Noteworthy Decision Summary

Decision: WCAT-2007-03680 **Panel:** Heather McDonald **Decision Date:** November 27, 2007

Personal Injury - Arising Out of and in the Course of Employment - Sections 5(1), (3) and (4) of the Workers Compensation Act - Item #16.60[1] of the Rehabilitation Services and Claims Manual, Volume II - Serious and Wilful Misconduct

This decision is noteworthy for its analysis of the application of sections 5(1), (3) and (4) of the *Workers Compensation Act* (Act) and of policy item #16.60 of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II) on Serious and Wilful Misconduct.

The worker claimed compensation from the Workers' Compensation Board, operating as WorkSafeBC (Board), for serious injuries he sustained, including second and third degree burns, as a result of an explosion in the main electrical room at his workplace. The Board denied his claim because it concluded that the worker was engaged in unauthorized activities at the time of the explosion.

The worker's appeal was denied. The panel found the worker's injuries did not arise out of and in the scope of his employment as a press operator. The worker was engaged in unauthorized activities at the time of the explosion which took him outside the scope of his employment. The evidence established that the explosion was caused by the worker's screwdriver making contact with a screw in a live 200 amp, 3-phase fusible disconnect switch mounted in a metal box in the electrical room. The worker was holding a Robertson 12-14 type screwdriver immediately before and at the time of the explosion. The worker did not slip or trip and fall into the breaker box, screwdriver in hand, accidentally triggering the electrical explosion. It was not in any sense part of his employment duties as a press operator to investigate and/or touch the electrical panel involving the 200 amp switch. The evidence established that the worker had a personal interest in either obtaining or, at the very least, closely examining a 200 amp switch. It was this personal interest that motivated his presence and activities in the electrical room. The worker mistakenly believed the switch was not "live" when he deliberately touched the switch panel with his screwdriver.

The panel found the presumption in section 5(4) of the Act was of no assistance in this case. Section 5(4) was helpful only when the evidence clearly established either that an injury arose "out of the worker's employment", or that the injury occurred "in the course of the worker's employment." If the evidence established either part of the two-fold test in section 5(1) of the Act, and if the injury arose from an accident, the balance of the two-fold test would be presumed to be satisfied unless there was sufficient evidence to the contrary to rebut the presumption. But in this case, the presumption did not clearly arise from the evidence with respect to either part of the two-fold test and thus the panel found it necessary to assess the evidence with respect to both parts of the two-fold test.

The panel found that item #16.60 of the RSCM II was not patently unreasonable in its requirement that the two-fold test in section 5(1) of the Act must be met before section 5(3) may be applied. Section 5(3) is an exception to the requirement that the Board will pay

[1] Policy item #16.60 was replaced by policy item C3-14.10, effective July 1, 2010.

compensation when personal injury to a worker arises out of and in the course of the worker's employment. If the injuries do not constitute serious or permanent disablement (or result in the worker's death), and the sole cause of the worker's injuries was the worker's serious and wilful misconduct, then section 5(3) may be applied to deny compensation benefits. The proper analysis is that first the Board must decide whether a worker suffered an injury that arose out of and in the course of employment under section 5(1) of the Act. If so, the analysis then shifts to whether the worker's claim should be denied because the worker engaged in serious and wilful misconduct which was the sole cause of the worker's injuries, and the injuries were not fatal or did not constitute serious or permanent disablement.

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Panel: Heather McDonald, Vice Chair

Introduction

On September 10, 2003 the worker was seriously injured at the employer's workplace. The employer employed the worker as a press operator in its printing operation. The worker sustained serious injuries including second and third degree burns as a result of an explosion in the main electrical room. In a decision dated November 10, 2003, the Workers' Compensation Board[2] (Board) denied the worker's claim for compensation. The Board concluded that the worker's injuries did not arise out of and in the course of his employment within section 5(1) of the *Workers Compensation Act* (Act). The Board case manager found that at the time of the explosion, the worker was engaged in unauthorized activities that did not fall within his press operator duties. The case manager found that the worker was in the process of removing the employer's disconnect switch for personal reasons not related to his job with the employer.

The worker requested the Board's Review Division to review the case manager's decision. In a decision dated March 20, 2006, a Review Division review officer confirmed the Board's earlier decision to deny the worker's compensation claim. See *Review Division Reference #13329*, published on the Board's website www.worksafebc.com.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submits that his injuries arose out of and in the course of his employment. He requests a finding that the Board accept his claim for compensation.

In this decision I have used initials and other non-identifying ways to refer to witnesses and other persons.

Issue(s)

Is section 5(4) of the Act of assistance in this case? Is *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) policy item #16.60 (*Serious and Wilful Misconduct*) patently unreasonable in requiring that section 5(1) of the Act be satisfied before section 5(3) of the Act may be considered and applied? In this case what is the effect, if any, of section 5(3) of the Act? Under section 5(1) of the Act, did the worker's injuries

[2] Now operating as WorkSafeBC

arise out of and in the course of his employment? Should the Board accept his claim for compensation?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act. Both the worker and the employer participated in the appeal proceedings. I convened an oral hearing which took place over two days, February 14, 2007 and June 6, 2007, at WCAT's Richmond premises.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Under section 251 of the Act, WCAT must apply a policy of the Board's board of directors unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Law and Policy

Section 5(1) of the Act provides that a personal injury or death must arise "out of and in the course of the employment" before benefits can be paid.

Section 5(3) of the Act provides that where a worker's injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

Section 5(4) of the Act provides that where the injury is caused by an accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment. Section 5(4) also provides that 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.

The Act's definition of "accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.

The relevant Board policy is found in the RSCM II, in particular chapter 3. I have considered all those policies but will only refer to some of them here.

In chapter 3, item #14.00 (*Arising Out of and in the Course of Employment*) is significant as it provides criteria that are guidelines for determining whether a worker's injury arose out of and in the course of the worker's employment.

RSCM II policy item #14.10 (*Presumption*) discusses the intent of section 5(4) of the Act. The policy provides that the phrase "out of employment" relates to the cause of the injury and the phrase "in the course of employment" relates to the time and place of the injury. Where an injury results from an accident, evidence is only needed 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. This presumption only applies when the injury is caused by an accident. The presumption is not a conclusive one because it will be rebutted if opposing evidence shows that the contrary conclusion is more likely. The policy says therefore it follows that all reasonable efforts must be made to obtain all available evidence.

RSCM II policy item #16.00 (*Unauthorized Activities*) states that the mere fact that a worker's action which leads to an injury was in breach of a regulation or order of the employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take the worker out of the course of employment or to prevent an injury from arising out of the employment.

