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INTERNAL REVIEW DECISION

April 10, 2013

Mr. Stephen J. May
Cox & Palmer
Suite 1000, Scotia Centre
235 Water Street
St. John's, NL A1C 1B6

COPY

Dear Mr. May:

Re: [redacted]

I have reviewed in accordance with **Section 46** of the **Workplace Health, Safety and Compensation (WHSC) Act** (here in referred to as the *"Act"*), the submission of all interested parties as to whether an action by [redacted] against the Defendants [redacted] is prohibited by **Section 44** of the Act.

BACKGROUND INFORMATION

On October 30, 2005, while in the course of his employment, [redacted] suffered a left shoulder injury (the initial injury). The claim was adjudicated and accepted by the Commission under Claim # [redacted]

On November 7, 2005, while attending [redacted] for receipt of physiotherapy treatments, [redacted] suffered a slip and fall in the parking lot causing further injury to his left shoulder (the subsequent injury).

On August 23, 2006, a statement of claim was made by Ms. Lois J. Skanes of the law firm Roebothan McKay Marshall on behalf of [redacted] against the Defendants for damages he suffered and continued to suffer as a result of the subsequent injury.

The Defendants filed a statement of defence with the court on September 25, 2006 and an amended statement of defence on March 19, 2007. They deny [redacted] claim. The Defendants plead that they are registrants under the Act and, at all material times, [redacted] was registered with the Commission. They further plead that the subsequent injury constituted a personal injury arising out of and in the course of [redacted] employment and as such is compensable under the Act. The Defendants contend that [redacted] right to compensation under the Act exists instead of his right of action against the Defendants and that, as such, [redacted] has no right of action in respect of the subsequent injury against the Defendants. The Defendants plead

Section 46 of the Act and say that the Commission has jurisdiction to adjudicate and determine whether the action is prohibited by the Act. The Defendants therefore seek a declaration that the action is prohibited by the Act.

On May 10, 2011, Mr. Stephen May requested a determination as to whether the action was statue barred pursuant to Section 46 of the Act on behalf of the [redacted] and [redacted]. Mr. May notes that the Defendants submit that determination of whether the action is statue barred requires the Commission to consider three sub issues, namely (a) whether [redacted] is a *"worker"* within the meaning of the act; (b) whether the Defendants are *"employers"* within the meaning of the act, and; (c) whether [redacted] subsequent injury arose out of and in the course of his employment. The Defendants submit that the Commission's determination of the sub issues must take into consideration the purpose of the Act, so as to achieve the general goals to which the Act is directed. The Defendants submit that [redacted] is a *"worker"* within the meaning of that term as defined by **Section 2(1)(z)** of the Act. They note [redacted] had entered into a contract of service with his employer, [redacted], and was working under the terms of that contract when he experienced his initial injury. The Defendants submit that they are *"employers"* within the meaning of that term as defined by **Section 2(1)(i)** of the Act. The [redacted] is a [redacted] which is engaged in the industry of [redacted] in the province. [redacted] is a body corporate which is engaged in the industry of snow and ice clearing/maintenance in the province.

On August 16, 2011, the Commission received reply submissions of [redacted] submitted by Mr. Jamie Martin of the law firm Roebothan McKay and Marshall. [redacted] agrees with the Defendants that the sole issue to be determined by the Commission is whether the action is statue barred by the Act. Mr. Martin notes that they agree with the Defendants that [redacted] is a "worker" and that the Defendants are "employers" within the meaning of the Act as stated in the Defendant's submission. The Defendants state that their application to have [redacted] actions statue barred "turns on whether there is sufficient causal link" between [redacted] initial workplace injury and the subsequent slip and fall injury in that subsequent injury would be considered "to have arisen out of an in the course of" his employment.

On March 6, 2012, the Commission received a separate submission from the [redacted]. It noted it confirmed its acceptance and endorsement of the submissions made in the joint application of the [redacted] and [redacted] dated January 6, 2011. [redacted] makes the submissions on its own behalf in response to arguments presented in paragraph 26 and 27 of the reply submissions of [redacted]. [redacted] submits that not only is the action statue barred by virtue of the law and arguments presented in the joint application but that the action is also statue barred as the injury does not fall within the scope of the exception enunciated in **Subsection 44(2)** and **45(1)(b)** of the Act. In other words, the injury occurred in the conduct of the operations usual or incidental to the industry carried on by the employer.

