



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

**DECISION NO. 1709/19**

**BEFORE:**

L. Petrykowski: Vice-Chair

**HEARING:**

September 24, 2019 at Timmins  
Oral

**DATE OF DECISION:**

October 8, 2019

**NEUTRAL CITATION:**

2019 ONWSIAT 2263

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

**APPEARANCES:**

**For the Applicant:**

C. Courville, Lawyer

**For the Respondents:**

B. Sunohara and C. Mackeigan, Lawyers

**For the interested third party:**

J.J. (245.... Ontario Inc.)

**Interpreter:**

Not applicable

Workplace Safety and Insurance  
Appeals Tribunal

505 University Avenue 7<sup>th</sup> 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<sup>e</sup> étage  
Toronto ON M5G 2P2

## REASONS

### (i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") made to the Tribunal in relation to an action filed in Cochrane in the Ontario Superior Court as File No. CV-18-00000196-0000. The plaintiff (Ms. C. Tremblay) in that action is the Applicant in the application before the Tribunal. The defendants (Mr. K. Kantharuban, CLE Capital Inc., and Canada Cartage System Limited Partnership) in that action are the Respondents in the application before the Tribunal. On August 16, 2018, the Applicant initially sought a declaration from the Tribunal that the Applicant was entitled to maintain her civil action against the Respondents. However, new information came to light in recent weeks that led to the below-reproduced agreed statement of facts between the parties.

[2] The Applicant was represented by Ms. Courville, a lawyer, in the Tribunal proceedings. The Respondents were represented by Mr. Sunohara and Ms. Mackeigan, both lawyers, in the Tribunal proceedings. The Tribunal also provided notice of the proceedings to interested third parties but only Mr. J. of 245.... Ontario Inc. attended the Tribunal proceedings.

### (ii) Agreed statement of facts

[3] The above-described parties provided an agreed statement of facts at the Tribunal hearing on September 24, 2019, which stated as follows:

The parties hereto, by their lawyers, hereby agree to the following facts:

1. A motor vehicle accident occurred on April 13, 2018 ("the accident"), between the Applicant, [C.] Tremblay, and the Respondent, [K.] Kantharuban ("Mr. Kantharuban").
2. As a result of the accident, the Applicant commenced a tort action in the Ontario Superior Court of Justice File No. CV-18-00000196-0000 ("tort action") as against the Defendants Mr. Kantharuban, CLE Capital Inc., and Canada Cartage System Limited Partnership (incorrectly named as "Canada Cartage System Limited" in both the tort action and the s. 31 *Workplace Safety and Insurance Act, 1997* ("WSIA") Application ("Tort Action Defendants") claiming damages for injuries the Applicant/Plaintiff alleges to have sustained in the accident.
3. As a result of the accident, the Applicant also commenced a Right to Sue Application pursuant to s. 31 of the WSIA against the Tort Action Defendants and [W.] (hereinafter referred to individually as "Respondent" or collectively as "Respondents").
4. At the time of the accident, the Respondent Mr. Kantharuban was an employee of 245.... Ontario Inc., an owner-operator company that provides transportation services to the Respondent Canada Cartage System Limited Partnership and the Lessee of the tractor-trailer operated by Mr. Kantharuban that was involved in the accident. The Respondent, CLE Capital Inc. is the Lessor of the tractor-trailer involved in the accident.
5. Mr. Kantharuban's employment relationship with 245.... Ontario Inc. is evidenced by the following facts:
  - a. At the time of the accident, Mr. Kantharuban was not working for any other transportation company besides 245.... Ontario Inc.
  - b. Mr. Kantharuban does not have any of his own customers.
  - c. Mr. Kantharuban is not permitted to use any tractors owned/leased by 245.... Ontario Inc. for any commercial purpose other than working for 245.... Ontario Inc.

d. Mr. Kantharuban is paid on a weekly basis by 245.... Ontario Inc.

e. Mr. Kantharuban works under the CVOR of Canada Cartage.

f. Mr. Kantharuban does not pay for insurance on 245.... Ontario Inc.'s tractor. 245.... Ontario Inc. pays a contribution to Canada Cartage insurance premiums by permitting Canada Cartage to deduct weekly an amount equal to 3.5% of 245.... Ontario Inc. weekly gross earnings.

g. Mr. Kantharuban does not advertise his own services.

h. Mr. Kantharuban is not responsible for maintenance and fuel costs. 245.... Ontario Inc. is responsible for maintenance and fuel costs.

i. Mr. Kantharuban does not use any of his own equipment while working for 245.... Ontario Inc.

6. At the time of the accident, the Respondent Mr. Kantharuban was in the course of his employment as a driver for 245.... Ontario Inc. He was delivering a load. 245.... Ontario Inc. is a registered Schedule 1 employer. Accordingly, the Applicant is not permitted to maintain a claim in tort as against Mr. Kantharuban pursuant to s. 28(1) of the WSIA.

