WorkplaceNL

Workplace Health, Safety and Compensation Commission

August 29, 2016

Internal Review Decision

Ms. Annette Conway
Curtis, Dawe
139 Water Street
P O Box 337
St. John's NL A1C 5J9

Dear Ms. Conway:

Re: [redacted]

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

Background Information

On June 28, 2007, [redacted] slipped and fell on a wet floor in the [redacted] building. At the time she was working as an assistant cook at the cafeteria, owned by [redacted] in the [redacted]

On June 17, 2009, a statement of claim was made by Mr. James Goudie of the law firm James Goudie Law Office, on behalf of [redacted] against the Defendants for damages she suffered and continued to suffer as a result of the injury. On Saturday, June 28, 2007, the Plaintiff was working as an assistant cook in the cafeteria located inside the [redacted] building which is owned by the First Defendant. As the Plaintiff exited the cafeteria's kitchen to enter the general area of the [redacted] she slipped on the wet floor of the general area and fell. The floor had recently been cleaned by the Second Defendant and was still wet and was extremely slippery. The Plaintiff was not given any notice or warning of the condition of the floor. The Plaintiff was wearing her steel-toed non-slip shoes at all material times.

On September 30, 2009 the Defendants filed a statement of defense with the court. They deny each and every allegation contained in the Statement of Claim. The First Defendant [redacted] admits only that the [redacted] is owned by the First Defendant. The First Defendant denies that the Second Defendant [redacted] was acting as Agent for the First Defendant. The Second Defendant is an independent contractor who provided cleaning and maintenance services in the First Defendant's premises. At no time was the Second Defendant an Agent of the First Defendant. The First Defendant states that the injuries and loss alleged to have been suffered by the Plaintiff were not a result of any negligence on the part of the First Defendant. The First Defendant states that it is responsible for managing, operating and developing the [redacted]

[redacted] However, it is not responsible for the cleaning and maintenance of the [redacted] Building.

The First Defendant states that if it is determined that the Plaintiff sustained injuries as a result of this incident, which is not admitted, such injuries were caused solely by, or contributed to by, the Plaintiff's own negligence, particularly, failing to maintain a proper or any lookout; failing to take due care for her own safety; failing to take notice of her surroundings; and walking without paying proper attention to her surroundings.

The First Defendant states that if it is determined that the Plaintiff sustained injuries as a result of this incident, which is not admitted, and such injuries were not caused solely by the Plaintiff's own negligence, which is not admitted, then the First Defendant states that the said injury was due to the negligence of the Second Defendant/Third Party who was responsible for maintaining and cleaning the [redacted] Building. The First Defendant requests that this action be dismissed against the First Defendant with cost against the Plaintiff.

On May 23rd, 2013, Ms. Annette Conway requested a determination as to whether the action was statute barred pursuant to Section 46 of the Act on behalf of the [redacted] and [redacted].

On August 23, 2013, WorkplaceNL received a reply submission of [redacted] submitted by Mr. James Goudie of the law firm James Goudie Law Office.

In June, 2016 I contacted Mr. Goudie who confirmed that the area where [redacted] fell was generally used for office staff and employees of the airport and the area would not usually be frequented by the public.

The agreed facts of the case are as follows:

[redacted] was employed as an assistant cook at the cafeteria, owned by [redacted] (the Cafeteria) in the [redacted] from April 22, 2007 until October 16, 2007 in a part-time position. She was going on a break at the time of the alleged slip and fall and exited the Cafeteria through the back door of the kitchen. She was taking a short five minute smoke break at the time.

[redacted] alleges that she slipped and fell on a wet floor just outside the Cafeteria door, in the hallway near an elevator. The parties agree that the elevator, near which she allegedly slipped and fell, leads up to office space on the upper levels of the [redacted] The area where she slipped and fell was behind airport security so the public had limited access to it.

Legislation and Policy

2. (1) In this Act

(j) "employer" means an employer to whom this Act applies and who is engaged in, about or in connection with an industry in the province and includes

(i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this Act,

(ii) the principal, contractor and subcontractor referred to in section 120,
(iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,
(iv) a municipality,
(v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this Act,
(vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this Act, and
(vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry;

(z) "worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

(i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,
(ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,
(iii) a part-time or casual worker, and
(iv) an executive officer, manager or director of an employer.