RSCM II policy item #16.60 (*Serious and Wilful Misconduct*) provides, among other things, that before the Board can consider section 5(3) of the Act, it must have determined under section 5(1) of the Act that the worker's injury arose out of and in the course of the employment. The policy states that the actions or conduct of the worker may induce the Board to conclude that the injury does not meet that requirement. The policy goes on to say that if the Board reaches such a conclusion, it will deny the claim even though the worker has suffered death or serious or permanent disablement. In this case the worker submits RSCM II policy item #16.60 is patently unreasonable in its requirement that a worker's injury must fall within section 5(1) of the Act before acceptance of the worker's claim under section 5(3) of the Act may be considered. The worker refers to *Johnson v. Workers' Compensation Board and the Workers' Compensation Appeal Tribunal*, 2007 BCSC 1410 (September 26, 2007), (the *Johnson* decision) in support of the proposition that section 5(3) of the Act must be interpreted by a plain reading without the prerequisite condition that a worker's injury arise out of and in the course of his or her employment.

The worker also relies on the Alberta Court of Appeal decision in *Alberta (WCB) v. Buckley*, [2007] A.J. No. 31, 2007 ABCA 7 (January 22, 2007), (the *Buckley* decision)[3] in support of his submission that the workers' compensation scheme is a no-fault system designed to provide compensation to injured workers, not to pass judgment on morally-blameworthy conduct nor to deter irresponsible and/or criminal activity. The worker also refers to other law including WCAT *Decision #2006-00440* (January 30,

[3] The Supreme Court of Canada denied leave to appeal, without reasons.

2006) and WCAT *Decision #2006-04412/04413* (November 29, 2006) (available on the WCAT website www.wcat.bc.ca) in support of the submission that his activities on September 10, 2003 did not take his injuries outside the statutory phrase in section 5(1) "arising out of and in the course of employment."

Background and Evidence, Reasons and Findings

There is no dispute that the worker was in the employer's electrical room at the time of an explosion on September 10, 2003, and that he suffered serious injuries as a result of that explosion. There is no dispute that the worker was the only person in the electrical room at the time of the explosion and that he was the only person injured as a result of the explosion. Much in dispute, however, are matters such as the motivation for the worker's presence in the electrical room at the time as well as the exact nature of his activities when he was in the room before the explosion.

The general background to and history of the worker's claim are found in the Review Division decision, available on the Board website. For the sake of brevity I will not repeat the details found in that decision nor otherwise set out all the evidence before me in detail. This case is at its third stage of proceeding. The parties are well aware of the basic facts, although as I have indicated some, of course, are in dispute. I have reviewed all the evidence and the parties' submissions, but in this decision I am going to focus on the central issues and the reasons I have reached for my findings on those issues.

In this case it has been necessary to make findings regarding both the credibility and reliability of certain evidence. Several years have passed since the events in question and understandably, there were some conflicts in witness testimony and as well, gaps in memory. Where there was a dispute or difference in the testimonial evidence, I have applied the test set out in *Faryna v. Chorney* [1952] 2 D.L.R. 354, 4 W.W.R. (NS) 171, that "the real test of the truth of the story of a witness . . . must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

Apart from credibility issues, it has also been necessary to determine reliability of evidence. In the spirit of the *Faryna v. Chorney* test, I have preferred evidence that was consistent with the pattern of the evidence in this case viewed as a whole. In that regard I have also considered what was reasonable and most probable in all the circumstances.

What was the immediate cause of the explosion on December 10, 2003?

A Board engineer from the Board's Investigations Department provided a July 6, 2005 report in which he described his examination of the evidence from the accident investigation, and provided his analysis and opinion of the cause of the accident. Under Rule #8.61 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), I accepted the engineer's job title as evidence of his qualifications to conduct an accident

investigation on behalf of the Board's Investigations Division. No party challenged the Board engineer's qualifications to provide the opinions and analysis provided in the report, and I have accepted his expertise in this area of accident reconstruction.

At one point during her closing argument at the oral hearing, the worker's legal counsel suggested that there was "no evidence" that it was a 200 amp disconnect switch that exploded because there was no evidence that a 200 amp service was being provided to the switch that exploded. I note that this argument is inconsistent with the written submissions dated June 6, 2007 made on behalf of the worker from the worker's legal representative in which it was stated in part that:

> The technical evidence establishes that the immediate cause of the September 10, 2003 explosion was that [the worker's] screwdriver touched a breaker box which used countersunk screws to hold a switch handle and flange cover assembly which had been removed; there was an open, live disconnect; and [the worker] made connection with a High Voltage source, which caused an electrical fault and explosion.
>
> The 200 amp switch handle and flange cover assembly had been removed some time between September 8 and September 10, 2003 by person[s] unknown.
>
> [at pages 4 - 5]

The July 6, 2005 report by the Board engineer confirmed that the explosion occurred when the worker's screwdriver made contact with a 600 volt, 200 amp, 3-phase fusible disconnect switch. Photo 1 in Appendix A of the report has the caption: "The switch cabinet with spaces for six switch modules. The explosion originated at the 200 Amp switch (arrow); located above three operable switches and below two empty spaces. The door of the 200A switch was returned to the closed position for this photo."

In his testimony at the oral hearing, the Board engineer stated that at the time of the explosion, a screwdriver made contact with the buss bar screw of the 200 amp disconnect switch. I also note the testimony of Mr. S, the employer's maintenance supervisor, who confirmed that he had overseen the electrical contractor's replacement/repair of the switch after the explosion. The repair involved replacing the switch with a 200 amp, 3-phase fusible disconnect switch, identical to the part involved in the explosion. The employer's accident investigation report also refers, in numerous places, to the "affected 200 amp disconnect breaker." I am satisfied as to the reliability of the foregoing sources of evidence. Therefore I disagree with legal counsel's suggestion that a 200 amp disconnect switch was not necessarily involved in the accident. I find that the evidence establishes the explosion was caused by the worker's screwdriver making contact with a screw in a live 200 amp, 3-phase fusible disconnect switch mounted in a metal box in the electrical room at the employer's worksite.

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The type of screwdriver held by the worker immediately prior to and at the time of the explosion

This is an important issue because under cross-examination the worker explained that he had the screwdriver in his hand when he walked into the electrical room because he had just been using it to unplug the ink keys on his press. He testified that then he noticed a light flickering on his press console, so he decided to get a replacement fluorescent tube. The worker testified that he remembers having the screwdriver in his hand when he left his press and went into the electrical room to get a replacement light tube. This would be the screwdriver that the worker had in his hand at the time of the explosion.

