THIRD PARTY DETERMINATION

October 20, 2014

Ms. Danielle S. Duchene
Stewart McKelvey Law Offices
Cabot Place, Suite 1100
100 New Gower Street
P.O Box 5038
St. John's, NL A1C 5V3

Dear Ms. Duchene:

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 Steven D. Marshall, of the law firm, Roebothan, McKay and Marshall, against [redacted] (Defendant), represented by yourself, is prohibited by Section 44 of the Act.

BACKGROUND INFORMATION

On April 9, 2009, [redacted], an employee of the [redacted] slipped and fell in a stairwell of the [redacted] which is owned, operated, and controlled by the [redacted].

On December 14, 2008, a statement of claim was made by Stephen D. Marshall on behalf of [redacted] citing that [redacted] *"was walking in a careful and prudent manner on her way down the public stairwell, servicing the* [redacted] *to access the* [redacted] *when suddenly and without warning, she slipped and fell on the stairwell which had not been adequately inspected and/or maintained due to the negligence and/or breach of contract of the Defendant and/or its employees, servants or agents, contributing to or causing the Plaintiff to fall heavily, therefore resulting in serious personal injury to the Plaintiff."*

On November 16, 2012, you submitted a request to the *Workplace Health, Safety and Compensation Commission* (the "*Commission*") on behalf of the [redacted] for a determination pursuant to *Section 46* of the Workplace Health, Safety and Compensation Act for a determination as to whether an action commenced by [redacted] should be barred pursuant to Section 44 of the Act. You provided a copy of your submission to Mr. Marshall.

[redacted] Ms. Danielle S. Duchene [redacted]

October 20, 2014

On June 11, 2013, Mr. Marshall provided a reply submission on behalf of [redacted], a copy of which was forwarded to your attention.

On July 8, 2013, you provided a reply submission in response to a June 11, 2013 submission of Mr. Marshall on behalf of [redacted]

On July 17, 2013, further correspondence was received from Mr. Marshall's office providing clarification of the details surrounding the incident of April 9, 2009. It was submitted, on [redacted] behalf, that she did not actually *"slip and fall"* but that she "*tripped in a frayed section of the carpet that had partially and inappropriately been cut away, allowing the remaining portion of the carpet to unravel"* causing the heel of [redacted] shoe to catch on the edge of the carpet and on several of the frayed strands of carpet, and resulted in her fall on the stairwell. *"All of this is alleged to be the result of the gross negligence of the Applicant, [redacted], and its failure to properly maintain the carpeting on the stairwell and/or of the stairwell itself."* It was also noted that [redacted] *notes that she was not in the hospital merely to get to work, she was also on her way from an appointment in the hospital, and thus cannot be said to have been simply on her way to work as suggested by the Applicant"*

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*
>
> *(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."*

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 pre-existing 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:

> *"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."*
>
> (2) 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 61 of the Act states:

"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."

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.*

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.

(a) Captive Roads

A captive road is one which may be considered a public road, but leads only to the premises of the employer and is, for practical purposes, under the control of the employer (i.e. the employer is responsible for repair and/or maintenance of the road). It is considered part of the employer's premises.

The nature of the use of a road and its relationship to the operations of the employer must be considered. For example, significant use of the road by the public and other employers not related to the employer's operations can indicate that it is not a captive road. However, the occasional or incidental use by the public will not necessarily preclude the determination as a captive road.

(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.

An injury that is caused by the worker's own vehicle in the employer's parking lot that is not the result of the parking lot or the employment is not covered (e.g. slamming the door on one's hand).

(c) Shopping Mall Parking Lots

A worker is covered if the employer owns and maintains the entire parking lot, or if the injury occurs in a parking area assigned or directed by the employer and where the employer has a contracted agreement with a lessor covering

maintenance of the parking lot. However, a worker is not covered while traveling from an assigned parking area to a shopping mall, or while in public parking areas not under the control of the employer.

(d) Shopping Malls versus Multi-Employer Buildings

The worker is considered to be in the course of employment upon entering the particular premises assigned to the employer.

In multi-employer buildings (multi-level office buildings occupied by more than one employer or tenant) the worker is covered in common areas such as entrances, lobbies, stairs, elevators, escalators, and exits. This is based on the principle that workers have a right of way in certain areas of buildings used by employers and their workers as opposed to buildings provided for the general public such as shopping malls. However, an injury in a common area may not be covered if the reason for being in that area is a deviation from the employment.

