WorkplaceNL
Health | Safety | Compensation

Third Party Determination

June 5, 2024

Koren Thomson
Stewart McKelvey
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Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3

Dear Koren Thomson:

[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On September 1, 2023, the **Workplace Health, Safety and Compensation Act** was repealed and replaced with the **Workplace Health, Safety and Compensation Act, 2022**. Although the applications for determination and submissions provided by the parties reference the repealed Act, my determination shall be made with reference to the current legislation.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 submissions of [redacted] (the Second Defendant) and [redacted] (the Fourth Defendant) as well as [redacted] (the Third Defendant) as to whether an action by [redacted] (the Plaintiff) against the Defendants is prohibited by **section 52** of **the Act**.

Background Information

On May 4, 2015, the Plaintiff was removing a boiler from a property on a job site when an accident caused him to roll his ankle. At the time of the injury, the Plaintiff was working as an apprentice plumber employed with [redacted]. The Plaintiff sought medical attention at the [redacted] in [redacted] Newfoundland and Labrador. The First Defendant, an emergency room physician,

assessed the Plaintiff and ordered an x-ray of the ankle. The First Defendant diagnosed the Plaintiff with an ankle sprain and he was discharged to home.

The Statement of Claim maintains that the Plaintiff's ankle did not improve and he continued to see his family physician. The family physician referred the Plaintiff to the Third Defendant, an orthopaedic surgeon at [redacted] in the [redacted], Newfoundland and Labrador, for further assessment in relation to the ankle injury.

On or about August 21, 2015, the Third Defendant assessed the Plaintiff and a consultation report was completed for the Workplace Health, Safety and Compensation Commission (WorkplaceNL). In the report, the Third Defendant diagnosed the Plaintiff with a sprained ankle which occurred three to four months prior to the assessment.

The Plaintiff's physician then referred him for a second opinion with an orthopaedic surgeon in the [redacted] Newfoundland and Labrador. The second orthopaedic surgeon ordered a CT scan which showed the presence of an osteochondral lesion along the posterolateral aspect of the talar dome with two tiny bodies within the posterior joint space. The Plaintiff then met with [redacted], Orthopaedic Surgeon, to discuss a surgical debridement. The Plaintiff underwent surgery on November 26, 2016 for the right ankle.

In the Response to Demand for Particulars, the Plaintiff confirmed that he applied for compensation benefits from WorkplaceNL which were approved under WorkplaceNL claim number [redacted] (Tab 2, Submissions from the Second, Third and Fourth Defendants).

On behalf of the Plaintiff, the Statement of Claim was filed by Kenneth Mahoney of the law firm Rogers Rogers Moyse on May 4, 2017 against the Defendants for damages resulting from alleged negligence and/or breach of contract. Kenneth Mahony continues to represent the Plaintiff and is now with the law firm Bennett Law. The Plaintiff claims that the Defendants breached their contractual duties towards the Plaintiff to provide medical services required by the Plaintiff in accordance with the standard of care expected of physicians with the qualifications, training and experience of the First and Third Defendants and/or of Hospitals which carry out the duties and responsibilities of the Second and Fourth Defendants. The Plaintiff also claims that the Second and Fourth Defendants are directly liable to the Plaintiff on the basis of their failure to properly supervise and monitor the physicians and/or their employees, servants and/or agents.

The Plaintiff claims the First Defendant failed to properly diagnose an ankle injury, and the Second Defendant is vicariously liable for this negligence in their capacity of a statutory body incorporated in the Province of Newfoundland and Labrador under the *Regional Health Authorities Act* SNL 2006 Chapter R-7.1.

According to the Statement of Claim, the Plaintiff also claims the Third Defendant was allegedly negligent by failing to provide a medical chart review or proper examination of the Plaintiff's ankle before concluding that the ankle was "perfectly normal" and encouraging the Plaintiff to resume all activities, including employment, without restrictions, and the Fourth Defendant is vicariously liable for this negligence in their capacity of a statutory body incorporated in the Province of Newfoundland and Labrador under the *Regional Health Authorities Act* SNL 2006 Chapter R-7.1.

