

## **CLAIM HISTORY AND APPEAL PROCEEDINGS:**

This is an appeal from a decision of a Hearing Officer of the Board dated August 15, 2007, in which the Hearing Officer determined that the Worker had not suffered a personal injury by accident arising out of and in the course of his employment. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on September 6, 2007.

This appeal proceeded by way of oral hearing. The Worker's spouse, G.M., testified at the hearing. The Worker also testified to a limited extent, although his ability to communicate is significantly impaired as a result of having suffered a stroke. Exhibit "1" at the hearing was a Driver Rating Sheet for July 2004.

## **ISSUE AND OUTCOME:**

Did the Worker's September 27, 2005 stroke constitute a personal injury by accident arising out of and in the course of his employment?

Yes. The presumption contained in s. 10(4) of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"], that the Worker's injury arose out of his employment because it arose in the course of his employment, has not been rebutted.

## **ANALYSIS:**

The legislation applicable to this appeal is the *Act*. Section 187 of the *Act* requires me to give the worker the benefit of the doubt, which means if the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker's favour.

The Worker suffered a massive stroke on September 27, 2005. He was employed as a truck driver at the time and he was driving his truck. He has been unable to return to work since of his stroke.

Section 10(1) of the *Act* provides that where 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.

The word "accident" is defined in s. 2 of the *Act*, to include, among other things, "a chance event occasioned by a physical or natural cause". The Tribunal, in *Decision 97-287-CA* (March 24, 2000, NSWCAT) determined that a heart attack met the definition of "accident" and, similarly, I find that a stroke would meet the definition, as a "chance event occasioned by a physical or natural cause".

In order to be entitled to compensation pursuant to s. 10(1), the worker must generally show a causal link between the injury and the workplace. Causation need not be proved to a degree of scientific certainty. Common sense may be used to infer causation where appropriate. (See *Workers' Compensation Board (N.S.) v. Workers' Compensation Appeals Tribunal (N.S.) and Johnstone* (1999), 181 N.S.R. (2d) 247 (C.A.).)

Section 10(4) establishes a rebuttal presumption related to s.10(1). Section 10(4) states:

“Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.”

If I find that the Worker's stroke occurred in the course of his employment, then the presumption in s. 10(4) applies, and his stroke will be presumed to have arisen out of the employment, unless the contrary is shown. It is not necessary for the worker to demonstrate any unusual stress or strain prior to his stroke for it to be compensable. It would appear logical to conclude that the presumption exists to give the worker the benefit of the doubt particularly in circumstances where the cause of the “accident” is unknown or unknowable; cases where the accident has been fatal, or as in this case, where a worker is left unable to communicate the circumstances of his injury.

In order to rebut the presumption in s. 10(4), there must be evidence that is sufficiently convincing to allow the conclusion that the Worker's stroke was not related to his employment. The absence of evidence to suggest that the Worker's stroke was work related, does not rebut the presumption.

As noted above, the Worker was a truck driver. The evidence from his wife was that he had been a truck driver for 32 years. He was driving his truck in Ontario on September 27, 2005, when he suffered a stroke and his truck hit a cement barrier. The Worker was taken to Kingston General Hospital and cared for by Dr. Jackson. Dr. Jackson's letter of October 6, 2005, states that the Worker did not have any known injuries that had occurred as a result of his motor vehicle accident.

According to the Discharge Summary of the South Eastern Ontario Health Science Centre, dated October 6, 2005, the Worker had presented at Kingston General Hospital Emergency Department with a sudden onset of right sided weakness while driving his truck across the country. The Worker's past medical history was noted to be “possible HTN, possible hypercholesterolemia, left MCA lacunes on CT Scan”. The Worker's pre-hospitalization medications were noted to be simvastatin, hydrochlorothiazide, diclofenac with misoprostol, ranitidine, fluticasone nasal spray and Ibuprofen. An initial CT scan of the head revealed left MCA thrombus, with evidence of chronic lacunar infarcts and mild atrophy.

The Discharge Summary states that the Worker was diagnosed on admission with a left MCA stroke secondary to proximal M1 segment clot. The etiology was uncertain at that time, with no cardiac arrhythmia on ECG.

The Discharge Summary notes that the Worker's symptoms did not improve and he continued to have, "right sided hemiplegia, with no response of the right upper arm and withdraw just to painful stimuli on the right leg." He was only responding to simple commands and he suffered from expressive aphasia, "in that the only word he has is no." The Discharge Summary states that the Worker's echocardiogram was essentially normal. The Worker had a repeat CT Scan on which the left MCA thrombus was seen and there was evidence of a large left MCA subacute infarct, with minimal right subfalcine herniation. The report notes that the Worker had minimal improvement in terms of cognition and essentially no improvement of motor function during his stay at the hospital. He was released and transferred to his home town under the care of Dr. Leckey, neurologist.

Dr. Leckey provided a consultation report on the Worker's condition dated June 12, 2006. In it, he indicated that the Worker had a massive stroke involving the left hemisphere, leaving him with a significant right hemipaligia and an expressive aphasia. Receptively he was quite comprehensive. As of the date of Dr. Leckey's report the Worker was able to walk with a cane. The Worker's wife testified that since the Worker's stroke he has had two seizures and a heart attack. The Worker's wife testified that since his heart attack in January of 2007 his memory has greatly diminished. He was in a wheelchair at the hearing.

