

2013 CarswellOnt 12792, 2013 ONWSIAT 1913

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Decision No. 1504/12

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Ontario Workplace Safety and Insurance Appeals Tribunal

M. Crystal V-Chair

Heard: September 5, 2013

Judgment: September 9, 2013

Docket: 1504/12

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Counsel: Mr. R.V. Andal, for Applicant

Respondents, for themselves

Subject: Employment; Public

Labour and employment law --- Workers' compensation legislation — Rights of action — Accident in course of employment

Labour and employment law --- Workers' compensation legislation — Rights of action — Statutory denial of right

Labour and employment law --- Workers' compensation legislation — Definitions — Worker — Miscellaneous

Cases considered by *M. Crystal V-Chair*:

Decision No. 755/02 (2002), 2002 ONWSIAT 1488, 61 W.S.I.A.T.R. 334, 2002 CarswellOnt 5130 (Ont. W.S.I.A.T.) — referred to

Decision No. 1460/02 (2003), 2003 ONWSIAT 297 (Ont. W.S.I.A.T.) — considered

Decision No. 1663/07 (2007), 2007 ONWSIAT 2042 (Ont. W.S.I.A.T.) — followed

Invesec Associates Ltd. v. Olea (1991), 19 W.C.A.T.R. 68, 1991 CarswellOnt 6195 (Ont. W.C.A.T.) — considered

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

s. 268 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A

Generally — referred to

s. 2(1) "worker" — considered

s. 27(2) — considered

s. 28 — considered

s. 28(1) — considered

s. 31 — considered

s. 31(1)(a) — considered

s. 126 — considered

Regulations considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A

General, O. Reg. 175/98

Sched. 1 — referred to

Sched. 1, class I, item 14 — referred to

M. Crystal V-Chair:

Reasons

(i) Introduction

1 This is an application under section 31 of the *Workplace Safety and Insurance Act* ("the Act") by the defendant in an action filed in Brampton, in the Ontario Superior Court of Justice as Court File No. CV-10-605-00A2. The plaintiffs in the action are Mr. and Mrs. Kumar. Mrs. Kumar brings her action pursuant to the *Family Law Act*. The defendant in the action is the Toronto Standard **Condominium Corporation** (TSCC) No. 1554.

2 I note that, in the materials filed by the applicant, two other individuals were named as applicants, namely, the president of TSCC No. 1554, and a person who was employed by TSCC No. 1554, as property manager. The case materials included a Notice of Motion, dated July 22, 2011, to add these individuals as defendants to the action, however, there did not appear to be an order adding them as defendants, and counsel advised that, as of the date of the hearing of this application, these individuals had not been added as defendants. Section 31 of the Act states, in part:

31(1) 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,

(a) whether, because of this Act, the right to commence an action is taken away;

...

3 Because neither of these individuals is "a party to an action" nor "an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act*" they are not entitled to apply to the Appeals Tribunal pursuant to section 31. Accordingly, TSCC No. 1554 is the sole applicant in this application.

4 At the hearing, it was noted that Mr. Kumar had made a claim to the Board concerning the accident which is the subject of this application. The case materials included a Case Record which included the Mr. Kumar's Board claim file. The Case Record was provided to me in a sealed envelope which noted that Mr. Kumar had not provided consent to release this information to the parties or to the Tribunal. As a preliminary matter at the hearing, I asked Mr. Kumar if he was willing to consent to the disclosure of the Case Record to the parties and the Tribunal. Mr. Kumar provided his consent to disclose the Case Record. I subsequently reviewed the Case Record and provided copies of the document to the parties.

5 Mr. Ramon V. Andal, legal counsel, represented the applicant. Mr. and Mrs. Kumar were represented by Mr. Kumar. Testimony was given by Mr. Kumar. Submissions were made by Mr. Andal and Mr. Kumar.

