

WorkplaceNL

Health | Safety | Compensation

July 10, 2018

INTERNAL REVIEW DECISION

Stewart McKelvey
Attn: Daniel M. Boone
1100-100 New Gower Street
P.O. Box 5038
St. John's, NL A1C 5V3

Dear Mr. Boone:

[REDACTED]

In accordance with Section 46 of the Workplace Health, Safety and Compensation Act (herein referred to as the "Act"), I have reviewed the submissions of all interested parties as to whether an action by [REDACTED] (the First Plaintiff), [REDACTED] (the Second Plaintiff), and [REDACTED] (the Third Plaintiff) against [REDACTED] and [REDACTED] (the Defendants) is prohibited by Section 44 of the Act.

Background Information

On February 22, 2012, [REDACTED] sustained bilateral knee injuries when he was descending the steps of a linesman truck, tripped and fell onto frozen ground. At the time of his injury, [REDACTED] was in the course of employment as a power linesman with [REDACTED]. He was then transported to hospital where he was diagnosed with bilateral patellar tendon ruptures. [REDACTED] was assessed by [REDACTED] and subsequently underwent surgical repair of the bilateral patellar tendons on February 23, 2012. Following a period of recovery, [REDACTED] was discharged from hospital on March 14, 2012. On March 20, 2012, [REDACTED] was transported to the [REDACTED]. In clinic notes, [REDACTED] Medical Examiner, documented that [REDACTED] had arrested upon arrival at the clinic and was pronounced dead. In the Registration of Death, [REDACTED] reported the cause of death as pulmonary embolism and D/T secondary to immobility and bilateral patellar knee surgery. [REDACTED] reported that the deceased was sent for autopsy which reported the cause of death as pulmonary embolus due to deep vein thrombosis resulting from bilateral knee injury. Subsequent to [REDACTED] death, WorkplaceNL spousal dependency benefits were approved effective March 20, 2012, which were to be paid to [REDACTED]. In the Statement of Claim, the Plaintiffs claim that the autopsy completed on March 21, 2012, confirmed that [REDACTED] cause of death was pulmonary embolus due to deep vein thrombosis resulting from bilateral knee injury. [REDACTED] was survived by his wife, [REDACTED] and his two children [REDACTED] and [REDACTED].

On March 19, 2014, a Statement of Claim was filed by Mr. Kevin Preston of the law firm Easton Hillier Lawrence Preston on behalf of the Plaintiffs against the Defendants for damages. The Statement of Claim claimed that:

6. "On February 22, 2012 while employed with ██████████ ██████████ ██████████ he was descending the steps of the Power truck when he fell down a distance of approximately 0.5 meters on both of his knees striking the ground on a hard surface consisting of a mixture of frozen snow and gravel. ██████████ ██████████ had injured both of his knees and as a result he attended the Hospital on February 22, 2012 at which time he was treated in the Emergency Department of the Hospital and the Second Defendant was notified by nursing staff at the Emergency Department of the occurrence. Upon examination by the Orthopedic Surgeon, ██████████ was noted to have both knees swollen and tender to palpation and there was a palpable gap of both patellas indicating rupture of the quadriceps tendon bilaterally.

7. The Second Defendant examined the medical history of ██████████ noting a past history of gout and a previous shoulder problem on the right side but no other ongoing medical problems. He obtained the consent of ██████████ to perform surgeries described as "open bilateral patellar tendon repair" to be performed by the Second Defendant, and the Second Defendant did conduct surgery while at the Hospital on ██████████ commencing at 11:41 hours and concluding at 12:37 hours on February 23, 2012 in which surgery, the Second Defendant operated on both the left and right knees of ██████████ and completed the patellar tendon repair. The patient was deemed to have tolerated the procedure well and sent to the recovery room in satisfactory condition.

8. ██████████ underwent a period of recovery while in Hospital and ultimately was discharged from the Hospital on March 14, 2012 with a Discharge Care Plan and Discharge Instructions from the nursing staff of the First Defendant with a return date of April 4, 2012 at 9:15 a.m. to see the Second Defendant. ██████████ was experiencing prolonged period of immobility and bed rest both while in Hospital and at the time of discharge to his home in the ██████████ by virtue of the nature of his injury.

9. While at home in ██████████ after Hospital discharge, ██████████ became critically ill. ██████████ certified ██████████ to be dead on arrival at the ██████████ on March 20, 2012 noting as the cause of death, pulmonary embolism secondary to recent limb surgery and immobility.

