



3rd Party Determination

November 4, 2014

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

Dear Mr. Fleming:

[REDACTED]

I have reviewed, in accordance with Section 46 of the Workplace Health, Safety and Compensation Act, *RSNL 1990, Chapter W-11* (herein referred to as the "Act"), all submissions with respect to your request for determination as to whether an action brought by [REDACTED] (Plaintiff), represented by Mr. Jamie Martin, of the law firm, Roebothan, McKay and Marshall, against your clients, [REDACTED] (First Defendant), [REDACTED] (Second Defendant) and [REDACTED] (Third Defendant) is prohibited by Section 44 of the Act.

BACKGROUND INFORMATION

On April 1, 2007, [REDACTED] while employed as a Linesman with [REDACTED] sustained physical injuries to his arms and hands, resulting in a bilateral amputation of both arms below the elbows. This was as a result of contact with electricity while installing strand wire to utility poles in [REDACTED], near the intersection of Routes [REDACTED] and [REDACTED] to run from one side of the [REDACTED] to the other side of the [REDACTED]. After attaching the strand at the longest span crossing the water, the Plaintiff, the Second Defendant and the Third Defendant unrolled the strand, which was on the spool attached to the First Defendant's motor vehicle, to reach to the next pole on the other side of the [REDACTED]. After the strand wire was unrolled across the [REDACTED], the Plaintiff climbed the next pole to continue the process of attaching the strand wire. While the Plaintiff was on the pole, he was electrocuted causing significant injury. There are three theories as to the cause of the electrocution; (1) the strand wire may have hooked the bridge railing and when released, jumped up and hit the power line or (2) the strand wire came too close to the power line sag and power arced to the strand wire being installed or (3) [REDACTED] may have touched one of the live power lines.

On February 24, 2009, a Statement of Claim was made by the Workplace Health, Safety and Compensation Commission, (represented by Mr. Martin) on behalf of [REDACTED] citing the injury was caused by the negligence of the Defendants.

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On December 10, 2009, you requested, on behalf of the Defendants, that the Commission determine, pursuant to Section 46 of the Act, whether the above-noted action brought by [REDACTED] (Plaintiff), represented by Mr. Jamie Martin, against your clients is prohibited by Section 44 of the Act.

A copy of the Application for Determination was provided to the Plaintiff's lawyer, Mr. Jamie Martin, who responded in a submission dated April 15, 2010. A copy of this submission was forwarded to you and you responded in a submission dated May 25, 2010 and copied to Mr. Martin.

Mr. Martin responded in a submission dated September 10, 2010 and copied to you. You responded in a submission dated October 1, 2010 and copied to Mr. Martin. You forwarded an additional submission dated July 11, 2013. On May 30, 2014, Mr. Martin confirmed he would not be providing any further submissions.

The Plaintiff submits that the accident occurred as a result of the use of a motor vehicle and, therefore, the actions are not statute barred pursuant to the provisions of the Workplace Health, Safety and Compensation Act.

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,*
 - (ii) *the principal, contractor and subcontractor referred to in section 120."*

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,*

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- (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 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."*

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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."*

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 44.1 of the Act states:

- "(1) Section 44 shall not apply where the worker is injured or killed*
 - (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or*
 - (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.*
- (2) In subsection (1) 'motor vehicle' means*
 - (a) a motor vehicle*
 - (i) registered under the Highway Traffic Act, or*
 - (ii) authorized under section 12 or 17 of the Highway Traffic Act to be operated on a highway in the province without being registered under that Act,*

whether or not it is being operated on a highway; or

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- (b) *another motor vehicle while being operated on a highway in the province and for the purpose of this definition 'highway' means a highway as defined in the Highway Traffic Act."*

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."

Determination, Requests and Submissions

In your December 10, 2009 Application for Determination, you requested that the Commission determine that, pursuant to Section 46 of the Act, the action brought by the Plaintiff is prohibited by Section 44 of the Act. The Plaintiff submits the accident occurred as a result of the "use of a motor vehicle" and as such is not statute barred. My task is to determine whether the Plaintiff's accident involved "the use of a motor vehicle".

