WorkplaceNL

Health | Safety | Compensation

Third Party Determination

March 20, 2024

Browne Fitzgerald Morgan & Avis
Attn: Sarah Fitzgerald
PO Box 23135
Terrace on the Square
St. John's, NL A1B 4J9

Dear Sarah Fitzgerald:

[redacted]

On September 1, 2023, the **Workplace Health, Safety and Compensation Act** was repealed and replaced with the **Workplace Health, Safety and Compensation Act, 2022**. Although the applications for determination and submissions provided by the parties reference the repealed Act, my determination shall be made in consideration of the current legislation. The new Act uses modern language and aligns with other legislation. There are no changes to benefits, obligations, authority levels or responsibilities.

In accordance with **section 55** of the **Workplace Health, Safety and Compensation Act, 2022** (**the Act**), I have reviewed the submission of [redacted] (the First Defendant) and [redacted] (the Second Defendant) as to whether an action by [redacted] (the Plaintiff) against the Defendants is prohibited by **section 52** of **the Act**.

In addition, I have reviewed the submissions of [redacted] (the Third Party) requesting a determination as to whether the action by the First and Second Defendants against the Third Party is prohibited by **section 52** of **the Act**.

I have reviewed both of the responses of the Plaintiff.

[redacted]

March 20, 2024

Background Information

On or about August 27, 2015, the Plaintiff claims that he slipped on water that had pooled on the floor coming from a vending machine in the food court area on the First Defendant's premises at the [redacted] in [redacted] Newfoundland and Labrador. On the day of the alleged incident, the Plaintiff's employer had a contract to complete construction work in a secure area on the First Defendant's premises which was owned and/or operated by the First Defendant. The Plaintiff was completing work for his employer installing metal beams in the ceiling behind the [redacted] area of the [redacted].

On April 26, 2017, a Statement of Claim was filed by Stephen D. Marshall of the law firm Roebothan McKay Marshall on behalf of the Plaintiff against the First Defendant and the Second Defendant for alleged damages suffered as a result of injuries to the back and legs as a result of an alleged incident. The Statement of Claim maintained that the premises where the incident occurred were operated, controlled and maintained by the First Defendant and the Second Defendant is responsible for the operation of food services and support services at the First Defendant's premises. The Statement of Claim stated:

> 4. "On or about August 27, 2015, the Plaintiff was walking in a careful, cautious and prudent manner on the Premises aforesaid when suddenly and without warning, he slipped and fell as a result, inter alia, a negligent buildup of water on the floor in the food court area of the Premises."

On October 13, 2020, an Application for Determination was received from Sarah Fitzgerald, Browne Fitzgerald Morgan & Avis, who requested the Workplace Health, Safety and Compensation Commission (WorkplaceNL) provide a determination as to whether the action was statute barred pursuant to **section 55** of **the Act** on behalf of the First and Second Defendant.

As well, both the First and Second Defendants have issued a Statement of Claim against [redacted] (the Third Party). It is claimed that the Third Party is the owner of the vending machine that was leaking water and was responsible for operation and maintenance of the vending machine. The First and Second Defendants allege that the vending machine was malfunctioning and the Third Party was negligent in inspecting and maintaining the equipment.

On behalf of the Third Party, Mark Murray, Martin Whalen Hennebury Stamp, requested WorkplaceNL provide a determination under **section 52** of **the Act** as to whether the action of the First and Second Defendant against the Third Party is statute barred in a Request for Determination dated November 13, 2020.

On December 3, 2020, Gail Walsh, Internal Review Specialist, requested that the solicitor for the Plaintiff forward their submission in relation to the First Defendant, Second Defendant and Third Party's request for a determination pursuant to **section 55** of **the Act**.

On February 2, 2021, the Plaintiff's solicitor provided a 35-page WorkplaceNL claim file pertaining to the injuries the Plaintiff allegedly sustained on August 27, 2015.

On March 3, 2021, the solicitor for the Third Party provided a Response to the Reply of the Plaintiff. On March 11, 2021, the Plaintiff's solicitor provided a response to the Third Party's position.

On April 19, 2021, the Internal Review Specialist provided the First Defendant, Second Defendant and Third Party with the submission provided by the Plaintiff.