10. Subsequent to his death, an autopsy was performed on March 21, 2012 by ██████████ ██████████ Pathologist, in which the findings were large pulmonary emboli in both main pulmonary arteries with cause of death being determined to be pulmonary embolus due to deep vein thrombosis resulting from bilateral knee injury.

11. While under the care of the Second Defendant and nursing staff of the First Defendant post-operatively between the date of surgery on February 23, 2012 and the date of discharge on March 14, 2012, ██████████ had already exhibited a number of symptoms consistent with a risk of deep vein thrombosis which is a condition well known to be linked as the cause of pulmonary embolism frequently resulting in death. This combined with the nature of the surgery itself and ██████████ ██████████ medical history should have alerted the Second Defendant and nursing staff of the First Defendant that ██████████ was at high risk of deep vein thrombosis and the risk of pulmonary embolism and death. These symptoms

included, but are not limited to: (i) edema or swelling in the legs; (ii) bluish skin discoloration around his knees that appeared to be enlarged veins on the side of his knees; (iii) attacks of tachycardia (racing heartbeat) while at rest; (iv) dry cough; (v) dizziness, and (vi) short at the breath. When the deceased, [REDACTED] and the First Plaintiff brought this to the attention of the Hospital nursing staff, the blue discoloration was explained as bruising from the position that his knees had been placed in. They were told not to worry about the other symptoms and no scans, tests, ultrasounds or compression stockings were provided, nor other extra precautions against blood clotting taken, with the possible exception of one prescription provided by the Second Defendant for medicine while in Hospital which was terminated before Hospital discharge.

12. As stated, [REDACTED] was immobile and while in the Hospital experienced light-headedness and dizziness whenever transfers to the toilet were being performed. He had frequent periods of anxiety, nervousness and shortness of breath with no prior history of same before Hospital admission. He and his spouse complained to the Hospital nursing staff of feeling that his heart was beating out of his chest and did experience tachycardia and complained for congested or getting a cold.
13. [REDACTED] was discharged to his home as aforesaid without anticoagulants or compression stockings, yet had been prescribed on anticoagulant in Hospital. This is so even though he was still at risk. The symptoms described in the above paragraphs continued and were communicated to the nursing staff, the public health nurse and the Second Defendant. [REDACTED] was told by employees of the First Defendant and Second Defendant that there was no need to be on blood thinners while he was at home. He was advised that this was not necessary. His Discharge Care Plan only included as Discharge Medications, Atasol 30. A Continuing Care Nurse was to follow-up to change dressings as needed. His immobility was described as limited to be able to get up with a walker to pivot transfer from his bed to a chair. None of the nursing staff who were spoken to by [REDACTED] and the First Plaintiff, nor the Second Defendant, adequately addressed the timely and legitimate concerns of [REDACTED] and the First Plaintiff and as such failed to recognize the risk factors present for pulmonary embolism. As a result, they failed to take any proper preventative measures given all the information which was available to them both prior to and after the discharge of [REDACTED] from the Hospital. The Plaintiffs state that inadequate protocols were in place for the care of [REDACTED] given his injury and symptoms, or that protocols were not properly followed and that failure to have proper protocols and procedures or to have them properly implemented lead to what would otherwise have been the preventable death of [REDACTED] from pulmonary embolism secondary to the surgery by the Second Defendant conducted at the Hospital of the First Defendant.
14. The First, Second and Third Plaintiffs claim as against the First and Second Defendants damages for wrongful death pursuant to the *Fatal Accidents Act*, R.S.N. 1990 c.F-6, as amended as a result of the negligence of the nursing staff of the First Defendant, including the continuing care nurse, and the negligence of the Second Defendant concerning the post-operative care of [REDACTED]. The First, Second and Third Plaintiffs also likewise claim against the First Defendant for the failure to properly establish and/or implement appropriate protocols to care for patients at risk of pulmonary embolism from deep vein thrombosis, and to identify

symptoms of patients at risk of pulmonary embolism from and communicate them between various healthcare providers.”

On March 5, 2015, a Statement of Defence was filed on behalf of the First Defendant [REDACTED] by Mr. Daniel Boone of the law firm Stewart McKelvey. An Amended Defence of the First Defendant was filed on March 21, 2015. On April 20, 2015, Mr. Peter Browne of the law firm Curtis, Dawe filed a Statement of Defense of the Second Defendant [REDACTED] with the court.