In a statement of claim by the Plaintiff against the two Defendants, it is noted that [redacted], a mechanic and millwright attended the premises of the first Defendant and/or Second Defendant. It is alleged that the First Defendant, [redacted], was responsible for the maintenance, upkeep and clearing of ice and snow from the building, grounds and parking areas. The Second Defendant, [redacted], was contracted by the First Defendant to carry out snow clearing and was responsible along with the First Defendant for the maintenance, upkeep and clearing of ice and snow on the premises.

In the Statement of Claim the Plaintiff claims:

4. "On or about the 7th day of November, A.D. 2005, at approximate 15:00 hours, the Plaintiff was walking in a cautious and prudent manner towards his motor vehicle in the parking lot of the Defendants' Premises (hereinafter referred to as the "Parking Lot"), after having attended at the said premises for physiotherapy, when suddenly and without warning he slipped on ice and/or snow which had negligently and/or by breach of contract been allowed to accumulate on the Parking Lot, causing the Plaintiff to fall, resulting in serious personal injury to the Plaintiff."

LEGISLATION AND POLICY

The **Workplace Health, Safety and Compensation Act** states:

> *"2(1) In this Act...*
>
> *(j) "employer" means an employer to whom this Act applies and who is engaged in, about or in connection with an industry in the province and includes*
>
> > *(i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this Act,*
> > *(ii) the principal, contractor and subcontractor referred to in section 120,*
> > *(iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,*
> > *(iv) a municipality,*
> > *(v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this Act,*

> *(vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this Act, and*
> *(vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry;*
>
> ...
>
> *(z) "worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes*
>
> > *(i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,*
> > *(ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,*
> > *(iii) a part-time or casual worker, and*
> > *(iv) an executive officer, manager or director of an employer."*

"19(1) The commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred

upon the commission, and the commission has exclusive jurisdiction to determine

a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;

...

(4) The decisions of the commission shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent."

*"**43**(1) Compensation under this Act is payable*

a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and
b) to the dependents of a worker who dies as a result of such an injury."

*"**44** (1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.*

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer."

*"**46** Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act."*

Policy EN-19, *"Arising Out of and In the Course of Employment"*, of the **Client Services Policy Manual** states:

*"**POLICY STATEMENT***

Entitlement to compensation is based on two fundamental statutory requirements:

1. the worker meets the definition of "worker" under subsection 2(z) of the Act; and

2. *the injury as defined under subsection 2(o) is one arising out of and in the course of employment.*

This policy focuses on the established principles that have evolved to define "arising out of and in the course of employment" within the compensation system. It also provides established guidelines on the extent and/or limitations of coverage in varying circumstances.

GENERAL

Arising out of and in the course of employment

Section 43 of the Act states:

1) *Compensation under this Act is payable*

   a) *to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and*
   b) *to the dependents of a worker who dies as a result of such an injury.*

The term "arising out of and in the course of employment" means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the employment. Arising out of refers to what caused the injury; in the course of refers to the time and place of the injury and its connection to the employment.

While no single criterion is conclusive in classifying an injury as one arising out of and in the course of employment, various indicators are used for guidance, including:

- *whether the injury occurred on the premises of the employer (see also* ***"Employer's Premises"*** *section);*
- *whether it occurred in the process of doing something for the benefit of the employer;*
- *whether it occurred in the course of action in response to instructions from the employer;*
- *whether it occurred in the course of using equipment or materials supplied by the employer;*
- *whether it occurred in the course of paid employment;*
- *whether the risk to which the worker was exposed was the same as the risk to which he/she is exposed in the normal course of production;*

- *whether the injury occurred during a time period for which the worker was being paid; and*
- *whether the injury was caused by some activity of the employer, a fellow worker, or a third party.*

Workers are not considered to be in the course of the employment while traveling to and from work, unless the conditions apply under the provisions for ***Travel for the Purpose of Employment*** *or* ***Transportation Controlled by the Employer*** *contained in this policy.*

...