On May 10, 2021, the solicitor for the Third Party provided a response to the Plaintiff's March 11, 2021 submission.

On January 19, 2022, The First and Second Defendant confirmed that they would not be making any further submissions with respect to the Application. On August 17, 2022, the internal review specialist advised that all submissions were received. The request for determination was reassigned to me on November 1, 2023.

The agreed upon facts of the case are as follows:

- On or about August 27, 2015, the Plaintiff was working for his employer at the [redacted] behind the [redacted] area installing metal beams in the ceiling.
- The Plaintiff went to the [redacted] food court during a lunchbreak on August 27, 2015 and claims to have slipped on water in the food court.

Legislation and Policy

Section 2 of **the Act** states:

Definitions

2. (1) In this Act

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

(i) a person who has in service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or in connection with an industry,

(ii) the principal, contractor and subcontractor referred to in section 144,

(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 as employer submit to the operation of this Act,

(vi) the Crown and a corporation, commission or similar body, established by or under an Act of the province, and

(vii) in respect of 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;

(v) 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) occupational 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;

(jj) worker" means a person who enters 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 receive 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 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 preliminary to employment,

(iii) a part-time or casual worker, and

(iv) an executive officer, manager or director of an employer.

Section 20 of **the Act** states:

Exclusive jurisdiction

20. (1) The commission has exclusive jurisdiction to examine, hear and determine all matters and questions arising under this Act and all matters or things in respect of which a power or authority is conferred upon the commission.

....

(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 50 of **the Act** states:

Compensation payable

50. (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 52 of **the Act** states:

Compensation instead of action

52. (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 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, dependents, the worker's personal representative 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 54 (1) of **the Act** states:

Where action allowed

54. (1) Where a worker sustains an injury in the course of the worker's employment in circumstances which entitle the worker or dependents to an action

(a) against a 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 53 applies,

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

Section 55 of **the Act** states:

Commission decides if action prohibited

55. Where an action in respect of an injury is brought against an employer or a worker by a worker or 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(1)(jj)) of the Workplace Health, Safety and Compensation Act, 2022 (the Act); and
2. the injury as defined under subsection 2(1)(v) 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 50(1) 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.

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

1. Employer's Premises

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

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

Where the premises is occupied by more than one employer, the employer's premises includes the exclusive premises of the employer and the shared or common areas such as entrances, exits, elevators, stairs, and lobbies.

Employer's premises does not include public or private land, buildings, roads (except captive roads as discussed in this section) or sidewalks, used by the worker to travel to and from home and the employer's premises, or private parking arrangements made by the worker independent of the employer.

….

(d) Shopping Malls versus Multi-Employer Buildings

The worker is considered to be in the course of employment upon entering the particular premises assigned to the employer.

In multi-employer buildings (multi-level office buildings occupied by more than one employer or tenant) the worker is covered in common areas such as entrances, lobbies, stairs, elevators, escalators, and exits. This is based on the principle that workers have a right of way in certain areas of buildings used by employers and their workers as opposed to buildings provided for the general public such as shopping malls. However, an injury in a common area may not be covered if the reason for being in that area is a deviation from the employment.

A worker is not covered while in the common areas of a shopping mall shared by workers and the public unless the entire area is owned and maintained by the employer. Such areas are not controlled by the employer.

(e) Lunchrooms, Rest and Coffee Breaks, Personal Needs and Comfort

Where the employer provides a lunchroom or similar facility on the employer's premises, or where an injury occurs during lunch hour, coffee break, or other similar rest period on the premises of the employer, or where an injury results from activities related to personal need or comfort, the injury is considered to be compensable providing:

- it occurs while the worker is making reasonable and proper use of the employer-provided facility; and,
- it arises from a hazard of the facility, not from a personal hazard (see also **Personal Risk**).

Workers taking lunch or breaks at worksites (e.g. construction sites) are covered while at the site.

Workers are not covered if they choose to leave the employer's premises to eat or perform other personal activities or errands.

(f) Captive Workers

Captive workers are workers who, because of the circumstances and nature of their employment, have no reasonable alternative to living in an employer-provided facility.

