WorkplaceNL

Health | Safety | Compensation

Third Party Determination

July 19, 2020

Philip J. Buckingham
Goodland Buckingham
16 Forest Road, Suite 200
St. John's, NL A1C 2B9

Dear Philip J. Buckingham:

[redacted]

I have reviewed in accordance with Section 46 of the Workplace Health Safety and Compensation Act (herein referred to as the "Act"), the submissions of all interested parties as to whether an action by [redacted] the (Plaintiff) against [redacted], (First Defendant) and [redacted] (Second Defendant) is prohibited by Section 44 of the Act.

[redacted] did not wish to make a submission. My role pursuant to section 46 of the Act is to adjudicate and determine whether the action brought against the Defendants is prohibited by the Act. Therefore, this determination relates to the action as a whole and pertains to all parties.

The Second Defendant, in a submission dated June 29, 2020, noted that the only evidence to be considered by WorkplaceNL is the record that was before the intake adjudicator and that further evidence cannot be considered. A determination made by the internal review division under section 46 is not an appeal or review of the intake adjudicator's entitlement decision. WorkplaceNL has delegated statutory bar determinations under section 46 of the Act to the internal review division in Policy EN-08, Third Party Actions. In adjudicating this action pursuant to section 46 of the Act, I am authorized to investigate and gather information in accordance with section 17 of the Act that is necessary for the purpose of my decision.

Background Information

The Plaintiff submitted a Form 6, "Worker's Report of Injury" to the Workplace Health, Safety and Compensation Commission indicating that on October 28, 2016, she sustained an injury to her left ankle as a result of stepping out of the ambulance (driver's

side) and her foot landed in a pothole, forcefully inverting her foot/ankle. She was employed as a paramedic with [redacted]

A Form 7, "Employer's Report of Injury" was received from [redacted] stating that the Plaintiff was at [redacted] when the injury occurred.

The claim was adjudicated and denied in a decision dated November 16, 2016. The intake adjudicator indicated that while the Plaintiff was still on paid time commuting back to the employer's base and was in the course of her employment, the injury did not arise out of the employment and required job duties.

On October 9, 2018, an amended statement of claim was filed by Marina Whitten of Chislett Whitten Law on behalf of the Plaintiff against the Defendants for damages to her left leg, including a fracture to her fibula and injuries to her tendons. It was noted the Plaintiff was working and driving an ambulance. She drove the ambulance onto the property owned by the First Defendant, located at [redacted] (the "Premises"). The Second Defendant was a tenant of the premises.

The Plaintiff drove the ambulance onto the parking lot of the premises with the intention of entering to make a purchase. As the Plaintiff stepped out of the ambulance she stepped into a pothole that was directly located below the driver's side door. As a result of stepping into the pothole the Plaintiff fell and suffered injuries to her left leg. M. Whitten cited the Plaintiff's injuries were due to the Defendant's failure to ensure that the premises were reasonably safe.

On January 7, 2019, you requested on behalf of the Second Defendant that WorkplaceNL determine, pursuant to Section 46 of the Act, whether the action brought by the Plaintiff against your client is prohibited by **Section 44** of **the Act**.

On December 20, 2019, a response was filed by the Plaintiff. She requested that WorkplaceNL determine that Section 44(1) is applicable in this circumstance thereby allowing her claim against the Defendants to proceed.

A reply submission was provided by the Second Defendant on June 29, 2020. It is noted that they contend the intake adjudicator erred in the interpretation of section 43 of the Act in denying the Plaintiff's claim. Therefore, the Second Defendant submits that the Plaintiff has no right of action against the Defendant and her action ought to be barred pursuant to section 44 of the Act.

Further clarification was sought from the Plaintiff regarding her intentions when stopping at [redacted]. In email correspondence dated February 24, 2021 the Plaintiff indicated that it was not her intention to purchase a refreshment for herself. She provided an email dated February 26, 2021, from [redacted] her paramedic partner, indicating that he can confirm on that day that there was no intention to purchase refreshments.

On March 8, 2021, the Second Defendant provided a copy of correspondence dated April 9, 2020, from the Plaintiff's lawyer retained in respect to the above referenced court proceeding with portions redacted based on a settlement privilege ("Claim Demand"). The Claim Demand indicated that the Plaintiff stopped at the [redacted] to purchase a coffee.