The worker's evidence on this point is, however, inconsistent with other evidence that I have found to be reliable. Mr. S., the maintenance supervisor, testified that the type of screwdriver needed to fix the ink modules on the worker's press would be a slotted screwdriver. Mr. S demonstrated the type of adjustment required and why the type of screwdriver that would fit the adjustment valve on the ink modules would have to be a slotted screwdriver. He testified that a Robertson screwdriver that would fit No. 12 and 14 screws definitely would not work because it would not engage with the adjustment valve on the press ink modules. Mr. S' evidence on this point was not challenged on cross-examination and I find his evidence to be reliable. Thus the type of screwdriver that the worker would have been using to unplug the press ink keys would have been a slotted screwdriver, not a "Robertson 12-14."

After the explosion, investigators found the worker's screwdriver on the electrical room floor. The handle was partly melted and part of the metal shank was missing. Melted into the handle were a thumb print and the print of part of a palm. The Board engineer testified that he examined the screwdriver under a microscope. His written report states that markings "legible on the handle" included "Robertson 12-14." I am satisfied that this is the most reliable evidence as to the type of screwdriver which the worker had in his hand at the time of the explosion. The report of the Board engineer also confirms that the screws found on the floor of the electrical room and on top of the switch were screws removed from the switch, and that the Robertson screwdriver was capable of fitting each of the screws found attached to and detached from the switch. I also accept the testimony of Mr. S that the type of screwdriver needed to remove the screws on the 200 amp disconnect switch would be a Robertson 12-14 type screwdriver, not a slotted screwdriver. Mr. S testified that he undertook the exercise of removing some of the screws on the disconnect switch assembly to find out the time it would take to remove them. I note that his evidence regarding the type of screwdriver needed to work on the 200 amp switch screws is consistent with the Board engineer's evidence on the point. I am satisfied that Mr. S' evidence is reliable regarding the type of screwdriver needed to remove these screws.

My finding is that the worker was holding a Robertson 12-14 type screwdriver immediately before and at the time of the explosion.

Testimony from the Board engineer as well as evidence in the Phillips accident investigation report (commissioned by the employer) agree that although the screwdriver was not a specialized electrician's screwdriver, the handle was insulated. Although much of the screwdriver was melted, that insulation likely saved the worker's life. In other words, the worker was not the "ground" for the power surge.

Did the worker accidentally slip or trip and then fall into the switch mechanism, triggering the explosion when his screwdriver accidentally touched the screw?

The history of the worker's claim indicates that at various times he has given different explanations for his presence in the electrical room and what he was doing immediately prior to the explosion. The physician's first report, dated September 10, 2003, records that the worker was trying to find out how a live electrical panel worked. Because it is not clear whether the worker said this to the physician or the information came from someone else, this evidence is not reliable. Further, as the worker's legal counsel has pointed out, the worker's statements during a time frame relatively soon after the explosion are unreliable due to the severity of his burns, the shock of the incident, and the effect of the types of medications with which he was being treated. These concerns about unreliability also apply to the worker's October 8, 2003 interview statements with the Board safety officer, in which the worker stated that he had no idea why he was in the electrical room on September 10, 2003. Also unreliable is the worker's October 30, 2003 advice to the Board case manager that he went into the electrical room to get light bulbs or rags.

Those types of concerns about reliability do not apply to statements made by the worker almost two years (and later) after the explosion. As part of the worker's submission to the Review Division, he swore a statutory declaration on March 1, 2005 advising in part as follows:

> 5. My reasons for entering the Storage/Electrical Room was to get a fluorescent light tube to replace a light on a press. We do have Maintenance persons to change lights but they do not change fluorescent tubes or halogen bulbs, or oven lights, on the presses.
>
> 6. When I entered the Electrical room, I noticed something unusual – that the Main Disconnect Switch was not on the breaker box. I thought this might be related to the installation of a new press by electricians and technicians which had been ongoing since the summer. I looked in and noticed tools right on the ledge. I did this because this was expected of any First Press Operator and Relief Charge Hand. I do not recall whether I touched the breaker box with the screwdriver. My next memory was a huge explosion.

In this statutory declaration there was no mention of clutter on the floor of the electrical room or in front of the switch panel, nor did the worker refer to any slip, trip or fall

incident before the explosion. The worker's submission to the Review Division was that it was part of his press operator job duties to get supplies such as fluorescent tubes from the electrical room. Further, the written submission on his behalf argued that one key duty of a press operator was to always look for anything unusual and to investigate the matter (such as the missing 200 amp switch handle and flange cover assembly). The worker's argument to the Review Division was that although not specifically authorized by the employer, the worker's investigation of the 200 amp switch was an action done *bona fide* for the purpose of the employer's business, as part of the worker's duties as a press operator.

The evidence, undisputed, is that sometime prior to the worker entering the electrical room shortly before 8 a.m. on September 10, 2003, some person(s), unknown, had already removed the 200 amp switch handle and flange cover assembly, exposing the 200 amp disconnect switch.

In the WCAT appeal proceedings, the worker did not completely abandon his submission that in furtherance of his press operator duties, he had been attempting to investigate the situation with the 200 amp switch in the electrical room. But during cross-examination, he agreed with the employer's legal counsel that it was not part of his press operator job to fix the switch panel nor was it part of his job to use a screwdriver to trouble-shoot the electrical panel. The worker agreed with the employer's legal counsel that the employer had told employees not to touch electrical panels[4] and he understood that it would not be part of his job to touch any part of the 200 amp switch. The worker responded to the employer's legal counsel that "I'd be on my way out the door" to tell someone in authority about the problem.

In the WCAT appeal proceedings, the worker's position is that he is "entitled to acceptance of his claim for his 'accident' of tripping on the floor cluttered with electrical wire, fuses [*sic*] breakers and falling into the open breaker box." See page 3 of the June 6, 2007 submission from the worker's legal counsel.

As I noted earlier, the slip or trip and then fall into the breaker box rationale was first raised by the worker during the WCAT oral hearing, almost four years after the explosion. Notably, he did not mention this rationale to the Board, either to the case manager or in the Review Division proceedings. My review of the documentary evidence also does not reveal that the worker had offered this rationale to anyone else.