(ii) The issue to be determined

6 The primary issue to be determined in this application is whether the action commenced by the plaintiffs against the defendant, is taken away by the Act. In determining whether the plaintiffs' action has been taken away by the Act, it will be necessary to determine whether the plaintiff/respondent, Mr. Kumar, was in the course of his employment, on December 26, 2008, when he slipped and fell on an icy walk outside of the condominium units and sustained a personal injury. It will also be necessary to determine whether, at the time of the accident, Mr. Kumar was a "worker" within the meaning of the Act, in the course of his employment, and employed by a Schedule 1 employer, and whether, at the time of the accident, the defendant TSCC No. 1554, was a Schedule 1 employer.

(iii) The evidence

7 At the hearing, Mr. Kumar testified that on December 26, 2008, he was employed by a company that carried on the business of retail sales of furniture and mattresses. The case materials included a copy of a transcript of Mr. Kumar's Examination for Discovery, conducted on June 24, 2011, in the subject action. The transcript indicated that Mr. Kumar was supervised by the owner of the store, and that Mr. Kumar had the title of store manager. The store occupied two units of the condominium managed by the defendant **condominium corporation**. Evidence was adduced indicating that the condominium was established to be occupied solely for commercial or industrial purposes.

8 Mr. Kumar testified that he was working at the store on December 24, 2008, and that at the end of the work day, the owner asked him to arrive at work "a bit early" on the next business day, which was December 26, 2008. Mr. Kumar testified that on that date, the store was holding a Boxing Day sale.

9 Mr. Kumar testified that on December 26, 2008, the opening time for the store was 11:00 a.m., and that, since he was instructed by the owner to arrive at the store "a bit early", he arrived some time prior to 11:00 a.m., although he was not certain of the exact time he arrived at the store. Mr. Kumar stated that when he arrived at the store, the owner of the store was already present. He stated that he greeted the owner when he arrived, and that the owner said to him "the banner is not there", or words to that effect. Mr. Kumar explained that there was a "banner" or large sign that had been previously prepared, announcing that the store was having a Boxing Day sale, and that the owner was indicating that the banner needed to be put up. Mr. Kumar testified that there was no masking or adhesive in the store that could be used to put up the banner, and that he told the owner, "I'll get the tape."

10 Mr. Kumar testified that he planned to go to the store that was next to the store where he worked, to borrow some tape to put up the banner. He indicated that the store where he was employed occupied two units of the condominium, namely units five and six, and that unit seven was a neighboring store, that was owned and operated by another individual, as a separate business. Other than being neighbours in the condominium, the business operated in units five and six was not related to the business operated in unit seven. Mr. Kumar explained that the store where he was employed took up two units of the condominium, but that the interior of the store was a single area, and that the door of one of the units was kept locked at all times. From the perspective of the consumer public, the store was a single store with only one front door in operation. Mr. Kumar indicated that he was acquainted with the owner of the store at unit seven, and he had been confident that he would be able to borrow some tape to affix the banner to the store where he was employed.

11 Mr. Kumar testified that his discussion with the owner about the banner occurred only a few minutes after he arrived at the store. He stated that he went outside for the purpose of borrowing the tape to put up the banner, but that he slipped and fell on the sidewalk between units six and seven and that he sustained a severe fracture to his ankle or leg. He stated that his supervisor, the owner of the store where he was employed, came outside, saw that Mr. Kumar had been injured, and pulled or dragged him back into the store. Mr. Kumar stated that an ambulance was called and that it arrived within a few minutes and took him to hospital where he received medical treatment for his injury.

12 The case materials included a Worker's Report of Injury (Form 6), dated June 2, 2009, that was filed by the Mr. Kumar with the Board, to commence an accident claim with the Board. The Form 6, which Mr. Kumar testified he prepared in his own handwriting, stated, in part:

I was at work on Dec. 26, 2008 at [his employer's store]. At about 10:36 AM, I left to store to go to Unit #7,

next door to get some scotch tape, and slipped on the icy walkway between unit #5 & 6. I hurt my ankle when I fell and then the ambulance was called and took me to [a local hospital]. At the hospital they discovered that my right ankle was broken from both sides and my ankle was operated on December 28, 2008. (surgery — with a rod, pins & screws in my ankle) I have not returned to work because of my injury.