Principles of the scope of coverage (spectrum, boundaries)

"Coverage generally begins when the worker enters the employer's premises to start the work shift, and usually terminates on the worker leaving the premises at the end of the shift (refer to section ***Employer's Premises****). Coverage may extend beyond the specific work shift or cycle in certain cases, such as captive or traveling workers, specifically discussed throughout this policy.*

However, in all cases, coverage is not so broad or expansive as to include personal hazards or deviations, removing oneself from employment, or serious and wilful misconduct."

1. Employer's Premises

"Employer's premises is any land or buildings owned, leased, rented, controlled, or used (solely or shared) for the purpose of carrying out the employer's business. It also includes captive roads and parking lots as described in this section of the policy (refer to ***Captive Roads*** *and* ***Parking Lots****).*

Coverage is extended to a worker in the course of employment while entering or exiting the employer's premises using an accepted means of entering and leaving the employer's premises, all in relation to performing activities for the purposes of the employer's business.

Where the premises is occupied by more than one employer, the employer's premises includes the exclusive premises of the employer and the shared or common areas such as entrances, exits, elevators, stairs, and lobbies.

Employer's premises does not include public or private land, buildings, roads (except captive roads as discussed in this section) or sidewalks, used by the worker to travel to and from home and the employer's

premises, or private parking arrangements made by the worker independent of the employer.

Employer premises does not include a picket line established by workers during a labour dispute or strike."

...

(b) Parking Lots

"A parking lot is considered the employer's premises when it is owned, maintained, or controlled by the employer. When the lot is leased or rented (or included as part of the lease or rental agreement) but the employer is not the owner and is not responsible for the maintenance or control, then it is not considered to be the employer's premises.

Because of the multitude of arrangements associated with parking, the Commission must obtain specific information regarding the ownership of parking lots, and the arrangement of the employer before an entitlement decision can be made regarding an injury that occurs in a parking lot."

...

10. Injury During Compensable Treatment or Return to Work Programming

"Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.

Where a worker is involved in a Commission-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program."

POSITION OF [redacted]

[redacted] agrees with the Defendants that the sole issue to be determined by the Commission is whether the action is statue barred by the Act.

[redacted] notes that he agrees with the Defendants that he is a *"worker"* and that the Defendants are *"employers"* within the meaning of the Act as stated in the Defendants submissions. [redacted] argues that he was not receiving treatment at the time he was injured but in fact slipped and fell while walking to his vehicle after having completed his treatment. He submits that there is no causal link between the slip and fall injury suffered by himself and his initial injury. That is to say, a slip and fall injury is not a

"necessary incident" of the previous injury [redacted], argues that he sustained. He notes he was merely walking to his vehicle from the clinic, and had finished his treatment on that day. The slip and fall was entirely separate from [redacted] treatment, despite occurring at the location where his treatment occurred. The link between the first and second injuries in [redacted] case is very remote. While it is true that [redacted] would likely not have been injured if he was not compelled to go to this particular physiotherapy clinic on this particular day due to his prior workplace injury, the slip and fall injury he sustained was not part of his treatment, and therefore not a necessary incident of his earlier injury. In response he repeats that the subsequent injury was not necessarily incidental to his employment.

[redacted] solicitors further submit that the more causally distant an action considered incidental to employment is from the initial injury, the less appropriate it is for the purposes of the Act. While it is important that employers obtain the benefit of the premiums they pay into the system, in turn protecting them from the risk of legal action (the *"historic trade off"*) they submit it would be unfair and inappropriate to allow this superfluously. As such, they submit that a finding that [redacted] subsequent injury did not arise out of and in the course of his employment would be more compatible with the overall purposes and goals of the compensation scheme set out by the Act.

