WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1591/16

BEFORE: V. Marafioti : Vice-Chair
B.M. Young : Member Representative of Employers
A. Signoroni : Member Representative of Workers

Revised Panel for reconvened hearing of January 17, 2019
V. Marafioti: Vice Chair

HEARING: June 16, 2016, July 12, 2018 and January 17, 2019 at Toronto
Oral

DATE OF DECISION: February 5, 2019

NEUTRAL CITATION: 2019 ONWSIAT 339

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated February 13, 2013

APPEARANCES:

For the worker: M. McDonough, Lawyer;
Self-represented at the reconvened hearing on July 12, 2018; and
R. Fink, Lawyer, at the reconvened hearing of January 17, 2019

For the employer: Not participating

Interpreter: n/a

REASONS

(i) Introduction

[1] The worker appeals the decision of the ARO, S. van Veen, dated February 13, 2013, which denied the worker initial entitlement for a February 7, 2011 head injury. The worker attended and provided testimony. Ms. K. K., the worker's girlfriend, attended as a witness. Mr. McDonough represented the worker.

[2] After hearing testimony from the worker and Ms. K., at the completion of this hearing date, June 16, 2016, the Panel determined that it would summon the co-workers and supervisor as witnesses, so it did not hear any final submissions from Mr. McDonough. The Panel directed that Tribunal Counsel Office summon Mr. A.D., co-worker, Mr. M. N., foreman, Mr. P. T., co-worker/acting supervisor on duty on February 7, 2011, and Mr. C. R., Field Supervisor. During this process, Mr. McDonough did not continue to represent the worker.

[3] The Panel gave sufficient time for the worker to seek a new representative, if he so wished and the worker chose to represent himself at the reconvened hearing on July 12, 2018. The summonsing of the witnesses proved to be challenging, and only two witnesses of the four that were summoned attended the reconvened hearing on July 12, 2018. The Panel directed that the other two witnesses be summoned for a reconvened hearing on January 17, 2019. Mr. C. R. attended as a witness, however, Mr. P. T. evaded the service of the summons, adopting a "catch me if you can" attitude, even though he continued to work for the employer. The Process Server has been unsuccessful in his attempt to serve Mr. P. T.

[4] On November 29, 2018 the Tribunal Chair requested that Mr. A. Akhtar of our Tribunal Counsel Office obtain consent from the worker for this appeal to proceed with Vice-Chair Marafioti sitting as a single Adjudicator without Side Members A. Signoroni and B. Young. Mr. Signoroni recused himself for personal reasons. Through Mr. Fink, the worker informed the Tribunal that he consented to proceeding with the Vice-Chair originally assigned to this appeal sitting as a single Adjudicator. The Scheduling Department was advised on December 12, 2018 to proceed with the appeal with the Vice-Chair sitting as a single Adjudicator. The Panel appreciates the good work by Mr. Akhtar in assisting the Panel in the hearing process.

(ii) Issues

[5] The only issue for the Vice-Chair to determine is whether the worker has initial entitlement for a February 7, 2011 head injury accident.

(iii) Background

[6] The background information in this case is succinctly noted in the ARO's decision. I have considered all of the documentary evidence, and provide the following brief background information, in order to place this appeal in context.

[7] The worker was employed as a unionized Journeyman. He testified that while working the evening shift on February 7, 2011, he was moving a scissor lift, and was struck in the head by an extension railing which had not been secured properly. He was working with Mr. A. D., a co-worker, and Mr. P. T., also a co-worker who was acting as Supervisor at the Eaton Centre. The work was being performed after mall hours. The worker testified that on February 7, 2011, he

