WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 835/20

BEFORE: G. Dee: Vice-Chair

HEARING: July 9, 2020 at Toronto
Oral by teleconference

DATE OF DECISION: July 22, 2020

NEUTRAL CITATION: 2020 ONWSIAT 1335

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

APPEARANCES:

For the applicants: E. Dadmand, Lawyer

For the respondents: M. Miller and D. Fischer, Lawyers

For the interested parties: T. Polic, Lawyer

Interpreter: N/A

REASONS

(i) Introduction

[1] This is a decision regarding a right to sue application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the WSIA).

[2] The application pertains to a personal injury claim filed in the Ontario Superior Court of Justice with Court File No. CV-15-00521359-0000.

[3] The claim is with respect to a slip and fall accident that occurred on February 20, 2013. The accident occurred in close proximity to where the driveway for an apartment building at 530 S. Road meets the municipal sidewalk in front of the building.

[4] The applicants in these proceedings are defendants in the court action. They seek an order that the respondent/plaintiffs are not entitled to commence an action against them for personal injuries sustained in the accident. This request is based upon the provisions of section 28 of the WSIA that may in some circumstances remove rights of action by workers injured in the course of their employment.

[5] The first applicant (HLH) is the owner and property manager of a number of buildings including two high rise apartment buildings with street addresses of 500 and 530 S. Road. HLH is a Schedule 1 employer under the WSIA.

[6] The second applicant (SLGM) is a maintenance company that was hired by HLH to clear ice and snow from the properties of the apartment buildings at 500 and 530 S. Road. SLGM is also a Schedule 1 employer under the WSIA.

[7] The first respondent (VH) worked as a cleaner for the HLH at both 500 and 530 S. Road at the time of the accident. The second respondent (BH) is the spouse of the first respondent.

[8] In addition to working for HLH, VH lived with BH in an apartment that they rented from HLH at 530 S. Road.

[9] The additional interested parties in these proceedings are the municipality and another maintenance company (CC) that are also defendants in the civil claim. The Statement of Claim asserts, and I accept for the purpose of this application, that CC is responsible for maintaining the municipal sidewalk at or near where the accident occurred. The representative of the interested parties observed but did not participate in the present proceedings.

[10] The accident at issue occurred at approximately 7:15 a.m. when VH was leaving 530 S. Road where she lived. She was leaving the premises on foot. She was intending to walk to 500 S. Road (about a three minute walk using the municipal sidewalk and crossing a public street) where she was scheduled to perform her work activities for the day. When the accident occurred VH was very close to where the private driveway at her apartment building met the municipal sidewalk.

[11] The employer's report of accident submitted to the WSIB by HLH in respect of the incident stated that the worker was not working at the time of the accident. The WSIB denied coverage to VH for the injuries sustained in the fall due to a finding that the worker was not in the course of her employment. VH did not appeal that decision of the WSIB but has proceeded

with a civil action instead. The decision of the WSIB is not binding upon me in these proceedings.

[12] There is agreement between the parties that the sole issue to be determined in this application, that will determine the outcome of the application, is whether VH was in the course of her employment at the time of the accident.

[13] If VH was in the course of her employment at the time of the accident neither VH nor BH may commence an action against either the first or second applicants for injuries resulting from the accident.

[14] If VH was not in the course of her employment there is no barrier to be found in the WSIA to the pursuit of the action for personal injuries by VH or BH.

[15] I accept that this agreement between the parties, regarding the sole issue to be determined in this application, is based upon an accurate reflection of the law as contained in section 28 of the WSIA and the agreed upon facts in this matter.

(ii) Analysis

(a) Decision overview

[16] I find that VH was not in the course of her employment when the accident occurred. As a result of this finding the application made by HLH and SLGM is denied. VH and BH may therefore proceed with their civil action.

