WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 822/10

BEFORE: M.J. Faubert: Vice-Chair

HEARING: April 27, 2010 at Toronto
Oral

DATE OF DECISION: June 11, 2010

NEUTRAL CITATION: 2010 ONWSIAT 1401

APPLICATION UNDER SECTION 31 OF THE WSIA

APPEARANCES:

For the applicant(s): A. Lempp, Lawyer
D. Greenside, Lawyer

For the respondent(s): R. Leto, Lawyer

For additional party: R. Adams, Claims Specialist

REASONS

(i) The Application

[1] On December 23, 2005, Anne Lanzarotta was standing in the parking lot of her employer, First Student, when she was struck by a motor vehicle owned by David Tremblett and operated by Mr. Tremblett's wife, Ann Tremblett. At the time of the accident, Ms. Lanzarotta was employed by First Student as a school bus driver and part-time driver trainer. She was about to depart the parking lot with some co-workers to go to Red Lobster for a holiday lunch celebration. Ann Tremblett was also an employee of First Student, working as a dispatcher. Just before the accident, she had left the employer's premises in her car to go to Tim Horton's to purchase lunch for herself and coffee for her co-workers. She was returning from her half hour lunch break and backing into her parking space in the employer's parking lot when the accident occurred. The owner of the vehicle, David Tremblett, has no employment relationship with First Student or any other employer relevant to this application.

[2] Ms. Lanzarotta sustained injuries in this accident and her employer, a Schedule 1 employer under the *Workplace Safety and Insurance Act,* submitted a claim on her behalf to the Workplace Safety and Insurance Board (the Board) for benefits in connection with the incident. Her counsel advised the Board that Ms. Lanzarotta elected to make a claim for Statutory Accident Benefits and to bring a legal action, and not to claim benefits from the Board. She commenced a legal action against the Trembletts, and claimed Statutory Accident Benefits from Royal & Sun Alliance Insurance, who has paid these benefits to the Respondent. Ms. Lanzarotta has executed an assignment of workplace safety and insurance benefits in favour of the insurer.

[3] The Trembletts ("the Applicants") have filed this application under section 31 of the *Workplace Safety and Insurance Act ("WSIA"* or *"Act")* for a declaration that Ms. Lanzarotta's (the Respondent's) right to sue has been removed by virtue of sections 28 and 29 of the Act. Royal & Sun Alliance Insurance (the co-Applicant or insurer) has filed this application under section 31 of the *WSIA* for a declaration that the respondent is entitled to claim benefits under the *WSIA* in respect of this accident, and that she is deemed to have elected to receive benefits under the *WSIA*. The employer was represented in this proceeding but did not participate in the hearing and took no position with respect to the issues before me.

[4] No party took issue with the insurer's standing to bring this application or to seek relief under section 31 of the *WSIA*. It is sufficient to note at the outset of these reasons that I am satisfied that the Tribunal does have the jurisdiction to consider this application and to make an order respecting the conduct of the Respondent's application for statutory accident benefits. There is some divergence in Tribunal decisions about whether this is derived from section 31(1)(a) or 31(1)(c) of the *WSIA*; if necessary I will address this issue later in these reasons.

(ii) The issue

[5] This application requires me to consider the work status of both the Applicant Ann Tremblett and the Respondent Anne Lanzarotta at the time of the accident, and in particular the work-relatedness of activities occurring during lunch breaks and/or on employer parking lots. The Applicants and the insurer submit that the Respondent is entitled to claim benefits under the

WSIA because she was a worker of a Schedule 1 employer in the course of her employment at the time of the accident in question. The Applicants also claim that Ann Tremblett was a worker of a Schedule 1 employer in the course of her employment at the time of the accident in question, and in these circumstances she cannot be sued by the Respondent. The Respondent takes the position that neither she nor the Applicant Ann Tremblett was in the course of her employment at the time of the accident, and that her right of action is not removed by the Act.