13 Mr. Kumar testified that he did not have a strong recollection of his initial dealings with the Board, but that he received benefits from the Board for two or three months. He testified that after a few months, his benefits from the Board stopped and that he spoke to someone at the Board about it. He indicated again that he did not have a strong recollection of his conversation with the Board representative, but he recalled being advised that it was necessary for him to contact a different department or agency, and that he did not follow up with this advice.

14 The Case Record included an internal Board memorandum, dated October 22, 2009 which stated that the Board had received correspondence, dated May 26, 2009, from Mr. Kumar's lawyer, which indicated that "worker does not wish to file a case with WSIB" and that the case had been abandoned. The Case Record also included correspondence, dated May 26, 2009 from Mr. Kumar's lawyer at the time, which stated, in part:

We understand that this accident was not reported by the employer to the WSIB. We are taking this opportunity to report the said accident on behalf of our client, however, we wish to advise that our client does not intend to make a claim for any WSIB benefits, and will pursue his right under tort law.

15 Mr. Kumar testified that, after commencing the court action which is the subject of this application, his lawyer's law firm was dissolved, and he did not have legal representation. He stated that he had subsequently attempted to obtain other legal representation, but that he had not been successful in doing so.

16 The hearing of this application was originally scheduled for August 2, 2012. The Vice-Chair who heard the application on that date prepared a memo of that date, which was included in the case materials. The memo stated that, on that date, Mr. Kumar had requested an adjournment of the hearing to obtain legal representation. It indicated that Mr. Andal consented to the adjournment, and that the Vice-Chair allowed the adjournment on a preemptory basis. The memo stated that the Vice-Chair had explained that if Mr. Kumar did not have a lawyer when the hearing was rescheduled, it would proceed whether or not he had a lawyer.

(iv) Law and policy

17 The accident which is the subject of this application occurred on December 26, 2008. Accordingly, the application is governed by the *Workplace Safety and Insurance Act, 1997*.

18 Section 31 of the *Workplace Safety and Insurance Act* 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 Act; 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 Act.

19 In *Decision No. 1460/02* [2003 ONWSIAT 297 (Ont. W.S.I.A.T.)], the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement.

Therefore, Board policy continues to be relevant in right to sue applications. See *Decision No. 755/02 (2002)*, 61 W.S.I.A.T.R. 334 (Ont. W.S.I.A.T.).

20 In determining this application, I have considered the following Board documents from the WSIB's *Operational Policy Manual (OPM)*:

- *OPM* Document No 15-02-02 on the subject of "Work-Relatedness", entitled "Accident in the Course of Employment."

(v) Conclusions and analysis

21 Section 28(1) of the Act provides:

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.

22 It follows that, in order to determine whether Mr. Kumar's right to sue is taken away by the Act, the following factors must be considered:

- Whether, at the time of the accident, Mr. Kumar was "a worker" within the meaning of the Act;
- Whether, at the time of the accident, Mr. Kumar was employed by a Schedule 1 employer;
- Whether, at the time of the accident, Mr. Kumar was in the course of employment; and
- Whether, at the time of the accident, the defendant was a Schedule 1 employer;

23 Accordingly, in keeping with section 28 of the Act, if each of these factors is answered in the affirmative, Mr. Kumar's action against TSCC No. 1554 is taken away by the Act.

24 Further, section 27(2) of the Act provides:

27 ...

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

25 Accordingly, if Mr. Kumar's action is taken away by the Act, Mrs. Kumar's action must also be taken away by the Act.

(a) Was Mr. Kumar "a worker" within the meaning of the Act?

26 Section 2(1) of the Act provides a definition of "worker". That provision states, "In this Act...'worker' means a person who has entered into or is employed under a contract of service or apprenticeship..."

27 At the hearing, Mr. Kumar testified that he was employed by the company that occupied units 5 and 6 of the condominium. Further, at his Examination for Discovery, referred to above, Mr. Kumar indicated that he "started working" for this company in October or November 2005, and that he was "hired" as "manager of the store". He stated that his responsibilities were "Selling. Fax the order. Managing the deliveries. Look after complaints of the customer. Little bit of lifting in the store. Standing, selling."