2. Coverage during Travel

a) Travel for the Purpose of Employment

Workers are covered while traveling where such travel is required either specifically or

as an expected part of employment duties. Coverage begins when the worker begins the employment related travel and extends continuously while the travel is taking place, unless there is personal deviation that removes the worker from the course of employment. An injury sustained during a refreshment break while traveling for the purpose of employment is covered.

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

Policy EN-08, Third Party Actions states:

Part I – Rights of Action

A. Where Court Action Not Allowed

Section 52 of the Act prevents a worker or his or her dependents from suing another worker or an employer covered under the Act. Even though another worker or an employer may have been responsible for the injury, a worker or dependent has no choice other than to claim compensation.

Where another worker or an employer has caused an injury, it must be clearly established that they were in the course of their employment (and, therefore, covered under the Act) at the time of injury.

Position of the First and Second Defendants

The First and Second Defendants are seeking a determination pursuant to **section 55** of **the Act** that the Plaintiff has no right of action against the First and Second Defendants and the action is barred pursuant to **section 52** of **the Act**.

The First and Second Defendants submit that at the time of the alleged injury, the Plaintiff was an employee of [redacted]. The solicitor also notes that the First and Second Defendants were, at all times, registered as employers within the meaning of **the Act**. Although the Plaintiff was not employed by the First or Second Defendant, the solicitor asserts that the action is prevented by **section 52** and **Policy EN-08** which prevents a worker from suing another worker or an employer covered under **the Act**, even if the other worker or employer is responsible for the injury.

Furthermore, **Policy EN-19** and **section 50** (previously **section 43**) of **the Act** provide that if an employee is injured on the employer's premises, then the injury arose in the course of employment, even if it occurs during a lunch hour.

The Request for Determination asserts that lunchrooms and common areas are included in the description of employer premises under **Policy EN-19** so long as the injury "occurs while the worker is making reasonable and proper use of the employer-provided facility, and it arises from a hazard of the facility not from a personal hazard".

The solicitor maintains that:

- The Plaintiff's alleged injury occurred while on the work site, in a "lunchroom" on the premises during regular work hours during a lunch break.
- The Plaintiff was using the facilities for their intended purpose when the alleged slip and fall occurred due to a hazard from the facility.

In the Application for Determination, the First and Second Defendants' solicitor submits that the above confirms the Plaintiff, at the time of the alleged slip and fall, was in the course of employment under **Policy EN-19**. Therefore, it is argued that the alleged injuries are compensable under **the Act**.

The Application for Determination claims that any alleged negligence by the First and Second Defendants resulting from the pooled water on the floor arose as part of usual operations of the Defendants which includes maintenance of the [redacted] for the First Defendant and operation of food services and support services for the Second Defendant. As such, the solicitor for the First and Second Defendants maintains that the action is statute barred pursuant to **section 52** of **the Act**.

Position of the Third Party Defendant

The solicitor for the Third Party asserts that the action of the First and Second Defendants issued on July 11, 2018 against the Third Party for alleged negligence as the owners, operators and maintainers of the machine that is alleged to have malfunctioned is prohibited by **section 52** of **the Act**. The solicitor notes that the Third Party is a registered employer under **the Act**.

The solicitor maintains that the Plaintiff was in a lunchroom on the work site during work hours or while on his lunch break. It is argued that the Plaintiff was using the facilities for the intended purpose when the alleged slip and fall occurred due to a hazard in the facility.

The Request for Determination asserts that lunchrooms and common areas are included in the description of employer premises under **Policy EN-19** so long as the injury "occurs while the worker is making reasonable and proper use of the employer-provided facility, and it arises from a hazard of the facility not from a personal hazard".

The Request for Determination outlines that the Plaintiff was not employed with the Third Party; however, the Plaintiff was in the course of employment; thereby the alleged

injuries are compensable. The solicitor states that since the Third Party is a registered employer under **the Act**, the Third Party is protected by **the Act** and **Policy EN-08** from the action.