On March 16, 2021 an email was received from the Plaintiff. She noted that she stood by her statement in regards to her intention on the day of her injury.

On March 24, 2021, correspondence was received from Marina Whitten. She confirmed that the statement that the Plaintiff stopped to purchase a coffee was in error. She reviewed the file and indicated there is no information in the file from the Plaintiff or any source indicating that she intended to purchase a coffee.

On April 29, 2021, a sworn statement was obtained from the Plaintiff. She indicated that she was not at [redacted] to purchase a beverage or use the washroom. She was there to purchase oat bars for her daughter.

Legislation and Policy

Section 2(1) of **the Act** states:

Definitions

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 12o,
(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 of 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 operation a boat, vessel or ship employed or intended to be employed in the industry;

(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 a reaction to a traumatic event or events;

(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 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:

Exclusive Jurisdiction

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

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

.....

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

Section 43(1) of **the Act** states:

> **Compensation Payable**
>
> Compensation under this act is payable
>
> (a) to a worker who suffers a personal injury arsing out of and in the course of employment; unless the injury is attributable solely to the serious and willful misconduct of the worker; and
> (b) to the dependents of a worker who dies as a result of such an injury.

Section 44 of **the Act** states:

> **Compensation Instead of Action**
>
> (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.
>
> (3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by 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.

2. Coverage During Travel

a) Travel for the Purpose of Employment

Workers are covered while travelling where such travel is required either specifically or as an expected part of employment duties. Coverage begins when the worker begins the employment related travel and extends continuously while the travel is taking place, unless there is personal deviation that removes the

worker from the course of employment. An injury sustained during a refreshment break while traveling for the purpose of employment is covered.

Any deviation from the reasonable and most direct route for personal or non-work related reasons constitutes removal from employment and coverage is not extended.

5. Substantial Deviations

A worker will not be covered if the worker's actions at the time of injury are a substantial deviation from the expectations and conditions of employment.

Examples of actions that are a substantial deviation from the employment include:

- Criminal acts;
- Injuries while intoxicated
- Horseplay, where the worker initiated the action and the action is a serious deviation from or abandonment of employment; and
- Exclusively personal activities that have no relationship directly or indirectly to the employment duties or employer's operations.

Position of Second Defendant

The Second Defendant, [redacted], is seeking a determination pursuant to section 46 of the Act, that the Plaintiff has no right of action against the Second Defendant and her action is barred pursuant to section 44 of the Act. The First Defendant has advised they would not be providing a submission.

The Second Defendant puts forth that the Plaintiff's injuries are compensable under the Act as they arose out of and in the course of employment. The Second Defendant notes the details of the Plaintiff's claim as alleged in the amended statement of claim. On October 28, 2016, the Plaintiff was working and driving an ambulance. She drove the ambulance onto the parking lot owned by the First Defendant. The Second Defendant was a tenant of the premises and operator of [redacted]. The Plaintiff drove onto the parking lot of the premises with the intention of entering to make a purchase. As the Plaintiff stepped out of the ambulance she stepped into a pothole that was located directly beside the driver side suffering injuries to her left leg.

To further support their position the Second Defendant referenced that the Plaintiff submitted a Form 6, Worker's Report of Injury indicating that she sustained an injury to her left ankle as a result of stepping in a pothole on or about October 28, 2016. A Form 7, Employer's Report of Injury from the employer, [redacted], a Schedule 1 Employer, pursuant to the Act, stated that the Plaintiff was at [redacted] on [redacted] when the injury occurred. The Employer's home office is located in [redacted], Newfoundland and Labrador.

The Plaintiff submitted a claim to WorkplaceNL. On November 16, 2016, the intake adjudicator denied the Plaintiff's claim. As a result of the denial, the Plaintiff commenced an action in the Supreme Court of Newfoundland and Labrador Trial Division (General) against the First Defendant, [redacted] and the Second Defendant alleging that the First Defendant and Second Defendant were negligent and/or breached a duty of care to the Plaintiff by failing to take reasonable steps to ensure her safety while visiting the premises.

