

# WorkplaceNL

Health | Safety | Compensation

## Third Party Determination

March 13, 2023

Darren Purchase  
Legal Counsel  
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500 Columbus Drive  
PO Box 12400  
St. John's, NL A1B 4K7

Dear Darren Purchase:

[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] [REDACTED] (First Defendant), [REDACTED] (Second Defendant) and [REDACTED] (Third Defendant) is prohibited by **section 44** of the Act.

### Background Information

On September 21, 2018, the Plaintiff filed a WorkplaceNL claim for entitlement to benefits for a stress related injury which she reported resulted from being sexually assaulted by the Third Defendant.

The intake adjudicator in a decision dated June 17, 2019, noted that the Plaintiff had confirmed that there was an investigation completed in relation to the assault that was reported. It was noted that the investigation was not able to conclude that the allegations took place as there was no evidence to support the claim. The adjudicator denied the claim on the basis that the weight of evidence did not support that the Plaintiff's reported stress related injury arose out of and in the course of their employment.

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The Plaintiff requested a review of this decision. On August 14, 2019, the internal review specialist rendered a decision and upheld the decision to deny the claim.

On December 17, 2019, a statement of claim was filed by Jamie MacGillivray of MacGillivray Law Office on behalf of the Plaintiff against the First Defendant, Second Defendant and Third Defendant.

It was stated the Plaintiff was employed with [REDACTED] for 23 years until she had to stop working due to severe Post Traumatic Stress Disorder caused by the assaults described in the claim.

The Plaintiff was a secretary of [REDACTED] which performed services under contract for the First and Second Defendants. The Third Defendant was employed as a [REDACTED] [REDACTED] at the Second Defendant's warehouse and [REDACTED] (the "Facility"). According to the statement of claim, numerous sexual assaults were committed by the Third Defendant commencing in the spring of 2005. Some of these assaults took place in the Third Defendant's office, while another took place in an adjacent warehouse.

The Plaintiff's duties at [REDACTED] included hand delivering invoices to the Third Defendant. The Third Defendant approved and sometimes expedited payment of the invoices.

The Plaintiff did not report the assaults to anyone. The Plaintiff claims that she suffered and continues to bear significant psychological trauma, including psychological breakdown, depression, anxiety, suicidal thoughts, Post Traumatic Stress Disorder, disruption of relationships, disruption of intimacy, and sleep disruption. The statement of claim states that the First and Second Defendants are both negligent and vicariously liable for the actions of the Third Defendant.

On June 17, 2020, Rebecca Marshall, Legal Counsel for the First Defendant requested on behalf of the First and Second Defendants that WorkplaceNL determine pursuant to **section 46 of the Act** that the action against the employer in this matter is prohibited by **the Act**.

Archibald Bonnell, Solicitor for the Third Defendant, provided a submission dated August 31, 2020 advising that the Third Defendant had reviewed the submission of the First and Second Defendants and adopts and relies on the contents of same as the relevant submission and arguments with respect to the written application.

On June 7, 2021, a response was filed by the Plaintiff. The Plaintiff submits that she was sexually assaulted outside the course of her employment and her action is not statute barred. The Plaintiff requests a determination that WorkplaceNL does not have jurisdiction to bar the action on the basis of issue estoppel. Alternatively, the Plaintiff requests a determination pursuant to **s. 46 of the Act** that the action is not statute barred.

On February 6, 2023 a reply submission was provided by the solicitor for the First and Second Defendants. They seek a determination pursuant to **section 46 of the Act** that the court action in this matter is prohibited against the First and Second Defendants.

## Legislation and Policy

### 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 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
- (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.

(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.**

**Section 61 of the Act states:**

**Presumption**

61. 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.

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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.

## Position of First and Second Defendants

The First and Second Defendants, are seeking a determination pursuant to **section 46 of the Act** that the Plaintiff has no right of action against the First and Second Defendants and her action is barred pursuant to **section 44 of the Act**.

The First and Second Defendants submit that at the time of the alleged injury, the Plaintiff was an employee of [REDACTED] and therefore a “worker” pursuant to **the Act (section 2(z))**. The Third Defendant was an employee of the Second Defendant and therefore also a “worker” pursuant to **the Act**. The Second Defendant was an “employer” under **the Act (section 2(j))**.