At paragraphs 16 and 18 of the Statement of Claim, the Plaintiff claims that the Second and Fourth Defendants, and their employees, servants and/or agents, are liable for:

- Alleged failure to properly supervise and/or monitor the doctors to whom it had granted treatment privileges at its' hospitals, including the First and/or Third Defendants;
- Alleged failure to meet the standard of care required in granting treatment privileges at its hospitals to the First and/or Third Defendant when it knew or ought to have known that the attending physician was not able to meet the standard of care required of a physician with the qualifications, training and experience of the First and Third Defendants in the Province of Newfoundland and Labrador in the treatment of the Plaintiff;
- Alleged failure of the Second and Fourth Defendants to provide adequate staff, equipment and/or facilities to the First and Third Defendants to assist in carrying on the treatment of the Plaintiff; and
- Such other alleged negligence as may appear.

On April, 12, 2021, Koren Thomson of the law firm Stewart McKelvey, filed a submission to WorkplaceNL on behalf of the Second and Fourth Defendants. In the submission, the Second and Fourth Defendants plead that the action of the Plaintiff against the Second and Fourth Defendants is statute barred by the operation of **the Act** pursuant to **section 52** (previously **section 44**) of **the Act**.

On April 22, 2021, WorkplaceNL acknowledged receipt of the submission which had been copied to all parties.

On May 4, 2021, Annette Conway of the law firm Curtis Dawe filed a submission requesting WorkplaceNL provide a determination on whether the action was statute barred pursuant to **section 52** (previously **section 44**) of **the Act** on behalf of the Third Defendant. The Third Defendant is now represented by Robert Cook of the law firm Curtis Dawe.

On May 6, 2021, the Second and Fourth Defendants confirmed that no further submission will be provided to WorkplaceNL at that time.

On September 15, 2022, the internal review specialist wrote the Plaintiff's solicitor and requested the Plaintiff submit a response within 3 weeks to the applications for determination submitted by the Second, Third and Fourth Defendants.

On March 13, 2024, the internal review specialist wrote the Second and Fourth Defendant's solicitor and advised that a submission from the Plaintiff had not been received following the September 15, 2022 request. Therefore, a determination whether the action is statute barred would proceed on the information on record. The March 13, 2024 letter was copied to all parties.

As of the date of this determination, WorkplaceNL has not received a submission on behalf of the Plaintiff. As a reasonable timeframe has been provided for the Plaintiff to provide a submission, the Defendants' requests for a determination in relation to the matter will proceed without a submission from the Plaintiff.

Legislation and Policy

I have reviewed the following:

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.
…

10. ***Injury During Compensable Treatment or Return to Work Programming***

Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.

Where a worker is involved in a WorkplaceNL-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program.

Position of the Second and Fourth Defendant

The Second and Fourth Defendants submit that the Action of the Plaintiff is statute-barred against the Second and Fourth Defendants. The Second and Fourth Defendants note that **section 20** of **the Act** provides WorkplaceNL the exclusive jurisdiction to determine questions arising out of **the Act**. This includes whether an Action in respect to an injury is prohibited by **the Act**. Furthermore, compensation benefits are payable for injuries that arise out of and in the course of employment under **section 50** of **the Act**. The Second and Fourth Defendants further note that pursuant to **section 52** of **the Act**, where an injury arises out of and in the course of employment, a worker, dependant, the worker’s personal representative or the employer of the worker have no right of action with respect to the injury against an employer or 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.

The Second and Fourth Defendants claim that at all times material, the Plaintiff was a worker under **the Act** working as an apprentice plumber with [redacted] in the Province of Newfoundland and Labrador.

Furthermore, the Second and Fourth Defendants argue that at all times material, the Second and Fourth Defendants were employers under **the Act**. The Second and Fourth Defendants are engaged in, about or connected with the industry that delivers and administers health care and community services in their regions. As part of their industry, they manage and control the operation of various programs and institutions within their jurisdictions, including the facilities where the Plaintiff received the alleged negligent medical treatment.

The Statement of Defence of the Second and Fourth Defendant states that the emergency room physician who treated the Plaintiff was [redacted]. The Statement of Defence states that, at all times, [redacted] was a physician registered and licensed to practice medicine in the Province of Newfoundland and Labrador. The First Defendant had privileges at the Hospital which is managed and controlled by the [redacted]

The Second and Fourth Defendants maintain that the May 4, 2015 ankle injury arose out of and in the course of employment and; therefore, the injury is compensable and the Plaintiff is entitled to compensation benefits under **the Act**.

Further, the submission states that the consequences of the medical treatment for the Plaintiff's injury are also compensable even if the consequences arise from the alleged negligent treatment of a workplace injury. The Second and Fourth Defendants claim that the treatment of the injury, including the alleged negligent treatment, and resulting losses for which the Plaintiff claims were a reasonably foreseeable consequence of the injury.