[17] In arriving at this conclusion I have not determined whether the accident that occurred took place on the driveway of 530 S. Road or on the municipal sidewalk or on some combination of both. I have not determined this issue as under either scenario I would find that VH was not in the course of her employment at the time of the accident. Furthermore, there is somewhat inconsistent evidence available on the issue of precisely where the accident occurred and the resolution of the issue may be of significance to the matter of liability in the civil action that is before the courts. It is preferable that if a decision is required on precisely where the accident occurred that the issue should be determined in a forum where something of substance turns on the matter.

[18] I have arrived at the determination that VH was not in the course of her employment when the accident occurred as I find that while VH was either on the employer's premises at 530 S. Road at the time of the accident or just before the time of the accident, VH was not on the employer's premises at 530 S. Road for the purposes of her employment.

[19] The worker was instead on the premises at 530 S. Road at the time of the accident, or just before the time of the accident, because that was where she lived and not because that was where she worked.

[20] If the worker was not on the employer's premises at 530 S. Road for the purposes of work but instead for another purpose (because she lived there) then the worker's trip to where she was to perform her work duties that day at 500 S. Road had no greater work-relatedness than any other trip from home to a fixed place of employment. Such trips are, with some specified exceptions not applicable in this case, routinely seen under WSIB policy and in WSIAT jurisprudence as not being in the course of employment until such time as a worker arrives at the employer's premises for the purpose of performing work for the employer.

(b) Workers travelling to a fixed workplace are not generally considered to be in the course of employment

[21] In right to sue applications WSIB policy is not binding upon the Tribunal. However, there is a strong desire to maintain consistency of decision-making between entitlement decisions in which the Tribunal must apply WSIB policy in accordance with section 126 of the WSIA and right to sue decisions where the Tribunal is not bound by the provisions of WSIB policy. This is at least in part because issues arising out of an accident may be considered by the Tribunal in both right to sue applications and benefit appeal decisions. As a result of this desire to maintain consistency, WSIB policy is still provided with significant deference in right to sue applications even if such policy is not technically binding upon the Tribunal in right to sue applications.

[22] The general approach to the status of workers who are travelling to work is dealt with in the WSIB's *Operational Policy Manual* (OPM) at Document No. 15-03-03. That approach is that workers are generally found not to be in the course of employment while travelling to work except in particular types of circumstances that are not applicable in the present application:

> It is generally considered that workers are in the course of the(ir) employment when they reach the employer's premises or place of work. A worker is generally not considered to be in the course of the employment when travelling to or from the workplace, although there are exceptions to this general rule. (See 15-03-05, Travelling.) The WSIB's practice in respect of accidents occurring on an employer's premises center on geographical location as a determining factor as to whether or not a worker was in the course of employment at the time of the accident. Location has been adopted as the line to be drawn between personal activities and work-related activities.
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> Without limitation to the following, the WSIB will consider entitlement in claims where a worker is injured when:
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> - going to or from work in transport under the control and supervision of, or chartered by, the employer
> - obtaining pay or depositing tools, etc., on the employer's premises after actual work hours
> - participating in a work-related sports activity, for example, school teachers and camp counselors, when the employer condones these activities by making the premises available and/or exercising a form of supervision and control
> - attending compulsory evening courses
> - travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer
> - travelling to or from a convention and/or participating in convention activities, and
> - on a lunch, break, or other non-work period (period of leisure) by ordinary hazards of the employer's premises.

[23] If it was not for the fact that the VH was on property owned by her employer HLH when she commenced her trip to work on February 20, 2013 there would simply be no question in my view that she was not in the course of her employment while travelling to work. While the purpose of her journey was to get to work, until she got there she would not be considered to be in the course of her employment.

[24] However, VH was on property owned by her employer HLH when she started her journey to where her work duties were to be performed on February 20, 2013 and the applicant's submissions relied heavily on that fact in arguing that VH was in the course of her employment at the time of the accident.

(c) The premises test requires more than simply being on the employer's premises in order to be to be in the course of employment

[25] As is stated in the above quote from OPM Document No. 15-03-03, workers are generally not considered to be in the course of their employment when travelling to work but are generally considered to be in the course of employment "when they reach the employer's premises or place of work".