Position of Defendants represented by Denis J. Fleming

The Defendants submit that at the time of the accident, the Plaintiff was a worker engaged in the course of his employment and each of the Defendants named in the action qualify as either an employer or worker under the Act, therefore, unless an exception to the statutory bar applies, the action is barred pursuant to the Act. The only exceptions to the statutory bar are found in Section 44.1 of the Act. This applies to accidents that occur while the worker is being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried, or where a worker suffers injury as a result of an accident "involving the use of a motor vehicle".

In the Defendants submission, they claim that neither of these exceptions apply. They submit that at the time of the accident, the Plaintiff was on the pole so was not being transported in the course of his employment therefore, Section 44.1 (1) (a) does not apply. They state that the accident involved a Line Truck which is a multi-purpose machine that can function as a motor vehicle or as a line installation device. It is equipped with a reel and a jack for tightening line being installed. They submit that, at the time of the accident, the Line Truck was functioning as a line installation device and not as a motor vehicle.

The Defendants submit that it is not clear whether the accident occurred as a result of the worker touching one of the live power lines attached to the second pole or the strand wire coming close enough to live power lines to become energized. The Defendants submit that the exception under Section 44.1 (1) (b) does not apply as the accident did not arise from "the use of a motor vehicle", rather, at the time of the accident, the Line Truck was being used as a line installation device and any movement of the truck was in order to tighten/install strand wire and not in relation to a means of transportation. You state that the line truck was not capable of being used as a means of transportation at the time of the accident as the strand wire, which was fixed to the truck, was also attached to two power poles on opposite sides of the bridge.

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In the submission, you state that the Line Truck was insured under the Standard Automobile Policy approved for use in Newfoundland and Labrador and [REDACTED] was the "insured" under the Automobile Policy. While [REDACTED] actions, in relation to the accident, would be covered by [REDACTED] Automobile Policy on the Line Truck, [REDACTED] actions would not be covered by the Automobile Policy as [REDACTED] was not the named insured under the Automobile Policy. He would only be covered by the Policy if he was personally driving or operating the truck at the time of the Accident. Neither was the case. [REDACTED] was standing outside of the Line Truck directing it when to stop; [REDACTED] was solely responsible for operating the Line Truck. Therefore, the Defendant submits [REDACTED] cannot claim indemnification from the insurer of the Line Truck for any liability imposed on him for the accident. You submit that as the purpose and intention of Section 44.1 (1) (b) of the Act is to transfer certain losses from the Commission to automobile insurers and there is no automobile insurance coverage for [REDACTED] actions, this is not one of the circumstances meant to be captured by Section 44.1 (1) (b). Therefore, the exception for accidents involving the use of motor vehicle cannot apply with respect to the claim against [REDACTED] and any claim against [REDACTED] based on it being vicariously liable for any action or inaction on the part of [REDACTED].

Pursuant to Section 46 of the Act, [REDACTED] [REDACTED] and [REDACTED] seek a determination that Section 44.1 (1) of the Act does not apply and that the action is barred pursuant to Section 44 of the Act. In the alternative, [REDACTED] and [REDACTED] seek a determination that Section 44.1 (1) of the Act does not apply and the portion of the action, against [REDACTED] or against [REDACTED] for vicarious liability, is statute barred.

Position of Plaintiff represented by Mr. Jamie Martin

Mr. Martin responded in the submission dated April 15, 2010, that there were essentially two issues as follows:

11. "A. *The principle issue is whether the vehicle in question constitutes a motor vehicle, thereby falling under the exception of the Act [use of vehicle]; and*

B. Whether the actions of the Third Defendant, [REDACTED] in terms of providing instructions to the Second Defendant, cause him to fall outside the First Defendant's insurance policy (Application of insurance policy to the Third Defendant)."

The Plaintiff states that the vehicle in question was being used as a motor vehicle on the day in question and the test, in particular, under Section 44.1 (b) of the Act, is the "use of a motor vehicle by the worker or another person, in the course of the worker's employment".

In his initial submission, the Plaintiff concludes, based on the statements concerning the use of the vehicle in question and application of the law, that the vehicle was clearly being used as a motor vehicle and thereby the accident involved the use of a motor vehicle and thereby falls within the exception as outlined in the Act. In a follow-up submission dated September 10, 2010, Mr. Martin submits, on behalf of the Plaintiff, that the strand wire which was still attached to the spool on the defendant's motor vehicle became snagged between the pole and the

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defendant's motor vehicle which continued to move forward causing the strand wire to make contact with a live wire and causing the plaintiff to be electrocuted. Thus, [REDACTED] injuries were caused not by the line truck operating as a line installation device, but rather as a result of the negligent operation of the Line Truck as a motor vehicle by the Second and Third Defendants.

