COURT UPHOLDS DECISION FINDING FIREFIGHTER'S HEART ATTACK WAS NOT WORK-RELATED

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In a recent decision, the Ontario Divisional Court dismissed an application for judicial review of a decision by the Workplace Safety and Insurance Tribunal (WSIAT) denying benefits under the *Workplace Safety and Insurance Act, 1997* ("the Act") to the estate of a firefighter who died of a heart attack in 2010.

Background Facts and Legislative Background

The deceased firefighter suffered a heart attack and died on April 13, 2010. The pathologist's opinion was that there had been a previous heart attack at least six weeks before his death, and a more recent heart attack that was at least two weeks old. The deceased had attended a call on February 7, 2010 and was on scene for 13 minutes. The deceased climbed several flights of stairs and was witnessed by two coworkers breathing shortly and quickly, sweating profusely, and having an ashen face. He did not seek medical attention. On April 10, 2010, the deceased attended his last shift and was again witnessed sweating with an ashen face. He did not attend any fires on this shift.

Section 13 of the Act states that "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". WSIB Policies 15-03-10 and 15-03-12 outline when heart injuries will be compensable. Section 15.1 of the Act is a special provision that deals with firefighters in prescribed circumstances and creates a rebuttable presumption that a heart injury has arisen out of and in the course of the firefighter's employment, unless the contrary is shown. According to *Ontario Regulation 253/07* (the "Regulation"), in order for the rebuttable presumption to apply, the worker "must have sustained the heart injury while, or within 24 hours of… attending a fire scene in the performance of his or her duties."

The Tribunal Decision

The Tribunal concluded that the applicant failed to prove that the deceased suffered a heart attack within 24 hours of attending a fire scene on February 7, 2010, and hence the rebuttable presumption did not apply.

The Tribunal first found that attendance to the call on February 7, 2010 was not attendance at a "fire scene", as required by the Regulation. The Tribunal further stated that, even if the February 7, 2010 incident was a "fire scene", the applicant had not proven that the deceased suffered a heart attack at work on February 7, 2010 or within 24 hours thereafter as required by the Regulation. Moreover, the Tribunal noted that the call was nine weeks prior to the worker's death and therefore "not entirely consistent" with the post-mortem examination of a six-week old heart attack. Finally, and most significantly there was no medical confirmation of the worker having suffered a heart attack at that time.

With respect to s. 13 of the Act, the Tribunal found that the applicant had not proven that the deceased suffered a heart attack arising out of and in the course of his employment. The Tribunal was not satisfied

that the deceased suffered a heart attack because of unusual physical exertion at work and also observed that there were non-occupational explanations for the deceased's death, who suffered from coronary artery disease and hypertensive cardiomyopathy. The Application was dismissed.

The Reconsideration Decision

The applicant sought reconsideration of the Tribunal's decision, arguing that there was new evidence of the deceased's heavy, 72-hour work schedule in the weeks prior to his death. The Tribunal denied the request for reconsideration on the grounds that this evidence was not new and there was still no medical evidence to support the argument that the deceased's work schedule caused his heart attack.

The Divisional Court Decision

In dismissing the application for judicial review, the Court first confirmed that the standard of review was reasonableness and considered the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, which stressed the importance of the reasoning process as well as the outcome.

First, the applicant argued that the Tribunal's application of s. 15.1 of the Act was flawed. Justice Swinton acknowledged that the Tribunal erred in stating that a heart attack nine weeks before death was "not entirely consistent" with the pathologist's opinion. However, this flaw was not fatal to the Tribunal's reasoning. The applicant further argued that it was unreasonable for the Tribunal to characterize evidence from the deceased's co-workers as "anecdotal" and to say there was no medical evidence to support a heart attack. Justice Swinton disagreed, stating that the Tribunal was entitled to describe the evidence this way and find it insufficient. The Court concluded that the Tribunal provided an acceptable explanation with respect to s. 15.1 of the Act.

With respect to s. 13 of the Act, Justice Swinton held that the Tribunal reasonably concluded that firefighters have a physically active job, and climbing stairs for 13 minutes was not "unusual physical exertion" for a firefighter. Combined with the findings on potential non-occupational explanations for the deceased's death, the Tribunal reasonably concluded that the deceased's firefighting duties did not significantly contribute to his death. Finally, the Court held that the Tribunal reasonably exercised its discretion to refuse the applicant's request for reconsideration.

Takeaways

This decision of the Divisional Court clarifies the scope of special provisions under the Act relating to the entitlement to benefits of firefighters who suffer from heart attacks. This decision provides guidance to municipal employers, as s. 15.1 of the Act has not received much consideration by the Tribunal or the courts prior to this line of decisions.