was preparing to set up the familiar work station on the second floor. This required that he bring his tools and scissor lift (a small scaffold) to the work station. According to the worker, the work station was right by a service elevator. The worker indicated he would push the scissor lift to the work station accompanied by Mr. A. D., who was behind him with his own scissor lift. According to the worker, in order to allow the lift to drive through the doorways and into the elevator, they had to dismantle the extension railings on the lift by removing the safety pins and then put them back on once they were through the doorways. According to the worker, at the time of the injury he had set up his lift and then while pushing Mr. D's lift the heavy metal extension bar dropped and struck him hard on the top of his head. The worker described immediate pain and an immediate bump on the head, but no bleeding. According to the worker, his co-worker Mr. D. was nearby and came because he heard the bang. The worker also indicated that Mr. P. T. also came immediately after the incident. The worker was asked whether he wanted to go to the hospital, but he declined. The worker continued to work, but indicated he had difficulties with his duties. He indicated he needed to work because of financial problems and he also feared eviction from his residence, and he didn't want to lose his job. According to the worker, the nature of the operation and industry indicated that the whole crew and the three people present, and even the foreman knew that he had a head accident at work and was having ongoing problems. He considered that the file statements from his co-workers, foreman and field supervisor were false and misleading.

[8] The worker was laid off work on February 18, 2011 on the basis that the employer indicated that there was a work shortage. The worker testified that work was available and continued. The worker stated his condition got so bad that he called in sick after February 18, 2011, feeling that he had the flu. Eventually, on the advice of his girlfriend, who also provided testimony at the hearing, the worker attended the Emergency Department of a local hospital on February 28, 2011, where he was told he had suffered a concussion from his head injury.

[9] The employer did not call the worker back to work, and the worker did try to work for another non-union company in March or April of 2011, but he only lasted approximately a week and a half.

[10] In summary, it is the worker's position that there was an accident at work that caused the head injury. There was immediate pain and the co-worker, Mr. D, and the acting foreman on that date, Mr. T. were all aware of the worker's accident. The worker maintains that he continued to work as he needed to earn a living, so he continued to work for a period of time, despite not feeling well. On the advice of his girlfriend the worker sought medical attention as he was not physically able to continue.

[11] In the decision of February 13, 2013 the ARO denied initial entitlement for the February 7, 2011 head injury. The ARO concluded that the evidence failed to establish proof of the February 7, 2011 head injury arising out of, and in the course of the worker's employment, and denied initial entitlement. The worker appealed to the Tribunal.

(iv) Law and Board policy

[12] As the claim relates to a February 7, 2011 injury, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[13] Section 126 of the WSIA, requires that the Tribunal apply Board policy when making decisions. The Workplace Safety and Insurance Board ("WSIB" or the "Board") confirmed that the following policy packages, revision #9, would apply to the subject matter of this appeal:

- Policy package #1 – Initial Entitlement
- Policy package #300 – Decision Making/Benefit of Doubt/Merits and Justice

[14] The policies will not be duplicated here for practical reasons. I have considered these policies as necessary in deciding the issues in this appeal. I have also considered the policies in the context of the legislation in arriving at my decision.

[15] General entitlement to benefits is governed by section 13, which states the following:

> **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.

[16] An accident is defined in section 2(1) of the WSIA as "a chance event occasioned by a physical or natural cause".

[17] On the definition of an accident, *Operational Policy Manual* Document No. 15-02-01 states that a chance event is "an identifiable unintended event which causes an injury."

[18] The standard of proof that applies in workers' compensation proceedings is the balance of probabilities. Pursuant to section 124(2), the benefit of doubt is given to the claimant in resolving an issue where the evidence for and against the issue is approximately equal in weight.

(v) Analysis and Conclusions

(a) The decision

[19] The only issue for me to determine in this case is whether there is initial entitlement for a February 7, 2011 head injury, resulting from the worker's employment. Having considered all of the documentary evidence, the testimony from the worker, his girlfriend, and the co-workers Mr. A.D., Mr. M.N., and Mr. C.R., and the submissions from Mr. Fink I find, on a balance of probabilities, that proof of accident has been established.

(b) Quality of the Testimony

[20] As, in this appeal, proof of a work-related accident and injury is in question, I therefore feel that it is necessary to comment on the nature and quality of the testimony. Tribunal jurisprudence has often cited the British Columbia Court of Appeal decision *Faryna v. Chorney* (1951), for W.W.R.(N.S.)171(quoted with approval by the Ontario Court of Appeal in *Philips v. Ford Motor Co.,* [1971 20.R 637] on the assessment of the credibility of interested witnesses:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth.
>
> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.
>
> In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[21] I recognize that the testimony from the worker was consistent, including statements made to medical professionals, in general terms indicating that he struck his head at work on the scissor lift. The testimony from his girlfriend was understandably very supportive of the worker. However, the testimony under oath from Mr. D., who was present on February 7, 2011 as a co-worker, and the testimony of Mr. M. N., who also provided testimony at the reconvened hearing of July 12, 2018, differed from the documentary evidence from them.