In addition, the Plaintiff maintains the actions of [REDACTED] were essential to the use of the vehicle in a safe manner. The Plaintiff submits that following the line of reasoning in *Incerto (supra)*, applying the test from *Amos* to the actions of [REDACTED], it can be concluded that he was essential to the use of the vehicle.

In his submission the Plaintiff concludes as follow and asks that the Application be denied:

"(a) The within action is not statute barred as it falls within the exceptions within the Act in particular the use of a motor vehicle as contemplated under the Highway Traffic Act; and

(b) The Third Defendant is covered under the First Defendant's motor vehicle policy as his actions were integral to the use of the Defendant's motor vehicle."

STATEMENT OF CLAIM

In the Statement of Claim dated February 24, 2009 by the Plaintiff ([REDACTED]) against [REDACTED], [REDACTED] and [REDACTED], the following is stated:

6. *On or about April 1, 2007 at approximately 09:45 a.m., the Plaintiff was in the course of his employment as a linesman with the First Defendant, and together with the Second and Third Defendants, was installing strand to utility poles in [REDACTED] near the intersection of Routes [REDACTED] and [REDACTED] to run from one side of [REDACTED] (hereinafter [REDACTED]) to the other side of [REDACTED]. After attaching the strand to the pole at the longest span crossing the water, the Plaintiff, the Second Defendant and the Third Defendant unrolled the strand, which was on the spool attached to the Defendant's motor vehicle, to reach to the next pole on the other side of the [REDACTED].*

7. *After the strand was unrolled across the [REDACTED] the Plaintiff climbed the next pole to continue the process of attaching the strand. The Plaintiff attached the strand to the next pole by a "J" Hook and while still up on the pole, he moved to the opposite side of the pole, from where the strand was attached. The Second Defendant, who had care and control of the Defendant's motor vehicle, was operating the Defendant's motor vehicle in a forward direction and away from the Plaintiff without being able to safely and properly see the location and/or condition of the strand, and/or the location and/or condition of the Plaintiff. The Third Defendant, was acting as a flagperson/spotter and was required to monitor the strand and provide direction on the operation of the Defendant's motor vehicle to the Second Defendant. While the Plaintiff was on the pole, the strand*

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which was still attached to the spool on the Defendant's motor vehicle became snagged between the pole and the Defendant's motor vehicle. The Third Defendant, who also had care and control of operation of the Defendant's motor vehicle as a result of the obstructed view of the Second Defendant, did not properly or prudently signal to the Plaintiff or the Second Defendant. The Second Defendant, who was operating the Defendant's motor vehicle, negligently continued to move the Defendant's motor vehicle forward, without properly and prudently ensuring that it was safe to do so, thereby causing the strand to make contact with live wire, and causing the Plaintiff to be electrocuted (hereinafter the "Accident")

Reasoning and Analysis

I have reviewed the following statements submitted regarding the incident:

Witness Statement from [REDACTED] dated April 1, 2007

[REDACTED], [REDACTED] and myself was going to run strand from one side of the bridge to the other side on [REDACTED]. [REDACTED] attached the strand to the pole on the opposite side of the bridge when he came down from the pole. I got in the truck and drove the truck across the bridge while [REDACTED] & [REDACTED] was putting the strand on the back of the truck. When we got to the other side, we stopped the truck and [REDACTED] climbed the pole and done the prep work, me & [REDACTED] helped on the ground attaching two down guys. When that was done, [REDACTED] pulled up the strand and put it behind a j-hook [a procedure we use in pulling up strand]. When everything was OK, I got in the truck and slowly moved forward watching [REDACTED] in my mirror and stopping the truck when [REDACTED] waved his arms. I got out thinking everything was OK until I seen [REDACTED] limp up in the pole. I got back in the truck and backed up the truck thinking [REDACTED] might have been pinched by the strand....."