They contend that the injury claimed by the Plaintiff falls within the definition of “injury” under **the Act (section 2(1) (o))**, as an injury allegedly caused by the willful and intentional act of another worker. The injury is alleged to have occurred in the course of the Plaintiff’s employment and in the conduct of operations usual in or incidental to the industry which the Second Defendant operates in. Specifically, the Plaintiff states the injury occurred at the Second Defendant’s premises where the Second Defendant was engaged in an industry while the Plaintiff was in the course of carrying out her duties to deliver her employer’s invoices in respect of its contract with the Second Defendant to a Second Defendant’s employee for payment.

To further support their position, the First and Second Defendants indicate that with respect to the First Defendant it should not have been named as a party to the action as it did not employ the Third Defendant and did not exist at the time of the alleged injury. The First Defendant was not incorporated as an entity until August 12, 2008, two years after the Third Defendant retired from the Second Defendant.

A reply submission by the First and Second Defendants dated February 6, 2023, contends that the Worker’s Compensation regime is the appropriate venue for the claim to be adjudicated. They maintain in the claim, the Plaintiff as a worker, claimed that she experienced an injury, during the course of her employment, as such, the determination of WorkplaceNL, as to the validity of the claim, in both the decision and the review, is within the exclusive jurisdiction of WorkplaceNL and not the courts of the Province of Newfoundland and Labrador.

The First and Second Defendants state that the decision and the review decision did not determine that the Plaintiff’s claim was not compensable under **the Act**. Rather it was



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noted that there was insufficient information to confirm that an event occurred and insufficient evidence to support the claim for mental stress.

They go on to note that WorkplaceNL's decision is nothing more than an unfavorable ruling for the Plaintiff, which pursuant to **the Act** is subject to statutory appeal, or alternatively judicial review, neither of which options have been pursued by the Plaintiff. By commencing the Action, the Plaintiff is trying to overturn the final decisions of WorkplaceNL outside of the proper review process. To allow the Action to proceed would be to allow the Plaintiff to re-litigate decided issues that fall within the exclusive jurisdiction of **the Act**, thereby undermining the legitimacy of the decision, the review decision, and the Worker's Compensation regime as a whole.

The First and Second Defendants also state that the doctrine of issue estoppel is not applicable to the application. It is noted that the Plaintiff had reported that at all times material to the liability issues, the Plaintiff was an employee of [REDACTED]. The Plaintiff's submission with respect to the alleged assaults now occurring outside of the course of her employment are inconsistent with all previous statements made by the Plaintiff.

## Position of the Plaintiff

The Plaintiff takes the position that she was employed as a secretary with [REDACTED] and the Third Defendant was an employee of the First and Second Defendants. [REDACTED] was contracted by the Second Defendant to provide [REDACTED] throughout Newfoundland and Labrador, as well as other services including [REDACTED].

The Plaintiff notes the employment relationship between herself and the Third Defendant was limited. Her duties as secretary for [REDACTED] included delivering invoices to the front desk of the office building at the Facility, approximately, once per week. Her employment related duties did not include or require direct interaction with the Third Defendant in his personal office at the Facility. They worked for separate employers. They were not co-workers.

The Plaintiff indicates the initial sexual assault occurred during the spring of 2005. For two years prior to the initial and subsequent assaults, she delivered invoices to the office building at the Facility without incident. She often delivered the invoices by leaving them with the Second Defendant's receptionist at the front desk. At some point the Third Defendant called her and instructed her to attend his personal office near the close of business for the purpose of hand delivering invoices to him directly.

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The Plaintiff outlines a sexual assault occurring outside the office building at the Facility while they were smoking cigarettes. On multiple occasions, sexual assaults occurred in the Third Defendant's office.

On one occasion, the Third Defendant after the close of business, advised her that he needed to show her something and led her to a large warehouse adjacent to the office building. Once inside, he led her to a storage room and sexually assaulted her there. The Plaintiff maintains she had no employment duties or dealings within the warehouse where the sexual assault occurred. Her only employment related dealings or interactions with the Third Defendant included the delivery of invoices to the office building at the Facility.

The Plaintiff indicates that in addition to the sexual assault which occurred in the Facility warehouse, there were other instances of sexual assault, perpetrated by the Third Defendant, which similarly constituted an assault occurring outside of the course of her employment. She was assaulted multiple times after hours, with no co-worker's present, which exposed her to a heightened level of risk, which was not associated with the usual course of her employment.