The Second Defendant submits that:

(i) The intake adjudicator held that the Plaintiff's injury occurred in the course of employment which finding leads to a presumption under section 61 of the Act that the injury also arose out of employment;
(ii) The presumption was not rebutted by the intake adjudicator;
(iii) The Plaintiff did not have a fixed place of employment and is presumed to be continuously in the course of employment pursuant to Policy EN-19, Coverage During Travel;
(iv) The Plaintiff was on a refreshment break when the injury occurred and an injury sustained during a refreshment break while travelling for the purposes of employment is covered pursuant to Policy EN-19, Coverage During Travel;
(v) There was no personal deviation that removed the Plaintiff from the course of employment. A line of authorities exist which have consistently held that when a Plaintiff is required to travel away from a fixed work site, stopping for a refreshment break does not constitute a personal deviation.
(vi) The injury occurred during the Plaintiff's shift, i.e., normal working hours;
(vii) The injury occurred while the Plaintiff was still on paid time commuting back to the employer's base.

The Second Defendant states that the intake adjudicator was required to engage in the two-part analysis set out in Section 43 of the Act and WorkplaceNL policies in examining whether the Plaintiff's injury arose out of and in the course of employment.

The Second Defendant notes that if a worker can establish that one of the two criteria in Section 43 is met then the rebuttal presumption in Section 61 applies.

The Second Defendant contends that the fact that the mechanism of the injury was not sustained while the Plaintiff was performing a core job duty or doing a job requirement does not remove it from the broader concept of employment and something incidental to her employment would be sufficient.

The Second Defendant notes that the intake adjudicator held that the Plaintiffs injuries occurred in the course of employment. The Second Defendant submits that no evidence has been identified by the intake adjudicator to suggest that the incident did not arise out of the employment, or how it was that the presumption could be said to have been rebutted. Therefore, the presumption was not rebutted and the action ought to be barred pursuant to Section 44 of the Act.

The Second Defendant further submits that the circumstances surrounding the Plaintiff's injury fall within Policy EN-19 related to travel for the purpose of employment, which draws a distinction between workers with fixed workplaces and workers whose conditions of employment require them to travel.

The policy makes clear that once a worker begins related travel they are presumed to be continuously in the course of employment unless a distinct departure is demonstrated. This policy covers precisely the circumstances of this case as the Plaintiff is a paramedic and did not have a fixed workplace. She was required to travel away from the employer's base and therefore was in employment continuously from the time she left the employer's base until the time she returned to the base.

The Second Defendant submitted that it is also significant that the Plaintiff was also on paid time commuting back to the employer's base when she stopped for a refreshment break. Policy EN–19, Coverage During Travel provides an injury sustained during a refreshment break while traveling for the purpose of employment is covered. The Second Defendant submits that based on the clear wording of Policy EN–19, Coverage During Travel, which strictly excludes refreshment breaks as being a "personal deviation", the Plaintiff's injury should have been compensable under the Act and her action barred pursuant to Section 44 of the Act.

The Second Defendant further submits that there does exist a line of authorities which has consistently held that when workers are required to travel away from a fixed worksite, that stopping for a refreshment break does not constitute a "personal deviation". Rather, stopping for a refreshment break, is regarded as an intrinsic part of the duties of a worker who has to travel in order to carry out their employment. The nature of this type of activity is considered reasonably incidental to a worker's employment.

The Second Defendant submits that when the Plaintiff stopped in the parking lot of the premises with the intent of entering the Second Defendant's business to make a purchase, she was stopped for the purpose of a refreshment break, being an activity that was reasonably incidental to her employment.

The Second Defendant submits that the facts of this case establish that the Plaintiff has sustained an injury arising out of and in the course of employment within the meaning of the Act. Therefore, the Plaintiff has no right of action and her action is barred pursuant to Section 44 of the Act.

A reply submission provided by the Second Defendant dated June 29, 2020, noted that the Plaintiff completed a Form 6, Worker's Report of Injury confirming that she sustained an injury to her left ankle. This demonstrated an acknowledgement that she was of the view that she sustained a compensable injury which arose out of and in the course of her employment.

The Plaintiff in the Statement of Claim indicates that she drove an ambulance onto the parking lot of the premises with the intention of entering the coffee shop to make a purchase. The Second Defendant submits that it is not required to prove beyond a reasonable doubt that the Plaintiff stopped at the premises for a refreshment break and the standard of proof is the balance of probabilities. The Plaintiff has not denied that she attended the premises for the purposes of a refreshment break. The Second Defendant submits that on the balance of probabilities, it is more probable than not that the Plaintiff attended the premises for the purposes of a refreshment break.

