Noteworthy Decision Summary

Decision: WCAT-2007-02634 **Panel**: Herb Morton **Decision Date:** August 30, 2007

Parking Lot Injury – Factors to consider – Item #19.20 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy as it examines the factors to consider when determining whether an injury which occurs in a parking lot constitutes a personal injury arising out of and in the course of employment. This decision provides a summary of other WCAT decisions which have addressed the factors to be considered with respect to parking lot injuries.

The worker parked her car shortly before her shift was to commence in the parking lot by her employer's premises. She injured her back when she slipped and fell on ice in the parking lot.

The panel examined the five basic factors to be considered in parking lot cases outlined in policy item #19.20 of the *Rehabilitation Services and Claims Manual*, *Volume II*. The policy does not provide detailed guidance as to how these factors were to be assessed. That is, it does not specify that all the factors have to be met, or that a certain number have to be met in order to support the conclusion that the worker's injury arose out of and in the course of the worker's employment. The panel inferred that the intent of the policy was to afford a measure of discretion to decision-makers in weighing the significance of these various factors in the context of the particular case.

The worker's appeal was allowed. The parking lot was contiguous (adjacent and attached) to the employer's premises. The injury occurred proximal to the start of the worker's shift. The fall was caused by a hazard of the premises. Although the employer did not own the land or premises or maintain the parking lot, it was significant that it was the "primary tenant" with responsibility for all the costs for parking lot maintenance. The panel had limited evidence as to the usage of the parking lot by visitors and workers of other employers. He considered it likely that the parking lot was primarily used by the employer's workers, together with clients and visitors to the employer's facility. The fact that the employer was the "primary tenant" suggested that visitors using the lot might be primarily visitors to the employer's facility. Where a company provides the same parking lot for the use of its employees and customers alike, that would not be a reason for limiting workers' compensation coverage for injuries to employees in the parking lot. The fact that the employer paid all of the costs for maintaining the lot suggested some measure of control by the employer.

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Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed the October 19, 2006 Review Division decision (*Review Decision #R0067402*). The review officer confirmed the March 30, 2006 decision by an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), to deny the worker's application for compensation.

The worker suffered a back injury on March 9, 2006, due to a slip and fall on icy ground after getting out of her car in a parking lot beside her place of employment. The review officer found that as the employer did not own the parking lot, and did not have any control over it, and as the lot was used by other tenants and visitors as well as workers, the worker's injury did not arise out of and in the course of her employment.

The worker is represented by her union representative. In her notice of appeal, the worker requested an oral hearing. She advised that she needed to explain how her injury happened and what she felt at the time of her injury. On preliminary review, the WCAT Registry determined that the appeal would proceed by written submissions. The worker's representative provided a written submission dated February 22, 2007. A representative for the employer provided a submission dated March 14, 2007. By rebuttal dated April 2, 2007, the worker's representative submitted that the parking lot in which the worker was injured was owned and maintained by a government corporation (B), and the worker was employed by the government, the same employer.

B was subsequently replaced by C. By memo dated May 16, 2007, I noted:

> If the worker's claim for compensation is denied on the basis that her injuries on March 9, 2006 did not arise out of and in the course of her employment, she may wish to consider pursuing a legal action against the owner of the parking lot [B]. Accordingly, [B] may have an interest in the determination as to whether the worker's injuries on March 9, 2006 arose out of and in the course of her employment.
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> *WCAT Decision #2006-03916* found that a failure to invite a potential defendant to participate in an appeal regarding the acceptability of a worker's claim for compensation involved a breach of natural justice.
>
> ...

A WCAT decision with respect to whether the worker suffered an injury arising out of and in the course of her employment is final and conclusive pursuant to subsection 255(1) of the Act. In view of the possibility that a legal action might be brought by the worker, and the further possibility that this might lead to an application for a certificate to the court under section 257 of the Act, I consider it necessary to invite [B] to participate in this appeal as a potentially affected person (regarding the issue as to whether the worker's injuries on March 9, 2006 arose out of and in the course of her employment).

Section 3 of the *[B] Act*, RSBC 1996, ch. 33, provides:

> **3**(1) The corporation is an agent of the government.
>
> (2) The Minister of Finance is the fiscal agent of the corporation.
>
> (3) The corporation has the power and capacity of a natural person of full capacity.