Witness Statement from [REDACTED] dated April 1, 2007

[REDACTED], [REDACTED] and myself were working on [REDACTED]. We were installing strand to the poles for the purpose of lashing fiber optic cable onto it at a later date. We attached the strand at one end of one of the poles at the longest span crossing the water. We then began driving off the strand to reach to next pole crossing the bridge. [REDACTED] drove; I made sure the strand was feeding off the reel correctly and [REDACTED] laid the strand along the sidewalk crossing the bridge. When we had enough strand, we began the prep work attaching it to the second pole. [REDACTED] climbed the pole and attached the fitting to the pole to be used for attaching. [REDACTED] & I attached two down guys to the pole before pulling up the strand. When this was done, we got the end of strand up to [REDACTED] who fed it through a j-hook to help it slide through when tensioning. [REDACTED] went to the truck and attached the end in the jack. I was on the bridge as [REDACTED] was using

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the truck to pull up the slack. I watched the strand coming off the sidewalk and feeding over the guardrail. When I turned to [REDACTED] to wait for him to stop the truck, I heard a loud buzzing sound. I looked up at [REDACTED] and he was lifeless hanging in the pole....."

Accident Investigation Report from [REDACTED] Supervisor, [REDACTED] dated April 1, 2007

"Conclusion:

Theory only: Unable to interview injured worker.

- 1. Strand may have hooked bridge railing. When released, jumped up and hit power line?*
- 2. Pulled strand too close to power line sag. Power arced to strand being installed?"*

Witness Statement of [REDACTED] dated November 2, 2007

"On April 1, 2007 I was working with [REDACTED] and [REDACTED] in area [REDACTED]. We were putting up strand for [REDACTED] in the area of [REDACTED]. The strand was 3/8 thickness and span was 139 metres and it was going to be a slack span. I decided to be the climber when we started the job until [REDACTED] was done so that there were two men on the ground. Once [REDACTED] was done, [REDACTED] and I would have been doing the poles. Work signs were put out before we started. I climbed the first pole and our strand was being installed a foot above Aliant's strand and cable. I drilled through a hole in the pole and double dead end it. I hung the 10 millimetre 3/8 strand on one side of the pole and hung a 6 millimetre which is 1/4 inch strand on the other side for future use. I came down from the pole. The 10 millimetre strand was attached to a spool on the line truck. I then drove the line truck across [REDACTED] and with the 10 millimetre rolling from the spool and [REDACTED] and [REDACTED] following along on foot placing the strand along the ground until we reached the next pole. I climbed that pole and did the same process of drilling hole and double dead end it. I drove in a J hook by the fitting and then brought up the 10 millimetre strand by the hand line and lodged it in over the hook. The 10 millimetre is still attached to the spool on the line truck. The line truck had moved ahead approximately 75 metres at this point. The 10 millimetre strand was snagged down back to the truck. I moved to the opposite side of the J hook and strand as a safety measure to get out of the way. I remember nothing else from this point on....."

While it is inconclusive as to whether the strand may have become snagged and when released, jumped up and hit the power line or whether the pulled strand was too close to the power line sag and the power arced to the strand being installed or whether [REDACTED] touched one of the live wires, the facts confirm that an incident did occur resulting in injuries to [REDACTED]

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I have reviewed and considered all submissions from all parties. My task is to determine, pursuant to Section 46 of the Act, whether the action brought by [REDACTED] against [REDACTED], [REDACTED], [REDACTED] and [REDACTED] is barred by the Workplace Health, Safety and Compensation Act..

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 44.1 of the Act states:

- "(1) Section 44 shall not apply where the worker is injured or killed*
 - (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or*
 - (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.*
- (2) In subsection (1) 'motor vehicle' means*
 - (a) a motor vehicle*
 - (i) registered under the Highway Traffic Act, or*
 - (ii) authorized under section 12 or 17 of the Highway Traffic Act to be operated on a highway in the province without being registered under that Act,*
whether or not it is being operated on a highway; or
 - (b) another motor vehicle while being operated on a highway in the province and for the purpose of this definition 'highway' means a highway as defined in the Highway Traffic Act."*

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In this determination, I have considered the following issues:

- (1) Was [REDACTED] a "worker" within the meaning of the Act?
- (2) Was [REDACTED] a "worker" within the meaning of the Act?
- (3) Was [REDACTED] a "worker" within the meaning of the Act?
- (4) Was [REDACTED] an "employer" within the meaning of the Act?
- (5) Did [REDACTED] injuries arise out of and in the course of his employment?
- (6) Did [REDACTED] injuries result from an accident involving the "use of a motor vehicle"?