The Second Defendant objects to the admissibility of the statements made by the Plaintiff in respect to her claim that while returning to the base, she did not take the most reasonable or direct route thereby removing her from her employment and coverage.

The Second Defendant states that the Plaintiff is attempting to place before WorkplaceNL information that was not part of the record at the time the decision was rendered.

If WorkplaceNL accepts the submission by the Plaintiff, the Second Defendant submits that no weight can be given to same as there is no indication on the record that the intake adjudicator found the Plaintiff to have made any deviation from the reasonable and most direct route of travel for personal reasons so as to remove her from the course of her employment.

The Second Defendant provided correspondence dated March 8, 2021, in response to the internal review request dated February 18, 2021, to submit any evidence including witness statements and/or discovery transcripts. The Second Defendant submits that this matter has not proceeded to discovery and no witness statements exist. Submitted was a copy of the correspondence from the Plaintiff's solicitor retained in respect to the court proceeding dated April 9, 2020, with portions redacted, based on settlement privilege.

Position of the Plaintiff

The Plaintiff takes the position that at the time of the incident she was not on a refreshment break when the incident occurred and therefore was not in the course of her employment. She also contends that while returning to base, the most reasonable or direct route was not taken, therefore voiding any coverage by WorkplaceNL.

The Plaintiff indicates that while paramedics are on shift, they are expected to remain within a certain distance of their ambulance and respond to calls when they are received. Once patient care is exchanged at the hospital, and a paramedic is back in the ambulance, they are then considered cleared. At this point, the call, in respect to the paramedic scope of practice has ended.

The Plaintiff references **Policy EN-19**, specifically **Section 2a**, and notes that according to WorkplaceNL, she would then be travelling for the purpose of employment. The paramedic would still be responsible for driving the ambulance back to home base, at which time one would resume the "on call" role.

She notes it is no secret that it is a regular occurrence for paramedics, especially those in the private sector to stop into a grocery store, drop by a loved one's place of employment to pick up forgotten house keys or drop into a mall to pick up a gift, while waiting for the next call or a return transfer patient's appointment to be over.

She indicates that she would take from the policy that a refreshment break would be a short break for tea, coffee, pop, juice etc. She contends there are other establishments on the route taken that day where refreshments could have been purchased. She notes she could have been stopping to purchase a gift card or a cookie for her daughter. She agrees that a refreshment break is part of or "incidental" to employment, but believes that purchase as noted in her statement of claim is very broad and could be for anything including a personal purchase.

The Plaintiff also references the policy regarding a reasonable and direct route while travelling. She outlined the most direct route that would always be taken. She contends the only time she would deviate from that would be if they had personal errands to run.

She notes that if it was her intention to purchase a refreshment, she could have very easily done so in her coverage area in [redacted] or once returning to base and then to her residence, where she could have easily made a coffee, which she often did.

She maintains it is important to note that she did not appeal the WorkplaceNL decision to deny her claim as she did not believe that the injury was due to a fault of her own, or that of her employer's requirements. She contends she knew she was not performing required work duties or anything within the scope of practice as a paramedic.

It is her contention that the decision to deny her claim was correct and the submission by the Second Defendant be rejected on the basis that there is no concrete evidence that it was her intention to purchase a refreshment when the injury occurred, rather just to make a purchase. She also contends while returning to base, the most reasonable or direct route was not taken, therefore voiding any coverage by WorkplaceNL.

A further submission was provided by the Plaintiff dated February 24, 2021 in response to the internal review specialist's correspondence of February 18, 2021. The internal review specialist asked the Plaintiff to respond as to whether it was her intention to purchase a refreshment for herself when attending [redacted] The Plaintiff responded that it was not her intention to purchase a refreshment for herself.

In a sworn statement obtained by WorkplaceNL dated April 29, 2021, the Plaintiff indicates that she was not at [redacted] to purchase a beverage or use the washroom. She was there to purchase oat bars for her daughter.

Reasoning and Analysis

I have reviewed and considered all submissions from the parties involved in this case. **Section 44(1) of the Act** provides the statutory bar to actions of a worker against an employer for an injury that arises out of and in the course of the worker's employment. In making this decision I applied the civil standard of proof which is the balance of probabilities.

