THIRD PARTY DETERMINATION

April 11, 2013

Mr. Stephen F. Penney
Stewart McKelvey
Cabot Place
1100-100 New Gower Street
P.O. Box 5038
St. John's, NL A1C 5Z3

Dear Mr. Penney:

Re: [redacted]

I have reviewed, in accordance with *Section 46* of the *Workplace Health, Safety, and Compensation Act* (herein referred to as the "*Act*"), all submissions with respect to your request for a determination as to whether an action brought by [redacted] (plaintiff) represented by Mr. Mark Rogers of the Law Firm Rogers Bussey, against your clients [redacted] (1st defendant) and [redacted] (2nd defendant) is prohibited by *Section 44* of the Act.

The Commission received medical information indicating [redacted] had sustained an alleged work injury on November 27, 2007. In correspondence of December 13, 2007 the Commission indicated there was no receipt of a Form 6, "*Worker's Report of Injury*". Therefore, the submitted claim was denied.

On November 25, 2009 a statement of claim had been filed by Ms. Gladys H. Dunne indicating [redacted] had incurred personal injury to his right elbow and arm when struck from behind by a door which had blown open resulting in ongoing pain and suffering, considerable discomfort, and economic losses and expenses as a result of negligence of both the 1st and 2nd defendants. The incident occurred on November 27, 2007.

On January 23, 2012, [redacted] submitted a Form 6, "*Worker's Report of Injury*", to the Commission. In this he noted he had incurred a right elbow injury outside the [redacted] smoke area. As well, [redacted] employer, [redacted], submitted a Form 7, "*Employer's Report of Injury*", on February 9, 2012. In this they indicate: "*Employee left salon to go on break. While standing outside the exterior door blew open and struck his right elbow*". It indicates the incident occurred: "*Outside* [redacted] *(smoke area)*".

On March 22, 2012 the Intake Adjudicator rendered a decision indicating the claim had not been submitted in the required time frame as per *Section 53* of the legislation and therefore, the claim was denied.

On May 23, 2012 the Commission received your request for a *Section 46* determination on behalf of the 1st and 2nd defendants. On July 30, 2012 the Commission received response from Mr. Mark Rogers, council for the plaintiff, in respect of your *Section 46* determination. On August 17, 2012 the Commission received your final response to the rebuttal from Mr. Rogers.

LEGISLATION AND POLICY

Section 2 (1) of the Act states:

> *"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*

Section 2 (1) of the Act states:

> *"In this Act*
>
> *(o) 'injury' means*
>
> *(i) an injury as a result of a chance event occasioned by a physical or natural cause,*
>
> *(ii) an injury as a result of a wilful and intentional act, not being the act of the worker,*
>
> *(iii) disablement,*
>
> *(iv) industrial disease, or*
>
> *(v) death as a result of an injury*
>
> *arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a preexisting condition but does not include stress other than stress that is an acute reaction to a sudden and unexpected traumatic event."*

Section 2 (1) of the Act states:

> *"In this Act*
>
> *(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."*

Section 19 (1) of the Act states:

"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;*

Section 19 (4) of the *Act* states:

(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.*

Section 43 (1) of the Act states:

"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."*

Section 43 (2) of the Act states:

> *The Commission shall pay compensation to a worker who is seriously and permanently disabled or impaired as a result of an injury arising out of and in the course of employment notwithstanding that the injury is attributable solely to the serious and wilful misconduct of the worker.*

Section 44 of the Act states:

> *"(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."*

Section 45 of the Act states:

> *"(1) Where a worker sustains an injury in the course of his or her employment in circumstances which entitle him or her or his or her dependents to an action*
>
> *(a) against some person other than an employer or worker;*
>
> *(b) against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer; or*
>
> *(c) where Section 44.1 applies,*
>
> *the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action.*
>
> *(2) The worker or his or her dependents shall make an election under subsection (1) within 3 months of the injury and an application for compensation is a valid election for the purpose of this section.*
>
> *(3) Where the worker or his or her dependents elect to bring an action, he or she or they shall immediately serve notice in writing of the election on the commission."*

Section 46 of the Act states:

> *"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."*

Section 60 (1) of the Act states:

> *"An issue related to a worker's entitlement to compensation shall be decided on a balance of probabilities and, where the evidence on each side of an issue is equally balanced, the issue shall be decided in favour of the worker."*

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.