I also note that [*sic*] the following information from [B's] website:

> [C] is a division of [name] within the Ministry of [name]. [Name] is the shared services provider for the Government of British Columbia, within which [C] provides accommodation and real estate services to government ministries and broader public sector customers and clients.

Clarification would be helpful regarding the legal status and role of B / C in relation to the parking lot in which the worker fell on March 9, 2006.

On June 5, 2007, a representative for B / C forwarded a notice of participation. She explained that at the time of this incident on March 9, 2006, she was employed by B in their Risk Management Department as their insurance co-ordinator and managed all claims. She advised:

> I will be supplying additional data as to the relationship and responsibility of the [employer] as to the Land Lease in place with [B] and the current arrangement with [C].

> **The agreement between [the employer] & [B] has always been that they occupy and pay for all maintenance to the buildings and land including the parking.** I should have a statement from [C] which should assist. This I should receive shortly and will forward.
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> [emphasis added]

B's representative attached a copy of an e-mail message addressed to her from a senior pricing advisor for C. This stated:

> …the situation at [location] is although [C] is owner of the [location] site, 100% of costs including grounds and parking lot maintenance is paid for by [the worker's employer]. They are the primary tenant on the site and as such are responsible for all costs.

Although invited to do so, the representative for B / C declined to provide any further evidence or submissions. These additional materials were disclosed to the worker and employer. The worker's representative and the employer's representative declined to provide a further submission. By letter dated August 6, 2007, the worker requested that a final decision be made on her appeal.

I find that the worker's appeal involves issues of law and policy, and does not involve any significant issue of credibility. I agree that the worker's appeal can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

The broad issue raised by the worker's appeal is whether her fall in a parking lot on March 9, 2006, arose out of and in the course of her employment.

Jurisdiction

The Review Division decision has been appealed to WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). 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 that is applicable (section 250(2) and 251 of the Act).

Background

The worker was employed as a food service helper at a hospital. On March 9, 2006, she parked in the "front parking lot" by her employer's premises at approximately 6:50 a.m. This was shortly before her shift was scheduled to commence at 7:00 a.m.

After getting out of her car and closing her car door, the worker suffered an injury when she slipped and fell on ice in the parking lot.

By letter dated March 22, 2006, the employer advised:

> [The employer] is not disputing that she injured herself but we are stating that based on WCB policy the injury did not arise out of and in the course of her employment. The parking lots at [location] are not owned or managed by the employer. The grounds are maintained by [B]. Please also note that the injury occurred prior to her shift start.

By decision dated March 30, 2006, the entitlement officer cited the policy at item #19.20, "Parking Lots," of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), and denied the worker's claim. The worker requested review by the Review Division.

By decision dated October 19, 2006, the review officer confirmed the March 30, 2006 decision. The review officer addressed the five criteria set out in policy at RSCM II item #19.20 as follows:

> As per policy item #14.00, control of a situation by an employer is an indicator that the situation is covered under the *Act*. Policy item #19.20 provides more specific indicators to be considered in determining whether an injury occurring in a parking lot is compensable.
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> Firstly, was the lot provided by the employer for the worker? In this case, while the parking lot was apparently used by the employer's workers, the lot was used by other tenants and visitors. It was not on the property owned by the employer. The lot was not provided solely for the employer's workers.
>
> Secondly, was the lot controlled by the employer? The lot was owned and maintained by a separate corporation. In the absence of ownership or the responsibility for repairing or maintaining the parking lot, I am satisfied that the employer did not have any control over it. In coming to that conclusion, I have considered the submissions of the worker's representative that there should be implied control based on the nature of the employer and the owner of the parking lot. I do not see, however, that such an implication arises from the circumstances cited.
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> Thirdly, was the injury caused by a hazard of the premises? I am satisfied that the fall was caused by a hazard of the premises as described in policy item #19.20.

Fourthly, was the parking lot contiguous to the place of employment? There does not appear to be any dispute that the lot was contiguous.

Fifthly, did the injury occur proximal to the start or end of the shift? Likewise, there does not appear to be any dispute that this question was answered in the affirmative.