Position of the Third Defendant

The Third Defendant maintains that the Third Defendant was at all times material, a fee for services physician at the [redacted] in the town of [redacted] Newfoundland and Labrador, and was duly qualified and licensed to carry on the practice of medicine in the specialty of orthopaedic surgery in the province. The submission states that the Third Defendant was registered with WorkplaceNL as a sole proprietor and principle of [redacted] under firm number [redacted]. As such, the Third Defendant submits that the Third Defendant is an "employer" under **the Act** that was engaged in, about or in connect with the industry of the delivery of health services in the province.

The Third Defendant submits that at all times material, the Plaintiff was a "worker" under **the Act**. Furthermore, the Third Defendant submits that the Plaintiff's injuries are compensable as the injuries arose out of and in the course of his employment as an apprentice plumber with [redacted] The Third Defendant maintains that the Plaintiff was in the process of "doing something incidental to his employment", when he rolled his ankle while lifting a hot water boiler out of a home on a job site. At the time of the incident, the Third Defendant notes that the Plaintiff was under a paid apprenticeship and there was a causal connection between the Plaintiff's employment and the injuries.

The submission argues that the consequence of medical treatment for a workplace injury is compensable under **the Act**, even if the consequence arises from negligent treatment. The Third Defendant submits that the alleged negligence is not an intervening event that breaks the chain of causation, and the treatment for the Plaintiff's injuries, and any resulting losses, were a reasonably foreseeable consequence of the injuries. Therefore, the Third Defendant maintains that pursuant to **section 52** of **the Act**, the Action initiated by the Plaintiff against the Third Defendant is statute-barred.

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 for which compensation is payable or which 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 Second, Third and Fourth Defendants note that the Plaintiff applied for compensation benefits following the injury of May 4, 2015 and WorkplaceNL provided compensation benefits for same. This is supported in the Response to Demand for Particulars which notes the Plaintiff applied for, and received compensation benefits in relation to the injury under claim number [redacted]. 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 and whether compensation is payable. 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. The Internal Review Division has been delegated the authority to make statutory bar decisions in accordance with **Policy EN-08**.

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

The case law is clear that, 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] and working in his capacity as an apprentice plumber on May 4, 2015. Therefore, I find that the Plaintiff was a worker under **section 2(jj)** of **the Act**.

2) Are the Second, Third and Fourth Defendants "employers" under **the Act**?

   I confirm that the Second Defendant is a registered employer with WorkplaceNL under Firm number [redacted]. As well, the Third Defendant is a registered employer with WorkplaceNL under the Firm name [redacted] The Fourth Defendant is a registered employer with WorkplaceNL under firm number [redacted] As such, I confirm the Defendants meet the legislative definition of "employer" under **section 2(k)** of **the Act**.

3) Did the Plaintiff injuries arise out of and in the course of employment?

   This is the main focus of my decision and the issue which must be determined.

   In this case, the Plaintiff alleges that he has suffered injuries as a result of alleged negligent treatment resulting in a delay in the proper diagnosis of posterolateral osteochondritis dissecans lesion to the ankle.

   A review of the facts of the case confirm the Plaintiff was assessed by the First Defendant at the Second Defendant's facility on May 4, 2015 for a right ankle injury. The First Defendant ordered an x-ray which noted soft tissue swelling over the lateral malleolus, but did not identify any fracture or suspicious bony lesions. The First Defendant diagnosed an ankle sprain and the Plaintiff was discharged from care.

   Subsequently, the Plaintiff was assessed by the Third Defendant on August 21, 2015 at a facility managed and controlled by the Fourth Defendant. The Third Defendant reviewed the findings from a physical examination and the x-ray results concluding that the Plaintiff had a sprained ankle three to four months prior to the

assessment. The Third Defendant indicated there was no need for surgery or further investigations and encouraged the Plaintiff to return to regular activity.

It is noted in the evidence that in January 2016, the Plaintiff was assessed by a second specialist in orthopedics who ordered a CT scan of the right ankle. The CT scan confirmed the presence of an osteochondral lesion along the posterolateral aspect of the talar dome. The Plaintiff underwent a right ankle arthroscopy with debridement and microfracture of OCS lesion with [redacted] on November 25, 2016.

