WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1253/09R

BEFORE: A.G. Baker: Vice-Chair

HEARING: October 26, 2010, at Toronto
Written

DATE OF DECISION: June 21, 2011

NEUTRAL CITATION: 2011 ONWSIAT 1566

DECISION(S) UNDER APPEAL: Request for clarification of *Decision No. 1253/09* dated March 4, 2010

APPEARANCES:

For the worker: T. Zigomanis, Lawyer

For the employer: Did not participate

Interpreter: N/A

REASONS

(i) Introduction

[1] The following decision considers a request for clarification of *Decision No. 1253/09*, dated March 4, 2010. That decision considered the section 31 Application brought by the Western Assurance Company, which had sought a determination of the Respondent's status under section 31 of the WSIA. The Applicant now seeks clarification of that decision to be addressed further in this decision. For the record, the parties who participated in the original Application were provided an opportunity to make submissions in regard to this clarification and only the Applicant's submissions were provided.

[2] The background to *Decision No. 1253/09* was also noted as follows:

> **(i) Introduction**
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> The above noted application was brought by the Western Assurance Company (Applicant) pursuant to s.31 of the *Workplace Safety and Insurance Act* (the "Act"). The issue in this application is whether the insurance company providing statutory accident benefits to the Respondent is entitled to a declaration regarding the Respondent's status under s.31 of the WSIA.
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> I have reviewed the application. As noted, the Respondent was involved in a motor vehicle accident (MVA) on February 14, 2005. At the time, he was an employee and personal support worker for the Canadian Red Cross Society ("employer") since approximately June 2001. It was submitted the Respondent was travelling to visit a client at the time of the accident, and as such, was in the course of his employment at the time of the accident. The Applicant has also submitted that the Respondent did not pursue a civil tort action and no statement of claim was filed in that regard. Further, that the statutory limitation period to file such a claim had expired, and the Respondent elected to pursue only Statutory Accident Benefits (SABs). As such, it was submitted that, as per sections 30 of the Act and s.59 of the *Insurance Act*, the worker's right of action is taken away for a failure to commence an action in regard to the MVA. The Applicant submitted that the worker's election was invalid since it was made primarily for the purposes of obtaining SABs contrary to s.59(2) of the *Insurance Act* Statutory Accident Benefits Schedule. For the record, no submissions were made on the behalf of the Respondent or any third party.
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> In this case, it was confirmed by way of a Workplace Safety and Insurance Board (the Board) status check memorandum that the Canadian Red Cross Society was an active Schedule 1 employer, and that the employer had coverage under the Act and benefits available. Further, that Royal Group Inc. o/a Majestic Plastic Company is an inactive Schedule 1 employer, and employed the driver of the other vehicle involved in the accident. However, I also noted correspondence on file from Ms. Rosenthall, dated October 23, 2008, indicating the driver of the other vehicle confirmed he was not in the course of his employment at the time of the accident. Rather, that the driver of the other vehicle had been on his way for an oil change in a personal vehicle and outside work hours. I noted that no submission was forthcoming claiming otherwise regarding that driver having been in the course of employment at the time of the accident.
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> **(ii) Background**
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> The Respondent filed a Form 6 reporting the MVA to the WSIB in March of 2005. The form indicated the worker had an MVA on February 14, 2005, at approximately 10:30 a.m. while travelling to visit a client. He was at a major intersection when he was struck on the front end of his car. He stated he continued to work for some days, then having to

stop working from February 23, 2005, because of gradually increasing and throbbing pain that prevented him from driving and taking care of his clients. He stated he reported the incident to his supervisor.

The employer also filed a Form 7 to the WSIB as of February 23, 2005. The report confirmed the worker had told his supervisor of the MVA and that the worker had been driving at that time to the residence of his third client for the day. It also noted a report from the worker that he was continuing to feel pain from the accident. A further letter attached to the form also confirmed the worker was travelling to the third client at the time of the MVA, as well as ongoing difficulties following the accident. It also noted a claim was to be filed with the Respondent's insurance company.

The Respondent also testified in this matter. He stated he was a personal care worker for the Red Cross. He used his personal vehicle to travel from one client location to another, providing personal care needs. The Form 6 on file indicated duties included bathing, grooming, transferring clients, and household management. It was stated the employer would instruct him on his job duties, that he was supervised, and paid by the employer. He stated he worked some 45-50 hours per week, and the schedule was provided by the employer.

The Respondent stated he started work the morning of the MVA at approximately 6:30 a.m. He had been travelling between two client locations at approximately 10:30 a.m. when the MVA occurred. He stated he drove to two client residences that morning and was on his way to a third. He stated he drove directly between the residences. He also stated that he would take lunch "on the go" or around approximately the noon hour. The Respondent stated he felt he was performing his job at the time of the accident.

I also noted the Respondent's signed statement regarding the MVA on file from March 1, 2005, in which he confirmed much of the same facts. Of particular relevance to this application was that he used his own vehicle for work; that the accident occurred at 10:30 a.m. and during his work hours; and that he was travelling to see a client at the time.

The worker stated he returned to work in approximately August or September of 2005, and that he lost many work hours because of the accident. He stated he felt he was still suffering difficulties from his injuries, including back pain, and wanted compensation for his losses. The Respondent acknowledged signing an assignment of benefits to the Applicant for WSIB benefits, which was also on file. He further acknowledged receiving SAB benefits from the Applicant. He also confirmed that no civil statement of claim was filed in regard to the accident.

