--SUMMARY--

Decision No. 1135/12 **09-May-2013** **J.Moore**

- In the course of employment (reasonably incidental activity test)
- Right to sue

No Summary Available

14 Pages

References: Act Citation
- WSIA

Other Case Reference
- [w2513n]

Style of Cause: Lue v. 1023248 Ontario Inc.
Neutral Citation: 2013 ONWSIAT 1001

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1135/12

BEFORE: J. P. Moore: Vice-Chair

HEARING: June 5, 2012, February 13, and 14, 2013 at Toronto
Oral

DATE OF DECISION: May 9, 2013

NEUTRAL CITATION: 2013 ONWSIAT 1001

APPLICATION: For an order under section 31 of the *Workplace Safety and Insurance Act, 1997* pertaining to an action filed at Oshawa in the Ontario Superior Court of Justice as court file #74742/11

APPEARANCES:

For the co-applicants: R. Rogers, A. Lennox, Lawyers

For a third party: D. Craig, Lawyer

For the respondent: J. P. Brown, Lawyer

Interpreter: Not applicable

REASONS

(i) Introduction

[1] This application arises out of legal proceedings related to an accident that occurred on September 30, 2009. The respondent, Mr. Lue, was injured on the premises of one of the applicants, K & K Recycling ("K & K"), while working for an auto repair business, Autoboyz Service Centre ("Autoboyz"). The accident resulted in serious injury to Mr. Lue, who commenced legal action against the corporate entity that operated K & K, 1023248 Ontario Inc., and three K & K employees. The defendants in that lawsuit commenced a third party action against the corporate entity that operated Autoboyz, 1116488 Ontario Ltd., and the owner of that business, Mr. Baggieri.

[2] After the accident, Mr. Lue received statutory accident benefits ("SABs"). The provider of those benefits, originally Coseco Insurance Company now Aviva Insurance, brought an application under section 31 of the WSIA. The defendants and third parties in Mr. Lue's legal action joined that application. The plaintiff, Mr. Lue, through his Counsel, has responded to the application.

[3] The parties seek a ruling as to whether Mr. Lue's lawsuit is barred or limited by the application of the provisions of the WSIA.

(ii) The issues

[4] The broad issue in this application is whether the lawsuit commenced by Mr. Lue regarding an accident that occurred on September 30, 2009 is barred or limited by the provisions of the WSIA. Specifically, it must be determined:

1. whether Mr. Lue was in the course of his employment for a Schedule 1 employer at the time of the happening of the accident;

2. whether the defendant employees were in the course of their employment for a Schedule 1 employer at the time of the happening of the accident;

3. if resolution of the first two issues permits Mr. Lue to pursue legal action, whether the action is limited as against the third parties.

(iii) The decision

[5] On the evidence and submissions presented to me, I am persuaded on the balance of probabilities that:

1. the respondent, Mr. Lue, was in the course of his employment for a Schedule 1 employer at the time of the accident of September 30, 2009;

2. the workers of the applicant, K & K, were in the course of their employment for a Schedule 1 employer at the time of the accident on September 30, 2009.

3. on those determinations, Mr. Lue's right of action is barred by section 28 of the WSIA; the third party action thereby fails, and no determination is made regarding limits on the third party action pursuant to section 29 of the WSIA.

(iv) Analysis

(a) Background and summary

[6] This application concerns an accident that occurred on September 30, 2009. The accident caused the respondent, Mr. Lue, to suffer severe injuries resulting in paraplegia. At the time of the accident, Mr. Lue was employed as an apprentice mechanic. He worked for the applicant Autoboyz.

[7] The accident resulted from the combined effect of the actions of five individuals, including Mr. Lue. Three of those individuals were workers of K & K, a recycling business. The fifth individual involved in the events was the owner of Autoboyz, and the defendant in Mr. Lue's action, Mr. Baggieri.

