

Noteworthy Decision Summary

Decision: WCAT-2005-01035-RB **Panel:** Heather McDonald **Decision Date:** February 28, 2005

Parking lots – Injury arising out of and in the course of employment – Sections 5(1) and 5(4) of the Workers Compensation Act – Policy item #19.20 of the Rehabilitation Services and Claims Manual, Volume I (RSCM I) – Items #14.00, #14.10, #18.01, #19.00, #19.30, and #21.10 of the RSCM I

The worker was struck and injured by a motor vehicle in a parking lot owned by the employer as she was returning from a lunch break. The worker met the criteria listed in policy item #19.20 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). As the worker was acting in the course of her employment under item #21.10, she was entitled to the benefit of the presumption in section 5(4) of the *Workers Compensation Act* (Act) that her injuries, caused by an accident, also arose out of her employment. Her injuries arose out of and in the course of her employment under section 5(1) of the Act.

The worker, a grocery store worker, was struck and injured by a hit and run driver in the parking lot of a shopping mall as she was returning to the store from her parked car at the end of her lunch break. The Workers' Compensation Board (Board) denied the worker's claim for compensation. The worker appealed to the former Workers' Compensation Review Board. On March 3, 2003, the appeal was transferred to the Workers' Compensation Appeal Tribunal under section 38 of the *Workers Compensation Amendment Act (No. 2), 2002*.

The panel noted that the employer owned the portion of the parking lot in which the worker's car was parked and in which she was injured, but had contracted with a third party to manage it. Furthermore, the worker had parked her car in an area of the lot that the employer had designated as the preferred area for its workers to park. She had gone to her car to have a cigarette as the employer prohibited smoking in or near the store.

The panel referred to a number of provisions in the RSCM I. Item #14.00 provides that "employment" is broader than "work". Item #21.10 provides that a worker is considered to be "acting in the course of employment" not only when the worker is performing work he or she is employed to do, but also while engaged in "incidental activities." Even if a shift has ended, or not yet started, an injury on the employer's premises, close to the start or stop of a shift, is generally compensable according to item #18.01.

The panel then considered the application of item #19.20 in the RSCM I which looks at five basic questions for the purpose of determining whether an injury occurring in a parking lot is compensable. Did the employer provide the lot for the worker to use? Did the employer control the lot? Was the injury caused by a hazard of the premises? Was the parking lot contiguous to the place of employment? Did the injury occur proximal to the start of a shift? The panel answered all of the questions in the affirmative.

The worker met all of the criteria under item #19.20. As the worker was acting in the course of her employment under item #21.10, she was entitled to the benefit of the presumption in section 5(4) of the Act that her injuries, caused by an accident, also arose out of her employment. Applying item #19.20 and the other policies in the RSCM I, the presumption under section 5(4) was not rebutted. Thus, the worker met the requirements of section 5(1) of the Act.



The worker's appeal was allowed and the Board's decision was varied.

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Introduction

The worker is employed by a large retail grocery store. She was injured on September 19, 1997, when a hit-and-run driver struck her in the store's parking lot as she was walking from her car, during her lunch break, returning to the employer store to resume her work. The worker sustained serious contusions (one of which became complicated by a cellulitis type of infection), a fractured rib, and injuries to her lumbosacral spine and left sacroiliac joint.

In a decision letter dated October 17, 1997, the Workers' Compensation Board (Board) denied the worker's claim for compensation under section 5(1) of the *Workers Compensation Act* (Act), stating that the evidence confirmed that the worker was not at work at the time of her injury, but rather on her lunch break and not on the employer's premises.

The worker appealed that decision, but needed to request an extension of time from the Workers' Compensation Review Board (Review Board) to do so. In a decision dated October 11, 2000, the Review Board denied the worker's request for an extension of time to appeal. The worker then appealed to the Appeal Division. In a decision dated June 12, 2001, the Appeal Division dismissed the worker's appeal regarding an extension of time on the ground that the new information and evidence presented by the worker should have been dealt with by the Board as a request for reconsideration of the October 17, 1997 decision under policy #108.00 in Volume I of the *Rehabilitation Services and Claims Manual* (RSCM I). The Appeal Division referred the worker's claim to the Board's Compensation Services Division for review and further consideration under policy #108.00.

In a decision dated May 14, 2002, a Board case manager reconsidered the October 17, 1997 decision to deny the worker's claim for compensation. The case manager decided that the October 17, 1997 decision was correct. The worker requested a managerial review and on May 24, 2002, a client services manager confirmed the decision to deny the worker's claim. The worker appealed the case manager's May 14, 2002 decision to the Review Board. Her position is that on October 17, 1997, she sustained an injury arising out of and in the course of her employment, and that therefore the Board should accept her claim for compensation.

