

**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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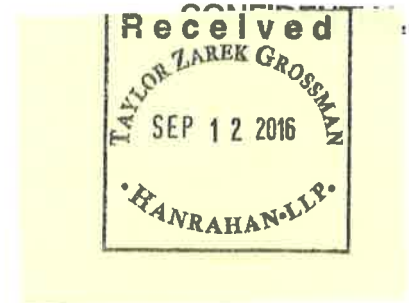
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06-Sep-2016

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Decision No.: 771 16 I
WSIAT #: 2015-0000688
WSIB File No.: 20150000688 LG, 26419763
Case Name: Cappadocia ats Mageean

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. 771/16I

BEFORE:

J. P. Moore: Vice-Chair

HEARING:

March 29, 2016 at Toronto
Oral
Post-hearing activity completed on August 19, 2016

DATE OF DECISION:

September 6, 2016

NEUTRAL CITATION:

2016 ONWSIAT 2352

APPLICATION:

Application by a defendant in an action, Court File No. 13-0186 in the Ontario Superior Court of Justice at Barrie, Ontario

APPEARANCES:

For the applicant:

T. Zigomanis, Lawyer

For the respondent:

R. Durante and S. Henry, Lawyers

For an interested party:

S. Bird, Lawyer

Interpreter:

Not applicable

REASONS

(i) Introduction

[1] This section 31 application arises out of a motor vehicle accident that occurred on August 9, 2012. The applicant, C. C., was operating a motor vehicle in which the respondent, K. M., was a passenger. C. C. and K. M. were engaged in making deliveries on behalf of a federal agency. The status of the two individuals in relation to that federal agency remains to be determined.

[2] K. M. initiated legal action against C. C. and others. C. C. defended against the lawsuit. C. C. also brought this application to the Tribunal pursuant to section 31 of the *Workplace Safety and Insurance Act, 1997* ("WSIA").

[3] The application was scheduled for hearing on March 29, 2016. At the hearing, K. M. challenged the Tribunal's jurisdiction over the application. The hearing was adjourned. I directed the Tribunal Counsel Office to prepare submissions on the issue of the Tribunal's jurisdiction in this matter. The parties were then given an opportunity to file reply submissions. Submissions on the jurisdiction issue were filed by K. M., C. C., and by the federal agency, participating as an interested party. What follows is my decision on the jurisdiction issue.

(ii) The issue

[4] The issue addressed in this decision is whether the Tribunal has jurisdiction to hear the application brought in this case.

(iii) The decision

[5] On the evidence and submissions presented to me, I am persuaded that the Tribunal has jurisdiction to hear the application brought in this case.

(iv) Analysis

(a) The jurisdictional issue

[6] The respondent, K. M., has initiated a lawsuit against the applicant, C.C., for injuries sustained in a motor vehicle accident. C.C. was making a delivery on behalf of the interested party. K. M. was assisting her in that activity.

[7] In response to K. M.'s lawsuit, C. C. brought an application pursuant to section 31 of the WSIA, which stipulates in part:

31. (1) A party to an action ... may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;...

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[8] In her section 31 application, C. C. argues that K. M.'s lawsuit should be barred by the Tribunal pursuant to section 31. C. C. argues that she and K. M. were co-workers of the interested party at the time of the accident and that, consequently, K. M.'s legal action against C. C. is taken away by section 12 of the federal legislation that governs entitlement to compensation for a workplace injury, the *Government Employees' Compensation Act*, R.S.C., 1985, c. G-5, which stipulates:

12. Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

[9] The respondent, K. M., has challenged the Tribunal's jurisdiction to hear this application under section 31 of the WSIA, arguing that the Tribunal does not have jurisdiction under section 31 to apply section 12 of the *Government Employees' Compensation Act* ("GECA"). The interested party supports the respondent in that application. The applicant, C. C., takes the position that the Tribunal has jurisdiction, in this case, to hear an application under section 31 and bar K. M's lawsuit by applying section 12 of the GECA.

(b) The GECA and the WSIA

[10] The GECA is federal legislation that applies to federal undertakings. It is intended to provide compensation benefits to employees of federal undertakings who are injured in the course of their employment. The GECA achieves this goal by empowering provincial compensation entities to provide compensation to federal employees. The central empowering provision in the GECA is section 4. I note, in particular, subsection 4(2) of the GECA:

- 4(2) The employee or the dependants referred to in subsection 1 are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the laws of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, ...

[11] Subsection 4(3) then identifies the provincial agencies that are authorized to determine and provide such compensation:

- 4(3) Compensation under subsection (1) shall be determined by
- (a) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
 - (b) such other board, officers or authority, or such court, as the Governor in Council may direct.

[12] A number of Tribunal decisions have addressed the interaction between the GECA and the WSIA regarding the extent to which the GECA "incorporates" certain provisions of the WSIA. A previous Tribunal decision, *Decision No. 485/90* (January 3, 1991), summarized the interplay between the GECA and WSIA as follows:

When there is a question as to whether a particular provincial provision ought to be included in the incorporation set out in s.4 [of the GECA], the decision as to whether the provision is reasonably incidental to the rates and conditions of compensation must be made with a view to considering whether the resulting compensation system can function as a fair, comprehensive, functional and balanced whole without it.

