WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2015-03790**
WCAT Decision Date: **December 17, 2015**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 141815-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. VLC-S-M-135635
Effie Ainsley v. Douglas L. Duthie and City of Vancouver

Applicants: Douglas L. Duthie and City of Vancouver (the "Defendants")

Respondent: Effie Ainsley (the "Plaintiff")

Interested Person: Insurance Corporation of British Columbia

Representatives:

For Applicants: Steven J. Gares / Jack Webster, Q.C.
WEBSTER HUDSON COOMBE LLP

For Respondent: Tyler F. Dennis
McCOMB WITTEN MARCOUX

For Interested Person: Don Gunn

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Introduction

[1] The plaintiff, Effie Ainsley, was injured in a motor vehicle accident on January 12, 2012, at approximately 10:25 a.m., while returning to her employer's premises during a paid coffee break. She was employed as a claims adjuster for the Insurance Corporation of British Columbia (ICBC). The accident occurred in the laneway behind ICBC's premises. The defendant, Douglas L. Duthie, was employed as a building inspector by the City of Vancouver (the City). He was driving a vehicle owned by the City, and had just completed a building site inspection as part of his employment.

[2] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury, or death. This application was initiated by counsel for the defendants on July 30, 2014. Transcripts have been provided of the examinations for discovery of the plaintiff (on May 29, 2014, continued on October 6, 2014) and of the defendant Duthie (on May 29, 2014).

[3] Written submissions have been provided by the parties to the legal action. ICBC is participating in this application as an interested person but did not provide a submission. This application involves questions of mixed fact, law, and policy, and does not involve any significant issue of credibility. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[4] Determinations are requested concerning the status of the parties to the legal action, at the time of the January 12, 2012 motor vehicle accident. The only contested issue concerns whether the plaintiff's injuries in the January 12, 2012 accident arose out of and in the course of her employment.

Jurisdiction

[5] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the plaintiff, Effie Ainsley

[6] The plaintiff submitted an application for workers compensation benefits by teleclaim on January 23, 2012, for injuries sustained in the January 12, 2012 motor vehicle accident. She provided the following account of the incident:

> On Jan 12, 2012, the worker was in a motor vehicle accident. The worker and her coworker had gone out to pick up a coffee on their coffee break. They had got their coffees and were returning back to the office. The worker was the driver, driving her own personal vehicle, and the coworker was the passenger. It was about 10:25am, and her 15 minute coffee break was to end at 10:30am. They were in the back alley of the ICBC claims centre at 999 Kingsway, in Vancouver, BC. She was travelling East in the alleyway. It was a fork alleyway, and another vehicle was making a right from the other fork. The other vehicle turned into the worker's vehicle. The worker swerved to the right to try to avoid the accident. The other car's left front struck the worker's left rear wheel. At the time, she was swerving to right, so her left arm was raised on the wheel. She was travelling about 15-20km at the time of the accident.
>
> [all quotations are reproduced as written, except as noted]

[7] ICBC provided an employer's report of injury on February 9, 2012. The employer advised that the plaintiff was employed as a claims adjuster. The employer indicated that the plaintiff's actions at the time of injury were for the purposes of its business, that the incident occurred during her normal shift, but that she was not performing her regular work duties at the time of the incident. The employer advised it had no objections regarding the acceptance of the claim.

[8] By decision dated February 15, 2012, an entitlement officer of the Board denied the plaintiff's claim for workers' compensation benefits. The entitlement officer reasoned:

- An employment connection generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift. The employment connection may also be terminated at other times.
- I do not find that you were in the course of your employment at the time of the motor vehicle accident. You had left the employer's premises on your coffee break for personal reasons.
- I do not find that your injuries arose out of the employment as there was no work purpose to your journey, so the employment was not of causative significance in producing your injuries.

[9] Item #18.1 of WCAT's *Manual of Rules of Practice and Procedure* provides that in a section 257 application, WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer.

[10] There is no dispute regarding the plaintiff's status as a worker employed as a claims adjuster by ICBC. I find that the plaintiff was a worker within the meaning of Part 1 of the Act. At issue is whether her injuries in the January 12, 2012 accident arose out of and in the course of her employment.

[11] The plaintiff provided evidence in an examination for discovery on May 29, 2014. At the time of the accident, she was returning from going for coffee with a co-worker (Q 47 to 49). It was a paid coffee break (Q 36 to 37). They had picked up their coffees from a coffee shop and were bringing them back to the office (Q 58). She stated (Q 59):

> Q That's because the coffee available at ICBC is barely drinkable; is that fair?
> A We don't really have coffee at ICBC.