Issue(s)

On September 19, 1997, when the worker was hit by a motor vehicle in the employer's parking lot, did she suffer injuries arising out of and in the course of her employment? Should the Board accept the worker's claim for compensation?

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced both the Review Board and the Appeal Division. As this appeal had not been considered by a Review Board panel before that date, I am deciding it as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

A trade union advocate represented the worker in these appeal proceedings. On her notice of appeal, the worker indicated that she did not require an oral hearing. I agree that an oral hearing is unnecessary in this case. Credibility is not in issue. Neither are the facts in dispute. Rather, the issue turns on the interpretation and application of Board policy and section 5(1) of the Act. This issue can be determined on a read and review basis. The trade union advocate provided written submissions on the worker's behalf, and the worker herself also provided written submissions.

The employer represented itself in these appeal proceedings. It also provided written submissions.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its final decision on the merits and justice of the case, but in so doing, must apply a Board policy that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it. This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. This is the final level of appeal.

The relevant statutory provisions in this case are sections 5(1) and 5(4) of the Act. Numerous policies were considered in this case. They are found in RSCM I, in the version that existed in October 1997. They include policy #14.00 (Arising Out of and in the Course of Employment), policy #14.10 (Presumption), policy #17A.10 (Commencement of Employment Relationship), policy #18.01 (Entry to the Employer's Premises), policy #19.00 (Use of Facilities provided by the Employer), policy #19.20 (Parking Lots), policy #19.30 (Lunchrooms), and policy #21.10 (Lunch, Coffee and Other Breaks). I will refer to the substance of those policies in the course of this decision.

Background and Evidence

The employer's grocery store is located in a strip mall with a common parking lot that it shares with other stores. The employer owns the part of the parking lot in which the worker was injured, which comprised the width of the building from the grocery store down to [F] Drive, the public road. The employer had designated the area closest to F Drive as the place where its employees should park, although customers of the mall and the grocery store could obviously park there, too, if they wished. The employer had an agreement with [S] Developments, which managed the mall and the landscaping for the outside mall area, to manage the portion of the parking lot it owned, as S Developments also managed the rest of the parking lot not owned by the employer. S Developments looked after the parking lot for line painting, snow removal and sweeping the lot, and would bill the employer for the portion of the lot owned by the employer. If the employer wanted additional snow removal or sweeping, it could contact the contractors directly and itself arrange for the additional services.

The worker provided a diagram of the employer's parking lot, marking the location of buggy return stalls located not only in the "customer only" parking portion of the lot, but also in the area where the employer had indicated that its employees could park. The worker noted that employees are required to empty the buggy cart returns daily. She submitted that the parking lot is considered part of the work site as employees not only empty the buggy cart returns, but also provide carry-out services to customers' vehicles on the lot.

The worker had parked her car in a space on the portion of the parking lot owned by the employer, in the area closest to F Drive that the employer had referred its employees as a preferred place for them to park. This parking area was adjacent to the grocery store.

On September 19, 1997, the worker purchased her lunch at the grocery store and ate it in the lunchroom. She then decided to go outside to get some fresh air and have a cigarette. The evidence is that smoking was prohibited inside the grocery store, and the employer did not want its employees to be standing outside near the grocery store smoking, for public relations' "image" reasons. Therefore the worker went to her car to have the cigarette. Near the end of her lunch break, she was making her way back to the store by foot and was several parking stalls away from her vehicle when she was hit by a vehicle towing a boat and trailer. The vehicle did not stop. There were witnesses to the accident and the worker was taken to the emergency department of the local hospital.

In denying the worker's claim for compensation, the claims adjudicator stated in the October 17, 1997 letter that the evidence was that the worker was on her lunch break and not on her employer's premises at the time of the injury.

After the Appeal Division returned the matter to the Board to reconsider the issue, a Board case manager issued a decision dated May 14, 2002. In that decision, the case

manager adjudicator referred to policy #19.20 (Parking Lots) in the RSCM I, which looks at five basic questions for the purpose of determining whether an injury occurring in a parking lot is compensable. The policy refers to the five questions as follows:

First, was the lot provided by the employer for the worker? The unauthorized use of a parking space by a worker would normally exclude the acceptance of a claim on the basis that the injury was not work related. There will, however, be exceptions where the employer, while not authorizing the parking, has condoned the practice by default in failing to take action to prohibit the practice.

Second, was the lot controlled by the employer? (The fact that a lot is owned or leased by an employer does not, in itself, automatically imply that it is controlled by the employer.) Claims are received for injuries occurring in parking lots not owned by the employer, but as a result of some arrangement, the worker is permitted to park there. If the lot is controlled by the employer, the claim may be acceptable. In claims involving shopping centre or shopping mall parking lots which are designed primarily for customer use and not controlled by the individual employer of a claimant, an injury occurring on such premises would not normally be considered as acceptable.