The Defendants denied each and every allegation contained in the Statement of Claim and plead that action of the Plaintiffs against the Defendants is statutory barred by the operation of the Act pursuant to **Section 44** of the Act in that:

- (a) The medical treatment in respect of which the Plaintiffs claim was provided to treat a workplace injury;
- (b) At all material times, [REDACTED] was a “worker” to whom the Act applied;
- (c) At all material times, the Defendants met the definition of “employer” to whom the Act applied;
- (d) An injury under the Act includes the consequences of medical treatment of a workplace injury;

On December 2, 2015, Mr. Daniel Boone provided a submission and requested WorkplaceNL provide a determination as to whether the action was statute-barred pursuant to Section 46 of the Act on behalf of the First Defendant.

On January 5, 2016, Mr. Peter Browne also provided a submission requesting a determination under Section 19 and Section 46 of the Act as to whether the action is permitted against the Second Defendant.

On January 4, 2016, Ms. Theresa Minnett, Internal Review Specialist, requested that Counsel for the Plaintiffs, Ms. Fiona Innes of Eastern Hillier Lawrence Preston, forward their submission in relation to the request the Defendants for a determination pursuant to Section 46 of the Act. On March 15, 2016, Ms. Minnett again wrote Ms. Innes and noted that she had left several telephone messages and e-mail correspondences with the Counsel of the Plaintiffs requesting a submission in relation to this matter; however, a submission had not been received. Therefore, Ms. Minnett advised that the Defendants’ request for a determination in relation to the matter will proceed without a submission from the Plaintiffs.

Legislation and Policy

Section 2(1) of the Workplace Health Safety and Compensation Act states:

In this Act

- (f) “dependent” means a member of the family of a worker who is wholly or partly dependent upon his or her earnings at the time of the death of the worker or who, but for the incapacity due to the injury, would have been so dependent;

(j) "employer" means an employer to whom this Act applies and who is engaged in, about or in connection with an industry in the province and includes

- (i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this Act,
- (ii) the principal, contractor and subcontractor referred to in section 120,
- (iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,
- (iv) a municipality,
- (v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this Act,
- (vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this Act, and
- (vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry;

z) "worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

- (i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,
- (ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,
- (iii) a part-time or casual worker, and
- (iv) an executive officer, manager or director of an employer.

Section 19(1) of the Act states:

The commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the commission, and the commission has exclusive jurisdiction to determine

- (a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;

(4) The decisions of the commission shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent.

Section 43 of the Act states:

(1) Compensation under this Act is payable

- (a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and
- (b) to the dependents of a worker who dies as a result of such an injury.

(2) The commission shall pay compensation to a worker who is seriously and permanently disabled or impaired as a result of an injury arising out of and in the course of employment notwithstanding that the injury is attributable solely to the serious and wilful misconduct of the worker.

Section 44 of the Act states:

(1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

(3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by the commission.

Section 46 of the Act states:

Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act.

Policy EN-19 "Arising Out Of and In the Course of Employment" of the Client Services Policy Manual states:

Policy Statement

Entitlement to compensation is based on two fundamental statutory requirements:

1. the worker meets the definition of "worker" under subsection 2(z) of the Act; and
2. the injury as defined under subsection 2(o) is one arising out of and in the course of employment.

This policy focuses on the established principles that have evolved to define "arising out of and in the course of employment" within the compensation system. It also provides established guidelines on the extent and/or limitations of coverage in varying circumstances.

General

Arising out of and in the course of employment

Section 43 of the Act states:

(1) Compensation under this Act is payable

- (a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and
- (b) to the dependents of a worker who dies as a result of such an injury.

The term "arising out of and in the course of employment" means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the employment. *Arising out of* refers to what caused the injury; *in the course of* refers to the time and place of the injury and its connection to the employment.

...

10. Injury During Compensable Treatment or Return to Work Programming

Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.

Where a worker is involved in a WorkplaceNL-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program.

11. Subsequent Injuries /Conditions and Compensable Consequences of Injuries

Where a worker experiences a subsequent injury or condition as a direct result of a compensable injury, then the subsequent injury or condition is compensable. There must be evidence satisfactory to WorkplaceNL that establishes a causal link between the initial work injury and the subsequent injury or condition. For example, a worker who develops frozen shoulder secondary to a compensable elbow injury.