[12] It was a common practice to go out and get coffee because there was no place close to buy coffee (Q 71).

[13] (I consider that the plaintiff's response to question 59 was ambiguous, as to whether she meant that coffee was not available at ICBC, or that it was available but it was her normal practice to leave her employer's premises to purchase coffee at a coffee shop. While not significant to my decision, I assume the latter interpretation is more likely.)

[14] ICBC provided free parking for employees under its claim centre (Q 43). ICBC provided her with a fob to be used to open the various doors in its premises, including the security gate at the entrance to the parking lot, located in the laneway just to the east of where the accident occurred (Q 44 to 45, 82). The plaintiff advised that as she

approached the intersection where the accident occurred, her vision was obstructed by a fence and houses on the left, as well as shrubs (Q 99 to 101). She advised she could not actually see to the left until she entered the intersection (Q 100). She was driving between 20 and 30 kilometres an hour (Q 108). Her foot was on the brake because there was a downhill grade (Q 108). She was preparing to go down, to go into the parking (Q 109). At the point of impact, she was about two car lengths from the point where she would have had to turn right to go into the underground ramp (Q 110 to 112). She would then have to make a sharp right turn to go into the ramp, down to the fob and the security gate (Q 135). She explained (Q 135 to 136):

> A. Yes. Usually, as we approach the underground, because of the difference, the distance between where the vehicle is and the actual scanner, you always have to put your car in Park and exit and walk up to it, to scan it.
> Q Because it's such a sharp corner, you mean?
> A Well, no. The distance between where the vehicle pulls up and the distance between your car and where the actual scanner is, you have to physically exit the vehicle.
> If you are coming west in the alley, you have the opportunity to pull up next to it, to scan it, sitting in your car. But when you are coming from the opposite direction, you have to physically exit your vehicle to do that.

[15] The plaintiff advised that for a vehicle traveling east in the alley, there was a sharp corner to turn into the ramp (Q 137 to 139). She further explained (Q 140 to 141):

> Q Okay. So I assume that what you would do is, you would, your normal practice, when you are coming into the claims centre parking lot, in the lane, is that you keep to the right-hand side of the, of the alley, that is as you are proceeding eastbound, and just as you approach the ramp you swing to the left, so that you can make the sharp corner to turn right into the ramp; is that right?
> A Well, a little bit to the left, yes.
> Q So you have to sort of swing into the oncoming lane –
> A Yes, **but that is much farther down below where the T-intersection is, where the two alleys meet**.
>
> [emphasis added]

[16] The plaintiff stated that at the time of the accident, her vehicle was on the right edge of the alleyway (Q 143). She stated (Q 148):

> Q You say you were on the right-hand side of the alleyway, going eastbound?
> A Well, as close as I could be to the right, yes.

[17] The plaintiff was driving a Honda Pilot, a sport utility vehicle (Q 87 to 88, 149). The plaintiff advised that she did not see the vehicle being driven by the defendant Duthie until she entered the intersection as her view was blocked (Q 150 to 152).

[18] Duthie provided the following account of the circumstances leading to the accident in his examination for discovery (Q 33):

> Okay. Well, I drove down the lane to where the T-lane is, and it is at an angle to the lane that I was on. And so basically I was trying to merge out, into that lane, and I was going to turn west. So it's at such an angle that it's very difficult to see around, and there was also a parked car that was off to my right. So I looked right and then I looked left, and then I just sort of took my foot of[f] my brake and sort of edged forward. Then, all of a sudden, made impact with the other vehicle.

[19] Duthie noted the plaintiff was traveling from the west to the east. He was attempting to turn right into the main alley, from which the plaintiff was coming. Duthie's evidence was that he had stopped before entering the main laneway, and looked to the right and to the left, and had "started to let my foot off the brake and was just edging up, just gone a few inches, and we made contact" (Q 91).

[20] There is some dispute as to the precise location of the plaintiff's vehicle at the time of the collision, as to whether she was on the right-hand side of the lane or had moved closer to the left side. Duthie indicated he had only entered the intersection a few inches and the collision occurred, and that the accident would not have happened if the plaintiff had been on her side of the lane. The plaintiff's evidence was that she was as close as she could be to the right-hand side of the lane. The plaintiff and Duthie also give differing estimates of the speed of their respective vehicles and perceptions of the speed of the other vehicle.