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

1. Was the Plaintiff a "worker" within the meaning of **the Act?**

I can confirm from review of the facts that the Plaintiff was employed as a paramedic with [redacted] and working in this capacity on October 28, 2016. The facts of the case support that the Plaintiff does meet the definition of "worker" within the meaning of **Section 2(1)(z) of the Act.**

2. Was [redacted], an employer under the Act?

I can confirm from review of the facts that [redacted] is a registered employer with WorkplaceNL within the meaning of **Section 2(1)(j) of the Act.**

3. Was [redacted] an employer under **the Act?**

I can confirm from review of the facts that [redacted] is a registered employer with WorkplaceNL within the meaning of **Section 2(1)(j) of the Act.**

4. Did the Plaintiff's 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 the Plaintiff suffered injuries arising out of and in the course of her employment. It has been argued by the Second Defendant that the Plaintiff's injury arose out of and in the course of employment.

The Second Defendant has indicated that the facts of the case establish that the Plaintiff has sustained an injury arising out of and in the course of her employment.

To the contrary, the Plaintiff contends she was not in the course of her employment as she was not on a refreshment break. It is also her contention that she deviated from her employment by not taking the most direct route back to her base of employment.

My review of the evidence indicates that the Plaintiff was working as a paramedic and driving an ambulance. She was in the course of her employment. She had cleared a call at [redacted] and was returning to her employer's base in [redacted] She stopped to visit [redacted] and drove the ambulance onto the parking lot of the premises and parked. She stepped out of the vehicle and into a pothole that was located directly below the driver's door. It is alleged that as a result of stepping into the pothole, the Plaintiff fell and suffered injuries to her left leg, including a fracture to her fibula and injuries to her tendons.

Policy EN-20, Weighing Evidence notes that decision makers must assess and weigh all relevant evidence. Decisions shall be based on the weight assigned to the evidence by the decision maker. Weight is determined by making judgments about the credibility, nature and quality of that evidence. Decision makers must weight conflicting evidence to determine whether it weighs for or against the issue. If the evidence weighs more in favour of one outcome, then that will determine the issue.

A submission provided by the Plaintiff dated December 20, 2019 indicates her intention of entering [redacted] make a purchase. Correspondence received from the Plaintiff dated February 24, 2021 notes that when she attended [redacted] it was not her intention to purchase a refreshment for herself.

An email was received from the Plaintiff's paramedic partner, [redacted], dated February 26, 2021, in which he confirms there was no intention to purchase refreshments.

The Plaintiff Claim Demand dated April 9, 2020 noted that the Plaintiff had stopped at [redacted] to purchase a coffee. The Plaintiff provided an email dated March 16, 2021, noting that she stood by her statement in regards to her intention on the day of her injury.

On March 24, 2021 correspondence was received from [redacted]. She confirmed that the statement that the worker stopped to purchase a coffee was in error. She indicated there is no information in the file or from any source indicating that the Plaintiff had stopped to purchase a coffee.

A sworn statement was obtained from the Plaintiff on April 29, 2021. She indicated that she did not stop at [redacted] to purchase a refreshment or use the washroom. She stated that she was there to purchase oat bars for her daughter.

The bulk of the evidence, including the sworn statement of the Plaintiff, supports that the Plaintiff stopped at [redacted] for the purpose of purchasing oat bars for daughter.

[redacted]

July 19, 2020

Case Law

Reference Re: Worker's Compensation Act, 1983

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

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

Analysis

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

Workplace Health, Safety and Compensation Review Division (WHSCRD) NFLD

WHSCRD Decision Number: 14053

A worker experienced back symptoms at work while employed as a licensed practical nurse when she bent forward to retrieve a CT requisition from the printer. The worker filed a Form 6, Worker's Report of Injury for a claim to compensation for the injury. WorkplaceNL denied the claim citing there was no direct connection between the back symptoms experienced and the employment activity. The internal review specialist in her decision found that the onset of symptoms was merely coincidental while in the course of employment. The worker appealed to the review division.

In the adjudication of such cases, the place, activity and time of the incident, the worker's activity at the time of the incident, whether the worker was performing a duty or function on behalf of the employer, or whether the worker was engaged in an activity that was incidental to the employment was considered. Consideration was also given to other factors such as whether the incident occurred in a place that the worker might reasonably have been expected to be while engaged in work related activities and whether the incident occurred during the working hours or at a time when the worker might reasonably have been expected to be engaged in work related activities and whether the worker was engaged in a work-related activity at the time of the incident.