[13] *Decision No. 485/90* went on to conclude that section 15 of the pre-1997 *Workers' Compensation Act*, the predecessor of section 31 of the WSIA, was not incorporated into the GECA. The Panel stated:

We are satisfied that the jurisdiction to adjudicate upon the rights of parties to an action is not reasonably incidental to the compensation scheme incorporated by s.4 (of the GECA).

[14] That is the context of the present application.

(c) The competing arguments

[15] The respondent, K. M., and the interested party argue that *Decision No. 485/90* is good law and should be followed. They note that *Decision No. 485/90* is consistent with court jurisprudence on this issue, notably two decisions of the Supreme Court of Canada, *Ching v. C.P.R.*¹ and *Bender v. The King*.²

[16] In each of those judgements, the Supreme Court confirmed that the GECA did not incorporate the provisions of the provincial legislation governing the right to sue.

[17] The position of the applicant, C. C., is that the Tribunal has jurisdiction over this matter because the applicant is not asking the Tribunal to apply provincial right to sue legislation. Rather, the applicant is asking the Tribunal to apply section 12 of the GECA, pursuant to its jurisdiction under section 31 to hear an application by a party to an action. Ms. Zigomanis noted, on behalf of the applicant, that the position taken by this Tribunal in *Decision No. 485/90* was not followed by the Nova Scotia Workers' Compensation Appeals Tribunal.

(d) Findings and conclusions on jurisdiction

[18] I am persuaded that the Tribunal has jurisdiction to hear this application pursuant to section 31 of WSIA. I acknowledge that *Decision No. 485/90* addresses a similar situation to the one before me in this application: a lawsuit brought by one federal worker against another federal worker. *Decision No. 485/90* concluded that the Tribunal could not bar that particular action under the predecessor provision of section 31 of the WSIA because adjudicating:

...upon the rights of parties to an action is not reasonably incidental to the compensation scheme incorporated by s. 4 [of the GECA].

[19] In reaching this conclusion, the Panel noted that cases it was relying on considered the GECA in a different context, but that:

These prior decisions indicate that the incorporation of provincial legislation has generally been considered to be limited in nature, and that, in questions of jurisdiction, each section must be judged on the basis of its relationship to the general language of the incorporation.

[20] As discussed below, the Supreme Court of Canada and the Ontario Court of Appeal have more recently indicated that a broader approach should be taken.

[21] In my opinion, the interplay between the GECA and the WSIA reflects a federal legislative intent to give a federal employee the right to apply to the Tribunal for a ruling under section 12. In my opinion, the Tribunal's authority to hear such an application is implicitly granted in the authority provided by the GECA to the provincial entity to determine issues of compensation.

[22] Subsections 4(2) and (3) of the GECA empower the provincial agency responsible for compensation for injured workers to provide compensation to federal employees. Those provisions also authorize decision-making regarding compensation by "the same Board, officers or authority" as is established by provincial law to make such determinations. In my view, one such "authority" is the Tribunal.

¹ [1943] S.C.R. 451

² [1947] S.C.R. 172

[23] Subsection 31(1) confers on the Tribunal the authority to hear an application by a party to a legal action and to determine, among other things:

Whether the plaintiff is entitled to claim benefits under the insurance plan.

[24] In the present case, the applicant is seeking a declaration regarding the plaintiff's right to claim benefits under the Insurance Plan. If it is determined, on the merits, that the plaintiff is entitled to claim benefits under the Insurance Plan, section 12 of the GECA would appear to become effective. That section stipulates that, where an accident happens to an employee in the course of his or her employment under such circumstances as "entitle him... to compensation under this act," that employee has no claim against the crown, nor against a "servant or agent" of the crown, other than for compensation under this Act.

[25] In my opinion, given that the GECA appears to confer full authority on the provincial entity to determine the "rates and conditions" of compensation to which a federal employee is entitled, where such a determination is made, it is reasonably incidental to that authority to allow the provincial entity, through the Tribunal in the exercise of its jurisdiction under section 31, to address section 12 of the GECA. It seems highly unlikely to me that the federal legislation intended that the provincial entity could address the first component of section 12 – that a person is entitled to compensation under the GECA – but not then address the second component of section 12 – whether the right to pursue legal action is thereby barred. It appears to me that the intent of section 12 is to bar automatically a lawsuit against a federal employer/employee, brought by a federal worker who is entitled to compensation under the GECA. In my view, if federal legislation has the purpose of allowing the provincial entity to determine compensation under section 4, it also confers on the provincial entity the power to determine the right to sue under section 12. The right to compensation and the loss of the right to sue are inextricably linked in section 12.

[26] *Decision No. 485/90* stated that the Tribunal should not have jurisdiction under the predecessor of section 31, to determine a party's right to compensation as an indirect way of receiving protection from a lawsuit. However, in my opinion, the jurisdiction under section 31 to determine the right to receive compensation is a clear and distinct power and one which melds fully with the provisions of section 4 of the GECA regarding provincial authority to determine compensation. I agree with the Appeals Tribunal of Nova Scotia³ that, once having determined that a federal worker was entitled to compensation "s.12 of the GECA [is] engaged." In so concluding, the Nova Scotia Appeals Tribunal preferred the reasoning in BC WCAT *Decision 2206-01356* to that in *Decision No. 485/909*.