Case Law

Gallately v. Newfoundland Worker's Compensation Appeal Tribunal, 1995 CarswellNfld 14 (NLCA)

While driving home from a business trip, Gallately was seriously and permanently disabled in a motor vehicle accident. At the time of the accident, his blood alcohol level was approximately four times the legal limit. Gallately's claim for worker's compensation benefits was denied, and that decision was upheld by the Worker's Compensation Appeal Tribunal. The Supreme Court of Newfoundland, Trial Division dismissed the appeal of the decision and concluded that Gallately's gross intoxication constituted an act that was not work-related. As a consequence, Gallately broke the employment nexus and took himself outside the scope of his employment. Gallately appealed to the Newfoundland and Labrador Court of Appeal. In the court's decision, Cameron, JA stated:

> "The words "in the course of employment" refer to the time, place, and circumstances under which the accident takes place. The words "arising out of employment" refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received (*Black's Law Dictionary*). In *Mackenzie v. Grand Truck Pacific Railway* (1925), [1926] 1 D.L.R. 1 (S.C.C.), MignaultJ. cited with approval [at p. 7] the statement of Lord Atkinson in *St. Helens Colliery Co. v. Hewitson*, [1924] A.C. 59 (H.L.), that the words ""arising out of" suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect…'" Today, doing something incidental to his or her employment would be sufficient, the discharge of a duty having been rejected as too narrow a view."

Analysis

The Gellately case is relevant as it provides additional explanation of the definition of "arising out of and in the course of employment" and is consistent with **Policy EN-19**.

Re Kovach, 2000 CarswellBC 73 (SCC) (also: *Re Kovach*, 1998 CarswellBC 1152 (BCCA))

Kovach obtained a certificate from the Worker's Compensation Board stating that the injury she sustained from an operation performed by her physician arose out of and in the course of her employment. The Board found that the physician was a worker, and was engaged in his employment when he operated on Kovach. As a result, the Board held that Kovach's action for negligence against the physician was barred. Kovach appealed the Board's decision to the British Columbia Court of Appeal and the certificate was quashed.

The physician appealed the decision to the Supreme Court of Canada. The appeal was unanimously allowed based on the reasons of the dissenting judge in the court of appeal.

The court stated that if Kovach had not been injured at work, she would not have been treated by the physician. That fact forms a causal link connecting the employment injury to the related treatment.

The court stated that the Board was not bound to apply common law principles of causation and what works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their work-related injuries it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection. The Court concluded that, "The bar to action is not ancillary to the worker compensation scheme, but central to it."

Analysis

The principles of the Kovach case are consistent with **Policy EN-19**, paragraph 10. This case has relevance to my determination in that Kovach had previously sustained an initial injury while in the course of her employment. While receiving treatment for the compensable injury, she claimed damages as a result of negligent medical treatment. In the case at hand, the Plaintiff had previously suffered a work related injury while in the course of his employment. The Plaintiff argues that he developed further disablement as a result of alleged negligence in medical treatment. In the Kovach case, the court found that an action against a treating doctor is barred when there is a causal link between the work injury and the related treatment.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1806/09

This decision concerns an application brought by Dr. R. Khan (Dr. Khan) under section 31 of the Workplace Safety and Insurance Act (WSIA) to the Tribunal to determine

whether or not an action brought against her by A. Tulake (the worker) is barred by operation of section 28 of the WSIA.

The worker filed a claim with the Ontario Workplace Safety and Insurance Board for a left forearm laceration in August 2005. At the time of his injury, the worker was working as a butcher in a butcher shop. He received treatment for the laceration repair at the Scarborough Hospital on the day of injury. He was seen by two nurses, Dr. Khan (a resident), and a specialist at the hospital.

Following the injury, the worker continued to experience ongoing issues with the injured arm and received additional treatment. Subsequently, the worker was diagnosed with a laceration of the ulnar nerve which required surgical repair. He continued to report that he suffered disability following the surgery.

The worker submitted an action against the Scarborough Hospital and against the nurses, Dr. Kahn and the specialist who initially treated his injury. The Tribunal held that the treatment provided by Dr. Khan was for a personal injury by an accident arising out of and in the course of employment and; therefore, is compensable under the Act. The action was barred by operation of section 28(1) of the WSIA.

Analysis

This case is relevant in that it is consistent with **Policy EN-19,** Paragraph 10 in that when a worker is receiving medical treatment for an injury, any further disablement or subsequent injury resulting from the treatment is compensable.