The chief review commissioner held that the injury was sustained in the course of employment and applied the Section 61, Presumption. Therefore, the injury is deemed to arise out of the employment unless the presumption is rebutted. As a result, the

review division held that the worker is entitled to succeed unless her claim is disproven ie., it has been shown there has been no significant or material contribution by the employment to the injury.

The chief review commissioner determined that the worker had sustained an injury arising out of and in the course of her employment.

Analysis

This case is relevant as these considerations are helpful in determining whether an injury is an injury arising out of and in the course of employment.

Gellately v. Newfoundland (Workers' Compensation Tribunal) 1984 No. 152, Supreme Court of Newfoundland and Labrador, Court of Appeal

The Gellately case involves a worker who was employed as the district manager for Granada Hospital Services Limited, which provided televisions for hospitals. While travelling home from Gander on a work-related trip he was involved in a motor vehicle collision which left him seriously and permanently disabled. Blood alcohol testing completed at the Health Sciences Centre in St. John's revealed a blood-alcohol reading approximately 4 times the legal limit as defined by the Criminal Code of Canada.

Mr. Gellately's application for benefits under the Workplace Health, Safety and Compensation Commission Act, R.S.N.L. 1990 was denied as it was determined his level of intoxication constituted serious and willful misconduct, breaking the employment nexus, and was the sole cause of the accident, and as a result the injury did not arise out of and in the course of employment.

On appeal to the Supreme Court of Newfoundland Court of Appeal, the Court 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

The Gellately case assists in interpreting the term arising out of and in the course of employment.

Workplace Health, Safety and Compensation Review Division (WHSCRD) NFLD

Decision Number: 13236

A worker while employed as a teamster incurred an injury to his right hip and leg when his right leg gave way while coming down a set of stairs and he fell to the floor.

The intake adjudicator rendered a decision that found the injury did not arise out of and in the course of the worker's employment and denied the claim. The worker appealed and the internal review specialist upheld the decision to deny the claim.
It was the position of the worker that he was on the employer's premises and had begun his shift. Therefore, he was in the course of his employment when his leg gave out from under him and he incurred an injury.

The review commissioner found that the facts of the case support that the worker's injury occurred in the course of the employment. This leads to a presumption under section 61 that the injury also arose out of the employment. This means that entitlement is established unless the presumption is successfully rebutted. Rebutting the presumption requires a demonstration as to how the contrary has been shown. The review commissioner noted that the fact that the mechanism of the injury was not performed as a duty or during a core job requirement does not remove it from the broader concept of employment. It was not established that the employment did not materially contribute to the injury so the claim was accepted.

Analysis

This case provides some guidance in determining whether an injury is an injury arising out of and in the course of employment.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision 2619/17

In this case the worker was a rental sales agent for a car rental company operating out of the airport. She slipped and fell in the airport cafeteria on her coffee break.

The tribunal concluded that the worker was in the course of employment at the time of accident. The accident occurred on the premises of the airport and the worker worked at the airport. While the accident might not have occurred on the employer's premises, it occurred in a public transportation facility where her employer's car rental booth was located. It was reasonable to expect that the worker would take breaks during her shift and that she would not sit in the employer's booth during breaks and the accident occurred in a place in which she might reasonably have been expected to be during course of employment. The tribunal also noted that the accident occurred during the worker's shift and she was on a paid break.

Analysis

This case provides some guidance as it discusses that the worker was in the course of her employment at the time of the injury. Although the injury did not occur on the employer's premises it discusses activities such as a taking a coffee or lunch break which is considered to be reasonably incidental to employment unless the worker removes themselves from the course of employment by making a distinct departure on

a personal errand. The break was held not to be an activity which deviated from the worker's regular employment duties.

In this case, the tribunal also referred to Decision No. 1786-06 which held that a train conductor who crossed the street to purchase food to consume while on the train was engaged in an activity that was reasonable and incidental to his employment.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision 1914/18

In this case the worker was employed as a long haul truck driver and a resident of New Brunswick. He slipped and fell while exiting a convenience store after purchasing snacks and personal items in Ontario. He filed a claim for Worker's Compensation benefits in New Brunswick which was accepted. He also commenced a civil action in Ontario.