Section 2 (z) of the Act defines a worker as a person who has entered into or works under a contract of service or apprenticeship, written or oral, expressed or implied, by way of manual labour or otherwise. I confirm, from my review of the facts, that [REDACTED] was employed as a Linesman by [REDACTED] at the time of the injuries, therefore, was a "worker" within the meaning of the Act.

At the time of the accident, [REDACTED] was employed as a Truck Driver and [REDACTED] was employed as a Flagperson/Spotter with [REDACTED]. Both [REDACTED] and [REDACTED] are considered workers within the meaning of Section 2 (z) of the Act.

According to the Commission's records, [REDACTED] is a registered employer. Therefore, in accordance with Section 2 (1) (j) of the Act, [REDACTED] is considered an "employer".

These facts are not in dispute.

The Commission determined that [REDACTED] injuries arose out of and in the course of his employment and the claim was accepted on claim # [REDACTED]. All parties agree that [REDACTED] and [REDACTED] were workers within the meaning of the Act, that [REDACTED] was an employer within the meaning of the Act and that [REDACTED] injuries arose out of and in the course of employment. The issue to be determined is whether the exemption to the statutory bar in Section 44.1 applies.

Did [REDACTED] injuries result from an accident involving the "use of a motor vehicle"?

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

Section 44 (2) of the Act states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to the industry carried on by the employer. This provision ensures what is known as the "Historic Trade-Off" as outlined in the Pasiechnyk v. Saskatchewan (Worker's Compensation Board (1997) 2 S.C.R. 890 and Reference Re: Workers' Compensation Act, 1983 (Nfld.) (Piercey Estate v. General Bakeries Limited). In this particular case, it must be determined if the exception as stated in Section 44.1 of the Act applies.

In this case, [REDACTED] was installing strand to utility poles. While he was on the pole he sustained injuries due to coming in contact with a live wire.

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Section 44.1 (1) (b) spells out the criteria that must now be considered in determining if a right of action exists. It states that Section 44 shall not apply where worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment. The 1990 International line truck in question was registered under the Highway Traffic Act, bearing license plate number [REDACTED]. Therefore, the Line Truck meets the definition of "motor vehicle" as outlined in Section 44.1(2) (a) of the Act.

It is accepted that [REDACTED] while employed as a Linesman with [REDACTED] sustained physical injuries to his arms and hands on April 1, 2007. This occurred as a result of installing strand wire to utility poles in [REDACTED] near the intersection of Routes [REDACTED] and [REDACTED] to run from one side of the [REDACTED] to the other side of [REDACTED]. [REDACTED] was employed with [REDACTED] as a Truck Driver and [REDACTED] was employed with [REDACTED] as a Flagperson/Spotter and unrolled the strand which was on the spool attached to the First Defendant's motor vehicle to reach the next pole on the other side of [REDACTED]. After the strand was unrolled across [REDACTED], [REDACTED] climbed the next pole to continue the process of attaching the strand. [REDACTED] was operating a motor vehicle in a forward direction while [REDACTED] was required to monitor the strand and provide direction on the operation of the Defendant's motor vehicle. While [REDACTED] was on the pole he was electrocuted. There are three theories; either the strand, which was still attached to the spool on the motor vehicle, came close enough to the live power line to become energized or the strand may have become snagged and when released, jumped up and hit the power line or [REDACTED] may have touched a live power line. [REDACTED] did file a claim with the Commission which was accepted.

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 precedence, I have reviewed the cases submitted to determine relevance and applicability to the case at hand.

Case Law

While not submitted by either of the parties, I have considered additional case law, that being:

Pasiechnyk v. Saskatchewan (Workers' Compensation Board) (1997) 2S.C.R 890.

In this case, employees at the construction site were injured when a Crane fell over onto a trailer occupied by the workers. The workers commenced a civil action against the Government of Saskatchewan alleging that it failed to adequately inspect the crane. The government applied for determination that the action against it was prohibited on the grounds that it was an employer under the Provincial Compensation Legislation and hence entitled to protection under the Board's Act. The Workers Compensation Board found the government was an employer and that the action against it was prohibited. The Supreme Court held that the questions to be answered were (1) was the Plaintiff a worker within the meaning of the Board's Act; (2) if so,

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was the injury sustained in the course of his or her employment; (3) is the Defendant an employer within the meaning of the Board's Act; and (4) if the Defendant is an employer within the meaning of the Board's Act does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about, or in connection with, the industry or employment in which the employer or worker of such employer causing the injury is engaged. The Supreme Court noted the historic trade-off by which workers lose their cause of action against employers but gain compensation that depends neither on the fault of the employer nor its ability to pay.