Third, was the injury caused by a hazard of the premises? This is intended to limit acceptance to only those injuries which have a connotation of "employment relationship". For example, a slip on a pool of oil or a trip over an obstruction would qualify. On the other hand, claimants who nip their fingers in their own car doors would not have their claims accepted. There will also be claims which are not a direct result of the premises which may qualify, such as a pedestrian struck by a fellow employee's car. The term "hazard of the premises" is not an absolute requirement for compensation coverage. Rather it illustrates a distinction between injuries resulting from personal causes and those resulting from the employment. In effect, the type of injury that would qualify for acceptance if it occurred on a factory floor would also qualify for acceptance if it occurred in a parking lot.

Fourth, was the parking lot contiguous to the place of employment? The word "contiguous" is defined as meaning both adjacent to and attached to. While desirable, it should not be deemed a mandatory prerequisite for acceptance. Non-contiguous lots, particularly those under the direction, supervision or control of an employer do qualify although coverage does not normally extend to workers while they are making their way to them across and along public thoroughfares.

Finally, did the injury occur proximal to the start or stop of the shift? If there is a significant time gap between the time of an accident and the start or stop of the shift, the matter is investigated to determine whether there is an employment relationship.

The case manager answered the first question in the affirmative, noting that the employer had provided the parking lot for customer use with an area designated where workers could park.

The case manager answered the second question in the negative, finding that the management company, S Developments, controlled the parking lot. The case manager referred to the sentence in the policy stating that injuries occurring on shopping centre or mall parking lots which are designed primarily for customer use, are normally not considered compensable.

The case manager also answered the third question in the negative, finding that there was no hazard of the premises that caused the accident.

The case manager answered the fourth question affirmatively, finding that the parking lot was contiguous to the worker's place of employment.

Finally, the case manager answered the fifth question in the negative, finding that the worker's injury occurred during a lunch break, not proximal to the start or stop of a shift.

The worker had referred to policy #18.01 (Entry to the Employer's Premises), but the case manager found that the policy did not apply as the employer had "provided a safe means of access and egress from their parking lot." With respect to policy #19.00 (Use of Facilities Provided by the Employer), the case manager stated that if the worker had used the lunchroom provided by the employer, she would not have been involved in the motor vehicle accident as she would not have left the building.

With respect to policy #21.10 (Lunch, Coffee and other Breaks), the case manager stated that taking a lunch break was more than an incidental activity, and that the worker was free to make choices regarding what to do on her lunch break.

In deciding not to change the October 17, 1997 decision, the case manager concluded as follows:

Your accident happened at a time when you were not under the direction of your employer. You made a choice to leave the employer's premises for your lunch break and were involved in a motor vehicle accident as you made your way through the parking lot that is designed primarily for customer use. You were placed at the same risk as the general population using the parking lot.

Although the employer owns the parking lot, they do not supervise or control the lot. The lot was in good repair. It was not a hazard of the parking lot that caused the accident.

Although your accident happened while you were at work, you were not in the course of your employment, you had clocked out and were on a lunch break.

The worker requested a manager's review of the case manager's May 14, 2002 decision. On May 24, 2002, a Board client services manager confirmed the Board's decision to deny the worker's claim. He referred to RSCM I policy #14.00 (Arising Out of and in the Course of Employment), which stated as follows:

Before a worker becomes entitled to compensation for injury under the Act, the injury must arise out of and in the course of employment.

Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the Act at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.

No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:

- (a) whether the injury occurred on the premises of the employer;
- (b) whether it occurred in the process of doing something for the benefit of the employer;
- (c) whether it occurred in the course of action taken in response to instructions from the employer;

- (d) whether it occurred in the course of using equipment or materials supplied by the employer;
- (e) whether it occurred in the course of receiving payment or other consideration from the employer;
- (f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
- (g) whether the injury occurred during a time period for which the employee was being paid;
- (h) whether the injury was caused by some activity of the employer or of a fellow employee.

This list is by no means exhaustive. All of these factors can be considered in making a judgment, but no one of them can be used as an exclusive test.

The client services manager also referred to RSCM I policy #19. 20 (Parking Lots). As well, he referred to RSCM I policy #19.30, (Lunchrooms) which stated:

Claims for injuries occurring in lunchrooms are acceptable if the lunchroom is provided by the employer. Again coverage is limited to reasonable use of the premises and would not extend to injuries sustained through eating food, unless this had been provided by the employer, and the employees had been specifically required to eat food provided by the employer, or it was provided as part of the worker remuneration.

People who have to travel in the course of their employment are covered during normal meal breaks. But a non-travelling employee who chooses to have a coffee break in a coffee shop across the street from the employment, rather than use the company facilities, would not be covered.