[26] This might suggest that VH, by being on the employer's premises as she started her walk to get to where she was working that day, started that walk in the course of employment.

[27] However, the same OPM Document also requires that in order to be considered in the course of employment the reason for a worker being on the employer's premises must be for the purpose of the employer's business:

> A worker is considered to be in the course of employment on entering the employer's premises, as defined, at the proper time, using the accepted means for entering and leaving to perform activities for the purpose of the employer's business.

[28] The central difficulty with the argument made by the applicant in this matter, that VH's presence on the premises of her employer at 530 S Road at or just before the time of the accident is significant, is that VH was not on the employer's premises at 530 S Road in order to perform activities for the purpose of the employer's business.

[29] VH was at 530 S Road that morning solely because that was where she lived. We did not receive direct evidence on what VH was doing in the hours prior to the accident (apart from the few minutes prior to the accident) but given that her personal residence was at 530 it can be presumed that she was doing the types of things individuals usually do in their homes. There was no evidence received and no reason to find that VH was performing duties for her employer in the hours prior to her accident.

[30] VH was therefore not in the course of her employment while on the employer's premises at 530 S Road where she lived on the morning of February 20, 2013 given that she was not on those premises for the purpose of performing work in support of her employer's business.

[31] Emphasis was also made in the submissions of counsel for the applicant that VH would spend some time during the week working at 530 S Road on behalf of her employer.

[32] VH in her testimony stated that she would usually be scheduled to work one day per week at 530 S Road. It would also appear based upon the testimony of the witness for the applicant, a former property manager of the two apartment buildings, that VH could on occasion be requested to perform work at 530 S Road that was not previously scheduled work "as needed". The witness for the applicant did not have specific information on how frequently VH was actually required to perform work at a different building than initially scheduled. VH in her testimony agreed that she could be called to the other building on occasion but that she mostly worked the full shift at one location. She also emphasized that she was not employed as a superintendent and that she had fixed working hours as a cleaner. If she was asked to perform cleaning work at 530 S Road that was not previously scheduled when she was scheduled to work

at 500 S Road, it would still be during the time of her regular shift. I received no evidence that contradicted this testimony from VH and I accept her testimony on this issue.

[33] I do not find the fact that VH sometimes worked at 530 S Road or the fact that sometimes she might be asked to work at 530 S Road even when she was not scheduled to work there but was instead scheduled at 500 S Road to be significant in this matter. Regardless of the fact that VH would sometimes perform work at 530 S Road for the applicant employer, there is no evidence that she had been requested to perform work at 530 S Road for the employer on the date of the accident. VH's presence at 530 S Road on February 20, 2013 in the period prior to the accident was therefore not for the purpose of performing activities on behalf of her employer. Her presence at that location at or just before the time the accident is explained instead by the fact that she lived there.

(d) Time, Place and Activity do not place VH in the course of her employment at the time of the accident

[34] In closing arguments applicant's counsel emphasized that VH had relatively fixed working hours from approximately 7:00 a.m. until 4:00 p.m. and that the accident occurred just prior to the start of the worker's expected start time for work. This was significant it was submitted given that WSIB policy as found in OPM Document No. 15-02-02 provides that accidents occurring during a reasonable period before or after those work hours are considered to be in the course of employment:

> If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

[35] The WSIB policy in question is one that describes how the interaction between the three variables of time, place and activity are considered when attempting to determine whether an accident is work-related.

[36] If the matter of time was considered on its own as the only relevant variable, the above quoted provision of WSIB policy could be read to suggest that VH's accident, having occurred during a reasonable period prior to her starting work, should be considered an accident that occurred in the course of employment.

[37] However, the determination of work-relatedness is not made based on consideration of just one variable, in this case time. The determination of work-relatedness is based on consideration of all three variables of time, place and activity.

[38] In terms of place, in this particular case the worker was not on the employer's premises where she was scheduled to work that day. She was instead at the location where she lived (which happened to be owned by her employer) and in order to get to the place (the employer's premises) where she was to work she needed to traverse other places (municipal sidewalks and roads) not owned or controlled by her employer before she got to the place where she was to work that day. I therefore find that the place of the accident was much more closely associated with the worker's personal life than her work life.

