

## Third Party Determination

July 26, 2022

Stewart McKelvey  
Attn: Robert J. Dillon  
Cabot Place, 1100-100 New Glower Street  
PO Box 5038  
St. John's, NL A1C 5V3

Dear Robert J. Dillon:

[REDACTED]

In accordance with **section 46** of the **Workplace Health, Safety and Compensation Act (the Act)**, I have reviewed the submission of [REDACTED] (the Second Defendant) as to whether an action by [REDACTED] (the Plaintiff) against the Second Defendant is prohibited by **section 44** of the **Act**.

### Background Information

On July 27, 2016, the Plaintiff fell while climbing exterior stairs of a building on the Plaintiff's premises at [REDACTED] in Newfoundland and Labrador. At the time of the fall, the Plaintiff was carrying out work duties of her employment as a janitor with [REDACTED] (the First Defendant). The Plaintiff's employer had a contract completing janitorial duties at the worksite which is owned and/or operated by the Second Defendant.

On July 13, 2018, a statement of claim was filed by John Ottenheimer of the law firm Morrow, Morrow & Crosbie on behalf of the Plaintiff against the First Defendant and the Second Defendant for alleged damages suffered as a result of the injury. The Statement of Claim claimed that:

4. "On or about the evening of the 27<sup>th</sup> day of July, 2016, the Plaintiff was employed by the First Defendant in a janitorial position and, as such, she was carrying out her duties at the First Defendant's Premises. The Plaintiff exited a building occupied by the First Defendant, situated on the Second

Defendant's Premises with the purpose of attending to an adjacent building, also on the Second Defendant's Premises. The Plaintiff began to climb the stairs into the adjacent building and fell while climbing the stairs; it was dark and neither the First Defendant nor the Second Defendant had an outside lighting system in use, thereby the Plaintiff was unable to have a clear path while walking and/or climbing the stairs, thus causing the Plaintiff to fall. As a result the Plaintiff sustained injuries and has suffered damages."

On March 8, 2021, an Application for Determination was received from Robert Dillon, Stewart McKelvey, who requested the Workplace Health, Safety and Compensation Commission (WorkplaceNL) provide a determination as to whether the action was statute barred pursuant to **section 46 of the Act** on behalf of the Second Defendant

On March 10, 2021, I requested that counsel for the Plaintiff, John Ottenheimer of Morrow, Morrow & Crosbie, forward their submission in relation to the Second Defendant's request for a determination pursuant to **section 46 of the Act**. I again wrote to the Plaintiff's counsel on October 6, 2021. On October 22, 2021, John Ottenheimer advised that Morrow, Morrow & Crosbie were no longer formally retained by the Plaintiff. Therefore, the law office would not be providing a submission regarding the action. On November 3, 2021, I wrote the Plaintiff requesting a response by December 1, 2021 as to whether she wished to provide a submission for the file. In the absence of a submission, the Plaintiff was advised I would proceed with the determination.

To date, a submission from the Plaintiff has not been received by WorkplaceNL. As a reasonable timeframe has been provided for the Plaintiff to provide a submission, the Second Defendant's request for a determination in relation to the matter will proceed without a submission from the Plaintiff.

## Legislation and Policy

**Section 2 of 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;
- (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 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 (4) 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 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

**Section 44 (1) (2) 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.

(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:

### **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.

**Policy EN-19, Arising Out of and In the Course of Employment** 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.

### ***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.

### **Position of the Plaintiff**

A reasonable timeframe was provided to the Plaintiff to provide a submission. No submission was received.

## Position of the Defendant

The solicitor for the Second Defendant notes that **section 46 of the Act** provides WorkplaceNL with the exclusive jurisdiction to determine whether an action is prohibited by **the Act**. Further, **section 44 of the Act** bars an action against an employer or another worker. The solicitor comments that these sections of the legislation that prohibit action against an employer or another worker are central to the workers compensation scheme and have been previously confirmed in a number of rulings by the Supreme Court of Canada and the Newfoundland and Labrador Court of Appeal.