19. (1) The commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the commission, and the commission has exclusive jurisdiction to determine
(a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;
(b) the existence and degree of impairment because of an injury;
(c) the permanence of impairment because of an injury;
(d) the degree of diminution of earning capacity because of an injury;

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

43.1 Notwithstanding paragraph 2(1)(o), where a worker suffers personal injury arising out of and in the course of employment that

(a) aggravates, activates or accelerates a condition, disease or disability existing prior to the injury; or
(b) is aggravated, activated or accelerated by causes other than the injury,

compensation is payable for the proportion of the loss of earnings or permanent impairment that the commission determines is attributable to the injury.

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

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

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

Policy EN-19 Arising Out of and in the Course of Employment

Entitlement to compensation is based on two fundamental statutory requirements:

1. the worker meets the definition of "*worker*" under subsection 2(z) of the Act; and
2. the injury as defined under subsection 2(o) is one arising out of and in the course of employment.

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

General
Arising out of and in the course of employment

Section 43 of the Act states:

(1) Compensation under this Act is payable

(a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and

(b) to the dependents of a worker who dies as a result of such an injury.
The term "arising out of and in the course of employment" means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the

employment. *Arising out of* refers to what caused the injury; *in the course of* refers to the time and place of the injury and its connection to the employment.

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

- whether the injury occurred on the premises of the employer (see also **"Employer's Premises"** section);
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether it occurred in the course of paid employment;
- whether the risk to which the worker was exposed was the same as the risk to which he/she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid; and
- whether the injury was caused by some activity of the employer, a fellow worker, or a third party.

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

Principles of the scope of coverage (spectrum, boundaries)

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

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

1. Employer's Premises

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

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

Where the premises is occupied by more than one employer, the employer's premises includes the exclusive premises of the employer and the shared or common areas such as entrances, exits, elevators, stairs, and lobbies.
Employer's premises does not include public or private land, buildings, roads (except captive roads as discussed in this section) or sidewalks, used by the worker to travel to and from home and the

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

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

(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.

(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.

Position of [redacted]

Regarding the issue of whether or not [redacted] is a worker, the Applicant's Memorandum of Fact and Law states that [redacted] was employed on a part-time basis at the Cafeteria owned by [redacted] and her status as a worker pursuant to the Act does not appear to be in dispute. [redacted] takes the position that at the time of the alleged incident she had decided to take a break from her employment and therefore was not a "worker" at that time.
[redacted] notes the Applicants refer to Policy EN-19 to support their position that her injury did arise out of and in the course of her employment. In doing so they placed great emphasis on one indicator provided for guideline purposes, namely whether the injury occurred on the premises of the employer.

Regarding the issue of "arising out of and in the course of employment" [redacted] takes the position that if the other indicators referenced in Policy EN-19 are considered, then the balance of the determination of the issue weighs in her favor. For instance, the alleged incident did not occur in the course of action in response to instructions from the employer, it did not occur in the course of using equipment or materials supplied by the employer and the injury was not caused by the employer or a fellow worker of [redacted] but by a third party. They contend that it is clear [redacted] was not making use of any employer-provided facility. In fact, she was outside of the workplace area controlled by the employer. In that regard, at the time of the alleged incident, [redacted] was in the same position as any other member of the general public, exposed to risks outside of her workplace over which her employer had no control.

[redacted] argues that the cafeteria in which she worked has a clearly defined area. She chose to leave that area and by doing so entered a part of the [redacted] that is open to members of the general public and by doing so exposed herself to the risks found in the general domain. Further to this, as the Applicants would not be immune to an action taken by any other member of the general public and [redacted] had accepted the risk associated with the public domain, the policy protection provided by the Act should not be held to apply. This position seems to be supported by Policy EN-19 where at paragraph (d) it states, "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".