The client services manager also referred to RSCM I policy #21.10 (Lunch, Coffee and Other Breaks), which stated as follows:

A worker is considered to be acting in the course of 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 employment while having a lunch or coffee break on the employer's premises, while going to the toilet, having a smoke or other

such activities. Therefore, if while engaged in such activities the worker is injured by virtue of some aspect of the work environment, a claim will be accepted. On the other hand, not all injuries occurring while engaged in such activities will be compensable. The injury must “arise out of” the employment as well as “in the course of” it. Thus, for example, if a worker has a heart attack while having a smoke during working hours a claim will likely be denied. This is because the heart attack probably arose from natural causes and was not caused by any aspect of the employment rather than because, in having a smoke, the worker was no longer in the course of employment.

In one case the claimant, during a paid coffee break, went out from her place of work to her employer’s parking lot with the intention of moving her car closer to the mill entrance. However, before she could do this, she trapped her finger in the car door while shutting it. The purpose of moving the car was to allow her to leave work more quickly and easily at the end of the day. She did not cease to be in the course of her employment when she walked out to the parking lot. It was not unreasonable for her to go out to her car during her coffee break. The evidence established that there was a common practice for employees to do this which was acquiesced in by the employer. If, for example, she had tripped over a pot hole in the lot, any resulting injury would have been compensable. It would have arisen out of the employment, as well as in the course of the employment, as it was caused by a hazard of the employer’s premises. It was considered that, in trapping her finger in her car door, she had not suffered an injury which arose out of her employment. The car was her personal property which she had brought onto the employer’s premises for her own convenience. It was a hazard arising from the use of this property which caused her injury.

This case should be contrasted with another claim where the claimant during a break in production, ran out to his car in the parking lot to get a package of cigarettes and twisted his ankle. His claim was denied. A person is considered to be in the course of his employment while entering and leaving his employer’s premises at the start and end of his shift and at other recognized coffee or lunch breaks. This may also extend to other times when a worker has to leave his employer’s premises for good reason, for example, in emergencies. However, not all trips to and from the worker’s place of work can be treated in this way. There will be trips for personal reasons unrelated to the work and which cannot be said to be simply incidental to that work. There is no coverage in such cases. The trip made in this case was of that kind.

It was considered that more was involved here than such activities as blowing a nose, smoking a cigarette, or going to the toilet, which would

normally be accepted as incidental to the employment. The rationale for accepting such activities is that they benefit the employer by making his employees comfortable while they are working and, therefore, in the long run, more efficient. It can, of course, be argued that the claimant's going to get his cigarettes benefited his employer by putting him in a position where he would be able to smoke and make himself comfortable. However, it seemed that this doctrine should be limited to the specific activities which make the worker more comfortable and not to other secondary activities which put him in the position of doing these activities.

The client services manager described the following information as "factual" in the worker's case: the worker was on her lunch break at the time of the accident, the parking lot was designed primarily for customer use, the portion of the parking lot where the accident occurred was owned by the employer, the parking lot was not controlled by the employer, the parking lot was for a shopping mall, a lunch room was provided on the employer's premises, and the worker chose to leave the work site for her lunch break. In confirming the May 14, 2002 Board decision to deny the worker's claim, the client services manager stated that his reasons were because:

- the worker was not working at the time of the accident;
- the worker was not under the direction or control of the employer at the time of the accident;
- the worker's choice to leave the work site for her lunch break was for a personal reason unrelated to her work; and
- the worker's employment did not place her at a greater risk than the general public using the parking lot at the time of the accident.

The client services manager indicated that if a co-worker had been struck by a vehicle while collecting buggies or assisting a customer, that worker would have been in the course of their employment as the accident would have occurred during the course of a shift, while the worker was doing work to benefit the employer and under the direction of the employer. The client services manager found that the worker's accident did not arise out of or in the course of her employment.

On appeal to WCAT, the worker's position is that the Board erred in applying RSCM I policy, particularly policy #19.20 (Parking Lots). The worker says that with respect to the five criteria in that policy, her claim meets all of them. With respect to the first criterion, the worker says that the parking lot was provided by the employer for its workers, as her use of the parking lot and her access to the grocery store was completely within the employer's policy guidelines and the use the employer expected its employees to have of the parking lot. With respect to the second criterion, the

worker disagrees with the Board's finding that the parking lot was designed primarily for customer use. She notes that the employer owned the parking lot adjacent to the grocery store, and that it designated an area within that lot in which its employees were entitled to park. In this regard, the worker referred to the following passage from *Appeal Division Decision #1991-0503* (September 1991), in which the panel accepted a worker's claim for an injury that occurred in a parking lot:

[The worker] had been directed by her store manager to park in a specific area of the lot and was therefore required to walk an additional distance to the store...