The Third Party's solicitor denies that the alleged pooling of water from the vending machine was within the scope of their responsibility and any alleged negligent action by them or their employees resulting in pooled water arose from the usual operations, which is limited to maintaining and operating the vending machine. As the maintenance and operation of the vending machine in question arose from the usual operations of the Third Party, the solicitor states that the action against the Third Party is barred by **the Act**. As well, the Request for Determination maintains that the action brought by the Plaintiff on the First and Second Defendants is also barred pursuant to **the Act**.

In response to the Plaintiff's submission, the Third Party submits that the Plaintiff did not request a review of the decision denying the claim in 2015. The solicitor for the Third Party asserts that a number of other factors were not considered in the denial of the claim that may have resulted in a different outcome such as whether there was enough room in the employer lunch room trailer for all employees. The Third Party submits that under **Policy EN-19**, when a worker is injured while travelling for a refreshment break while in the course of employment, there is entitlement to compensation. In addition, the Third Party argues that the food court where the alleged injury occurred is on the jobsite and the denial of the Plaintiff's claim since he was not in the employer designated area essentially makes the Plaintiff a captive worker under **Policy EN-19**; thereby extending entitlement to compensation regardless of the individual circumstances of the case.

The Third Party's solicitor questions the definition of premises in the entitlement decision and submits that to deny the Plaintiff's claim would be akin to restricting entitlement to compensation for workers who remove themselves for bathroom breaks, for washing their hands, or for returning to their work station to retrieve a forgotten personal item or piece of equipment.

Position of the Plaintiff

On February 2, 2021, the solicitor of the Plaintiff provided a copy of the Plaintiff's WorkplaceNL claim file noting that the Plaintiff's application for compensation benefits was denied. I note that the evidence contained in the file included an Incident Investigation Report completed by the Plaintiff's employer dated August 27, 2015. The report states that at approximately 12:00 am, the Plaintiff went to the [redacted] food court to look for a microwave. At the time, the Plaintiff was on his break. The Plaintiff slipped on water that had pooled on the floor which was coming from a "cola machine". According to the report, the Plaintiff slipped but was able to catch himself and did not fall. The incident was witnessed by [redacted] a food court worker.

The Project Manager from the Plaintiff's employer provided a statement noting that the Plaintiff was on a non-paid lunch break at the time of the incident. The employer's statement noted that employees are required to use the lunchroom provided by the employer at the jobsite which is equipped with a microwave and all other necessary utilities.

A November 10, 2015 claim note from the Plaintiff's WorkplaceNL claim file confirms that the Plaintiff was aware the employer had a designated trailer for employees for lunches that included a table, microwave and refrigerator.

In a correspondence dated March 11, 2021, the Plaintiff's solicitor responded to the Third Party's submission stating that the possible lack of adequate room for all employees in the lunchroom presented in the Response from the Third Party is based on speculation and conjecture rather than on the facts of the case. Furthermore, the solicitor of the Plaintiff states that the Plaintiff's employment status does not fit the definition of a captive worker. The Plaintiff's solicitor asserts that this situation is no different than the Plaintiff working in one area of the mall and taking his lunch break at a food court at a shopping mall and the facts do not support the Plaintiff was mandated to remain on the premises.

The solicitor states the Plaintiff's alleged injuries did not occur during regular working hours. The Plaintiff's solicitor requests the original decision of WorkplaceNL be affirmed.

Reasoning and Analysis

I have reviewed and considered all submissions from the parties involved in this case. **Section 52(1)** of **the Act** provides the statutory bar to actions of a worker against an employer or a worker for an injury that arises 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.

The Plaintiff submits that there is no new evidence that would alter the facts upon which the initial WorkplaceNL entitlement decision was made. However, an entitlement decision is a completely different decision than the statutory bar determination. With regard to entitlement decisions, **sections 20** and **50** of **the Act** establish WorkplaceNL's exclusive jurisdiction to examine, hear and determine all matters and questions arising under **the Act**, including whether an injury has arisen out of and in the course of employment. For statutory bar determinations, **section 55** 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.

Section 54 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.

In this case, my task is to determine whether the action of the Plaintiff brought against the Defendants and the action of the First and Second Defendant against the Third Party are barred by the provisions of **the Act**. My role does not extend to whether there was negligence on the part of the First Defendant, Second Defendant and/or the Third Party. In a civil action, the question of negligence must be left to the courts.