28 I am satisfied by this evidence that Mr. Kumar was "employed under a contract of service" by the company, and that at the time of the accident, he was "a worker" within the meaning of the Act.

(b) Was Mr. Kumar employed by a Schedule 1 employer?

29 The case materials included a memo, prepared by a Tribunal staff member, which stated that a status check provided by the Board to the Tribunal indicated that the company that employed Mr. Kumar was "an active schedule 1 employer with a coverage start date of January 1, 2008." On the basis of this information, I am satisfied that, at the time of the accident, Mr. Kumar was employed by a Schedule 1 employer.

(c) Was Mr. Kumar in the course of his employment when the accident occurred?

30 *OPM* Document No 15-02-02, referred to above states in part:

Policy

A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time, and activity indicate that the accident was work-related.

Guidelines

In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of place, time, and activity in the following way:

Place

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident oc-

curred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

...

31 Although the Board's policy document is not binding upon the Tribunal, I accept that addressing the issues of "Place", "Time" and "Activity" associated with Mr. Kumar's accident, will assist in determining whether he was in the course of employment at the time of the accident.

32 I note that the accident occurred immediately outside of the employer's premises. The policy document provides that "if a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer... a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities."

33 In this case, as I have found below, Mr. Kumar's accident occurred while he was engaged in a work activity, namely, going to get tape from the unit next to the employer's unit. The accident occurred while Mr. Kumar was outside the store where he was employed, and en route to the store where he planned to borrow the tape. In keeping with the policy document, I find that when the accident occurred, Mr. Kumar was "in a place where [he] might reasonably have been expected to be (i.e., on the sidewalk between the stores)" while engaged in the work activity of obtaining tape to post the banner. This finding is consistent with Mr. Kumar being in the course of his employment at the time of the accident.

34 At the hearing, Mr. Kumar testified that his accident occurred shortly after he arrived at the employer's premises to start work. He indicated that his supervisor had asked him to start work earlier that day, and that he arrived at work earlier than the usual start time. I am satisfied, however, that the accident occurred after he began his work day. The fact that the start time that day was somewhat earlier than the usual start time does not affect my finding that the accident occurred during work hours. The accident occurred after Mr. Kumar had begun his work day, and when the accident occurred, he was not at the employer's premises for any purpose other than starting work. This finding is consistent with Mr. Kumar being in the course of his employment at the time of the accident.

35 Finally, when the accident occurred, Mr. Kumar was participating in an activity which had a clear purpose that was associated with his work. He was going to a neighbouring unit to get some adhesive tape in order to post a banner at the store, advertising the store's Boxing Day sale. I am find that the accident occurred while Mr. Kumar was performing a work related activity. This finding is consistent with Mr. Kumar being in the course of his employment at the time of the accident.

36 As noted above, although Board policy is not directly applicable to a s.31 application, (as opposed to an appeal), the need for consistency in Tribunal decisions makes Board policy relevant as persuasive authority, although not binding upon the Tribunal. Considering the criteria set out in the guidelines in the policy, for the reasons noted above, I find that Mr. Kumar was in the course of his employment at the time of his accident.

(d) Was the defendant TSCC No. 1554 a Schedule 1 employer?

37 The same memo prepared by a Tribunal staff member in relation to a status check that was provided by the Board, referred to above, indicated that TSCC No. 1554 was not in the WSIB data base. This information indicates that TSCC No. 1554 was not paying premiums to the Board at the time of the accident.

38 Tribunal jurisprudence indicates, however, that the question of whether or not an entity is paying premiums to the Board in relation to its insurance plan, is not determinative of whether the entity should be considered to be a Schedule 1 employer. As Mr. Andal indicated in his submissions, *Decision No. 1663/07* [2007 ONWSIAT 2042 (Ont. W.S.I.A.T.)] states at paragraph 4 of the reasons for decision:

The information provided in Addendum No. 3 indicates that Black's was not paying premiums for WSIB coverage at the time of the accident. In fact, it appears that the Board has no record of Black's ever having had coverage with them. That being said however, I am satisfied that it is now well established in Tribunal case law that the question to be asked is not whether a particular entity was paying WSIB premiums at the time of the accident but rather, whether the business being performed was a compulsorily covered industry within Schedule 1 (see for example *Decision Nos. 611/05, 783/96 and 991/88*).