This panel finds that although the spaces were not exclusively reserved for staff, they were also not primarily designed for customer use. We accept that the employer had sufficient control to direct his staff where to park and has some responsibility to see that the area was maintained. The employer directed his staff where they could park and paid his share of costs to have the area hazard-free.

The worker says that in *Appeal Division Decision #1991-0503*, the employer did not own the parking lot, whereas in this case, the employer's attachment to the parking lot area where her accident occurred is even stronger as it owned that portion of the lot.

With respect to the third criterion in policy #19.20, the worker says that her injury was caused by a hazard of the employer's premises. The worker says that the parking lot area is part of the employees' work environment, as they frequently have to go out in the parking lot throughout their shifts for carry outs, collecting carts, or running after a customer that may have forgotten their change or other items at the check stand. The employer has a strict policy that prohibits employees from smoking inside or in front of the building, and directs them to cross the parking lot to have a cigarette on their lunch or coffee breaks. The worker says that there was no crosswalk or painted lines for employees to cross safely into the lot, and she submits that her accident could have been prevented if there had been a crosswalk in the area where her accident occurred. The worker's position is that employees are exposed to a safety hazard when they use the employer's portion of the parking lot.

With respect to the fourth criterion in policy #19.20, the worker says that the parking lot was contiguous to her place of employment, the grocery store.

With respect to the fifth criterion, the worker submits that her injury occurred in the middle of her work shift. Although the case manager stated that the worker was in control of what she did on her lunch break, the worker submits that in returning to the grocery store at the end of her lunch break to resume work, she was in a no different position than any worker starting her shift at the beginning of the shift and needing to access the grocery store via the parking lot adjacent to the store. There was no alternative for the worker but to enter the store by way of the parking lot. In this regard, the worker relies on the passage in RSCM I policy #21.10 (Lunch, Coffee and other

Breaks) which states that “A person is considered to be in the course of his employment while entering and leaving his employer’s premises at the start and end of his/her shift and at other recognized coffee breaks.”

The worker concludes her submission as follows:

One of the hazards with working in the parking lot on the employer’s premises is, of course, being hit by one of the customer’s vehicles. Several of my fellow employees have informed me of episodes where they were just about hit by a moving vehicle. If WCB does not consider this part of our worksite, could you please advise [the employer] not to instruct their employees to cross their parking lots on their work shifts, for carry outs etc. as it is completely unfair to put them at risks by not supplying proper means of a cross walk while on their premises.

In its written submission, the employer supported the Board’s decision to deny the worker’s claim. The employer submitted that during her lunch break, the worker made a personal trip to her vehicle, and that she was not directed by the employer to do that. The employer submitted that during her lunch break, the worker placed herself at the same risk as the general population using the parking lot. The employer submitted that the worker’s injuries arose from personal causes, not those resulting from her employment.

Reasons and Findings

Section 5(1) of the Act sets out the dual requirements for claiming compensation:

Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.

Thus in order to be compensable, an injury must both “arise out of” and be “in the course of” a worker’s employment.

Section 5(4) of the Act contains the “accident presumption,” which in the case of injury or death by accident, assists in determining whether the dual requirements are met:

In cases where an injury is caused by accident, where the injury arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

RSCM I policy #14.10 expands on section 5(4) of the Act. It explains that for injuries resulting from an accident, evidence is only needed in the first instance to show either that the injury arose out of the employment or that it arose in the course of employment. The balance is presumed, unless there is evidence to the contrary. In other words, it is not a conclusive presumption. It is rebutted "if opposing evidence shows that the contrary conclusion is more likely." The policy further explains that, generally speaking, "arising out of the employment" concerns the cause of the injury and "in the course of employment" refers to its time and place.

RSCM I policy #14.00 provides a number of indicators that the policy says may be used "for guidance" in determining whether an injury should be classified as one arising out of and in the course of employment. The list is not exhaustive and not one of the factors can be used as an exclusive test. It is noteworthy that RSCM I policy #14.00 provides that in the workers' compensation system, the term "employment" is broader than the term "work." It is not necessary that a worker be engaged in productive work when injured, to be eligible for workers' compensation benefits. This is an important concept because if one were to apply the indicators in policy #14.00 as rigid requirements for an injury to qualify as arising out of and in the course of employment, many injuries occurring outside of productive work time would not be compensable under section 5(1) of the Act. Thus policy #14.00 emphasizes that the indicators are to be used as guidance only, and that an injury may be compensable even when a worker was not engaged in productive work for the employer at the time of the injury. As RSCM I policy #21.10 points out, a worker is considered to be "acting in the course of employment" not only when the worker is performing work he or she is employed to do, but also while engaged in "incidental activities." According to that policy, a worker does not cease to be in the "course of employment" while "having a lunch or coffee break on the employer's premises, while going to the toilet, having a smoke or other such activities."