The Plaintiff allegedly slipped on water that had accumulated on the floor in the food court of the First Defendant's premises while on an unpaid lunch break at approximately 12:00am on August 27, 2015. The case law is clear that, in making my determination there are a number of questions that must be considered:

1. Is the plaintiff a worker within the meaning of **the Act**?

2. Did the Plaintiff's alleged injuries arise out of and in the course of employment?

3. Is the defendant an employer within the meaning of **the Act**?

4. If the defendant is an employer within the meaning of **the Act**, did the injury occur otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer?

Question 2 is the core focus of my decision and the main issue which I must determine. Therefore, I will first address questions 1, 3 and 4.

Question 1:

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

I confirm from review of the facts that the Plaintiff was employed by [redacted] to install metal beams in the ceiling behind the [redacted] area on August 27, 2015. The facts of the case support that the Plaintiff is a worker within the meaning of **the Act** while installing the metal beams in the ceiling behind the [redacted] area.

Question 3:

3A. Are 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 January 22, 1999. The Second Defendant, [redacted]

[redacted] has been a registered employer with WorkplaceNL since May 19, 2000. Thereby, the Defendants both meet the legislative definition of “employer” under **section 2(k)** of **the Act**.

3B. Is the Third Party an “employer” under **the Act**?

I confirm that the Third Party has been a registered employer with WorkplaceNL since February 6, 1981. Thereby, the Third Party meet the definition of “employer” under **section 2(k)** of **the Act**.

Question 4:

4. Did the “injury” occur in the conduct of the operations usual in or incidental to the industry carried on by the First Defendant, the Second Defendant and the Third Party?

At the time of the alleged incident, the Second Defendant was a registered employer operating within the province of Newfoundland and Labrador, and was responsible for the operation of food services and support services on the First Defendant’s premises. The Second Defendant submits that any potential negligence with regard to maintenance and/or operation of the soda machine is arising from their usual operations.

The First Defendant is involved in the business of operating the [redacted]. The First Defendant submits that at the time of the alleged incident, the First Defendant was responsible for operations and the alleged pooled water arose from the usual operations that they carried out, which include the upkeep of the [redacted].

The Third Party operates a beverage and soda machine supply business with vending machines located on the First Defendant’s premises, including the food court. The Third Party submits that the alleged pooled water arose from the usual operations they carried out, maintaining and operating soda machines.

I note that the Plaintiff does not dispute that the conduct of the Defendants and Third Party constitutes operations incidental to the industry in which they operate.

On this point I agree with the Defendants and Third Party submissions that the alleged incident occurred in the conduct of operations usual in and incidental to the industries carried on by the First Defendant, the Second Defendant and the Third Party.

Question 2:

2. Did the Plaintiff’s alleged injuries arise out of and in the course of employment?

It has been argued by the First Defendant, the Second Defendant and the Third Party that the Plaintiff was in the course of employment and was on the work site in a lunchroom on the premises at the time the injury occurred. Therefore, the solicitor for the First and Second Defendant state the Plaintiff does not have a right of action against the Defendants.

I note that the Plaintiff's Statement of Claim states that the First Defendant is responsible for the operation, control and maintenance of the premises and the Second Defendant was contracted to perform operations of food services and support services on the First Defendant's premises. The answers to Interrogatories on behalf of the Plaintiff notes that the Plaintiff was employed by their employer to perform work in an area behind the [redacted] area of the First Defendant's premises. His duties were construction work, in particular, installing metal beams in the ceiling. This document also confirms that the Plaintiff was on an unpaid lunchbreak when the incident occurred.

On the Worker's Report of Injury (submitted by the Plaintiff's solicitor on February 2, 2021), the Plaintiff clearly reports that the accident occurred during a lunch break when he went to the food court of the [redacted] In a claim note dated November 10, 2015 from the WorkplaceNL claim file, WorkplaceNL's intake adjudicator documented that the Plaintiff clarified the employer designated a trailer for employees to use as their lunchroom that was located close to the [redacted] site. The Plaintiff advised the trailer was equipped with tables, a microwave and refrigerator.

The statement of the project manager for the Plaintiff's employer dated November 4, 2015, confirms that the injury occurred during an unpaid lunch break. It also states that the employees are required to use the lunchroom provided on the jobsite which has a microwave and all necessary utilities.