(iii) The decision

[6] I have concluded that Anne Lanzarotta was injured in the course of her employment in the December 23, 2005 accident and is entitled to claim benefits under the *WSIA* in respect of this accident. I have also concluded that Ann Tremblett was in the course of her employment at the time of the accident, and therefore Anne Lanzarotta's right of action against Ann Tremblett is removed by section 28 of the *WSIA*. Her right of action against the Applicant David Tremblett is not removed by section 28 of the *WSIA*.

(iv) Legislation and policy

[7] These applications are brought pursuant to section 31 of the *Workplace Safety and Insurance Act* (WSIA), which states as follows:

> **31.** (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[8] Section 28 of the *Act* applies to remove a worker's right of action against Schedule 1 employers and their workers:

> **28.** (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> (2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
>
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.
>
> (3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

> (4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

[9] Injuries are insured in accordance with the provision set out at section 13 of the *Act*, which states, in part, as follows:

> **13.** (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> (2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[10] Section 31(1) of the *Act* refers to section 268 of the *Insurance Act*, the relevant portions of which state:

> **268 (1)** Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.
>
> ...
>
> **(8)** Where the Statutory Accident Benefits Schedule provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.

[11] Section 59 of Ontario Regulation 403/96 under the Insurance Act (Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996 ("the Schedule") sets out the obligation of a statutory accident benefit (SAB) insurer to pay benefits to an insured person who is entitled to receive workers' compensation benefits. It provides:

> **59 (1)** The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan.
>
> **(2)** Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the Workplace Safety and Insurance Act, 1997 so long as the election is not made primarily for the purpose of claiming benefits under this Regulation.
>
> **(3)** If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the Workplace Safety and Insurance Act, 1997, no income replacement, caregiver, or non-earner benefit is payable to the person in respect of any period of time before the person makes the election.
>
> **(4)** If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in section 30 of the Workplace Safety and Insurance Act, 1997 and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program that the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute.

> (5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,
>
> (a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and
>
> (b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.

[12] Section 126(1) of the *WSIA* requires the Appeals Tribunal to apply Board policy with respect to the "subject-matter of an appeal" when making its decision. This section has been found inapplicable to a right to sue application of first instance because it is not an "appeal" (see *Decision No. 117/98*). The Board nevertheless forwards applicable Board policy in right to sue applications and in this case, the Board included these *Operational Policy Manual* documents regarding initial entitlement: 15-02-01, "Definition of an Accident", 15-02-02 "Accident in the Course of Employment", 15-03-04 "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries".

[13] Although section 126 does not apply in respect of applications under s. 31 of the Act, Tribunal Panels do consider these policies in such applications, as it is important that there be consistency in decision making with respect to the common issues that arise in appeals and in section 31 applications that consider similar questions. The Vice-Chair in *Decision No. 755/02* (July 2, 2002) commented on this approach as follows:

> As indicated above, the Tribunal is not bound by Board policy in a right to sue application of first instance. It does not necessarily follow, however, that Board policy should not be weighed heavily in arriving at a decision in a right to sue application. This is particularly true in this application where the worker first claimed benefits from the Workplace Safety and Insurance Board and was denied by the Board's first level decision-maker. Had Ms. MacDonald decided to appeal that denial first to the Board's internal appellate level and then to the Tribunal, the Tribunal would have been obliged to adhere to section 126. In my view, the Tribunal should therefore be careful so as not to reach two different outcomes depending on whether the issue arises out of an "appeal" or out of an "application".

[14] *Operational Policy Manual* (OPM) Document No. 15-02-02 entitled "Accident in the Course of Employment" states that a personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time and activity indicate that the accident was work-related. The document provides guidelines regarding the application of the criteria of place, time and activity and also indicates that the importance of the three criteria varies depending on the circumstances of each case but that in most cases, the decision-maker focuses primarily on the activity of the worker at the time of the accident. The policy provides the following with respect to the criteria of place, time and activity:

> **Place**
>
> If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as:

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

[15] OPM Document No. 15-03-04 sets out the following Board policy for "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries":

Policy

Workers are in the course of employment upon entering the employer's premises at the proper time, using an accepted entrance.