In considering this appeal, I have also kept in mind that an injury on the employer's premises is generally compensable. See *Appeal Division Decision #1993-0206*, published at 9 WCR 699 (February 9, 1993). Even if a shift has ended, or not yet started, an injury on the employer's premises, proximal to the start or stop of a shift, is generally compensable: see RSCM I policy #18.01, which provides that compensation coverage generally begins when a worker enters the employer's premises for the commencement of a shift, and RSCM I policy #17A.10, which states in part that:

It is not essential that a person must actually have commenced productive work for an employer before being covered. If, for example, an injury took place while entering the employer's premises on the way to the first day of work the worker may be covered. The employment relationship would have commenced at the moment of entry to the premises and would not have been delayed until completion of the necessary hiring formalities or actual commencement of work.

Thus in *Appeal Division Decision #1993-0206*, supra, the Appeal Division found that a worker sustained an injury arising out of and in the course of her employment when she fell on ice in the parking lot owned by her employer. In that case, the parking lot was considered to be part of the employer's premises. The panel referred to policies #14.00 and #18.01, as well as #19.20, the specific policy applicable to parking lot injuries. The panel noted that the worker was on the employer's premises at the time of the accident, and thus her compensation coverage had started. The parking lot was on the premises of the employer, provided for the worker's use, and the panel found that it was within the control of the employer or its agents. Falling on ice was a hazard of the premises and not something extraneous or personal to the worker. The parking lot was contiguous to her place of employment and the injury occurred proximal to the start of her shift, before she was to begin work.

Applying the five basic questions in RSCM I policy #19.20 to this case, as well as the other policies referred to in this decision, I have reached a different conclusion than the Board. My conclusion is that the worker sustained an injury arising out of and in the course of her employment when she was struck by the vehicle in the parking lot on September 19, 1997.

For the reasons provided by the Board in its decisions, I also respond in the affirmative with respect to the first and fourth of the five basic questions posed in policy #19.20. The employer designated an area within the parking lot for its employees to park their vehicles when they came to work. Although the area was not designated exclusively for employees, as customers could also park in that area, I agree with the Board that the first question is satisfied in that the employer owned the parking lot next to the store and directed them to park in a designated area within the lot. With respect to the fourth question, the parking lot was contiguous to the grocery store, the worker's place of employment.

The second question asks whether the employer controlled the parking lot. In the "parking lot" cases I have reviewed (the cases referred to by the worker and the other reported decisions noted in these reasons), this has been a difficult aspect of policy to interpret and apply. Policy #19.20 states that the fact that a parking lot is owned or leased by an employer does not, in and of itself, automatically imply control by the employer. The policy also states that in claims involving shopping centre or shopping mall parking lots which are designed primarily for customer use and controlled by a claimant's employer, an injury occurring on such premises would not "normally" be accepted as compensable.

The issue of an employer's control over a parking lot has been discussed in a number of Appeal Division and WCAT decisions. In *Appeal Division Decision 1993-0174*, published at 9 WCR 691 (February 4, 1993), the panel addressed the issue of control by first noting that RSCM I policy #14.00 also states that "lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable." But the panel

observed that the specific parking lot policy suggests that control of the parking lot by the employer must be established before an injury on the parking lot is found to be compensable. Thus the panel indicated that the second basic question in RSCM I policy #19.20 must be answered in the affirmative before compensating a worker injured in a parking lot. The panel recognized, however, that RSCM I policy #19.20 does not clarify what it means by “control,” as the policy could refer to control of the operation, repair and maintenance of the parking lot, or alternatively, control of access to the parking lot. The panel’s decision, however, attached greater significance to control of the operation, repair, and maintenance of the parking lot than to control of access to the lot.

I agree with the approach taken by the panel in *Appeal Division Decision 1993-0174*, namely, that “control” in policy #19.20 largely concerns itself with matters such as operation, repair, and maintenance of an area, more so than access to the parking lot area itself. I note that this approach has been followed in subsequent Appeal Division and WCAT decisions. Such an approach reconciles policy #19.20’s reference to an employer’s “control” as a condition to compensability of an injury, with policy #14.00’s statement that an employer’s lack of control of a situation does not bar the compensability of an injury otherwise acceptable. No employer can control every circumstance or situation which gives rise to a workplace injury, which is what I interpret the statement in policy #14.00 to recognize. However, in order for a parking lot injury to be compensable, policy #19.20 requires “control” by the employer over the parking lot in the sense that an employer has authority to deal with, in some measure, parking lot hazards. Thus the factors of operation, maintenance, and repair of the parking lot area are important to assess in the context of policy #19.20’s reference to “control”, as they relate to an employer’s duty of care with respect to an extended view of the typical workplace.