Case Law

Section 20(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 cases submitted to determine relevance to the case at hand.

Marine Services International Ltd. v. Ryan Estate (Supreme Court of Canada [2013] SCC 44

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 **section 44** of the Workplace Health, Safety and Compensation Act (**section 52** of **the Act, 2022**), 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. The court noted that although there was not a direct employment relationship between the deceased fishermen and the Defendants in the case:

> "…the statutory bar in s. 44 of the WHSCA does not only benefit an "employer in a direct employment relationship with the injured worker. Any employer" that contributes to the scheme (and any worker of such an employer) benefits from the statutory bar, as long as the worker was injured in the course of his or her employment and the injury "occurred … in the conduct of the operations usual in or incidental to the industry carried out by the employer.""

This case provides guidance in determining whether the Defendants and Third Party are "employers" under **the Act** 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 usual operations so long as the injury arises out of and in the course of employment.

WorkplaceNL developed **Policy EN-19**, **Arising Out of and in the Course of Employment** as a guide for decision makers when determining whether the injury arose 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. It also indicates that the injury happened at a time and place and in circumstances consistent with and reasonably essential to the employment. "Arising out of" refers to what caused the injury and "in the course of" refers to the time and place of the injury and its connection to the employment.

Policy EN-19, provides a number of indicators which can be used as a guide in determining whether an injury has arisen out of and in the course of employment. 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.

On August 27, 2015, the Plaintiff allegedly slipped on water that had accumulated on the floor in the food court of the First Defendant's premises. A review of the facts confirms that the Plaintiff was visiting the food court while on an unpaid lunch break.

The Plaintiff takes the position that at the time of the alleged incident, he was on an unpaid lunch break from his employment and; therefore, was not in the course of employment at the time of the incident. Using the indicators above, I find that at the time of the alleged injuries, the Plaintiff was on an unpaid lunch break so he was not doing something for the benefit of the employer. Furthermore, I find that the Plaintiff was not directed by the employer to go to the food court for his lunch break. Rather, the employer provided a trailer for employees to take their breaks. In review of the evidence, the Plaintiff's employer did not supply the equipment or materials in the food court. However, the employer provided a trailer to the Plaintiff with necessary equipment for breaks which the Plaintiff did not use.

With respect to risk, the Plaintiff allegedly slipped on water in the food court. The water was allegedly coming from a vending machine. The food court is not in the worker's assigned construction work area. Upon review of the facts, I find the risk of the Plaintiff slipping on water in a common area of a public building is not the same level of risk exposure for the Plaintiff while performing normal construction work in the course of employment. While in the food court, the worker is at the same level of risk as other members of the public.

Further, the Plaintiff and the Plaintiff's employer confirm the alleged incident occurred during an unpaid lunch break. Therefore, I find the Plaintiff was not in the course of paid employment. Therefore, I find the Plaintiff was not being paid when the alleged injuries occurred. Finally, it is claimed that the injuries resulted from a vending machine that caused a pooling of water on the floor in the food court which was allegedly caused by another 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 upon the worker leaving the premises at the end of the shift. Therefore, it must be determined whether the Plaintiff was on the employer's premises when the injury occurred. I acknowledge that the Plaintiff was working for a contractor on the premises of the First Defendant which are not premises owned by the Plaintiff's employer. For purposes of this

determination, I will consider the "employer's premises" to be the portion of the premises of the First Defendant that constitutes the Plaintiff's employer's work site. While the Plaintiff was installing the metal beams in the ceiling behind the [redacted] area, he was clearly on the employer's premises since this was his work site. This area is not accessible to the public and not considered a public space. The question to be determined is whether the employer's premises extends to the food court while the Plaintiff was on a lunch break.

While **Policy EN-19** does not specifically addres [redacted] it does address shopping malls and multi-employer buildings. In this case, I find that the food court in the [redacted] where the Plaintiff was allegedly injured is more akin to a shopping mall than a multi-employer building. The food court is an area accessible to the general public with retail vendors specific to food services. The food court is regularly accessed by members of the general public. The alleged incident did not occur in an area of the [redacted] that is behind [redacted] where there is limited public access or in an area generally used only for workers and employers.