The Plaintiff indicates that WorkplaceNL has denied her claim for compensation despite the fact that an independent investigation found that the Third Defendant acknowledged engaging in sexual intercourse with her during business hours and after business hours at the Facility on three separate occasions including in the warehouse. It is the Plaintiff's contention that the Third Defendant engaged in gross misconduct.

The Plaintiff maintains that as multiple instances of assault took place outside the course of her employment, with at least one very serious instance occurring outside the course of her employment or operational scope, WorkplaceNL is unable to bar her right to sue the Third Defendant or his employer(s) for any such instances of sexual assault.

It is the Plaintiff's contention that WorkplaceNL has already determined that her claim is not compensable under **the Act**. It is also submitted that this matter is one which issue estoppel applies. The matter has already been decided, such decision was final, and the parties relevant to the proceedings are the same. Even if such is not found to be the case, the Plaintiff submits that she was sexually assaulted outside the course of her employment and that her action is not statute barred.

## 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 or a worker 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.

With regard to the Plaintiff's submission regarding issue estoppel, the entitlement decision is a different issue than the statutory bar determination and, therefore, issue estoppel is not applicable. **Section 19 of the Act** establishes WorkplaceNL's exclusive jurisdiction to determine whether an injury has arisen out of and in the course of employment within the scope of **the Act**. **Section 46 of the Act** establishes WorkplaceNL's jurisdiction to determine if an action is prohibited by **the Act**. This exclusive jurisdiction has been confirmed by the Court of Appeal of Newfoundland and Labrador in Warford v. Weir's Construction Limited, 2012 NLCA 79.

When the Plaintiff applied for WorkplaceNL compensation benefits, WorkplaceNL determined that the Plaintiff was not entitled to benefits because there was insufficient information to establish that an event occurred while she was in the course of her employment which would meet the parameters of **Policy EN-18**. The Plaintiff ceased work in September 2016 and she was referred to counselling for factors unrelated to the alleged sexual assault.

In this case, my role in determining whether this action is barred does not extend to determining whether the alleged sexual assault occurred and caused the injuries that the Plaintiff claims she has suffered. In a civil action, the question of whether the alleged sexual assault occurred must be left to the courts. In my determination, I must answer the following question:

If the Plaintiff establishes that the alleged sexual assault occurred, is the resulting action prohibited by **section 44 of the Act**?

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 questions 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 secretary with [REDACTED] and was working in this capacity during the time the alleged sexual assaults took place. 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 the Third Defendant a "worker" within the meaning of **the Act**?

I can confirm from review of the facts that the Third Defendant was employed as a [REDACTED] at the Second Defendant's warehouse and provincial distribution Facility and does meet the definition of "worker" within the meaning of **section 2(1)(z) of the Act**.

3. Was the First Defendant an employer under the Act?

At the time of the alleged assaults the First Defendant was not an incorporated entity within the province so it was not a registered employer with WorkplaceNL within the meaning of **section 2(1)(j) of the Act**.

4. Was the Second Defendant an employer under the Act?

I can confirm from review of the facts that the Second Defendant is a registered employer with WorkplaceNL within the meaning of **section 2(1)(j) of the Act**.

5. Did the Plaintiff's injuries arise out of and in the course of her employment?

6. Did the injury occur in the conduit of the operations usual in or incidental to the industry carried on by the employer?

Questions 5 and 6 are the main focus of my determination and the issue that is in dispute between the parties.

It has been argued by the First and Second Defendants that given the injury occurred on the premises of an employer, occurred in the process of doing something for the benefit of her employer and presumably occurred on instruction by her employer, the injury arose out of and in the course of her employment. As such, the Plaintiff was in the course of her employment at the time of the injury.

To the contrary, the Plaintiff contends that the entirety of the assaults did not occur in the course of her employment and noted one particular incident that was outside the scope of her employment. Other alleged assaults took place in the Third Defendant's office after the Plaintiff had delivered invoices to the Third Defendant for payment.

**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 judgements about the credibility, nature and quality of that evidence. Decision makers must weigh 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.

### Case Law and Submissions

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

Danyluk v. Ainsworth Technologies Inc.

In this case the appellant became involved in a dispute with her employer over unpaid commissions. The appellant rejected a proposed settlement from the employer and filed a complaint under the Employment Standards Act (ESA) seeking unpaid wages, including commissions in October 1993.