In the alternative, if it is found that [redacted] was acting *"in the course of his employment"*, when he sustained his slip and fall injury, they submit that he should not be barred from bringing an action based on the operation of **Subsection 45(1)(b)** of the **Workplace Health, Safety and Compensation Act**. They go on to note that **Subsection 45(1)(b)** of the Act allows the bringing of an action against an employer where an injury occurs outside of the *"conduct of the operations usual or incidental to the industry carried on by the employer"*. Therefore, if an injury occurs as a result of actions taking place outside of the usual or incidental operations of an employer, the worker will be entitled to elect to bring an action against that employer rather than claim compensation. A slip and fall injury incurred outside of a physiotherapy clinic would not be usual or incidental to the work carried out at a physiotherapy clinic, and as such, based on **Section 45**, [redacted] should be able to elect to bring an action, instead of claiming compensation.

POSITION OF THE DEFENDANTS

Position of [redacted]

The solicitor for the Defendants, [redacted] and [redacted] take the position that the claim of [redacted] is subject to the statutory bar in that [redacted] is a worker under the Act and the [redacted] and [redacted] are employers within the meaning of the Act. They note that [redacted] had entered into a contract of service with his employer, [redacted], and was working under the terms of that contact when he experienced his initial injury. They submit that there is a sufficient causal link between [redacted] initial injury and his subsequent injury such that the

subsequent injury should be considered to have arisen out of and in the course of Mr. [redacted] employment.

The Defendants submit that [redacted] was acting within the course of his employment when he attended the [redacted] for treatment of his initial injury. Had [redacted] not suffered the initial injury, he would not have been required to attend the [redacted] his attendance at the [redacted] was a necessary incident of the initial injury. The Defendants therefore submit that the subsequent injury arose out of and in the course of [redacted] employment in that the injury occurred while [redacted] was attending physiotherapy for treatment of his initial injury.

The Defendants submit that [redacted] initial injury is causally connected to his subsequent injury in that the latter is a necessary incident of the former. If [redacted] had not been injured at work, he would not have been required to seek out and cooperate in medical treatment as required by **section 54.1(1)(b)** of the Act, during the course of which he suffered the subsequent injury. The Defendants submit that this conclusion is consistent with the overall purpose underscoring the no fault compensation scheme established by the Act, and specifically the goals that workers should be paid compensation quickly, and enjoy security of payment, without regard to the fault of employers, and that employers should in turn benefit from the premiums that they pay towards the injury fund. The Defendants submit that if workers are to be required to undergo treatment for their work related injuries as the necessary consequent of the no fault compensation scheme, the scheme must also cover by necessity any subsequent injury sustained by injured workers as a consequent of their seeking such treatment. The Defendants therefore request that the Commission declare that the action is prohibited by the Act.

Position of the [redacted]

The Solicitors for the [redacted] (the "[redacted]"), confirms its acceptance and endorsement of the submissions made in the joint application of the [redacted] and [redacted] dated January 6, 2011 (the "Joint Application"). The [redacted] makes these submissions on its own behalf in response to arguments presented in paragraphs 26 and 27 of the reply submissions of [redacted]. The [redacted] submits that not only is the action statue barred by virtue of the law and arguments presented in the Joint Application, but that the action is also statue barred as the injury does not fall within the scope of the exception enunciated in Subsections 44(2) and 45(1)(b) of the Act. In other words, the injury occurred in the conduct of the operations usual or incidental to the industry carried on by the employer.

REASONING & CONCLUSION

I have reviewed and considered all submissions from all parties involved in this case. Section 44(1) of the Act provides the statutory bar to actions of a worker against an employer for an injury that arises out of and in the course of a worker's employment.

My task is to determine whether the action brought against the [redacted] and [redacted] is barred by the provisions of the Workplace Health, Safety and Compensation Act. In making my determination there are a number of facts I have considered:

1. Was [redacted] a "worker" within the meaning of the Act?

   I can confirm from review of the facts that [redacted] was employed on the [redacted] when he sustained the initial injury to his shoulder. It is not disputed that [redacted] is a worker within the meaning of the Act. I conclude that [redacted] does meet the definition of worker within the meaning of Section 2 of the Act.

2. Were the [redacted] and [redacted] "employers" at the time [redacted] injuries occurred?

   I confirm from review of the facts that the Defendants were registered employers with the Commission within the meaning of Section 2 of the Act. This fact is not disputed.