Ontario Workplace Safety and Insurance Appeals Tribunal Decision No. 1396/08

In this case, an application under section 31 of the WSIA was made to the Appeals Tribunal by St. John's Rehabilitation Hospital (St. John's) to determine whether or not an action filed in the court by the Estate of Robert Lewis James Wheelan (Wheelan) was barred pursuant to section 28(1) of the WSIA.

Wheelan was electrocuted while in the course of his employment on May 30, 2001. As a result of his injuries, his right arm and bilateral lower limbs were amputated. Subsequent to the amputations, Wheelan was an inpatient at St. John's for medical treatment for his injuries until he was discharged to his home on April 22, 2002. He received outpatient services until December 2002 following which he continued to receive medications and personal care for daily living assistance.

On August 14, 2003, after Wheelan's personal care attendant left for the day, there was a massive power outage which included the apartment building where Wheelan lived. Wheelan's apartment did not have an emergency back-up generator and he was unable to evacuate the building. On or about August 15, 2003, Wheelan died in his apartment. The Estate of Wheelan submitted an action to the Ontario Superior Court of Justice

against St. John's for negligence in its assessment of appropriate living conditions for Wheelan.

The OWSI Appeals Tribunal determined that Wheelan's death, alleged to be due to negligent medical treatment for injuries for which there was entitlement under the Act, arose out of and in the course of employment. It was found that the right of action of a worker's estate will be determined to be taken away where the worker's right of action has been taken away. In this case, Wheelan's right of action was taken away. Therefore, the Appeals Tribunal determined that the right of action by the Wheelan's Estate against St. John's was barred pursuant to section 28 of the WSIA.

Analysis

This case is relevant in that it is consistent with **Policy EN-19**, Paragraph 10 as noted above in that a subsequent injury (i.e. death in the Wheelan case) resulting from medical treatment for a work injury arose out of and in the course of employment.

Lindsay v. Worker's Compensation Board (Saskatchewan), 1997 CarswellSask 670 (Sask. QB)

Lindsay incurred injuries to his lungs in a mining accident which arose out of and in the course of his employment for which he received compensation benefits. Following his injury, Lindsay underwent treatment including a biopsy. During the procedure, the doctor severed Lindsay's nerves. Subsequently, Lindsay brought an action against the district health board and two doctors. The Worker's Compensation Board in Saskatchewan noted that the doctors were employers under the Act and actions in common law for negligence against an employer for injury were barred by section 180 of the Worker's Compensation Act, 1979 S.S. 1979, c. W-17.1. As such, The Board determined that the action against the doctors was dismissed.

Lindsay appealed the decision to the Saskatchewan Queen's Bench. The Court confirmed the Board's decision that there was a causal relationship between the work injury and the need for the medical treatment. Therefore, the Court determined that the injury sustained during the biopsy "arose out of and in the course of" Lindsay's employment and; therefore, is statute-barred. This decision was affirmed by the Supreme Court of Canada.

Analysis

The decision of the court in the Lindsay case is relevant as it is consistent with **Policy EN-19**, Paragraph 10. Had Lindsay not been injured in the course of employment, the alleged negligent medical treatment would not have been required.

Keddy v. Workplace Health, Safety and Compensation Commission (New Brunswick) 2002 CarswellNB 89 (NBCA)

Keddy was at work when she cut off part of her finger with a saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing more pain. Keddy brought an action against the nurse and hospital.

The nurse applied for a determination as to whether Keddy's action was barred under section 11(1) of the Worker's Compensation Act. The Tribunal held that the injection resulted from Keddy's work-related injury in that the injury and treatment were connected because without the injury, Keddy would not have needed treatment. Keddy appealed and it was dismissed by the court. It was determined that workers injured while receiving treatment for work related injuries are acting within the course of their employment at the time of suffering the subsequent injury.

The court held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objective of the no-fault compensation scheme.

Analysis

The principles in this case are consistent with **Policy EN 19**, paragraph 10. In the Keddy case, the court determined that a worker is in the course of employment when receiving medical treatment for a work injury. In this case, the Plaintiff claims he suffered further disablement as a result of alleged negligence in medical treatment for the work injury which resulted in a delay in diagnosis.

Cross Estate v. Central Newfoundland Regional Health Authority and Dr. Joseph A. Tumilty

Dean Cross injured his bilateral knees on February 22, 2012 while working as a linesman with Newfoundland Power Inc. As a result of the injuries, Cross required bilateral knee surgery for repair of the patellar tendons and was discharged from hospital on March 14, 2012. On March 20, 2012, Cross was transported to the Family Medical Clinic in Lewisport at which time he arrested and was pronounced dead. The Registry of Death reported that Cross' cause of death was pulmonary embolism and D/T secondary to immobility and the bilateral patellar knee surgery.

