WorkplaceNL

Health | Safety | Compensation

Third Party Determination

September 24, 2020

Hughes & Brannan
Attn: James D. Hughes
357 Memorial Drive
Clarenville, NL A5A 1R8

Dear James Hughes:

[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] (Plaintiff) against [redacted] (First Defendant) and [redacted] Second Defendant) is prohibited by section 44 of the Act.

Background Information

On September 2, 2016, [redacted] the Plaintiff was injured while working as an engineer with [redacted]. The Plaintiff described that while he was crossing a road on the property of [redacted] he was struck by a forklift driven by the First Defendant.

On February 1, 2018 a statement of claim was filed by James D. Hughes of Hughes & Brannan, on behalf of [redacted] citing that [redacted] suffered personal injury as a result of negligence on the part of the First Defendant who struck him with a forklift that was owned by the Second Defendant.

On May 15, 2018, you requested, on behalf of the Plaintiff that WorkplaceNL determine, pursuant to section 46 of the Act whether the action brought by your client is barred by section 44 of the Act. The request was for a finding that the Plaintiff could opt out of his workers' compensation plan in favour of a civil action. You provided a copy of the submission to the Defendant's legal representative, Mr. Jorge Segovia of the law firm Cox & Palmer.

On July 4, 2018, a submission of the Defendants was received by WorkplaceNL from Jorge Segovia. In the submission, the Defendants stated the Plaintiff and [redacted] were both employed at the time of the accident and they were acting in the course of their employment. Mr. Segovia requested the finding that the exception to the statutory bar found in section 44.1(1) of the Act does not apply in this matter and the action brought by the Plaintiff against his clients is thereby statue barred. A copy of this submission was forwarded to your attention.

On July 9, 2018, the Plaintiffs provided a response to the Defendants position.

On September 25, 2018, further correspondence was received from Jorge Segovia providing notice that he had spoken to the Plaintiff's counsel and all parties were in agreement that all submissions were now before WorkplaceNL.

Legislation and Policy

Section 2(1) of the **Workplace Health Safety and Compensation Act** (the **Act**) states:

Definitions

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.

Section 19 of **the Act** states:

Exclusive Jurisdiction

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;

(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

43. (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.

Section 44 of **the Act** states:

Compensation Instead of Action

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.

Section 44.1 of the **Act** states:

No Compensation

44.1 (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**.

Section 45 of **the Act** states:

Where action allowed

45. (1) Where a worker sustains an injury in the course of his or her employment in circumstances which entitle him or her or his or her dependents to an action

(a) against some person other than an employer or worker;

(b) against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer; or

(c) where section 44.1 applies,

the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action.

Section 46 of **the Act** states:

Commission Decides if Action Prohibited

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.

Position of the Plaintiff

The Plaintiff is seeking a determination pursuant to section 46 of the Act that section 44.1(1) of the Act does apply in this case. In the Plaintiff's submission it is argued [redacted] injuries are not covered by the statutory bar as found in section 44 of the Act which prohibits actions against employers and their workers. The position is put forth that section 44.1 of the Act allows exceptions to the statutory bar and therefore the Plaintiff commenced an action in the Supreme Court of Newfoundland and Labrador-General Division, against [redacted]

Regarding section 44.1, it is put forth by the Plaintiff that this section of the Act applies as [redacted] accident involved the use of a motor vehicle, and that [redacted] injuries were caused directly by the use of a forklift which fits the definition of a motor vehicle in accordance with the Highway Traffic Act.

The definition of highway from the Highway Traffic Act states "highway" is defined as "a place or way, including a structure forming part of the place or way, designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and include all the space between the boundary lines of the place or way".

The Plaintiff contends that while the road had restricted access, it was specifically designed for use by the public and public use still occurs. It is the Plaintiff's position that insured vehicles driven by members of the public drive along the road to visit ships docked at [redacted] wharf and members of the public deliver goods and services to the vessels. The Plaintiff adds that portions of the road have a sidewalk (pedway) and vehicular parking is available in and outside the security gate. It is argued by the Plaintiff that the area where the accident occurred, although restricted, was specifically designed for use by the public and the area is in fact a highway as defined by the Highway Traffic Act.

The Plaintiff put forward that the forklift was a motor vehicle as it was being used on a highway. The Plaintiff notes all vehicles operating on a highway as defined by the Highway Traffic Act must be registered. As such, it is the Plaintiff's position that the forklift should have been registered under the Highway Traffic Act.