Reference re: Workers' Compensation Act, 1983 (NFLD.) (Piercey Estate v. General Bakeries Ltd.)

This decision confirmed the cornerstone of the Workers' Compensation system as the "*Historic Tradeoff*". This means employers pay assessments based on the annual earnings of the workers who forfeited their right to sue an employer or another worker covered under the Act unless an exception to the statutory bar applies. The employers are thus protected by the statutory bar (aside from any stated exceptions) and workers receive benefits under the Act.

Weir's Construction Ltd v. Warford 2003 Carswell Nfld 172 NL Court of Appeal

The worker was injured in the course of his employment as a Car Mechanic with Weir's Construction when the vehicle on which he was working rolled on top of him. The Commission's Internal Review Specialist provided a broad meaning to the word "use", and concluded that litigation was permitted.

The Court's ultimate conclusion was that the Review Specialist had been patently unreasonable when he felt he was compelled to follow a line of cases that mandated a broad interpretation of the word "use". The Court of Appeal held that it is necessary to adopt a purposive approach to statutory interpretation. The Court adopted the approach to statutory interpretation where the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objective of the Act and the intent of Parliament.

Analysis

In this case, the Court of Appeal was clear that in determining whether the exception found in Section 44.1 (1) (b) of the Act applies to a given fact situation, the Commission should examine the purpose of the Act in general and Section 44.1 (1) (b) in particular.

Amos v. Insurance Corp. of British Columbia

A motorist was attacked by a gang while he was driving. One of the gang members shot and seriously injured the motorist while he was escaping in his vehicle. The motorist applied for benefits under his Automobile Insurance policy. His claim was denied; therefore, the motorist subsequently appealed to the Supreme Court of Canada. The Court determined the motorist was driving his van down the street which was an ordinary and well-known use of an automobile. In making this determination, the Court applied a two-part test: (1) did the accident result from the ordinary and well-known use of an automobile, and (2) is there a causal

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relationship between the motorist's injuries and the ownership, use or operation of the vehicle. The Court determined that driving a van down the street was an ordinary and well-known activity to which automobiles are put and the injuries were causally connected with the ownership, use and operation of the vehicle. Therefore, the motorist was entitled to insurance benefits.

Analysis

In the Amos case, the injuries or damages were determined to be as a result of the use of a motor vehicle. The motor vehicle in question was an automobile (motor car) designed to carry people. Amos deals with entitlement to motor vehicle insurance benefits under the Insurance (Motor Vehicle) Act of British Columbia. In this case, it was determined that the motorist's driving, was an ordinary and well-known activity, to which automobiles are put. The motorist's injuries were considered to be causally connected with the ownership, use and operation of the vehicle.

The Amos case does not involve an interpretation of the Workplace Health, Safety and Compensation Act, or similar Legislation from another Workers' Compensation jurisdiction and does not involve a multi-use vehicle. Therefore, this case does not assist me in my determination.

Citadel General Insurance Co. v. Vytlingham

The injured motorists were seeking insurance coverage under their own automobile insurance policy. The Plaintiffs were seriously injured when boulders were dropped overhead on their car as they passed through the underpass. The tortfeasors had transported boulders to the overpass with their car. In order to recover under the Policy the injuries had to arise "*directly or indirectly from the use or operation*" of the tortfeasor's automobile.

The Supreme Court applied the two-part purpose and chain of causation test. The Court found that the purpose test was satisfied since transportation is what motor vehicles are used for. However, the Court held that the chain of causation had been broken by an intervening act of negligence. The Court found that the rock throwing was an activity entirely severable from the use or operation of the tortfeasor's car. The Court held that there was no coverage under the policy.

Herbison v. Lumbermens Mutual Casualty Co.

In this case, a hunter accidentally shot a member of his hunting party while driving his truck to his designated hunting spot. It was just before sunrise and the hunter, believing he saw a deer in his headlights, got out of his truck and shot the other hunter.