A worker is not covered while in the common areas of a shopping mall shared by workers and the public unless the entire area is owned and maintained by the employer. Such areas are not controlled by the employer."

DETERMINATIONS, REQUESTS AND SUBMISSIONS

In your November 16, 2012 submission, you request that the Commission determine, pursuant to Section 46 of the Act, whether the action commenced by the Plaintiff against the Defendant is prohibited by the Act.

A copy your application for determination was provided to the Plaintiff's lawyer, Mr. Stephen D. Marshall, who responded in a submission of June 11, 2013. On July 8, 2013 you provide a response to the Plaintiff's June 11, 2013 submission. On July 17, 2013 the Plaintiff's lawyer provided correspondence outlining further details regarding the April 9, 2009 incident.

POSITION OF [redacted]

You submit that the action commenced by [redacted] should be barred pursuant to Section 44 of the Act as she was acting in the course of her employment when she slipped and fell; that the Defendant, [redacted] was an employer within the meaning of the Act at the time of the injury and that "*based on the evidence provided by the legislation, pertinent decisions, and [redacted] claim, it is clear that the accident is covered by the Act and Policy EN-19 and as such, the action commenced by [redacted] is statute barred*". You state as follows:

"Facts"

2. At all times material, [redacted] was the owner, operator and controller of the [redacted] located at [redacted] Newfoundland and Labrador [redacted] was also at all material times an Employer as defined in the Act.

3. At the time of the incident, [redacted] was at the [redacted] while acting as a paid employee of the [redacted] She was attending at the [redacted] to fulfill the duties of her employment when she slipped at (sic) fell in a stairwell at the [redacted]

"Arguments"

8. There is a clear causal connection between [redacted] employment and her alleged incident. She states herself she was accessing the stairwell in question to attend at the [redacted], her place of employment.

14. The fact that injuries which occur while an individual is entering or leaving work are subject to the statutory bar is confirmed by Policy EN-19, relied upon in the [redacted] decision.

Reference: Client Services Policy Manual, Policy No. EN-19: *"Arising out of and In The Course of Employment"*

16. It is irrelevant that the stairwell on which the plaintiff fell was not directly owned by her employer. As per the discussion above, the employer need not own the area on which an incident occurred for the incident to be considered part of the course of employment.

POSITION OF THE PLAINTIFF [redacted] AS REPRESENTED BY STEPHEN D. MARSHALL, WITH ROEBOTHAN, MCKAY AND MARSHALL

Mr. Marshall, representing [redacted] submits that she was not in the course of her employment at the time of the accident. He states:

2. [redacted] accepts the facts as set out in paragraph 2 of the [redacted] submission, and that [redacted] was at the time of the incident in the [redacted] was traveling through the [redacted] on her way to begin a shift at [redacted] as part of the [redacted] It was while [redacted] was in the [redacted] that she slipped and fell on the stairwell in the [redacted] and belonging to the Applicant, [redacted]

3. The stairway in question was located directly across from [redacted] This area was not in use by [redacted]

9. [redacted] was indeed accessing the stairwell to eventually attend at her place of employment, but as the Applicant states her employment was at the [redacted] and not with [redacted] Moreover, no aspect of [redacted] employment required her to be in other areas of the [redacted] making her presence in the stairwell too far removed to be ***"causally connected"*** to [redacted] employment.

[redacted] injury cannot be said to have arisen out of her employment as is suggested by the Applicant.

14. The Applicant states that access to and egress from the premises of the employment is considered part of the employment. As authority for this proposition the Applicant quotes from Worker's Compensation in Canada (2nd ed.), in which it is stated:

> *"Access to and egress from the premises of the employment are part of the employment. Thus, for example, an injury sustained by a worker in the company parking lot is generally compensable. Also, an injury sustained while en route from the company's parking lot to the particular place of work is generally compensable, even though it may have occurred on a highway. A worker who enters or leaves the premises by a different method from that directed or intended by the employer is nevertheless in the course of employment".*

Reference: T. Ison, Workers' Compensation in Canada, 2nd ed (Toronto: Butterworths Canada Ltd. 1989) 3.3.8 (Tab 2)

15. However, Mr. Ison *goes* on to state that there were exceptions to this rule. He notes:

> *By way of exception, an injury resulting from a collision between two motor vehicle may not be compensable if the arrival and departure from the premises of the employment related to ordinary commuting, and no other feature of the premises or of the employment had causative significance.*

