WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3243/18

BEFORE:	P. Allen	: Vice-Chair
	K. J. Soden	: Member Representative of Employers
	A. Kosny	: Member Representative of Workers
HEARING:	November 14, 2018 at Toronto Oral	
DATE OF DECISION:	November 21, 2018	
NEUTRAL CITATION:	2018 ONWSIAT 3635	
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated February 10, 2017	

APPEARANCES:

For the appellant:	J. Johal, Paralegal
For the employer:	R. Fink, Lawyer
Interpreter:	M. Gulati, Punjabi

REASONS

(i) Introduction

[1] The appellant appeals the February 10, 2017 decision of the ARO which determined that he was not a worker of the employer (PN) on June 3, 2015. This is the sole issue before the Tribunal.

[2] Prior to the start of the hearing, as a preliminary issue, the representatives for the appellant and PN requested that the Tribunal take jurisdiction over the issue of initial entitlement to benefits. After considering this request the Panel determined that it was unable to assume jurisdiction over this issue as the ARO wrote a letter to the appellant's representative on December 18, 2018 advising that "initial entitlement is not an issue within my jurisdiction" and because the ARO decision of February 10, 2017 did not make a decision on this matter. As the WSIB has not made a final decision on initial entitlement the Tribunal cannot assume jurisdiction over the issue of initial entitlement.

(ii) Background

[3] The following are the basic facts.

[4] On July 27, 2015 the appellant completed a Form 6 indicating that he slipped and fell on June 3, 2015 while employed by PN.

[5] On August 11, 2015 the Eligibility Adjudicator spoke with the accountant for PN who advised that the appellant had not worked for PN since September 2014. The accountant advised that the last cheque provided to the appellant for work performed was on September 18, 2014.

[6] On August 12, 2015 the Eligibility Adjudicator spoke with the appellant's representative who advised that the appellant was paid cash for work performed on June 3, 2015.

[7] On September 10, 2015 the Eligibility Adjudicator spoke to the appellant's representative and requested the following information: who directed him to go to the jobsite on June 3, 2015; the names of coworkers and witnesses to the June 3, 2015 accident and to whom did he report the June 3, 2015 accident. The Eligibility Adjudicator did not receive a response from the appellant regarding this information request and on September 24, 2015 the appellant received a letter from the Eligibility Adjudicator advising that there was no evidence of an employment relationship between the appellant and PN. The appellant appealed this decision.

[8] On July 8, 2016 an Account Specialist with the Employer Services branch of the Workplace Safety and Insurance Board (WSIB) wrote to the appellant and advised that the WSIB was aware that he had claimed that he worked solely for PN in 2015 but that PN had provided an Employer's Summary of T4 statements and the appellant's name was not included. The letter also advised that the appellant did not self-declare as an independent operator in construction. The letter concluded that the WSIB did not consider the appellant to be a worker of PN.

[9] On December 16, 2016 the ARO wrote to the appellant and advised that he did not have jurisdiction over the issue of initial entitlement to benefits and that the sole issue before the ARO was whether there was a worker/employer relationship as of June 3, 2015.

[10] On February 10, 2017 the ARO determined that the appellant was not a worker of PN on June 3, 2015. It is from this decision that appellant appeals.

(iii) Law and policy

[11] Since the appellant claims an injury in 2015, 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.

[12] Section 11 (1) of the WSIA governs the worker's entitlement in this case and it states:

> 11. (1) The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer. However, it does not apply to workers who are,
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> (a) persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer's industry; or
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> (b) persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home or on other premises not under the control or management of the person who gave out the articles or materials. 1997, c. 16, Sched. A, s. 11 (1).

[13] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280.*

[14] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[15] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal: #170, #183 and #300. We have considered these policies as necessary in deciding the issues in this appeal.

(iv) Analysis

[16] The appellant's representative submitted that the appellant was employed by PN as a worker during 2015 and in particular on June 3, 2015. The appellant's representative clarified that his client was not an independent operator but rather that he was a worker of PN on June 3, 2015. The representative for PN submitted that the appellant was not employed by PN during 2015 and in particular on June 3, 2015.

[17] In considering whether the appellant was a worker for PN on June 3, 2015 the Panel has considered the following documentary evidence contained in the Case Record:

- **Cheques:** The Case Record contained copies of three cheques made out to the appellant by PN on the following dates: August 9, 2013 ($1,000); January 25, 2014 ($640) and September 18, 2014 ($570).
- **T4 Records for 2013 and 2014**: Prior to the start of the hearing the representative for PN provided copies of T4 Statements for the appellant for 2013 and 2014 showing employment income of $5,500 and $5,000 respectively. The appellant's representative agreed to the admission of this new evidence.

