WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1806/09

BEFORE:	J. P. Moore : Vice-Chair
HEARING:	June 17, 2010 at Toronto Oral
DATE OF DECISION:	July 27, 2010
NEUTRAL CITATION:	2010 ONWSIAT 1752
APPLICATION:	For an order under section 31 of the WSIA barring an action brought in the Ontario Superior Court of Justice in the City of Toronto, Court File #06-CV-316141PD3
APPEARANCES:	
For the applicant:	G. Hnatiw, Lawyer
For the respondent:	R. Leto and S. Leith, Lawyers
For an interested party:	K. Bjerring, a student at law
Interpreter:	G. Yimiti

REASONS

(i) Introduction

[1] On August 11, 2005, the respondent in this application, A. Tulake, suffered a laceration injury to his left forearm while working as a butcher. At the time of the accident, Mr. Tulake was an employee in a butcher shop. The parties acknowledged that Mr. Tulake's employer had not paid premiums to the Workplace Safety and Insurance Board (the Board) prior to the injury. However, the parties also agreed that the employer's business fell within Schedule 1 of O. Reg. 175/98, under the *Workplace Safety and Insurance Act, 1997* ("WSIA"). In summary, the parties agreed, regarding Mr. Tulake, that he was a worker in the course of his employment for a Schedule 1 employer at the time of the injury to his left forearm.

[2] Following the accident, Mr. Tulake received treatment at the emergency department of the Scarborough Hospital, an eventual defendant in a lawsuit subsequently brought by Mr. Tulake. At the hospital, Mr. Tulake was seen by two nurses, a resident, and a specialist. The laceration was repaired.

[3] Over the ensuing months, Mr. Tulake experienced ongoing problems with his arm and sought further medical attention, which resulted in a diagnosis of a laceration of the ulnar nerve. Mr. Tulake subsequently required surgery for this problem. Mr. Tulake claims that he has suffered continuing disability following the surgery.

[4] Mr. Tulake issued a lawsuit against the Scarborough Hospital and against the nurses, the resident, and the specialist who were involved in his treatment. One of those defendants, the resident, Dr. R. Khan, has brought this application, under section 31 of the WSIA, seeking a declaration that Mr. Tulake's lawsuit against her is barred by section 28 of the WSIA. None of the other defendants is involved in this application nor do they seek a remedy under the Act for themselves at this point.

(ii) The issue

[5] The issue in this application is whether Mr. Tulake's legal action against Dr. Khan is barred by section 28 of the WSIA. Resolution of that issue requires addressing two questions:

1. whether the allegedly negligent treatment Dr. Khan provided to Mr. Tulake on August 11, 2005 was an injury to which section 28 applies;
2. whether Dr. Khan was a worker in the course of her employment for a Schedule 1 employer when she provided treatment to Mr. Tulake on August 11, 2005.

(iii) The decision

[6] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that:

1. the allegedly negligent treatment Mr. Tulake received from Dr. Khan on August 11, 2005 is an injury to which section 28 applies;

2. Dr. Khan was in the course of her employment for a Schedule 1 employer at the time she provided treatment to Mr. Tulake on August 11, 2005.

[7] On the basis of those findings, I conclude that Mr. Tulake's action against Dr. Khan is barred by section 28 of the Act.

(iv) The applicable legislation

[8] The following provisions of the WSIA apply:

> **Decisions re rights of action and liability**
>
> **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;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.
>
> (2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).
>
> Finality of decision
>
> (3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.
>
> **Claim for benefits**
>
> (4) Despite subsections 22 (1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).
>
> **Extension of time**
>
> (5) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so. 1997, c. 16, Sched. A, s. 31.
>
> **Certain rights of action extinguished**
>
> **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.
>
> **Schedule 2 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.

> **Restriction**
>
> (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.
>
> **Exception**
>
> (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. 1997, c. 16, Sched. A, s. 28.

[9] Section 69 of the WSIA also applies. It is cited in discussion below.

(v) Analysis

(a) Was the allegedly negligent treatment received by Mr. Tulake on August 11, 2005 an injury to which section 28 applies?

[10] On this issue, Ms Hnatiw, Counsel for the applicant, submitted that the treatment received by Mr. Tulake on August 11, 2005 was provided immediately after his accident and was a foreseeable consequence of that accident. She argued that, since medical treatment in this case was a reasonably foreseeable consequence of the worker's accident, any negligence that may have occurred in that treatment was itself an injury for which the worker was entitled to benefits under the Insurance Plan.