Cross' surviving spouse and two dependent children (the Cross Estate) initiated an action against the Central Newfoundland Health Authority and the surgeon who completed the bilateral tendon repair surgery for alleged negligence. The Defendants applied to WorkplaceNL to determine whether the action brought by the Cross Estate was statute barred pursuant to **section 44** of **the Act**. The internal review specialist determined that Cross was a worker under **the Act**, the Plaintiffs were dependents

under **the Act** and the Defendants were employers under **the Act**. In applying the principles in **Policy EN-19**, the internal review specialist determined that the subsequent condition resulting in Cross' death arose out of and in the course of employment. Therefore, the action was prohibited by **the Act**.

Analysis

The principles of the Cross case are consistent with **Policy EN 19,** paragraph 10 as noted above. Had the worker not been injured in the course of employment, the alleged negligent medical treatment would not have been required.

Analysis and Conclusion

The Statement of Claim, which is the subject of this application, alleges that the Plaintiff has suffered injuries as a result of treatment by the First and Third Defendants and the Second and Fourth Defendants are liable in their capacity as "employers" of the First and Third Defendants.

As noted above, the main issue I must decide is whether the Plaintiff's injuries arose 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.

The Response for Demand for Particulars provided by the Defendants in their submissions confirms that on May 4, 2015, the Plaintiff was employed as an apprentice plumber with [redacted] and applied for compensation benefits from WorkplaceNL following the accident. The Plaintiff confirmed that he received benefits from WorkplaceNL following the accident under claim [redacted].

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. WorkplaceNL coverage generally begins when a worker enters the employer's premises to start the work shift, and usually ends when the worker leaves the premises at the end of the shift. In this case, the property where the broiler was being removed by the Plaintiff is considered a job site used to carry out the employer's business. A review of the facts confirms that the Plaintiff was performing duties for the benefit of the employer when he rolled his ankle while removing a broiler from the property. The injury occurred

during paid employment while the Plaintiff was performing the duties of an apprentice plumber at the instruction of the employer. The facts of the case support that the Plaintiff's ankle injury arose out of and in the course of employment.

In determining whether the Action of the Plaintiff is statute-barred, the question that must now be answered is whether any injuries resulting from the medical treatment of the Plaintiff by the First and Third Defendants at the Second and Fourth Defendant's facilities for the May 4, 2015 ankle injury arose out of and in the course of employment.

With respect to injury during compensable treatment as a result of a work injury, **Policy EN-19** notes:

> **10.** ***Injury During Compensable Treatment or Return to Work Programming***
>
> Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.
>
> Where a worker is involved in a WorkplaceNL-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program.

It is noted that the Plaintiff was treated by the First and Third Defendants for the right ankle following the May 4, 2015 accident. Through policy, WorkplaceNL has extended coverage to situations where a worker is further disabled and/or a subsequent injury occurs while undergoing medical treatment for a compensable work-related injury. The Plaintiff was injured at work and was required to seek out and cooperate in medical treatment and assessment as stipulated in **section 63** of **the Act**.

My role is to determine whether the claim of the Plaintiff is barred by **section 52** of **the Act**. In considering this matter, I have reviewed this case and note that if not for the workplace accident which arose out of and in the course of employment, the Plaintiff would not have sustained a right ankle injury. If not for the right ankle injury, he would not have required medical treatment from the First and Third Defendants at the facilities controlled and managed by the Second and Fourth Defendants. As in the cases noted above, that fact forms a causal link connecting the work injury to the related treatment.

I note that the Plaintiff's May 4, 2015 right ankle injury and treatment for that injury is compensable since the right ankle injury arose out of and in the course of employment. Therefore, in accordance with **Policy EN-19**, any claim for injuries resulting from the treatment for the right ankle is compensable. As such, I find that the Plaintiff's alleged

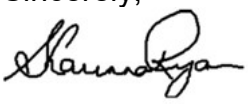
injuries resulting from attending treatment for his right ankle injury arose out of and in the course of employment.

Decision

It is my determination that the action brought by the Plaintiff against the Second, Third and Fourth Defendants for alleged injuries resulting from medical treatment and/or assessment for the May 4, 2015 right ankle injury is 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
Robert Cook, Curtis Dawe
Kenneth Mahoney, Bennett Law