[8] On September 30, 2009, in the early afternoon, Mr. Baggieri organized the delivery of three derelict automobiles to the K & K yard. According to the evidence, K & K was approximately 100 metres from the Autoboyz premises. Mr. Baggieri had contacted the K & K dispatcher/scale operator to arrange for the delivery. Only one of the three vehicles was operational, so Mr. Baggieri decided to push the other two vehicles to the K & K premises using the operational vehicle. Mr. Lue and a co-worker agreed to steer the two non-operational vehicles while Mr. Baggieri pushed them. Upon arriving at the K & K premises, Mr. Baggieri attempted to push the vehicle driven by Mr. Lue onto a scale to weigh the vehicle. He was unable to do so and enlisted the assistance of a second K & K employee, a bobcat operator, to push Mr. Lue's vehicle up a ramp onto the scale. The operator did so. Once the vehicle was weighed, the bobcat pushed the vehicle down a ramp and Mr. Lue steered the vehicle off the ramp and to an area to the left of the ramp. Unbeknownst to Mr. Baggieri, Mr. Lue, and the bobcat operator, the scale operator had asked a third K & K employee, a crane operator, to be in position to take each vehicle away after it was weighed. The scale operator proceeded to do so with Mr. Lue's car, while Mr. Lue was still in the vehicle. Mr. Lue was crushed and significantly injured. According to the evidence, neither the scale operator nor the crane operator was aware that Mr. Lue was in the vehicle. Mr. Baggieri and the K & K bobcat operator were aware that Mr. Lue was in the vehicle, but were not aware that the scale operator had arranged for the crane operator to remove the vehicle driven by Mr. Lue.

[9] The scale operator, the crane operator, and the bobcat operator were all sued by Mr. Lue, along with their employer. They in turn filed a third party claim against Mr. Baggieri and his company. The plaintiff's pleadings detail allegations of negligence.

[10] In this application, the co-applicants seek a declaration that all of the alleged negligence that gave rise to Mr. Lue's injury occurred in the course of the employment of all parties to the action. They argued that, as a result, Mr. Lue's action is barred by section 28 of the WSIA, which stipulates:

Certain rights of action extinguished

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.

Schedule 2 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.

Restriction

(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.

Exception

(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. 1997, c. 16, Sched. A, s. 28.

[11] The third party seeks, in the alternative, a declaration that, if Mr. Lue's legal action can proceed against the defendants, the defendants' third party action is limited by the provisions of section 29 of the WSIA, which stipulates:

Liability where negligence, fault

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.

Determination of fault

(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. 1997, c. 16, Sched. A, s. 29.

[12] The provisions of section 26 of the WSIA are also relevant. That section provides:

> **No action for benefits**
>
> **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. 1997, c. 16, Sched. A, s. 26 (1).
>
> **Benefits in lieu of rights of action**
>
> **(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. 1997, c. 16, Sched. A, s. 26 (2); 1999, c. 6, s. 67 (6); 2005, c. 5, s. 73 (6).

[13] In response, the respondents, through their Counsel, argue that Mr. Lue was not in the course of his employment at the time of the accident because the actions of his employer took Mr. Lue out of the course of his employment. On such a finding, Mr. Lue would be permitted to continue his legal action. Alternatively Mr. Lue's Counsel argues that, if Mr. Lue was in the course of his employment at the time of the accident, one or more of the workers of K & K were not in the course of their employment at the time of the accident in issue and Mr. Lue's action could, therefore, proceed.

[14] As will be seen in the discussion below, I am persuaded that Mr. Lue was in the course of his employment when he was injured. I am also persuaded that the workers of K & K were in the course of their employment when Mr. Lue was injured. On those findings, Mr. Lue's action is barred by section 28 of the WSIA.

(b) The status of the respective employers

[15] It was not contested by any of the parties that both Autoboyz and K & K were Schedule 1 employers at the time of the accident. It was not contested that Mr. Lue was a worker of Autoboyz and that the three named defendants were workers of K & K at the time of the accident. The issue in this appeal is whether, in the circumstances giving rise to Mr. Lue's accident, some or all of the parties acted outside the course of their employment.

(c) Was Mr. Lue in the course of his employment at the time of the accident?

[16] The co-applicants cited and relied on a Board policy document, *Operational Policy Manual* ("OPM") Document No. 15-02-02, which addresses "Accident in the Course of the Employment." That document stipulates in part:

> 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.

[17] Regarding "place," the document recognizes that an accident can occur in the course of employment away from the premises where the worker usually works:

> If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer …, 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.

[18] The co-applicants argued that, at the time of the accident, Mr. Lue was in a place where he might reasonably have been expected to be in the course of his employment. According to testimony, Autoboyz occasionally cleared derelict vehicles from its premises by delivering them to a scrap metal dealer. According to Mr. Baggieri's testimony, since K & K was so close to his premises, he preferred to use their facility. The evidence established that Autoboyz had used K & K on prior occasions. In the submission of the co-applicants, it was reasonable that Mr. Lue would find himself on the K & K premises as part of his employment duties.

