

--SUMMARY--

Decision No. 1285/14

08-Jul-2014

T.Mitchinson

- Independent operator (truck driver)
- Right to sue (statutory accident benefits)
- Worker

No Summary Available

5 Pages

References: Act Citation

- WSIA

Other Case Reference

- [w3414n]

Style of Cause:
Neutral Citation: 2014 ONWSIAT 1465



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1285/14

BEFORE: T. Mitchinson: Vice-Chair

HEARING: July 3, 2014 at Toronto
Oral

DATE OF DECISION: July 8, 2014

NEUTRAL CITATION: 2014 ONWSIAT 1465

APPLICATION FOR AN ORDER UNDER SECTION 31(1)(c) OF THE WORKPLACE SAFETY AND INSURANCE ACT

APPEARANCES:

For the applicant: J. Frost, Lawyer

For the respondent: T. MacKinlay, Lawyer

For the interested party: A. Tsurkan, Business owner

**Workplace Safety and Insurance
Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS**(i) Introduction and Background**

- [1] On June 21, 2010, the driver of a transport truck (“SS”) owned by Sigma Trucking (70767207 Canada Corp) (“Sigma Trucking”) was injured as a result of a motor vehicle accident. On June 22, 2010, Sigma Trucking filed a Form 7 Employer’s Report of Accident with the Workplace Safety and Insurance Board (the Board). It indicates that SS was a worker who had been employed by Sigma Trucking as a truck driver for 1 ½ months prior to the motor vehicle accident.
- [2] Following the accident, SS submitted an Application for Accident Benefits to Markel Insurance Company of Canada (“Markel”), stating that he wished to claim Statutory Accident Benefits pursuant to section 268 of the *Insurance Act* under Sigma Trucking’s insurance policy with Markel. Sigma Trucking then completed an Employer’s Confirmation Form advising Markel that SS was an employee, working as a truck driver, with responsibility for driving a transport truck on a full-time basis.
- [3] Markel initiated an investigation and adjustment of SS’s accident benefits claim, and obtained a statement from SS on October 6, 2010. In it, SS states:
- (a) Sigma Trucking paid for the truck and the majority of the equipment or other related property (such as gas, maintenance, oil charges, insurance, license and storage) and SS was not required to finance the truck and/or any related equipment or property through company sources.
 - (b) SS did not have the right to exercise a choice in selecting and operating the vehicle. DD did not have market mobility and did not have the right to enter into contracts of any duration to transport goods and in order to maximize his profits.
 - (c) Sigma Trucking controlled where products were picked up or delivered by SS. SS was required to follow the instructions of Sigma Trucking concerning all pick ups and deliveries. The truck and trailer was parked in Sigma Trucking’s lot when not in use, although the truck was set aside for SS’s sole use when he was using it. SS was not permitted to work for any other transportation company or dispatcher or haul goods for anyone but the deliveries as set out by Sigma Trucking. Sigma Trucking provided an exact route for SS to follow from Toronto to Montreal.
 - (d) SS was employed as a ‘self-employed company driver’ although SS’s personal corporation, Seni-Bul Ltd., has not been active since 2008.
 - (e) SS was paid a fixed amount per trip via cheque made payable to his name. At the time of the statement, SS did not know if taxes, Employment Insurance and Canada Pension Plan were deducted from his paycheque.
- [4] SS also attended an Examination Under Oath on September 21, 2011, at which point he provided additional evidence concerning his relationship with Sigma Trucking, including the following:
- (a) All operating expenses were paid for by Sigma Trucking.
 - (b) SS used a company credit card to pay for operating expenses at the Flying J service centre in Napanee.
 - (c) Sigma Trucking performed all maintenance on the vehicle supplied to SS.
 - (d) Sigma Trucking paid all insurance premiums for the vehicle.

- (e) Sigma Trucking owned the vehicle used by SS in the course of his employment.
- (f) In the year before the accident, SS only drove trucks for Sigma Trucking and no other trucking company.
- (g) Sigma Trucking directed SS where to pick up and drop off loads.
- (h) Sigma Trucking paid SS a fixed rate for each pick up and waiting time.
- (i) Sigma Trucking issued a T4 slip to SS.