Presumption

Section 61 of the Act provides that where the injury arose out of the employment, it shall be presumed, unless the contrary is shown, that it occurred in the course of the employment, and where the injury occurred in the course of the employment, it shall be presumed, unless the contrary is shown, that it arose out of the employment. In other words, entitlement is based on a two part test.

The presumption provision ensures that workers are covered where one condition of compensability applies, i.e. the injury either arose out of or occurred in the course of employment, but there is insufficient evidence to establish that the other condition applies. The standard of proof to be applied when determining either of these shall be that established under section 60 (Policy EN-20 Weighing Evidence).

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.

(e) Lunchrooms, Rest and Coffee Breaks, Personal Needs and Comfort

Where the employer provides a lunchroom or similar facility on the employer's premises, or where an injury occurs during lunch hour, coffee break, or other similar rest period on the premises of the employer, or where an injury results from activities related to personal need or comfort, the injury is considered to be compensable providing:

- *it occurs while the worker is making reasonable and proper use of the employer-provided facility; and,*
- *it arises from a hazard of the facility, not from a personal hazard (see also **Personal Risk**).*

Workers taking lunch or breaks at worksites (e.g. construction sites) are covered while at the site.

Workers are not covered if they choose to leave the employer's premises to eat or perform other personal activities or errands.

DETERMINATION, REQUESTS, AND SUBMISSIONS

In your May 17, 2012 correspondence, you request the Commission determine, pursuant to *Section 46* of the Act, whether the claim commenced by the plaintiff against the defendants is prohibited by the Act.

Your May 17, 2012 request was forwarded from your office, to the plaintiff's lawyer, Mr. Mark Rogers, who provided a response in his July 27, 2012 submission of which you were provided a copy. Subsequently, on August 15, 2012 you provided your rebuttal submission.

POSITION OF [redacted] (DEFENDANTS)

Mr. Penney, you submit that the action commenced by [redacted] should be barred pursuant to *Section 44* of the Act. You submit the defendants were employers under the Act and their conduct of operations was usual in or incidental to the industry carried on by them.

You submit the plaintiff was on the employer's premises at the time of injury and was in the course of his employment.

POSITION OF [redacted] (PLAINTIFF)

Mr. Rogers submits the plaintiff does have an action against the defendants. He argues the plaintiff is not employed by the defendants in any way and therefore, the legislation does provide for an action against the defendants as they are not [redacted] employers. As well, Mr. Rogers submits that the plaintiff removed himself from employment when being outside the [redacted] on a break having a cigarette.

REASONING AND ANALYSIS

I have reviewed and considered all submissions from the parties involved in this case. *Section 44 (1)* of the Act provides the statutory bar to claims made by a worker against an employer for an injury that arises out of and in the course of employment. I have reviewed the arguments put forward by yourself on behalf of the applicants, [redacted] and [redacted], and also the arguments put forward by the solicitor for [redacted], Mr. Mark Rogers.

My role is to determine whether the action brought against the defendants is barred by the provisions of the Act. In making my determination I have considered a number of factors:

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

   From review of the facts of this case, I confirm that the plaintiff was employed with [redacted] at the time of the injury. The facts of the case support [redacted] is a worker within the meaning of the Act. I conclude [redacted] does meet the definition of "*worker*" within the meaning of *Section 2* of the Act. [redacted] had reported for work on the day in question and was on a rest break when the incident occurred.

2) Was [redacted] an "*employer*" within the meaning of the Act?

