--SUMMARY--

Decision No. 1135/12R **16-Dec-2013** **J.Moore**

- Reconsideration (consideration of evidence)
- Right to sue

The application of the plaintiff in a civil case to reconsider Decision No. 1135/12 was denied. The Vice-Chair considered the evidence and came to a reasonable conclusion.

10 Pages

References: Act Citation
- WSIA

Other Case Reference
- [w0514s]
- CROSS-REFERENCE: Decision No. 1135/12

Style of Cause: Lue v. 1023248 Ontario Inc.
Neutral Citation: 2013 ONWSIAT 2674

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1135/12R

BEFORE: J. P. Moore: Vice-Chair

HEARING: October 25, 2013 at Toronto
Written

DATE OF DECISION: December 16, 2013

NEUTRAL CITATION: 2013 ONWSIAT 2674

DECISION UNDER REVIEW: Respondent request for reconsideration of *Decision No. 1135/12* dated May 9, 2013

APPEARANCES:

For the respondent: J. P. Brown, Lawyer

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

For a third party: D. Craig, Lawyer

REASONS

(i) Introduction

[1] This decision addresses a request to reconsider *Decision No. 1135/12*. The request is brought by the party respondent to an application brought under section 31 of the *Workplace Safety and Insurance Act, 1997* ("WSIA"). In *Decision No. 1135/12*, the present Vice-Chair issued a declaration, pursuant to section 31, stipulating that a lawsuit brought by the respondent against several defendants was barred by section 28 of the WSIA. The decision also barred third party actions taken by the defendants. Finally, the decision ruled that the worker was entitled to claim benefits under the Insurance Plan.

[2] The present request for reconsideration has been brought by the respondent. The request is supported by written submissions filed by the respondent's counsel, Mr. Brown. The submissions allege that *Decision No. 1135/12* contained several substantive and procedural errors which, if corrected, would likely have resulted in a different decision. The respondent also seeks an extension of the time for filing the reconsideration request.

[3] What follows is my decision on the reconsideration request.

(ii) The threshold test

[4] The *Workplace Safety and Insurance Act* and the *Workers' Compensation Act* provide that the Appeals Tribunal's decisions shall be final. However, section 129 of the *Workplace Safety and Insurance Act* and sections 70 and 92 of the *Workers' Compensation Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so." Because of 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.

[5] Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of finality and the prejudice to any party if the decision reopened. The threshold test has been discussed in *Decision Nos. 72R* (1986), 18 W.C.A.T.R. 1; *72R2* (1986), 18 W.C.A.T.R. 26; *95R* (1989), 11 W.C.A.T.R. 1; and *850/87R* (1990), 14 W.C.A.T.R. 1.

[6] As discussed in *Decision No. 871/02R2*, one of the fundamental concepts which guides the entire Tribunal process is a duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote a fair process. The threshold test and the role of the reconsideration process must be understood in the context of the Tribunal's processes generally. Most parties have the option of an oral hearing, which is a hearing "de novo" at the Tribunal. This is very unusual at the final level of appeal within any adjudicative system. The Tribunal invests considerable resources in preparing cases for hearing and assisting parties to identify the issues in dispute so that parties can in turn be fully prepared for the hearing. The reconsideration process should not be so generally available that it undermines the important role of the original hearing or the finality of decisions which are reached after a fair hearing process.

[7] Because of limited resources, the Tribunal must also carefully balance its processes to ensure that parties awaiting their first hearing are not penalized because of the expenditure of scarce resources on reconsideration requests.

[8] It is instructive to refer to *Decision No. 871/02R2*'s analysis of the threshold test that a reconsideration request must meet and the reasons for this:

> Section 123 of the Workplace Safety and Insurance Act provides that a decision of the Appeals Tribunal under the Act is final. While the Appeals Tribunal does have the discretionary power to reconsider its decision under section 129 of the Act, this remedy is an exceptional one. Because the integrity of the appeal process and the finality of Tribunal decisions are important considerations in any reconsideration application, the standard of review or threshold which must be met in the reconsideration process is a high one. Although some representatives may advise their clients that a reconsideration application is merely a routine step in the WSI appeal process, this advice is wrong. The reconsideration process is a special remedy and the Tribunal's power to reconsider is invoked only in unusual circumstances; it is not intended as a routine process for any party or representative unhappy with a Vice-Chair or Panel decision. To treat reconsiderations as a routine, insignificant process would effectively undermine the statutory principle of finality, suggest that parties could routinely discount the original hearing process, and put successful parties at risk of multiple proceedings. To be successful on a reconsideration application, an applicant must discharge the onus to satisfy the Tribunal that an otherwise final decision should be reopened. Essentially, an applicant must:
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> (a) demonstrate that there was a fundamental error of law or process which, if corrected, would likely produce a different result, or
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> (b) introduce substantial new evidence which was not available at the time of the original hearing and which would likely have resulted in a different decision had this substantial evidence been introduced at the original hearing.
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> Any error and its resulting effects must be sufficiently significant to outweigh the importance of decisions being final and the prejudice to any party of the decision being re-opened. [emphasis in original]