[21] The defendants have furnished a site condition report prepared by the City Engineering Department. This diagram shows the main laneway along which the plaintiff was driving in an easterly direction, and the angled laneway from which Duthie was coming to turn right into the main laneway in a westerly direction. The position of the parking entrance is also marked on the diagram, a short distance to the east of the intersection of the two laneways. The smaller laneway enters the main laneway on an angle, somewhat like a "Y" except that the main laneway is straight. Photographs have also been provided, showing the paved main laneway, and the smaller angled laneway covered with old tar and gravel. The photographs show two separate openings to the underground parking area, separated by a rectangular concrete column. The entrance to the parking area is to the east of the second opening, with a post on the left hand side for using a fob. The other opening, covered with metal grillwork of a different style than the gate, appears to have a doorway for pedestrians. The plaintiff would have to drive past the first opening, and turn into the paved area leading to the second opening.

[22] The photographs show that the entry to the parking area is at or close to ground level, with parked cars visible through the gate. It appears the paved area leading from the lane to the gate may have a slight incline.

[23] The plaintiff has furnished a "Speed Scene" diagram bearing measurements of the area in question. Moving from west to east, this indicates the distances were as follows:

From	**To**	**Distance**
West side of angled lane	Hydro pole	10' 4"
Hydro pole	east side of angled lane	32' 9"
East side of angled lane	edge of ICBC driveway	19'
West edge of ICBC driveway	east edge of ICBC driveway	43'

[24] The defendants submit that the plaintiff was a paid employee at the time of the accident, and that she was permitted to leave the employer's premises to obtain coffee as a term of her employment. The accident occurred near the entrance to the parking area, and free parking was provided to the plaintiff as a term of her employment. The plaintiff was returning to work at the time of the accident. Her injuries arose out of her employment and the section 5(4) accident presumption applies (that her injuries in the accident occurred in the course of her employment).

[25] The defendants further submit that the plaintiff was exposed to a special hazard not normally experienced by the regular traveling public. This special hazard was due to the location of the ICBC parking entrance. The defendants point to the characteristics of the intersection of the main laneway and the angled laneway, and the absence of any safety signage. The accident would not have occurred but for the special hazard to which the plaintiff was exposed as she was returning to work. The defendants point to the double blind corner, in which neither the plaintiff nor the defendant Duthie could see whether there was any other vehicle until they entered the intersection of the two laneways. This was particularly perilous for ICBC employees given the close proximity of the ICBC parking entrance.

[26] The defendants further cite the policy entitled "Extension of the Employer's Premises." The defendants submit that the intersection of the two laneways is close enough to the parking entrance to create a hazard that only employees of ICBC are exposed to. Thus, it is a special hazard to which the traveling public is not normally exposed, and should be found to be a spill-over from the employer's premises.

[27] The plaintiff submits that the two laneways are used by the public for reasons wholly unrelated to parking in the ICBC building, as the laneways provide access to multiple residential parking garages. The laneways could not be considered a captive road. The plaintiff further submits that there are no hazards at or near the accident location which the traveling public would not ordinarily encounter. The lack of safety signage and character of the intersection are nothing out of the ordinary. There are many other

intersections of similar character in the near vicinity. The plaintiff provides photographs of six such locations.

[28] The plaintiff notes, with reference to the policies at RSCM II item #C3-14.00, that only two of the nine factors support a finding of employment connection, based on the fact the accident occurred during a time period during which the plaintiff was being paid.

[29] The plaintiff submits, with reference to the measurements on the "Speed Scene" diagram submitted by the plaintiff, that it is likely the collision took place at a minimum of 30 to 50 feet from the ICBC parking entrance, and was probably closer to 100 feet from the post where the plaintiff would use her fob. The plaintiff submits that there was a minimum of 19 feet after the intersection of the two laneways had been fully cleared before it would be necessary to swing into the left side of the laneway in order to turn right into the entrance to the parking area. The plaintiff submits the defendants have conflated the intersection of the two laneways with the ICBC parking entrance in order to support a finding of a special hazard, but there was some distance between these two locations. The plaintiff submits the character of the ICBC parking entrance had no effect on how the accident occurred, and that the accident location was not part of employer's premises, spilled over or otherwise. The plaintiff submits the accident did not arise out of or in the course of her employment.