Submissions

The worker's representative argues that the worker's claim meets the requirements of policy item #19.20, and that her injury arose out of and in the course of her employment. He submits:

1. Use of the parking lot for employee parking was authorized by the employer.
2. The lot was operated by [B] a Crown Corporation, and that her employer is a Crown Corporation.
3. Her injury was caused by an icy surface, a hazard of the premises.
4. The parking lot was contiguous to the place of employment.
5. The injury occurred just prior to the start of the work shift.

The employer's representative advises that the employer is not a crown corporation. Rather, it is part of the Provincial Health Service Authority. The employer submits that individuals from other companies, clients and visitors to the buildings, used various areas of this parking lot. The employer was not in control of the maintaining or upkeep of the parking lot. The employer accepts that the parking lot was contiguous to her place of employment and that the worker was at the beginning of her shift.

Other Decisions

Several WCAT decisions have involved an application of the policy at item #19.20 concerning parking lots. Some of these decisions have concerned applications for workers' compensation benefits. Other decisions have involved the provision of a certificate to the court in a legal action, where the injured worker was seeking to pursue a legal action against the owner of the parking lot under the *Occupiers Liability Act*. In both situations, the same issues arise as to whether the worker's injury arose out of and in the course of the worker's employment. These decisions are all accessible on the WCAT website. Apart from the decision dated April 30, 2007, all of the decisions listed below were posted on the WCAT website prior to the initial submission dated February 22, 2007 by the worker's representative.

Two WCAT decisions involved employers whose workers were injured on grounds owned and maintained by B: *WCAT Decision #2003-02443-RB* and *#2007-01383*.

WCAT Decision #2003-02443-RB, September 9, 2003, concerned a nurse employed at a hospital complex. While out for a walk on one of his breaks, the nurse tripped on a rock staircase leading to a garden area and fell, wrenching his back. The WCAT panel found:

> The location of the incident where the worker fell is a garden where individuals go to smoke, rest or sit on benches. The area is not controlled, owned or maintained by the hospital.
>
> The employer provided background information concerning the hospital grounds in its submission. According to the employer, the roads and sites on the hospital grounds are connecting roads to various arterial routes and the general public and employees utilize the grounds and the roads. There are seven different employers with facilities on the grounds. As part of its submission the employer provided a brochure from a horticultural society advertising public tours of various parts of the hospital grounds, including the garden area where the worker was injured.
>
> Before embarking on this decision, I requested that the employer provide me with additional information. I requested a detailed site map of the hospital grounds, identifying the employer's premises, both building(s) and grounds and identifying the location where [the worker] worked at the relevant time and also identifying the location where the worker was injured. I requested title documents showing the ownership of the lands as a whole and the particular areas of significance….
>
> The information provided to me confirms that whole of the hospital grounds are owned by [B] and are subject to various statutory rights of way. There are no registered leasehold interests. The map provided discloses that the garden area where the worker's injury occurred is at some remove from the hospital building where the worker was employed. The garden is not contiguous with the employer's premises. There are several roadways and open areas that must be crossed when travelling from the hospital to the garden.

Although the worker's injury in that case did not occur in a parking lot, the panel noted:

> Item 19.20 of the RSCM refers to parking lots and provides that a worker will not be covered for a parking lot accident where the lot is not provided or controlled by the employer and is not contiguous to the employment premises. The employer has argued that the circumstances of the worker's injury are by analogy, covered by this provision.

The WCAT panel found that the worker's injury did not arise out of and in the course of his employment:

> I find that the worker, when he was injured, was on an unpaid break, on premises that were neither owned nor controlled by the employer. Although the area where the worker fell may be associated, in the mind of the public, with the employer hospital I must have regard to actual ownership and control of the premises where the injury occurred. I find that the worker suffered an injury on premises that were not his employer's and were not occupied or maintained by the employer. Further, these are premises that are open to the general public.

WCAT Decision #2007-01383, April 30, 2007, concerned a hospital employee. The WCAT panel noted that the employer's facility was one of several facilities operated by different agencies on the same parcel of land owned by B. The WCAT panel rejected the argument that no distinction should be drawn between B and the employer as they were both government agencies:

> I conclude that although the employer is for all purposes an agent of the Government, under the governing statute it is a corporation with its own employees and as such a distinct employer. I find that in the context of the worker's claim, the relevant "employment" in section 5(1) and 5(4) of the Act is the worker's employment with the corporate entity, and the "employer" for the purposes of the Act and relevant policies, including items #14.00 and #19.20, is the corporate entity and not the Government.