The solicitor for the Second Defendant references the Plaintiff's written statement which reported:

- On July 27, 2016 the Plaintiff was employed as a cleaner with the First Defendant
- As of July 27, 2016, the Plaintiff was working at the [REDACTED] for approximately 1.5 to 2 years
- The Plaintiff was working the night shift from 6:00 pm to 6:00 am
- At approximately 1:00 am on July 27, 2016, the Plaintiff was working in a building located at the [REDACTED] site. When the Plaintiff finished cleaning the building, she left to go to the adjacent building located approximately 50-100 feet away
- It was dark and the Plaintiff did not have a flashlight
- The Plaintiff was ascending the exterior staircase of the adjacent building, tripped, fell and allegedly suffered personal injuries. The Plaintiff reported she does not know the cause of the fall.
- After the incident, the Plaintiff reported the fall to the supervisor and was told to seek medical attention at the onsite medical clinic. The onsite nurse advised the Plaintiff to consult with a physician.

In the Application for Determination, the Second Defendant's solicitor submits that the Statement of Claim and the Plaintiff's statement confirms the Plaintiff was a "worker" as defined by **the Act**. The solicitor also notes that the Second Defendant was, at all times, operating in the industry of processing nickel to finish products at the [REDACTED] and is registered as an employer within the meaning of **the Act** under Firm Number [REDACTED]

The Application for Determination notes that as part of regular operations, the Second Defendant contracted the First Defendant to provide janitorial and maintenance services on the site. The Plaintiff was employed as a janitor with the First Defendant.

Furthermore, the injuries the Plaintiff alleged to have suffered occurred in the conduct of operations usual in or incidental to the industry carried out by the employers. Given the facts, the Second Defendant submits that the alleged personal injuries the Plaintiff

sustained on or about July 27, 2016 in the fall on the exterior stair case at the [REDACTED] [REDACTED] arose out of and in the course of employment. As such, the Second Defendant maintains that based on the allegations contained in the Statement of Claim and the Plaintiff's statement, the incident is covered under **the Act**. Therefore, the action is statute barred pursuant to **section 44 of the Act**.

## Reasoning and Analysis

I have reviewed the Statement of Claim and the Application for Determination put forth by Robert Dillon, solicitor for the Second Defendant. **Section 44 (1) of the Act** establishes a statutory bar to claims made by a worker against an employer or a worker for an injury that arises in the course of a worker's employment. In this case, my task is to determine whether the action of the Plaintiff brought against the Defendant is barred by the provisions of **the Act**. I note Plaintiff fell when ascending exterior stairs of a building owned and/or occupied by the Second Defendant at the [REDACTED] [REDACTED] on July 27, 2016. In making my determination there are a number of questions that must be considered:

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

I confirm from a review of the Facts that the Plaintiff was employed by [REDACTED] [REDACTED] and working in her capacity as a janitor on July 27, 2016. Therefore, I find that the Plaintiff was a "worker" as defined under **section 2(z) of the Act**.

2) Were the First Defendant and Second Defendant "employers" under **the Act**?

I confirm that the Defendants are registered employers with WorkplaceNL. The First Defendant, [REDACTED], has been a registered employer with WorkplaceNL since March 30, 2010. The Second Defendant, [REDACTED], has operated under Firm Number [REDACTED] since October 6, 1995. Thereby, the Defendants both meet the legislative definition of "employer" under **section 2(j) of the Act**.

3) Did the Plaintiff's alleged injuries arise in the course of employment?

This is the main focus of my decision and the issue which must be determined. It has been argued by the Second Defendant that the Plaintiff was in the course of employment and was on the employer's premises at the time the injury occurred. Therefore, the Plaintiff does not have a right of action against the Defendants. On a Bodily Injury Questionnaire (Tab Two from the Application for Determination), the Plaintiff clearly reports that the accident occurred during the course of business and that the Plaintiff was eligible for Worker's Compensation Benefits but did not apply for benefits.