The reliability of this memory, first raised in the WCAT proceedings, is also brought into question by the evidence that the floor in front of the electrical room switch cabinet was not cluttered so that the worker would likely have tripped over clutter, falling into the

[4] The one exception was a regular practice of pushing a "reset" button on machinery. There were no such reset buttons in the electrical room. It is unnecessary for me to further explain this exception as it has no relevance to the 200 amp switch situation in the electrical room.

switch. The photos, and testimony of Mr. S, indicate that there was material piled in an area around the corner from the switch cabinet (on the other side). There was also material and equipment stored in shelving against a wall, but nothing was stored in such a way as to impede traffic through the electrical room. The evidence is that there was approximately four feet of clearance for someone to walk by the material. In the June 6, 2007 written submission, the worker's legal counsel referred to the reference in the hydro company report to several skids of electrical spare parts removed from the electrical room. But the evidence (see testimony of Mr. S) is that the skids were not in the room at the time of the explosion. Rather, after the explosion, when the entire electrical room was cleaned out, electrical parts that had been stored on shelves were removed on skids from the room.

I also accept Mr. S' testimony that shortly after the explosion, just after the worker had exited the room and colleagues were assisting him nearby, Mr. S entered the electrical room to see if the main disconnect switch had been tripped. Mr. S testified that the room was dark and full of smoke. He had a flashlight to help him see. Mr. S testified that there was nothing to impede his progress in the room.

The credibility of the "slip or trip and fall" rationale, at least as dependent on clutter, is also weakened by the worker's responses under cross-examination on the point by the employer's legal counsel. I understand that the worker was under stress and upset while giving his testimony, particularly under cross-examination. I also acknowledge that he has been diagnosed with post-traumatic stress disorder and that this disorder causes him to be sometimes irritable and otherwise has an impact on his personality "affect". Nevertheless, it was clear that the worker could not in fact actually recall any specific clutter or material in front of the switch box, although he remembered material "built up around the corner there", away from the electrical box. The worker ended up testifying that it could have been his shoelaces "for all I know" that he tripped on. He testified: "This will be my memory", and then related that he tripped on something and fell into the switch.

I find that the worker did not slip or trip and fall into the breaker box, screwdriver in hand, accidentally triggering the electrical explosion. I have already referred to the unreliability of this memory/theory, given the fact that it was raised almost four years after the incident and given that it is not consistent with what I have found to be reliable evidence of the state of the electrical room before the explosion. This theory/rationale is also not consistent with the evidence of the Board engineer regarding the likely cause of the explosion.

The Board engineer's report described the blast shadow (area free of blast residue) and the blast residue pattern. The Board engineer expanded on his report in his testimony, explaining his finding that the blast shadow and residue pattern were consistent with the worker's body blocking some of the blast from contacting the back wall, as would be

expected if the worker had been standing in front of the switch, holding the screwdriver at the buss bar with his right hand.

At the oral hearing, some time was spent by the worker and his legal counsel in cross-examining the Board engineer regarding the reliability of his opinion that it had been the worker's right hand rather than his left that was holding the screwdriver at the time of the explosion. The thrust of questioning was that the worker might have been holding the screwdriver in his left hand. The Board engineer was not shaken in his testimony, remaining firm that the likely result of a person operating the screwdriver with his left hand would have been a different shadow effect on the blast pattern on the wall behind the person. He agreed with the proposition by the employer's legal counsel that if a person had been standing in front of the electrical cabinet, guiding the screwdriver into the screw with his left hand but holding the screwdriver with the right hand, the blast pattern would be consistent with the pattern revealed by the September 10, 2003 explosion. The Board engineer testified that in that case the worker's left hand and side would bear the brunt of the injuries, although the worker's right arm and side would also be affected. This in fact was the situation with the worker, in that he suffered more serious burns to his left side than his right side, although both hands and arms suffered burns. The hospital consultation report, dated September 10, 2003, describes the worker's injuries as follows:

> He had singing [*sic*] of his facial air, including his nasal vibrissae. There were blistered burns which appeared partial-thickness, involving his anterior face and neck, as well as his ears. There were burns involving his anterior neck and the anterior aspect of his chest, which again were blistered. There was an area over his left pectoral region which appeared indeterminate in depth, bordering on full-thickness. He had burns involving about 50% of his right upper extremity as well as the hand, which appeared partial-thickness. His left upper extremity was more severely burned and he had circumferential burns extending the entire length of the upper extremity, including the hand, over the forearm, particularly on the dorsal surface. These appeared deep and there was a strip over the medial aspect of the arm on the left side, which also appeared deep. Similarly, there were indeterminate-to-deep areas on the dorsum of the left hand.

At page 7 of the June 6, 2007 submission, the worker's legal counsel submitted that the medical burn evidence tends to corroborate that when the explosion occurred the worker was falling, contradicting the speculation that he was "bent over, attempting to unscrew the equipment." On page 9 of the same submission, the worker's legal counsel submits that the worker's burns tend to establish that he was "standing at approximately chest level" holding the screwdriver in his left hand, when the explosion occurred. These submissions appear to contradict each other; it is difficult to reconcile them. I disagree that the fall theory can be reasonably made from the medical evidence about the burn pattern. The only expert opinion evidence on the worker's

position in light of the available evidence was that from the Board engineer. The Board engineer's evidence does not support a finding that the worker was falling at the time of the explosion nor that the screwdriver was held in the worker's left hand. Nor did the employer, the Board engineer or other witnesses suggest that the worker was bent over at the time of unscrewing the 200 amp screw. Considering the height of the worker and the height of the electrical panel, this would be unlikely. The totality of the evidence contradicts both the fall theory and the screwdriver in the left hand theory, and I reject them as unsupported on the evidence.

I have found that there was no clutter or other material that caused the worker to trip and fall into the electrical room switch box. Although the worker suggested that he might have tripped over his own shoelaces, I do not find this a likely explanation for the triggering of the explosion. I find that it would have been too much of a coincidence that all the following events just happened to occur, leading up to the explosion:

(a) The switch handle and cover had been earlier removed, exposing the 200 amp disconnect switch (the breaker unit);

(b) The worker happened to have in his hand the exact type of screwdriver needed to unscrew the screws holding in the 200 amp disconnect switch;

(c) Although there was no clutter or other impediment in the area near the switch panel, the worker for some reason tripped, falling into the panel in such a way, at approximate eye height, that his screwdriver made contact with the live screw in the panel;

(d) Nevertheless the blast shadow and blast residue pattern that resulted from the worker's body blocking some of the blast from contacting the back wall, were consistent with, just prior to the explosion, the worker standing in front of the switch and holding the screwdriver at the buss screw with his right hand.

My review and analysis of the evidence is that the most reasonable explanation for the explosion was that the worker had been standing in front of the switch panel, holding the screwdriver in his right hand, deliberately using the screwdriver to touch the components in the panel. As noted on page five of the Board engineer's report, this action triggered a "phase-to-ground electrical fault that ionized the air, and created a conductive atmosphere across the buss bars and hence, a phase-to-phase fault across all three buss bars, resulting in an explosion."