[9] The Divisional Court has reviewed and upheld the Tribunal's reconsideration process in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No. 919 (Div. Ct). In particular, the Court found that:

> because a reconsideration is distinct from an appeal, a high threshold test is required to balance the interests of the Tribunal and other parties, and the original adjudicator is in the best position to evaluate the proceedings to address natural justice allegations.

(iii) Findings and conclusions

[10] In the present case, I am persuaded that the respondent should be granted an extension of time to bring the reconsideration request. However, I am not persuaded that the Tribunal's threshold test for reopening a Tribunal decision has been met. I am not persuaded that the respondent has identified any errors of such significance that their correction would lead to a different result.

[11] As noted above, the reconsideration request arises out of an application brought under section 31 of the WSIA. That application concerned an accident that occurred on September 30, 2009, in which the respondent suffered severe injuries resulting in paraplegia. The respondent subsequently brought legal action against a third party employer on whose premises the accident occurred, and several of its workers, alleging that the accident resulted from the negligence of the workers of the third party employer. That employer filed a third party claim against the respondent's employer.

[12] The details of the respondent's accident are set out in paragraph 8 of *Decision No. 1135/12*.

[13] The reconsideration request seeks the following remedy:

> Pursuant to section 129 of the *Workplace Safety and Insurance Act, 1997* the respondent Anthony Lue (Lue) requests a reconsideration of the decision rendered by the Vice-Chair. Lue requests that the decision be revoked and his right to sue the Applicants be restored. Alternatively, Lue requests that the decision be revoked as it relates to the applicant Arnold Langille (Langille) and that his right to sue Langille be restored.

[14] The reconsideration requests asserts that *Decision No. 1135/12* contained the following errors and omissions:

> A clear error in law respecting the conduct of Langille, who was deceased and provided no testimony.
>
> Overlooking the important evidence of Kevin Morgan (Morgan) owner of the Applicant, K&K Recycling (K&K), regarding Langille's intentional breaching of a known protocol and policy of his employment.
>
> A clear error in law and overlooking important evidence by holding that a sequence of events that led up to Lue's injury was "irrelevant." These events were unlawful and would take Lue outside the course of his employment.
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> A clear error in law and overlooking important pieces of evidence by equating the word "place" to "premises" under [the WSIB's] Operational Policy 15-02-02. The place where the incident occurred was the scrapyard where the crane was operated. The "premises" included areas where the public attends, the office, a parking lot, and the scrapyard. By expanding the definition of place, the Vice-Chair erred in law by reversing the onus on [Lue]. Moreover, the Vice-Chair overlooked the evidence that Lue had never been in the place of the incident scraping cars before, that K&K employees had never seen this activity take place before, and that the apprenticeship agreement nowhere contemplated that Lue would be in such a place.
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> A clear error in law by placing the onus of proof on Lue as opposed to the Applicants.
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> A failure to render a decision in relation to the submissions respecting section 28(4) of the Act.

[15] I address each of those assertions below.

(a) Extending the time for bringing a reconsideration request

[16] I am persuaded that an extension of the time limit imposed on reconsideration requests by the Tribunal's Practice Direction should be allowed. I note, first of all, that the request was filed three days after the 40-day time limit set out in the Tribunal's Practice Direction. I also note that the Practice Direction is not mandatory but states:

> The Tribunal has determined that as a matter of good practice, it is not advisable to reconsider Right to Sue Applications unless a request to consider and the supporting materials are received within 40 days of the date of the decision.

[17] I am persuaded, therefore, that there are reasonable grounds for extending the time for filing the respondent's reconsideration request. I find that the delay was insignificant and cause no prejudice to another party.

(b) Error of law regarding the conduct of Langille

[18] Upon this point, Mr. Brown argued that, notwithstanding making a finding that statements made by Mr. Langille were not credible, the decision found as a fact that Mr. Langille's conduct did not amount to acting in a manner intended to cause harm to the respondent Lue. Mr. Brown cited a statement made by the co-applicant Langille in which Langille acknowledged that he pushed a vehicle in which Mr. Lue was an occupant onto a scale and then off the scale into an area where there was a crane. Mr. Brown appears to be attempting to impute to Mr. Langille greater degree of culpability than simple negligence.

