

CLAIM HISTORY AND APPEAL PROCEEDINGS:

I will set out only those portions of the claim history and appeal proceedings most relevant to my reasoning and conclusion.

This is an appeal from an April 24, 2006 Hearing Officer decision. The Hearing Officer found that the Worker suffered a personal injury arising out of and in the course of his employment, when he fell off a truck in the course of an altercation with co-workers.

The incident in question occurred on August 16, 2003. The Employer terminated the Worker from its employment on August 25, 2003, as a result of the incident.

No formal recognition decision was rendered early in the administration of this file, notwithstanding a request by the Employer for a decision. The Worker received various forms of workers' compensation benefits since the time of the injury, although there have been instances of benefits being suspended and then reopened.

As a result of the Employer's further efforts to have a formal, appealable recognition decision issued, a December 7, 2005 Case Manager decision found that the Worker had suffered an injury arising out of and in the course of his employment. The Employer appealed the Case Manager decision by means of a December 15, 2005 Notice of Appeal to Hearing Officer. That appeal led to the April 24, 2006 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Employer's filing of a May 23, 2006 Notice of Appeal with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing, held at Halifax, Nova Scotia, on September 20, 2006. LM, the Employer's Safety Program Manager, provided testimony. The Employer Representative (a lawyer) provided oral submissions. Neither the Worker nor the Board took part in the hearing.

ISSUES:

At issue is whether the Worker suffered a personal injury by accident arising out of and in the course of his employment on August 16, 2003. In particular, at issue is whether the Worker was an aggressor in an altercation, such that he left the ambit of his employment.

The Employer's appeal is allowed. The Worker was an aggressor and consequently took himself outside of the ambit of his employment. Consequently, he did not suffer a personal injury by accident arising out of and in the course of his employment.

Given my conclusion on the issue immediately above, it is not necessary for me to consider whether the Worker falls within s.10(3) of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"].

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files, as well as the testimony and submissions. I also reviewed the tapes of the hearing prior to rendering this decision. I will refer only to those portions of the evidence and submissions most relevant to my reasoning and conclusion.

Preliminary Issue - Notice to Worker

The Worker did not attend at the oral hearing, nor did he respond to the Tribunal's various correspondence to him, nor to the Tribunal's attempts to contact him by telephone. For the sake of completeness, I will review the materials on file concerning the Tribunal's efforts to provide notice to the Worker.

The Tribunal wrote to the participants, including the Worker, on May 30, 2006. The letter to the Worker was sent to a particular North Sydney address. The correspondence indicated (1) the appeal would proceed by oral hearing, (2) that the Tribunal would be in contact with the participants and (3) provided a toll-free number at which the Tribunal could be reached concerning this matter. On June 22, 2006, the Tribunal wrote to the Worker at the North Sydney address, indicating that repeated unsuccessful attempts had been made to contact the Worker by telephone, to schedule the oral hearing. The Worker was asked to contact the Tribunal at the toll-free number, to discuss dates for the hearing. The Worker was advised that the hearing would be scheduled without his input, unless he contacted the Tribunal. At around the same time, on June 27, 2006, the Board wrote to the Worker at that same North Sydney address, requesting that he contact the Board. On June 29, 2006, the Worker called the Board, indicating that he had received the Board's June 27, 2006 letter. As a result, I conclude the Worker also received the May 30, 2006 and June 22, 2006 correspondence from the Tribunal, but simply chose not to contact the Tribunal, for whatever reason.

On July 21, 2006, and July 24, 2006, the Tribunal wrote to the participants setting out the time and location of the oral hearing. There is on file a record of an August 28, 2006 telephone contact between the Board and the Worker. The Board employee complained to the Worker that it was impossible to reach the Worker, as his cell phone was always turned off. The Worker replied that he had "just moved", and planned to get a telephone connected. Given the Worker's indication that he had "just moved", I conclude that he in all probability received the July 2006 notices of the time and place of the hearing. In any event, if he had replied to the earlier May 30, 2006 and June 22,

2006 correspondence, he could have easily taken part in the scheduling of the oral hearing.