The issue before the Supreme Court was whether the injury sustained by the other hunter arose "*directly or indirectly from the use or operation*" of an automobile. The Court applied a two-part test that had been traditionally applied by the Court. The Court concluded that although the purpose test was satisfied, since the truck was being driven at the time of the shooting, the

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chain of causation test had not been satisfied and ruled that the Policy did not apply. The Court concluded that there had been an intervening act of negligence that had been the cause of the accident – that being the shooting itself. The Court held that this act was independent of the use and operation of his truck.

The Court distinguished this case from the facts in the *Amos* case on the basis that this case was not a no-fault benefit case involving the interpretation of a statute.

Analysis (Citadai and Herbison)

In both these cases, it was determined that there was an intervening act of negligence responsible for the “*accident*” and the Court concluded that the act was independent of the use and operation of the motor vehicle. I find both scenarios, that being dropping boulders onto a highway and the shooting, are not similar to the case at hand. These cases did not involve multi-use vehicles and are not similar.

Harvey v. Shade Brothers Distributors Ltd.

An individual filled the tank of the domestic oil heating plant, and continued to pump oil into the premises, thereby causing damage. The oil was conveyed from the delivery tank truck (a motor vehicle) by means of a hose and pump, the power for the operation of which was supplied by the truck’s engine. The truck was stationary at the time. It was concluded that the motor vehicle was being used as a tank and a pump and the accident was not one in which a motor vehicle was involved.

F.W. Argue Ltd. v. Howe

A delivery person overfilled an oil tank from a tank truck. The oil ignited, causing extensive damage to the customer’s premises. It was determined that the damage was caused by the use or operation of the fuel pump mounted on the motor vehicle when the motor vehicle itself was stationary. The Court determined that the vehicle was being used as something other than a motor vehicle at the time of the accident.

Lanteigne v. Nova Scotia (Workers’ Compensation Appeals Tribunal)

The worker was injured when a boom truck toppled onto its side. The injured worker was in the steel bucket at the end of the boom. The Appeal Tribunal held that while the accident involved the use of a motor vehicle, the vehicle was not being used as a motor vehicle at the time of the accident. The Nova Scotia Court of Appeal upheld the decision.

Peters v. North Star Oil Ltd.

An employee delivered gasoline to a filling station. The employee put the nozzle on the end of the hose attached to a pump on the side of the delivery truck into the filler pipe of an underground tank located outdoors. He started the pump and gasoline began to flow into the underground tank. Gasoline overflowed and ran in upon the floor of the garage. An explosion

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followed. In this case, it was determined that the use of auxiliary equipment attached to, but not forming an integral part of a vehicle, was for a purpose unrelated to the operation of the vehicle. The damages were not occasioned by the motor vehicle or by the operator.

Dixon Cable Laying Co. Ltd. v. Osborne Contracting Ltd.

A backhoe was being used to fill a trench in which cable had been laid for the British Columbia Telephone Company. In the process, the backhoe went out of control and damaged the cable. The backhoe was considered a motor vehicle under the Motor Vehicle Act. The question was whether the limitation period under the Motor Vehicle Act applied. In order to apply, the damages had to be occasioned by a motor vehicle. The Court held that the backhoe was being used as a shovel and was not being used as a motor vehicle. The Court further stated that it did not matter that the vehicle was stationary or operational in determining use of the vehicle.

Analysis (Harvey, Argue, Lanteigne, Peters & Dixon)

In the above cases, the injuries or damages were determined not to be as a result of the use of a motor vehicle. The facts in the above noted cases are different than the case at hand. Each case involved a vehicle that was parked at the time of incident. The five cases interpret Legislation that is different than the Act. However, the cases provide guidance on how the Courts have viewed multi-use vehicles. In these cases the Courts distinguish between when the vehicle was being used as a motor vehicle versus when it was being used as equipment.

Walsh v. Marwood Ltd.

In this case, a Forklift Operator was unloading lumber from a trailer and an employee was injured when a load of lumber fell on him off the forklift. The injured worker elected to receive benefits from the Workers' Compensation Board. The worker subrogated his rights and the Board brought an action against the employer. There was a potential exception to the statutory bar if the injury involved a motor vehicle, however, the Supreme Court determined that the forklift was not operating as a motor vehicle at the time of the accident but was being used as a piece of industrial machinery. Any movement underway along ground was incidental to the job of removing wood from the trailer. Even if the forklift was a motor vehicle, it was not being "driven" and as such the accident did not result from driving a motor vehicle registered or required to be registered, therefore, exception to the statutory bar did not apply.