In that case, the employer was located on the part of the land owned by B that was across a highway and some distance from the other facilities. The WCAT panel found that the parking lot in question was not analogous to a parking lot in a shopping centre/mall:

> The shopping centre/mall example does not apply in this case. Shopping centres/malls typically have a single landlord, many different businesses/employers as tenants and parking lots used by customers of the various businesses. As the policy recognizes, individual employers may arrange for their employees to be able to park in the shopping center's parking lot, but the lots are generally designed primarily for customer use and not controlled by individual employers. In this case any similarity to a shopping mall ends with the fact that there is a single landlord and multiple tenants/employers on the [B] lands. This case is distinguished by the fact that the employer's facility is the only one on a certain part of the [B] land that is relatively isolated, and at some distance from the facilities on the rest of the [B] lands. Whether or not they are permitted to do so, I understand from the location and relative isolation of the employer's facility that employees of other tenants/employers would be unlikely to park on the employer's parking lot. Whether or not employees of other agencies on the [B] lands are permitted to park on the

> employer's lot, for practical purposes the employer's lot is effectively only for the use of the employer and its employees and visitors.
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> The location and relative isolation of the employer's buildings from the rest of the [B] lands also means that the employer's employees would not reasonably be expected to park elsewhere on the [B] lands.
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> I find from the fact that the employer buildings and parking lot are surrounded by a security fence, and that the employer maintains security over the parking lot, that the employer exercises a significant amount of control over the parking lot. I recognize that the evidence does not establish that the employer directly maintains the surface of the parking lot. Under the terms of the lease agreement [B] maintains the employer's premises, including the buildings and parking lot. This is a situation where both the employer/tenant and the landlord exercise some control over the parking lot.

The WCAT panel found that the employer had sufficient control over the parking lot that this factor weighed in favour of the worker's claim. The WCAT panel found that the worker's fall, when she slipped on ice while opening her car door in the parking lot, arose out of and in the course of her employment.

WCAT Decision #2005-01035-RB, February 28, 2005, summarized as "noteworthy" on the WCAT website, concerned an injury to a worker in the parking lot of a large retail grocery store. The employer owned the portion of the parking lot where the worker was injured. This area was used by both customers and workers. The grocery store contracted with another firm to manage the portion of the lot which it owned. That other firm took care of the entire parking lot area for the mall owners. The WCAT panel concluded that the worker's injury arose out of and in the course of her employment. The panel reasoned in part:

> …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.

…

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.

WCAT Decision #2007-00248, January 24, 2007, concerned an employee of a Safeway store. (As that decision was provided in a legal action, it was not necessary to remove identifying information.) In that case, the WCAT panel noted:

> Under the terms of the lease, Safeway Ltd. was responsible for repair and maintenance related to the everyday use or operations of the parking lot whereas the owner was responsible for capital expenditures. Safeway Ltd. was required to remove all debris etc. from the parking lot, wash and sweep the area, keep it in a neat, clean and orderly condition, keep it free of snow and ice, keep appropriate directional signs, markers and lines, maintain all landscaped areas, and repair automatic sprinkler systems or water lines and keep the parking area adequately lighted during business hours.

The WCAT panel found that the plaintiff's injuries arose out of and in the course of her employment.

WCAT Decision #2006-02342, May 31, 2006, concerned a worker who was injured in a parking lot at an airport. In that case, the WCAT panel noted that the policy at #19.20 does not indicate how many of the tests set out in the policy need be met in order to accept a claim. The panel found, however, that the presence or absence of employer control was a significant factor:

> Item #19.20 does not explicitly indicate how many questions need to be answered in the affirmative before it can be concluded that an injury occurring in a parking lot is an injury that arose out of and in the course of a worker's employment. I find that the circumstances of the worker's claim only clearly produce affirmative answers to questions three and five. Question four is not answered in the affirmative. Even if, on some basis, I

found that the parking lot was provided by the employer to the worker, I consider that the evidence does not support a conclusion that the parking lot was controlled by the employer.