Similarly, any direct and natural consequence that flows from a compensable injury is also compensable, unless it is the result of an independent intervening cause. An example is where a medical complication stemming from the original injury leads to a condition more serious than the original injury.

Position of [REDACTED]

Mr. Boone, Solicitor for the First Defendant takes the position that the action of the Plaintiffs is subject to statutory bar in that [REDACTED] was a worker under the Act as [REDACTED] injuries were

a result of a personal injury arising out of and in the course of his employment. In the submission for the First Defendant, Mr. Boone maintains that the negligence alleged to have resulted in the death of [REDACTED] in the action is a reasonable and foreseeable consequence of [REDACTED] injuries and any losses flowing from the medical treatment for the work injuries constitute injuries which arose out of and in the course of [REDACTED] employment.

Mr. Boone notes that, at all times material, the Plaintiffs were each a "member of the family" as provided in the definition of "dependent" under the Act. Therefore, Mr. Boone maintains that the Plaintiffs are "dependents" of [REDACTED] within the meaning of the Act.

Furthermore, Mr. Boone argues that, at all times material, [REDACTED] was an employer under the Act. The First Defendant was the manager and operator of the [REDACTED] where [REDACTED] received medical treatment for the compensable work injury. Both [REDACTED] and [REDACTED] are registered with WorkplaceNL under Master Firm Number [REDACTED]. As such, Mr. Boone requests a determination that under Section 46 of the Act that the action is statute-barred pursuant to section 44 of the Act.

Position of [REDACTED]

Peter Browne, Solicitor for the Second Defendant, submits that the action should be statute barred pursuant to Section 44 of the Act. [REDACTED] reported cause of death was pulmonary embolism secondary to recent limb surgery and immobility. The medical treatment was required as a result of an injury which arose out of and in the course of [REDACTED] employment. Mr. Browne maintains that consequences of medical treatment of a workplace injury are also compensable under the Act and this is the case even if the consequences arose from negligent treatment. Mr. Brown's position is that, and all times material, [REDACTED] was a "worker" under the Act. In addition, the Plaintiffs constituted "dependents" under Section 2 (1) (f) the Act.

According to the Solicitor of the Second Defendant, [REDACTED] was a fee-for-service physician with privileges at the [REDACTED] and was duly qualified and licensed to practice medicine in the specialty of orthopedic surgery in the Province of Newfoundland and Labrador. Furthermore, at all times material, [REDACTED] was the sole director and principal of [REDACTED] and is registered with WorkplaceNL as an employer under Employer Number [REDACTED]. Therefore, the Second Defendant is registered as an "employer" under the Act. As such, Mr. Browne argues that the action is prohibited pursuant to section 44 of the Act.

Reasoning and Analysis

I have reviewed the Statement of Claim and the arguments put forth by the solicitors for the Defendants. Section 44 (1) of the Act provides statutory bar to claims made by a worker or a worker's dependent against an employer or a worker for an injury that arises out of and in the course of a worker's employment. In this case, my task is to determine whether the action of the Plaintiffs brought against the Defendants is barred by the provisions of the Act. In making my determination there are number of questions that must be considered:

- 1) Was [REDACTED] a "worker" within the meaning of the Act?
- 2) Are the Plaintiffs "dependents" within the meaning of the Act?
- 3) Are [REDACTED] and [REDACTED] "employers" under the Act?

- 4) Did the circumstances of [REDACTED] injuries and subsequent death arise out of and in the course of his employment?

Case Law and Submissions:

Section 19(4) of the Act states that decisions of WorkplaceNL shall be upon the real merits and justice of the case and is not bound to follow strict legal precedent.

While WorkplaceNL is not bound to follow strict legal precedent, I have reviewed the cases submitted to determine relevance and accountability to the case at hand.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1075/05

Mr. Haji Malla died after he fell and was run over by a tractor and/or a bin carrier while working at an apple orchard. He had been working for the employer but had not yet been paid. Mr. Haji's parents and siblings submitted an action in the Ontario Superior Court of Justice for damages from Mr. Haji's employer and a second defendant.

The Appeals Tribunal determined that at the time of Mr. Haji's death, he was a worker within the meaning of the Act. As such, the right of action of his estate and family were statutory barred. At the time of his death, Mr. Haji's parents and siblings were partially dependent on his earnings.