3. Did [redacted] injuries arise out of and in the course of his employment with [redacted]?

   This is the main focus of my decision and the issue that is in dispute between the parties.

The focus of this determination is whether or not [redacted] suffered injuries arising out of and in the course of his employment. It must be determined whether the injury arose out of and the in course of his employment. It is noted that [redacted] sustained his original injury on October 30, 2005 while employed on the [redacted], where he slipped and fell. He subsequently returned home to [redacted], and was attending physiotherapy at the [redacted]. On November 8, 2005, [redacted] was leaving the [redacted] after attending the physiotherapy appointment for his initial injury when he slipped and fell on the [redacted] parking lot sustaining a subsequent injury to his left shoulder.

CASE LAW AND SUBMISSION:

Section 19(4) of the Act states the decisions of the Commission shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent.

While the Commission is not bound to follow strict legal precedents, I have reviewed the cases and text books submitted to determine relevance and applicability to the case at hand.

Archean Resources Ltd. v. Newfoundland Minister of Finance

The Newfoundland and Labrador Court of Appeal considered Section 16 of the Interpretation Act and the rules of statute interpretation in this case.

Analysis:

Based on this case, when interpreting the Act, we must examine more than the actual language of the sections. We must look at the context and interpret the sections of the legislation liberally in a way that best ensures the attainment of the objects of the Act. I have applied the principles in this decision.

Reference Re: Worker's Compensation Act, 1983.

The Lieutenant Governor in Council referred to the Court of Appeal questions relating to the constitutional validity of s.32 and 34 of the Worker's Compensation Act, S.N. 1983 (the Act). Section 32 and 34 of the Act deal with the statutory bar and are similar to Section 44 and 46 of our current Act.

It was concluded that Section 32 of the Act does not infringe on the equality rights protected by Section 15 of the charter in denying workers and their dependents a right of action in respect of work related injuries or death and replacing it with a no fault insurance scheme of compensation.

Analysis

This case explains the historic trade off whereby workers give up the right of action and the employers collectively agree to pay compensation regardless of fault. The historic tradeoff has been taken into account in my interpretation of the Act.

Keddy v. New Brunswick (Workplace Health, Safety and Compensation Commission.

Ms. Keddy was at work when she cut off part of her finger with a saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing more pain. Ms. Keddy brought an action against the nurse and hospital. The nurse applied for determination of whether Ms. Keddy's action was barred under s.11(1) of the Worker's Compensation Act. The tribunal held that the injection resulted from Ms.

Keddy's work related injury in that injury and treatment were connected because without the injury, Ms. Keddy would not have needed treatment. Ms. Keddy appealed and the appeal was dismissed. It was determined workers injured while receiving treatment for work related injuries are acting within course of their employment at the time of suffering the subsequent injury.

The court held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objects under scoring the no fault compensation scheme. What is inconsistent with the scheme is the adherence to Commission law principles of causation.

Analysis

The principles in this case are consistent with Policy EN-19, paragraph 10. This case has relevance to the case at hand in that Ms. Keddy had previously sustained an initial injury while in the course of her employment. While receiving treatment for the initial injury, she suffered a subsequent injury. In the [redacted] case, [redacted] had previously suffered a work related injury in the course of his employment. He suffered a subsequent injury while on the parking lot after receiving treatment for the initial workplace injury.

Pasiechnyk v. Saskatchewan (Worker's Compensation Board)

A crane collapsed on a provincial utility worksite, killing two workers and seriously injuring several others. The injured workers and dependents of the deceased workers qualified for and received worker's compensation benefits. They later commenced an action for damages against the provincial government among others. The claim against the government alleged that it failed to meet its statutory duties under the Occupational Health and Safety Act and the Building Trades Protection Act by failing to adequately inspect the crane. The Defendants applied to the Worker's Compensation Board for determination of whether the actions against them were barred by the Worker's Compensation Act. The Board held that all of the Defendants were "employers" engaged in an "industry" within the meaning of the Act and that the actions were therefore barred by the Act. It found the government was engaged in the "industry of regulating". The Plaintiff's application for judicial review was dismissed. They appealed. The appeal was allowed with respect to the government only. The government appealed. Justice Sopinka discussed the "historic tradeoff" associated with the no fault compensation scheme as well as the purpose of the scheme. The Court notes the importance of the historic tradeoff which has been recognized by the courts. Benefits that are paid immediately, whether or not the employer is solvent, and without the cost and uncertainties inherent in the tort system; however, there may be some who recover more from a tort action then they would under the Act. It notes that for instance, security of payment is assured by the existence of an injury fund that has maintained through contributions from employers and administered by an independent commission, the Worker's Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends on the fund and the adjudication of claims by the