The Plaintiff maintains the area where the accident occurred is designed to allow members of the public (private citizens) to drive private vehicles upon the property and proceed to areas within [redacted] boundaries to visit and service vehicles and people. The Plaintiff argues people who use the road are not necessarily related to the property owner and can be delivering goods/services to a vessel on behalf of the vessel owner

unrelated to the business of the property owner. The Plaintiff maintains that in this case the general public may not have access to the area; however, the public does notwithstanding it may be restricted. They maintain that by not using the term "general public" in the current definition of highway as per the Highway Traffic Act, the intention is to ensure that any area where the public find themselves driving, whether on private property with permission or on a public road, they are meant to be included.

The Plaintiff's argument is that he was injured as a result of an accident involving the use of a forklift that was being operated on a highway, thereby meeting the definition of a motor vehicle described in section 44.1(2) and thus meeting the requirements for the exception to the statutory bar found in section 44.1(1)(b). The Plaintiff submits that the action taken against [redacted] and [redacted] should not be statute barred.

Position of Defendants

The Defendants, [redacted] and [redacted] are seeking a determination pursuant to section 46 of the Act that section 44.1(1) of the Act does not apply in the case of [redacted] injury and action. Therefore the Defendants maintain that [redacted] is barred from maintaining the action pursuant to section 44 of the Act.

The Defendants put forth that there is no question that the worker's injury occurred while he was engaged in the course of his employment or that each of the Defendants named in the action qualify as either a worker or employer under the Act. Therefore, unless an exception to the statutory bar applies, the action by the Plaintiff is barred pursuant to the Act.

The Defendant's position is that the only possible exception to the statutory bar within this case is found in section 44.1 of the Act. Section 44.1 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 suffers injury as a result of an accident involving the use of a motor vehicle. The Defendants maintained that neither of these exceptions applies in this case. The Defendants argue that section 44.1(1)(a) is not applicable to this case because the Plaintiff was not being transported by any mode of transportation at the time of the accident.

The Defendants argue that section 44.1(1)(b) is not applicable to this case either because neither definition of motor vehicle as outlined by the Act applies to the circumstances of this case. The Defendants submit that the forklift does not meet the Act's definition of a motor vehicle. The forklift was not registered under the Highway Traffic Act nor was it being operated on a highway as defined by the Highway Traffic Act.

The Defendants note that at the time of the accident, the forklift was being operated inside [redacted] a secure area, with restricted access, located on private land. The definition of highway under the Highway Traffic Act does not include roads on private land. As a result, the Defendants submit the forklift driven by the First Defendant was not on a "highway" as defined by the Highway Traffic Act, and it does not meet the definition of a "motor vehicle" as defined by section 44.1(2) of the Act. The Defendants argue that because there was no use of a "motor vehicle", the exception to the statutory bar, in section 44.1(1)(b) of the Act cannot apply and the action remains barred.

The Defendants maintain the forklift was not required to be registered. They have also argued that whether the forklift should have been registered is irrelevant as section 44.1 only says "registered" as opposed to "required to be registered".

The Defendants argue that the forklift was only operated within [redacted] and at the time of the accident, the forklift was inside [redacted] This facility is on private land and the Defendants maintain the [redacted] is subject to the *Regulations* which impose strict security procedures that restrict access to the facility. The facility is fenced and gated. It is monitored by security personnel 24 hours per day, seven days per week. Both vehicular and foot traffic is strictly controlled. They argue it is in no way, shape or form, intended for use by the public. Without specific permission from [redacted] individual members of the public may not enter the [redacted]. To show the distinction between the secure [redacted] roads and parking areas, they provided the example of a shopping mall where the public has an implied invitation to enter versus the [redacted] were only those specifically authorized by [redacted] can enter. Their argument is that the [redacted] was not designed nor intended for, or used by, the public. As such, its roads and parking areas inside the facility cannot be "highways" as defined by the Highway Traffic Act.

Reasoning and Analysis

[redacted] (Plaintiff) is the applicant in this case. The matter before me, as a result of the application by the Plaintiff, is to determine whether the action of the Plaintiff against [redacted] (First Defendant) and [redacted] (Second Defendant) is barred by the provisions of the Act. As provided by section 46 of the Act, WorkplaceNL has the authority upon the application of a party to the action to adjudicate and determine whether the action is prohibited by the Act. I have reviewed and considered the written submission of the Plaintiff and rebuttal submission of the Defendants.

Section 44 of the Act provides the statutory bar to actions of the worker against an employer or another worker for an injury which arises out of and in the course of the worker's employment. There is an exception to this provision of the Act. Section 44.1(1)

states that section 44 shall not apply where the worker is injured 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. Section 44.1(1) also states that section 44 shall not apply where the 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.