I also note an October 12, 2006 Contact Sheet, concerning a contact between the Worker and the Board. The Worker expressed the desire to appeal an October 11, 2006 Case Manager decision, which denied him further benefits beyond October 25, 2006. The Worker also indicated that he wished to change his address on file with the Board. I have reviewed the Board's computer system, and the Worker has reverted to the North Sydney address to which the Tribunal's correspondence was sent. Presumably, individuals with whom the Worker is in contact reside at this address, and I find that the Worker was in all probability aware of the oral hearing.

There are also notations on the Tribunal file, concerning many efforts by Tribunal staff to contact the Worker by telephone.

Generally, there have been periods where the Board has been unable to contact the Worker for extended periods of time. The Worker does however contact the Board on those occasions when his benefits are terminated.

LM's testimony:

LM is the Safety Program Manager for the Employer. Part of his duties involve overseeing injuries in the workplace, and conducting incident investigations. To a great extent, LM's testimony consisted of the Employer Representative taking him through various documents which were generated as part of the investigation of the August 16, 2003 incident.

LM set out the following version of what occurred, based on his investigation. Two workers - PB (the driver) and BS (the passenger) - were sitting in a one-ton truck. They were involved in highway work and construction. Evidently, a section of the road had been completed, and they were waiting for the sealant to cure. Once the sealant cured, they would then allow traffic to drive over the highway. While the one-ton truck was parked, the Worker drove in and parked his vehicle behind the one-ton truck. He then proceeded to the driver side of the one-ton truck and began to engage in an argument with PB. He apparently placed his head in the window of the driver's side and challenged PB to a fight. The Worker then engaged in a "dance", challenging PB to leave the truck and engage in a fight. PB refused to leave the truck to engage in the altercation with the Worker, and told the Worker to stay away from the truck. The Worker then progressed to the passenger side of the one-ton truck, placed his finger inside the vehicle and pointed at PB, and continued to challenge him to a fight. PB told him he did not wish to fight, and told him to stay away from the truck. Apparently, the Worker backed off the truck by a foot or two, at which point PB started the truck to drive away. When the truck started moving, the Worker jumped onto the mirror of the truck.

BS saw this, and told PB to stop. The truck apparently progressed approximately 6-10 feet, at which point the Worker pushed himself off the truck, and then laid on the ground.

LM indicated that he conducted an investigation of the incident, taking the initial one-page statements from PB and BS. The police also conducted an investigation, and decided not to charge PB with an offence. The police called LM, and advised that BS had a more complete statement to provide. At this point, LM approached BS, which resulted in the longer statement by BS, which is dated August 25, 2003.

LM stated that, in the course of the investigation, it became apparent that the Worker was a very agitated employee. LM learned from his foreman and supervisors that the Worker quite easily engaged in verbal confrontations with fellow employees. The Worker's immediate supervisors had hoped this had been addressed by various verbal warnings. LM indicated that he was previously unaware of the Worker's history in this respect.

Of particular relevance, LM learned of an incident which occurred in Moncton. JG, a driver for a trucking firm, was unloading emulsion for the Employer. The Worker started the pump and tried to engage it, but the belt was slipping. PB came across the yard, and told the Worker to heat the pump. Apparently a shouting match ensued, so PB walked away. The Worker went to the back of JG's trailer and said "I've got a knife and I'll cut him up". The knife was up the sleeve of the Worker's shirt. JG did not wish to be involved in this matter, and returned immediately to the cab of his truck. JG did not note any further altercation between the Worker and PB.

As a result of the investigation, the Employer terminated the Worker's employment. The General Manager of the Employer communicated the termination to the Worker, by means of August 25, 2003 correspondence. LM had consulted with the General Manager about this course of action. LM indicated that the Worker would have been terminated even if he had not been injured, given what was learned in the investigation. Of particular concern was the presence of a knife in the workplace. PB was suspended for three days, and instructed to take an anger management course prior to returning for employment the following year. PB has not returned to employment with the Employer. BS was not disciplined, and continues to be employed with the Employer.