Analysis

This decision has been viewed in light of the definition of "dependent" under the Act. This case considered the definition of "dependent" under the Ontario legislation which is similar to the definition provided in the Act. I conclude the principles and reasoning in the Haji case provide guidance in the determination of what constitutes a "dependent" under the Act. The Appeal Tribunal stated that the factors to be considered in determining dependency include the legal obligation to support, the actual contributions to support, and the reasonable expectation to support in the future.

Gallately v. Newfoundland Worker's Compensation Appeal Tribunal

While driving home from a business trip, the Appellant was seriously and permanently disabled in a motor vehicle accident. His blood alcohol level at the time of the accident was approximately four times the legal limit. The Appellant's claim for worker's compensation benefits was denied, and that decision was upheld by the Worker's Compensation Appeal Tribunal. The Appellant's appeal to the Supreme Court of Newfoundland, Trial Division, was dismissed. The court concluded that the Appellant's gross intoxication constituted an act that was not work-related and, as a consequence, broke the employment nexus and took the appellant outside the scope of his employment. The Appellant appealed to the Newfoundland and Labrador Court of Appeal. In the court's decision, Cameron, JA stated:

"The words "in the course of employment" refer to the time, place, and circumstances under which the accident takes place. The words "arising out of employment" refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received (*Black's Law Dictionary*). In *Mackenzie v. Grand Truck Pacific Railway* (1925), [1926] 1 D.L.R. 1 (S.C.C.), Mignault J. cited with approval [at p. 7] the statement of Lord Atkinson in *St. Helens Colliery Co. v. Hewitson*,

[1924] A.C. 59 (H.L.), that the words ““arising out of” suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman’s service, the cause of that effect...” Today, doing something incidental to his or her employment would be sufficient, the discharge of a duty having been rejected as too narrow a view.”

Analysis

The Gellately case is relevant as it provides additional explanation of the definition of “arising out of and in the course of employment”.

Kovach v. Singh and WCC (British Columbia)

Ms. Kovach (the complainant) obtained a certificate from the Worker’s Compensation Board stating that the injury she sustained from an operation performed by her physician arose out of and in the course of her employment. The Board found that the physician was a worker, and was engaged in his employment when he operated on the complainant. As a result, the Board held that the complainant’s action for negligence against the physician was barred. The complainant appealed the Board’s decision to the British Columbia Court of Appeal and the certificate was quashed.

The physician appealed the decision to the Supreme Court of Canada. The appeal was unanimously allowed based on the reason of the dissenting judge in the court of appeal.

The court stated that if Ms. Kovach had not been injured at work she would not have been treated by the doctor. That fact forms a causal link connecting the employment injury to the related treatment.

The court stated that the Board was not bound to apply common law principles of causation and what works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.

Analysis

The Kovach case is consistent with Policy EN-19, paragraph 10. This case has relevance to the [REDACTED] case in that Ms. Kovach had previously sustained an initial injury while in the course of her employment. While receiving treatment for the compensable injury, she suffered a subsequent injury. In the case at hand, [REDACTED] had previously suffered a work related injury while in the course of his employment. The Plaintiffs argue that [REDACTED] developed a subsequent condition as a result of alleged negligent medical treatment for the initial workplace injury.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1806/09

This decision concerns an application brought by Dr. R. Khan (Dr. Khan) under Section 31 of the Workplace Safety and Insurance Act (WSIA) to the Tribunal to determine whether or not an action brought against her by Mr. A. Tulake (Mr. Tulake) is barred by operation of Section 28 of the WSIA.

In August 2005, Mr. Tulake filed a claim with the Ontario Workplace Safety and Insurance Board for a left forearm laceration. At the time of his injury Mr. Tulake was working as a butcher in a butcher shop. He received treatment for the laceration repair at the Scarborough Hospital on the day of injury. He was seen by two nurses, Dr. Khan (a resident), and a specialist at the hospital.

In the following months, Mr. Tulake continued to experience ongoing issues with the injured arm and received additional treatment. Subsequently, Mr. Tulake was diagnosed with a laceration of the ulnar nerve which required surgical repair. He continued to report that he suffered disability following the surgery.

Mr. Tulake submitted an action against the Scarborough Hospital and against the nurses, Dr. Kahn and the specialist who initially treated his injury. The Tribunal held that the treatment provided by Dr. Khan was for a personal injury by an accident arising out of and in the course of employment and; therefore, is compensable under the Act. The action was barred by operation of section 28(1) of the WSIA.