[3] The original decision also addressed the jurisdiction of the Tribunal to declare the worker's election invalid and contrary to section 59 of the SAB schedule under the *Insurance Act*. The following was concluded:

> [12] In this case, and as found in the case noted above, the Tribunal does not have jurisdiction to address any issues arising out of the election of Mr. Puri, including the assignment that was completed, and the enforcement of that assignment. In my view, that is a full answer to any request for determinations by the Applicant in these particular circumstances under either s.30 of the WSIA or s.59 of the Schedule. While it is clear that disputes regarding claims for WSIA benefits fall to the Tribunal, it appears equally clear that disputes regarding the failure of a SAB recipient to bring an action as per s.59 of the schedule are resolved before the Financial Services Commission of Ontario ("FSCO"). Accordingly, I find I do not have jurisdiction to determine the Respondent election under s.30 of the Act in relation to s.59 of the Schedule. The Tribunal can however declare that the Respondent's right of action is taken away under s.31.

[4] The original decision then turned to the question of standing and a request for a declaration under section 31 of the WSIA. The decision discussed the application of section 31 and also noted extensively *Decisions No. 14/06* and *1362/06I*, and the excerpts will not be repeated in this clarification. It was determined that:

> [17] In my view, the decisions cited above are correct in their interpretation and findings regarding the application of s.31 where only SAB benefits have been claimed and no civil action pursued. As such, it was my view that the Applicant not only had proper standing before the Tribunal in this matter, but was also entitled to a declaration under the WSIA regarding the Respondent's status.

[5] The decision then addressed the question of the worker was barred from commencing an action under the WSIA in relation to the MVA. After considering an excerpt from *Decision No. 1238/08,* the following was found:

> [19] It was evident in this case that the Respondent was in the course of employment at the time of the accident. He was clearly in the middle of his workday and had already attended two clients, and was travelling to a third at the time of the MVA. There was also no doubt that this was a typical workday, for which he usually travelled by way of his own personal vehicle from one client to another. It was also evident that he was travelling to the third client, with no persuasive evidence that he had varied from his route or taken a significant break or stopped for lunch. It was also clear he was an employee and under the specific direction of the employer, working for clients at the behest of the employer, and on a schedule established by the employer. In short, there was no doubt the Respondent was performing an activity reasonably incidental to his employment, travelling from client to client by way of his personal car, at the time of the accident. As such, he was evidently in the course of his employment.
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> [20] The difficulty arises when this same criteria is applied to the driver of the second vehicle involved in the accident. In order for the Respondent to be barred from pursuing an action in these circumstances, the second driver is also required to have been a "worker" for a Schedule 1 employer under s.28(1) of the WSIA. While it was evident that the second driver worked for a Schedule 1 employer, it was also evident that he was not in the course of employment and could not be considered a "worker" at the time of the accident. In applying the same criteria noted above, it was not disputed that the second driver was clearly outside of work hours, driving a personal car for personal business, and not performing any task that could reasonably be interpreted to be incidental to his employment. As such, I find that Mr. Puri's right to pursue legal action is not barred by s.28 of the WSIA.

(ii) Law

[6] The *Workers' Compensation Act* and the *Workplace Safety and Insurance Act* provide that the Appeals Tribunal's decisions shall be final. However, sections 70 and 92 of the *Workers' Compensation Act* and section 129 of the *Workplace Safety and Insurance Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so." Due to the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

[7] A clarification is a type of reconsideration request. Section 7.0 of the Tribunal's *Practice Direction: Reconsiderations* deals with clarifications, and provides that, where a request is made to clarify some part of a decision but not to change its substance, the Tribunal may decide to clarify the decision without going through the full reconsideration process. In a clarification request the substance of the decision is not being called into question. Rather there is a

misstatement or ambiguity which is beyond an obvious typographical or technical error. Accordingly, the threshold test does not apply to a clarification request.

(iii) The clarification request

[8] In this case, the Applicant sought clarification of *Decision No. 1253/09* and I reviewed the submissions from the Applicant dated December 10, 2010. In that regard, the Applicant stated that the findings from the original decision were correct, save that a finding under section 31(1)(c) was omitted from the original decision. In particular, the Applicant requested that the original decision be clarified by making the further determination as to whether the Respondent Mr. Puri, is entitled to claim benefits under the insurance plan.

[9] The Applicant also noted key findings in the original decision. There was no dispute or issue taken with the findings noted above and the substance of the original decision, save the noted omission. In particular, the Applicant requested a further finding under section 31(1)(c) in the nature of a clarification as to the entitlement of the Respondent to claim benefits under the WSIA in respect of the noted accident. A number of WSIAT decisions were also noted, which were stated to have made such a finding where a Respondent had the right to pursue accident benefits claims and a tort action was not commenced, as well as the limitation period to do so having been expired. The decisions noted are not cited at length here but included *Decisions No. 822/10, 107/10, 2064/09, 1044/04,* and *2397/09.*

[10] After reviewing the above submissions, I find it necessary to clarify the original decision with regard to the inadvertent omission of the determination under section 31(1)(c). Such a clarification would not change the substance of the original decision and clearly addresses an omitted determination. I rely on the findings in the original decision noted above. In particular, it was found that the worker was a worker for a Schedule 1 employer and in the course of employment at the time of the MVA. I therefore clarify *Decision No. 1253/09* and provide the omitted determination that the Respondent is entitled to make a claim for benefits under the WSIA for the February 14, 2005, MVA.

DISPOSITION

[11] *Decision No. 1253/09* has been clarified and the application is allowed in part. The Respondent was in the course of his employment in the February 14, 2005, accident and is entitled to make a claim for benefits under the WSIA.

[12] The application remains denied in finding that the Respondent is entitled to pursue legal action against the Applicant, and is not barred by section 28 of the WSIA.

DATED: June 21, 2011

SIGNED: A.G. Baker