   From review of the facts, the defendant was a registered employer with the Commission. This supports the determination that the defendant was an "*employer*" within the meaning of the Act.

3) Was [redacted] an "*employer*" within the meaning of the Act?

   From review of the facts, the defendant was a registered employer with the Commission. This supports the determination that the defendant was an "*employer*" within the meaning of the Act.

4) Did [redacted] injuries "*arise out of and in the course of employment*" with [redacted]?

The focus of this decision is to determine whether the plaintiff suffered injuries arising out of and in the course of his employment. It has been argued by the defendants that [redacted] was in the course of his employment and was on the employer's premises at the time the injuries occurred. Therefore, he does not have a right of action against the defendants. To the contrary, Mr. Rogers argues that the worker was not on the employer's premises and also removed himself from employment therefore, as the injury did not arise out of and in the course of employment he does have a course of action against the defendants. The question to be answered is two-fold; was [redacted] on the employer's premises at the time of injury and did [redacted] remove himself from the course of employment because he was on a break.

Policy EN-19 defines the term "*arising out of and in the course of employment*". The policy indicates this to mean the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and that 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 and "*in the course of*" refers to the time and place of the injury and its connection to the employment. The policy provides guidance which can be used for making this determination.

I reference *Policy EN-19* particularly to lunch rooms, rest and coffee breaks, and personal needs and comfort. This section of the policy notes that where the employer provides a lunch room or similar facility on the employer's premises, or when an injury occurs during lunch hour, coffee break, or other similar rest periods on the premises of the employer, or where an injury results from activities related to personal need or comfort, the injury is considered to be compensable provided it occurs while the worker is making reasonable and proper use of the employer-provided facility and it arises from a hazard of the facility, not from a personal hazard.

The facts of this case indicate that [redacted] was outside on the [redacted] entrance having a cigarette when the door blew open striking him in the elbow. He had taken a break from his employment with [redacted] and proceeded to the area in question on a rest break. Policy EN-19 is clear in that when an injury occurs during a break on the premises of the employer the injury is considered to be compensable provided it occurs while the worker is making reasonable and proper use of the employer-provided facility and it arises from a hazard of the facility. All parties agree that [redacted] injury occurred during a break. [redacted] was having a cigarette on his break and it is not disputed that he was in an area commonly used by employees as a smoking area. Therefore, I find [redacted] was making reasonable and proper use of the facility. Since [redacted] injuries resulted from the door blowing open, it is clear the hazard arose from the facility.

Further referencing *Policy EN-19*, it provides direction with respect to situations where injuries can occur and whether coverage would be extended. The policy notes that 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. The policy discusses different aspects of an employer's premises. The policy indicates the employer's premises is any land or buildings owned, leased, rented, controlled, or used (solely or shared) for the

purposes of carrying out the employer's business. It notes that 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 purpose of the employer's business. The policy also notes that 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.

Application of this portion of the policy gives rise to the second part of the test; was [redacted] on the employer's premises at the time of injury. There is a lease in place between [redacted] and the defendants (landlords). This was noted as being completed in March 2007. Under the lease agreement, article 12 references "*Common Areas*". This section of the lease notes the tenant is permitted to use the common areas of the landlord. *"Common areas"* is defined in Section 1.1 (d) of the lease to include all areas, facilities, utilities, improvements, equipment and installations in or about the hotel which serve or benefit the retail areas, the tenants therein, and their employees, customers, and other invitees and which are not leased or intended to be leased by the landlord to tenants of the retail areas including all entrances to and exits from the retail areas. I find that the [redacted] entrance where [redacted] was injured is a common area of all employers in the [redacted]. Since the [redacted] is occupied by more than one employer, and the [redacted] entrance is a common area shared by the employers, including the [redacted], the [redacted] entrance constitutes the [redacted] premises in accordance with Policy EN-19.

