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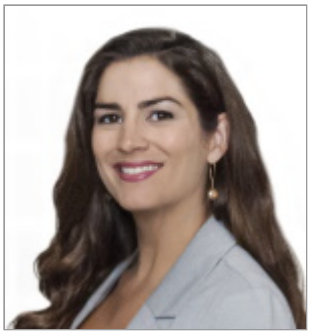
Injury at Work

Giving consideration to plaintiffs' right to sue

By **Jocelyn-Rose Brogan**



Jocelyn-Rose Brogan

(October 25, 2019, 10:31 AM EDT) -- When the evidence in a personal injury action suggests that one or more of the parties were working when the accident occurred, insurers and defence counsel should turn their minds to whether the action is suitable for a Right to Sue Application.

If the application is successful, the plaintiff's civil action will be statute-barred. There are no cost consequences if the application is unsuccessful.

When the accident involves a worker who is injured in the course of employment, is employed by a Schedule 1 employer and sues another Schedule 1 employer or a worker of a Schedule 1 employer, an application can be initiated pursuant to the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, Chapter 16, Sched. A (WSIA).

Workplace Safety and Insurance Board status is decided by the business activities of the employer and whether they correspond to one of the nine industry classes listed in Schedule 1, not solely by contributions to the insurance fund.

When considering the merits of an application, the Workplace Safety and Insurance Board Tribunal considers the nature of the employment relationship, as well as the place, time and activity surrounding the accident.

If the plaintiff in the civil action is found to be an independent operator as opposed to a worker, or where the place, time and activity giving rise to the accident are not sufficiently connected with the employment itself, the plaintiff's personal injury action will not be barred.

Application

In *Decision No. 550/19* [2019 ONWSIAT 1844], tribunal vice-chair Melvin Crystal recently considered an application where he determined that Mr. C's right to sue TC Inc. was taken away by the WSIA.

Personal injury action

After C completed a long haul delivery and returned the truck he was driving to a yard owned by TC Inc., C's daughter came to pick him up at the yard. Once he was in her vehicle, he thought he had left behind a personal item near the truck.

C got out of his daughter's vehicle to look for his personal item. On his return trip to his daughter's vehicle within the trucking yard, he slipped and fell on ice and broke his leg.

Issues in dispute

The main issues in dispute for the application were whether C was an independent operator or a "worker" for TC Inc. and whether he was in the course of his employment when the accident occurred.

Worker versus independent operator

Crystal considered Operational Policy Manual Document No. 12-02-1, titled "Workers and

Independent Operators," to decide whether C was a worker for TC Inc. or an independent operator.

Vice-chair Crystal stated that there were mixed factors of C having both worker and independent operator status; however, overall the evidence supported that C was a worker for TC Inc. He outlined the following factors in support of her determination:

- C worked on a full-time basis and exclusively for TC Inc. He was at liberty to work for others, but he never did so;
- TC Inc. was the owner of the truck operated by C. He did not bear significant financial risk and did not have a significant opportunity to obtain profit or bear a loss, since he did not own the truck;
- TC Inc. paid for vehicle maintenance, insurance and fuel;
- C's earnings were determined by the amount of driving he was assigned by TC Inc., thereby limiting his opportunity for profit or loss;
- C infrequently refused to a haul a load for TC Inc.; and
- While C was responsible for damage that he caused to the truck or freight, this rarely occurred. Therefore, this responsibility did not considerably change C's opportunity for profit or loss.

Vice-chair Crystal recognized that there was evidence that suggested there was an intention of the parties for C to be an independent operator. For example, C established a corporation and TC Inc. did not make source deductions from his earnings.

However, vice-chair Crystal highlighted that the organizational test, which attributes weight to the level of control exercised by the respective parties and considers whether the subject party has an opportunity for profit or loss, outweighed the intention of the parties.

Course of employment

Vice-chair Crystal applied the "premises test" to conclude that C was in the course of his employment at the time of the accident.

Vice-chair Crystal stated that the only reason C was in TC Inc.'s truck yard was because he was leaving his employment at the end of his work assignment. He concluded that the number of minutes that passed before C's daughter arrived to pick him up from work did not change the fact that he was in the yard for reasons related to his work.

Further, he concluded that retrieving a personal item in these circumstances was reasonably incidental to leaving work, and leaving work was reasonably incidental to his employment.

Lesson

This case demonstrates that even when faced with mixed factors of a party having both worker and independent operator status, and when there is doubt that the "place, time, and activity" giving rise to the accident are sufficiently connected with the employment itself, an application may still be successful.

Insurers and defence counsel are reminded to consider the true nature of the employment relationship, by looking beyond the intentions of the parties, contracts and tax returns.

The value of a positive outcome on an application is obvious by the exposure in a civil action being avoided altogether.

Jocelyn-Rose Brogan is an associate at Rogers Partners LLP *in Toronto. Jocelyn-Rose practises a broad range of litigation matters, including occupiers' liability, motor vehicle accidents, property loss and more.*

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