[19] With respect to the "time" element, the co-applicants argued that the accident happened during the course of Mr. Lue's regular work hours.

[20] With respect to the "activity" element, the co-applicants argued that what Mr. Lue was doing when he was injured was done in response to decisions made and directions given by his employer. They argued that there was no personal element that brought Mr. Lue to the K & K premises and that the sole purpose for his presence there was to perform a work-related activity: delivering derelict vehicles for the benefit of his employer.

[21] In response, Mr. Lue's Counsel, Mr. Brown, cited and relied on the Tribunal's *Decision No. 2508/09* (January 10, 2010), which applied with approval the criteria used in *Decision No. 165/96* to determine whether a worker was in the course of employment when injured:

> In our view, the test employed for "course of employment "is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors including:
>
> 1. the nature of the activity performed by a worker at the time of the accident;
> 2. the relationship of the specific activity to the worker's normal employment activity or routine;
> 3. any personal aspect to the activity which gave rise to the accident;
> 4. the nature of the risk associated with the activity - i.e. whether primarily an employment related risk or a public risk;
> 5. employer control or supervision of the activity;
> 6. the time of the accident - i.e., whether within or outside working hours;
> 7. the location of the accident - i.e., whether on premises controlled by the employer or on public premises;
> 8. the type of equipment or tools involved in the accident - i.e., whether it was equipment supplied by the employer;
> 9. specific remuneration (if any) for the activity at the time of the accident; and
> 10. contribution to the injury by the activity of the employer or co-worker(s).
>
> While no one factor will normally be determinative of the issue, a consideration of all of the factors may allow a Panel to determine the overall character of the activity – whether primarily work-related or primarily personal.

[22] With respect to the criteria in the Board's policy, Mr. Brown argued that the place where the accident occurred was away from the employer's premises. However, I am persuaded that it would be expected that an auto mechanic shop would need to deliver derelict vehicles to a scrap dealer. Hence, it would not be unexpected for a worker of such a shop to be on the premises of a scrap metal dealer. I accept the testimony that Mr. Baggieri had made such deliveries before

these events. I also accept that Mr. Baggieri had directed Mr. Lue to attend at the K & K premises for the purposes of delivering a derelict vehicle to the scrap metal dealer. I find that the place where the accident occurred was a place where Mr. Lue might usually have been expected to be while engaged in work-related duties. Accordingly, the "place" criterion supports that Mr. Lue was in the course of his employment.

[23] Mr. Brown argued that the "time" element in the Board's "course of employment" policy was not met in the present case. He cited evidence from Mr. Lue that he was on his lunch break when Mr. Baggieri asked him if he wished to participate in the delivery of the vehicles to K & K. However, in my opinion, those facts do not take Mr. Lue out of the course of his employment. Mr. Lue was not required to desist eating his lunch. He had, according to his evidence, finished doing so and was "playing with his phone". He also acknowledged in his testimony that he was not ordered to accompany Mr. Baggieri but agreed in response to a request. Hence, in my view, even if Mr. Lue was technically on his lunch break, he voluntarily waived his right to remain on his lunch break and agreed to participate in the delivery of the vehicles to K. & K. The delivery took place during normal working hours and at the employer's request after Mr. Lue had finished eating his lunch. I find that the time criterion is met.

[24] Finally, Mr. Brown argued that the activity that gave rise to Mr. Lue's accident occurred outside the scope of Mr. Lue's employment by virtue of the nature of the operation in which Mr. Lue participated. He stated that the undertaking breached the *Occupational Health and Safety Act of* Ontario. He argued that it may also have involved breaches of the *Highway Traffic Act*. He further argued that, by involving Mr. Lue in the undertaking, his employer reached the "Training Agreement" entered into by Autoboyz and Mr. Lue.

[25] Mr. Brown cited a number of Tribunal decisions that found workers to be acting outside the course of their employment when their actions were reckless, dangerous, or involved acts that were clearly not reasonably incidental to employment, such as fighting or horseplay. He submitted that the actions of Mr. Lue's employer met those criteria and thereby took Mr. Lue out of the course of his employment. Mr. Brown placed particular emphasis on Mr. Lue's status as an apprentice and argued that the scope of what was potentially dangerous for Mr. Lue was narrower than for an experienced worker.