Analysis

This case is relevant in that it is consistent with Policy EN-19 Paragraph 10 as noted above.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1396/08

In this case, an application under section 31 of the WSIA was made to the Appeals Tribunal by St. John's Rehabilitation Hospital (St. John's) to determine whether or not an action filed in the court by the Estate of Mr. Robert Lewis James Wheelan (Mr. Wheelan) was barred pursuant to Section 28(1) of the WSIA.

Mr. Wheelan was electrocuted while in the course of his employment on May 30, 2001. As a result of his injuries, his right arm and bilateral lower limbs were amputated. Subsequent to the amputations, Mr. Wheelan was an inpatient at St. John's for medical treatment for his injuries until he was discharged to his home on April 22, 2002. He received outpatient services until December 2002 following which he continued to receive medications and personal care for daily living assistance.

On August 14, 2003, after Mr. Wheelan's personal care attendant left for the day, there was a massive power outage which included the apartment building where Mr. Wheelan lived. Mr. Wheelan's apartment did not have an emergency back-up generator and he was unable to evacuate the building. On or about August 15, 2003, Mr. Wheelan died in his apartment. The Estate of Mr. Wheelan submitted an action to the Ontario Superior Court of Justice against St. John's for negligence in its assessment of appropriate living conditions for Mr. Wheelan.

The OWSI Appeals Tribunal determined that Mr. Wheelan's death, alleged to be due to negligent medical treatment for injuries for which there was entitlement under the Act, arose out of and in the course of employment. It was found that the right of action of a worker's estate will be determined to be taken away where the worker's right of action has been taken away. In this case, Mr. Wheelan's right of action was taken away. Therefore, the Appeals Tribunal determined that the right of action by the Mr. Wheelan's Estate against St. John's was barred pursuant to section 28 of the WSIA.

Analysis

This case is relevant in that it is consistent with Policy EN-19 Paragraph 10 as noted above.

Lindsay v. Worker's Compensation Board (Saskatchewan)

Mr. Lindsay incurred injuries to his lungs in a mining accident which arose out of and in the course of his employment for which he received compensation benefits. Following his injury, Mr. Lindsay underwent treatment including a biopsy. During the procedure, the doctor accidentally severed Mr. Lindsay's nerves. Subsequently, Mr. Lindsay brought an action against the district health board and two doctors. The Worker's Compensation Board in Saskatchewan noted that the doctors were employers under the Act and actions in common law for negligence against an employer for injury were barred by Section 180 of the Worker's Compensation Act, 1979 S.S. 1979, c. W-17.1. As such, The Board determined that the action against the doctors was dismissed.

Mr. Lindsay appealed the decision to the Saskatchewan Queen's Bench. The Court confirmed the Board's decision that there was a causal relationship between the work injury and the need for the medical treatment. Therefore, the Court determined that the injury sustained during the biopsy "arose out of and in the course of" Mr. Lindsay's employment and; therefore, is statute-barred. This decision was affirmed by the Supreme Court of Canada.

Analysis

This case is relevant to the [REDACTED] case in that the decision of the court is consistent with Policy EN-19 Paragraph 10. In both cases, it was alleged that an injured worker sustained further injury during medical treatment for a compensable condition. In both cases, had the worker not been injured in the course of employment, the alleged negligent medical treatment would not have been required.

Keddy v. Workplace Health, Safety and Compensation Commission (New Brunswick)

Ms. Keddy was at work when she cut off part of her finger with saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing more pain. Ms. Keddy brought an action against the nurse and hospital. The nurse applied for a determination as to whether Ms. Keddy's action was barred under s. 11 (1) of the Worker's Compensation Act. The Tribunal held that the injection resulted from Ms. Keddy's work-related injury in that the injury and treatment were connected because without the injury, Ms. Keddy would not have needed treatment. Ms. Keddy appealed and the appeal was dismissed. It was determined that workers injured while receiving treatment for work related injuries are acting within the course of their employment at the time of suffering the subsequent injury.

The court held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objective of the no-fault compensation scheme.