The plaintiff claims that the statutory bar does not extend to the defendants because they are not [redacted] employer. Section 44 of the Act establishes a statutory bar to an action of a worker *"against"* an employer because of an injury that arises out of and in the course of the worker's employment. This section clearly indicates that all employers are covered by the statutory bar by using the word *"an"* instead of using his/her employer. Protection against suit for employers is a fundamental principle of the Workers Compensation System which is outlined by the Supreme Court of Canada in the Pasiechnyk case noted above.

Furthermore, the plaintiff claims that the injury occurred otherwise than in the conduct of the operations usual or incidental to the defendant's industry. The defendants are in the Hotel industry, including management of the hotel premises. The injury did not occur outside the usual or incidental operations of the hotel industry.

CASE LAW

As outlined in *Section 19 (4)* of the Act, the Commission is not bound by legal precedent. However, I have reviewed the cases submitted by the parties to determine relevance and applicability to the case at hand.

CASE NO. 1 – KING vs NEWFOUNDLAND WHSCC

A home care worker was injured while employed with a company which provided personal care, homemaking care, and respite care. The worker had been assigned to provide care to a client in their own apartment. The building was owned and managed by Omega Investments Limited. The Commission indicated Omega was an employer under the Act and was classified in the

rental properties industry. The worker reported for work and later in the day went to use the washroom facilities, sat on a toilet which became dislodged, tipped over and resulted in the worker falling to the floor, injuring her hip and shoulder.

The worker filed action against Omega who applied for a *Section 46* determination. The Commission determined the worker was in the course of her employment and was considered a worker under the Act. The Commission also determined Omega was an employer under the Act and was conducting operations usual in and incidental to the industry carried on by the employer.

Analysis: In this case the defendants are employers having valid Firm Numbers. This case provides guidance as it assists in determining whether the defendants were conducting operations usual in and incidental to the industry in which they were involved. 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 incident occurred outside the normal conduct of business.

CASE NO. 2 – FRY vs KELLY

An employer, who operated a business was driving his truck in the course of his business when it collided with another vehicle containing passengers. The passengers incurred injury and received Worker's Compensation benefits. The passengers also brought an action against the employer. The court held that the incident occurred within the normal course of business and the employer had privileges of coverage under the Act.

Analysis: This case provides guidance and assists in determining whether the employer was conducting operations usual in or incidental to the industry prescribed. 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.

PASIECHNYK vs SASKATCHEWAN WORKER'S COMPENSATION BOARD

Employees at a construction site were injured when a crane fell over onto a trailer occupied by the workers. These workers commenced civil action against the Government of Saskatchewan alleging failure to adequately inspect the crane. The Government of Saskatchewan applied for a determination as to whether it was an employer and therefore, protected under the Act. The Compensation Board found that the Government was an employer and therefore, the action was prohibited. When reviewed by the Supreme Court of Canada, the court supported the findings of the Compensation Board and noted the fundamental questions to be answered were whether the plaintiffs were a worker, if so, was the injury sustained through employment? ; Were the defendants an employer and if so, did the claim arise out of acts or faults of the employer while engaged in, about, or in connection with the industry or employment in which the employer or employees of the employer were engaged.

Analysis: This case provides guidance as the fundamental questions to be answered are whether [redacted] was a worker and was the injury sustained through employment? Also, were the defendants employers and was their conduct usual in or incidental to the industry in which they were engaged?

PUBLIC DECISION NO. 147/2001

A worker claimed for a right shoulder injury in November 1995 through altercation with a co-worker. The claim was accepted by the Manitoba Board and benefits commenced. The appeal panel reviewed the issue of whether the claimant/WCB right of action was removed by the Act and the parties in question wished to exercise right to sue. The panel found the actions of both parties were minor and the injury occurred within "*the conduct of operations usual in or incidental to the industry carried on by the employer*".

Analysis: The panel found the tests of "*whether employer carrying on operations usual in and incidental to industry*" and "*arising out of and in the course of employment*" were similar. Essentially, it was whether the employment connection is broken.