LM testified that the Employer has a zero tolerance policy for horseplay and violence in the workplace. There are various company policies to this effect, as well as policies proscribing harassment in the workplace. The Worker attended an April 10, 2003 annual safety workshop, and thus was well-versed in the company's policies. Further, the Worker signed a rehire agreement on or about June 9, 2003, in which he indicated he would comply with the company's policies.

The Worker has not sued the Employer with respect to his termination. In addition, there has been no Labour Standards Board proceeding with respect to the termination of the Worker.

LM opined that this file has been mismanaged by the Board from the very start. In spite of his various efforts to secure an appealable decision from the Board, it was not until December 2005 that an appealable recognition decision was rendered. Moreover, the Board has yet to render a decision on the Worker's continuing entitlement to TERB. The Employer argues that, but for the Worker's misconduct and resulting termination, he would have been eligible for modified duties with the Employer.

LM further opined that he has suspicions concerning whether the Worker suffered a real injury. However, he does not have any medical facts to put forward. He noted that the Worker had been cleared to return to work fairly soon after the accident. However, the Worker has continued to collect benefits since August 2003.

Employer's Submissions

The Employer Representative argued that the Hearing Officer erred in a number of respects.

First, the Hearing Officer unduly focussed on a brief passage in Terrence G. Ison, *Workers' Compensation in Canada* (Butterworths, 1989), at page 64. The Employer Representative argued that the Hearing Officer ought to have considered the entirety of Ison, in its proper context. Moreover, the Ison text is primarily focussed on Ontario, even though it does make reference to other Canadian jurisdictions. In that connection, the Hearing Officer ought to have referred to previous Ontario workers' compensation decisions. The Employer Representative made reference to *Decision No. 433/92*, [1992] O.W.C.A.T.D. No. 1036, and *Decision No. 1818/98*, 2000 ONWSIAT 980. In brief, an aggressor in a fight takes himself outside the ambit of his employment, and thus is not entitled to workers' compensation benefits with respect to any injuries he may suffer.

The Employer Representative also referred to an older decision of the Nova Scotia Supreme Court *en banc*, *Rudland v. Smith* (1917), 33 D.L.R. 536, which considered the meaning of the words "wilful and serious misconduct" in the statute, as it then read.

Second, the Employer Representative criticized the Hearing Officer's conclusion that the Worker was injured owing to an impulsive act. Rather, the Worker initiated the conflict at every stage. The Worker chose (1) to approach the one-ton vehicle, (2) to confront PB at the driver's side of the vehicle, (3) to challenge PB to a fight, (4) to stay in proximity to the truck even when asked to leave, (5) to proceed to the passenger

side, (6) to stick his finger in the vehicle, (7) to jump on the mirror after the vehicle started moving, and then (8) to jump off the vehicle. The Worker's actions were not impulsive, but were intentional at every stage.

Statutory Provisions

10(1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

.....

(3) Where a personal injury is attributable wholly or primarily to the serious and wilful misconduct of the worker, the Board shall not pay compensation to the worker unless the personal injury

- (a) results in death or serious and permanent impairment; or
- (b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

2 In this Act,

- (a) "accident" includes
 - (i) a wilful and intentional act, not being the act of the worker claiming compensation,
 - (ii) a chance event occasioned by a physical or natural cause, or
 - (iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event;

Previous Decisions and Textbook Statements

I have not been able to locate any previous decision by this Tribunal respecting whether a worker takes himself out of the ambit of his employment by challenging another worker to a fight, thereby disentiing himself to compensation.

At page 35 of his text, concerning “fighting”, Ison states:

If the injured worker was an aggressor, the injury may still be one arising out of and in the course of employment if the fight was about work, or was partly induced by the stress of the employment situation, or if the methods of work stimulated aggressive competition among workers, or if the employment was in some other way a contributing cause.

Where the injured worker was an aggressor and the injury is minor, the claim might be barred for serious and wilful misconduct.