Workers are not in the course of employment when they leave the employer's premises, unless for the purpose of work (see 15-02-02, Accident in the Course of Employment and 15-03-03, On/Off Employers' Premises).

Accidents on employer's premises arise out of employment, unless

- for personal reasons, the worker used an instrument of added peril, for example, an automobile, motorcycle or bicycle. (For exceptions, see parking lots, below.)

- the act causing the injury does not relate to work or employment obligations.

Guidelines

Employer's premises

Definition

The building, plant or location of work, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways and private roads.

Parking lots

- The employer must own or lease the parking lot.
- If driving, the condition of the employer's lot must cause the accident.
- If walking, the condition of the lot need not be a contributing factor.
- Workers are not entitled to compensation if injured by their own vehicle.

....

Cases not falling within these guidelines are judged individually, depending on the circumstances.

[16] The Respondent also provided a copy of OPM Document No. 15-03-03, which sets out the following policy for "On/Off Employers' Premises":

Policy

A worker is considered to be in the course of employment on entering the employer's premises, as defined, at the proper time, using the accepted means for entering and leaving to perform activities for the purpose of the employer's business. The "In the course of employment" status ends on leaving the employer's premises, unless the worker leaves the premises for the purpose of the employment.

The employer's premises are defined as the building, plant, or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways, and roads controlled by the employer for the use of the workers when entering or leaving the work site.

An accident shall be considered to arise out of the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident

- the accident is occasioned by the injured worker using, for personal reasons, any instrument of added peril such as an automobile, motorcycle, or bicycle, except when the accident was caused by the condition of the road or happening under the control of the employer, or
- the worker is performing an act not incidental to his work or employment obligations.

Guidelines

It is generally considered that workers are in the course of the employment when they reach the employer's premises or place of work. A worker is generally not considered to be in the course of the employment when travelling to or from the workplace, although there are exceptions to this general rule. (See 15-03-05, Travelling.) The WSIB's practice in respect of accidents occurring on an employer's premises centre on geographical location as a determining factor as to whether or not a worker was in the course of employment at the time of the accident. Location has been adopted as the line to be drawn between personal activities and work-related activities.

Without limitation to the following, the WSIB will consider entitlement in claims where a worker is injured when

- going to or from work in transport under the control and supervision of, or chartered by, the employer
- obtaining pay or depositing tools, etc., on the employer's premises after actual work hours
- participating in a work-related sports activity, for example, school teachers and camp counselors, when the employer condones these activities by making the premises available and/or exercising a form of supervision and control
- attending compulsory evening courses
- travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer
- travelling to or from a convention and/or participating in convention activities, and
- on a lunch, break, or other non-work period (period of leisure) by ordinary hazards of the employer's premises.

(v) Was the Respondent in the course of her employment at the time of the accident?

[17] This is a threshold issue in this application, since both applications must fail if I conclude that the Respondent was not injured in the course of her employment at the time of the accident on December 23, 2005.

[18] Although there was some dispute about the interpretation of the facts relating to the Respondent's activities at the time of the accident, I do not find that there is a significant dispute about the material facts. The Respondent worked for the employer as a school bus driver. In addition, she was a part-time driver trainer. At the beginning of each school year, she would choose a bus route that either began or ended closest to her house. She drove students to school in the morning, and picked them up at school and delivered them home in the afternoon. In the period of time between these routes, she was generally free to do as she wanted and was not required to report to the employer's premises. She parked the bus she operated at her home, and would take it to the employer's premises for service, maintenance, or safety seminars.

[19] The employer's premises at Hawkestone Road consisted of an office building and two parking lots. One lot was for buses and the bus drivers, and the other was for office employees and others who had business with the employer. While the bus lot was fenced, and could be locked to secure the buses, access to the office lot from the street was uncontrolled. The materials contained a record of a property search indicating that the property has been owned by Travelways School Transit Inc. since 1980. While the Branch Manager testified that the business formerly known as Travelways was acquired first by Laidlaw and then by First Student, and that she believed the property was transferred in each of these sales, the record does not reflect a change in title. Nonetheless, it is a reasonable inference that the employer controlled both parking lots, if not as owner then as lessee or licensee, as there was no evidence that any other business operated in either the building or the parking lots. In reaching this conclusion I do not find it material that one lot was more secure than the other; while they had different purposes, both were used only for the purposes of the employer's business.