Further to this issue, even if [redacted] is wrong in her position that this scenario is more like the shopping mall scenarios than the office building scenarios, Paragraph (d) of Policy EN-19 states that even in the office building scenarios, "an injury in a common area may not be covered if the reason for being in that area is a deviation from that employment" which is the case here as [redacted] had decided to leave work to go on a smoke break.

Regarding, "the conduct of the operations usual in or incidental to the industry carried on by the employer" the Plaintiff admits that the Applicants conduct would constitute operations incidental to the industry carried on by the employer. [redacted] submits that for the reasons stated above, the injury she sustained was not an injury arising out of and in the course of her employment and therefore she is not statute barred from taking action against the Applicants.

Position of the Defendants

The solicitor for the Defendants, [redacted] and [redacted], take the position that the question is whether [redacted] is entitled to bring an action against an employer subject to the provisions of the Act. The issue to be determined requires consideration of whether the Accident occurred "otherwise than in the conduct of the operations usual in or incidental to the industry carried on" by [redacted] and the [redacted] in accordance with the provisions of Section 44 (2).

The Defendants submit that the issue to be determined by WorkplaceNL in this instance are:

1). Is [redacted] a worker as defined in the Act?;
2). Did [redacted] injury arise out of and in the course of her employment? and
3). Did the slip and fall occur in the conduct of operations usual and incidental to the industry carried out by [redacted]?

They note the issue can also be considered from the perspective of whether [redacted] would have been entitled to compensation for the injury allegedly sustained had she applied to WorkplaceNL for compensation. They note at the time of the alleged incident, [redacted] was employed on a part time basis at the Cafeteria owned by [redacted]. The status of [redacted] as a "worker" pursuant to the Act does not appear to be in dispute. As to the issue of whether the injury arose out of and in the course of her employment, the injury is alleged to have occurred as [redacted] was going on a break.

The Defendants note, whether the injury occurred on the premises of the employer is outlined as a significant factor to consider when determining whether the injury arose out of and in the course of employment. The definition of "Employers Premises" under Policy EN 19, clearly contemplates that an Employer's Premises includes a situation where the premises are occupied by more than one employer and further, the Policy acknowledges that the premises includes "the shared or common areas such as entrances, exits, elevators, stairs and lobbies." It is [redacted] testimony that she fell in the shared/common area of the [redacted]. The [redacted] consists of various offices owned or operated by multiple employers. [redacted] submits that the [redacted] is more akin to a multi-employer building than to a shopping mall. In her discovery evidence, [redacted] stated that there were multiple employers in the [redacted], and indicated that she slipped and fell in front of elevators that lead to office space. Further, she indicates that she slipped and fell in an area behind [redacted] security, where there was limited public access. This can be distinguished from a shopping mall where there is unlimited access to common areas by the public.

The Defendants go on to note that [redacted] was in the course of her employment when she allegedly fell, as the fall occurred in the common area of the [redacted] akin to her employer premises. As noted in the Policy, a worker is considered to be in the course of his/her employment upon entering the employer's premises and is covered in the common areas of a multi-employer building. Common areas include entrances, lobbies, stairs, elevators, escalators and exits.

Notably, [redacted] was taking a break at the time of the fall. She alleged that she slipped and fell in the hallway of the [redacted] while on her way to take a short five minute smoke break. Clearly, [redacted] was engaging in an activity related to personal needs at the time of her alleged injury, as contemplated by Policy EN-19, and as a result, WorkplaceNL should find that she was in the course of her employment at the time of the alleged slip and fall. There is no indication in [redacted] discovery evidence that exiting the Cafeteria to take a smoke break was an irregular activity for her or that it was unknown to her employer, especially given that any individual working within the [redacted] would have to exit the building if they intended to smoke. Therefore, [redacted] submits that WorkplaceNL should find that [redacted] was in the course of her employment while taking a break. In the circumstances of this case, there is no evidence to suggest that [redacted] employer discouraged her from exiting the [redacted] through the hallway outside the Cafeteria door, as she did when the slip and fall allegedly occurred, so that she could proceed to take a smoke break. Further, there is no evidence that [redacted] actions were prohibited by her employer. Finally, it is clear that [redacted] would not have sustained her alleged injury but for her employment. The Defendants submit that [redacted] presence in the hallway for the purpose of exiting the [redacted] to take a short smoke break was in the course of her employment.