[27] Regarding the jurisprudence cited by the respondent and the interested party, the *Ching* and *Bender* decisions, I note that the issue in those cases was whether the provincial entities had authority under the equivalent provisions of section 31 to enforce the provincial right-to-sue legislative provisions. That is not the case here. The applicant is not asking the Tribunal to apply the provincial right-to-sue provisions found in section 28. Rather, the applicant asks the Tribunal to apply the right-to-sue provision in section 12 of the GECA, pursuant to the authority conferred on the province by section 4 of the GECA. In my view, that is a distinct situation that makes both *Ching* and *Bender* inapplicable to this case.

³ WCAT No. 2008-494-TPA

[28] In any event, in my view, more recent court jurisprudence takes a broader view of the interplay between the GECA and provincial legislation than is found in those older court judgments. It recognizes the important role of the provinces in adopting law and policy and of provincial agencies in determining entitlement to compensation.

[29] In the case of *Martin v. Alberta (Worker's Compensation Board)*,⁴ the Supreme Court of Canada stated, in paragraph 3 of the judgement:

The provincial boards and authorities are required under the GECA to apply their own provincial laws and policies, *provided they do not conflict with the GECA*. [emphasis added]

[30] At paragraph 19, the Court stated:

Where Parliament intended to impose different conditions, it has done so expressly.

[31] At paragraph 24, the Court stated:

As I observe below, the legislative history clearly indicated that the reference to the "same conditions" was intended to indicate that the *eligibility conditions* for federal employees under the GECA were to be the same as under the provincial scheme.

[32] The Court stated at paragraph 39:

Where a direct conflict between the provincial law and the GECA exists, the GECA will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers. Otherwise, the provincial workers' compensation scheme prevails. In either case, provincial boards and authorities will be responsible for adjudicating the claim.

[33] Finally, at paragraph 49, the Court stated:

Provincial law supplements the federal Act with structure and specificity.

[34] The Court of Appeal of Ontario also addressed the interplay between the GECA and the WSIA. In *Canada Post Corp. v. Smith*⁵, the Court of Appeal, per Abella, J. A. as she then was, stated:

The various provincial laws, not the GECA, set out the relevant boundaries of the compensation schemes for injured workers. The GECA is merely the statutory vehicle for transferring authority over these issues to the appropriate provincial bodies (s.4(3)), thereby inferentially absorbing all compensation-related rights and benefits provisions in provincial statutes (s.4(2)). As the expert body and designated interpreter of this legislation in Ontario, the Tribunal's decisions in this regard are entitled to curial deference absent clear irrationality.

[35] What is notable about that statement is that it recognizes that one of the reasons for transferring the authority to determine compensation matters to the provincial authority is the particular expertise the provincial authority has in determining rights of compensation. One of the areas in which the Tribunal exercises such expertise is in determining who falls within the governing legislation. In the present case, the Tribunal is being asked to determine, among other things, the "worker" versus "independent operator" status of the plaintiff. This is an area in which the Workplace Safety and Insurance Board has developed extensive policy, and the Tribunal has extensive case law. The Tribunal is, therefore, the logical adjudicator of the issues

⁴ 2014 SCC 25

⁵ 40 O.R.(3d) 97

that arise out of section 12 regarding the plaintiff's entitlement to compensation and her right to pursue legal action.

[36] In summary, in my opinion, section 4 and section 12 of the GECA, read together, reflect an intention on the part of Parliament to confer on the appropriate provincial authorities, including the Tribunal, the jurisdiction to address the matters that are the subject of sections 4 and 12: the right to compensation and the impact of that right on a lawsuit brought by an injured federal employee against his/her employer or co-worker. In my opinion, the present application asks the Tribunal to make that determination pursuant to the authority granted to it by the provincial legislation under section 31 of the WSIA. There is no express conflict between the GECA and the WSIA. Rather, section 31 supplements the federal Act with structure and specificity in accordance with *Martin*.

[37] In any event, subsection 31(1)(a) provides that the Tribunal can determine whether a plaintiff is entitled to benefits under the Insurance Plan, and subsection 4(3) of GECA provides that compensation under subsection 4(1) of GECA shall be determined by the provincial authority, in this case the Tribunal. The effect of a finding of entitlement to compensation would be to remove the right of action under the wording of section 12 of the GECA, even if the Tribunal did not have jurisdiction to make a specific order removing a party's right to sue.

[38] Consequently, I rule that the present application may proceed to a hearing of the case on the merits.

DISPOSITION

[39] The Tribunal has jurisdiction, pursuant to section 31 of the WSIA, to consider the application brought regarding the respondent's right to compensation under section 4 of the GECA, and her right to pursue legal action against the applicant, in light of section 12 of the GECA.

[40] Previously arranged hearing dates will proceed to address the merits of the application.

DATED: September 6, 2016

SIGNED: J. P. Moore