WORKPLACE HEALTH, SAFETY, AND COMPENSATION REVIEW DIVISION (WHSCRD) DECISION 08031

On April 4, 2007 a worker filed a claim indicating while employed as a home support worker she slipped and fell on steps going into a client's home. The employer did not agree the injury happened in the course of her employment. The Commission accepted the claim as compensable. The employer appealed the decision citing the entrance way to the client's home was not under the control of the employer as they were not responsible for maintenance, etc. and therefore this was not the employer's premises. The Review Division concluded the decision of the Commission was correct.

Analysis: This case does offer information to consider with respect to an employer's premises. Coverage was extended to the worker as she was considered in the course of her employment while entering the employer's premises. This decision is consistent with Policy EN-19.

ONTARIO WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL DECISION 2525/00 MAAR vs AON INCORPORATED

In this case a worker was proceeding to work and fell on a walkway area. The walkway was property owned by the landlord of which the worker's employer was a tenant. The worker slipped and fell on a walkway to the employer's premises which was used by customers. The worker was proceeding to the locked door prior regular business hours in order to fulfill her employment obligations. The worker proceeded with an action against the property owner for damages. The tribunal found the worker was on the employer's premises at the time, therefore, the action was statute barred.

Analysis: This case is similar and provides some guidance as it discusses the location of an incident and whether the location in question is on the employer's premises. It provides guidance for consideration with respect to the employer's premises. This case is consistent with Policy EN-19.

WORKER'S COMPENSATION APPEALS TRIBUNAL DECISION NO. 2003-648-TTA, NOVA SCOTIA APPEALS TRIBUNAL

The worker slipped and fell on the top step of the front entrance of the building as she arrived for the start of her work shift. She was approximately four feet from the front door of the building. The building was shared by the employer and building owner. The Appeals Tribunal found that the worker had no choice but to walk up to and through the building to her employer's offices on the fourth floor. The Appeals Tribunal found that the employer, at least theoretically, was in a position to negotiate with the owner of the building to maintain a safe and clean entrance to the building because of its tenant/landlord relationship. Therefore, the Appeals Tribunal held that the area was part of the worker's place of employment. It was found that entry to the building should be considered part of the employer's premises. As well, the Appeals Tribunal found that the worker was engaged in an act "*reasonably incidental*" to her work. Thus, the worker's injuries arose out of and in the course of employment.

Analysis: The decision must be viewed in the light of the fact that when rendered the Nova Scotia Worker's Compensation Board did not have a specific policy dealing with entrances. The Commission does have *Policy EN-19* which indicates that the employer's premises includes shared entrances.

WORKPLACE HEALTH, SAFETY, AND COMPENSATION REVIEW DIVISION (WHSCRD) DECISION 06302

In this case a worker slipped and fell in a parking lot of the airport. She was employed by a security service as a passenger screener. The claim was denied by the Commission as the parking lot was not considered to be the employer's premises. This was upheld through the appeal level. It was noted the parking lot was not under the control or maintenance of the employer and therefore, was not considered the employer's premises.

Analysis: This case does not provide any guidance with respect to the case at hand as [redacted] injuries did not occur on a parking lot.

WORKPLACE HEALTH, SAFETY, AND COMPENSATION REVIEW DIVISION (WHSCRD) DECISION 09156

This is a case where a worker submitted a claim to the Commission indicating she had fallen in a parking lot sustaining an injury. She noted the injury occurred on the employer's parking lot. It was indicated the worker was in the parking lot smoking a cigarette on a break. The claim was denied as the parking lot was not owned, controlled, maintained, etc., by the employer. This was upheld through the appeal process and it was also noted the employee chose to leave the employer's premises.

Analysis: This case does not provide any guidance as [redacted] was not in the parking lot when the incident occurred.