[26] However with respect, I am not persuaded by Mr. Brown's arguments. In my opinion, they fail to establish that Mr. Lue was outside the course of his employment when he was injured for two reasons. The first is that, in my opinion, only in the most unusual of circumstances could a worker be effectively taken out of the course of his employment by the actions of his employer. In the case law cited by Mr. Brown, the issue was whether a worker took him or herself out of the course of employment by their own actions. None of those cases support the proposition that an employer's recklessness or disregard for the danger of an undertaking can take a worker out of the course of his employment.

[27] In making that assertion I rely on the definition of accident in subsection 2(1)(a) and on section 26 of the WSIA. Subsection 2(1)(a) provides that an accident "includes a willful and intentional act, not being the act of the worker." Even accepting that the employer's actions involved breaches, the direction that Mr. Lue participate in such activities was a deliberate and intentional act and is included in the definition of "accident." While the WSIA excludes acts of self-harm on the part of the injured worker, deliberate and willful acts of others resulting in harm to the worker are specifically included. Further, section 26 stipulates that entitlement to benefits

from the Insurance Plan is in lieu of all rights of action that a worker may have against his own employer for an accident happening "while in the employment of the employer." In my view, the intent and purpose of that provision is to establish that, under the "historic bargain" implicit in workers' compensation legislation, when a worker is injured in the course of his employment the "default" determination is whether there is entitlement to benefits from the Insurance Plan.

[28] The implication of Mr. Brown's argument is that an employer, by its actions, could take a worker out of the course of his employment and thereby deprive him of benefits from the Insurance Plan. I am not aware of any authority for that proposition, nor did Mr. Brown provide any. In my view, the principle set out in the decisions cited by Mr. Brown is that a worker can act outside the course of employment and thereby lose the right to benefits from the Insurance Plan. But, in my view, the Tribunal case law and section 26 stand for the proposition that an employer cannot take a worker outside the course of employment; only the worker can do so.

[29] Mr. Brown submitted that, because Mr. Lue was an apprentice, the scope of his employment was narrower and hence the scope of activities that could take him outside the course of his employment was broader. However, as was noted by Counsel for the co-applicants, the implication of that argument is that an apprentice has a lesser scope of entitlement to benefits from the Insurance Plan if he is injured and a greater reliance on access to litigation. In my view, that is contrary to the underlying principles of compensation legislation and not supported in any way by the legislation. Again, Mr. Brown did not provide any authority for this argument. As I interpret the legislation, there is no apparent difference in what constitutes the scope of employment for an apprentice. While the training agreement entered into by Mr. Lue and Autoboyz set out the scope of Mr. Lue's training agenda, I am not persuaded that the agreement was intended to preclude Mr. Lue from engaging in other aspects of an auto repair business. It may well be that Mr. Lue had the right, under the agreement, to refuse to perform certain activities that were beyond the scope of his training agenda. Similarly, he may have had the right to refuse to participate in unsafe activity. However, in my opinion, performing such activities at the employer's request would not take an apprentice out of the course of his employment. In my view, generally speaking, if a worker is performing an activity in response to a request or direction from his employer, and the activity is reasonably incidental to the employment, the apprentice will be in the course of his employment. If the employer executes the activity in a careless or negligent way, the apprentice will remain in the course of his employment because he continues to be subject to the risks of his employment.

[30] The second basis for not accepting Mr. Brown's argument is that, if Mr. Baggieri engaged in an activity that reflected a breach of the law, those activities occurred while Mr. Baggieri was pushing Mr. Lue's vehicle on a public road. I note, in this regard, that Mr. Baggieri was found by the Ontario Ministry of Labour to have breached the *Occupational Health and Safety Act* during that activity. But Mr. Lue was not injured in the course of that process. He was not injured until he was off the public road and on the K. & K. premises. At that point, Mr. Lue had ceased to be subject to the potential risks of Mr. Baggieri's delivery method.

[31] I am persuaded, therefore, that the manner in which Mr. Baggieri delivered his vehicles to K & K is not relevant in determining the status of Mr. Lue. The sole question is whether, while at K & K's premises, Mr. Lue acted in a manner that took him out of the course of his employment and, in my opinion, he did not.