The worker's injury occurred in a parking lot that was not owned by the employer. By arrangement, she was permitted to park there. The policy indicates that if such a lot is controlled by the employer, a claim may be acceptable. In this case the lot was not controlled by the employer. I question whether the parking lot used by the worker could be properly compared to a parking lot attached to a shopping centre or shopping mall. Such lots are primarily designed for customer use, whereas the lot in which the worker parked was not for customer use.

Thus, I question the express applicability of the provision in a policy which indicates that claims for injuries involving shopping centre or shopping parking lots would not normally be considered acceptable. However, I note that the provision may have some application in that I infer from it that the absence of control with respect to a parking lot may not automatically mandate the denial of a claim. I say this because the policy provides that "an injury... would not normally be considered as acceptable." The use of the word "normally" suggests that there may be some discretion with respect to injuries occurring in shopping centre or shopping mall parking lots. Had the policy-makers wished to make the absence of control determinative of the claim, they would not have used the word normally. I do accept, however, that the presence of control is a significant factor.

After reviewing the matter, I find that the worker's injury did not arise out of and in the course of her employment. I agree with the decision of the review officer that the worker's injury did not arise out of and in the course of her employment. The absence of control by the employer over the parking lot is significant. I do not consider that the circumstances of this claim are so compelling that the absence of such control should be disregarded or that less weight should be attached to its absence. I find that the worker's employment circumstances were not such that she was required to use the lot that she did. That the circumstances of the worker's claim involve affirmative answers to at least two of the questions in item #19.20 is not sufficient to find that her injury arose out of and in the course of her employment.

Review Decision #R0063391, July 12, 2006, concerned a psychiatric nurse who was injured when she slipped and fell in a parking lot owned and maintained by B, at the end of her shift on December 2, 2005. The review officer concluded that there was insufficient evidence to support the conclusion that the employer controlled the parking lot in which the worker was injured, to meet the requirements of policy item #19.20.

Policy

In making my decision, I will apply the policies in the RSCM II which were in effect at the time of the worker's accident on March 9, 2006. The general policy at item #14.00 provided:

> Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.
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> 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.
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> **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.**
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> [emphasis added]

The specific policy at #19.20 concerning "Parking Lots" provided:

> For the purpose of determining whether an injury occurring in a parking lot is compensable, the Board looks at five basic questions.
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> 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, a 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 worker, an injury occurring on such premises would not normally be considered as acceptable.
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> 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, workers who nip their fingers in their own car doors would not have their claims accepted. (7) 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 the 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.
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> 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.
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> 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.

Another policy of potential application is contained at #18.01, "Entry to Employers Premises":

> Compensation coverage 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. Thus where a worker is travelling to work by automobile, there is no coverage for

> compensation from home to the point of entry to the employer's premises, but there is coverage from there to the worker's particular place of work. However, a Board decision denied a claim from a worker who, having entered her employer's premises and decided not to cross a picket line, was injured before she had left those premises as the result of tripping over a cement abutment.
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> It is a responsibility of the employer to provide a safe means of access to and egress from the place of work. Thus where a worker is travelling by highway to a place of work that is not adjacent to the highway, and must cross other land before reaching the employer's premises, compensation coverage begins at the point of departure from the highway rather than the point of entry to the employer's premises.

A decision in the *Workers' Compensation Reporter* illustrates the application of the policy in the last paragraph quote above. *Decision No. 50*, "Re the Coverage of Workers' Compensation, 1 W.C.R. 212, was retired from policy effective February 24, 2004, and was not part of the published policy of the board of directors at the time of the worker's accident on March 9, 2006. Nevertheless, it is of interest as illustrating the application of the policy at #18.01. *Decision No. 50* further reasoned, at page 215:

> The case [for workers' compensation coverage] would be particularly strong if it was found that the employer made the decisions on repairs. In such a case, the road might be classified as part of the employer's premises for compensation purposes. But that doctrine has no application here because the road in question was used by at least three or more employers.