[22] In my view, their testimony given under oath, from Mr. D. and Mr. M.N. now supported the worker's position. Mr. Fink suggested that perhaps the *documentary* evidence was made under duress as the representative for the employer at that time was aggressively challenging the worker's claim.

[23] The testimony of Mr. C. R. at the reconvened hearing on January 17, 2019 given in a very credible manner, did not rule out the possibility that a head injury could occur by striking the scissor lift. This witness was skeptical however regarding the worker's claim as the worker asked to be re-employed while at the same time complaining that he was injured. The witness indicated that a person could strike their head on a scissor lift numerous occasions during their shift and did not consider the worker's discussion with him to indicate a serious injury. Therefore he did not pursue it further.

[24] In summary, as the quality of the testimony as a whole is questionable, I relied on the preponderance of evidence which I considered most relevant. I also note that the Board Investigator in 2011 did not interview Mr. T. or Mr. D., the two co-workers who were present and working with the worker on February 7, 2011, the date of the incident in question although the Investigator interviewed other individuals who were not present.

(c) Discussion and proof of accident

[25] In the decision of February 13, 2013, the ARO found that the worker's claim to a February 7, 2011 compensable head injury was not supported. In essence he found there were no direct witnesses to the claimed injury, and the statements from two co-workers, the foreman and the field supervisor denied having knowledge of a head injury. The ARO noted there was no immediate lay off from work, and there was a delay in reporting, and that there was no request made to summon any of the co-workers or supervisor as witnesses by the worker. Added to the delay in reporting, the ARO concluded there was a delay in layoff, lack of confirmed continuity and a delay in seeking medical attention. In summary, on this basis, the ARO found that the worker failed to establish proof of accident on February 7, 2011 arising out of and in the course of the worker's employment and denied the worker's claim.

[26] On February 7, 2011 the co-worker, Mr. D. was nearby. Also present with the worker was Mr. T., the other co-worker who was also acting as a designated foreman. I acknowledge that this claim was not established by the worker in a straightforward manner. However, I also acknowledge that the employer did not carry out any internal investigation of the claim at that time.

[27] The employer retained the services of a consultant professional corporation to represent them regarding all WSIB matters. It was this corporation that strongly objected to the worker's claim. However, I note that on November 29, 2012, the ARO spoke with the representative from the consultant corporation, who indicated that she was advised by the employer that they would proceed self-represented, and that the Board should contact the employer directly. Although the

employer expressed an interest to attend a hearing, the ARO did contact the employer on February 6, 2013, the day of the hearing, and spoke with the employer. The ARO advised the employer about the hearing and that all other parties were there except the employer. The employer indicated that they were familiar with the case and knew that the employer was to attend a hearing, but did not have it marked down on their calendar, and would not be able to attend. The employer was advised that the hearing would proceed, as the absence was not due to an emergency situation. The employer agreed, and requested a copy of the decision.

[28] Furthermore, several attempts were made to summon Mr. T., the other person present on February 7, 2011 at the work site. However, as indicated above, Mr. T. evaded service of a summons and although acknowledging that he was being summoned, he refused to participate, even though he was still employed by the employer. In testimony, the worker indicated that Mr. T. was nearby and came because he heard the bang. The worker also testified that Mr. T. was also present immediately after the occurrence. The worker was asked whether he wanted to go to the hospital, but he declined.