[11] Ms Leto submitted, on this issue, that, while medical treatment was a foreseeable consequence of a workplace injury, negligent medical treatment was not a foreseeable consequence of a workplace injury but, rather, an entirely new injury that triggered a fresh remedy for the recipient of that negligent medical treatment. She submitted that, in effect, the negligent medical treatment constituted a new intervening cause that broke the chain of causation with the workplace injury. She noted medical evidence that, in her view, suggested that the allegedly negligent medical treatment Mr. Tulake received gave rise to a significant impairment that he would not have suffered had a correct diagnosis been made at the time of the initial medical treatment. Ms Leto cited a previous decision of this Tribunal that came to precisely that conclusion, *Decision No. 24/91* (October 4, 1991). She also cited and relied on the reasoning found in a decision of the British Columbia Court of Appeal in *Kovach v. British Columbia (Workers' Compensation Board)* [1999] 1 W.W.R. 498. She noted that, in Kovach and in *Decision No. 24/91*, an injured worker was permitted to pursue legal action for negligent medical treatment on the basis that, at the time of the allegedly negligent treatment, the worker was no longer in the course of employment.

[12] In responding submissions, Ms Hnatiw noted that *Decision No. 24/91* addressed the right-to-sue provisions found in the pre-1997 *Workers' Compensation Act* ("pre-1997 Act"), provisions that were different from the provisions found in the WSIA. She also noted that subsequent Tribunal decisions had not followed *Decision No. 24/91*. Finally, she noted that the decision of the majority of the British Columbia Court of Appeal in Kovach had been overturned by the Supreme Court of Canada (*Kovach v British Columbia (Workers' Compensation Board)*, [2000] 1 S.C.R.55).

[13] Notwithstanding the very able argument made by Ms Leto on this issue, I prefer the position put forward by Ms Hnatiw. In my view, the weight of legal authority falls on the side of the position taken by Ms Hnatiw.

[14] With respect to the Tribunal case law, I note that the decision relied on by Ms Leto, *Decision No. 24/91*, found that the allegedly negligent medical treatment received by the plaintiff in that case constituted a foreseeable consequence of the initial workplace injury so as to entitle the worker to compensation benefits. However, the Panel went on to conclude that, because of the nature of the wording of the right to sue provisions in the pre-1997 Act, the plaintiff/injured worker continued to have a right of legal action against hospital workers who provided the allegedly negligent medical treatment. Specifically, the Panel cited subsection 8(9) of that Act, which requires that:

> ... the workers of both employers be in the course of their employment at the time of the happening of the injury.

[15] The Panel concluded that the plaintiff/injured worker was not in the course of employment at the time of the injury caused by the allegedly negligent medical treatment.

[16] As Ms Hnatiw noted, subsequent Tribunal decisions have not followed the interpretation found in *Decision No. 24/91*. Subsequent decisions have chosen, instead, to apply the interpretation found in *Decision No. 1902/01* (November 6, 2001). That decision noted that the issue addressed in *Decision No. 24/91* had subsequently been considered by the Supreme Court of Canada, which came to a conclusion contrary to that found in *Decision No. 24/91*. In *Decision No. 1902/01*, the Vice-Chair also noted that the compensation system was a no-fault system that was intended to provide compensation coverage for injuries that resulted from a workplace accident. The Vice-Chair noted that *Decision No. 24/91* found that subsequent medical treatment was a reasonably foreseeable consequence of a workplace injury and that the injured worker in that case was entitled to compensation benefits. She went on to state that the Legislature intended that this be the limit of the worker's entitlement and that the Legislature had not intended to create an additional right to pursue legal action against another worker of a Schedule 1 employer simply because the plaintiff was not at work when receiving medical treatment. As the Vice-Chair stated at paragraph 64 of *Decision No. 1902/01*:

> In my view, if the Legislature had intended to introduce new rights for a worker to proceed with a cause of action, to establish a deterrent in cases involving professional negligence, I consider it likely that the Legislature would have provided for this with clear words.

[17] Moreover, as Ms Hnatiw noted in her submissions, the reasoning in that decision spears to be even more apposite in the present case because of changes to the legislation in 1998. The WSIA introduced new right-to-sue provisions to which, in respect of the issue before me, the reasoning in *Decision No. 1902/01* fully applies.

[18] Subsection 13(1) of the Act provides that a worker who sustains an injury by accident arising out of and in the course of his employment is entitled to benefits under the Insurance Plan. Subsection 27(1) of the Act stipulates that a worker who sustains an injury that entitles him or her to benefits under the Insurance Plan is subject to the provisions of sections 28 to 31.