[5] Markel brought an application under section 31(1)(c) of the *Workplace Safety and Insurance Act* (the *Act*) for an order that SS was a “worker” and entitled to claim benefits under the *Act*.

[6] Jason Frost, a lawyer, represented Markel at the hearing. Thomas MacKinlay, also a lawyer, attended on behalf of SS. Andry Tsurkan, an owner, attended on behalf of Sigma Trucking, and SS was also present at the hearing.

(a) Issue to be determined

[7] The issue to be determined in this application is whether SS is entitled to claim benefits under the insurance plan, within the meaning of section 31(1)(c) of the *Act*, which reads as follows:

A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the appeals Tribunal to determine,

...

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[8] SS is not currently a “plaintiff” in an action. However, prior decisions have determined that the Tribunal has jurisdiction to make an order pursuant to section 31(1)(c) in circumstances where an individual has claimed accident benefits under the *Insurance Act*. For example, the Vice-Chair in *Decision No. 964/10* made the following findings:

I have also considered the question of whether the Tribunal has jurisdiction to consider this application, given that, since he has not commenced an action, Mr. Sanghera is not a “plaintiff”, within the ordinary meaning of that term. In that regard, I am satisfied that the term “plaintiff”, as it appears in section 31(1)(c) of the *Act*, should be interpreted to include a person who is claiming statutory accident benefits within the meaning of section 31(1), and for that reason I conclude that I have jurisdiction to make the order contemplated by section 31(1)(c) in the circumstances of this application, notwithstanding the fact that, in this case, an action has not been commenced.

[9] After referencing a number of other decision that dealt with this issue, the Vice-Chair elaborated:

... I agree that the approach described in *Decision No. 1362/06I* is straightforward, and is consistent with the likely intention of the provision, which is to relieve a statutory accident benefit insurer from paying benefits to an insured person who is entitled to receive workers’ compensation benefits. In my view, it is not logical, nor was it likely the intention of the provision, to distinguish between such insurers on the basis of whether an action had been commenced in the circumstances. For these reasons, I find that I have jurisdiction under the *Act* to make an order under section 31(1)(c), in the circumstances of this application.

[10] I agree with this reasoning and adopt it for the purposes of this application, and find that I have jurisdiction to make an order under section 31(1)(c) in present circumstances.

(b) Findings

- [11] All parties are in agreement that SS was a Schedule 1 worker employed by Sigma Trucking, a Schedule 1 employer, at all relevant times, and that the motor vehicle accident of June 21, 2010 occurred during the course of his employment.
- [12] I concur.
- [13] A “worker” is defined in the WSIA as follows:
 “worker” means a person who has entered into or is employed under a contract of service or apprenticeship ...
- [14] The definition goes on to set out a non-exhaustive list of workers.
- [15] An “independent operator” is defined as follows:
 “independent operator” means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose
- [16] Board *Operational Policy Manual* (OPM) Document No. 12-02-01 sets out a framework determining whether an individual is a worker or an independent operator, including characteristics for each category. The policy states that persons employed under a contract of service are workers, and those engaged on a contract for service are generally independent operators. Guidelines published under this policy state:
- A "**contract of service**", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.
- Workers – those who work under contracts of service – are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.
- A "**contract for service**", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.
- Independent operators – those who work under contracts for service – are not automatically insured or entitled to benefits unless they voluntarily elect to be considered "workers" and apply to the WSIB for their own account and optional insurance.
 (See 12-03-02. Optional Insurance.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.
- [17] Having reviewed the various characteristics set out in OPM Document No. 12-02-01, I find that they overwhelmingly point to an employer-employee relationship between SS and Sigma Trucking. I also accept, based on information provided by the Board, that Sigma Trucking is a Schedule 1 employer; and finally, that SS is a Schedule 1 worker who was in the course of employment at the time of the motor vehicle accident on June 21, 2010.
- [18] Accordingly, the requirements of section 31(1)(c) are present, and Markel's application is allowed.

DISPOSITION

[19] SS was at all relevant times a Schedule 1 worker of Sigma Trucking, a Schedule 1 employer and, as such, is entitled to claim benefits under the *Act* for injuries sustained in the June 21, 2010 motor vehicle accident.

DATED: July 8, 2014

SIGNED: T. Mitchinson