[29] Although the employer indicated that the worker was terminated because of a lack of work, the evidence indicates that the work at the Eaton Centre continued until February 28, 2011, and that Mr. T. continued doing that work. Under oath, Mr. D. testified that he was immediately made aware of the injury, confirmed the worker's accident, and supported the worker's claim. The foreman responsible for that site, Mr. M. N., was not on that shift that evening, and Mr. T. was the acting foreman on duty. Mr. N. acknowledged in oral testimony that he was not present the night of the incident, and found out about the claim later through the office. I note in particular that Mr. T., the co-worker, who was acting as foreman that evening, and Mr. D., the other co-worker, were not interviewed by the Board Investigator, although, as noted above, under oath Mr. D. did support the worker's claim. I found it difficult to understand that if the employer considered the claim fraudulent, why it did not carry out an internal investigation at the time, did not attend the ARO hearing, and did not encourage Mr. T., who still worked with them, and was present the night of the incident, to attend the hearings or at least provide consistent written submissions. As indicated, Mr. T evaded service of a summons to attend the Tribunal hearing and I do make a negative inference on his lack of attendance at the hearing, given that he continued working with the employer and did not need to display such evasive behaviour in terms of being served with a summons.

[30] The delay in seeking medical attention until February 28, 2011 is troublesome. Tribunal *Decision No. 1196/10* (for example) discusses the difficulty in delaying reporting as follows:

> [49] The presence of immediate reporting goes a long way to removing doubts about possible non-occupational causes of injury. By delaying in reporting at work, to her doctor, and to the WSIB, the worker has opened up the possibility for doubt to exist concerning the role of her workplace accident in causing her left knee injury.

[31] I do note however that the worker did see Dr. O. Fried on February 28, 2011, and a Health Professional's Report (Form 8) was completed by Dr. Fried, indicating that the worker was "hit by a bar on head". The date of the accident noted was February 7, 2011.

[32] As noted above, on December 13, 2018, the worker's new representative, Mr. Fink, provided consent that this matter could go ahead with a single Adjudicator. Along with that, Mr. Fink provided a letter dated November 27, 2018 from Dr. D. Wong, which the Vice-Chair accepted into evidence. I allowed this report to be submitted into evidence as the Board considered the worker's delay in seeking medical attention a significant factor in the denial of

the worker's claim. Mr. Fink asked Dr. Wong to provide an opinion regarding why the worker would have delayed in seeking medical attention if the injury and its sequelae were as serious as the worker outlined.

[33] Dr. Wong is a Consulting Neurologist. Dr. Wong related the worker was involved in a closed head injury on February 7, 2011. In addition, Dr. Wong reviewed all of the documentary medical evidence. Dr. Wong stated the following:

> In my experience, it is not uncommon for patients who have suffered a concussion not to seek immediate medical attention, particularly when there is no loss of consciousness. Patients often delay in reporting the injury for various reasons. In the case of [the worker] he likely had the expectation that the symptoms would resolve within a few days. He also could have attributed some of his symptoms to an upper respiratory infection he had developed within a week of the injury. Post-concussive symptoms worsen with activity (physical and mental) and it often will take a number of days until patients recognize the impact of the symptoms on their function, including their work performance and day to day activities. It is also important to recognize the delay in institution of post-head injury treatment may gradually lead to worsening of symptoms over days following an injury. I would note that the treatment of a concussion is different from other types of injuries, as it is critical to curtail one's activity causing the symptoms. Therefore [the worker's] post-concussive symptoms intensified in the days following the injury, which explained why there was a delay in him and others around him to recognize the seriousness of the problem and seek medical treatment.

[34] In conclusion I find, on a balance of probabilities, that initial entitlement for a head injury of February 7, 2011 is in order. Given the way the worker reported his claim, the inconsistencies in the evidence from the co-workers, and their lack of willingness to participate and the evasion of summons by Mr. T., a critical witness still employed by the employer, it is difficult to determine completely and without any doubt whether an accident occurred on February 7, 2011 as described by the worker. However, I am satisfied, on a balance of probabilities, that the worker's testimony regarding the accident and the testimony of the co-worker who was present on February 7, 2011 supports initial entitlement. The accident history was provided by the worker in a consistent manner to all of the treating physicians without any expressed concern on their part. I therefore find, on a balance of probabilities, that initial entitlement should be granted for the February 7, 2011 compensable injury.

DISPOSITION

[35] The worker's appeal is granted.

DATED: February 5, 2019

SIGNED: V. Marafioti