In making the determination I have considered a number of issues which include:

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

From my review of the facts in this case, [redacted] was employed as an Engineer with [redacted] a registered employer. He was struck by a forklift driven by the First Defendant while he was walking across a road to tend to his vessel docked on the property of the Second Defendant. [redacted] is a worker within the meaning of section 2(1)(z) of the Act.

2. Was [redacted] a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, [redacted] was employed as a Lead Hand with [redacted] He was driving the forklift inside [redacted] when he struck [redacted] who was walking on the road. [redacted] is a worker within the meaning of section 2(1)(z) of the Act.

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

According to WorkplaceNL records, [redacted] is a registered employer in the province of Newfoundland and Labrador. In accordance with section 2(1)(j) of the Act, [redacted] are considered employers within the meaning of the Act.

4. Did [redacted] injuries arise out of and in the course of employment?

My review of the facts confirms that [redacted] injuries arose out of and in the course of employment. This is also agreed upon by all parties.

5. Does the exception to the statutory bar in section 44.1 of the Act apply to this case?

This is the main focus of my decision and the issue that is in dispute between the parties. Section 44.1 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.

Section 44.1(1)(a) 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. The worker was a pedestrian and not being transported by a mode of transportation at the time of the accident. Therefore, section 44.1(1)(a) does not apply.

Section 44.1(1)(b) spells out the criteria that must be considered in determining if a right of action exists. It states that section 44 shall not apply where a 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.

Section 44.1(2)(a) provides that in subsection (1) "motor vehicle" means (i) a motor vehicle registered under the Highway Traffic Act; (ii) a motor vehicle 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.

Section 44.1(2)(b) states that a motor vehicle also includes another motor vehicle while being operated on a highway as defined in the Highway Traffic Act in the province.

The facts of the case show that the Plaintiff was struck by a forklift that the First Defendant was operating on a road within [redacted] The Defendants have put forward the position that the forklift was not operating on a highway as defined by the Highway Traffic Act.

Case Law and Submissions

As outlined in section 19(4) of the Act, WorkplaceNL is not bound by strict legal precedent; nevertheless, I have reviewed the cases submitted by the parties to determine their relevancy and applicability to the case at hand.

Buckle v. Stevens

This is a decision involving two motor vehicles that collided at the intersection of two driving lanes on a shopping mall parking lot. Buckle, the Plaintiff had taken the position that the driving lanes are "highways" and the accident area is an "intersection" as defined in the Highway Traffic Act, thus bringing into play the statutory rules of the road, in particular, the obligation to give way to a vehicle on the right. The Defendant disagreed and applied for a pretrial determination of the issue.

It was determined the driving lanes in the shopping mall parking lot are not highways within the meaning of the Highway Traffic Act.

Analysis

In this case the accident took place on a shopping mall parking lot that was considered private property. The current definition of highway was not used. The parking lot was not considered a highway. In the case at hand, the Plaintiffs put forth that the current definition of highway includes the phrase "or the parking of vehicles" that was not in the definition relied upon in the Buckle case and was added by the legislature to include any area where the public drive and park motor vehicles, whether public or private. The Defendants have put forth that in an earlier version of the Highway Traffic Act, the definition of highway included the phrase "whether it is publically or privately owned and whether or not it is designed or intended for use by the public" but that phrase was subsequently deleted. The Defendants submit that the later addition of "parking of vehicles" does not alter the definition of highway to include private land, since if that was the intention, the legislature would have specified.

In the Buckle case the court held that the Highway Traffic Act, and consequently, its definition of highway, only applied to public land. In the case at hand, the accident also took place on private property. This case provides some guidance in how the courts interpret "highway".

Best v. Penney

This is a decision involving two motor vehicles that collided in the parking lot of a grocery store. Ms. Best had backed her vehicle out of the parking stall and was stopped in the driving lane when Mr. Penney's vehicle backed out of his stall hitting Ms. Best's stopped car. Action was taken on behalf of Best against Penney for damages arising from the collision.

It was determined that Mr. Penney failed to keep a proper look out before reversing his vehicle and judgement was given to the plaintiff on her statement of claim.

Analysis

This case is somewhat applicable as it references the aforementioned Buckle v. Stevens' case and the matter of whether private property is included within the definition of highway within the Highway Traffic Act. This case considered the current definition of highway under the Highway Traffic Act. The court wrote that the Highway Traffic Act "does not strictly apply to privately owned parking lots". The Plaintiff submits that the court erred in the Best case by incorrectly relying on the definition of highway in Buckle. The courts comments are inconsistent with the Plaintiff's interpretation of the definition of highway and the Plaintiff's interpretation of the reason for the addition of "or the parking of vehicles". The court specifically addressed private parking lots and does not

comment on public parking lots. The Defendants have put forth that the roads of the [redacted] are on private land and therefore not included in the definition of highway.