Board. The principle of no fault recovery assists the goal of speedy compensation by reducing the number of issues that must be adjudicated. The bar to actions is not ancillary to the scheme but essential to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

Analysis

This case illustrates the principle of the workers compensation system and the historic tradeoff.

Gallately v. Newfoundland Worker's Compensation Appeal Tribunal

While driving home from a business trip, the Appellant was seriously and permanently disabled in a motor vehicle accident. His blood alcohol level at the time of the accident was approximately four times the legal limit. The Appellant's claim for Worker's Compensation benefits was denied, and that decision was upheld by the Worker's Compensation Appeal Tribunal. The Appellant's appeal to the Supreme Court of Newfoundland, Trial Division, was dismissed. The Appellant appealed. The appeal was allowed and the Court of Appeal held that the injury was contributed in a material degree by the worker's employment, that is, it arose out of the employment. The Court stated that for the injury to arise out of employment, doing something incidental to his employment would be sufficient, the requirement for the worker to be discharging a duty is rejected as too narrow a view.

Analysis

The Commission's Policy En-19 is consistent with the courts analysis of the meaning of "arising out of and in the course of employment". In the Gallately case, the parties had accepted that Mr. Gallately was in the course of his employment when the injury occurred. The question before the court was only whether the injury arose out of employment. In the [redacted] case, it has not been accepted that [redacted] was in the course of employment. In the course of employment refers to the time, place and circumstances under which the accident takes place. This is the very question to be determined.

Kovach v. G.S. Singh and WCC (British Columbia)

The Complainant obtained a certificate from the Worker's Compensation Board stating that the injury she sustained from an operation performed by her physician arose out of and in the course of her employment. The Board found that the physician was a worker, and was engaged in his employment when he operated on the Complainant. As a result, the Board held that the Complainants action for negligence against the physician was barred. The Complainant appealed the Board's decision, and the certificate was quashed. The physician obtained leave to appeal the decision to the Supreme Court of

Canada. The appeal was allowed based on the reason of the dissenting judge in the court of appeal.

The court stated that if the plaintiff had not been injured at work she would not have been treated by the doctor. That fact forms a causal link connecting the employment related injury to the treatment.

The court stated what works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.

Analysis

This case is consistent with Policy EN-19, paragraph 10, noted above.

King v. Workplace Health, Safety and Compensation Commission and Omega Investments Ltd.

Ms. King was employed by a company that provided personal care to its clients. She was assigned to provide care to a client in his own apartment which was owned and managed by Omega Investments.

On November 21, 1995, Ms. King reported for work at the client's apartment. Later in the day she went to use the washroom facilities. When she sat on the toilet, it became dislodged and tipped forward. She fell to the floor and sustained multiple injuries.

Ms. King commenced a civil action against Omega. The Commission determined that Ms. King was in the course of her employment at the time of her injury. The Commission determined that the action against Omega was barred under the Act, as the accident occurred in the conduct of operations usual and incidental to the industry carried on by Omega. The action was statue barred. Ms. King appealed. The Supreme Court upheld the Commission's decision. They found the injury occurred within Omegas normal course of business property ownership of rental. In this case, it was determined that Ms. King's injuries occurred in the conduct of the operations usual in or incidental to the industry carried on by the employer.

Analysis

In the King case, the Court confirms that in considering section 45 (1) (b) of the Act, the plain language of the section prohibits action against an employer unless the accident occurred outside the normal course of his business.