What must be next be determined is whether the Plaintiff was in the conduct of operations usual in or incidental to the industry carried out by the First and Second Defendants.

On July 27, 2016, the First Defendant was contracted to perform janitorial and maintenance duties in buildings located at the [REDACTED] for the Second Defendant. The Plaintiff's statement confirms when cleaning in a building was completed, she left and walked to an adjacent building 50 to 100 feet away. When entering the building, the Plaintiff fell ascending the exterior staircase. The Second Defendant submits that at the time of the alleged fall, the Second Defendant was involved in operations which are usual in or incidental to the processing of nickel. Furthermore, the Second Defendant is the owner and operator of the worksite known as the [REDACTED].

I note that the Plaintiff's Statement of Claim also states that the Second Defendant is the owner and operator of the worksite and the First Defendant was contracted to perform janitorial and maintenance duties on the Second Defendant's premises. The Statement of Claim notes that the Plaintiff was employed by the First Defendant in a janitorial position and carrying out janitorial duties on the Second Defendant's premises. On this point, I agree with the Second Defendant's submission and I find that the alleged fall occurred while the Plaintiff was performing janitorial services which are services usual in and incidental to the industries carried on by the First and Second Defendants.

#### Case Law

**Section 19(4) of the Act** states that decisions of WorkplaceNL shall be upon the real merits and justice of the case and are not bound to follow strict legal precedent. That said, I have reviewed the case submitted to determine relevance to the case at hand.

#### *Pasiechnyk v. Saskatchewan (Workers Compensation Board) [1997] 2 S.C.R.890*

In this case, a crane owned by Pro-Crane fell onto a trailer in which employees of Saskatchewan Power Corp. were taking a morning coffee break. Two employees died and six others were seriously injured. The injured workers and dependents of the deceased workers elected to receive benefits from the Worker's Compensation Board in Saskatchewan.

In January 1991, the respondents initiated an action against Saskatchewan Power Corp., Pro-Crane, and the Saskatchewan Government. The action against the Saskatchewan Government alleged it failed to meet requirements under the Occupational Health and Safety Act, R.S.S. 1978, c. o-1 by failing to adequately inspect the crane. Saskatchewan Power Corp., Pro-Crane, and the Saskatchewan Government requested the Worker's Compensation Board (the Board) make a determination of

whether the action was statute barred by the Legislation in that jurisdiction. The Board determined that the action was statute barred and the Court of Queen's Bench denied the respondents request for judicial review.

The Court of Appeal allowed the respondents' appeal with respect to action against the government as a regulatory body, but dismissed the action against ProCrane and Saskatchewan Power Corp. agreeing with the Board that the action against ProCrane and Saskatchewan Power Corp. was statute barred. The ruling was appealed to the Supreme Court of Canada. The judgement of the court, delivered by J. Sopinka, noted that as conceived by Sir William Meredith, the workers' compensation scheme provides a "historical trade-off" whereby the workers lost their cause of action against their employers but gained compensation in a no-fault system. In turn, employers were mandated to pay into a mandatory insurance scheme but gained immunity from suits from injured workers and their dependents. The court found that the bar to action against employers is central to the workers' compensation scheme and it would be unfair to allow an action against an employer when the injured worker could obtain greater compensation through the no-fault insurance scheme funded by employers.

#### Analysis

This case provides guidance in the intent of the workers' compensation scheme and assists in determining whether an employer is conducting operations usual in or incidental to an industry. The court provides guidance in determining whether the Defendants are employers and, if so, they have immunity to action as part of the overall no-fault insurance scheme funded by employers to cover accidents that occur in the course of business.

A review of the facts confirms that on July 27, 2017, the Plaintiff fell on exterior stairs while employed with the First Defendant. At the time, the Plaintiff was working as a janitor, cleaning office buildings, on a worksite owned and operated by the Second Defendant. The First Defendant was contracted to perform janitorial and maintenance duties by the Second Defendant at the [REDACTED]. The facts confirm the Plaintiff walked from one building to an adjacent building 50-100 feet away. When ascending an exterior staircase, the Plaintiff fell resulting in personal injuries.