[32] According to the evidence, Mr. Lue was in the vehicle when it was weighed because his employer asked him to do this. Mr. Lue complied with the request. In doing so, Mr. Lue appears to have been aware of the fact that his vehicle would be pushed up a ramp by an employee of K & K, at the request of his employer. In my opinion, there is nothing in those events that shows that Mr. Lue was performing an activity outside the course of his employment.

[33] Looking at the criteria in *Decision No. 165/96*, I find that the nature of Mr. Lue's activities at the time of the accident were included in his work duties and, in any event, reasonably incidental to his work duties. There was no personal element in those activities. I also find that Mr. Lue was under the supervision and control of his employer at the time of his accident, operating a vehicle belonging to his employer, receiving remuneration for that work during normal working hours. Finally, I find that the risks to which he was exposed were risks created by his employment. Mr. Lue was in the course of his employment when he was injured.

(d) Were the workers of K & K in the course of their employment at the time of Mr. Lue's accident?

[34] I have determined above that, at the time of Mr. Lue's accident, he was in the course of his employment. On that finding, Mr. Lue would be entitled to benefits from the Insurance Plan. However, pursuant to section 28 of the WSIA, notwithstanding that fact, Mr. Lue could have a right of action against another Schedule 1 employer and the workers of that employer if, in the circumstances giving rise to the injury, those workers were not acting in the course of their employment. In his submissions on behalf of Mr. Lue, Mr. Brown argued this requirement was met in the present case.

[35] Mr. Brown's arguments focused on the actions of the bobcat operator, Mr. Langille, who was named as a defendant in Mr. Lue's action. I note that Mr. Langille died at some point after Mr. Lue's accident. However, the materials contained three statements made by Mr. Langille during the course of the investigation of Mr. Lue's accident.

[36] Although Mr. Brown did not make any significant arguments with respect to the status of the crane operator and the scale operator, I will briefly address their roles in the events before examining Mr. Langille's conduct.

[37] On the evidence and testimony presented to me, I am persuaded that both the scale operator and the crane operator, named defendants in Mr. Lue's lawsuit, were acting in the course of their employment when the accident happened. Each individual testified in these proceedings. They also gave post-accident statements. Their evidence has been consistent in showing that they were unaware that Mr. Lue was in the vehicle when it was weighed. They each stated, and I accept their testimony as truthful, that they did not see Mr. Lue at any point in the process surrounding the weighing of the vehicle in which Mr. Lue sat.

[38] The scale operator stated that he could not see the scale directly but only through a screen. He indicated that he was able to see the ramp approaching the scale but did not notice Mr. Lue getting in or out of the vehicle on the ramp. He stated that he arranged for the crane operator to come over to pick up the car on the assumption that the vehicle would be unoccupied. He stated that, when he saw the bobcat push the vehicle up the ramp onto the scale, he assumed it was empty.

[39] In my opinion, on that uncontroverted evidence, I am not persuaded that the scale operator engaged in conduct of reckless disregard for the safety of others that might arguably

take him outside the course of his employment. There is no evidence that he was informed that the vehicle could be occupied when he learned that the vehicles would be delivered for weighing. His ability to communicate with the individuals outside his booth was limited by his situation as was his opportunity to observe what was going on around him. There is no evidence that he disregarded any workplace policy. If, in retrospect, he could have done more to be certain that the vehicle was unoccupied, any failure to do so was unintentional and not beyond the course of employment.

[40] Similarly, the crane operator testified that he was not told that the vehicle would be occupied when asked to pick it up. It does not appear that he was in breach of any workplace protocol or policy. I accept his testimony that he could not see into the vehicle because the windows were tinted. It also appears from Mr. Lue's testimony that, as he left the ramp, he drove his vehicle off to the left of the ramp whereas the crane was on the right side. Consequently, the crane operator would not likely have been able to see the driver's side of the vehicle even if the windows had not been tinted. Again, in my opinion, to the extent that the crane operator could have been more diligent to ascertain whether the vehicle was empty, any failure to do so did not constitute conduct outside the course of employment.

[41] Mr. Brown focused his arguments on the conduct of the bobcat operator, Mr. Langille. He noted testimony by the owner of K & K that Mr. Baggieri had no authority to direct any of K & K's employees, including Mr. Langille. The owner noted that his workers signed a "Worker Responsibilities" form when they began employment. One of the responsibilities they agreed to was as follows:

> Do not operate any equipment/machinery without given proper instructional [sic] and authority to do so.