Fry v. Kelly (Gordon Fry, Applicant and Anthony Kelly and Eric Lindstol, Respondent)

Mr. Kelly and Mr. Lindstol were employees of the provincial government, travelling in a truck when they collided with another truck operated by Mr. Fry. Mr. Fry was delivering mail under contract with Canada Post. Mr. Kelly and Mr. Lindstol commenced an action against Mr. Fry and he requested the Commission determine whether the respondents rights were taken away under Section 12 of the Worker's Compensation Act. The Commission determined that Mr. Kelly and Mr. Lindstol were not precluded from suing the Applicant (Fry). Mr. Fry appealed to the Newfoundland Supreme Court. The parties accepted that Mr. Fry was an employer as defined in Section 2(m) of the Act in an industry covered by Section 3 of the Act. The Court noted Section 12, which prohibits action against an employer unless the accident occurred outside the normal course of his business. In this case it was determined the accident occurred within the normal course of his business. It was determined that the respondents were precluded from bringing the action against the Defendant by virtue of Section 12(1) of the Act.

Analysis

The Court stated that the plain language of the section prohibits an action against an employer unless the accident occurred outside the normal course of his business. Immunity is granted as part of an overall no fault insurance scheme funded by employers to cover accidents occurring in the course of business.

Public Decision No. 147/2001

In January 1996, the claimant filed a Worker's Compensation claim for a right shoulder injury that occurred at work in November 1995. On his application form for benefits, the claimant indicated that he touched the back of a co-workers knee and it went forward. The claimant continued walking towards the shelf to put a tool on it and when he turned around the co-worker was waiting for him. The co-worker took the claimant by the neck with force and lifted him off the ground and then shoved him against the 2x2. The claimant indicated that he felt immediate pain in his right shoulder blade area. The claimant's claim was accepted by WCB and wage loss benefits were paid. In October 2000, the WCB commenced an action in the Court of Queens Bench against the claimant's co-worker in respect of damages alleged by the claimant to have been caused by the accident. The claimant's right of action was removed and it was determined that both the actions of the Plaintiff and the Defendant were minor in nature and occurred within "the conduct of the operations usual in or incidental to, the industry carried on by the employer.

Analysis

The Court indicated that the question of whether the accident occurred within the conduct of the operations usual in, or incidental to, the industry carried on by the employer is similar to the "in the course of employment test".

Workplace Health, Safety and Compensation Review Division Decision 08031

On April 4, 2007, the worker filed a report of injury indicating that while employed as a Home Support Worker she slipped and fell on the steps and broke both arms. The employer's report of injury indicated that while on route to work the worker fell down over a flight of stairs that were owned by the client. The employer forwarded correspondence to the Commission on April 3, 2007 indicating they felt the claim should not be accepted mainly because it was the employer's belief the worker was not in the course of her employment at the time of the injury. The employer maintained the injury occurred while on route to her place of employment which was the client's residence. The Commission determined that she was entitled to compensation benefits. The employer appealed the decision. The employer's representative argued that the worker was considered travelling to work and her employment did not commence until she actually entered into the client's home and that circumstances leading up to the worker's injury cannot be considered to have occurred in the course of her employment. The Review Division upheld the Commission's decision to extend benefit coverage to the worker.

Analysis

The above noted case indicated that Policy EN-19 was considered and it was determined that coverage was extended to the worker as she was considered in the course of her employment while entering the employer premises.

This decision is consistent with our Policy EN-19.

Decision No. 2525/00 MAAR v. Aon Inc

The Plaintiff was a worker in a bakery. The Plaintiff fell while proceeding from her car to the employer's door. There was a walkway sized overhang created by part of the second floor of the building. The worker slipped and fell while walking on this walkway under the overhang. The walkway was used by customers during business hours. The worker was proceeding to the locked door prior to regular business hours in order to fulfill her employment obligations. The tribunal determined that the worker was acting in the course of her employment at the time of the fall and that her right to bring an action against the property owner was taken away by the application of Section 10(9) of the Worker's Compensation Act. It was determined that the worker was on her employer's premises and was in the course of employment.

Analysis

This decision is consistent with our Policy EN-19.