[20] I also heard evidence about occasions when the Respondent worked for the employer as a driver trainer. The employer employed full-time trainers, but if it needed additional trainers the Respondent would be asked to come to the employer's premises after finishing her bus route. The Respondent testified that in such cases she would arrive at the Hawkestone location between 9 and 9:30 a.m. when she would park her vehicle in the bus lot. Generally, she had no reason to be in the front lot. She would then go out with a new driver for three to four hours, and would be in the yard only to do the circle check around the bus. She did not take any lunch breaks when training a new driver. After completing the driver training, she would return to the office and fill out her report. After that, she considered her time to be her own.

[21] The branch manager testified that the Respondent was paid a flat rate for her bus routes, and an hourly rate for all other work she performed for the employer. She also testified that bus drivers were considered to be on duty until they parked their buses.

[22] The Respondent's activities on the day of the accident were different from her normal routine as a bus driver or driver trainer. On that day, she planned to go to the Hawkestone location to meet some co-workers and go for lunch. The employer asked her to come to the Hawkestone location after finishing her morning bus route to help another employee pick up a bus in Brampton. She agreed to do so, since she was coming in for lunch that day anyway. She and her co-worker used a company minivan to drive to Brampton. The Respondent drove the minivan back to Hawkestone Road, stopping along the way to fill it with gas. She recalled that she reported to the dispatcher after filling up the van, and told them she would arrive in five to ten minutes. She recalled that she arrived at Hawkestone at approximately 11 a.m., and reported in when she arrived. She parked at the rear in the bus lot, and went past the gate to get into the vehicle of the co-worker who would drive to the restaurant. It was her plan to return to her school bus after finishing lunch and proceed to do her usual afternoon bus route.

[23] Instead, she got out of her co-worker's van to talk to someone who had called out to her. While walking backwards in the office parking lot, she was struck by the vehicle operated by one of the Applicants, and was injured in the incident. She was taken to the hospital and did not return to work that day.

[24] I heard evidence from all witnesses about the nature of the lunch that was to take place on the day of the accident. The branch manager testified that she and the operations manager had planned to go to lunch that day with the driver trainers. She intended to pay for the lunch on behalf of the company, as a gesture of appreciation for their hard work. She expected that the lunch conversation would be about personal and work issues.

[25] The Respondent's characterization of the lunch was somewhat different. She testified that the lunch was not work-related, but merely a lunch with co-workers with whom she had a personal relationship. She did not consider it to be a Christmas lunch, but simply an occasion to have lunch with some people she was close to. She acknowledged that the branch manager and operations manager would be present, but testified that she had every intention of paying for her lunch as she had not been advised that anyone else would pay for it. Nonetheless, she acknowledged that she was hoping the manager would pay so that she did not have to.

[26] In argument, counsel for both Applicants submitted that it was clear that at the time of the accident, the Respondent was present in the employer's parking lot for the purpose of departing for an office holiday lunch to be paid for by the employer. They referred to OPM Document 15-02-02, which states that where a worker is injured while carrying out an activity reasonably incidental to or related to the employment, the personal injury by accident generally will have occurred in the course of employment. In their submission, the activity of going for lunch with co-workers and managers is reasonably incidental to the Respondent's employment.

[27] It was also argued that the Respondent was essentially engaged in work-related activity all day; and even if it could be said that there were two distinct periods of employment separated by personal time, the Respondent was injured while leaving the employer's premises, and this is sufficient to bring her within the course of her employment at the material time. It was argued that the effect of the Board's policy on "Employer's Premises" (OPM Document No. 15-03-04) is that injuries that occur on an employer owned or leased parking lot arise out of and in the course of a worker's employment.