The Defendants note that once it has been established that [redacted] injury occurred in the course of her employment, WorkplaceNL must be satisfied that the accident occurred in the conduct of operations usual and incidental to the industry carried out by [redacted], in order to find that the action against [redacted] is statute barred.

The Defendants further submit that based on the provisions of the Cleaning Services Proposal, it is clear that [redacted] as the contracted cleaning company, was under a duty to clean the hallway/entrance in which [redacted] allegedly slipped. It is therefore submitted, that maintaining and cleaning the [redacted], and in particular the hallway leading to the exit, in which [redacted] allegedly fell, was within the operations usual and incidental to the industry carried on by the Second Defendant [redacted]. The [redacted] is involved in the business of running and operating an [redacted] and at the time of the Accident was involved in operations which were usual to the industry carried on by that employer.

Consequently, the Defendants submit there is no exclusion which would allow [redacted] to bring an action against the First or Second Defendants, or alternatively give WorkplaceNL the right to take a subrogated action against the First and Second Defendants for the injuries alleged suffered by [redacted]. [redacted] and the [redacted] respectfully submit that [redacted] action against [redacted] is statute barred pursuant to section 45 of the Act. They also seek a determination pursuant to the exclusive jurisdiction of WorkplaceNL set out in Section 46 of the Act, that the Plaintiffs claim against the [redacted] and [redacted], employers under the Act, is prohibited.

Reasoning and Conclusion

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

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

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

   I can confirm from review of the facts that [redacted] was employed as an Assistant Cook with [redacted] when she sustained an injury to her back. The facts of the case support that [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 coffee break when the incident occurred.

2. Were [redacted] and the [redacted] employers under the Act?

   I confirm from review of the facts that both [redacted] and the [redacted] are registered employers with WorkplaceNL within the meaning of Section 2 of the Act.

3. Did [redacted] injury arise out of and in the course of her employment?

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

The focus of this determination is whether or not [redacted] suffered injuries arising out of and in the course of her employment. It must be determined whether the injury arose out of and in the course of her employment. It has been argued by the Defendants that [redacted] was in the course of her

employment and was on the employer's premises at the time the injuries occurred. Therefore, she does not have a right of action against the Defendants. To the contrary, Mr. Goudie argues that the worker was not on the employer's premises and also removed herself from employment therefore, as the injury did not arise out of and in the course of employment she does have a course of action against the Defendants. The question to be answered is twofold; was [redacted] on the employer's premises at the time of injury and did [redacted] remove herself from the course of employment because she was on a coffee break.

4. Did the slip and fall occur in the conduct of operations usual and incidental to the industry carried out by [redacted] and the [redacted]?

At the time of the Accident, [redacted] was a company with its registered office located in the City of St. John's, in the Province of Newfoundland and Labrador, and had entered into a contract with the [redacted] to perform cleaning services at the [redacted]. They are employers under the Act. [redacted] is a cleaning business, which had entered into a cleaning contract with the [redacted] for cleaning services within the [redacted]. [redacted] submits that it cleaned all areas of the [redacted], pursuant to the Cleaning Services Proposal, in a prudent manner.

The [redacted] is involved in the business of operating the [redacted]. The Defendants submit that at the time of the alleged fall the [redacted] was involved in operations which were usual to the industry carried on by the [redacted].

I note that the Plaintiff admits that the Defendants conduct would constitute operations incidental to the industry carried on by the employer.

On this point I agree with the Defendants submission and I find that the accident occurred in the conduct of operations usual in and incidental to the industries carried on by [redacted] and the [redacted].

Case Law and Submission:

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

While WorkplaceNL is not bound to follow strict legal precedents, I have reviewed the cases submitted to determine relevance and accountability to the case at hand.

King V. Workplace Health, Safety and Compensation Commission and Omega Investments Limited.

