

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTING PARTY:

REPRESENTED by: Richard Fink, Fink & Bornstein Barristers & Solicitors

RESPONDENT:

HEARING: Oral Hearing in Toronto on June 22, 2017

HEARD by: J. Mangoff, Appeals Resolution Officer

OTHER PARTIES:

- Teresa Chiu – mandarin interpreter
- - worker's sister
- Ms. Jackie Lusaski - law student observer

ISSUE

The worker objects to the denial of his claim based on the decision which found proof of accident was not established.

BACKGROUND

On October 26, 2016 the worker sustained a right distal radius fracture which required surgical repair. The worker was diagnosed with a laceration of the right lobe of the liver and a right adrenal injury. I note there are inconsistencies in the accident history reported by the worker and the employer.

The Employer's Report of Injury dated October 28, 2016 stated on October 26, 2016 the worker was cutting a branch when he fell off a ladder. The worker, in conversations with the Case Manager, reported while on a roof the platform he was standing on collapsed and he fell to the ground.

Entitlement was initially accepted; however, upon receipt of additional information the decision was overturned. Consequently, the worker was denied benefits as it was determined proof of accident was not established.

The worker did not agree with the decision to deny entitlement in his claim and the file was referred to the Appeals Services Division for further review and consideration.

AUTHORITY

- 11-01-01 – Adjudicative Process
- 11-01-03 – Merits and Justice
- 15-02-01 – Definition of Accident
- 15-02-02 – Accident in the Course of Employment

ANALYSIS

In rendering this decision I have reviewed and considered the information in the claim file, the relevant sections of the Workplace Safety and Insurance Act, the appropriate operational policies and any submissions provided.

I have reviewed the circumstances of this claim and I find the criteria to grant initial entitlement has been met. The following is a summary of my observations and findings.

The worker testified he began roofing in 2016 with the accident employer. The worker stated he found the job on a Chinese website and he worked with the employer from about June 8, 2016 until November 2016. He worked 4-5 days per week and was paid \$150 per day. The worker was advised of his schedule by text message from the boss or he was told the previous day he would be working. The worker was picked up by the employer at an agreed upon meeting place. The worker stated the owner of the company was [redacted] and he testified he is not related

On October 26, 2016 the worker was injured. The worker described that on this day he was picked up by the employer and he was brought to a residential house where they worked on a roof. The worker testified he was organizing material and putting the materials on the roof for the roofers. The worker explained a machine was used to lift the material and he would manually move the material to the corners of the roof. When he was injured he was working on a big house with platforms outside the windows and the materials were put on these platforms. The platforms were not part of the house; but, built specifically for the construction. About half of the materials were placed on the platforms and the other half of the material was put in the garage. The worker was standing on the platform doing his job when the platform collapsed and he fell to the ground. The worker testified a co-worker saw him fall and he was brought to the hospital. The worker testified it was his boss who gave the statement when they arrived at the hospital because he was very injured, did not speak English well. The worker confirmed that he heard his boss provide inaccurate information but he was in pain and could not provide clarification at that time. The worker was transferred to St. Michael's hospital by ambulance due to the severity of his injury. The worker explained that he did not tell anyone what happened because he was not well enough to speak. The worker was admitted to the hospital and he had surgery. His sister, [redacted], came to see him the next day and his boss visited him in the hospital.

The worker explained he attempted to get statements from his co-workers to confirm his injury but they would not provide any information as they did not want to get into trouble with the boss. When asked about the employer's report of the accident history the worker denied he was cutting trees at his boss's house and testified he did not put Christmas lights on a tree. The employer reported he was related to the worker; however, the worker testified he had never met [redacted] before he began working for him. The worker advised he heard his boss report he

was his cousin and that he fell out of a tree. His boss told him when he was in the hospital he should report the same accident history to avoid trouble and make it easier to get benefits. The worker testified that after he was discharged he spoke with a lawyer and told him to tell the truth. Therefore, he did not corroborate the employer's statement.

The testimony of the witness was pertaining to the conversation she had with the employer. She explained she had never seen before she met him at the hospital and she is not related to him. had advised her that the police were not called when her brother fell because he believed the worker did not have a visa to work in Canada. then assured her he knew the procedures and said her brother's statement must match what he reported to the WSIB.

A claim created by the WSIB for a workplace accident/disease is adjudicated based on entitlement principles and the facts of the case. All decision-makers use the same criteria for ruling on initial entitlement to WSIB benefits. This system is known as the "five point check system."

Policy 11-01-01 outlines the criteria for an allowable claim and states in part:

An allowable claim must have the following five points:

- *An employer;*
- *A worker;*
- *Personal work-related injury;*
- *Proof of accident; and*
- *Compatibility of diagnosis to accident or disablement history.*

Also, in determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of **place**, **time**, and **activity** in the following way:

Place

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as:

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration:

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Decision-makers focus on the activity of the worker and examine all the surrounding circumstances to decide if the worker was in the course of employment at the time that the personal injury by accident occurred.

I acknowledge the accident history reported by the employer is not the same as the accident history provided by the worker. Further, there is a discrepancy in whether the worker is related to the employer. I note the employer did not attend the hearing, has not provided an objection to the allowance of the claim and did not provide any evidence to support the worker was injured at his home. After considering the information provided, I accept the worker's description of the accident and that he fell from the roof when the platform collapsed. The worker reported the injury immediately and sought medical attention. Based on the evidence I find proof of accident has been established.

In my view the worker was engaged in a work-related activity reasonably related to his employment. Also, I note the worker was injured during his work shift. The worker indicated he was on the job site; however, the employer indicated the worker was at his home. Regardless, the worker was performing an activity related to his employment. Therefore, I find the balance of evidence supports the worker was injured while employed by _____ and that his injury arose out of and in the course of his employment.

The evidence must also support the worker sustained a personal work-related injury as a result of the workplace injury. The medical reporting confirmed the worker had a fracture, liver laceration and an adrenal injury. Therefore, it is evident the worker had sustained a personal injury. Further, I find the diagnosis is compatible to the accident history.

Page 5

Therefore, after a careful review and consideration of the evidence presented, I find the criteria to grant entitlement was met and the worker is entitled to benefits

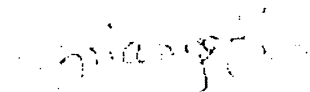
CONCLUSION

I conclude the evidence supports the worker sustained an injury that arose out of and in the course of his employment. Therefore, entitlement is granted for a right distal radial fracture, a liver laceration and an adrenal injury.

The nature and duration of benefits is left to the discretion of the operating area.

The worker's objection is allowed.

DATED July 13, 2017



J. Mangoff
Appeals Resolution Officer
Appeals Services Division