Another policy of interest is contained at #18.11, "Captive Road Doctrine." This provides, in part:

> In another case, the worker was injured in a motor vehicle accident while travelling from home along a private road owned, controlled and maintained by the employer. The argument that it was a "captive road" was rejected because the road also led to the plants of several other employers and a public recreation area which were located further along the road than the plant of the worker's employer. The use of the road by the public up to and beyond the employer's plant was significant. The further argument, that the claim should be accepted because the road formed part of the employer's premises, was also rejected. While it was agreed that, generally speaking, injuries occurring on the employer's premises were compensable, it was not accepted that the extent of the employer's premises for this purpose could simply be determined by whether the employer legally owns or controls the property in question. To take an obvious example, there would be no coverage if an employee

> were injured at the employer's home when invited there out of work hours on a purely social occasion. It is apparent, therefore, that **regard must be had to other factors such as the use to which the land is normally put and its relationship to the operation of the employer's business**.
>
> The "Captive Road Doctrine" lays down situations when a road, though technically a public one, can, in effect, be regarded as part of the employer's premises for compensation purposes with the result that coverage extends to injuries occurring on it. This occurs when the road for practical purposes leads only to the employer's premises and can, therefore, be equated with a private road which is just an incidental feature to the employer's plant. The natural corollary of this doctrine is that, where a road is technically a private one, it should not be considered as part of the employer's premises where in reality it leads to the premises of several different employers and is indistinguishable from a public highway. The road is not then just an incidental feature of the plant of the one employer who happens to own the road. It appeared that roads leading to an employer's premises should be classified for compensation purposes by the real nature of their use and hazard. **The Board should not be artificially distinguishing roads otherwise indistinguishable on the basis of legal ownership and control**. It was concluded that the road concerned in this claim must in reality be considered as a public highway rather than a private road forming an adjunct to the employer's premises.
>
> [emphasis added]

Reasons and Findings

The worker's representative has argued that the worker is employed by the provincial government, and that B is also a government corporation. He submits, in effect, that these are the same employer. I do not accept this argument. I find that the worker's employer, B, and the provincial government, are three distinct legal entities. I agree with the reasoning in *WCAT Decision #2007-0138* dated April 30, 2007 on this issue. (This decision was accessible on the WCAT website by the time the parties were invited to provide additional submissions in June and July 2007. However, as it is not evident that the employer would have had reason to review the decisions on the WCAT website subsequent to its submission of March 14, 2007, I have not relied on the reasoning in the April 30, 2007 decision apart from adopting its reasoning on this particular point.)

Policy at RSCM II item #19.20 states that for the purpose of determining whether an injury occurring in a parking lot is compensable, the Board looks at five basic questions. The policy does not provide more detailed guidance as to how these factors are to be assessed. For example, it does not specify that all the tests must be met, or that a certain number must be met, in order to support a conclusion that a worker's injury arose out of and in the course of the worker's employment. I infer that the intent of the

policy is to afford a measure of discretion to decision-makers, in weighing the significance of these various factors in the context of the particular case.

No hard and fast rule can be drawn from the policy at item #19.20. The reasons for this are illustrated by *Decision No. 50*. In one passage, that decision noted that the case for workers' compensation coverage would be particularly strong if it was found that the employer made the decisions on repairs to the road. In another passage, that decision noted that the Board should not be artificially distinguishing roads otherwise indistinguishable on the basis of legal ownership and control. It is evident that a factor that might be determinative in one case (such as control) may have little weight in another context. Thus, a decision-maker must exercise judgment in evaluating the various factors which may apply.

The various factors listed in policy item #19.20 may be viewed as relating to the general issues as to whether the parking lot in question should be viewed as part of the employer's premises, and whether there is a sufficient degree of employment connectedness to support a conclusion that the worker's injury arose out of and in the course of her employment.

I find that B's fall occurred in a parking lot which was contiguous (adjacent and attached) to her place of employment. Her injury was proximal to the start of her shift. As well, her fall resulted from a hazard of the premises (the ice in the parking lot). In those respects, her circumstances are essentially the same as those of any worker injured in a company parking lot after arriving at work. Workers' compensation coverage would normally extend to such injuries. However, an important difference in the worker's case is that that the parking lot was owned and maintained by B.