[30] At the time of the accident on January 12, 2012, the policy in Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) at item #C3-14.00, Arising Out of and In the Course of the Employment, provided:[1]

> The test for determining if a worker's personal injury or death is compensable, is whether it arises out of and in the course of the employment. The two components of this test of employment connection are discussed below.
>
> In applying the test of employment connection, it is important to note that employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment.

[31] The policy set out a list of nine non-exclusive factors to be used in making a determination as to whether an injury arises out of and in the course of the employment. All of the factors listed may be considered in making a decision, but no one of them may be used as an exclusive test. Other relevant factors not listed in policy may also be considered. Other policies in Chapter 3 may provide further

[1] The board of directors of the Board approved a revision to the policies in Chapter 3 of the RSCM II, and those new policies were made applicable to injuries or accidents that occur on or after July 1, 2010. In this decision, I have applied the policies in the new Chapter 3, which were in effect at the time of the accident on January 12, 2012.

guidance. The nine factors are as follows: (1) On Employer's Premises; (2) For Employer's Benefit; (3) Instructions From the Employer; (4) Equipment Supplied by the Employer; (5) Receipt of Payment or Other Consideration from the Employer; (6) During a Time Period for which the Worker was Being Paid or Receiving Other Consideration; (7) Activity of the Employer, a Fellow Employee or the Worker; (8) Part of Job; and (9) Supervision.

[32] The policy provides the following additional guidance regarding the application of factors 5 and 6:

> **5. Receipt of Payment or Other Consideration from the Employer**
>
> Did the injury or death occur while the worker was in the process of receiving payment or other consideration from the employer? If so, this factor favours coverage.
>
> This includes cases where the worker is required to report to the employer's premises or office in order to pick up a paycheque, whether or not this is during a regular shift.
>
> **6. During a Time Period for which the Worker was Being Paid or Receiving Other Consideration**
>
> Did the injury or death occur during a time period in which the worker was paid a salary or other consideration, or did the injury or death occur during paid working hours? If so, this is a factor that favours coverage.

[33] The plaintiff was on a paid coffee break. Accordingly, the 6th factor supports a finding of employment connection. With reference to the 5th factor, the plaintiff was not in the course of receiving payment or other consideration such as would be the case if she was picking up or cashing a paycheque (distinguishing this factor from the 6th factor).

[34] I do not view the 5th factor as supporting a finding of employment connection. In any case, as the remaining factors are not met, the factors in item #C3-14.00 provide little support for a finding of employment connection. It is necessary to have regard to other specific policies in Chapter 3.

[35] Policy at item #C3-18.00, Personal Acts, provides:

> A worker's injury or death is compensable if it arises out of and in the course of the employment, as described in Item C3-14.00, *Arising Out of and In the Course of the Employment*. However, there is a broad intersection and overlap between employment and personal affairs. An incidental intrusion of personal activity into the process of employment is not a bar to compensation. Conversely, an incidental intrusion of some aspect of employment into the personal life of a worker at the moment of

an injury or death does not automatically entitle the worker to compensation.

In the marginal cases, it is impossible to do better than weigh the employment features of the situation against the personal features to reach a conclusion, which can never be devoid of intuitive judgment, as to whether the test of employment connection has been met. The standard of proof is the balance of probabilities and consideration is given to section 99(3) of the *Act*.

Where the common practice of an employer or an industry permits some latitude to workers to attend to matters of personal comfort or convenience in the course of employment, compensation for injuries or death occurring at those moments is not denied simply on the ground that the worker is not in the course of productive work activity at the crucial moment. This is within the scope of the established doctrine relating to acts which, though not in themselves productive, are nevertheless a normal incident of employment.

A. Lunch, Coffee and Other Breaks

A worker may be considered to be in the course of the employment not only when doing the work the worker is employed to do, but also while engaged in other incidental activities. For example, a worker does not cease to be in the course of the employment while using washroom facilities or having a lunch or coffee break on the employer's premises. An injury or death that occurs in these situations may not, however, also arise out of the employment. While both employment and non-employment factors may contribute to the injury or death, the causative significance of the employment must be more than trivial for the Board to find that the injury or death arose out of the employment.

[emphasis added]

[36] Policy at item #C3-20.00, Employer-Provided Facilities, further provides:

C. Lunchrooms

Injuries or death occurring in lunchrooms may be considered to arise out of and in the course of the employment if the lunchroom is provided by the employer. This does not extend to injuries or death sustained through eating food, unless the food was provided by the employer, and the worker was specifically required to eat the food provided by the employer, or the food was provided as part of the worker's remuneration.