The Worker's wife was asked about any health conditions the Worker had prior to his stroke. She testified that he was on cholesterol medication, that he smoked, and that he was taking hydrochlorothiazide, for swelling in his hands. She testified that the Worker had high cholesterol but was told by his doctor that it was "nothing to worry about." The Worker's wife indicated that the Worker did not have high blood pressure, but rather, the hydrochlorothiazide was solely for the swelling in his hands. The Worker's wife testified that she was told by one of the Worker's doctors that it was possible that he had had "mini strokes" prior to the massive stroke he suffered in September 2005. She had not witnessed, personally, any stroke-like episodes.

The Worker's wife testified that he loved his job and that truck driving was "in his blood". She was asked whether there was anything in the Worker's life around the time of his accident that could have been viewed as an unusual stressor. She testified that he had been in an accident in Ontario in June of 2005 and was going to have to go to court and testify regarding that incident. She stated that that was weighing heavily on his mind. Apart from that, she said it was just the normal stress of the job; traffic etc. The Worker's wife testified that the Worker had a medical exam in 2005 and that it "was fine."

The Worker was unable to give a clear response as to whether or not he had done any loading or unloading of his truck the day of the stroke. Information provided from the Employer in a letter dated May 30, 2006, regarding the Worker's job duties was essentially undisputed by the testimony of the Worker and his wife. According to the letter, the

Worker's main duty was to drive. There was a suggestion from the Worker's testimony, that he helped other drivers unload trucks occasionally, however, there was no evidence that he did so on the day of his stroke.

Unfortunately, any evidence the Worker provided in response to questions from his Workers' Adviser at the hearing of this appeal, was difficult to interpret and was, therefore, of limited value to the issue on appeal.

Driver Rating Sheets were referred to at the hearing. According to Ms. MacDonald, of the Employer, there are limits to the number of hours a driver can drive. These sheets would indicate whether a driver had driven an excessive, and therefore prohibited number of hours, and if so, he would receive a violation. According to the Driver Rating Sheets for July, August, and September of 2005, the Worker had no violations.

Ms. MacDonald testified that had the Employer had any idea that the Worker was not feeling well, or that something such as what happened to the Worker, was likely to happen, they never would have sent him out on the road. She testified that the Worker never indicated that he was not feeling well to his Employer.

Mr. MacKinnon testified that the Worker was always good at all of his duties. He made it clear that he had nothing bad to say about the Worker and that he had been an excellent driver for the Employer.

The Workers' Adviser argued that the Board had taken the wrong approach to this case by its emphasis on "unusual or excessive stressors". The Workers' Adviser argued that quite simply, the presumption in s. 10(4) applies, and that in the absence of evidence to the contrary, where the Worker's accident occurred in the course of his employment, it is presumed to have arisen out of his employment. I accept the Workers' Adviser's argument. There is no evidence of unusual or excessive stressors in this case but that is not the end of the inquiry.

The Worker is not in a position to shed any light on the circumstances surrounding his stroke on September 27, 2005. As his wife testified, his memory, since his heart attack in January of 2007, is severely diminished. Not only is his memory diminished, but his ability to communicate is as well.

I accept that the Worker was in the course of his employment at the time of his stroke. He was a truck driver and he was driving his truck, transporting a load. There is no evidence before me to suggest that he was doing anything outside of the course of his employment at the time he was driving his truck. The presumption of s. 10(4) applies, and I must, therefore, look to see if there is evidence to rebut it.

There is evidence that the Worker was a heavy smoker. There is evidence that he had high cholesterol, although it was his wife's evidence that he did not have high blood pressure. Although there was some testimony from the Worker's wife that she had been told he had

had mini-strokes prior to his massive stroke, there is no medical evidence before me to determine that the Worker had any pre-existing condition which caused his stroke. I am not qualified, nor am I assisted by any medical evidence, to draw a conclusion that because the Worker smoked he had a stroke, or because he had high cholesterol, he had a stroke. None of the medical evidence before me provides a non-work related cause for the stroke. In the words of s. 10(4), “the contrary” has not been shown in this case, and the Worker’s stroke is presumed to have arisen out of his employment.

In deciding this appeal, I have reviewed both Tribunal jurisprudence, and jurisprudence from the Workplace Safety and Insurance Appeals Tribunal of Ontario [WSIAT]. The *Ontario Workers’ Compensation Act*, contains a presumption clause similar to the one in the *Act*. In WSIAT *Decision No. 247-99*, the Tribunal dealt with a case where a worker was a counselor at a residence for the developmentally challenged. Shortly after the end of his shift he was found lying on the kitchen floor and he died without recovering consciousness. An autopsy was unable to determine the cause of the Worker’s death. WSIAT had this to say at paragraphs 44-45 of its decision:

It is possible to speculate about what might have caused the worker’s death. For example, he might have been exposed to solvent that could only be detected with a specific test. However, as the Panel in *Decision No. 107/88* said, as page 331: “Since mere speculation is not evidence, speculation will not suffice as a substitute for evidence in order to rebut the presumption.”

The law does not require speculation. When a worker dies in the course of his employment, section 4(3) of the pre-1997 *Workers’ Compensation Act* requires that the adjudicator find that the worker’s death arose out of the employment “unless the contrary is shown” [emphasis added]. In the appeal here being considered, the contrary has not been shown.

As it was in the WSIAT case, it is possible to speculate as to the cause of the Worker’s stroke. Speculation is not sufficient to rebut the s. 10(4) presumption.

I find that the Worker is entitled to recognition that he suffered a personal injury by accident arising out of and in the course of his employment. I leave to the Board, any issues of apportionment relating to the quantum of benefits to be paid to the Worker.

## **CONCLUSION:**

This appeal is allowed. The Worker suffered a personal injury by accident arising out of and in the course of his employment.