Decision No. WCAT 2007-02634

A food service worker at a hospital suffered a back injury due to a slip and fall in a parking lot located beside her employer. The parking lot was adjacent and attached to the employer's premises. The injury occurred proximal to the start of the worker's shift. The fall was caused by a hazard of the premises. Although the employer did not own the land or premises or maintain the parking lot, it was significant that it was the "primary tenant" with responsibility for all the costs for parking lot maintenance. After determining that the parking lot was related to the employer's operations, the tribunal held that the worker's injury arose out of and in the course of her employment.

Analysis

This case is consistent with Policy EN-19.

Summary

Review of the facts confirm that [redacted] had sustained an initial injury on October 30, 2005 while in the course of his employment.

The facts confirm that on November 7, 2005 while attending the [redacted] for receipt of physiotherapy, [redacted] suffered a slip and fall causing further injury to his left shoulder. This slip and fall occurred in the parking lot after [redacted] had attended his physiotherapy treatment.

The term "arising out of and in the course of employment" means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place and in circumstances consistent with and reasonably essential to the employment. Arising out of refers to what caused the injury; in the course of refers to the time and place of the injury and its connection to the employment. The worker who injures himself while obtaining medical treatment for a work related injury has consistently been held to constitute an injury "arising out of and in the course of employment" in accordance with Policy EN-19, "Arising out of and in the Course of Employment"

With respect to injury during compensable treatment or return to work programming, Policy EN-19 notes:

> ***10. Injury During Compensable Treatment or Return to Work Programming***
> *Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.*
>
> *Where a worker is involved in a Commission-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be*

shown to arise out of and in the course of the return to work program or the training program.

According to Policy EN-19 "Arising out of and in the Course of Employment", coverage generally begins when the worker enters the employer premises to start the work shift, and usually terminates on the worker leaving the premises at the end of the shift.

It is noted that [redacted] slipped and fell on the [redacted] parking lot after exiting the building. He had just finished receiving physiotherapy treatments for his compensable left shoulder injury. Through policy, the Commission has extended coverage to situations where a worker is injured while undergoing compensable treatment. Policy EN-19 provides principles regarding the scope of coverage and what is considered the employers premises. Although we are not dealing with an injury which occurred on Mr. [redacted] own employers premises, the same principles can be applied to the premises of the [redacted]

According to Policy EN-19, where an injury occurs while entering or exiting the employer's premises in relation to performing activities for the purposes of the employer's business, it is determined to be in the course of employment.

Employer's premises are determined to be any land or buildings owned, leased, rented, controlled, or used for the purposes of carrying out the employer's business. This can also include a parking lot.

In this case, [redacted] was injured on the parking lot exiting the [redacted] in which he had just received treatment for his compensable injury. Policy En-19 states that a parking lot is considered the employers premises when it is owned, maintained, or controlled by the employer. In this case, the [redacted] owned, maintained and controlled the parking lot. Therefore, the parking lot is part of the [redacted] premises.

[redacted] was attending the [redacted] for treatment of a compensable injury and Policy En-19 has extended coverage to that situation. The parking lot is part of the [redacted] premises and in applying Policy EN-19 coverage would extend to the worker while he was on the premises for the purpose of treatment.

I find that [redacted] was acting in the course of his employment when he attended the [redacted] for treatment of his initial injury. His attendance at the [redacted] was a necessary incident of the initial injury. [redacted] was injured at work and was required to seek out and cooperate in medical treatment as required by Section 54.1 (b) of the Act. It was following the course of this treatment he suffered the subsequent injury.

I find the subsequent injury arose out of and in the course of [redacted] employment in that the injury occurred while he was attending physiotherapy treatment of his initial injury.

In applying the factors set out in Policy EN-19 I find [redacted] injuries did arise out of and in the course of employment.

Mr. Stephen J. May – Cox & Palmer
Re: [redacted]
April 10, 2013

Determination

It is my determination that the action brought against the [redacted] & [redacted] is statue barred as [redacted] injuries did arise out of and in the course of his employment. Attached is a certificate which may be filed with the court.

Sincerely,

Jacqueline Mantey
Internal Review Specialist

JM/ap

Cc: Yvonne McDonald – Internal Review Division
Jamie Martin – Roebothan, McKay & Marshall
Gerry Fleming – Stewart & McKelvey