Hicks Morley

Amanda Cohen and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Amanda at 416-864-7316 or Jessica at 416-864-7529. They may also be reached by email at: amanda-cohen@hicksmorley.com and jessica-toldo@hicksmorley.com.

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STAFFING SUCCESS IN THE FIRE SECTOR: DECREASE IN MINIMUM STAFFING CLAUSE AWARDED

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Whether it is the minimum staffing provision in a Collective Agreement or the minimum number of firefighters per pumper, both associations and municipalities have been raising staffing issues at bargaining and interest arbitration. For the first time, that we are aware of, an Arbitration Board has decreased a minimum staffing clause.

Staffing in the City of Owen Sound

In *Corporation of the City of Owen Sound and Owen Sound Professional Fire Fighters Association (International Association of Fire Fighters, Local 531)*, released January 27, 2020, a majority of a Board of Arbitration chaired by Arbitrator Slotnick (the "Board") granted the City's proposal to decrease the minimum number in the staffing provision.

The City of Owen Sound employs 26 full time suppression firefighters over four (4) platoons out of one (1) station. Five (5) full time firefighters are on standby at all times and ready to respond within a reasonable amount of time. The City does not have volunteers, but does have a mutual aid agreement, which operates in a similar fashion to an automatic aid agreement, with the surrounding municipality of Inter-Township. The Collective Agreement had a minimum staffing provision that required five (5) firefighters on duty at all time.

Due to long term absences, the City's overtime to meet the requirements of the staffing provision was up to $185,000 per year in call-backs. While this number fluctuated year to year, it was based on the number of firefighters off at any given time, which was unpredictable and subject to change. Therefore, the City proposed decreasing the minimum staffing provision to four (4) on duty at one time. The total number of full time suppression firefighters (26) would remain unchanged. In contrast, the Association proposed to increase the total number of firefighters from 26 to 28.

The only issue before the Board was whether the decrease in staffing would have an impact on firefighter safety. Under the *Fire Protection and Prevention Act*, municipalities determine the level of service required for their community. Therefore, the issue of public safety was not before the Board. While the issue was not before the Board, the proposed staffing change was presented to City Council on three (3) separate occasions and passed unanimously each time. Both parties also had experts testify with regard to the impact on firefighter safety.

Arguments

During the interest arbitration process, the City, represented by John Saunders and Jessica Toldo of Hicks Morley, made the following arguments:

- The City has the ability to provide additional resources on the scene if needed from its standby firefighters and mutual aid agreement;

- Incident Commanders and firefighters in Owen Sound are well trained and are expected to follow the relevant Standard Operating Guidelines (SOGs), which explicitly state what four (4), or even fewer, firefighters are able to do;
- The City had the second highest per capita cost for fire services in its twenty three (23) municipality comparable group;
- The City provided evidence of twenty four (24) comparable municipalities with four (4) or fewer firefighters on duty at one time.

In response, the Association raised the following arguments:

- The Board should require exceptional circumstances to change freely negotiated language and this should only be done when other solutions have failed;
- The job of a firefighter is inherently dangerous;
- The Association emphasized Brockville as the "only true comparator" (with a minimum of five firefighters) and Stratford (with a minimum of six firefighters);
- More firefighters on scene faster was better for building occupants and firefighters, so fewer firefighters must therefore have a negative impact on safety.

Board's Decision

The Board accepted the City's position that the minimum staffing provision in the Collective Agreement should be decreased. In arriving at the decision, the Board emphasized that "a party seeking to change longstanding and freely bargained language in a collective agreement bears a heavy burden in interest arbitration." The Board observed that the City had to use overtime for between 12 to 29 percent of the time to maintain the minimum staffing numbers.

Based on the comparator data, the Board was influenced by the fact that the City was the only municipality with five (5) firefighters on duty and one (1) station out of the comparables. City Council had also unanimously passed the new staffing model on three (3) occasions. Guidelines, such as NFPA 1710 provide guidance, but there is no legislation in Ontario mandating any minimum number of firefighters at the scene. The Board accepted that the Incident Commander must perform their duties with firefighter safety in mind and in accordance with the SOGs. It was concluded that the change was a "negligible additional risk in an occupation that is inherently dangerous."

Conclusion

Staffing issues are becoming more prevalent in the fire sector, and municipalities can look to this award for guidance. As a note, municipalities should be aware that there are ongoing cases dealing with the issue of minimum staffing, as these issues continue to be raised by both parties. Accordingly, further clarity pertaining to staffing issues may be forthcoming.