WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1361/16

BEFORE: S. Martel: Vice-Chair

HEARING: May 24, 2016 at Toronto
Oral
Post-hearing activity completed July 13, 2016

DATE OF DECISION: September 2, 2016

NEUTRAL CITATION: 2016 ONWSIAT 2345

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

APPEARANCES:

For the applicant:	P. J. Barnes, Lawyer
For the respondent:	Did not participate
For the interested party:	Did not participate
Interpreter:	N/A

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (WSIA) by the applicant, an insurer, for a determination as to whether the respondent is entitled to claim benefits under the WSIA insurance plan.

(ii) Issue

[2] The respondent was involved in a single motor vehicle accident on February 10, 2014. He has no memory of the accident and may have suffered a stroke or seizure. There is little dispute that the respondent was a worker of a Schedule 1 employer in the course of his employment at the time of the accident. The main issue is whether the respondent suffered a personal injury by accident arising out of and in the course of his employment as set out in section 13 of the WSIA.

(iii) Background

[3] The respondent drove a transport truck. He was hired by a transportation company (the interested party in this application) as a probationary employee on January 1, 2011 and as a full-time employee on April 10, 2011. His employment contract refers to him as a full-time employee. He drove a truck owned by the transportation company.

[4] The respondent's typical job duties involved driving an empty trailer from southern Ontario to auto parts factories in the United States and then returning to southern Ontario for delivery.

[5] On February 10, 2014, the respondent was driving his usual tractor-trailer, owned by his employer. He was on his way to pick up auto parts in Indiana. The accident occurred between 6:30 p.m. and 7:00 p.m. on an Ohio interstate. The respondent has no memory of the accident. His first memory after the accident is of speaking to a State Highway Patrol officer. His statement to the Highway Patrol Officer indicates that he remembers driving southbound on the highway as he uses that highway every day. He remembers driving but then has no other memory. In an examination under oath, the respondent indicated that he remembers crossing U.S. customs but then does not really remember anything afterward; he does not pay that much attention because he does the same thing every day.

[6] The application materials also include a witness statement from someone who witnessed the accident. The witness was traveling north on the highway when he noticed a southbound truck cross the median and the northbound lanes, hit the guardrail and go down the shoulder of the highway. The witness parked on the right shoulder and ran to the driver who was unaware of what had occurred. He was shaking and looked confused.

[7] The respondent was taken by ambulance to the hospital and discharged three days later. The respondent understands that he suffered a seizure but no definite cause has yet been determined for the seizure.

[8] The respondent suffered physical injuries in the accident. Dr. Yovanovich, an orthopaedic surgeon, conducted an independent orthopaedic evaluation on January 12, 2015. He opined that the respondent sustained a significant L1 vertebral compression fracture superimposed on moderate compression fractures at T12 and L3 (believed to be old). He continued to suffer a back impairment as a consequence of the acute compression fracture and related soft tissue

injuries and reduced thoracolumbar mobility. The respondent provided a history of being "informed that he had sustained a seizure."

[9] The respondent submitted a claim for a work-related seizure to the Workplace Safety and Insurance Board (WSIB), which was denied in a letter dated March 25, 2014. Prior to denying the claim, the WSIB obtained an opinion from Dr. Razavi, a specialist in occupational medicine, regarding the likely diagnosis for the worker's condition at the time of the accident. Dr. Razavi reviewed the available medical evidence and opined that "[t]he worker likely had a seizure" and that "[t]his was probably a complex partial seizure." Dr. Razavi further opined that the worker "likely had a seizure disorder that may be related to cerebrovascular disease" and that his diagnosis could probably be confirmed with a sleep deprived EEG.

[10] The WSIB denied the claim because it was not more probable than not that the circumstances of his employment significantly contributed to the development of the medical condition being claimed:

> The claim was initially established for a possible cardiac incident resulting in single motor vehicle accident on February 10, 2014. It was later considered to have been related to an episode of syncope or seizure while driving.
>
> Employment
>
> You are an experienced truck driver, having worked for your employer since 2011. On February 10, 2014, while on your regular route to the U.S.A. your semi-truck crossed over the median and went into a ditch on the other side of the road. Ambulance arrived and you were taken to the hospital for treatment. You do not recall the accident, only gaining consciousness afterwards.
>
> You indicated that it was a normal work day on February 10, 2014, same as any other. There is no information to suggest otherwise.
>
> Medical
>
> A review of medical information on file was made by our external physician consultant. A seizure was deemed likely, but the cause was not clearly identified. An acute cardiac disease or epileptic episode was not confirmed.
>
> Discussion
>
> Given the nature of your claim it must be established that it is more probable than not that the circumstances of your employment significantly contributed to the development of the medical condition being claimed. After considering the evidence on file I find there is nothing to indicate that your work would have caused your seizure.
>
> Decision
>
> It has not been accepted that your employment was a significant contributing factor to the cause of your seizure. Therefore eligibility for an occupational disease has been denied.