In addition, I have reviewed decisions of the Ontario Workplace Safety and Insurance Appeals Tribunal respecting this issue. In particular, I have reviewed *Decision No. 1688/03*, 2004 ONWSIAT 170; *Decision No. 89/01*, 2001 ONSWIAT 3208; *Decision No. 247/03*, 2003 ONWSIAT 1352; *Decision No. 949/04*, 2005 ONSWIAT 2162; and *Decision No. 1886/04*, 2005 ONSWIAT 1806.

The Ontario decisions to a great extent result from the various policies adopted by the Ontario workers’ compensation authorities. However, those policies do not set out an idiosyncratic, jurisdiction-specific position. Rather, the Ontario policies accord with identifiable lines of authority found in other jurisdictions, and set out by learned text writers. In brief, the Ontario position is as described at paragraph 24 in *Decision No. 1688/03*, *supra*:

The Act does not provide coverage for workers who are injured while participating in a fight that results solely over a personal matter. However, if the fight results solely over work, the claim may be accepted if the injured worker - was not the aggressor and did not provoke the fight, or - was an innocent bystander.

Aggressors and participants in a fight take themselves out of the course of their employment. As such, an innocent injured worker has a right of third party action (see 01-01-04).

I have also referred to the American text, *Larson’s Workers’ Compensation, Desk Edition* (Matthew Bender, Release 57, June 2006), at chapter 8, particularly at chapter 8.01.5(a). Although the American treatise writer appears to generally disagree with permitting employers to raise an “aggressor defence” to deny compensation benefits, the text states the following at page 8-17:

...On the other hand, there may be sound justification for finding a departure from course of employment when the amenities of the how-about-stepping-outside-for-a-moment type of combat are observed. For

example, in the *Stillwagon* case,⁷¹ the deceased struck the first blow while his antagonist was responding to an invitation to get down out of his truck and fight it out. Similarly, when the employee takes the trouble to leave his or her duties and seek out the enemy in the basement of the building where the employee works, there is a real basis for saying that the employee abandoned the employment in the process.⁷²

Reasoning

I will now apply the statutory provisions and the previous definitions of the law to the fact situation, to determine whether the Worker is entitled to recognition of his claim. In particular, I will assess whether the Worker's behaviour disentitled him to workers' compensation benefits.

The role played by the moving truck in the Worker's injury is somewhat unclear. The Board decisions below appear to have been predicated on the truck materially contributing to the Worker's injury. However, the witness statements suggest that the Worker jumped onto the truck, and then jumped off the truck while it was either stopped or moving very slowly.

I believe the Worker disentitled himself to benefits, regardless of the role played by the truck, for the reasons I set out below.

To start, I accept that the Worker was an aggressor, in that the entire incident flows from his effort to provoke a fight with PB. The Worker's position is not strengthened by PB's refusal to engage in the fight, and to drive away to avoid the Worker.

In reaching my conclusion, I have assessed the evidence to determine the genesis of the Worker's challenge to PB.

The witness statement of JG, produced by the Employer, suggests that the Worker's antipathy to PB may have been influenced by PB telling the Worker to heat up the pump. The cause of the August 16, 2003 incident is unclear. LM understood it related to a dispute over where the truck was parked. The statement of BS suggests that the dispute turned on PB's failure to move the truck. However, according to a May 21, 2004 Contact Sheet, the Worker stated he went to speak to PB, to see why PB was driving a one-ton truck instead of a semi, which he normally drove.

Although there were some ties to the workplace, I find that the fight was caused by the Worker's aggressive nature and his rage disorder, for the reasons below.

In assessing the possible workplace causes of the challenge to fight, the evidence does

not disclose an intense work environment which would have triggered a conflict. The workplace disputes or interactions on file are simply too trivial to explain why one person would wish to provoke a fight with another. The Employer Representative argued that the Worker is simply a violent person. For example, various Contact Sheets from October 2003 indicate the Worker was in jail for about a week, following a domestic dispute in which the police became involved. Moreover, the Worker had a history of disputes with other employees. Moreover, in recent dealings on file, the Worker did not take part in a multi-disciplinary program because he suffers from a rage disorder. Moreover, in July of this year, the Worker was apparently assaulted by three individuals. Although it is possible that this was a completely unprovoked assault against the Worker, the incident is somewhat consistent with the Worker's pre-disposition to violence and conflict. Finally, it is particularly telling that the Worker showed JG a knife in his sleeve, and indicated he would "cut" PB. In assessing all the evidence, I find that the Worker's challenge to PB flowed from his own violent nature, as opposed to any employment-related tension or conflict. It was merely fortuitous that the object of the Worker's aggression - PB - happened to be a co-worker. I find that the "conflicts" over heating a pump or the parking of a truck were simply convenient pretexts to pick a fight.

