Taking Away the Plaintiff's Right to Sue

Jocelyn Brogan
September 2019

The Nature of a Right to Sue Application

When the evidence in a personal injury action suggests that one or more of the parties may have been working when the accident occurred, insurers and defence counsel should ask themselves, is the action ripe for a Right to Sue Application ("Application")?

A successful Application results in the plaintiff's civil action being statute-barred. If unsuccessful, there are no cost consequences at the conclusion of the Application.

Under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, Chapter 16, Sched. A ("WSIA"), an Application can be commenced 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.

The purpose behind this legislative provision is to ensure that workers who are injured in the course of employment will receive benefits through a no-fault insurance plan, while at the same time employers are protected against civil actions by those same workers.

Employers in certain industries in Ontario are statutorily obligated to participate in the workplace compensation scheme and pay premiums to the Board. The business activities of those employers listed as Schedule 1 employers are divided into nine industry classes.

However, what is required by statute does not always happen in practice. It is not unusual for the Board to have no record of registration by the parties alleged to be employers. The WSIB status is determined by the type of business carried on and whether it is listed in the Schedules, not by the contributions to the insurance fund.

On a Right to Sue Application, the 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, the plaintiff will be allowed to continue his or her civil action. Correspondingly, where the place, time and activity giving rise to the accident are not sufficiently connected with the employment itself, the plaintiff will be allowed to continue his or her civil action.

The Application

Vice Chair Crystal recently considered an Application in *Decision No. 550/19* [2019 ONWSIAT 1844, (Ont. W.S.I.A.T.)], which resulted in a favorable outcome for the insurer of TC Inc., a trucking company, against Mr. C, a long-haul truck driver. She determined that Mr. C's right to sue TC Inc. was taken away by the WSIA.

The Civil Action

The civil action between Mr. C and TC Inc., arose out of a slip and fall accident on January 11, 2014 (the "accident").

On the accident date, Mr. C had completed a long haul delivery and had returned the truck he was driving to a yard owned by TC Inc. After parking the truck, Mr. C called his daughter to come pick him up at the yard. Once he was in her vehicle, he thought that he left behind a personal belonging near the truck.

Mr. C then got out of his daughter's vehicle, and looked for the personal belonging that he thought that he left behind. He realized that he was mistaken about having left anything behind.

On his return trip to his daughter's vehicle within the trucking yard, he slipped and fell on ice, and broke his leg.

Issues on the Application

The two main issues for the Application were whether Mr. C was an independent operator or a "worker" for TC Inc., and whether the accident occurred while he was in the course of his employment.

Independent Operator versus Worker

Vice Chair Crystal considered Operational Policy Manual Document No. 12-02-1, titled “Workers and Independent Operators” to determine whether Mr. C was a “worker” for TC Inc., or an independent operator.

Some features of the policy document include providing definitions of a "contract of service," or employer-employee relationship, and a "contract for service," or a business relationship. The policy also provides information about the "organizational test," which is a basis for determining whether a party is an independent operator or a worker.

The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business.

Vice Chair Crystal stated that there were mixed factors of Mr. C having both “worker” and independent operator status; however, overall the evidence supported that Mr. C was a “worker” for TC Inc. She highlighted the following factors in support of her determination:

- Mr. C worked on a full-time basis for TC Inc., typically working 70 hours or more, exclusively for TC Inc. Despite Mr. C being at liberty to work for others, he never did so;
- The truck driven by Mr. C while performing his work was owned by TC Inc. Since he was not the owner of the truck, he did not bear significant financial risk, and did not have a significant opportunity to obtain profit or bear a loss;
- TC Inc. paid for fuel, insurance and vehicle maintenance;
- Mr. C drove the assignments provided to him by TC Inc., and his earnings were essentially determined by the amount of driving he was assigned, thereby limiting his opportunity for profit or loss;
- Mr. C rarely refused to a haul a load for TC. Inc.; and
- Despite Mr. C being responsible for damage which he caused to the truck or freight, this occurred infrequently. Therefore, this fact did not significantly change Mr. C's opportunity for profit or loss.

There was evidence that Mr. C established a corporation and that TC Inc. did not make source deductions from his earnings. Vice Chair Crystal acknowledged that this may reflect an intention of the parties to establish a relationship in which Mr. C was an independent operator.

However, she stated that those factors were superseded by the organizational test, which attributes weight to the level of control exercised by the respective parties and to the question of whether the subject party has an opportunity for profit or loss.

Course of Employment

Mr. C argued that he was not in the course of his employment at the time of the accident because: 1) 15 to 20 minutes had passed between him parking the truck and completing his workday; and 2) the accident occurred when he was undertaking a personal activity (i.e., leaving his daughter's vehicle to retrieve what he believed to be a personal item), which was not related to work.

Vice Chair Crystal applied the “premises test” to conclude that Mr. C was in the course of his employment at the time of the accident.

The premises test establishes that “…a personal injury by accident sustained on the employer's premises occurs in the course of employment — unless the worker's activity is sufficiently remote from normal employment functions that the activity and resulting injury cannot be characterized as reasonably incidental to employment…”

Vice Chair Crystal acknowledged that this test typically reflects circumstances where a worker has left a workplace which is a building and has fallen in an adjacent parking lot. However, she stated that Mr. C leaving his truck and falling in the employer’s truck yard is comparable to the “premises test” and the same principles should be applied.

Vice Chair Crystal found that the only reason that Mr. C was present in TC Inc.'s truck yard was that he was leaving his employment at the end of his work assignment. She concluded that the number of minutes that passed before his daughter arrived to pick him up for work does not change the fact that he was in the yard for reasons that were related to his work.

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

The Takeaway

When considering whether to pursue a Right to Sue Application, insurers and defence counsel are reminded to look beyond the intentions of the parties, contracts, and tax returns, and evaluate the true nature of the employment relationship.

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

The benefit of a positive outcome on an Application should not be undermined. After all, a successful Application results in the exposure in a civil action being avoided altogether.