Was the worker authorized to touch the electrical panel with the screwdriver or otherwise investigate the 200 amp switch situation by touching it? Was it part of the worker's employment duties as a press operator with the employer to touch or otherwise investigate the electrical panel involving the 200 amp switch?

The evidence is that although there was a warning sign on the electrical room door indicating "Keep out – Danger", employees routinely entered the electrical room to obtain supplies such as fluorescent light tubes. Therefore the mere fact of the worker's presence in the electrical room (if it had been for the purpose of obtaining a light tube for his press console, for example) would not be out of the ordinary scope of his employment duties. However, the act of taking a screwdriver to deliberately investigate or work on an electrical panel in the electrical room is another matter.

The worker's trade union president testified on the worker's behalf. He made a valiant effort to support the position that part of a press operator's duties with the employer would be to investigate and repair virtually any problem, including an electrical problem, at the employer's plant, even on equipment not connected with a press operator's regular duties. This testimony, however, was overwhelmingly contradicted by other evidence. Therefore I do not accept it as valid. I refer specifically to the evidence of Mr. S as well as the worker's own responses under cross-examination on this point, earlier referred to in this decision.

I agree with the review officer's finding that no one on the employer's staff, including maintenance personnel, would have reasonably undertaken the type of contact with high voltage equipment in the electrical room that occurred in this case. The high-voltage equipment in the employer's electrical room was exclusively maintained by third-party electrical contractors. The worker knew, as did other workers, that it was not part of anyone's job at the employer's plant to touch such equipment. Therefore I find the worker was not authorized to touch the electrical panel with the screwdriver. He was not authorized to otherwise investigate the 200 amp switch. I find that it was not in any sense part of his employment duties as a press operator with the employer to investigate and/or touch the electrical panel involving the 200 amp switch.

Motive - Worker's personal interest in a 200 amp disconnect switch.

On September 11, 2003, Mr. S provided a written statement for the employer in which he related that approximately one week before the explosion, he had a conversation with the worker in which the worker asked if there were any old 200 amp disconnect switches left over from the removal of the Goss community press. Mr. S replied that there were not any left over, and asked the worker why he needed one. Mr. S said the worker responded he was installing a 200 amp electrical service in his house. Mr. S advised the worker that a 200 amp panel would come with a 200 amp main breaker, and therefore that was all he would need. Mr. S stated that for some reason Mr. S did not understand, the worker felt he needed a separate disconnect switch. They then discussed the cost of a separate disconnect switch (between $200 – $300). That was the end of the conversation. In his oral hearing testimony, Mr. S again related this conversation.

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The worker's testimony is that he does not recall having such a conversation with Mr. S. He was candid, however, in not denying that such a conversation took place. The worker's legal counsel did not challenge Mr. S on cross-examination regarding whether this conversation in fact took place. She did suggest to him that a 200 amp service would be for industrial use, not residential use. His response was that it would be possible to make use of a 200 amp service in a residential context, and also readily agreed that such an installation would have to be inspected and approved by the appropriate hydro and electrical authorities.

In a rebuttal submission dated October 4, 2007 from the worker's legal counsel, the statement was made: "We have no explanation for [Mr. S'] allegations. Some feel they were made to deflect the Employer's attention away from [Ms. S] own negligence in permitting the Electrical Vault to be used as a *de facto* storage area which Press workers routinely entered." This was the first time such an allegation was made about Mr. S. The allegation was made by worker's legal counsel after the oral hearing and beyond the time when Mr. S and the employer had a fair opportunity to respond. There is no specific identity of the statement's reference to "some" persons and the description of their feelings are in my view, unreliable. I can find nothing in the evidence which would form a basis for suggesting that the employer or anyone ever considered Mr. S to be negligent in any way, let alone relating to the fact that materials were stored in the electrical room. I have not considered this statement by legal counsel to be a valid challenge to the reliability or credibility of Mr. S' evidence regarding the September 2003 conversation he had with the worker. I have found Mr. S' evidence about the conversation to be credible. I find that this evidence establishes that the worker had a personal interest in either obtaining or at the very least closely examining a 200 amp switch.

The worker's legal counsel submits that the worker's house did not need and could not use a 200 amp switch. She has also referred to evidence that the worker and his wife were financially secure. The worker's submission is that therefore there was no reason or motive for him to touch or try to remove the 200 amp switch in the employer's electrical room. It is unnecessary for me to make definite findings on exactly why the worker was interested in the 200 amp switch. The worker's legal counsel has described other activities, outside of the employer's workplace, in which the worker was involved in 2003. She relates that he and his wife owned several other properties apart from their residence, and that the worker also owned construction equipment (dump trucks and backhoes) for use in construction work. The worker is clearly a talented individual who put his many skills to good and varied uses. The precise reason for his personal interest in a 200 amp disconnect switch is not a finding I need to make. I find as a fact that he did have such a personal interest, and that it was this personal interest rather than the need for a fluorescent light tube that motivated his presence and activities in the employer's electrical room on September 10, 2003. This motive is more consistent with the evidence as a whole, including the evidence that the worker had a Robertson 12-14 screwdriver in his hand at the time of the explosion, than the explanation

provided by the worker about seeking a fluorescent light tube and then accidentally tripping.

Worker's perception about whether or not the switch was "live."

The worker has also submitted that he knew the employer still needed the 200 amp disconnect because the press machine that the employer had decommissioned in August 2003 was still capable of being operated if required. As he (and the rest of the workforce) knew the employer was keeping the press to use as a backup if needed, the worker's position is that it would have been unreasonable for him to deliberately touch the electrical panel, knowing that the 200 amp disconnect switch was "live."

There is other evidence, however, which gives rise to an explanation that is consistent with the worker both knowing that the backup press might be needed and put into use, and with the worker still deliberately using the screwdriver to make contact with the 200 amp switch panel. Mr. S testified that the 200 amp breaker was not actually hooked up to a press on September 10, 2003. The employer's workforce knew that the old press was not operating that day. Mr. S also testified that on September 10, 2003, the breaker panel had black felt-pen markings that clearly stated: "Not In Use." A reasonable conclusion, consistent with the evidence in this case, is that although the worker knew that the press and related breaker could be put to use if necessary, he believed that the breaker was "not in use" or not "live" at the time. This would be a reasonable perception, given his knowledge that the decommissioned backup press was not operational that day and given the panel markings that characterized the breaker as not in use. This explanation is consistent with the worker having in his hand the type of screwdriver necessary to remove the buss bar screws, and with him deliberately touching the electrical panel for that purpose.