[11] The applicant submits that while the WSIB denied the respondent's claim for a work-related seizure or other occupational disease, it never considered entitlement for the worker's injuries arising out of the motor vehicle accident. The applicant submits that these injuries are compensable under the WSIA and seeks a determination to this effect.

(iv) Law and policy

[12] Section 31 of the WSIA provides that an insurer from whom statutory accident benefits 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.

[13] Section 13 of the WSIA sets out when a worker is entitled to benefits under the WSIA:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[14] Section 2(1) of the WSIA defines an "accident" as including:

> (a) a wilful and intentional act, not being the act of the worker,
>
> (b) a chance event occasioned by a physical or natural cause, and
>
> (c) disablement arising out of and in the course of employment; ("accident")

[15] In *Decision No. 1460/02*, the Panel noted that the Tribunal is not required to apply WSIB policy in right to sue applications because section 126 of the WSIA 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. WSIB policy therefore continues to be relevant in right to sue applications (see *Decision No. 755/02*).

[16] *Operational Policy Manual* (OPM) Document No. 15-02-01 entitled "Definition of an Accident" states that a chance event is defined as an identifiable unintended event which causes an injury and that "[a]n injury itself is not a chance event."

(v) Submissions

[17] The applicant submits that the tractor trailer's collision with inanimate objects constitutes a "chance event." The applicant further submits that the respondent should receive the benefit of the presumption of subsection 13(2), which states that if the accident occurs in the course of a worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. The applicant notes that the worker has no memory of the accident and submits that the medical evidence is inconclusive regarding the etiology of the worker's condition prior to the accident.

[18] The applicant relies on a number of decisions including *Decision Nos. 1225/09, 1683/13, 366/14* and *1955/15*. The applicant submits that the majority of Tribunal decisions conclude that injuries following a fainting or seizure at work arise out of and in the course of employment. I also brought the applicant's attention to *Decision No. 178/09*, which held that a non-work-related fainting episode causing an accident takes a worker out of the employment context. The applicant notes that the decision nevertheless granted entitlement to benefits, finding that there was a chance event when the worker attempted to stop his truck and the ground underneath collapsed causing a roll-over. The applicant further submits that the decision's comment that fainting takes a worker outside of the employment context is contrary to the mainstream Tribunal jurisprudence. The applicant submits that while the underlying syncope / seizure is not compensable in this case, the physical injuries arising out of the motor vehicle accident are compensable and the respondent is entitled to claim benefits. The applicant seeks a determination

that the respondent is entitled to claim benefits under the WSIA and asks the Tribunal to refer the matter to the WSIB for an assessment of the respondent's entitlement.

(vi) Tribunal jurisprudence

[19] There are several Tribunal decisions that have considered entitlement for injuries that follow after a seizure or syncope (fainting) episode. I have categorized these decisions into four groups.

a) Work-related seizure or syncope episode

[20] Some Tribunal decisions, upon consideration of the evidence, conclude that the seizure or syncope episode was, on a balance of probabilities, a result of a work-related injuring process (such as exposure to chemicals). In these cases, both the seizure / syncope and ensuing injuries are held to be compensable (see for example *Decision Nos. 336/06*, *347/07*, *2348/14*, and *1955/15*). In these cases, it is generally considered that the seizure / syncope episode is a compensable chance event caused by work-related factors.

b) Application of the presumption

[21] In other cases, the cause for the seizure or syncope episode remains unknown. In some of these cases, Panels and Vice-Chairs apply the statutory presumption (section 13(2) of the WSIA) which provides that where the accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment. Where there is no evidence regarding the cause of a worker's seizure to rebut the section 13(2) presumption, the presumption is applied and a finding is made that the worker has entitlement for the injuries flowing from the accident (see for example *Decision Nos. 1683/13*, *418/09* and *413/07*). Mr. Barnes submits that the facts of the current case fall into this category because no definitive diagnosis explaining the cause of the worker's seizure / syncope episode has been identified.

c) Entitlement where the seizure or syncope is unrelated to employment

[22] Alternatively, Mr. Barnes submits that the facts of this case fall into another category of Tribunal decisions wherein the cause of a worker's seizure / syncope episode is found to be unrelated to work but entitlement to injuries sustained following the episode are compensable. In *Decision No. 366/14*, the Panel found that while it was more likely than not that the worker's pre-existing non-compensable health condition caused his fall from a ladder at work, that finding did not preclude initial entitlement. The Panel found that a worker is not disentitled to benefits even if it is shown that a non-compensable pre-existing condition caused or contributed to the injury. The Panel found that the issue is whether the workplace made a significant contribution to the accident. In the case before them, the Panel found that the fact that the worker was on a ladder for work-related purposes at the time of the syncope episode played a role in the injuries he sustained. His injuries would not have been as severe had he not fallen from a ladder. The Panel found that Tribunal case law supports a conclusion that workers are entitled to benefits for injuries arising from such accidents even though they are not entitled to benefits for the underlying condition. In *Decision No. 1814/05*, a worker on a scoop tram fainted and suffered facial injuries when he struck his face on a rock as he fell to the ground. The Panel granted entitlement for the facial injury because the seriousness of the injury was due to the fact that the fall occurred on a rock.