An employment connection generally exists for traveling employees during normal meal breaks. **However, an employment connection generally does not exist where a nontraveling worker chooses to have a coffee**

> **break in a coffee shop away from the employer's premises, rather than use the company facilities**.
>
> [emphasis added]

[37] The plaintiff was not a traveling employee. Her work was performed at her employer's premises. Reading the policies at #C3-18.00 and #C3-20.00 together, I consider it clear that workers' compensation coverage generally does not apply to a person such as the plaintiff in connection with her travel away from her employer's premises, for the purpose of buying coffee or a meal away from the employer's premises, subject to an employment connection being established on some other basis.

[38] Policy at item #C3-19.00, Work-Related Travel, provided:

> The general policy related to travel is that injuries or death occurring in the course of travel from the worker's home to the normal place of employment are not compensable. On the other hand, where a worker is employed to travel, injuries or death occurring in the course of travel may be covered. This is so whether the travel is a normal part of the job or is exceptional. In these cases, the worker is generally considered to be traveling in the course of the employment from the time the worker commences travel on the public roadway.
>
> In assessing work-related travel cases, the general factors listed under Item C3-14.00, *Arising Out of and In the Course of the Employment*, are considered. Item C3-14.00 is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of the employment.
>
> …
>
> **A. Regular Commute**
>
> An employment connection generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift.
>
> …
>
> There are, however, certain situations when a worker's regular commute may be considered part of a worker's employment.
>
> The following provides guidance as to how some of the factors in Item C3-14.00 may be applied when considering specific cases relating to a worker's regular commute.
>
> **1. On Employer's Premises**
>
> Did the injury or death occur on the employer's premises? If so, this is a actor that favours coverage.

It is the responsibility of an employer to provide a safe means of access to and egress from the place of work. Thus, where a worker is traveling by public roadway to a place of work that is not adjacent to the public roadway, and must travel along a captive road or through a special hazard before reaching the employer's premises, the employment connection may begin at the point of departure from the public roadway rather than at the point of entry to the employer's premises.

It is not considered significant that an injury or death occurs while a worker is seeking to gain access to the employer's premises by a method that is different from that which the employer intends. However, it may be considered significant if the worker chooses a method that he or she has been advised is specifically forbidden by the employer, or if the worker chooses a route that is clearly dangerous.

a. Captive Road

Where a road is public, but as a practical matter is controlled by and leads only to the premises of the particular employer, the road can effectively be regarded as part of the employer's premises. The employer's control may be demonstrated by the fact that the employer makes decisions on maintenance or repairs of the public road. This is known as the "captive road" doctrine.

…

b. Special Hazards of Access Route

Where a place of work is so located that for access and egress the worker must pass through special hazards beyond the ordinary risks of travel, an injury or death sustained from those hazards may be one arising out of and in the course of the employment.

A "special hazard" for the purpose of this policy is one that goes beyond those hazards normally encountered by the traveling public and which the worker would not normally encounter, but for the location of the employer's premises.

For a claim to succeed on the grounds of a special hazard, the hazard need not lie on the only route to the employer's premises. It is sufficient if it is on the worker's regular commute route.

c. Extension of the Employer's Premises

An injury or death that occurs to a worker in the immediate approaches to the place of work, though still on the public roadway, may be considered to arise out of and in the course of the employment if the hazard causing the injury or death is a spill-over from the employer's premises.

> As well, if an employer provides a specific vehicle, like a crew bus, to transport its workers to and from the employer's premises, injuries or death occurring while traveling in this employer-controlled vehicle may be considered to arise out of and in the course of the employment, as the crew bus is considered to be an extension of the employer's premises.
>
> The employer's control of the transportation does not need to be exclusive for this factor to be in favour of coverage. For example, coverage may also be extended where the employer contracts out the crew bus service to transport its workers to and from work.
>
> [emphasis added]

[39] The plaintiff's estimate of her distance, at the time of the accident, from the opening to the parking lot was that she was two car lengths away. Upon considering the evidence set out above, I consider that there are several factors which assist in identifying the location of the accident. Firstly, Duthie was turning right from the angled laneway, to go west on the main laneway. Accordingly, the accident would necessarily have been directly in front of the angled laneway, or a little to the west of the angled laneway. The distance between the precise location of the collision, and the entry to the parking area, would have involved part of the intersection, an area which was in front of part of the ICBC building (with small trees in front of the building), and then the first opening to the parking area covered with a metal grill (which was not the entry gate for vehicles).