[19] Under this heading, Mr. Brown also argued that the decision failed to consider the evidence of another of the applicants/defendants, the operator of a crane on the employer's premises. Mr. Brown submitted that this individual:

> … gave evidence that the pushing of a scrap car toward the crane of the scale had never happened before,…

[20] However, in my opinion, *Decision No. 1135/12* did, in fact, consider this evidence specifically and generally.

[21] I note, first of all, that paragraph 48 of *Decision No. 1135/12* stated explicitly that, according to the testimony of both the crane operator and the "scale operator":

> … [W]hat Mr. Langille did that day had never happened before and has never happened since.

[22] Consequently, the assertion by Mr. Brown that I failed to consider the crane operator's testimony is not true.

[23] With respect to the broader argument under this heading - that *Decision No. 1135/12* failed to consider Mr. Langille's statement and impute to Mr. Langille a greater degree of culpability than simple negligence - I note that paragraphs 50, 51, and 53 explored in detail the nature of Mr. Langille's motives and the extent of his culpability. The decision specifically found, in paragraph 51, regarding Mr. Langille's decision to push Mr. Lue's car onto the scale:

> 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.

[24] In effect, under this heading, Mr. Brown is rearguing submissions that he made at the original hearing. I rejected those arguments at that time and I am not persuaded that the reconsideration submissions identified evidence that was ignored or not considered which might otherwise have resulted in a different finding regarding Mr. Langille's conduct.

(c) Failing to consider evidence of Kevin Morgan

[25] On this point, Mr. Brown argues that *Decision No. 1135/12* failed to consider testimony from the owner of K & K Recycling regarding K & K's workplace policies. Specifically, Mr. Brown cited testimony by Mr. Morgan about two policies regarding dangerous or unauthorized use of machinery. Mr. Brown asserted that, in failing to consider those policies fully, and failing to conclude that a breach of those policies took K & K's workers outside the course of employment, *Decision No. 1135/12* failed to consider important evidence and thereby contained a significant error.

[26] This point was argued at the original hearing. Mr. Brown is re-presenting the same argument, but suggests that *Decision No. 1135/12* contained a fatal error because it only addressed one of the two policy stipulations cited by Mr. Morgan.

[27] I note regarding this argument that paragraph 41 of *Decision No. 1135/12* cited the form about which Mr. Morgan testified. The form was a "Worker Responsibilities" form that each worker signed when they began employment. Paragraph 41 also cited one of those "Responsibilities" as follows:

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

[28] The decision does not cite a second component of the form in which workers are prohibited from operating machinery in a way that might endanger themselves or others. However, in my view, paragraphs 47 through 50 of *Decision No, 1135/*12 addressed Mr. Langille's conduct within the context of the company's policy expectations:

> [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.
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> [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.
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> [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.
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> [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.

[29] What is clear from those paragraphs is that the test to be met in determining the status of Mr. Langille is whether he exceeded the scope of employment, not whether he breached company policy. *Decision No. 1135/12* addressed that issue. In my opinion, not specifically considering a particular policy stipulation did not constitute a significant error the correction of which would likely lead to a different result.

[30] Under this heading, Mr. Brown also re-presented an argument that he made at the previous hearing that Mr. Langille exceeded the scope of his employment by allowing someone from outside the company to direct his activities. Paragraph 46 of *Decision No. 1135/12* considered and rejected that argument. There is therefore no identifiable failure to consider evidence relevant to that argument.

(d) The status of the respondent Lue

[31] On this point, Mr. Brown argued that *Decision No. 1135/12* erred in concluding that a sequence of events that preceded the arrival of Mr. Lue at the premises where the injury occurred was irrelevant to determining Mr. Lue's status at the time of the injury. This issue was raised by Mr. Brown at the original hearing. It was addressed in the portion of *Decision No. 1135/12* that addressed Mr. Lue's status at the time of the accident (section (iv)(c)). There is therefore no identifiable failure to consider evidence relevant to that argument. I am also not persuaded that the conclusions on this issue were erroneous.

[32] In the reconsideration submissions, Mr. Brown argued that *Decision No. 1135/12* failed to consider whether Mr. Lue's own conduct and his apparent breach of his apprenticeship training agreement could take Mr. Lue out of the course of his employment.

[33] In my view, that issue was implicitly considered in paragraph 30 of *Decision No. 1135/12*, where it was concluded that any risks associated with the activities Mr. Lue and his employer engaged in prior to arriving at K & K premises ceased and no longer had the potential to cause harm to Mr. Lue.

[34] With respect to the training agreement, paragraph 29 found and concluded:

> 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.