d) No entitlement

[23] Finally, in the fourth category of decisions, entitlement for injuries following a seizure or syncope episode is denied where the seizure / syncope is not work-related and there is no "added peril" in the workplace. *Decision Nos. 464/11* and *2538/11* denied entitlement for spontaneous falls in the workplace caused by a seizure unrelated to the employment. In these cases it was held that there was no "added peril" such as the operation of heavy machinery or a fall from a height to make the injuries work-related.

[24] *Decision No. 178/09* also questioned some of the Tribunal jurisprudence on fainting. It found that the application of the s. 13(2) presumption was troubling because it contrasted with how the Tribunal assesses other injuries in which the cause is not easily identified. It held that some cases seem to treat fainting as a separate injury as opposed to a symptom of an injury. *Decision No. 178/09* noted that in accordance with the WSIA, a worker must establish that he or she has a personal injury by accident and that the injury by accident arose out of and in the course of employment. The Panel opined that a non-work-related fainting episode causing an accident takes a worker out of the employment context. Fainting in itself is not a chance event. Nevertheless, based on the facts of that case, the Panel granted entitlement for the worker's injuries caused in a truck roll-over because there was another incident after the worker began feeling faint. The worker started feeling unwell and as a result attempted to stop on the highway shoulder. In the midst of his attempt to stop the truck, the ground underneath the truck collapsed, which constituted a chance event.

(vii) Conclusion

[25] With respect, I disagree with the applicant's submission that the presumption applies in this case because there is no definitive medical diagnosis to explain the cause of the worker's seizure / syncope episode. While there is no definitive medical explanation, the standard of proof in workers' compensation cases is the balance of probabilities. A definitive diagnosis is not necessary to rebut the presumption. In this respect, I agree with the comments of *Decision No. 178/09* that the presumption should not be applied just because the cause of a seizure / syncope episode is not easily identified. With the presumption, the question becomes whether it has been shown, on the balance of probabilities, that the worker's seizure did not arise out of his employment. The presumption may be rebutted based on evidence that satisfies the balance of probabilities. The evidence to rebut the presumption does not have to be "definitive."

[26] In the facts before me, there is a persuasive opinion from a specialist in occupational medicine, Dr. Razavi, that the worker probably had a complex partial seizure that may be related to cerebrovascular disease. His opinion references various medical investigations. There is also no evidence of any work-related cause for the worker's seizure. In my view, Dr. Razavi's opinion relating the worker's seizure to cerebrovascular disease is sufficient to rebut the presumption. On the balance of probabilities, the seizure the worker experienced on February 12, 2014 did not arise out of his employment.

[27] I find, however, that the facts of this case fall into the third group of cases described above. While the worker's seizure was not related to his employment and the worker has no entitlement for his seizure disorder, the physical injuries arising out of his motor vehicle accident are compensable. In this case, the worker suffered his seizure during the course of his regular duties while operating a tractor trailer on the highway. In essence, the operation of a tractor trailer on the highway was an employment-related "added peril." The extent of the worker's

injuries was causally related to the work environment. As noted by Mr. Barnes, the chance event in this case can be described as the multiple collisions that the worker had with inanimate objects before his truck came to a stop on the side of the highway.

[28] I appreciate the concerns expressed in *Decision No. 178/09* regarding the application of the presumption in fainting cases and treating fainting as a separate injury as opposed to a symptom of an injury. I agree that care should be exercised in the application of the presumption, which, as held earlier, does not require definitive proof that the accident did not arise out of employment. The standard of proof in rebutting the presumption is the balance of probabilities. Nevertheless, I am persuaded that the majority of Tribunal decisions have found that entitlement for injuries flowing from a seizure / syncope episode may still be granted even where the seizure / syncope episode is not employment-related *if* there is an "added peril" in the workplace. Entitlement may be granted for such injuries if the employment significantly contributed to such injuries when the seizure / syncope episode occurred.

DISPOSITION

[29] The application is granted.

[30] The worker is entitled to benefits under the WSIA for the physical injuries he sustained in the motor vehicle accident of February 2014.

[31] Subsection 31(4) of the WSIA provides that a claim may be filed with the WSIB six months after a section 31 determination is made. While the worker claimed benefits for the seizure disorder, no claim has yet been made for the injuries arising out of the motor vehicle accident. The worker may file such a claim within six months of this determination.

DATED: September 2, 2016

SIGNED: S. Martel