[40] As well, a wooden Hydro pole is visible in the photographs beside the laneway, at or near the location where the collision occurred. It appears that the next wooden Hydro pole is located just past the entry to the parking gate. Accordingly, the distance between the scene of the collision and the entry to the parking area was nearly the distance between the two poles.

[41] The plaintiff's evidence was that while she was slowing, at the time of the accident she was traveling between 15 and 20 kilometres per hour (as indicated in her application for compensation), or 20 and 30 kilometres an hour (as indicated in her examination for discovery). In either case, this is consistent with the other evidence showing that the accident occurred while she was still a short distance from the point at which she would be turning into the parking area. She would necessarily have had to slow down further in preparation for the sharp turn, and the stop required to use her fob.

[42] In addition to the foregoing, the plaintiff has furnished a diagram showing measurements of the distances involved. The distance from the Hydro pole, located near the scene of the collision, to the far west side of the driveway to the parking, was approximately 94 feet. Subtracting half the width of the driveway, the entry to the parking area would be about 72 feet from the scene of the collision. At a minimum, measuring from the east side of the angled laneway, the distance from the site of the collision to the parking entry was approximately 40 feet. I infer that the plaintiff's

estimate that she was two car lengths from the entry to the parking area was conservative, and underestimated the actual distance.

[43] The defendants do not argue that the laneway where the accident occurred was a captive road. I agree with the plaintiff that the laneway was a public laneway, was not controlled by the employer, and led to many different premises. The captive road doctrine has no application in this case.

[44] The defendants submit that the plaintiff was exposed to a special hazard not normally experienced by the regular traveling public. This special hazard was due to the location of the ICBC parking entrance. The defendants point to the characteristics of the intersection of the main laneway and the angled laneway, and the absence of any safety signage. The accident would not have occurred but for the special hazard to which the plaintiff was exposed as she was returning to work. The defendants point to the double blind corner, in which neither the plaintiff nor the defendant Duthie could see whether there was any other vehicle until they entered the intersection of the two laneways. This was particularly perilous for ICBC employees given the close proximity of the ICBC parking entrance.

[45] The special hazard need not be in close proximity to the employer's premises in order to establish an employment connection, so long as workers must pass through the area affected by the special hazard in order to access the employer's premises. The policy states the hazard need not lie on the only route to the employer's premises, and that it is sufficient if it is on the worker's regular commute route.

[46] An example of a situation in which a special hazard was found to apply is provided by *Decision No. 50*, "Re the Coverage of Workers' Compensation," 1 W.C.R. 212, retired from policy effective February 24, 2004. That decision concerned a worker injured by a train while driving over a railway crossing situated close to the employer's premises on her way home from work. In that case, the railway crossing was located one-fifth of a mile from the exit gate of the plant. *Decision No. 50* noted (at page 216):

> …**the doctrine that a worker is not covered for compensation while travelling to and from work is well-established and that doctrine excludes compensation for injuries resulting from the hazards of highway travel even though the highway approaching the place of work may be the only access route. For the injury to be compensable, therefore, it must result from a hazard of the industrial environment going beyond the ordinary hazards of highway travel.** Thus if the railway crossing in this case were the same as other railway crossings in the city, we would regard it as an ordinary hazard of highway travel, not a special hazard of egress from the place of employment. **Similarly an injury to a worker on the way home from work, even though on the only egress route from the employer's premises, is not compensable if it results from other normal risks of highway travel, such as a collision between two automobiles.**

[emphasis added]

[47] *Decision No. 50* further reasoned (at pages 216 to 217):

> In the Vancouver area, there seem to be basically two kinds of railway crossings. One is the kind where. flashing red lights warn highway traffic of an approaching train. The second is the kind where there are no controls or warning lights, and no indication of an approaching train except for any warning signals of the train itself. But the second kind of crossing is typically found in dock areas, in industrial plants, on industrial roads, or on the immediate approaches to industrial plants.
>
> For these reasons, we conclude that **the injury in this case resulted not from the ordinary hazards of highway travel but from a special hazard of the industrial environment. It was a hazard beyond those normally encountered by the travelling public and which the claimant would not normally encounter but for the location of the employer's premises.** It was a hazard in the course of egress from the place of work. Where a place of work is so located that for access and egress the worker must pass through special hazards beyond the ordinary risks of highway travel, an injury sustained from those hazards is, in our view, one arising out of and in the course of the employment.
>
> [emphasis added]

[48] As set out in current policy at item #C3-19.00, it is necessary to distinguish between those hazards normally encountered by the traveling public, and one which goes beyond such hazards and is one which the worker would not normally encounter but for the location of the employer's premises.