Analysis

In this case, while the phrase "driving a motor vehicle" was the Legislation at issue, and it is more restrictive than the Commission's Act "use of motor vehicle", I find that this case does have applicability to the case at hand. While the forklift was not stationary, it was being used to lift lumber as opposed to being used as a means of transportation. The Court noted that any movement was incidental to removing the wood. Similarly, in this case, the Line Truck was being used to install strand wire to utility poles.

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Jenkins v. Bowes Publishing Co.

In this case, the plaintiff was injured when a forklift was left parked on an incline without applying the parking brake or placing blocks under the wheels. The forklift moved forward down an incline, causing injury to the plaintiff. The Court determined the forklift was not being used as a loading device at the time of the accident. The forklift moved forward causing the injury and therefore was considered a motor vehicle.

Analysis

In the above referenced case, the injuries or damages were determined to be as a result of the use of motor vehicle. I find this case does not apply to the case at hand as the injuries were as a result of the plaintiff being struck by the forklift.

Non-Marine Underwriters, Lloyd's of London v. Scalera , [2001] 1 S.C.R 551

In this case the plaintiff registered a statement of claim against the homeowner's insurance policy alleging bodily injury. The insurance company bought a petition seeking a declaration that it was not required to defend the insured against the plaintiffs claim as the policy had an exclusionary clause stating that the insured was not insured for claims arising from "*bodily injury ... Caused by any intentional or criminal act or failure to act*". The court held in part that when determining entitlement it is "*not bound by the legal labels chosen by the plaintiff*" and "*must look beyond the choice of labels, and examine the substance of the allegations*".

Analysis

This reference case is different in that it does not involve injuries involving use of a motor vehicle, and it involves insurance law. However, it is helpful in that it provides direction as to how the wording used in the statement of claim is to be considered.

Summary

On the date of the accident, [REDACTED] was installing strand wire to utility poles. While performing this activity, [REDACTED] was operating the First Defendant's motor vehicle in a forward direction and away from the Plaintiff. [REDACTED] was monitoring the strand wire and providing direction on the operation of the First Defendant's motor vehicle to [REDACTED]. While the Plaintiff was on the pole, the strand wire was still attached to the spool on the First Defendant's motor vehicle. There are three theories as to the cause of [REDACTED] injuries (1) the strand may have hooked bridge railing and, when released, jumped up and connected with the power line causing it to energize or (2) the strand wire came too close to the power line sag and the power arced causing the line to become energized or (3) [REDACTED] touched a live power line. As previously stated, the 1990 International line truck meets the definition of motor vehicle under the Act. However, the truck is multi-purposed and is used for other purposes aside from its use for transportation. Indeed, when [REDACTED] was injured, the Line Truck was being used for the installation of fiber optic lines. At the time of the accident the line truck could not be used for transportation because the strand wire was attached to the line spool and pole. Thus, as in the Harvey, Argue, Lanteigne, Peters and Dixon cases, the vehicle in question in

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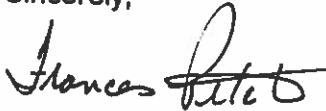
this case, although classified as a motor vehicle, was not being used as a motor vehicle when [REDACTED] was severely injured, but rather for its other purpose, that being the installation of fiber optic lines. The movement of the line truck was to tighten the strand wire and as in the Walsh Case, the truck movement was incidental to the installation of the strand wire not to its use as a motor vehicle. Section 44 of the Act states that, the exemption to the statutory applies if injuries are the result of an accident involving the "use of a motor vehicle". As such, the exemption to the statutory bar does not apply in this case.

The cases referenced in the Plaintiff's initial submission and the documents and cases contained in the third reply submission of the Defendant all relate to whether Section 44.1 applies to the claim against [REDACTED] who was the spotter. Since I have determined that the accident did not involve the use of a motor vehicle and the exemption in Section 44.1 is not applicable, it is not necessary to address this material.

DETERMINATION

It is my determination that the action brought by the Plaintiff against the Defendants is statute barred. I have filed a certificate with the court, a copy of which is attached.

Sincerely,



Frances Pitcher
Internal Review Specialist

FP:jh

c: Yvonne McDonald, Administrative Officer, Internal Review
c: Mr. Jamie Martin, Roebouthan, McKay & Marshall
c: Rebecca Phillips, Legal Counsel