

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 71/04

- [1] This appeal was heard in Toronto on January 15, 2004, by a Tribunal Panel consisting of:

R. McClellan: Vice-Chair,
B. Wheeler : Member representative of employers,
D.C. Timms : Member representative of workers.

THE APPEAL PROCEEDINGS

- [2] The worker appeals the decision of the Appeals Resolution Officer, Mrs. Whitaker, dated January 9, 2003. That decision concluded that the worker did not have entitlement for a right leg fracture sustained on June 7, 2000 and the grounds that the injury was the result of horseplay and therefore did not arise out of and in the course of the worker's employment.

- [3] The worker appeared and was represented by Mr. V. Severino. The employer attended as a witness. Ms. T. Stubbins attended as an observer.

THE RECORD

- [4] The Panel considered the material included in the Case Record prepared by the Office of the Vice-Chair Registrar (Exhibit #1). In addition, we considered Addendum 1, (Exhibit #2); Addendum 2, (Exhibit #3); the Hearing Ready Letter, (Exhibit #4).

- [5] The Panel also heard oral evidence from the worker and the employer. Submissions were made by Mr. Severino.

THE ISSUES

- [6] The issues before the Panel are whether the worker has entitlement for a right leg fracture sustained on June 7, 2000. This involves a consideration of and whether the worker was injured by accident arising out of and in the course of his employment, or whether he took himself out of the course of employment as a result of horseplay.

THE REASONS

(i) Background

- [7] The worker is a 26-year-old man who was employed as a transport truck driver. On June 7, 2000 he fractured his right leg in two places at the femur, in a forklift accident, in a warehouse belonging to a customer to whom he was making a delivery of tires.

- [8] On June 12, 2000 the worker submitted a written description of the accident of June 7. He wrote as follows: that while working for the accident employer, he delivered a load of tires to the customer. While he was waiting for the tires to be unloaded from his truck, his co- worker threw a roll of "toilet paper" up into rafters of the customer's warehouse, where it became stuck and partially unrolled. The co-worker asked the worker to retrieve the roll and the worker stepped onto the forks of a forklift to attempt to reach the roll, at which point the co-worker jumped onto the forklift and raised the worker up high. The worker wrote that he pleaded to be let down, whereupon the co- worker started to drive the forklift around the warehouse and then crashed the forklift into a steel pole, crushing the worker's leg and fracturing his femur.
- [9] The worker was off work for three months after which he returned to his regular duties with the accident employer.
- [10] In a letter dated July 16, 2000, the claims adjudicator advised the worker that, in her view, the worker had been engaged in horseplay, that he was not authorised to operate or stand on the forklift, which was owned by the employer's customer, that he was a participant in the horseplay and therefore entitlement was denied.
- [11] Company Safety Rules, at page 119 of the Case Record stated, at Rule #14, "no employee shall board a moving or stationary docking cart." The Company Discipline Policy, at page 117 of the Case Record, states, at point #5, "un-authorised use of equipment", and at #10 "carrying an unauthorised person in a company vehicle"-are grounds for an immediate dismissal.
- [12] The incident of June 7 was investigated by the Ministry of Labour Safety Inspector on June 8, 2002, who took statements from persons involved. The statement dated June 8, 2000 taken from the Operations Vice-President of the accident employer's customer, states that the worker and the co-worker involved in the incident were aware of the customer's policy that truck drivers were confined to a truck driver waiting area and were not allowed to go past that area unless they were accompanied by a member of the customer's staff. The Vice-President stated, "it was clear to them that they should not enter the warehouse."
- [13] The accident was investigated by the police but no charges were laid.
- [14] The employer's report of injury dated June 13, 2000 states, "worker was on forklift (un-authorised) at (the customer's premises) - driver of forklift jerk foreword and pinned (the worker) against a pole and broke his leg ... riding on forks of forklift trying to get roll of toilet paper off ceiling."
- [15] Board Memo #5 dated July 13, 2000 records a conversation between the claims adjudicator and the worker, wherein the worker stated that the co-worker threw a roll of tissue toward the ceiling and then asked the worker to retrieve it.