Marine Services International LTD v. Ryan Estate

This is the case involving the spouses and dependents of Joseph Ryan and David Ryan, who sought to pursue an action against a number of Defendants for a marine accident that resulted in the death of the Ryan brothers when the Ryan's Commander, a fishing vessel, capsized in heavy seas off Cape Bonavista in September 2004.

The mainstay of the case was that the **Marine Liability Act, S.C. 2001**, a federal statute, and the **Workplace Health, Safety and Compensation Act, RSNL 1990**, a provincial statute, were at constitutional odds regarding whether a right of action was statute barred. The federal statute allowed for fault-based tort law, while the provincial statute eliminated fault-based tort law in respect of workplace injuries, substituting a no-fault insurance scheme requiring employers within the province, covered by this scheme, to pay into a common insurance fund which workers and their dependents benefit from.

I cite the following from the Supreme Court of Canada's decision in the case of Ryan Estate concerning the historic trade-off:

> [29] The central element of Sir Meredith's proposal was what has come to be called the "historic trade-off": workers "lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay", while employers had to contribute to a common fund "but gained freedom from potentially crippling liability": Pasiechnyk, at para. 25
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> [30] This "historic trade-off" provides timely and guaranteed compensation for workers (or their dependents) and reduces liability for employers. In Pasiechnyk, Sopinka J. described it as a necessary and central feature to a workers' compensation scheme (para. 26). See also Reference re: Workers' Competition Act, 1983 (Nfld.), ss. 32, 34 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.).
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> [31] The WHSCA is a workers' compensation scheme in Newfoundland and Labrador providing no-fault compensation to workers and their dependents arising from workplace accidents; it mandates automatic compensation without the need to establish fault on the part of the employer. The WHSCA replaces the tort action for negligence with compensation. As such, it is distinct from tort law. Section 44 of the WHSCA provides for the statutory bar that is at the heart of the "historic trade-off".

The Court determined that that section 44 applied in the case of the Ryan Estate, and federal paramountcy did not apply, and the right of action was statute barred.

Analysis

I find the Ryan Estate decision is relevant as it assists me in determining the intent of the Workers' Compensation System and section 44.1 when considering whether or not an action is statute barred.

Analysis and Conclusion

A review of the facts of this case confirms that on September 2, 2016, [redacted] was injured after being struck by a forklift while walking on a road of the [redacted] At the time of the accident [redacted] was working in the course of his employment as an Engineer with [redacted] The forklift was being operated by [redacted]

The September 2, 2016 accident report completed by [redacted] Quality, Health, Safety and Environmental Manager, confirmed that [redacted] security footage shows [redacted] operating the forklift heading west up the road parallel to the north side of the main office and [redacted] walking across the head of the graving dock towards the main office. It was confirmed that [redacted] was struck by the forklift and fell to the ground.

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. The submission of the Plaintiff is that the forklift was being operated in a negligent manner and as a result [redacted] experienced injuries. In order for an action to be able to proceed, an exception as stated in section 44.1 of the Act would need to apply.

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 a 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 argument put forward by the Plaintiff is that the forklift was a motor vehicle given it was being operated on a highway. The Plaintiff argues the forklift should have been registered under the Highway Traffic Act.

In determining the applicability of section 44.1(1)(b), the first step in this analysis is to determine whether the forklift is a motor vehicle as defined in section 44.1 of the Act.

The definition which is applicable in this case is contained in section 44.1(2) of the Act which provides that:

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.

Section 12 of the Highway Traffic Act deals with non-residents and new residents. Section 17 of the Highway Traffic Act deals with dealer's licenses. Therefore, section 44.1(1)(2)(a)(ii) does not apply. Therefore, the definition raises two questions (i) was the forklift registered under the Highway Traffic Act and (ii) does the forklift meet the criteria of another motor vehicle while being operated on a highway in the province.

(i) Is the [redacted] forklift registered under the Highway Traffic Act?

The affidavit of [redacted], general manager of the second Defendant, states that all forklifts owned by [redacted] are only operated within the [redacted] Because they are not operated outside the [redacted] they are not registered under the Highway Traffic Act. [redacted] states that the forklift involved in the accident was not registered under the Highway Traffic Act.

Based on my review of the facts, the [redacted] forklift was not registered under the Highway Traffic Act.

(ii) Was the [redacted] forklift being operated on a highway in the province?