In March 1994, the appellant commenced a court action in which she claimed damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject matter of her ESA claim.

In September 1994, the ESA officer advised the employer that she had rejected the appellants claim for unpaid commissions. At the same time, she ordered the employer to pay the appellant the equivalent of two weeks pay in lieu of notice. The appellant was made aware that she could apply to the Director of Employment Standards for a review of this decision. The appellant did not apply to the director for a review of the decision, instead, she decided to carry on with her wrongful dismissal action in the civil courts.

The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. In June 1996, the Ontario Court (General Division) granted the respondents motions. Only the claim for damages for wrongful dismissal was allowed to proceed.

Analysis

This case provides guidance when determining whether a case meets preconditions of issue estoppel which are 1) that the same question has been decided; 2) that the judicial decision which is said to create the estoppel was final; and 3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

King v. Workplace Health, Safety and Compensation Commission and Omega Investments Ltd.

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

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

Ms. King commenced a civil action against Omega. WorkplaceNL determined that Ms. King was in the course of her employment at the time of her injury. WorkplaceNL determined that the action against Omega was barred under **the Act**, as the accident

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

#### Analysis

In the King case, the Court confirms that in considering **section 45(1)(b)** of the Action, the plain language of the section prohibits action against an employer unless the accident occurred outside the normal course of his business. This case is relevant as these considerations are helpful in determining whether an injury occurred in the conduct of operations usual in and incidental to the industry in which the Second and Third Defendants operate in.

#### Workplace Safety and Insurance Appeals Tribunal Decision No. 2396/07

In this case the worker was employed by an automobile manufacturer. She testified that she was stalked and harassed by a co-worker who also worked on the same line as her for a time. The co-worker would visit her work station on occasion and began making comments that made her nervous. At least some of the events occurred at work and in the employer's parking lot.

The question which was central to the determination of this case is whether the worker's injury arose out of and in the course of her employment.

The tribunal concluded that the while the worker did suffer a negative experience, the events that transpired were viewed as outside of the employment of the worker and not in the control or under the supervision of the employer. The tribunal found the worker did not suffer an accident arising out of and in the course of her employment. There was no entitlement to benefits.

#### Analysis

This case provides limited guidance in determining whether an injury is work related and qualify as arising out of or in the course of employment because it involves the application of Ontario policy. WorkplaceNL has its own policy (**EN-19**) to assist in determining whether an injury arose out of and in the course of employment which is applied in this jurisdiction.

#### Ontario Workplace Safety and Appeals Tribunal Decision 3096/17

In this case a worker filed a statement of claim alleging that they suffered serious personal injuries and impairments as a result of the harassment and sexual assaults

committed by their supervisor. They filed an action against the employer and supervisor. The main point of contention was whether the worker sustained a personal injury by accident arising out of and in the course of employment. If so, then she may not pursue an action against the employer.

It was determined that the worker's injuries clearly fell within the definition of accident: she was the victim of a willful and intentional act by another worker in the workplace. It was found that the worker's right of action against the employer is barred with respect to alleged sexual assaults and harassment that occurred in the workplace. Section 26 of the WSIA does not preclude her action against them with respect to the incident outside of the workplace for which she would not be entitled to claim benefits under the WSIA.

### Analysis

This case provides limited guidance in determining whether an injury is work related and qualify as arising out of or in the course of employment because it involves the application of Ontario policy. WorkplaceNL has its own policy (EN-19) to assist in determining whether an injury arose out of and in the course of employment which is applied in this jurisdiction. With regard to the issue of statutory bar, the case indicates that through his deliberate act of sexual assault, he had taken himself out of the course of employment and the right to sue the assailant was not removed by **the Act** but the action against the employer was barred. This case is different because in our jurisdiction **section 44(2)** and **section 45(1)** of **the Act** specifically allows an action against an employer or against a worker where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

### Marine Services International Ltd. v. Ryan Estate

In this case, two fishermen drowned when their fishing vessel capsized. The widows and dependents of the deceased fishermen received compensation under the provincial Workplace Health, Safety and Compensation Act. Under the federal Marine Liability Act, the estates also commenced actions against U Ltd, M Ltd and its employee P, alleging negligence in the inspection of the fishing vessel by Transport Canada. M Ltd and P applied to the Workplace Health, Safety and Compensation Commission for a determination of whether the MLA action was prohibited by virtue of s. 44 of the WHSCA, and the commission held that the action was, in fact, barred. The estates successfully brought a judicial review of the commission's decision, and it was overturned on the basis of the doctrines of interjurisdictional immunity and federal paramountcy. The Court of Appeal upheld this decision. M Ltd and P appealed the decision of the Court of Appeal. The Supreme Court of Canada allowed the appeal and determined that interjurisdictional immunity and federal paramountcy did not apply and the action was barred.