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

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

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

Analysis

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

Ontario Workplace Safety and Insurance Appeals Tribunal Decision 1163/96

In this case the workers accident occurred during his coffee break. The Hearings Officer decided that the worker was entitled to benefits for a right ankle injury because it was found that the worker was in the course of his employment at the time of his injury, and that the workers accident arose out of his employment.

The employer's representative contended that the workers injury was not an accident arising out of and in the course of his employment because the worker was engaged in a personal rather than an employment related activity at the time of his accident and the accident occurred when he was on a city road off the employer's premises.

The workers representative argued that the Hearings Officer's decision was correct in that the practice of going off premises for coffee breaks was an employment related activity because it was a regular part of the workers employment and it was condoned by the employer.

The Tribunal concluded that the worker was entitled to benefits for disability resulting from that injury.

Analysis

This case is not relevant because it is based on an Ontario policy that is different than the Newfoundland Policy. The Ontario policy distinguishes between workers who work at a fixed workplace and those who do not. The Ontario worker was injured while crossing the road to a coffee house and coverage was extended because he did not have a fixed workplace. Policy EN-19 indicates that workers are not covered if they chose to leave the employer's premises if they chose to eat or perform other personal activities or errands. Policy EN-19 deals with coverage for breaks when the worker is on the employers premises which is the relevant question in this decision.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision 3142/00

In this case the worker slipped and fell on a public sidewalk. The sidewalk was located between the employer owned parking lot and the employer's premises. The sidewalk was owned by the principality. At the time of the accident, the worker was proceeding in the most direct route from the parking lot to work. The employer was responsible for removal of snow and ice from the sidewalk.

The tribunal found that the worker was in the course of his employment at the time of his injury.

Analysis

This case provides some guidance as it discusses the location of an incident and whether the worker was in the course of his employment. It provides guidance for consideration with respect to the employer's premises.

Summary

A review of the facts confirm that [redacted] had sustained an injury on June 28, 2007. It is confirmed that she was employed with [redacted] (the Cafeteria) which was located inside the [redacted] building at the time she incurred her injury. The facts confirm that she had left the Cafeteria through the back door of the kitchen to take a short five minute smoke break. She reports falling on a wet floor just outside the Cafeteria door, in the hallway near an elevator.

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 happened 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.

While Policy EN- 19 does not address areas such as an [redacted] in this case, I find that the section of [redacted] where [redacted] fell is more akin to a multi-employer building than a shopping mall. There are multiple employers in the [redacted] [redacted] notes that she slipped and fell in front of elevators which lead to an office space. Further, she indicates that she slipped and fell in an area behind [redacted] security, where there was limited public access. I find that the typical and primary use of this area is for employees to access the office space and cafeteria in the [redacted] and there is limited public access. Although the area in which she slipped and fell is accessible to the general public, it is not generally accessed by the general public. It is generally frequented by general office staff and employees of the [redacted].

According to Policy EN-19, 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.

With respect to injuries sustained in a multi-employer building, Policy EN-19 notes:

(d) 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.

According to Policy EN 19 Arising out of and in the Course of Employment, 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.

I find that [redacted] fell just outside the cafeteria door by the elevator in the lobby area of the [redacted]. This would be considered a common area in the building. I find that in this instance, she would be considered to be on her employers premises as this section of the [redacted] is considered a multi-employer building and she slipped and fell in a common area, next to an elevator which led to office space where there was limited public access.

It is noted that [redacted] injuries resulted from a slip and fall during a break from her employment. She proceeded to the area in question for a cigarette break. Policy EN-19 is clear in that when an injury occurs during a break on the premises of the employer the injuries are 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. I find that [redacted] made reasonable use of the premises since she was required to smoke outside and was walking through the area to do so. The hazard arose from the facility since she slipped and fell on the floor.

At the time of the incident, [redacted] was a salaried employee with [redacted] and would fall within the definition of Worker in accordance with Section 2 (1) (o). In accordance with policy and legislation, [redacted] injury is one that arose out of and in the course employment.

Determination

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

Sincerely,

Jacqueline Mantey
Internal Review Specialist

JM:ap

c: Yvonne McDonald, Administrative Officer - Internal Review Division
James Goudie - James Goudie Law Office