The Board engineer's report confirms the reasonableness of this explanation. At page 6, the Board engineer stated that to the untrained person, it might have appeared that the 200 amp switch was not energized because the electrical contact points were open, with the arms connecting the fuses to the buss bars being in the raised position, not contacting the connection plate. Further, electrical cables (to connect the fuse end of the switches and supply current to a press) were not in place. The Board engineer states that even though the switch was not supplying current to a press, it was energized. The Board engineer was of the opinion that the worker, not knowing the buss bars were energized, might have thought it was safe to remove the switch. But because the screws were fastened into the energized buss bar, the head of the screws was also energized. When the worker's screwdriver contacted the bottom screw, the electrical fault and explosion occurred.

For all the foregoing reasons, I find that the most reasonable conclusion to draw in this case, considering the evidence as a whole and what likely happened in that context, is that the worker mistakenly believed the switch was not "live" when he deliberately touched the switch panel with his screwdriver.

Timing

Another objection raised by the worker to a finding that he deliberately touched the breaker panel is the submission that there was insufficient time for him to have been involved in deliberate activity with the switch panel, removing sufficient screws to gain access to the energized panel components.

Not surprisingly, witnesses and subsequent investigation reports are neither precise nor consistent with respect to the exact time when the worker was last seen at his press console, and the exact time of the explosion. Without describing all those details the evidence indicates that the worker likely entered the electrical room at approximately 7:55 in the morning, and that the explosion occurred at 8:00 or just before 8:00 that morning. Thus the time frame for the worker being in the electrical room immediately before the explosion, admittedly an approximate time frame, is five minutes or so.

In the June 6, 2007 submission on the worker's behalf, his legal counsel refers to and relies on the statement on page 18 in a July 10, 2005 Board incident investigation report "Removal of the switch handle and the cover plate and subsequent removal of several screws fixing the disconnect switch in place would have taken at least five to eight minutes." Legal counsel submits that since this could not be done in five minutes or less, it is not a reasonable conclusion that the worker was in the process of using his screwdriver deliberately to touch and or remove components of the panel.

The problem with that analysis is that the evidence is firm that the switch handle and flange cover assembly had already been removed, by person(s) unknown, some time before this five-minute approximate time frame (either the day before or sometime earlier in the shift). The Board engineer's report indicates that the only fasteners holding the switch in the cabinet at the time of the explosion were the buss bar screws, and that the worker's screwdriver had made contact with the lowest buss bar screw, causing the electrical fault. There were six screws connecting the switch to the buss bars. Some of those screws had been removed just prior to the explosion.

In his testimony Mr. S related that using the requisite Robertson-type screwdriver in a test to demonstrate the time involved, it took him between 20 – 30 seconds to remove four screws. This would mean approximately 6 – 8 seconds to remove each screw. Even assuming a maximum of 12 screws to hold the disconnect switch inside the cabinet, it would take less than two minutes to remove 12 screws. Therefore, even on the tight, albeit approximate, time frame of five minutes presence in the electrical room before the explosion, I find the evidence to be consistent with the worker having sufficient time to use his screwdriver deliberately to remove sufficient components of the electrical panel to reach the energized buss bar screws.

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Law and Policy Applied to the Evidence

Section 5(4) of the Act

I have not found the presumption in section 5(4) of the Act to be helpful in this case. First, there is the issue of whether the worker's injuries in this case were caused by "accident" as defined in the Act. The section 1 definition of "accident" excludes a wilful and intentional act of the worker. I have found that the explosion was caused by the worker's deliberate action in touching the electrical panel with his screwdriver. One view would be that therefore, with the worker's deliberate action causing the explosion, the Act's definition of accident does not apply in this case. I am aware, however, of the *Buckley* decision which found that a similar definition of "accident" in the Alberta workers' compensation statute did not exclude all intentional and wilful acts of a worker, but only those acts where the deliberate intent was to cause the accident or the damage. In this case the evidence does not suggest that the worker deliberately intended to cause the explosion.

If the *Buckley* decision's interpretation of accident is correct and if I were to find that the worker's injuries were caused by an accident as defined in the Act, even then I would not find section 5(4) of the Act to assist me in this case. Section 5(4) is helpful only when the evidence clearly establishes either that an injury arose "out of the worker's employment", or that the injury occurred "in the course of the worker's employment." If the evidence establishes either part of the two-fold test in section 5(1) of the Act, and if the injury arose from an accident, the balance of the two-fold test may be presumed to be satisfied unless there is sufficient evidence to the contrary to rebut the presumption. But in this case, the presumption does not clearly arise from the evidence with respect to either part of the two-fold test. I have found it necessary, therefore, to assess the evidence with respect to both parts of the two-fold test in section 5(1) of the Act.

Section 5(3) of the Act – serious and wilful misconduct; the Buckley decision

Before addressing section 5(1) of the Act, I will address the worker's arguments regarding section 5(3) of the Act and that RSCM II policy item #16.60 is patently unreasonable in requiring that the section 5(1) test be met before section 5(3) may be considered and applied. Legal counsel on behalf of the worker submits that the *Buckley* decision supports a plain reading of section 5(3) of the Act. She says that such a plain reading is illustrated by the Alberta Court of Appeal interpreting the equivalent provision in the Alberta legislation [section 19(2) of that workers' compensation statute] as not requiring that the worker's injuries arose out of and in the course of his employment. The worker's legal counsel submits that the recent *Johnson* decision from the B.C. Supreme Court also supports such a plain reading of section 5(3) of the Act, in accordance with the principles referred to by E.A. Driedger in *Construction of Statutes*. Those principles provide that statutory provisions should be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute,

the object of the statute and the intention of the legislators in the context of the statute as a whole.

The worker's submission is that the *Buckley* decision stands for the proposition that even where an injury is primarily due to a worker's serious and wilful misconduct, *and even though the injury did not arise out of and in the course of the worker's employment*, workers' compensation legislation is a no-fault scheme intended to provide compensation benefits to such a worker. The worker's legal counsel refers to the *Johnson* decision's reference to one of the fundamental principles of workers' compensation law as compensation paid to injured workers "without regard to fault." She then urges the conclusion that this includes workers whose injuries did not arise out of and in the course of their employment. The logical result of this argument is the submission that RSCM II policy item #16.60 is patently unreasonable in its requirement that the conditions in section 5(1) of the Act must be met before section 5(3) may be applied.