- [16] Board Memo #18, dated July 15, 2002, records a second conversation between the claims adjudicator and the worker about the incident. The worker stated that he was in the office at the customer's facility and when he came out, his co-worker asked him to retrieve a roll of paper towel -not toilet paper- which was lodged in the ceiling. The worker is described as a tall man, at 6'2" and the co-worker as short, at 5'1".
- [17] On October 31, 2000, the Board Investigator reported that the worker explained the events of June 7 to him as follows. Prior to the accident the worker was waiting beside his trailer. The worker stated that his co-worker had left the waiting area to return to the truck, and when he came back he smelled of marijuana. The co-worker had a roll of paper towel which was throwing up in the area and catching. He threw the roll at the worker, from 30 feet away and the worker threw it back to him and then the co-worker threw the roll up and it got lodged in the support beams of the warehouse and unravelled. The customer's Receiver was present and asked the co-worker to get it down, but the co-worker was too short, so he asked the worker to help get it down. The worker stood on the forks of the forklift, whereupon the co-worker raised the forks about 15 ft. in the air and left him there for about three minutes. The co-worker then lowered the forklift to about 7 ft. and started driving around the warehouse, until he crashed the forklift into a pole.
- [18] The Investigator interviewed the warehouse Receiver, who stated that he alone had unloaded the trailers and that he did not witness the accident, did not see any horseplay with paper towels, was not aware of any drug use, and was in the washroom at the time all this was going on.
- [19] The Investigator reported that he tried to interview the co-worker but was unable to locate him. In his signed statement, the co-worker wrote as follows:
- Hit a pole with forklift with [the worker] on the forks. We were getting a roll of paper that got stuck in the roof. I do not know (why) we were on the forklift and we were not allowed on it. Sorry.
- (ii) The medical evidence**
- [20] The Emergency Report from Halton Healthcare Services, dated June 7, 2000 records the injury to the worker's right leg resulting from the forklift accident.
- [21] On June 8, 2002 surgery was performed to repair the worker's fractured femur. X-rays revealed fracturing throughout the distal shaft in the supracondylar area of the femur with displacement of the proximal fragment. Further surgery was required on June 9 and again on June 13.
- [22] On July 6, 2000, the worker began a course of physiotherapy, but the clinic notes record that he attended only three out of 10 scheduled sessions and that he was discharged from the clinic on September 13, 2000.

(iii) The worker's testimony

- [23] The worker testified as follows. He stated that he began working for the accident employer in 1997 as a truck driver with an AZ license.
- [24] He described the accident of June 7, 2000 as follows. He and his co-worker (in a second truck) delivered two loads of tires to the warehouse where the accident occurred, in the evening of June 7, 2000. The delivery required two trips. The first delivery was unloaded, they returned to their headquarters to reload and then delivered the second load. The trucks were backed up to the warehouse loading door. The worker stated that he could not recall clearly who was unloading the trucks. He stated that his co-worker was unloading the trucks, using a forklift and that the warehouse Receiver was unloading the trucks as well but he could not recall if they were both unloading at the same time, or how many forklifts were involved. The tires were unloaded on their skids and placed inside the warehouse. While the unloading was taking place, the worker testified that he just waited, pointing to an area beside the office on the edge of the warehouse. He did state that not unload any of the tires himself. He stated that he could not leave until his co-driver was finished and they could leave together, when all the Proof of Delivery papers were signed.
- [25] The worker testified that after the second delivery was unloaded, his co-driver left the warehouse area and went outside. When the co-driver returned, the worker stated that he smelled of marijuana. He stated that his co-worker had a roll of "something" which he was throwing up in the air. At one point, he threw it to the worker, who threw it back. The worker stated that they were very close together when this happened. The co-worker then threw of the paper roll up in the air and it got stuck in the warehouse rafters, with a piece of the roll hanging down.
- [26] The worker testified that the warehouse Receiver then came into the warehouse and said "you guys" better get that down. The worker stressed that the Receiver said "you guys," plural, and that because of this he was afraid that if he didn't follow this instruction he would be blamed, reported to his boss, and disciplined.
- [27] The worker stated that the co-worker tried to get the paper roll down, but he was too short to reach it and he asked the worker to help get it down. The worker stated that he agreed to help, and stepped onto the prongs of the forklift, one foot on each prong, facing forward, and reached up to retrieve the roll.
- [28] At this point, he stated that the co-worker jumped into the forklift and raised the forklift some 25 ft. into the air and then got out of the forklift and left him 25 feet up in the air for about five minutes, while the worker was yelling to be let down. The worker stated that he turned around and hugged the cage of the forklift to keep from falling. He stated that the co-worker then got back on the forklift and lowered it to a height of 7/10 feet and then started to drive the forklift around the warehouse. As he was driving the forklift through the warehouse, the

co-worker crashed into a steel post, crushing and breaking the worker's leg. The worker stated that he was still draped over the cage, with one leg on each fork at the time of the crash. He stated that the co-worker then lowered the forklift and the worker lay on the ground until the ambulance came to take him to the hospital.