[49] In this case, the employer's premises were not located in a distinctly industrial area. ICBC's premises were located on Kingsway, a major avenue in Vancouver on which a large variety of business, stores, restaurants, *et cetera*, is located. The area surrounding ICBC's premises (off of Kingsway) appears to be primarily residential in nature. The paved main laneway ran behind the businesses located on Kingsway, and the angled laneway led to various private residences.

[50] The manner in which the two laneways joined on an angle is unusual. It appears that this is a result of the fact that Kingsway was first established as a wagon road through the forest to New Westminster. A grid system of roads was built up around Kingsway at a later date. This history is described as follows in Wikipedia[2]:

> **Kingsway follows the wagon road built by the Royal Engineers between Vancouver's historic Gastown waterfront and the former**

[2] https://en.wikipedia.org/wiki/Kingsway_(Vancouver)

> **capital of the Colony of British Columbia at New Westminster**, as recommended by Colonel Richard Moody to facilitate troops movement between the two points. The trail (also known as the False Creek Trail) opened in 1860, and cut diagonally across Burrard Peninsula following its gentlest incline, peaking near Metrotown in Burnaby. **The road thus lies at an angle to Vancouver's street grid, which had not yet been laid when the road was first built.** As Vancouver became established with a street grid beyond Gastown, the route was named Westminster Road; the stretch of what is now Main Street from 7th Avenue north to the waterfront, seen as a continuation of Westminster Road, was similarly named Westminster Avenue.
>
> The stretch of the road through Burnaby was widened in 1872, and eventually became known as the Vancouver Road. This section of the road was further improved following Burnaby's municipal incorporation in 1892; together with the opening of a parallel interurban line connecting Vancouver and New Westminster the previous year, the area along the road became increasingly favourable for settlement. The provincial and municipal governments joined forces in 1912 to improve and pave the road, which officially reopened on September 30, 1913 as Kingsway.
>
> [emphasis added]

[51] The plaintiff has provided photographs of other angled laneway intersections, which appear to be similarly located near Kingsway.

[52] It would seem, therefore, that the intersection of the two laneways, with one being on an angle, is somewhat of an anomaly relating to the manner in which Kingsway was established prior to a grid system of roads being laid out. This historical anomaly stems from Vancouver's pioneer days, rather than being a feature of an industrial environment.

[53] I consider, however, that it is commonly the case that laneways involve situations in which a driver's vision will be obstructed by fences, garages, and trees on private property. Drivers must proceed with caution as they cannot see, for example, whether children are riding bicycles down an intersecting lane even if the lane is on a 90 degree right angle, or whether another vehicle is driving down the lane. While the angled intersection where the accident occurred is visually distinctive, I consider that the underlying hazard involving obstructed vision is of a similar nature to that commonly encountered by the driving public in using laneways throughout the City. As such, I consider it more in the nature of the ordinary risks of travel on laneways rather than a special hazard.

[54] The policy in the former Chapter 3 of the RSCM II (which does not apply in this case) included examples of situations which were not found to constitute a special hazard of the access route. The former policy at RSCM II item #18.12 stated:

> In another decision, it was argued that the accident resulted from a special hazard of the industrial environment, and therefore a hazard of egress from the employer's premises. In this connection, reference was made to the bends in the road being sharper in the mountains than was normal for lowland highways, to falling rock on the road, to crosswinds, and to ice patches in winter. While the evidence with regard to the existence of these conditions was accepted, they were seen as hazards of mountain highways rather than a special hazard of egress from this kind of work place. The claim was, therefore, not allowed under the special hazard doctrine. In another case, the argument was made that there were special hazards on the road to the employer's premises arising from poor road conditions due to snow. This was rejected because these conditions were no more than was to be ordinarily expected on any road during winter in the interior of the province.

[55] While the applicable policy concerning special hazards no longer includes examples, I consider that the statement in the current policy that a "special hazard" is one that goes beyond those hazards normally encountered by the traveling public and which the worker would not normally encounter, but for the location of the employer's premises, is consistent with the examples, and reasoning, set out in the former policy.