The evidence provided by the parties and B is somewhat limited. I do not know the size of the parking lot, the number of workers of the employer who would normally park in the parking lot in question during one shift, the number of visitors who would normally use this lot, and the proximity of other employers and other parking lots in the surrounding area. While there were other employers in the surrounding area, this involved a very large site. While it is asserted that workers of other employers parked in this lot, no evidence has been provided regarding the actual extent of such use.

In this context, I consider that the evidence provided by the representative for B / C is significant. She advised that the worker's employer occupied and paid B for maintenance "to the buildings and land including the parking." A representative for C, the entity which replaced B, similarly explained that although C was the owner of the site, 100% of costs including grounds and parking lot maintenance is paid for by the worker's employer. She advised that the worker's employer is the primary tenant on the site and as such is responsible for all costs. While this information was provided together with the notice of participation, and additional corroborative evidence was not provided subsequently, I accept that the representatives for B and C were in a position to provide evidence on these questions. This evidence was disclosed to the employer,

and the employer declined the opportunity to respond. I accept the evidence provided on behalf of B / C, notwithstanding the limited nature of the information provided. Accordingly, significant new evidence has been provided which was not before the entitlement officer or review officer.

This was not a case in which several different employers all contributed towards the cost of maintaining a parking lot, with no particular area being linked to one employer. The fact that the worker's employer is described as "the primary tenant," with responsibility for all the costs for parking lot maintenance, distinguishes this case from that of a shopping centre or shopping mall parking lot.

The fact that the employer was the primary tenant would suggest that the visitors using the lot may well have been primarily visitors to the employer's facility. Where a company parking lot is provided for the use of its employees and customers alike, that would not be a reason for limiting workers' compensation coverage to its employees in relation to an injury occurring in the parking lot.

Given that the employer was responsible for 100% of the costs of the maintenance, I consider it reasonable to infer that the employer would notify B if the maintenance work being performed was inadequate or deficient. Even though the parking lot was maintained by B, the fact that the employer paid all the costs for maintaining the lot suggests some measure of control by the employer.

The representative for B / C indicates that the agreement between the employer and B was that the employer would occupy and pay for all maintenance to the buildings and land including the parking. This seems to indicate that B also owns the land and building where the worker was employed. If that were so, B's ownership of the building would not have any relevance in considering whether a slip and fall by the worker in the hospital building arose out of and in the course of her employment. I do not consider that legal ownership of the land or premises is an important factor in this case. The fact that B performed maintenance in respect of the hospital building would also not be relevant to considering the acceptability of a claim by a worker to an injury while at work in the hospital. The evidence on this point tends to support treating both the hospital building and the contiguous parking lot as being part of the employer's premises, subject to consideration of the evidence regarding use of the parking lot by persons unconnected to the employer.

The circumstances of this case are in a grey area, in light of the usage of the parking lot by visitors and workers of other employers. Nevertheless, I consider that the weight of the evidence before me supports a conclusion that the worker's injury arose out of and in the course of her employment. As a practical matter, I consider it likely that the parking lot was primarily used by the employer's workers, together with patients and visitors to the employer's facility. While I also accept the employer's evidence that individuals from other companies, clients and visitors to the buildings used various areas of this parking lot, I find that this evidence is insufficient to support a conclusion different from that set out in the preceding sentence. I consider it reasonable to infer that there is some correlation or logical connection between the extent of the employer's financial responsibility for maintenance of the parking lot, and the extent to which use of the parking lot was related to the employer's operations. In the absence of other more detailed evidence from the employer, I find that the fact that the employer bore total responsibility for the costs of maintenance is the best evidence before me regarding the actual use of the parking lot.

On balance, I consider that the circumstances of the worker's injury more closely resemble those of a worker who suffered a fall in a company parking lot, rather than those of a store employee injured in a fall in a shopping mall parking lot used by multiple employers. Having regard to the five factors in item #19.20, as well as the other policies cited above, I find that the worker's injury arose out of and in the course of her employment. The worker's appeal is, therefore, allowed.

Expenses

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I make no order regarding expenses of this appeal.

Conclusion

I vary the Review Division decision. I find that the worker's injury due to a fall in a parking lot on March 9, 2006 arose out of and in the course of her employment.

Herb Morton
Vice Chair

HM/gw