I agree with the employer's submission that RSCM II policy item #16.60 is not patently unreasonable in its requirement that the two-fold test in section 5(1) of the Act must be met before section 5(3) may be applied. The proper analysis is that first, under section 5(1) of the Act, the Board must decide whether a worker suffered an injury that arose out of and in the course of employment. If so, the analysis then shifts to whether the worker's claim should be denied on the grounds that the worker engaged in serious and wilful misconduct which was the sole cause of the worker's injuries, and because the injuries were not fatal or did not constitute serious or permanent disablement. Section 5(3) is an exception to the requirement that the Board will pay compensation when personal injury to a worker arises out of and in the course of the worker's employment. If the injuries do not constitute serious or permanent disablement (or result in the worker's death), and the sole cause of the worker's injuries was the worker's serious and wilful misconduct, then section 5(3) may be applied to deny compensation benefits.

I find that the worker's legal counsel has misinterpreted the *Buckley* decision by reading excerpts from the decision out of context with the rest of the reasons in the decision. In *Buckley*, the worker Mr. B was employed as a truck driver when, driving while severely intoxicated, he crashed his truck and trailer unit by driving into the back of a police cruiser and another vehicle. Both the police officer and another individual were killed in the accident. Mr. B was convicted of two counts of impaired driving causing death.

In the *Buckley* decision, the Alberta Court of Appeal overturned an appellate tribunal decision that found because of his severe intoxication or misconduct, Mr. B had removed himself from the course of his employment at the time of the accident. The Alberta Court of Appeal concluded that this reasoning was wrong. The Court found that moral blameworthiness cannot be taken into account in determining whether a worker has taken himself or herself out of the course of their employment. Under section 18(1) of the Alberta workers' compensation statute [the equivalent to section 5(1) of the

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British Columbia Act], the issue is not whether a worker's conduct is morally wrong or blameworthy, but whether the conduct that caused or contributed to the injury "arose out of and in the course of employment".

In the *Buckley* decision, the Alberta Court of Appeal noted that at the time of the accident, Mr. B was driving his employer's transport truck down the highway. This is what Mr. B's employer paid him to do, it was a core activity of his employment, and thus at the time of the accident he was engaged in an activity of his employment. Mr. B's injuries therefore arose out of and in the course of his employment, albeit that he was carrying out his employment duties in a criminal manner at the time he was injured.

The Alberta Court of Appeal distinguished another case [*Ramey v. Alberta (Workers' Compensation Board)*, (1997) 51 Alta L.R. (3d) 218, 200 A.R. 59 (C.A.)], in which the injuries of a truck driver ("Mr. R") were found not to have arisen out of and in the course of his employment. In that case, Mr. R, after he had finished an assignment for his employer, went to a bar, became intoxicated, and then got back into his truck and became involved in a motor vehicle accident. The Alberta Court of Appeal observed that in this other case, the issue was not whether Mr. R's intoxication or misconduct had taken him out of the course of his employment. Compensation was not denied because Mr. R had been intoxicated at the time he was injured. Rather, the question was whether Mr. R's employment activities had terminated at the time of the accident. Was he no longer in the course of his employment because he had ceased doing employment activities and had commenced doing personal activities? The question was answered in the affirmative.

The Alberta Court of Appeal noted that the result (denial of compensation because Mr. R's injuries did not arise out of and in the course of his employment) would have been the same if the accident had occurred after Mr. R had stopped to play a game of pick-up hockey with friends before heading home in the truck, or after he had stopped at a hospital to visit a friend. In those circumstances compensation would be denied not because Mr. R's conduct was blameworthy or morally wrong, but rather because Mr. R's injuries would not have arisen out of and in the course of his employment. At paragraph 85 in *Buckley*, the Alberta Court of Appeal stated that Mr. R's injuries occurred when he had "ceased to engage in his employment activities, and moved on to private activities." Mr. R was denied compensation benefits because his injuries did not fall within the scope of workers' compensation legislation. His intoxication in and of itself was not relevant to the issue of whether his injuries fell within the scope of workers' compensation legislation. But the evidence that Mr. R was *intoxicated because he had stopped working to drink in a bar* was relevant to that issue. Mr. R's injuries were outside the scope of the legislation because they did not arise out of and in the course of his employment. They arose from personal activity not related to his employment duties.

In the *Buckley* decision the Alberta Court of Appeal decided that the statutory phrase "out of and in the course of employment" should not be interpreted so that moral

blameworthiness is introduced into the analysis of whether a worker's conduct comes within the scope of that phrase. The Alberta Court of Appeal concluded that to do so would undermine the no-fault basis of the workers' compensation system and would be inconsistent with other provisions of the Act, notably section 19 [refer to section 5(3) in the British Columbia Act] which denies compensation for minor injuries where the sole cause of the injuries was the worker's serious and wilful misconduct. The Alberta Court of Appeal also observed that where morally blameworthy conduct is specifically mentioned in one section but not in another [that is, section 18 of the Alberta statute or section 5(1) of the British Columbia Act], one assumes that it is not a factor in the latter section. Thus if a worker's action or conduct was a matter arising out of and in the course of the worker's employment, the worker is entitled to the Act's protection regardless of whether the worker's action or conduct was morally wrong or blameworthy.

In its analysis of the interplay between sections 18 and 19 of the Alberta workers' compensation statute, the Alberta Court of Appeal was very clear, however, that before a worker is entitled to the protection of workers' compensation legislation, the worker's action or conduct must come within the scope of that legislation. That is, the worker's action or conduct must arise out of and in the course of the worker's employment. With respect to Mr. B, the Alberta Court of Appeal noted that the facts in his case were distinguishable from those in Mr. R's case. Leaving aside altogether the issue of whether Mr. B's conduct was morally wrong, blameworthy or criminal in nature, the Alberta Court of Appeal found that at the time of the accident, Mr. B was otherwise engaged in his normal employment duties. He was driving his truck and trailer unit on the highway. That was part of his job with the employer. He was not involved in any personal or private activity apart from driving for the employer. Thus Mr. B was entitled to the protection of the Alberta workers' compensation legislation under section 18 of that legislation because his injuries arose out of and in the course of his employment. Section 19 of the Alberta legislation was another matter with which the Court did not need to deal. Only under section 19 would it be relevant to engage in an inquiry regarding the manner in which Mr. B was carrying out his employment duties (serious and wilful misconduct), the nature of his injuries, and whether compensation should be paid to him despite serious, wilful misconduct.