[19] Subsections 28(1) and (3), read together, provide that a worker of a Schedule 1 employer is not entitled to commence action against a worker of another Schedule 1 employer provided that that other worker was acting in the course of his/her employment.

[20] Subsection 8(9) of the pre-1997 Act states that, where a worker of a Schedule 1 employer was injured by the actions of another worker of a Schedule 1 employer, the right to sue was barred "where the workers of both employers" were in the course of their employment at the time of the happening of the injury. Subsection 28(3) of the WSIA stipulates that, if the workers of other Schedule 1 employers were involved in the circumstances in which the worker sustained an injury, the bar to legal action applied only if those workers were "acting in the course of their employment". Hence, under subsection 28(3), the requirement of contemporaneity that arguably existed in subsection 8(9) of the pre-1997 Act is not present in the WSIA. In effect, as I interpret section 28 of the WSIA, the Legislature intends that, if a worker sustains a workplace injury, his right of action for non-contemporaneous actions by another worker is barred as long as those other non-contemporaneous actions occurred in the course of that other worker's employment for a Schedule 1 employer.

[21] I note that the only Tribunal decision that has actually addressed the language found in section 28, is *Decision No. 1396/08* (October 9, 2008). I note paragraphs 37 and 38 from that decision:

> The statutory provisions in the Act support the conclusion that it cannot be determined that an injury is compensable because it was sustained in the course of employment, and at the same time be determined that a right of action remains in respect of the very same injury on the basis the worker was not in the course of his employment. Section 28(1) of the Act bars a worker employed by a Schedule 1 employer from bringing an action against any Schedule 1 employer. This general provision is limited only by the following restriction set out in section 28(3):
>
> > (3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection 28(1) applies only if the workers were acting in the course of their employment.
>
> We read "the workers" in the phrase "if the workers were acting in the course of their employment" as a reference only to the workers of the employer against whom an action may be commenced. It is not a reference to the injured worker. This interpretation is consistent with section 27 of the Act, which states that sections 28 to 31 only apply with respect to a worker "who sustains an injury or disease that entitles him or her to benefits under the insurance plan". Pursuant to section 13(1) of the Act, a worker is only entitled to benefits under the insurance plan if he or she sustains an injury by accident "arising out of and in the course of his or her employment". Thus, section 28 can only possibly be applicable if it is already determined that the injured worker was acting in the course of his employment. If that has already been determined, there would be no need to determine it again in the context of considering whether the section 28(3) restriction on the section 28(1) bar is applicable.

[22] In her submissions, Ms Leto argued that *Decision No. 1396/08* was distinguishable from the present case in that the alleged subsequent negligence in that case was foreseeable whereas the negligence in the present case was not foreseeable. In my view, however, it is clear from the law in this area, that, because medical treatment is a foreseeable consequence of a workplace injury, and because negligence in that treatment is also a foreseeable consequence, negligent medical treatment is a foreseeable consequence of a workplace injury.

[23] In my view, the Supreme Court of Canada supports that view of the law on this issue.

[24] As noted above, the British Columbia Court of Appeal, in the *Kovach* decision (cited above), a majority judgement, took the position that was taken by the Panel that issued this Tribunal's *Decision No. 24/91*. That is, the majority found that the injured worker/plaintiff could continue his lawsuit against hospital workers who were in the course of employment when they treated the injured worker/plaintiff because the injured worker/plaintiff was not in the course of his employment at the time of the treatment.

[25] The minority position, in *Kovach,* argued that negligent medical treatment ought not to be seen as an intervening event that broke the chain of causation with the original workplace injury. The minority judgement noted that, while such a position seemed to provide some degree of immunity for professional negligence, it was obvious that the Legislature intended the workers' compensation system to provide a comprehensive remedy for the consequences of a workplace injury and this comprehensive remedy should include negligent medical treatment.

[26] Paragraph 34 of the dissenting judgement reads as follows:

> The truly vexing aspect of this case is that a doctor secures immunity from action through participation in the scheme as an employer or worker. We are not accustomed to such a result. **But as anomalous as it may seem, the choice of including professionals in the scheme was made by the legislature, and the structure of the scheme must not be altered to defeat the immunity.** The plaintiff must forgo the prospect of a large tort judgement for the prompt and certain payment of compensation without having to prove fault. The trade-off may seem disadvantageous in the circumstances involving a doctor but it is highly advantageous in the vast majority of claims [emphasis added].