[35] Finally, for the sake of completeness, I note that paragraphs 31 to 33 of *Decision No. 1135/12* considered whether Mr. Lue's conduct while at the premises of the third party employer took Mr. Lue out of the course of his employment. The conclusion in those paragraphs was that it did not.

[36] Consequently, I find no basis for concluding that *Decision No. 1135/12*, contained significant errors in its findings and conclusions regarding Mr. Lue's status the correction of which would likely have led to a different result.

(e) Determinations regarding the "place" where the respondent Mr. Lue was injured

[37] That issue was raised at the hearing of this application by Mr. Brown. It was addressed in paragraph 22 of *Decision No. 1135/12*. In his reconsideration request, Mr. Brown argued that the decision erred by expanding the concept of place to include the entirety of the premises of the third party employer. It is not entirely clear what the point of this argument is since Mr. Lue's accident occurred in what was clearly the operational part of the third party employer's premises. In any event, it is clear from the Board's policy that the concept of place is to be given a large and liberal interpretation. I note the following excerpt from the Operational Policy in question, Document No. 15-02-02:

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

[38] Mr. Brown seems to be arguing that the decision erred by finding that the third party employer's premises was a place where the worker might reasonably have been expected to be since he had never been on those premises before. However, that point was addressed and considered in paragraph 22 of *Decision No. 1135/12*. Hence, Mr. Brown's argument, on this issue, is a reargument of an issue that was addressed and disposed of by *Decision No. 1135/12*. In my opinion, it was correctly disposed of. Consequently, Mr. Brown has failed to identify an error on this issue the correction of which would likely lead to a different result.

(f) The onus of proof was placed on the respondent rather than on the applicant

[39] With respect, there is no evidence to support that argument. Mr. Brown's specific point on this issue reads as follows:

> The Vice-Chair improperly placed the onus on Lue as opposed to the applicants in determining various issues in the proceedings. References to evidence and arguments it the decision clearly reflects that when weighing and considering the evidence, the Vice-Chair put the onus on Lue throughout the decision.

[40] Mr. Brown did not identify any examples of placing the onus on Mr. Lue on any of the issues addressed in the decision. Earlier in his submissions, Mr. Brown appeared to suggest that, in determining the true nature of the conduct of the applicant Langille, I accepted the testimony of Mr. Lue over written statements provided by Mr. Langille. In my opinion, it is erroneous to suggest that preferring Mr. Lue's testimony over other evidence constituted placement of the onus of proof on that issue on Mr. Lue. In the absence of examples of clear placement of the onus on Mr. Lue, I am not persuaded that Mr. Brown has identified an error on this issue the correction of which would likely lead to a different result.

(g) Subsection 28(4)

[41] Mr. Brown argued that *Decision No. 1135/12* failed to consider submissions made by Mr. Brown on the applicability of subsection 28(4) to the application. That subsection stipulates that the bar against legal action in subsection 28(1) of the Act will not apply if an employer, other than the worker's employer, supplies a:

> … motor vehicle, piece of machinery or equipment on a purchase or rental basis without supplying worker's to operate the motor vehicle, machinery or equipment. …

[42] In the course of submissions, the applicants each addressed subsection 28(4) and argued that, on the evidence, it had no applicability to the case at hand since there was no evidence that anyone involved in the events leading up to Mr. Lue's accident provided a motor vehicle, piece of machinery, or equipment on a purchase or rental basis without supplying worker's to operate that equipment.

[43] In his responding submissions on this issue, Mr. Brown very briefly alluded to subsection 28(4) without making any reference to an evidentiary basis for relying on that subsection and without making any submissions as to how and why the subsection would apply so as to allow an exemption from the provisions of subsection 28(1).

[44] In the absence of presentation of evidence and a substantive argument regarding the applicability of the section, I concluded that the section had no application to the circumstances

of this case and did not address the issue. Had I done so, I would have concluded that the section was irrelevant and that no one had produced evidence or persuasive argument to show that the section was relevant.

[45] Consequently, failure to address that particular subsection does not constitute an error the correction of which would likely lead to a different result.

[46] In summary, I am not persuaded that Mr. Brown has identified, in his reconsideration submissions, any errors substantive or procedural the correction of which would likely lead to a different result. In my view, Mr. Brown has not shown that *Decision No. 1135/12* overlooked any evidence. The fact that the evidence cited and relied on by Mr. Brown was rejected, distinguished, or considered irrelevant in the decision does not constitute overlooking that evidence.

[47] Since the reconsideration request does not meet the Tribunal's threshold for reopening one of its decisions, the reconsideration request is denied.

DISPOSITION

[48] The respondent's reconsideration request is denied.

DATED: December 16, 2013

SIGNED: J. P. Moore