Workers' Compensation in Canada, Second Edition, Terrence G. Ison, Butterworths, Toronto and Vancouver, *Section 3.3.18, Refreshment Breaks.* *'Where an injury occurs*

during a lunch break, coffee break, or other refreshment break, it is generally compensable if the worker is at the premises of the employment. Similarly, if the break is taken in the course of travel of an employment purpose, an injury that occurs during the break is generally compensable. However, if a worker at a fixed place of employment elects to leave that place during the break to take refreshment elsewhere or for a personal errand, an injury that occurs off the premises of the employment is generally not compensable.

Where a worker arrives early and is injured while taking refreshment in the factory cafeteria prior to the commencement of the shift, the injury is compensable".

Analysis: I find the reference from Terrence G. Ison is applicable to the specific facts in this case. The reference refers to the timing of a break and when it occurs in the course of employment on the employer's premises it is generally compensable. This is consistent with Policy EN-19.

Workers' Compensation in Ontario, Garth Dee, Nick McCombie, & Gary Newhouse, Butterworths, Toronto and Vancouver, Chapter 6 – "Arising out of and in the Course of Employment":

> *"Three basic concepts regarding work activity applied by the Board . . . are:*
>
> 1) *The task being performed should be in the best interest of the employer;*
> 2) *If the employer is aware of, but overlooks an improper activity that results in injury to the employee, the claim may have merit;*
> 3) *There is NO entitlement to compensation benefits, if the employee is doing something quite outside the duties assigned or if the employee goes to a place or transacts some business for personal reasons only.*
>
> *In the strictest sense, not all work activities will necessarily be in the best interest of the employer, but if a specific activity is reasonably incidental to work the activity may be characterizable as within the scope of employment. This view would seem to be reflected in some of the more specific Board policies regarding activity, as discussed below.*
>
> *II) Acts of Personal Comfort*
>
> *Board Policy is that a worker is in the course of employment during a lunch, break, or other non-work period (period of leisure). If there is an injury in the course of these activities by reason of the ordinary hazards of the employer's premises, that injury will be compensable.*
>
> *Apparently, the Board has accepted that a worker who felt a sudden sharp pain in his back while bending to pick up a can of cola from a dispensing machine located in the company canteen, was entitled to compensation for the injury. Clearly, the act of obtaining a drink is not of direct benefit to the employer, but is a reasonable incident of employment. In the cola dispenser case, it was held by the Board that:*

"It is now well settled that all kinds of incidents, personal, contractual, or reasonable under the circumstances, may well arise out of and in the course of the employment. Such incidents include the use of facilities supplied by the employer for the benefit of the employee during working hours."

Analysis: I conclude the reference is similar to the facts of this case. The reference indicates that a worker is in the course of employment during a lunch, break, or other non-work period. Generally, it notes if there is an injury in the course of these activities by reason of the ordinary hazards of an employer's premises, then the injury will be considered compensable. This is consistent with Policy EN-19.

SUMMARY

In reviewing the facts of this case, it is confirmed that [redacted] was employed by [redacted] at the time he incurred his injury. The facts confirm he was on the outside entrance way known as the [redacted] entrance while having a cigarette during his break. Policy EN-19 indicates workers are covered during breaks if on the employer's premises. The entrance way is a common area and was used by the tenants of the building as a smoking area. Policy EN-19 indicates that where the premises is occupied by more than one employer, the employer's premises includes the common areas.

I find [redacted] was on the employer's premises at the time the injury occurred. [redacted] injury occurred during a break on the employer's premises and in accordance with Policy EN-19 his injury arose out of and in the course of employment.

DETERMINATION

It is my determination that the action brought against [redacted] and [redacted] employers under the Act, by [redacted], a worker under the Act, having incurred an injury arising out of and in the course of employment is statute barred.

This decision represents the final decision of the Commission. Attached is the certificate which may be filed with the court.

Yours sincerely,

Paul Tobin

Paul Tobin
Internal Review Specialist

PT:lf
Enclosure

c: Mr. Mark Rogers, Rogers Bussey