[39] In terms of activity the worker was travelling to work. This is not a core work function. I acknowledge that there are some limited circumstances where the activity of travelling to work in combination with the presence of other work related factors, might allow a worker to be considered in the course of his or her employment. However, there is an absence of other

work-related factors such as are found in the above quoted excerpt from OPM Document No. 15-03-03 and, as can be seen in the cases cited below, travel to work on its own is not considered an activity reasonably incidental to employment that is sufficient to establish the work-relatedness of an accident.

[40] However, regardless of the extent of work-relatedness that exists with respect to each of the three variables of time place and activity, there are some circumstances that do not require a nuanced weighing of time, place and activity as called for in OPM Document No. 15-03-02 because other additional WSIB policies specific to those circumstances applies.

[41] One of those circumstances is travel to work which is, as noted above, specifically dealt with in OPM Document No. 15-03-03 and which provides that "A worker is generally not considered to be in the course of the employment when travelling to or from the workplace." The exceptions to that general rule as outlined in the policy document do not apply to the circumstances of VH as they existed at the time of the accident.

[42] A worker who is travelling to work is not in the course of employment, even if they are just minutes or seconds or even mere feet from arriving at the workplace, until such time as they arrive at the workplace premises unless one of the exceptions to the general rule applies. The premises rule is strict in that regard. See for example *Decision Nos. 2697/15* and *936/18.*

[43] The following is stated in *Decision No. 2697/15:*

> [17] With respect to the activity of commuting to work, Board policy stipulates that a worker is generally not in the course of employment when travelling to or from the workplace, with exceptions not relevant to this appeal (such as travel on employer's business).
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> [18] All workers, other than telecommuters, must travel from home to the workplace. For all these workers, this commute is related to their employment in the sense that the only reason they are on that bus, in their car, cycling that path, or walking along that route, is to get to work. Yet, the entirety of one's commute is not considered an activity reasonably incidental to employment, sufficient to establish the work-relatedness of any accident occurring from the moment a worker leaves home. As stated in *Decision No. 1178/10*:
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> > … it is clear that the general rule is that commuting to and from work is not sufficient, in and of itself, to bring a worker into the course of his or her employment. There must be some greater nexus between the work and the travel.
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> [19] Board policy has clearly established geographical location as "the line to be drawn between personal activities and work-related activities", in determining whether or not a worker, travelling to work, is in the course of employment.

[44] The general policy provisions of OPM Document No. 15-02-02 regarding time place and activity do not override the specific policy provisions of Document No. 15-03-03 regarding travel to work. If they did in the manner that is being suggested by the applicant, the provisions of OPM Document No. 15-03-03 would be rendered almost meaningless. The fact that the worker was travelling to work and that the accident occurred within minutes of her expected start time is not sufficient to conclude that VH was in the course of her employment at the time of the accident.

(e) Employer-owned private roads

[45] In closing arguments applicant's counsel also relied on the provisions of OPM Document No. 15-03-04 dealing with "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries" and provides as follows:

> Employer-owned private roads
>
> If part of the worker's journey to or from work takes place on a road that is completely controlled by means such as posted notices, warning signs, or opening or closing of gates, maintenance work or snow clearing, the worker is in the course of employment while using the roadway.
>
> The worker is not in the course of employment while using a road open to the general public.
>
> The condition of the employer's private roads must cause the accident.

[46] It was submitted that the driveway that the worker was walking on at the time of the accident or just prior to the accident was a private road controlled by the first applicant that the worker was using to get to work, that the conditions of the driveway caused the accident and the worker was therefore in the course of her employment at the time of the accident.

[47] I do not accept this argument.

[48] These provisions of WSIB policy are intended to define the extent of the workplace premises. The policy provides a definition of "Employer's premises" that states as follows:

> Employer's premises
>
> Definition
>
> The building, plant or location of work, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways and private roads.