- **T4 Records for 2015**: The Case Record contained four T4 Statements for 2015 showing employment income for four employees of PN. The Case Record did not contain a T4 Statement for the appellant in 2015.
- **Invoices for June 2015**: Prior to the start of the hearing the representative for PN provided copies of two invoices issued by PN to roofing clients. The invoices were dated June 19, 2015 ($3,955) and June 27, 2015 ($3,164). The appellant's representative agreed to the admission of this new evidence.

[18] The Panel has also considered the testimony of the employer's witness (G.A.) and the appellant which is summarized below:

- **G.A.'s Testimony:** GA provided the following testimony under oath:
  - G.A. owns PN and he began the business in 2013.
  - PN is a company that performs residential roofing.
  - PN is a small company with 3 or 4 employees who work between the months of April and October when work is available.
  - During the month of June 2015 PN worked on two houses and each of these jobs required roughly 2.5 days per house.
  - Although G.A. owns the company, he also performs roofing and he is present for each of the roofing jobs.
  - Employees of G.A. are paid via cheque and the accountant for PN completes reports for the Canada Revenue Agency declaring employment income for each worker.
  - The appellant performed roofing work for PN in 2013 and 2014. He last worked for PN in 2014 and his last cheque for work performed was on September 18, 2014 in the amount of $570.
  - The appellant did not work with PN in 2015 and beyond as PN was advised by the appellant that he began his own company in the residential roofing business.
  - The appellant was not working for PN on June 3, 2015 and G.A. has no knowledge of an accident on June 3, 2015.
- **Appellant's Testimony** The appellant provided the following testimony under oath:
  - The appellant began working with PN in 2012 or 2013 and was employed as a roofer.
  - He worked for PN from April until October, 5 days per week (weather permitting).
  - He was hired and supervised by G.A. and by his brother-in-law.
  - He was paid in cash and only a few times per year was he paid via a cheque.
  - On June 3, 2015 he was working for PN when he fell.
  - The fall resulted in injuries to his low/mid back and right shoulder.
  - He reported the accident to a number of people with PN including G.A.
  - He sought medical attention for the injury but did not work again with PN.

[19] After considering the foregoing evidence, the Panel finds that there is no evidence of significance demonstrating that the appellant was a worker of PN on June 3, 2015. We have made this finding for three primary reasons:

- **Contract of Service**: OPM Document No. 12-02-01 (Workers and Independent Operators) was included in the Case Record by the WSIB and it states:

  > A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.
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  > Workers - those who work under contracts of service - are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.
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  > A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

  The Panel finds no evidence of significance of a "contract of service" between the appellant and PN on June 3, 2015 or on any other date in 2015. The appellant has not provided copies of cheques from PN demonstrating that he was paid for any work performed on behalf of PN in 2015. The appellant has not provided any witnesses or any witness statements which support that he was performing work for PN on June 3, 2015 and the appellant has not provided any witnesses or witness statements that he was injured while performing work for PN on June 3, 2015. In summary, the appellant has a burden of proof which means that he has a responsibility to offer proof in support of the issue in dispute. For the reasons described, the Panel finds that the appellant has not offered proof of a "contract of service" between him and PN on June 3, 2015.

- **T4 Evidence:** PN has provided evidence which would indicate that the worker was not under a contract of service in 2015. This includes T4 Statements for 2013 and 2014 which indicated that the worker received employment income from PN and was therefore under a contract of service and a T4 Statement for 2015 for all employees of PN which does not include the worker's name. This evidence leads the Panel to find that, while a contract of service existed in 2013 and 2014, it did not exist in 2015 and, in particular, it did not exist on June 3, 2015.

- **G.A.'s Evidence**: G.A. testified that he owns and operates a small business which, in June of 2015, performed work on the roofs of two houses and which required the use of employees (other than himself) to perform the work. G.A. testified that this work required 2.5 days per roof to perform and as a result, employees were required for roughly 5 days in the month of June 2015. G.A. directed the attention of the Panel to two invoices (June 19, 2015 and June 27, 2015) in support of his testimony of the small nature of the business. The Panel finds that the evidence supports that PN was a small business which employed workers on an occasional basis from April to October of 2015. This finding contradicts the worker's testimony which was that he worked full-time (weather permitting) from April to October 2015. G.A. also testified that he paid his employees via cheque and that his accountant recorded this information and submitted it to the CRA. G.A. also testified that his accountant confirmed that no cheque was issued to the worker in 2015. The Panel finds that the testimony of G.A., which was that workers were paid by

cheque, is supported by cheques paid to the worker by PN on August 9, 2013, January 25, 2014 and September 18, 2014. In addition, the Panel finds that the testimony of G.A., which was that the appellant was paid via cheque, is supported by the accountant for PN who spoke with the WSIB on August 11, 2015 and confirmed that the last cheque issued to the appellant was in 2014.

[20] As a result of the foregoing, the Panel finds that there is no evidence of significance that a contract of service existed between the appellant and PN in 2015. The appeal is denied.

DISPOSITION

[21] The appeal is denied.

DATED: November 21, 2018

SIGNED: P. Allen, K. J. Soden, A. Kosny