16. [redacted] submits that this is more particular to her situation as she was commuting to her place of work when the incident took place. Commuting can take any form, either by car or by foot as in [redacted] situation. Moreover, the Policy states that *"coverage is not extended for routine commuting to and from the normal place of employment...."* The Policy defines *"routine commuting"* as.... *"Travel to and from the workplace with no employment obligations or duties included in the travel other* than *the obligation of being at the worksite for the work shift".* [redacted] only concern at the time was making it to her shift that day. She was not carrying out any duties related to her employment. She was passing through the [redacted] on her way to the [redacted] located in the [redacted]

17. The wording of the Policy also suggests that [redacted] would not be considered to be in the course of employment while she was on her way to work. The Policy provides that:

> *(W)orkers 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.*

18. It is clear that [redacted] was on her way to work when the incident occurred. Further, there is no indication that [redacted] was traveling for the purposes of employment.

19. It has also been suggested by the Applicant that [redacted] slip and fall occurred on the employer's premises.

20. There is no indication that the Applicant is stating that the premises where the incident occurred were owned by [redacted] or part of the [redacted]. Indeed, the Applicant has admitted that it owns the [redacted] where the incident took place. Although the [redacted] and the [redacted] are located in one complex, they are in no way connected in any way to suggest that [redacted] employer fits the definition of an employer's premises as defined above. The [redacted] and the [redacted] as part of [redacted] are separate entities.

26. [redacted] submits that, as is the custom of her employer, she is required to sign in at the beginning of each session or shift. [redacted] are told that they are not working until they sign in and will not be paid if this is forgotten. [redacted] had not yet signed into work when the incident occurred. This puts [redacted] outside the scope of coverage at the time that the incident took place. Moreover, since [redacted] was not on the premises of her employer's premises when she fell, she would not have been within the scope of coverage.

27. As the applicant suggests, [redacted] was on her way to work when she slipped and fell in the stairway. However, she was not on the employer's premises, as defined in the Policy, when the incident occurred. She was instead commuting to her place of work in the [redacted] on the [redacted]. The fact that the [redacted] was attached to the [redacted], and [redacted] employer, is not relevant to making this determination. [redacted] employer was not responsible for maintaining the stairwell, as it was in fact owned entirely by the Applicant, [redacted].

28. The injury occurred before [redacted] work shift had begun, and as such did not occur during a time period for which she was being paid. Moreover, she was not in the process of doing something for the benefit of her employer. The injury did not result from a duty associated with her type of employment such as using equipment or materials involved with her work or upon taking instructions from her employer. It did not result from exposure of a risk equivalent to a risk she is exposed to in the normal course of production, and finally, was not caused by some activity of her employer, a co-worker, or a third party.

29. As such, it is [redacted] position that the Policy that informs the Newfoundland and Labrador Workers' Compensation scheme places her outside its intended scope. [redacted] respectfully submits her action is not barred by virtue of S. 44 of the Act.

REASONING AND CONCLUSION

I have reviewed and considered all the submissions from the parties involved in this case. Section 44 (1) of the Act provides a statutory bar to claims made by a worker against an employer for an injury that arises out of and the course of employment. I have reviewed the arguments put forth by you on behalf of the Applicant, [redacted] as well as the arguments put forth by Mr. Stephen D. Marshall, the Solicitor for the Plaintiff, [redacted]

Ms. Danielle S. Duchene
[redacted]
October 20, 2014

My task is to determine whether the action brought against [redacted] is barred by the provisions of the Act. In making this determination, there are a number of factors I have considered:

1. Was [redacted] a "*worker*" at the time her injuries occurred?

I confirm from my review of the facts in [redacted] was employed by the [redacted] at the time of her injury. It is not disputed that [redacted] is a worker within the meaning of the Act. Therefore, I conclude, [redacted] does meet the definition of "*worker*" within the meaning of Section 2 (1) (z) of the Act. This fact is not disputed.

2. Was the [redacted] an "*employer*" at the time [redacted] injury occurred?

I confirm that the defendant was a registered employer with the Commission within the meaning of Section 2 (1) (j) of the Act. This fact is not disputed.