**The Act** affords WorkplaceNL with 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 caused by some hazard resulting from the nature, conditions or obligations of the employment and 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 and in the course of refers to the time and place of the injury and its connection to the employment.

To assist in determining whether the Plaintiff's alleged injuries arose in the course of employment, I considered the indicators provided in **Policy EN-19** and determine as follows:

- Did the injury occurred on the premises of the employer?

According to **Policy EN-19**, 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. The facts of the case confirm the Plaintiff was working a nightshift (6:00 pm to 6:00 am) at the time of the alleged incident. At 1:00 am on July 27, 2016 the Plaintiff allegedly fell when entering a building on the First and Second Defendant's premises. The Plaintiff was entering a building owned and operated by the Second Defendant that is used to perform activities for the purpose of the Defendants business. I find that in this instance, the Plaintiff was on the Second Defendant's premises and performing duties at her workplace since the Plaintiff's employer was contracted to complete janitorial services for the Second Defendant. As the Plaintiff's alleged injuries occurred after the start of the work shift and prior to the end of the shift, I find that the injury occurred on the employer's premises.

- Did the injury occur in the process of doing something for the benefit of the employer?

I find that at the time of the alleged injuries, the Plaintiff was employed by the First Defendant and performing janitorial services for the benefit of the First and Second Defendants.

- Did the injury occur in the course of action in response to instructions from the employer?

I find that the janitorial services were being completed by the Plaintiff at the instruction of the First Defendant.

- Did the injury occur in the course of using equipment or materials supplied by the employer?

In a statement completed on July 24, 2019, the Plaintiff reported she was not carrying any materials or equipment at the time of the alleged incident. Therefore, this indicator is not applicable.

- Did the injury occur in the course of paid employment?

The Plaintiff reported an hourly compensation from the First Defendant on the Bodily Injury Questionnaire noting the incident occurred during business. I find

the alleged incident occurred during paid employment.

- Were 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?

The Plaintiff allegedly tripped on stairs when entering a building. I find the risk of the Plaintiff tripping on stairs entering a building is the same level of risk exposure for the Plaintiff while performing normal janitorial services in the course of duties.

- Did the injury occur during a time period for which the worker was being paid?

As noted above, the Plaintiff was being compensated for janitorial services at the time of the alleged fall. Therefore, I find the Plaintiff was being paid by the First Defendant when the alleged injuries occurred.

- Was the injury caused by some activity of the employer, a fellow worker, or a third party?

The Plaintiff confirmed she was alone at the time of the alleged incident and there were no witnesses. In review of the facts, I find there were no other individuals involved in the alleged incident.

## Conclusion

I find that the Plaintiff was employed by the First Defendant at the time of the fall. The First Defendant was contracted by the Second Defendant to perform janitorial duties that are incidental to the operations of the business.

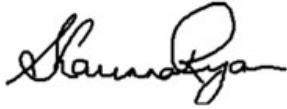
In accordance with Policy and Legislation, based on the above noted indicators, the Plaintiff's alleged injuries arose in the course of employment. **Section 44 of the Act** bars an action by the worker because of an injury in respect of which compensation is payable or which arises in the course of a worker's employment.

## Determination

It is my determination that the action brought against the First and Second Defendant is statute barred under **the Act**. The First and Second Defendants were employers under **the Act** when the Plaintiff fell on the Second Defendant's premises. The Plaintiff was a worker under **the Act** at the time of the fall, and alleged injuries as a result of the fall arose in the course of employment. Attached is the certificate which may be filed with the court.

[REDACTED]  
[REDACTED]  
July 26, 2022

Sincerely,



**Shaunna Ryan**  
Internal Review Specialist

SR:kb  
Enclosure: Certificate

c: Paula Fudge, Internal Review Clerk  
[REDACTED]  
[REDACTED]