[27] In its review of the *Kovach* judgement, the Supreme Court set aside the judgement of the majority and adopted the reasons of the minority judgement. In my view, in doing so, the Supreme Court of Canada has endorsed the principle that an injured worker will be entitled to the benefits for the reasonably foreseeable consequences of a workplace injury, including negligent medical treatment. But that same worker will lose his right to pursue legal action for such injury, provided that the treatment was given by workers who were themselves in the course of their employment for a Schedule 1 employer when the treatment was given.

[28] I am persuaded, therefore, that the preponderance of legal authority on this issue requires a finding in the present case that the allegedly negligent medical treatment Mr. Tulake received from Dr. Khan was a foreseeable consequence of his workplace injury. As such, it is an injury to which section 28 applies, provided that Dr. Khan was in the course of her employment for a Schedule 1 employer at the time she provided treatment. That leads to the second issue in this application, regarding the status of Dr. Khan.

(b) Was Dr. Khan in the course of employment for a Schedule 1 employer at the time she provided medical treatment to Mr. Tulake on August 1, 2005?

[29] On this issue, Ms Hnatiw submitted that, at the time Dr. Khan provided medical treatment to Mr. Tulake, she was in the course of her employment for a Schedule 1 employer. She submitted that Dr. Khan was working on the premises of Scarborough Hospital, which is a Schedule 1 employer. She noted that Dr. Khan was there as a resident who had been placed at

the Scarborough Hospital by the University of Toronto Medical School in its capacity as a training agency. Ms Hnatiw conceded that the arrangement was an unusual one in that the medical school's residency agreement was that Dr. Khan gave the medical school the authority to assign Dr. Khan to a hospital but the terms of that assignment were found in an agreement between a residents' association and an association of hospitals. However, Ms Hnatiw submitted that this arrangement fell within the purview of section 69 of the WSIA which reads as follows:

> **Training agencies and trainees**
>
> **69.** (1) In this section,
>
> "placement host" means a person with whom a trainee is placed by a training agency to gain work skills and experience; ("agent d'accueil")
>
> "training agency" means,
>
> (a) a person who is registered under the *Private Career Colleges Act* to operate a private career college, or
>
> (b) a member of a prescribed class who provides vocational or other training. ("organisme de formation") 1997, c. 16, Sched. A, s. 69 (1); 2002, c. 8, Sched. P, s. 8.
>
> **Election**
>
> (2) A training agency that places trainees with a placement host may elect to have the trainees considered to be workers of the training agency during their placement. However, only a training agency in an industry included in Schedule 1 or 2 may make such an election. 1997, c. 16, Sched. A, s. 69 (2).
>
> **Effect of election**
>
> (3) When the Board receives written notice of a training agency's election, the following rules apply with respect to each trainee placed with a placement host, other than a trainee who receives wages from the placement host:
>
> 1. The placement host shall be deemed not to be an employer of the trainee for the purposes of this Act. However, the placement host remains the employer of the trainee for the purposes of section 28 (rights of action).
>
> 2. The training agency shall be deemed to be the employer of the trainee for the purposes of this Act.
>
> 3. The trainee shall be deemed to be a learner employed by the training agency. 1997, c. 16, Sched. A, s. 69 (3).
>
> **Injury to trainee**
>
> (4) If a trainee in relation to whom subsection (3) applies suffers a personal injury by accident or occupational disease while on a placement with a placement host,
>
> (a) the trainee's benefits under the insurance plan shall be determined as if the placement host were the trainee's employer; and
>
> (b) sections 40 and 41 (return to work) do not apply to the placement host or the training agency. 1997, c. 16, Sched. A, s. 69 (4).
>
> **Revocation of election**
>
> (5) The training agency may revoke an election by giving the Board written notice of the revocation. The revocation takes effect 120 days after the Board receives the notice. 1997, c. 16, Sched. A, s. 69 (5).

Effect of revocation

(6) An election that is revoked continues to apply with respect to an injury sustained before the revocation takes effect. 1997, c. 16, Sched. A, s. 69 (6).

[30] Ms Leto suggested, in one of her submissions, that Dr. Khan was not a worker of a Schedule 1 employer because it was not possible to determine from the evidence who Dr. Khan's employer was. Ms Leto suggested that, in those circumstances, the inference was that Dr. Khan was an independent operator and not a worker. Ms Leto also suggested that Dr. Khan's professional activities were evidence of sufficient independence from an employer that she would be found to be an independent operator under the Tribunal's case law.