[56] I consider the situation in this case to be comparable to that addressed in the example provided in the former policy, in which the worker encountered additional hazards involving falling rock, ice patches, and crosswinds. Those additional hazards were identified as hazards of mountain highways rather than a special hazard of the access route. I similarly find that the hazards in the present case involving obstructed vision were hazards of laneway travel in general, rather than a special hazard of access to or egress from the employer's premises.

[57] A further question concerns whether the plaintiff's injury in the immediate approaches to the place of work, though still on the public roadway, resulted from a hazard which involved a spill-over from the employer's premises. In this case, the plaintiff was in the laneway approaching the entry to the employer's premises. However, the collision involved a vehicle coming from a different direction, unrelated to her employer's premises. The plaintiff's travel was essentially the same as that involved in travel on any laneway. She was still a short distance from the entrance to the parking, and had not commenced a turn or slowed significantly for the purpose of turning into the entrance and stopping. While her reason for being in the laneway was based on the need to use the gated entry to the parking area, I see little basis on which to conclude that the accident resulted from a hazard which involved a spill-over from the employer's premises. This was not a case involving congestion at the gates to a plant, or an accident with a car leaving the employer's parking area. The circumstances of this case are not like those addressed in *WCAT-2015-01822***,** *Guci v. Starline Architectural Windows Ltd. et al.*, June 9, 2015, which concerned a construction worker who was

arriving at a high rise construction site to perform tile work in the high rise building when a window fell from a great height and landed beside him in the street.

[58] As the June 20, 2012 accident occurred during the plaintiff's paid work time, the accident may be considered as having occurred in the course of her employment. Pursuant to section 5(4) of the Act, a rebuttable presumption arises that the accident arose out of the plaintiff's employment. I find that the weight of the evidence establishes that the accident in which the plaintiff was injured did not arise out of her employment. Accordingly, I find that the plaintiff's injuries in the January 12, 2012 accident did not arise out of and in the course of her employment.

Status of the defendants, Douglas L. Duthie and City of Vancouver

[59] There is no dispute regarding the status of the defendants. The plaintiff concedes the defendant Duthie was a worker in the course of his employment at the time of the accident.

[60] In his examination for discovery, Duthie advised that he was employed by the City as a building site inspector for engineering (Q 9 to 10). He worked regular hours from 8:00 a.m. until 4:30 p.m. (Q 12). His usual place of employment was located at Broadway and Cambie. He generally started his workday by going to his office, and would then leave for his first inspection within one hour (Q 15 to 17). Alternatively, he might go straight to an 8:00 a.m. appointment (Q 14). On the day of the accident, he was driving a vehicle owned by the City (Q 19). At the time of the accident, he was coming from a worksite (Q 20) and was driving to another worksite (Q 23).

[61] I find that the defendant Duthie was a worker within the meaning of Part 1 of the Act. I further find that any action or conduct of Duthie, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

[62] By memorandum dated July 15, 2015, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that the City of Vancouver, account number 001770, was registered with the Board at the time of the January 12, 2012 accident. While a determination of the status of the City has not been expressly requested, I consider that a determination of the status of the City as an employer is necessarily incidental to a finding that Duthie was a worker employed by the City.

Conclusion

[63] I find that at the time of the January 12, 2012 accident:

(a) the plaintiff, Effie Ainsley, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Effie Ainsley, did not arise out of and in the course of her employment within the scope of Part 1 of the Act;

(c) the defendant, City of Vancouver, was an employer engaged in an industry within the meaning of Part 1 of the Act;

(d) the defendant, Douglas L. Duthie, was a worker within the meaning of Part 1 of the Act; and,

(e) any action or conduct of the defendant, Douglas L. Duthie, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM/gw

NO. VLC-S-M-135635
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

EFFIE AINSLEY

PLAINTIFF

AND:

DOUGLAS L. DUTHIE and CITY OF VANCOUVER

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, DOUGLAS L. DUTHIE and CITY OF VANCOUVER, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, January 12, 2012:

1. The Plaintiff, EFFIE AINSLEY, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, EFFIE AINSLEY, did not arise out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, CITY OF VANCOUVER, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

4. The Defendant, DOUGLAS L. DUTHIE, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

5. Any action or conduct of the Defendant, DOUGLAS L. DUTHIE, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of December, 2015.

_____

Herb Morton
Vice Chair

NO. VLC-S-M-135635
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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BETWEEN:

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PLAINTIFF

AND:

DOUGLAS L. DUTHIE and CITY OF VANCOUVER

DEFENDANTS

SECTION 257 CERTIFICATE

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141815-A

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