[28] On behalf of the Respondent, counsel submitted that the facts do not really conform with the "lunch break" cases since the Respondent's shift was over, and the employer no longer had control over her activities until she began her usual bus route later in the day. She argued that the Respondent's presence in the parking lot was for the purpose of a social event only, since it was not an area where she would normally go and it was outside her usual working hours. In her submission, I should apply a "work-relatedness" test, and not simply a "premises" test, and conclude that the Respondent's reasons for being in the parking lot at the time of the accident had nothing to do with her employment. She also submitted that the area where the accident occurred was essentially a public lot, since members of the public such as delivery vehicles would also use the lot. In that respect, she argued that the risks associated with being on the lot are no different than those on a public road. She also disputed that there was a "company lunch" character to the event the Respondent planned on attending on the day of the accident. Finally, she argued that the Respondent was injured by an "instrument of added peril" in the parking lot, and under the applicable policy, such an accident is not within the course of employment. She noted that the policy intends that routine motor vehicle accidents be covered outside the Act, and that the insurers through this application are merely trying to displace their financial obligations onto the workplace insurance system.

[29] In considering the essential character of the Respondent's activities at the time of the accident, I have not found it helpful to focus only on her intention to share lunch with her co-workers as a marker of the work-relatedness of her actions. I agree with counsel for the Respondent that the case cannot properly be characterized as a "lunch break" case, as the Respondent is a worker who does not normally take her lunch on the employer's premises and it was not her intention to do so at the time of the accident. I conclude that she was present in the employer's parking lot in the act of leaving work after completing duties that ended on her return to the lot. The fact that she would return to the area after lunch, had it occurred, to retrieve her vehicle, does not detract from this conclusion. In addition, the delay between her arrival at the lot and the time of the accident is so brief that it cannot be said that her purpose in being on the lot changed materially. It is irrelevant whether she planned to go for lunch with co-workers or to return home; instead, her activity should be treated in the same way as any other worker injured in an employer's parking lot while entering or exiting work after a shift.

[30] In my view, the law on this point is clear. It was summarized by the Vice-Chair in *Decision No. 1764/03* (November 14, 2003) in this manner:

> The Board also has a policy that explicitly deals with accidents that occur in parking lots. Document No. 03-02-10 of the *Operational Policy Manual* defines "an employer's premises" as including parking lots. The policy goes on to stipulate that, for a parking lot to be considered part of an employer's premises, that employer "must own or lease the parking lot".
>
> Tribunal decisions that have addressed the question of whether someone is in the course of their employment when injured in an employer's parking lot have not been entirely consistent in their approach. An early Tribunal decision, *Decision No. 547/87* (8 W.C.A.T.R. 160), considered whether an injured worker had yet entered the course of employment when he was injured in a motor vehicle collision in his employer's parking lot. The Panel concluded, in that decision, that it was necessary to consider a number of factors, including whether the worker was at any greater risk in the parking lot than was a member of the public.
>
> That analysis was subsequently rejected in several Tribunal decisions, each of which concluded that the test to be applied in such cases was not whether there was added risk but whether the injured person was in the parking lot in issue for an employment-related reason (see, e.g., *Decisions No. 674/89* (March 1, 1990), *531/90* (August 23, 1990), *764/91* (21 W.C.A.T.R. 348), *368/95* (September 29, 1995)). I note that, in one of those decisions, *Decision No. 531/90*, there was a dissent that was relied upon by Mr. Argiropoulos. In that dissent, a Panel member expressed the view that the majority in that decision was not, in fact, applying a work-relatedness test but was applying a narrow "premises" test. The dissenting member went on to list a number of factors that ought to be considered in determining whether someone was in the course of their employment when injured in a parking lot. The factors listed in the dissent placed substantial weight on the activity of the individual when he/she was injured.
>
> In the last of the decisions I noted above, *Decision No. 368/95*, the Panel expressed the opinion that the majority decision in *Decision No. 531/90* did not, in fact, apply a strict premises test but applied a test that considered the worker's activity and the employment-relatedness of that activity. The Panel in *Decision No. 368/95* found that the majority decision in *Decision No. 531/90* and a decision that followed and applied the majority's reasoning, *Decision No. 764/91* adopted an analysis that:

> … found that the primary purpose for the presence of the workers in the parking lot was their employment, and that the use of a motor vehicle in that context was an accepted mode of travel which was accommodated by the employer. (para. 16)
>
> ……
>
> Having reviewed the case law cited above, I am in agreement with the reasoning found in *Decision No. 368/95*. In my view, the correct "test" – a test that has been applied in most Tribunal decisions in this area – is whether a person injured in a parking lot was in that parking lot for reasons related to their employment.
>
> I am persuaded, by the facts of this case, that there was a strong nexus between the parking lot where the Applicant was injured and the Applicant's employment.
>
> The Applicant was working in the Hospital premises on the instructions of her employer. The parking lot where she was injured was leased by the Hospital. The Hospital had full responsibility for maintenance of the parking lot. The worker paid a monthly fee for use of the parking lot. The public had no access to that parking lot.
>
> In all these circumstances, I am persuaded that the parking lot where the applicant was injured was part of the Hospital premises. Since the Applicant's office was situated in the Hospital's premises, the Applicant's place of employment was the Hospital's premises. In my view, the parking lot where the Applicant was injured was part of those premises.

[31] The test, then is whether the Respondent was in the employer's parking lot at the time of the accident for reasons related to her employment. I conclude that she was. She was in a parking lot that was controlled by her employer. I have found it to be a reasonable inference that the employer was the only business with the right to use the lot, whether as owner, lessee or licensee. I have also found that the lot was used for the purpose of the employer's business, including the provision of parking to employees. Although the lot was accessible to the public, in the sense that members of the public who had business with the employer would use it, there is no evidence that it was a "public lot" or one that had multiple users and was maintained by a third party and not the employer. The Respondent was leaving work after what may be described as a "shift" of work, and would return later to retrieve her vehicle and begin another "shift" later in the day. She would not have been present on the lot had it not been for her work duties that day, and there was no intervening event or delay that altered the nature of her presence on the lot. It is irrelevant that she was injured in an area where she would not normally park; it was the area where she would depart from work having regard to the fact that she would be driven by a co-worker. Finally, I note that under the Board policy on employers' premises, workers injured while walking on the employer's parking lot are considered to be in the course of their employment, even where the injury is caused by the operation of a motor vehicle by another person not the worker. Not only does the policy not exclude coverage under the Act in these circumstances, it expressly provides for it.

[32] I find nothing to distinguish these facts from those before the Vice-Chair in *Decision No. 1764/03*, and I find that the Respondent was injured in the course of her employment on December 23, 2005 so as to be entitled to benefits under the *WSIA*.

(vi) Was the Applicant Ann Tremblett in the course of her employment at the time of the accident?

[33] In *Decision No. 368/95* (September 29, 1995), in circumstances similar to those in this application, a worker who was walking in the employer's parking lot was struck by a vehicle operated by a co-worker. The Panel found both workers to be in the course of their employment at the time of the accident. It found:

> We conclude that both workers in this application were in the course of their employment having regard to factors which were described under the "work relatedness" test. The employer in this case provided free parking facilities for the convenience of its employees, who were shift workers. It provided security and maintenance for this parking lot. This arrangement clearly benefited both the employer and its workers. The use of the parking lot can be described as reasonably incidental to the employment of the employer's workers. Thus, the fact that the nature of the activity and the equipment used in the activity (driving and using a motor vehicle) were not relevant to the labour which the workers performed, the activity was nonetheless related to their employment. Thus, we find that both workers were in the course of their employment at the time of the happening of the accident.

[34] As indicated, the Panel found the use of the parking lot to be reasonably incidental to the employment of the employer's workers. This is consistent with a number of other Tribunal decisions; see, for example *Decisions No. 674/89* (March 1, 1990), *531/90* (August 23, 1990), and *764/91* (21 W.C.A.T.R. 348).