[31] Dealing briefly with that aspect of Ms Leto's submissions, I am persuaded that the preponderance of the evidence does not establish that Dr. Khan was an independent operator when she provided medical treatment to Mr. Tulake. I am persuaded that, looking at the criteria for determining whether a person is a worker or an independent operator, Dr. Khan clearly fell within the criteria typical of a worker. The case law and policy applicable to determining whether a person is a worker or independent operator were reviewed in a recent decision of the Tribunal, *Decision No. 1020/10* (June 15, 2010). That decision summarises the Tribunal's case law as well as the Board's policy in this area. The decision suggests that the primary factors to be considered in determining a person's status are: the intention of the parties, the profit or loss element, control, public status and the degree of integration.

[32] In my opinion, looking at all of these criteria, Dr. Khan would appear to be a worker and not an independent operator.

[33] As will be seen in the discussion below, the terms of her residency appointment clearly intended that she be viewed as worker and not an independent operator. There is no evidence of any opportunity for profit or risk of loss typical of an entrepreneur. Her work as a resident was scheduled and controlled by a hospital committee and by a specialist who practised medicine at the hospital. Dr. Khan could not independently treat a patient without the approval and supervision of that physician. Finally, Dr. Khan's work was entirely integrated into the hospital to which she was assigned. She had no authority to practise medicine outside of the parameters of her residency appointment to the Scarborough Hospital.

[34] I am persuaded, therefore, that applying the indicia for determining worker status under the Tribunal's case law and the Board's policy, Dr. Khan is a worker.

[35] However, Ms Leto submitted that while Dr. Khan may appear to be a worker, there was no evidence as to who her employer was. Specifically, there was no evidence that she was a worker of a Schedule 1 employer. In absence of such evidence, in her view, Dr. Khan ought to be seen as an independent operator.

[36] She also submitted that the terms under which Dr. Khan worked did not specifically entitle her to coverage under the WSIA.

[37] In my view, this latter point is not significant. Entitlement to benefits by a worker under the WSIA is a legislative right and not one that requires confirmation in a private contract.

[38] However, Ms Leto's argument with respect to the absence of evidence of a contract of service between Dr. Khan and a Schedule 1 employer is more interesting because of the complexity of the arrangement under which Dr. Khan functioned at the time of her treatment of Mr. Tulake. At that time, Dr. Khan was a student of medicine at the Faculty of Medicine of the University of Toronto. She had a student identification number. She signed an agreement in April 2004 with the University of Toronto Faculty of Medicine for an appointment in what was described in the agreement as "a post-graduate training program." The agreement stipulated that, under that agreement, Dr. Khan could be assigned to any of the hospitals or institutions associated with the education program of the university. The agreement also stipulated that funding for Dr. Khan's position was the responsibility of the Ontario Ministry of Health and that the terms of remuneration were governed by an agreement between the Professional Association of Interns and Residents of Ontario ("PAIRO") and the Council of Academic Hospitals of Ontario ("CAHO"). The agreement between PAIRO and CAHO that governed Dr. Khan was a three-year agreement reached by the professional association and the Council of Hospitals covering the period from April 1, 2005 to June 30, 2008. The "general purpose" statement in the agreement indicated that the purpose of the agreement was to facilitate a relationship between residents and hospitals so that the residents would be reasonably compensated "for the duties which they perform as hospital employees." The agreement went on to state:

> It is agreed that residents have dual status; *viz*, they are post-graduate medical trainees registered in approved university programmes leading to licensure and/or certification; and they are physicians employed by the hospitals performing essential service functions.

[39] The agreement, which was lengthy, contained details of remuneration as well as benefits. However, the agreement did not stipulate who was responsible for Dr. Khan's salary. A T4 form Dr. Khan received for the year 2005 indicated that Dr. Khan's remuneration was provided by the "Toronto Hospitals Post-graduate Payroll Association."

[40] Notwithstanding the complexity of the arrangement that governed residents like Dr. Khan at the time in issue in this application, the circumstances surrounding Dr. Khan's employment fall squarely within the purview of section 69 of the WSIA. In my opinion, the arrangement makes sense when seen through the prism of that section. Dr. Khan was a student of the University of Toronto Medical School during her residency. Subsection 69(1) describes a training agency as meaning a member of a prescribed class who provides vocational or other training. Section 17 of Ontario Regulation 175/98 describes the prescribed class as including "educational institutions." I am persuaded, therefore, that the University of Toronto Medical School was a training agency for the purposes of section 69.