With respect to this second question in policy #19.20, I have concluded that in this case, the employer did control the parking lot area in which the worker was injured, in the sense of “control” as it is used in that policy. The first significant fact, and one which distinguishes this case from other parking lot cases in which a worker’s claim has been denied, is that the employer owned the parking lot area in which the worker was injured. I am aware that policy #19.20 says that ownership alone will not prove “control.” But the employer’s ownership in this case does distinguish the case from the typical shopping mall case in which the parking lot is owned and maintained by the mall owners, and the employer retail store simply pays rent on a lease to share the use of its mall premises and a common parking area with other mall stores and their customers.

The evidence in this case is that the employer owns the lot contiguous to its grocery store up to the edge of F Drive, the public road. The employer contracts with S Developments to manage the portion of the lot it owns. I judge that relationship to be one of convenience for the employer, and I find that the delegation and billing arrangement with S Developments does not detract from the employer’s controlling authority over the area of the parking lot it owns. Given that S Developments takes care

of the entire parking lot area for the mall owners, with respect to line painting, snow removal and sweeping the lot, it makes sense for S Developments to do the same for the employer's parking lot at the same time as it maintains the rest of the lot for the mall. But I note the evidence that the employer is free to directly hire additional maintenance services, and my view of that evidence is that the employer has control over which contractor(s) it chooses to hire for parking lot maintenance and repair.

Given that the employer owned the parking lot adjacent to its grocery store, I agree with the worker's point that it could have directed a contractor to paint crosswalk lines or other lines, or posted signs, to assist vehicular and pedestrian traffic. I am not finding (as there is insufficient evidence on that issue), that the worker's accident was caused by the employer's failure to take steps in that regard in the sense that the accident could have been prevented by a crosswalk or a posted traffic sign. But I do find that the employer in this case had control over the parking lot area adjacent to its grocery store with respect to repair and maintenance issues, and that it could have exercised that control with respect to some pedestrian and vehicular traffic matters on the lot, such as by posting traffic signs or painting crosswalk lines.

On the matter of the "operation" of the parking lot, the employer's parking lot is not a private lot but is open to the public. Therefore the parking lot was not "operated" in the way that some private lots might be, with restricted access and perhaps charging customers and others parking fees. The parking lot was primarily for the benefit of the employer's customers, but the employer recognized that its employees would use it as well by designating for them a specific area for them to park. The map of the employer's parking lot indicated the location of buggy kiosks for the return of the employer's shopping carts. There was also evidence from the worker, not contradicted by the employer, regarding the typical grocery store incidents of workers working in the parking lot by gathering shopping carts, assisting customers with carry outs, and running after customers to return change and other forgotten items. The employer did not "operate" this parking lot in the sense that a private parking lot might be "operated," with restriction of access and charging of fees. But I am satisfied that the employer's ownership of the lot, the lot's location contiguous to its grocery store, the employer's direction to employees to park in a specific area of the lot next to F Drive, the commonplace extension of work duties beyond the grocery store into the parking lot itself, and the employer's control over repair and maintenance matters, characterizes the parking lot as an extension, to some degree, of the employer's grocery store premises. I have already observed that the employer's right of control could have involved painting crosswalk lines or posting other signs with respect to pedestrian and vehicular traffic on the lot. Given the employer's ownership of the parking lot area adjacent to the store, it would also have been entitled, for example, to hire a security firm to patrol its parking lot. Thus in my view, the employer had a sufficient operational nexus with the parking lot, together with its responsibilities to oversee maintenance and repair of the lot, to support a finding that the employer controlled the parking lot area in which the worker was injured.

My conclusion with respect to the second question in RSCM I policy #19.20 (namely, that the employer owned and controlled the portion of the parking lot in which the worker was injured) means that the worker's September 19, 1997 injury occurred on the employer's premises or at least at an entry (owned by the employer) to the employer's premises. At the time of the accident, the worker's lunch break was drawing to a conclusion and she was returning to the grocery store, walking toward the store on the employer's parking lot that provides access to the store's main entrance. This is significant because RSCM I policies #18.01 (Entry to Employer's Premises) and #21.10 (Lunch, Coffee and Other Breaks) indicate that a worker's injury on the employer's premises (or at the entry to such premises) is characterized as occurring "in the course of" his or her employment albeit that the worker is not engaged in productive work at the time of the injury. With the worker's injury characterized as occurring in the course of her employment, this gives rise to the rebuttable presumption in section 5(4) of the Act that her accident injury "arose out of" her employment as well. I find that I need to respond to the other basic questions in RSCM I policy #19.20 in order to determine whether or not the section 5(4) presumption has been rebutted in this case.