Analysis

The principles in this case are consistent with Policy EN 19, paragraph 10. This case has relevance to the case at hand in that Ms. Keddy had previously sustained an initial injury while

in the course of her employment. While receiving treatment for the initial injury, she suffered a subsequent injury. In the [REDACTED] case, [REDACTED] had previously suffered a work-related injury in the course of employment. The Plaintiffs maintain that medical treatment for the work injury resulted in a subsequent diagnosis of pulmonary embolus due to deep vein thrombosis. It is alleged that [REDACTED] subsequent condition of pulmonary embolism resulted in his death.

1) Was [REDACTED] "worker" within the meaning of the Act?

I can confirm from review of the facts that [REDACTED] was employed by [REDACTED] and working in his capacity as a linesman when he sustained bilateral knee injuries on February 22, 2012, for which he required bilateral patellar tendon repair. In reviewing the circumstances of the injury, I find that [REDACTED] bilateral knee injuries arose out of and in the course of his employment with [REDACTED]. Therefore, I conclude that [REDACTED] was a "worker" as defined in Section 2(z) of the Act.

2) Are the Plaintiffs "dependents" within the meaning of the Act?

In the medical records, [REDACTED] next of kin is listed as the First Plaintiff. The documentation provided supports that the First Plaintiff is the spouse of [REDACTED]. The Second and Third Plaintiffs are the children of the First Plaintiff and the late [REDACTED]. The First and Second Plaintiffs resided with [REDACTED] while the Third Plaintiff lived at a separate residence. However, the Statement of Claim indicates that the Third Plaintiff has claimed damages for losses sustained which include loss of financial support.

A "dependent" is defined under Section 2(f) of the Act as a family member who is wholly or partly dependent on a worker's earnings at the time of the worker's death or would have been so dependent if not for the incapacity due to the work injury. In review of the information provided in the Statement of Claim and the submissions of the Defendants, the Plaintiffs are family members who were wholly or partially dependent on [REDACTED] earnings at the time of his death. Therefore, I find that the Plaintiffs are "dependents" as defined in Section 2(f) of the Act.

3) Are [REDACTED] and [REDACTED] "employers" under the Act?

I confirm that the Defendants were registered employers with WorkplaceNL. [REDACTED] [REDACTED] has been a registered employer with WorkplaceNL since September 8, 1987. I also confirm that [REDACTED] is an employer which has been registered with WorkplaceNL since November 16, 2001.

4) Did the circumstances of [REDACTED] injuries and subsequent death arise out of and in the course of his employment?

This is the main focus of my decision and the issue which must be determined.

The focus of this determination is whether or not [REDACTED] death "arose out of an in the course of employment".

It is noted that [REDACTED] sustained his original work injury on February 22, 2012 while employed as a Power Lineman with [REDACTED]. He was transported to the [REDACTED] and underwent bilateral patellar tendon repair on [REDACTED].

February 23, 2012. Subsequent to surgery for bi-lateral patellar tendon repair, ██████████ was treated as an inpatient at ██████████ until March 14, 2012 at which time he was discharged home in the care of his family. ██████████ passed away on March 20, 2012 due to pulmonary embolism secondary to bilateral patellar tendon repair and immobility.

In this case, the Plaintiffs allege that ██████████ cause of death was a result of negligent medical treatment following his bilateral lower limb surgery. On the March 20, 2012 ██████████ referenced the recent bilateral knee surgery and reported that the probable cause of death was pulmonary embolism.

Review of the facts of the case at hand confirms that ██████████ sustained bilateral knee injuries on February 22, 2012. ██████████ was working within the capacity of his employment as a linesman with ██████████ when he tripped and fell on his knees. In this case, there is no issue that the bilateral knee injuries on February 22, 2012, arose out of and in the course of employment.

Subsequently, ██████████ was diagnosed with bilateral patellar tendon tears which required surgery and inpatient care. These facts are evident in the medical records provided in the First Defendant's submission as well as the Plaintiffs' Statement of Claim.

██████████ died on March 20, 2012, for which the cause of death is listed as pulmonary embolism. The Plaintiffs allege that the pulmonary embolism was secondary to negligent medical treatment by the Defendants. What must be determined is whether or not ██████████ death in March 2012 flowed from the initial work-related injury of February 22, 2012. Essentially, the issue at hand is whether or not ██████████ death arose out of and in the course of his employment.