[35] The only anomalous factor in this application is that Ms. Tremblett was not arriving at or leaving work for the day, but returning to work after purchasing food and coffee off site during her lunch break. Arguably, she was returning to work after completing a personal errand. However, it is not unreasonable for employees to leave their employer's premises to obtain food during a break period; and consequently I can find no principled reason for considering Ms. Tremblett's activity in entering the parking lot after her break in a different light from an employee arriving at or leaving the employer's premises for the day. Consequently, I conclude that she was in the course of her employment at the time of the accident in this matter.

(vii) The election issue

[36] Ms. Leto argued that it would be unreasonable to remove Ms. Lanzarotta's right to sue in light of the processing of the election by the WSIB, creating a sequence of events taking place over four years. In particular, she noted that although the employer filed a claim on behalf of her client, the WSIB advised her she was entitled to bring an action and provided her with an election form, advising her of her rights in this manner:

> I understand you were injured in a motor vehicle accident that may have been caused by another person. From the information available to the WSIB it seems you may have the choice to either claim workplace safety and insurance benefits OR to collect statutory accident benefits and bring a legal action. You cannot do both.

[37] The letter also suggested that Ms. Lanzarotta obtain legal advice about her options.

[38] Ms. Leto advised the Board that her client had chosen to commence an action and seek statutory accident benefits. She argued that after such a period of delay, her client would be prejudiced if her right to do so were removed as it is too late to reverse course.

[39] The election referred to arises out of section 30 of the Act, which provides:

> **30(1)** This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.
>
> **(2)** The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

[40] In its preliminary review of a claim, the Board may detect circumstances in which a worker may be entitled to make a claim against a third party; however, in providing information about possible third party claims the Board is not providing a final determination about either the likelihood of success of such a claim, or about whether the right to bring an action is removed by the Act. In the latter case, the jurisdiction to make such a determination rests with the Appeals Tribunal and the fact of the election cannot determine the outcome of any application under section 31 of the Act. Otherwise, any application under section 31 of the Act would be defeated by the execution of an election to bring an action, a result that is clearly not contemplated by the legislation.

[41] In any case, there can be no prejudice to Ms. Lanzarotta by any determination that her right to bring an action is removed by the Act. Section 31(4) of the Act provides that a worker or survivor may file a claim for benefits within six months after the tribunal's determination under section 31(1), so that any claim will not be defeated by the time limit provisions of section 22 of the Act.

(viii) The jurisdictional issue

[42] As discussed at the outset of these reasons, there has been some divergence in Tribunal decisions about whether the Tribunal's jurisdiction to grant relief to an insurer from who statutory accident benefits are claimed is derived from section 31(1)(a) or 31(1)(c) of the *WSIA*. Although no party challenged the Tribunal's jurisdiction to make an order under section 31 in respect of the claim against the insurer, it is necessary to address this question in order to determine the nature of relief to be granted in this application.

[43] Section 31 of the *WSIA* provides, in part, as follows:

> **31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.
>
> **(2)** The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).
>
> **(3)** A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

[44] In the first of a series of decisions to consider this issue, the Panel in *Decision No. 465/05* (September 22, 2005) concluded that the Tribunal was without jurisdiction to consider such an application since the claimant in question had not commenced legal action and was not, therefore, a plaintiff under the *Courts of Justice Act*. In those circumstances, the Panel concluded that the insurer in that case could not invoke the jurisdiction of the Tribunal pursuant to section 31 of the WSIA.

[45] Subsequently, however, the Tribunal has confirmed the right of an insurer to seek relief under section 31 of the WSIA even in those cases where the SAB claimant has not commenced a court action. In *Decision No. 1362/06I* (October 10, 2006), a worker was injured in a single vehicle accident. He applied for Statutory Accident Benefits and executed an assignment to the insurer of any WSI benefits that may be payable. The SAB insurer brought an application before the Tribunal for a declaration under section 31(1)(c) of the Act. In the result, the Panel found that in order to interpret the WSIA and the *Insurance Act* harmoniously and purposively, the word "plaintiff" found in subsection 31(1)(c) also includes a claimant for statutory accident benefits, and that the insurer may seek relief from the Tribunal under subsection 31(1)(c) of the *WSIA*.