7. The Respondent Canada Cartage System Limited Partnership is a registered Schedule 1 employer. Accordingly, the Applicant is not permitted to maintain a claim in tort as against Canada Cartage System Limited Partnership pursuant to s. 28(1), or alternatively, s. 29 of the WSIA.

8. The Respondent CLE Capital Inc. is a registered Schedule 1 employer. Accordingly, the Applicant is not permitted to maintain a claim in tort as against CLE Capital Inc. pursuant to s. 28(1), or alternatively, s. 29 of the WSIA.

9. At the time of the accident, the Applicant was in the course of her employment with the Respondent [W.], a registered Schedule 1 employer.

10. All of the Respondents are either Schedule 1 employers or employed by a Schedule 1 employer. Accordingly, the Applicant is not permitted to maintain a claim in tort as against any of the Respondents pursuant to s. 28(1), or alternatively, s. 29 of the WSIA.

11. The Applicant requests six (6) months from the date of the determination of her Application to file a claim for WSIB benefits.

### **(iii) Background**

- [4] The Applicant (Ms. Tremblay) was involved in a motor vehicle accident on April 13, 2018 with the Respondent (Mr. Kantharuban). Both were employees of Schedule 1 employers at the time of the accident. The Applicant sustained personal injuries due to this accident.

### **(iv) Law and policy**

- [5] Section 31 of the WSIA provides that a party to an action or an insurer from whom statutory accident benefits (SABS) are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether: a right of action is taken away by the WSIA; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the WSIA.

[6]

Sections 26 through 29 of the WSIA provide the following:

**26(1)** No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

**(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependent has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

**27(1)** Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

**(2)** If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependent or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*.

**28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

**(2)** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

**(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

**(4)** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

**29(1)** This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

**(2)** The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[7] In determining the issue in dispute in this application, I have considered the following Board policy documents from its *Operational Policy Manual* (“OPM”), which form part of the documentary record before me:

- OPM Document No. 15-02-02, “Accident in the Course of Employment;”
- OPM Document No. 15-03-03, “On/Off Employers’ Premises;”
- OPM Document No. 15-03-04, “Employer Premises, Parking Lots, Roads, Plazas, Malls, Boundaries;”
- OPM Document No. 15-03-05, “Travelling;” and
- OPM Document No. 15-03-08, “Personal Activities/Removing Self from Employment.”

**(v) Analysis and conclusions**

[8] This matter proceeded by way of an agreed statement of facts between the parties. The respective counsel for the Applicant and Respondents sought a joint resolution of this matter and were in agreement that the determinations sought by them should be granted on a consent basis. I have reviewed the entirety of the case materials and find that there is no obstacle to granting the determinations sought by the parties. I find that the requirements of section 28(1) of the WSIA are wholly satisfied in the present case with respect to making the determinations that follow.

[9] In my view, and the view of the parties in this case, the Applicant was working with a Schedule 1 employer (W.) when she sustained her workplace accident on April 13, 2018. She was performing “work related errands” as a community development administrator at that time. The mechanism of accident encompassed her driving a vehicle when she was impacted from the rear by a transport truck operated by the Respondent (Mr. Kantharuban). The truck driver was performing driving-related duties with another Schedule 1 employer (245... Ontario Inc.) at that time. There is no evidence of substance that either the Applicant or the Respondent (Mr. Kantharuban) was not in the course of their employment or not performing an activity reasonably incidental to their employment at the time of this accident.

[10] Accordingly, I find that the Applicant was in the course of her employment at the time of the accident on April 13, 2018. She was employed by a Schedule 1 employer at that time. The Respondent (Mr. Kantharuban) was also in the course of his employment and employed by a Schedule 1 employer at the time of this accident. The overall character of the place, time, and activity concerning this accident was work-related.

[11] Hence, I find that the Applicant is barred by virtue of subsection 28(1) of the WSIA from proceeding with her civil action filed as CV-18-00000196-0000 against the Respondents. However, the Applicant is entitled to apply for benefits to the Board for the accident of April 13, 2018 pursuant to subsection 31(4) of the WSIA within six months following the release of this decision.

**DISPOSITION**

[12] This application is resolved on a consent basis, as follows:

- The Applicant was in the course of her employment at the time of the accident on April 13, 2018;
- The Applicant is barred by virtue of the WSIA from proceeding with her civil action in the Ontario Superior Court File No. CV-18-00000196-0000 against the Respondents; and
- The Applicant is entitled to apply for benefits to the Board for the accident of April 13, 2018 pursuant to subsection 31(4) of the WSIA within six months following the release of this decision.

DATED: October 8, 2019

SIGNED: L. Petrykowski