The tribunal concluded that the worker was involved in activity reasonably incidental to his employment when he sustained his slip and fall accident. He had not at the time made a distinct departure on a personal errand such as to remove himself from the course of employment. The tribunal noted that it was difficult to separate personal and employment activities given the worker is responsible to the truck and his work is his truck and the journey itself is his work.

Analysis

This case provides some guidance as it discusses the worker's activities were considered to be incidental to his employment and did not constitute a distinct departure on a personal errand. The worker's injuries were considered to have arisen out of and in the course of employment. The tribunal noted that a break is typically not a distinct departure from employment.

Conclusion

A review of the facts confirms that in October 2016, the Plaintiff was employed as a paramedic when she incurred injuries to her left leg as a result of stepping into a pothole while exiting the ambulance in the parking lot at the premises. She was in the course of paid employment. She was on her way back to the employer's base in [redacted] when she stopped at [redacted]. She drove the ambulance onto the parking lot of the premises with the intention of purchasing oat bars for her daughter.

The Statement of Claim, which is the subject of this application, alleges that the Plaintiff has suffered injuries as a result of stepping into a pothole that was directly below the driver's door. It is confirmed that she was employed with [redacted] At the time of the incident the Plaintiff was travelling for the purpose of employment and during paid employment. She was returning to her employer's base in [redacted] after completing a call at [redacted]. In determining

whether the Plaintiff's injuries arose out of and in the course of employment, essentially the issue is whether the Plaintiff was on a refreshment break when she stopped at [redacted] and whether she deviated from her employment by make a personal deviation or by not taking the direct route back to the employer's base of operations.

The Act affords WorkplaceNL the exclusive jurisdiction to determine whether an injury has arisen out of and in the course of employment. **Policy EN-19** provides guidance to decision-makers when determining whether an injury has arisen out of and in the course of employment. The term "arising out of and in the course of employment" means the injury is cause 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.

Policy EN-19 provides a number of indicators which can be used as a guide in determining whether an injury has arisen out of and in the course of employment. With respect to coverage during travel **Policy EN-19** notes:

> **2. Coverage During Travel**
>
> **a) Travel for the Purpose of Employment**
>
> Workers are covered while traveling where such travel is required either specifically or as an expected part of employment duties. Coverage begins when the worker begins the employment related travel and extends continuously while the travel is taking place, unless there is personal deviation that removes the worker from the course of employment. An injury sustained during a refreshment break while traveling for the purpose of employment is covered.
>
> Any deviation from the reasonable and most direct route for personal or non work related reasons constitutes removable from employment and coverage is not extended.

The Plaintiff has listed two reasons why she contends she was not in the course of her employment. Firstly, she contends she deviated from her employment by stopping at [redacted] to make a personal purchase for someone else. She has indicated that she was not on a refreshment break rather she stopped to purchase oat bars for her daughter. The policy speaks to coverage during travel for employment purposes and notes that workers are covered unless there is a personal deviation that removes the worker from the course of employment.

I have determined that the Plaintiff stopped to purchase an oat bar for her daughter. This stop was for a personal reason not related or incidental to her employment. Therefore, I find that the Plaintiff did make a personal deviation when stopping at

[redacted]

July 19, 2020

[redacted] She was not on a refreshment break. I find that she was not in the course of her employment as a result of this deviation.

It is also the Plaintiff's contention that while returning to the employer's base, the most reasonable or direct route was not taken. She has provided what she considers to be the most direct route back to the base. She has also provided the route taken when stopping at [redacted] which contends was not the most direct route.

Based on the map there are various routes from [redacted] to the employer's home base including via [redacted] The most direct route may depend on such factors as traffic, time of day, construction etc. All these routes are reasonable and direct and the choice may depend on various factors. Therefore, I cannot determine that the Plaintiff deviated from the most reasonable and direct route.

The Second Defendant suggests that the injury occurred in the course of employment so this leads to the presumption under section 61 that the injury also arose out of the employment. However, the section 61 presumption is rebuttable. In this case, the presumption is rebutted because the Plaintiff made a personal deviation that removed her from the course of employment. Purchasing oat bars for her daughter was not incidental to the Plaintiff's employment.

Determination

It is my determination that the action brought against [redacted] is not statute barred under the Act as [redacted] injuries did not 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:kao
Attachment: Certificate

c: Paula Fudge, Internal Review Clerk
[redacted]
Sarah Learmonth