[42] As noted above, Mr. Langille did not testify in these proceedings but provided post-accident statements. In each of those statements, he indicated that he was not aware that Mr. Lue was in the vehicle when he pushed the vehicle up the ramp onto the scale. He acknowledged, however, that as the vehicle left the scale he became concerned that someone might be in there because of the way in which the vehicle was moving. In testimony, Mr. Lue and Mr. Baggieri stated that, when Mr. Baggieri initially attempted to push Mr. Lue's vehicle up the scale ramp, he could not do so and asked Mr. Langille to complete the job. Mr. Lue and Mr. Baggieri each testified that, as Mr. Baggieri and Mr. Langille were discussing this, Mr. Lue stepped out of the car and was standing several feet away from Mr. Baggieri and Mr. Langille. In their view, Mr. Langille could not have missed seeing Mr. Lue and knew that Mr. Lue was in the vehicle. I accept that testimony and find that Mr. Langille was aware that Mr. Lue was in the vehicle when he pushed the vehicle up the ramp.

[43] Mr. Brown also cited acknowledgment by Mr. Langille in his prior statements that he sometimes did Mr. Baggieri a "favour" and helped him when he brought in derelict vehicles.

[44] While I am persuaded that Mr. Langille was aware that Mr. Lue was in the vehicle, and was doing Mr. Baggieri a "favour" by assisting him, I am not persuaded that, by these actions, Mr. Langille acted beyond the course of his employment.

[45] First of all, with respect to the "favour" aspect of the arrangement, there is no evidence that Mr. Langille stood to gain personally by doing a "favour" for someone who was, according to the evidence, an occasional customer of K & K. Mr. Baggieri was on the K & K premises for

the purpose of transacting business with K & K. Mr. Langille only got involved in assisting Mr. Baggieri when it became clear that Mr. Baggier could not get the vehicle up the ramp.

[46] I am also not persuaded that Mr. Langille pushed the vehicle up the ramp solely on the basis of an order given to him by Mr. Baggieri. As I interpret the evidence, Mr. Baggieri asked Mr. Langille to perform an activity that he performed occasionally: pushing a vehicle up the ramp. I am not persuaded that Mr. Baggieri exercised any authority over Mr. Langille and thereby compelled him to perform an action outside the course of his employment. He merely asked Mr. Langille to do what he sometimes did and Mr. Langille complied.

[47] The most compelling argument made by Mr. Brown with respect to Mr. Langille's activities is that, by knowingly pushing an occupied vehicle, Mr. Langille was acting outside the scope of his employment because the act itself was willfully reckless and showed a significant disregard for the safety of Mr. Lue.

[48] According to the testimony of the scale operator and the crane operator, what Mr. Langille did that day had never happened before and has never happened since.

[49] On the other hand, these witnesses agreed that vehicles did drive up the ramp onto the scale, notably, pickup trucks delivering scrap metal. The vehicles were weighed with their scrap content, left the ramp, deposited the scrap, and returned to the scale to be weighed without the scrap. Hence, the presence of a vehicle on the scale with an operator inside was not unusual.

[50] Similarly, the crane operator testified that he had seen the bobcat operator push items up onto the scale and that he was not aware of any policy against doing so. According to the testimony, using the bobcat to push a vehicle up the ramp was not unusual. It was also not unusual for vehicles to be driven up the ramp onto the scale. The ramp was there for an obvious purpose: to enable vehicles to access the scale without having to be lifted by the crane. While there was a general worker's responsibility for Mr. Langille not to operate equipment "without given proper instructional [sic] and authority to do so," there was no dispute that Mr. Langille was generally authorized to operate the bobcat. There was also no evidence that Mr. Langille was in breach of any specific workplace policy on the use of the bobcat. I am persuaded, therefore, that neither driving nor pushing a vehicle up the ramp onto the scale constituted an action outside the course of employment.

[51] What was apparently unique about what Mr. Langille did that day was that he effectively combined the two: pushing a vehicle onto the scale while there was someone in the vehicle. I am persuaded that Mr. Langille did so operating on the assumption that there was no risk to Mr. Lue. What Mr. Langille did not know was that the scale operator had previously arranged for the crane operator to pick up the vehicle after it was pushed up onto and off the ramp. I am persuaded that Mr. Langille was not aware of this communication and that it was this failure to communicate that led to the accident.