The Employer Representative also argued that the Worker was not engaged in any productive activity at the time he challenged PB to a fight, and the challenge had nothing to do with his employment. I find that given the Worker's dislike of PB, his actions are more consistent with seeking PB out to start a fight, rather than simply asking him why he was driving a one-ton truck. In that sense, the Worker's actions would be akin to the situation described in the previous passage from *Larson's*, where a worker abandoned his employment duties and sought out his enemy in the basement of a building.

In short, the Worker was an aggressor, and his aggression disentitled him to workers' compensation benefits.

In addition, if the Worker's injury were solely due to his jumping onto and off of the truck, and the truck's movement played no material role in the injury, I would find that the Worker did not suffer a personal injury "by accident". In particular, the Worker's action of jumping onto and off of the truck does not constitute an "accident" per the *Act*, because it strictly involved a wilful and intentional act of the worker (i.e., the Worker) claiming compensation. Consequently, the Worker's injuries would not constitute a "personal injury by accident" per section 10(1) of the *Act*, and the s. 2(a)(i) definition of "accident".

Given my conclusions above, it is not necessary for me to consider whether the Worker falls within section 10(3) of the *Act*. It is arguable that section 10(3) applies only where the "serious and wilful misconduct of the worker" does not take that worker outside the

ambit of his employment.

Historic Trade-Off

The present appeal concerns only the Worker's entitlement to benefits. No application pursuant to s. 29 of the *Act* is in issue. However, a recognition analysis should take some cognizance of the statutory bar, given the close relationship between recognition and the statutory bar to a lawsuit. That being said, the principles underlying the historic trade-off do not necessarily determine the manner in which the *Act* is interpreted. See for example, *DiPersio v. Nova Scotia Workers' Compensation Appeals Tribunal*, 2004 NSCA 139, at paragraphs 80-83.

First, it is necessary to focus on the specific situation at hand. It is impossible to foresee the almost infinite number of situations which could arise. This appeal apparently involves the first "aggressor" matter considered by the Tribunal. Presumably, the Tribunal's approach will develop as more situations are considered, either in the recognition or statutory bar context. The current factual situation is the only one before the Tribunal, and this decision must focus on that situation.

Second, in the present appeal, it is the Employer who is challenging the recognition of the Worker's claim. Hence, the Employer has presumably accepted the risk of possibly losing the benefit of the statutory bar, if recognition is successfully challenged.

Third, the conclusion that an aggressor removes himself from the ambit of employment does not necessarily imply that an innocent victim of an assault is removed from the ambit of employment. In fact, the definition of "accident" contemplates the wilful and intentional acts of another worker, and thus an innocent worker is not necessarily disentitled to workers' compensation benefits simply because an aggressor is disentitled.

Fourth, it is difficult to believe that the Legislature intended that unprovoked violent aggression be considered reasonably incidental to the employment context, except perhaps in unusual situations (at page 8-18 *Larson's* considers a case involving an injured aggressor who was the "enforcer" on a semi-professional hockey team). This point is made more stark if one considers workers employed by different employers. It is difficult to believe that the statutory bar covers an unprovoked assault by Employer A's worker on Employer B's worker (an innocent victim), simply because the attack occurred during both workers' hours of employment.

Generally, *Decision No. 1688/03, supra*, contains a useful discussion of the "aggressor" situation, in the context of a right to sue application.

CONCLUSION:

The Employer's appeal is allowed, for the reasons set out hereinabove. The Worker is not entitled to recognition of his claim because his aggressive behaviour took him outside the ambit of his employment.