[29] The worker said he was off work for three months and then returned to work at his regular job with the accident employer.

[30] He insisted that he had not been involved with the co-worker in throwing the paper roll around in the warehouse, and that he was just following the instruction of the Receiver to remove the paper roll.

(iv) Testimony of the accident employer

[31] The employer testified that he was the worker's employer and the owner of the trucking business. He stated that if the warehouse Receiver had instructed his workers to retrieve the roll of paper from the rafter, that it was outside their job function and that they had no obligation to follow a customer's instructions.

[32] He stated that under his company's policy, workers engaging in horseplay were "subject to dismissal" but that dismissal is not automatic: the policy places discipline at his own discretion.

[33] The employer stated that the worker had a good record before the accident, "95% of the time", with one prior incident which involved dragging his truck in a customer's yard i.e. running it with the brakes locked, causing the customer to bar the worker from the premises.

[34] The employer stated that his drivers are sometimes expected to help with unloading a truck but they are not expected ever to use a forklift, which requires a license to operate, and he did not believe that either of the two drivers was licensed to operate a forklift.

[35] The employer stated that he supported the findings of the Claims Investigator, the Claims Adjudicator and the ARO and that he believed the decision to deny entitlement should be upheld.

(v) Submissions of the worker's representative

[36] Mr. Severino submitted that the worker was an involuntary participant in the horseplay initiated by the co-worker and that the worker only tried to retrieve the paper roll because the Receiver told him to do so. He cited Board *Operational Policy Manual*, Document #03-02-11, *Fighting Horseplay and Larking*, and submitted that the worker was an innocent victim of the co-worker's horseplay and therefore, within the meaning of the policy, entitled to compensation.

(vi) Law and policy

[37] On January 1, 1998, the *Workplace Safety and Insurance Act, 1997* (“WSIA”) took effect.

[38] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal.

[39] The definition of accident is set out as follows:

1. (1) in this Act,

“accident” includes,

- (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”)

[40] Section 13 of the WSIA reads:

13(1) A person 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 .

[41] Board *Operational Policy Manual*, Document #03-02-11, *fighting, horseplay and larking*, provides that horseplay and larking are grounds for excluding a worker from entitlement to compensation for an accident, on the grounds that such workers have taken themselves out of the course of employment.

Horseplay And Larking

Similarly, the Act does not provide coverage for workers injured while participating in horseplay and larking.

An injured worker who is an innocent victim has entitlement if the worker

- does not participate in the horseplay or larking, and
- does not retaliate.

As with fighting, those who initiate the horseplay take themselves out of the course of their employment. As such, any innocent injured worker has a right of third party action (see 01-01-04).

(vii) The Panel's conclusions

[42] The issue before the Panel is whether or not the worker was in the course of employment at the time of his injury. Relevant to this is a consideration of whether he was a participant in horseplay at the time he was injured on June 7, 2000. The evidence establishes that the worker’s co-worker was clearly involved in horseplay.

[43] The Panel's task is not made easier by the absence of witnesses to the event, nor by the many contradictory versions of what happened which are recorded in the various statements found in the Case Record. Not the least of these contradictions are those of the worker himself. Suffice it to say that the worker's testimony before the Panel is neither confirmed nor corroborated by the statements taken by the Claims Investigator nor by the statements recorded by the claims adjudicator nor the statements taken by the Ministry of Labour inspector.

[44] We cite some of the main inconsistencies.

1. Who unloaded the trailers? The worker testified that his co-worker and the warehouse Receiver unloaded the trailers together, using a forklift, but he could not tell the Panel whether the two men worked at the same time on two forklifts or one-at-a-time on one forklift, nor could he say whether the forklift involved in the accident had been used to unload the trucks. Since the worker had spent some three hours standing, waiting and presumably watching while the trucks were being unloaded a few feet away from him, the uncertainties in this testimony is difficult to comprehend. Moreover, the co-worker, in his signed statement, wrote that the workers were not allowed on the forklifts. And the Receiver wrote in his statement of June 8, 2000, that he had unloaded the two trailers by himself. The Receiver also stated to the Claims Investigator that the co-worker did not drive the forklift to unload the trailers.