[52] Returning to the Board's policy, I note that, with respect to the "activity" element, the policy states that the following factors should be considered in determining whether the activity was outside the course of employment:

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

[53] Regarding Mr. Langille's decision to push the occupied vehicle onto the scale, I am persuaded that it was based on a spontaneous decision made by Mr. Langille. I am persuaded that the nature of the activity, while likely very rare, was an activity that Mr. Langille did in furtherance of his employment duties, i.e., facilitating the weighing of scrap metal, and did not deviate significantly from Mr. Langille's regular employment activities. In my view, his actions, while arguably careless, were not inherently risky. In fact, Mr. Langille completed the action he undertook without incident. What created the additional risk was a factor unknown to Mr. Langille: that a co-worker had arranged for the crane operator to pick up the vehicle. In essence, the very tragic event that led to the worker's injury arose out of a failure to communicate among three co-workers. I am not persuaded on the evidence that any of the K & K workers operated with reckless disregard for the safety of others.

[54] I note, in this regard, the following excerpt from the Tribunal's *Decision No. 2445/11* (January 18, 2012), at paragraph 21:

> In my opinion, all of the circumstances surrounding the worker's accident occurred in the course of the worker's employment. The worker's activity, while careless, was not willfully or intentionally reckless. The worker's actions were reasonably incidental to his employment – going from one site to another site on the premises. In doing so, the worker sustained an injury as a result of an unexpected and unintended event.

[55] In my view, that analysis applies to the actions of Mr. Langille. What he did, while perhaps rare, was reasonably incidental to his employment. It was done in pursuit of his employer's business objectives. His actions, while careless, were not willfully or intentionally reckless. The result was an injury from an unexpected and unintended event.

[56] Applying the criteria used in *Decision No. 165/96* to the K & K workers, I find that the activities they were engaged in at the time Mr. Lue was injured were part of or incidental to their regular employment duties. There was no personal element in their actions. They were on their employer's premises, during their regular work hours, using the employer's equipment, to accomplish the employer's business. They were remunerated for the work they were doing. There is no evidence that the actions of any of the K & K workers constituted an act of insubordination or a grievous breach of company rules. They each operated machinery or equipment that they had the authority to operate and in a manner that was consistent with their job duties. Even accepting that Mr. Langille may have exceeded the scope of his authority by using the bobcat in an unusual way, in my opinion, doing so did not take Mr. Langille outside the scope of his employment. He made an error in judgment that, combined with a communication breakdown, had a catastrophic result due to that failure to communicate. But his actions were not divorced from his work duties. He did what he believed was in the interests of his employer by responding to the request of his employer's customer.

[57] I find as a fact that none of the defendant workers named in Mr. Lue's lawsuit was acting outside the course of their employment at the time Mr. Lue was injured.

(e) Rulings

[58] The lawsuit brought by Mr. Lue against the defendants/co-applicants is barred by section 28 of the WSIA, on the finding that, at the time of the accident that injured Mr. Lue on September 30, 2009, Mr. Lue and the defendants/respondents were acting in the course of their employment for a Schedule 1 employer.

[59] As the action by Mr. Lue against the defendants cannot proceed, the basis for the third party action no longer exists.

[60] With respect to the worker's entitlement to SABs, I find that the worker's injury occurred in and arose out of the course of the worker's employment on September 30, 2009. Pursuant to section 31(1) of the WSIA, the worker is entitled to claim benefits under the Insurance Plan. I note that, under subsection 31(4) of the WSIA, the respondent has six months from the date of this decision to file a claim for benefits.

DISPOSITION

[61] The application is allowed:

1. The lawsuit brought by Mr. Lue against the defendants/co-applicants is barred by section 28 of the WSIA on the finding that, at the time of the accident that injured Mr. Lue on September 30, 2009, Mr. Lue and the defendants/respondents were acting in the course of their employment for a Schedule 1 employer.

2. As the action by Mr. Lue against the defendants cannot proceed, the basis for the third party action no longer exists.

3. With respect to the worker's entitlement to SABs, I find that the worker's injury occurred in and arose out of the course of the worker's employment on September 30, 2009. Pursuant to section 31(1) of the WSIA, the worker is entitled to claim benefits under the Insurance Plan. I note that under subsection 31(4) of the WSIA, the respondent has six months from the date of this decision to file a claim for benefits.

DATED: May 9, 2013

SIGNED: J. P. Moore