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

The focus of this determination is whether [redacted] suffered an injury *"arising out of and in the course of her employment"*. Section 61 of the Act states that where an injury arose out of the employment, it shall be presumed, unless the contrary is shown, that it occurred in the course of the employment. Where the injury occurred in the course of the employment, it shall be presumed, unless the contrary shown, that it arose out of the employment. In this particular case, the issue to be determined is whether [redacted] injuries occurred in the course of her employment, at a time and place, and in circumstances consistent with and reasonably essential to the employment. This presumption provision ensures that workers are covered where one condition of compensability applies. Policy EN-19, *"Arising Out of and in the Course of Employment"* provides direction in making such determinations. It states that *"coverage generally begins when a 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"*. Therefore, the question to be determined is whether [redacted] was on the employer's premises at the time of the injury.

Policy EN-19 defines employer's premises as any land or buildings owned, leased, rented, controlled or used (solely or shared), for the purpose of carrying out the employer's business. Coverage is also 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 are occupied by more than one employer, the employer's premises include the exclusive premises of the employer and the shared or common areas such as entrances, exits, elevators, stairs, and lobby.

In this particular case, it is accepted and confirmed that the premises of the [redacted] of [redacted], [redacted] employer, are located in the [redacted] which is owned, operated and controlled by [redacted] has confirmed that she was on her way to work in the [redacted] when the heel of her shoe caught in the frayed carpeting on the stairs causing her to trip and fall. She has indicated that prior to this she had attended a personal appointment in the [redacted] but that, at the time of the fall, she was on her way to her employment.

The arguments put forth from the various parties focus on whether [redacted] was in the course of her employment at the time of the accident. In the course of employment generally refers to the time and place of the injury and its connection to the employment. In this particular case, it has been accepted that [redacted] was on her way to, but had not yet arrived, at the [redacted] to commence paid employment. [redacted] was not commuting or traveling to work but had arrived at and was walking through the building in which her employer's premises was located. Policy EN-19 provides specific direction in determining what is to be considered an employer's premises. It states specifically 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 in or leaving the employer's premises, all in relation to performing activities for the purposes of the employer's business. It goes on to state specifically 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. It is clear from the facts of this case that Ms. Andrews was injured on premises occupied by more than one employer, in this case [redacted] and [redacted] and the location of her accident was in the shared/common area of a stairwell. [redacted] was in the stairwell for the purposes of her employment, she was on her way to work. Although [redacted] submits she also attended a personal appointment at the [redacted] it was also indicated that this personal appointment had been completed and she was on her way to the [redacted] for the beginning of her shift. It is my determination that [redacted] activity at the time of the accident was for the purposes of her employment, she was in a shared/common area and as such she was on the employer's premises. I find she was in the course of her employment at the time she sustained her injuries.

CASE LAW

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

GELLATELY v. NEWFOUNDLAND (WORKERS' COMPENSATION APPEAL TRIBUNAL)

While driving home from a business trip, Mr. Gellately was seriously and permanently disabled in the Motor Vehicle Accident (MVA). His blood alcohol level at the time of the accident was approximately four times the legal limit. Mr. Gellately's claim for Workers' Compensation benefits was denied and that decision was upheld by the Workers Compensation Appeal Tribunal (WCAT). His appeal to the Supreme Court of Newfoundland, Trial Division, was dismissed. The Court concluded that the appellant's gross intoxication constituted an act that was not work-related and, as a consequence, broke the employment nexus and took the

appellant outside the scope of his employment. Mr. Gellately appealed. The appeal was allowed and the Court of Appeal held that the injury was contributed to, in a material way, 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 was rejected as too narrow a view.

Analysis

In the Gellately case, the parties had accepted that Mr. Gellately was in the course of his employment when the injury occurred. The question before the court was only whether the injury arose out of the employment. In this case, it is 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 in this case. Therefore, the Gellately case has little relevance to my determination.

WORKERS COMPENSATION IN CANADA, SECOND EDITION, TERRENCE G. ISON, BUTTERWORTHS, TORONTO AND VANCOUVER

3.3.8 Access and Egress. Access and egress from the premises of the employment are part of the employment. Thus, for example, an injury sustained by a worker in the company parking lot is generally compensable. Also, an injury sustained when en route from the company parking lot to the particular place of work is generally compensable, even though it may have occurred on a highway. A worker who enters or leaves the premises by a different method from that directed or intended by the employer is nevertheless in the course of employment. By way of exception, an injury resulting from a collision between two motor vehicles may not be compensable if the arrival at or departure from the premises of the employment related to ordinary commuting and no other feature of the premises or of the employment had causative significance.

Analysis

I conclude that the references from the parties are somewhat applicable, in this case as it is to be determined whether [redacted] was injured on the employer's premises.