## Analysis

This case provides guidance on the historic trade off. In exchange for an employer funded public insurance plan which provides compensation to workers who are injured in the workplace, the workers in return give up their right to sue the employers regarding work related injuries.

## Analysis and Conclusion

My review of the evidence indicates that the Plaintiff was working as a secretary at [REDACTED]. Her employment duties included delivering invoices to the front desk of the office building at the Facility. At some point, the Third Defendant requested the Plaintiff attend his personal office near the close of business for the purpose of hand delivering invoices to him directly. According to the statement of claim, personal delivery of the invoices facilitated prompt payment. The Plaintiff contends that there were multiple times when interacting in the Third Defendant's office that sexual assaults occurred. There was another occasion when the Third Defendant led the Plaintiff to a large warehouse adjacent to the office building and allegedly sexually assaulted her.

In answering question 5, **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 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.

**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.

**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. 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.

In review of the facts I find that the Plaintiff was dropping off invoices to the Third Defendant while in the course of her employment as a secretary with [REDACTED]. She has outlined multiple instances in which the assaults took place in the Third Defendant's office and adjacent warehouse which is the premises of an employer. The alleged assaults occurred in the process of doing something for the benefit of her employer, specifically the payment of invoices. I find in this instance the Plaintiff was on the Second Defendant's premises and performing duties which were required in her job with [REDACTED]. The statement of claim indicates that the personal delivery of invoices facilitated prompter payment. If the Plaintiff establishes that the alleged assaults occurred and caused her injuries, the Plaintiff was in the course of employment and therefore, her alleged injuries arose out of and in the course of her employment.

In answering Question 6, we must determine whether the injury occurred in the conduct of the operations usual in or incidental to the industry carried on by the Second Defendant.

**Section 44(2) of the Act states:**

**Compensation instead of action**

44. (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 45(1) of the Act notes:**

**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.

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

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

The Second Defendant operates and maintains a [REDACTED] It owns and maintains an office premise, the Facility. The Third Defendant was employed as a [REDACTED] with the Second Defendant. The alleged sexual assaults committed in the workplace are not part of the Third Defendant's employment duties or the Second Defendant's operations.

Assuming the alleged facts are accurate, the sexual assault conducted by the Third Defendant is not a usual operation of the Second Defendant and is not incidental to the industry carried on by the Second Defendant. As per Ontario Workers Compensation Decision 3096/17, workers who commit intentional sexual assaults take themselves out of the course of employment, therefore, the right to sue is not removed by **the Act**. However, the victims of such assaults at work are still entitled to claim benefits under **the Act**.

By engaging in the alleged activity, the Third Defendant has taken himself out of the scope of his employment by allegedly committing an act which was not part of his employment duties. The sexual assault is outside the normal course of business of the Second Defendant. The alleged assaults were not incidental to the Third Defendant's employment or Second Defendant's operations.

**Section 45(1)** indicates that a worker can bring an action against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of operations usual in or incidental to the industry carried on by the employer. This exception to the statutory bar applies to both employers and workers of that employer.

Provided the Plaintiff can establish the assault occurred and caused the injury, the injury arose out of and in the course of employment. However, I find that the alleged sexual assaults did not occur in the conduct of operations usual in or incidental to the industry carried on by the Second Defendant.

## Determination

It is my determination that the action brought against the Second Defendant and Third Defendant is not statute barred under **the Act**. Although the Plaintiff's injuries did arise

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out of and in the course of her employment, I find her alleged injuries did not occur in the conduct of the operations usual in or incidental to the industry carried on by the Second Defendant. Attached is a certificate which may be filed with the court.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Mantey". The signature is cursive and somewhat stylized.

**Jacqueline Mantey**  
Internal Review Specialist

JM:kb  
Enclosure: Certificate

c: Paula Fudge, Internal Review Clerk  
Chad Horton  
Archibald Bonnell