[41] Subsection 69(1) defines a "placement host" as a person with whom a trainee is placed by a training agency to gain work skills and experience. In my view, the Scarborough Hospital was, in this case, a person with whom Dr. Khan was placed to enable her to gain work skills and experience. Dr. Khan's agreement with the University of Toronto Faculty of Medicine anticipates that such an assignment will be made by the University and effectively, delineates the university's status as a training agency and the hospital's status as a placement host.

[42] Who, under section 69, is the trainee's employer? In my opinion, reading section 69 in its entirety, it is clear that the intention of this section is that the placement host is the trainee's employer. In my view, three aspects of section 69 make that clear.

[43] The first is that subsection 69(2) permits a training agency to retain the status of employer of the trainee by providing written notice to the Board. The inference I draw from that stipulation is that, if such written notice is not provided, the placement host will be seen as the trainee's employer.

[44] Second, subsection 69(4) stipulates that, where a training agency retains its status as employer of the trainee, and the trainee sustains an injury while on placement, the trainee's benefits shall be determined as if the placement host were the employer. In my view, this reinforces the notion that the host is the default employer since, in the case of injury, the trainee is seen as the worker of the placement host even if the training agency exercises its right to retain the trainee as an employee.

[45] Finally, subsection 69(3) stipulates that, if a training agency elects to retain a trainee as an employee, notwithstanding that election, the placement host remains the employer of the trainee "for the purposes of section 28 (rights of action)."

[46] Taken together, in my opinion, the provisions of section 69 reflect a clear intention on the part of the Legislature that the placement host in a training arrangement is the deemed employer of a trainee who participates in a training program.

[47] However, Ms Leto argued that there was no contract of service between Dr. Khan and the Scarborough Hospital during her residency at the hospital. She noted that the definition of a "worker" under the Act requires that the so-called worker be "a person who has entered into or is employed under a contract of service or apprenticeship". In her opinion, there was no such contract of service.

[48] However, I note that the definition identifies two types of contract of service: one that the person has entered into and one under which the person is employed. The implication of that definition is that a person can be employed under a contract of service to which that person is not actually a party. In my view, that circumstance applies to the present case. In my opinion, Dr. Khan was, as of August 2005, employed under a contract of service, which, while complicated, resulted in Dr. Khan's employment by the hospital at which she did her residency. Dr. Khan had an agreement with the University of Toronto Faculty of Medicine which permitted the university to assign her to a hospital and to do so in accordance with what amounted to a collective agreement between an association that represented Dr. Khan and an association that represented the Scarborough Hospital. That agreement intended that Dr. Khan be treated as an employee of the hospital and explicitly recognized that she was, in fact, employed by the hospital to which she was assigned. The agreement also stipulated in full detail the terms of Dr. Khan's employment, including remuneration. The fact that remuneration was actually paid by the payroll association used by Toronto hospitals does not, in my view, suggest that this source of payment was, in fact, Dr. Khan's employer. I am persuaded that the Toronto Hospitals Post-graduate Payroll Association was a payroll agent utilized pursuant to the collective agreement that governed Dr. Khan's employment with the Scarborough Hospital.

[49] I am persuaded, therefore, that, when Dr. Khan treated Mr. Tulake on August 11, 2005, she was in the course of her employment as a worker for the Scarborough Hospital, a Schedule 1 employer.

(c) Summary

[50] The action brought by Mr. Tulake against Dr. Khan is barred by the operation of section 28 of the WSIA. The alleged negligent act that is the basis for Mr. Tulake's lawsuit was a foreseeable consequence of Mr. Tulake's injury and one for which he would be entitled to benefits under the Act. It was, therefore, an "injury" to which section 28 applies provided that Dr. Khan, one of the other workers involved in the circumstances of Mr. Tulake's injury, was in the course of her employment for a Schedule 1 employer.

[51] I find that, as a matter of fact and law, at the time that Dr. Khan provided the medical treatment that is the subject of Mr. Tulake's lawsuit, she was in the course of her employment as a worker of a Schedule 1 employer.

[52] On the basis of those findings, Mr. Tulake's action against Dr. Khan is one that is barred by section 28 of the Act.

DISPOSITION

[53] The application is allowed. The action brought by the plaintiff/respondent, A. Tulake, is one that is barred as against the defendant/applicant, Dr. R. Khan.

[54] I make no ruling regarding the status of Mr. Tulake's action against the other defendants in the lawsuit.

DATED: July 27, 2010

SIGNED: J. P. Moore