at the time of the accident on August 13, 2013?
3. Were Mr. S.H. and Mr. A.D. employed by a Schedule 1 employer at the time of the accident on August 13, 2013?

(iii) Background

[4] At the hearing of this application, both Mr. S. H. and Mr. A.D. testified about the accident that occurred on August 13, 2013. Mr. A.D. testified that at the time of the accident he was employed as an employee of S.C. Inc., a company in the business of providing "swing stages" and "rigging", which are elements of scaffolding, to construction sites. He stated that at the time of the accident, with the permission of S.C. Inc., he was driving a truck owned by S.C. Inc., and that he was on his way to a site where he was planning to perform rigging work. He stated that Mr. S. H., and another employee of S.C. Inc., who is not a party to this proceeding, were passengers in the truck. He stated that he had to pull the truck he was driving off to the side of the road, and that his truck was struck from behind by another truck. Mr. A.D. stated the truck he was driving fell over onto its side as a result of the collision, and that he sustained injuries as a result of the accident. Mr. A.D. indicated that he started work at about 6:30 a.m. on the date of accident, and that the accident occurred at about 7:30 a.m. He stated that he was in the course of his employment at the time of the accident.

[5] The case materials also included an "Application for Accident Benefits" signed by Mr. A.D., and dated August 20, 2013. The application indicated that, during the four weeks prior to the accident, he was employed as a "rigger", that S.C. Inc. was his employer, and that he worked 42 hours per week, with a gross income of \$1,100.00 per week. Mr. A.D. testified that he was not an independent operator at the time of the accident.

[6] Mr. S.H. also testified at the hearing. He stated that he agreed with Mr. A.D. about how the accident occurred. Mr. S.H. also testified that, at the time of the accident he was employed by S.C. Inc. as a rigger, and that he was on his way to a job site to perform his work for the employer. He stated that he started work on the date of the accident at about 6:30 a.m. and that he was in the course of his employment at the time of the accident, which occurred at about 7:30 a.m. He stated that he had been employed by S.C. Inc. since about May 2013.

[7] The case materials also included an "Employer's Confirmation Form (OCF-2) dated October 7, 2013, in relation to statutory accident benefits claimed by Mr. S.H., which indicated that Mr. S.H. was employed by S.C. Inc. at the time of the accident. The form stated Mr. S.H.'s weekly earnings with S.C. Inc. during the four weeks preceding the accident. The materials also included a Motor Vehicle Accident Report, dated August 13, 2013, indicating that Mr. S.H. was a passenger in the vehicle driven by Mr. A.D. The case materials also included notes from an interview of Mr. S.H. carried out on September 26, 2013, which disclosed that Mr. S.H. sustained personal injuries to his neck, back, hips and head as a result of the accident that occurred on August 13, 2013. Mr. S.H. also testified that he was not an independent operator at the time of the accident.

[8] The case materials also included a memo, dated October 13, 2016, prepared by a member of the Tribunal's staff. The staff member indicated in the memo that she had contacted the Board to determine the status of S.C. Inc. The memo stated that the Board had advised the Tribunal that S.C. Inc. "is an active schedule 1 employer with a coverage start date of May 12, 2003." The memo also indicated that accident claims had been established at the Board for the subject accident by Mr. A.D., Mr. S.H. and by the other passenger in the truck with them, who is not a party to this proceeding.

(iv) Applicable law

[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.

(v) **Analysis**

[11] I am satisfied that Mr. A.D. and Mr. S.H. are both entitled to claim benefits under the WSIA. I note that section 13(1) of the WSIA provides:

13(1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[12] According to the testimony provided by Mr. A.D. and Mr. S.H. at the hearing, and other information included in the case materials, at the time of the accident on August 13, 2013, they were both regular employees of S.C. Inc. and as such I find that they were workers with the meaning of the *Workplace Safety and Insurance Act, 1997*. I also find that they were both in the course of their employment at the time of the accident. I am also satisfied on the basis of the memo, dated October 13, 2015, from the Tribunal staff member who carried out a status check at the Board, that S.C. Inc. was a Schedule 1 employer at the time of the accident. There was no information before me that would cause me to conclude that, at the time of the subject accident, Mr. A.D. and Mr. S.H. were not workers within the meaning of the WSIA, that they were not in the course of their employment with S.C. Inc., or that S.C. Inc. was not Schedule 1 employer. I am also satisfied that both Mr. A.D. and Mr. S.H. sustained personal injuries as a result of the accident that occurred on August 13, 2013.

[13] On this basis of these findings, I conclude that, pursuant to section 31(1)(c), of the WSIA, Mr. A.D. and Mr. S.H. are entitled to claim benefits under the insurance plan. I note that this disposition is made on consent by the applicants and the respondents.

DISPOSITION

[14] The application is granted.

[15] Mr. A.D. and Mr. S.H. are entitled to claim benefits under the insurance plan in relation to the accident that occurred on August 13, 2013.

[16] Section 31(4) of the WSIA provides that a claim may be filed 6 months after a section 31 determination is made.

DATED: December 23, 2016

SIGNED: M. Crystal