The Act affords WorkplaceNL with exclusive jurisdiction to determine whether an injury has arisen out of and in the course of employment. Policy EN-19 provides guidance to decision-makers when determining whether an injury has arisen out of and in the course of employment. The term arising out of and in the course of employment means the injury is caused by some hazard resulting from the nature, conditions or obligations of the employment and happens at a time and place and in circumstances consistent with and reasonably essential to the employment. Arising out of refers to what caused the injury and in the course of refers to the time and place of the injury and its connection to the employment.

Policy EN-19 provides a number of indicators which can be used as a guide in determining whether an injury has arisen out of and in the course of employment. With respect to injury during compensable treatment or subsequent injuries as a result of a work injury, Policy EN-19 notes:

“10. Injury During Compensable Treatment or Return to Work Programming

Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.

Where a worker is involved in a WorkplaceNL-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program.

11. Subsequent Injuries /Conditions and Compensable Consequences of Injuries

Where a worker experiences a subsequent injury or condition as a direct result of a compensable injury, then the subsequent injury or condition is compensable. There must be evidence satisfactory to WorkplaceNL that establishes a causal link between the initial work injury and the subsequent injury or condition. For example, a worker who develops frozen shoulder secondary to a compensable elbow injury.”

Similarly, any direct and natural consequence that flows from a compensable injury is also compensable, unless it is the result of an independent intervening cause. An example is where a medical complication stemming from the original injury leads to a condition more serious than the original injury. “

As can be seen in the policy, entitlement is extended when treatment for the compensable injury results in further disablement or subsequent injury. As well, when a worker experiences a subsequent injury or condition as a direct or natural consequence of a compensable injury, the subsequent injury or condition is compensable. There must be a causal link between the initial work injury and the subsequent injury or condition.

It is noted that [REDACTED] underwent surgery for his compensable bilateral knee injuries on February 23, 2012. Through policy, WorkplaceNL has extended coverage to situations where a worker is further disabled and/or a subsequent injury occurs while undergoing treatment for the compensable work-related injury. The surgery was a necessary medical procedure for the work injury. [REDACTED] was injured at work and was required to seek out and cooperate in medical treatment as stipulated in Section 54.1 (b) of the Act. Following surgery, [REDACTED] required ongoing post-operative care. Had [REDACTED] not been injured at work, he would not have required ongoing care following the surgery for his bilateral lower limbs. I find that [REDACTED] was a worker acting in the course of employment when he underwent surgical intervention and receiving post-operative care for his bilateral lower limb injuries.

In the Statement of Claim, the Plaintiffs maintain that [REDACTED] pulmonary embolism was a result of alleged negligent medical treatment by the Defendants. The subsequent pulmonary embolism, which resulted in [REDACTED] death, was reported to be secondary to the bilateral patellar tendon repair surgery. The Statement of Claim notes that the action is specifically pertaining to [REDACTED] post-operative care for his bi-lateral knee surgery for which the Plaintiffs allege resulted in [REDACTED] death.

In considering this matter, I have reviewed this case and note that if not for the trip and fall which arose out of and in the course of employment, [REDACTED] would not have sustained bilateral knee injuries. If not for the bilateral knee injuries, he would not have required bilateral patellar tendon repair. Therefore, [REDACTED] was acting in the course of his employment when he attended the hospital for treatment for his initial injury. Subsequent to the surgery and discharge from hospital, the evidence supports that the worker developed pulmonary embolism secondary to the surgery and immobility. In considering the case, I find that the pulmonary embolism was a subsequent condition which directly flowed from the initial work injury. Therefore, I find that [REDACTED] subsequent condition which reportedly resulted in his death arose out of and in the course of his employment in that there is a causal link between initial compensable injury and the development of the pulmonary embolism.

[REDACTED]
July 10, 2018

In applying the factors set out in Policy EN-19, specifically, paragraphs 10 and 11, I find that [REDACTED] subsequent condition that resulted in his death did arise out of and in the course of employment.

Determination

It is my determination that then action brought against [REDACTED] and [REDACTED] under the Act is statute barred. The Defendants were operating as employers under the Act when providing medical treatment to [REDACTED]. [REDACTED] was considered a worker under the Act and his subsequent condition arose out of and in the course of employment. The Plaintiffs in this case are dependents under the Act. Attached is the certificate which may be filed with the court.

Sincerely,


Shaunna Ryan
Internal Review Specialist

SR/kao

c: Paula Fudge, Administrative Officer ✓
Peter Browne, Curtis, Dawe
Easton Hillier Lawrence Preston, Attn: Fiona Innes