

## BLG Successfully Represents Air Charter Company During WSIAT Application and Reconsideration

September 12, 2017

Cochrane Air Services ats R. Hutchinson; 2017 ONWSIAT 498, Decision No. 941/16

An aircraft accident involving a floatplane occurred during landing. The accident resulted in the death of the rear seat passenger and pilot. The front seat passenger survived. The accident occurred when the front seat passenger was returning home from a remote location where he had been working for eight days preparing a campsite and cabin on behalf of the air charter service, owner of the floatplane.

The front seat passenger received benefits from the Ontario Workplace Safety and Insurance Board ("WSIB") in accordance with the provisions of the Workers' Compensation Act, R.S.O. 1990, C. W.11. ("Workers' Compensation Act"). The front seat passenger also commenced a civil action against the air charter service (Schedule 1 employer) and the deceased pilot (Schedule 1 worker).

The defendants brought a "Right to Sue" section 31 application before the Workplace Safety Insurance Appeals Tribunal ("WSIAT") seeking a declaration that the plaintiff was not allowed to proceed with a civil action against his own employer or co-worker. The front seat passenger contested the section 31 application on the basis that the section 11 exemption under the Workers' Compensation Act applied in that his employment was of a "casual nature" and he "was employed otherwise than for the purposes of the employer's industry".

Evidence was led by the air charter company that although it offers some air charter services, the bulk of its business activity consists of fly-in-fishing and hunting at remote camps, which are only accessible by floatplane. In the years leading up to, and including, the accident, the air charter service had hired the front seat passenger to perform maintenance and repairs at some of its cabins. According to the air charter company, the work completed by contract was an essential part of the business to ensure that its cabins were ready for the first tourists of the season. There was no debate that the front seat passenger was a casual employee.

WSIAT determined that the incident occurred during work that was a regular part of the charter air services' business activities. Although seasonal, the work was regular, had occurred for many years, was necessary, and was an integral part of the charter air services' business. The WSIAT also disagreed with a secondary argument by the front seat passenger that the accident occurred when his work was complete. The WSIAT relied upon Operational Policy Manual Document No. 15-03-05, which states that "in the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer. A significant factor in determining whether a worker is in the course of his employment while travelling to and from work is the degree of control exercised by the employer over the transportation arrangements. In this case, the employer exercised full control since it was the operator of the float plane.

The air charter services company and deceased pilot were successful in their section 31 application and the tribunal determined that the injured worker was not entitled to commence a civil action as a result of the aircraft accident. The injured worker applied for a reconsideration of this decision, but after further written submissions WSIAT determined that the worker did not meet the threshold test for reconsideration and that there were no fundamental errors in the original tribunal decision.

Although WSIAT decisions are based on very specific fact scenarios, and the governing legislation varies in each province, this decision is a reminder to all parties involved in a civil lawsuit to consider whether or not a section 31 application can be brought notwithstanding the fact that the accident occurred during travel to or from work. It is also an important reminder that WSIAT has exclusive jurisdiction to make a determination that the loss occurred during the course of employment and whether or not there is a statutory exemption that could be applied that would still allow a civil action to proceed.

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