WORKERS COMPENSATION APPEAL TRIBUNAL DIVISION DECISION # : 2003 – 648 – TPA, NOVA SCOTIA APPEALS TRIBUNAL

The worker slipped and fell on the top step of the front entrance to the building as she arrived for work at the start of her work shift. She was approximately four feet from the front door of the building. She was required to open the door. The building was shared by the employer and building owner. The Appeals Tribunal found that the worker had no choice but to walk up and through the building to her employer's office on the 4th floor. The Appeals Tribunal also 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 the tenant/landlord relationship. Therefore, the Appeals Tribunal held that the area was part of the worker's place

of employment. It was found that the entry to the building should be considered part of the work 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 her employment.

Analysis

Decision 2003 – 648 – TPA has to be reviewed in light of the fact that, at the time, the Nova Scotia Workers' Compensation board did not have a specific policy dealing with entrances and parking lot. The Commission does have a Policy EN-19 which provides guidance regarding coverage in entrances, parking lots and common areas. Decision 2003 – 648 – TPA does provide some guidance in this determination as part of its conclusion was based on the finding that the worker was compelled to walk up to and through the building to her employer's premises at the time of her accident. The Appeals Tribunal stated *"the risk was different than a member of the general public, for instance, on a public street"*. I find this case is applicable in that [redacted] also had to walk through the building to her employer's premises at the time of her accident.

MS. B v. CROMBIE PROPERTIES LIMITED

Ms. B was arriving at work for the start of her shift when she slipped and fell on the sidewalk adjacent to her place of employment. Ms. B. contended her injury did not arise out of and in the course of employment and, therefore, was not statute barred. The Defendant contended that the Plaintiff injuries did arise out of the employment. The Internal Review Specialist determined Ms. B was a salaried employee and would fall within the definition of *"worker"* under the Act. As well, she was entering an entrance exclusive to her employer and was on the sidewalk under the overhang several feet from the entrance. The area in question was not a common area for the general public or other employers occupying the building as the entrance Ms. B. used was one exclusive to employees. It was determined that Ms. B's injuries arose out of and in the course of her employment.

Analysis

I conclude, this case is somewhat similar as the worker's accident occurred outside the immediate premises of her employer. This case differs because the stairwell where the accident happened was not for the exclusive use of the employer, [redacted]

WORKPLACE HEALTH , SAFETY AND COMPENSATION REVIEW DIVISION DECISION #09099-MAY 9, 2009

The worker, an employee of a home care agency, injured her foot on the parking lot of the hospital where she was to provide care to an inpatient. The claim was initially accepted. The employer appealed and the Internal Review Specialist determined that the injury was not work-related as it occurred on a parking lot that was not the premises of the employer and therefore the worker had not commenced her employment when the accident occurred. This decision was upheld on appeal.

Analysis

I conclude this case is somewhat similar as the worker's accident occurred immediately prior to the worker commencing employment. However, this case is different as it occurred on a parking lot which was not the employer's premises

SUMMARY

A review of the facts confirm that in April 2009, [redacted] was employed by the [redacted] when she tripped and fell in a stairwell of the [redacted] while on her way to her employment at the [redacted] It was agreed that the stairwell was the premises of the [redacted] which solely owned, maintained and operated the [redacted] in which the [redacted] was located. In determining whether [redacted] injuries arose in the course of her employment, specific note was given to Policy EN-19, "*Principles of the scope of coverage (spectrum, boundaries)*" which provides specific guidelines as to what is to be considered the employer's premises. In particular 1(d) "*Shopping Malls versus Multi-Employer Buildings*" states that in multi-employer buildings (multi-level office buildings occupied by more than one employer or tenant) the worker is covered in common areas such as entrances, lobbies, stairs, elevators, escalators, and exits. This is based on the principle that workers have a right-of-way in certain areas of buildings used by employers and their workers as opposed to buildings provided for the general public such as shopping malls. As [redacted] was injured in a common area of a Multi-employer building, I find she was in the course of her employment at that time.

DETERMINATION

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

This represents the final decision of the Commission. Enclosed is a copy of the certificate which has been filed with the court.

Sincerely,

Frances Pitcher

Frances Pitcher
Internal Review Specialist

FP:bl/jh
Enclosure: Certificate

c: Yvonne McDonald, Administrative Officer, Internal Review
c: Stephen D Marshall, Roebothan McKay and Marshall