The use of the word "while" in the phrase "another motor vehicle while being operated on a highway in the province" indicates that we must consider the status of the forklift at the time of the accident. For the purpose of section 44.1 of the Act, the forklift is

considered a motor vehicle while it is being operated on a highway. Therefore, I must determine if the forklift was being operated on a highway at the time of the accident.

As noted by the definition of "highway" from the Highway Traffic Act, "highway" is defined as a place or way, including a structure forming part of the place or way, designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and includes all the space between the boundary lines of the place or way.

I have reviewed [redacted] September 2, 2016 incident report which indicates the accident occurred on the road located on the northwest corner of the main office building. A sketch of the place the accident occurred within the [redacted] was included. The Plaintiff also included an aerial view of the subject property.

A sworn Affidavit from [redacted] General Manager of [redacted] dated July 3, 2018, indicates the accident occurred inside the [redacted] on a road near the northwest corner of the main office building. [redacted] confirms access to the [redacted] is strictly controlled and monitored. He states the [redacted] is encircled by an eight-foot fence, with barbed wire in required areas. He states there is strict control of both vehicular and foot traffic access to the [redacted] and only authorized persons are permitted to enter the facility. He states all authorized persons who enter the facility are required to sign in or swipe a security pass. He noted the primary access to the [redacted] is through the Main Gate, adjacent to [redacted] which is overseen by security personnel within the adjacent guard-house. He noted the Main Gate is monitored 24 hours per day, seven days per week and vehicular access, for authorized persons, is via a swing arm, which is controlled by security personnel within the guard-house. This is confirmed in exhibits B, C and D of the Affidavit of [redacted]

I have reviewed the submission of the Defendants which includes a copy of the Deed of Conveyance between [redacted] as Vendor and [redacted], as Purchaser. The November 1999 Deed of Conveyance confirms the [redacted] is located on private property. The Defendants supervise and control access to the property in accordance with Marine Transportation Security Regulations. The Defendants maintain those entering the property may be members of the public but are subject to restrictions and require authorization and security screening before entering. I accept that the accident occurred on the road on the premises privately owned and restricted access by [redacted]

Highway is defined as a place or way designed and intended for or used by, the public for the passage of traffic or the parking of vehicles. The case of Buckle v. Stevens confirmed that the Highway Traffic Act and the definition of highway do not apply to private property. The definition of highway has been amended since this decision by adding "or the parking of vehicles". I find that this includes public parking lots and does not expand the definition of highway to include private property. If the legislature intended to include private property, it would have likely included similar language to the

previous definition which stated "whether it is publically or privately owned and whether or not it is designed or intended for use by the public". This language was deleted and the reference to private ownership or usage was not added to the revised definition. Therefore, it is reasonable to conclude that the legislature did not intent to extend the definition of highway to private property.

In this case, the accident occurred on the road which is owned by [redacted] The evidence of both the Plaintiff and the Defendants indicates that the public was permitted inside the [redacted]. The Defendants confirm members of the public have restricted access and must pass through the security gate. Based on the evidence, the road is private property and is not designed and intended for, or used by, the public for the passage of traffic or for parking vehicles. Those driving on the road or parking in designated lots are permitted to do so only with the approval of the [redacted] security personnel. Therefore, I find the road area where the accident occurred is not a highway as defined in the Highway Traffic Act and, consequently, it is not a highway under section 44.1(2)(b) of the Act. The [redacted] forklift is not a motor vehicle as defined in section 44.1(2) of the Act since the forklift was not being operated on a highway and hence does not meet the definition of "another motor vehicle while being operated on a highway in the province".

Section 44.1(1)(b) is an exception to the statuary bar for accidents where the 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. I have determined that the forklift was not a motor vehicle as it was not registered under the Highway Traffic Act and was not being operated on a highway as defined by that Act. The accident did not involve the use of a motor vehicle. Therefore, section 44.1(1)(b) does not apply.

I find that [redacted] injury arose out of and in the course of his employment. Section 44 of the Act bars an action against an employer or a worker because of an injury which arises in the course of a worker's employment. I find that the accident did not involve the use of a motor vehicle by the worker or another person. The section 44.1 exception to the statutory bar is not applicable.

Determination

The action by [redacted] brought against [redacted] is statute barred. Attached is a certificate which may be filed with the court.

James D. Hughes, Hughes & Brannen

[redacted]

September 24, 2020

Sincerely,

Kelly Murphy

Kelly Murphy
Internal Review Specialist

KM:jh

c: Paula Fudge, Internal Review Clerk
Cox and Palmer, Attn: Jorge Segovia