According to **Policy EN-19**, in the case of a shopping mall, a worker is not covered under **the Act** in a common area which is shared by workers and the public unless the entire area is owned and maintained by the employer. This is because the area is not controlled by the worker's employer.

The Plaintiff was on an unpaid lunch break in a common area shared by workers and the public which was not owned or maintained by the worker's employer. The worker was outside of the break area designated by the employer when the alleged incident occurred. The Plaintiff was reportedly looking for a microwave; however, it has been confirmed by the Plaintiff and the Plaintiff's employer that a microwave was provided by the employer in the designated break trailer. Based on the above criteria and the public nature of the food court, I find that the food court does not constitute the employer's premises under **Policy EN-19**.

It has been argued that **Policy EN-19** indicates that where the employer provides a lunchroom or similar facility on the employer's premises, or where an injury occurs during lunch hour, coffee break, or other similar rest period on the premises of the employer, the injury is considered to be compensable providing it occurs while the worker is making reasonable and proper use of the employer-provided facility; and it arises from a hazard of the facility, not from a personal hazard. This argument is based on the food court being considered the employer's premises. However, since I have found that the food court is not the employer's premises, the following policy statement from **Policy EN-19** is more applicable:

> "Workers are not covered if they choose to leave the employer's premises to eat or perform other personal activities or errands."

The Third Party has indicated that there may not have been adequate room for all employees in the lunch room provided by the Plaintiff's employer. However, the relevant question is whether the Plaintiff was on the employer's premises when the alleged injury occurred. In this case, the construction site behind the [redacted] area and the employer assigned lunchroom were the employer premises. I find that the Plaintiff left the employer's premises when he went to the public food court for his unpaid lunch break rather than the designated break trailer provided by the employer. As such, the Plaintiff was not in the course of his employment when he went to the food court.

The Third Party suggests that the Plaintiff's movement to the food court is akin to "Coverage during Travel" under **Policy EN-19**. Coverage during travel is only covered when the travel is required either specifically or as an expected part of employment duties. In this case, there is no evidence that the Plaintiff was travelling for the purpose of employment. As such, the Plaintiff was not on a refreshment break while travelling when he went to the food court.

The solicitor for the Third Party suggests that to deny compensation to the Plaintiff based on the fact that he was not in the employer designated area essentially makes the Plaintiff a captive worker. **Policy EN-19** stipulates that to be considered a captive worker, one has no other reasonable alternatives to living arrangements other than the employer-provided facilities. In review of the facts, the Plaintiff arrived at the beginning of the shift and returned home at the end of the day. There is no evidence to indicate the Plaintiff was living in an employer-provided facility due to the circumstances and nature of his employment. Therefore, in this case, the worker does not meet the definition of captive worker.

To summarize, the Plaintiff's alleged injury occurred while the Plaintiff was on an unpaid lunch break and did not occur on the employer's premises, the alleged injuries did not occur in the process of doing something for the benefit of the employer, did not occur in response to instructions from the employer, and did not occur in the course of using equipment or materials supplied by the employer. Further, while in the food court, the worker is at the same level of risk as other members of the public. Based on the criteria outlined in **Policy EN-19**, I find that the alleged injuries sustained in the incident at the food court on the First Defendant's premises did not arise out of and in the course of employment.

Determination

Although the First Defendant, the Second Defendant and the Third Party are "employers" under **the Act**, and the Plaintiff was a "worker" under **the Act**, the alleged injuries did not arise out of and in the course of employment.

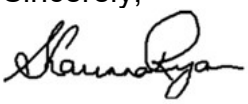
[redacted]

March 20, 2024

It is my determination that the action brought against the First and Second Defendant is not statute barred under **the Act**. As well, it is my determination that the action brought against the Third Party is not statute barred under **the Act**.

The attached certificate has been filed with the court.

Sincerely,



Shaunna Ryan
Internal Review Specialist

SR:kb
Enclosure: Certificate

c: Paula Fudge, Internal Review Clerk
Stephen Marshall, Roebothan McKay Marshall
Mark Murray, Martin Whalen Hennebury Stamp