The third basic question in RSCM I policy #19.20 asks whether the injury was caused by a hazard of the premises. The policy states that the question is intended to distinguish injuries that arise from "personal causes" from those that "have a connotation of 'employment relationship'." An example of an injury arising from a personal cause which would not be compensable, is where a worker nips his finger in his own car door. An example of an injury arising from an employment relationship is where a worker is a pedestrian and is struck by a fellow employee's car in the parking lot. In offering that latter example, the policy states that claims may be acceptable albeit that the injuries are not a "direct result of the premises." The policy states that in effect, "the type of injury that would qualify for acceptance if it occurred on factory floor would also qualify for acceptance if it occurred on a parking lot."

Both the Board and the employer agree that there was no hazard of the employer's parking lot that caused the worker's accident. They stated that the worker placed herself at the same risk as the general public using the parking lot, and that the worker's injuries arose from personal causes not related to her employment. I do not agree with their assessment of the situation giving rise to the worker's injury.

The employer's parking lot poses motor vehicle accident hazards to its employees that are also shared by the general public. The fact, however, that customers using the parking lot are also exposed to motor vehicle hazards does not diminish the significance of those hazards as employment-related hazards to workers. They are part of the work environment. The worker's injuries in this case did not arise from personal causes related, for example, to her use of her own personal property. Just as a store clerk or assistant was exposed to the risk of being hit by a car while helping a customer or collecting a shopping cart in the parking lot, so too the worker was exposed to the risk of being hit by a car as she made her way toward the grocery store, heading for the store's

main entrance, on the employer's parking lot, at the conclusion of her lunch break to recommence working inside the store.

In my view it does not matter whether the worker was struck by an employee's vehicle, a customer's vehicle, or the vehicle of a driver simply passing through the parking lot. The risk was there for all employees either engaged in productive work for the employer on the lot, or like the worker, otherwise in the course of their employment as they made their way into the store on the employer's parking lot at the end of a coffee or lunch break to resume work on a shift. In that sense, the risk to the worker was the same risk to which an employee would be exposed, while in the parking lot, in the normal course of production for the employer (see item (f) in RSCM I policy #14.00). Further, if the worker had been making her way back to work, just inside the grocery store, and a motor vehicle had crashed through the store's glass window and struck her, her claim would be compensable albeit that she was not engaged in productive work at that moment in time. Therefore, referring to RSCM I policy #19.20's statement that "the type of injury that would qualify for acceptance if it occurred on a factory floor would also qualify for acceptance if it occurred in a parking lot," by way of analogy, I find that the fact that the motor vehicle accident took place outside the grocery store on the employer's parking lot does not render the worker's claim non-compensable.

The final question in RSCM I policy 19.20 is the fifth: did the injury occur proximal to the start or stop of the shift? A significant time gap between an accident and the start or stop of a shift may affect the finding of an employment relationship. Both the Board and the employer respond to this question in the negative, referring to the worker's accident as occurring during her lunch break. Again, I do not agree with their assessment. The significant point for the purposes of the fifth question in RSCM I policy #19.20 is that the injury, to be employment-related, should occur close in time to the worker having engaged or being about to engage in productive work for the employer. In this case, the worker was still on her lunch break, but the evidence is that the break was drawing to a close and she was engaged in activity incidental to her employment (see policy #21.10) in that she was walking on the employer's parking lot, returning to the grocery store, to resume her shift for the afternoon. My approach is consistent with *WCAT Decision #WCAT-2003-00748-ad* (May 30, 2003) (published at www.wcat.bc.ca), wherein the panel found that a worker's injury was "proximal to the worker's shift, in that it occurred during the middle of the shift during her lunch break," as the worker was leaving her employer's premises to start her lunch break.

I have responded in the affirmative to all five of the basic questions posed in RSCM I policy #19.20. I find that the worker is entitled to the benefit of the presumption in section 5(4) of the Act that her injuries, caused by an accident, arose out of her employment as I have found that her injuries occurred in the course of her employment. Applying RSCM policy #19.20 as well as the other policies I have referred to in this decision, I find no reasons that rebut that statutory presumption. Indeed, application of the relevant policies supports a finding, independent of the statutory presumption in

section 5(4) of the Act, that the worker meets the dual requirements of section 5(1) of the Act that her injuries arose out of and in the course of her employment.

Conclusion

For the foregoing reasons, I allow the worker's appeal and vary the Board's decision dated May 14, 2002. I have found that on September 19, 1997, when the worker was hit by a motor vehicle in the employer's parking lot, she sustained injuries arising out of and in the course of her employment. Therefore I have found that the Board should accept her claim for compensation.

Expenses of the appeal were not in issue and none are awarded.

Heather McDonald
Vice Chair

HM/hb