[49] These provisions of WSIB policy provide greater definition of what an employer's premises is. They do not, however, remove the requirement found in OPM Document No. 15-03-03 that in order to be in the course of employment a worker must have entered the employer's premises "for the purpose of the employer's business".

[50] There can be little doubt that VH would have been in the course of her employment if the accident had occurred on her employer's private driveway at the place she was to go to work that day at 500 S. Road as the driveway would be considered a part of the employer's premises and she would have entered those premises for the purpose of her employer's business.

[51] However, the right of VH to be on the private driveway at 530 S. Road and her reason for being on the driveway at 530 S. Road on the morning of February 20, 2013 did not relate to her status as a worker for HLH. She was on the driveway at 530 S. and she had a right to be on that driveway because she lived in the apartment building there. That is where she got up in the morning while on her own time and not performing any work activities. She remained on her own time and never did enter into the course of employment that morning because she never arrived at the employer's premises for the purpose of providing work for her employer.

(f) The case law relied upon by the applicant is distinguishable on the facts and not persuasive

[52] I have reviewed the case law referred to by applicant's counsel in closing argument and find that none of the cases are directly applicable to the circumstances that existed between VH and HLH at the time of the accident.

[53] *Decision No. 431/09* deals with a question of whether an employer exerted sufficient control over a parking lot that it should be considered to fall within the definition of premises even though the employer did not own the parking lot. There is on the other hand no dispute that HLH owned and controlled the driveway at 530 S. Road. That is just not enough, on its own, to place VH in the course of her employment when the accident occurred given that VH was not at 530 S. Road for the purpose of performing work for HLH. She was there because she lived there.

[54] *Decision No. 701/12* dealt again with the control of an employer over a parking lot it did not own but for which arrangements were made for its workers to park there. The parking lot was considered to be the employer's premises and an accident that occurred when the worker walked from the parking lot to the place he was to work was found to be an accident in the course of employment regardless of whether it occurred in a public place. Having entered the course of his employment once he entered the parking lot for the purposes of work the worker did not leave the course of his employment by completing an action reasonably incidental to his work. The worker in the present case did not park a car in an employer provided parking spot and never did enter into the course of employment on February 20, 2013.

[55] *Decision No. 1058/11* is again a case about the degree of control that an employer needs to exercise over a parking lot before it is considered the employer's premises but it is clear that HLH owned and controlled the driveway at 530 S. Road.

[56] *Decision No. 1501/16* is a case dealing with a worker who, as a result of the fact that she did not have a fixed workplace but had to travel to different locations during the day, was considered to be in the course of her employment while proceeding to and from work. This is a recognized exception in WSIB policy for workers who do not have fixed workplaces. The nature of VH's employment, on the other hand, did not place her within one of the exceptions to the general rule that workers travelling to and from work are not in the course of their employment.

(g) Conclusion

[57] VH was a worker travelling to work when the accident occurred. The usual rule is that workers travelling to work are not in the course of employment. VH did not fall within any of the exceptions to that rule found in WSIB policy.

[58] The unusual, and perhaps unique, twist to this case is that VH started to her journey to work on a path that included public spaces, from a home location that was owned by her employer and where she sometimes worked.

[59] The building where the worker lived was owned her employer and might be considered the employer's premises. However, the apartment that the worker rented from the employer was clearly also the worker's home.

[60] Being on an employer's premises is not sufficient in and of itself to place a worker in the course of employment. In order to be in the course of employment the worker must be on the premises for the purpose of providing work for the employer.

[61] In the present matter VH was not on the employer's premises at 530 S. Road on the morning of the accident for the purpose of providing work for the employer when she started off on her walk to work. She was there because she lived there.

[62] The fact that VH rented her home from her employer and started her journey to work from that location is insufficient in my view, in the circumstances of this case, to change the application of the basic rule that travel from home to work is not considered to place an individual in the course of employment until such time as the individual arrives at the employer's premises for the purposes of work.

DISPOSITION

[63] The application is denied.

DATED: July 22, 2020

SIGNED: G. Dee