[45] 2. Did the Receiver order the two drivers to retrieve the roll of paper? The worker testified to the Panel that the Receiver used the expression, "you guys", as in "you guys better get this down." The worker was definite that the phrase "you guys" was used, stressing that the phrase implicated him and made him fearful of discipline if he didn't accede to the Receiver's demand. But there is no reference to the Receivers' involvement at all in any of the events of June 7 in the worker's own signed statement of June 12, 2000.

[46] In his various statements to the claims adjudicator, recorded in Board Memo #5, dated July 31, 2000, Board Memo #6, dated August 10, 2000, Board Memo #18, dated July 15, 2002 and Board Memo #20, dated July 16, 2002, the claims adjudicator recorded four separate conversations with the worker about the accident. In none of these is the Receiver even mentioned.

[47] Board Memo# 20 states,

The worker denies knowing that he saw the roll of paper towels having been thrown. He stated he had no idea how the roll of toilet paper got there. He claims he came out of the office and was asked by his co-worker to get something that was lodged in the ceiling.

[48] In his signed statement found at page 106 of the Case Record, dated June 7, 2000, the Receiver stated that he was in the washroom while all this was happening and did not come out until after the accident had happened. The Receiver advised the Claims Investigator that he did not see any horseplay, that

the two drivers were waiting near the office, talking and laughing while he himself did all the unloading. He said that he thought that the drivers were leaving and he went into his office to drop off the paperwork. He then went to the washroom. While he was in the washroom, he heard the forklift start up and he thought that the warehouse manager had returned and was running it. While he was still in the washroom he heard the crash and the screams. The Receiver told the Claims Investigator that he did not see any horseplay and did not see anybody throwing toilet paper up into the rafters.

3. What was happening with the paper roll? The Worker told the Claims Investigator that the co-worker threw the paper roll to him from some 30 ft. away and that the worker threw it back. But the Worker stated to the Panel that they were side-by-side when the roll was thrown back and forth. The Claims Investigator reported that the accident employer had advised him that the co-worker said that he and the worker were throwing the roll back and forth, "playing catch-up with it like a football". Board Memo# 20 records that the worker told the claims investigator that he had no idea how the roll of toilet paper got lodged in the ceiling.
4. The height of the forklift. The worker testified that the Co-worker raised the forklift 25 ft. into the air. But all previous versions reported that it was about 15 feet.

[49] This case does turn upon the credibility of the worker. In the light of the evident contradictions in the worker's various versions of what happened on June 7, 2000, and the evident contradictions between each of his versions and those recorded in the Case Record from his co-worker and the Receiver, the Panel finds that it is unable to rely upon the worker's testimony. We prefer the evidence of the Receiver and accept that he did not tell the workers to retrieve the paper roll.

[50] The Panel concludes, on the basis of the evidence in the Case Record as documented by the claims adjudicator and the Claims Investigator, as well as the statements from the Receiver and the co-worker, taken at the time of the accident, that the worker did participate in horseplay with his co-worker. The worker and the co-worker were in the main part of the warehouse, after the trucks had been fully unloaded, were they had absolutely no business to be. It was not part of the workers job to be in this location at this time. They were tossing a paper roll back and forth like a football and it got stuck in the rafters of the warehouse. The co-worker may or may not have raised the worker 25 ft. into the air on the forklift, but it is a fact that they were riding around inside the warehouse on a forklift, with the co-worker driving and the worker standing on the forks, when it crashed into a steel beam, breaking the worker's leg.

[51] It is clear to the Panel that it was not part of the duties of the worker to be the warehouse at that point in time and to be tossing around a roll of paper towel. It was absolutely no part of his job duties to be touching, standing on or driving a

forklift which belonged to the customer. The employer did not condone these activities. The activities were not reasonably incidental to the worker's employment. By putting himself into a situation where he was participating in foolish behaviour with his co-worker, the worker took himself out of the course of his employment and was engaging in horseplay and larking within the meaning of Board *Operational Policy Manual*, Document #03-02-11.

[52] Entitlement to compensation is denied.

THE DECISION

[53] The worker's appeal is denied.

DATED: This 2nd day of March 2004/

SIGNED: R. McClellan, B. Wheeler, D.C. Timms.