39 I agree with the view expressed in *Decision No. 1663/07*, and the decisions cited therein. This approach ensures that the objects of the legislation will be met, in that injured workers will be covered by the Board's insurance plan, regardless of the employer's compliance with the Act.

40 The case materials included a "Declaration" made pursuant to the *Condominium Act*, registered on title, pursuant to the *Land Titles Act*. This document sets out duties and requirements of the **condominium corporation**, TSCC No. 1554. At "Article X" of the Declaration:

1. Duties of the Corporation

The duties of the Corporation shall include all those duties set forth in the Act, Declaration, By-laws and Rules of the Corporation, and shall *also include the property operation and/or maintenance of those services, facilities and installations situate on the Property* in complete conformity with the terms and provisions set forth in the Conditions and Restrictions

[emphasis added].

41 I also note that the Declaration states at "Article IV" that "each unit shall be occupied and used only for industrial/commercial purposes in compliance with the applicable zoning by-law provisions and for no other purpose..." As can be noted from evidence addressed above, Mr. Kumar's employer occupied units five and six for the purpose of carrying on a retail business, in a manner consistent with Article IV.

42 Schedule 1 to the *Ontario Regulation 175/98* made pursuant to the *Workplace Safety and Insurance Act, 1997*, lists "Industries the employers in which are liable to contribute to the insurance fund." Under the heading "Class I — Other Services", Schedule 1 lists item 14:

Operation of a building rented wholly or partly for manufacturing, retailing, wholesaling or warehousing.

43 The materials also included information which indicated that TSCC No. 1554 was an employer. The materials included a transcript of an Examination for Discovery, of an individual referred to hereinafter as Ms. M.,

conducted on June 22, 2011. Ms. M. testified at the examination, as noted on the first page of the transcript, that she was employed by the **condominium corporation** as "manager".

44 From the information included in the "Declaration" filed on title for TSCC No. 1554, and the other evidence before me, I am satisfied that it carried on the business activity of operating a building rented, at least in part, for retailing. This business activity is listed in Schedule 1 as an industry in relation to which, employers carrying on the business activity are required to contribute to the Board's insurance plan. From the evidence before me, I am satisfied that TSCC No. 1554 was an employer participating in a business which was a compulsorily covered industry within Schedule 1. In keeping with the jurisprudence provided in *Decision No. 1663/07*, referred to above, on this basis, I am satisfied that TSCC No. 1554 is a Schedule 1 employer within the meaning of section 28(1) of the Act.

45 I also note that in *Decision No. 991/88 [Invesec Associates Ltd. v. Olea, 1991 CarswellOnt 6195 (Ont. W.C.A.T.)]*, which was one of the decisions cited in *Decision No. 1663/07*, the Panel concluded that a **condominium corporation** created to manage the condominium property was a Schedule 1 employer. The fact that the entity in question was a **condominium corporation** did not prevent or limit this determination.

46 For these reasons, I find that, at the time of Mr. Kumar's accident, the defendant, TSCC No. 1554, was a Schedule 1 employer.

(e) Conclusion

47 Above, I set out four factors to consider in determining whether the action commenced by Mr. and Mrs. Kumar had been taken away by the Act, noting that, in keeping with section 28, if each of these factors is answered in the affirmative, the Kumars' action against TSCC No. 1554 is taken away by the Act. For the reasons provided above, I conclude that each of these factors was answered in the affirmative.

48 Accordingly, the action is taken away by the Act.

Disposition

49 The application is allowed.

50 The action commenced by Mr. and Mrs. Kumar in the Ontario Superior Court of Justice as Court File No. CV-10-605-00A2, is taken away by the *Workplace Safety and Insurance Act, 1997*.

END OF DOCUMENT