[46] A different approach was taken by the Tribunal in *Decision No. 14/06* (February 12, 2007), where the Vice-Chair considered the circumstances of a worker who had claimed statutory accident benefits and had not made a claim for WSI benefits. Moreover, he had not commenced an action against the SABs insurer. The circumstances of the case also suggest that no third party claim was available to the worker, who was injured while jumping down from a truck. The Vice-Chair concluded that section 31(1)(a) of the WSIA applied in these circumstances and made a declaration that the worker's right to commence an action against his employer and its workers is taken away by section 28 of the WSIA. He wrote:

> If the evidence establishes a right of election that is followed either by an actual election or a deemed election, then at that point, a party to an action or a SABs insurer may apply to the Tribunal for a declaration whether the electing party's right to commence an action is taken away. In my view, this interpretation fits with the provision in the *Insurance* Act, found in subsection 59(2), which appears to remove an insurance company's right to make an independent assessment regarding entitlement to benefits under a compensation plan once an insured person "elects" to bring an action.

[47] More recently, in *Decision No. 897/09I* (October 6, 2009), the Vice-Chair adopted the approach of the Panel in *Decision No. 1362/06I*, for these reasons:

> However, when an evidentiary basis sufficient to engage the provisions of section 30 is lacking, which is often the case in section 31 applications, then section 31(1)(a) is simply not available. In such cases, the dilemma posed by the two different interpretations of the word "plaintiff" in section 31(1)(c) still remains.
>
> Facing that dilemma, and with respect to the Panel in *Decision No. 456/05* and the Vice-Chair in *Decision No. 2035/05*, I agree with the approach taken by the Vice-Chair in *Decision No. 1362/06I*, whose reasoning I adopt. I find that the term "plaintiff" in section 31(1)(c) should be interpreted to include a person who has claimed benefits under the Schedule referred to in Section 268 of the *Insurance Act*, even if that person has not initiated a civil action. In my opinion, to interpret "plaintiff" in the manner suggested in *Decision Nos. 465/05* and *2305/05* leads to strange and anomalous results that could not have been intended by the drafters of that provision.

[48] Like the Vice-Chair in *Decision No. 897/09I*, I prefer the approach of the Panel in *Decision No. 1362/06I*, as it does not depend upon the existence of rights against a third party (or the employer) and a notional "election" to commence an action or "right to commence an action" in order to address the question of which insurance scheme applies. Moreover, I find it to be the more direct approach that can be applied whether or not the accident causing a claimant's injuries gives rise to a third party action.

[49] In *Decision No. 764/91*(November 27, 1991), the Panel pointed out the importance of certainty and consistency in decision making within any administrative body, and concluded that these principles should take precedence over the preference of certain panels for particular lines of decisions, where a consensus has emerged. Although certainty on this issue is desirable, it may be premature to conclude that there is a consensus emerging in recent Tribunal decisions that the word "plaintiff" found in subsection 31(1)(c) also includes a claimant for statutory accident benefits, and that insurers against whom such claims have been made may bring an application to the Tribunal under subsection 31(1)(c) of the *WSIA*. However, I find that the decisions reaching this conclusion contain a fuller and persuasive discussion of the issue, and I adopt their reasoning. Consequently, the order in this application will be made under this provision of the *WSIA*.

(ix) The claim against David Tremblett

[50] As the owner of the vehicle involved in the accident, Mr. Tremblett is a "stranger to the Act" who is not a worker in the course of his employment at the time of the December 23, 2005 accident. Accordingly, no relief can be granted by the Tribunal in respect of the action against him.

DISPOSITION

[51] The application is allowed in part. The Respondent was injured in the course of her employment in the December 23, 2005 accident and is entitled to claim benefits under the *WSIA* in respect of this accident. Her right of action against the Applicant Ann Tremblett is removed by section 28 of the *WSIA*. Her right of action against the Applicant David Tremblett is not removed by section 28 of the *WSIA*.

DATED: June 11, 2010.

SIGNED: M.J. Faubert.