I note that the *Buckley* decision is consistent with WCAT *Decision #2004-05329*, relied on by the worker in this case, wherein the worker was injured performing a job that the WCAT panel found to be a necessary component of the employer's business as well as part of her regular job duties. Similarly, in WCAT Decision *#2006-04412/04413*, notwithstanding the worker's impairment from drugs, at the time of the motor vehicle accident that caused his injuries, he was engaged in his employment duty of highway driving for the employer. These decisions, relied on by the worker, do not support the worker's position that section 5(3) of the Act does not require, in order for a worker's injury to be compensable, that it have arisen out of and in the course of his employment.

I find that the *Buckley* decision does not support the worker's submission that RSCM II policy item #16.60 is patently unreasonable in its requirement that section 5(1) must be met before section 5(3) may be considered and applied. In fact, I find that the *Buckley* analysis supports the policy. The *Buckley* analysis interprets the Alberta workers' compensation legislation by considering the relevant statutory provisions in their entire context, keeping in mind the purposes of workers' compensation legislation. A similar interpretation of sections 5(1) and 5(3) of the British Columbia Act reflects the *Johnson* decision's acknowledgment that statutory provisions should not be read in isolation but in an ordinary way within the context of the Act and with the Act's object in mind. I am satisfied that it would be inconsistent with those principles to interpret section 5(3) of the Act as not requiring a worker's injuries to fall within the scope of the Act under section 5(1). This would make no sense as it would accord compensation entitlement and other protection of the Act to persons whose injuries did not arise out of and in the course of their employment, who did not come within the scope of the Act. Keeping in mind the purposes of workers' compensation legislation and reading section 5(3) in context with the Act as a whole, I cannot interpret section 5(3) as providing that a worker must be covered by workers' compensation legislation without reference to the phrase "arise out of and in the course of employment" in section 5(1) of the Act.

Having found that RSCM II policy item #16.60 is not unreasonable in its requirement that section 5(1) of the Act must be met before section 5(3) may be considered and applied, therefore under section 251 of the Act I must apply that Board policy. Before I can consider section 5(3) of the Act, I must be satisfied that the worker's injuries come within the scope of the Act. Accordingly I turn to the issue of whether the worker's injuries arose out of and in the course of his employment within section 5(1) of the Act.

Section 5(1) of the Act – did the worker's injuries arise out of and in the course of his employment?

RSCM II policy item #14.00 provides ten criteria as guidelines to determining whether an injury should be classified as one arising out of and in the course of employment. Applying those guidelines to this case, only two out of the ten are satisfied: the worker's injury occurred on the employer's premises, and it occurred during a time period for which he was being paid (he was being paid by the employer to do his press operator, job, however, not to tamper with the 200 amp disconnect switch in the electrical room).

The other eight criteria do not apply. I have found that the worker did not enter the electrical room to get a light tube but rather with the intent of investigating and touching the electrical panel with his screwdriver. His activity in the electrical room did not benefit the employer in any way. Investigating and touching the electrical panel was contrary to the employer's instructions and there was no supervision by the employer condoning the worker's actions on that day. It was in no way part of the worker's regular job duties or the job duties of any of the employer's employees; I find that RSCM II policy item #16.40 (*Injury While Doing Another Person's Job*) does not apply in

this case. The risk to which the worker exposed himself was not similar to the risks in a press operator's job. Although the screwdriver may have been supplied by the employer, it was not supplied for the purpose for which the worker used it in touching the electrical panel.

The criteria in RSCM II policy item #14.00 are not an exhaustive test. The worker's legal counsel submits that at worst, the worker's entry into and actions in the electrical room constituted bad judgment on his part, and that this type of unauthorized activity did not take the worker out of the course of his employment. She refers to several WCAT decisions and text book authority in support of that proposition. The principles reflected in those resources, however, illustrate that there is a clear distinction between a worker doing something recklessly or negligently or with poor judgement *which a worker is employed to do*, and the worker doing a thing *altogether outside and unconnected with what the worker is employed to do*. The former action does not take the worker outside the scope of the worker's employment, while the latter does. I have considered RSCM II policy item #16.00 (*Unauthorized Activities*) and acknowledge that the mere breach of an employer's regulation or order does not mean that the worker's injury did not arise out of and in the course of employment. The focus must generally be on whether the breach occurred while the worker was undertaking his or her job duties, and whether the injury arose out of the worker's performance of those duties.

I have considered RSCM II policy item #21.00 (*Personal Acts*) and find that the worker's activities in the electrical room did not constitute an incidental intrusion of personal activity into the worker's job akin to taking a coffee break or other brief recess expected in the routine workday as a normal incident of employment.

The worker referred to RSCM II policy item #17A.10 (*Commencement of Employment Relationship*), referring to the phrase that states the Board must make a decision whether having regard to the substance of the matter, an employment relationship had begun for compensation purposes. There is no question that the worker and the employer had an employment relationship and that on the workday on September 10, 2003, before his activities in the electrical room began, the worker had been in the course of his employment relationship with the employer. But RSCM II policy item #17A.10 does not stand for the proposition that just because a worker begins the day in the course of an employment relationship with an employer, that the worker can never take himself or herself outside of the scope of that relationship for compensation purposes under the Act.

Considering the evidence as a whole, I find that the worker's actions in the electrical room on September 10, 2003, in particular his investigation and tampering of the electrical panel, were outside the scope of his employment with the employer. In engaging in those activities, he had ceased to engage in his employment activities and had moved on to private activities of personal interest to him. I find that the worker's injuries did not arise out of and in the scope of his employment with the employer.

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Having made that finding, for reasons earlier provided, it is unnecessary to deal with section 5(3) of the Act or RSCM II policy item #16.60.

Conclusion

For the foregoing reasons, I deny the worker's appeal and confirm the Review Division decision dated March 20, 2006 which confirmed the Board's November 10, 2003 decision to deny the worker's claim for compensation. I have found that:

- Section 5(4) of the Act was of no assistance in determining the issues in this case;
- RSCM II policy item #16.60 (*Serious and Wilful Misconduct*) is not patently unreasonable in requiring that section 5(1) of the Act be satisfied before section 5(3) of the Act may be considered and applied;
- Under section 5(1) of the Act, the worker's injuries did not arise out of and in the course of his employment;
- Section 5(3) of the Act did not apply because the worker did not meet the criteria in section 5(1) of the Act for obtaining compensation coverage under the Act;
- The Board was correct in denying the worker's claim for compensation.

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Expenses

In the course of the oral hearing I requested legal counsel to advise me of any request for reimbursement of appeal expenses. No one made such a request. I note that in the appeal proceedings the worker's legal counsel tendered in evidence a copy of a July 2006 psychiatric consultation report, with hospital clinical records, referring to the worker's diagnosis of post-traumatic stress disorder. The account indicates a $50.00 charge to the worker's legal counsel. One purpose for which these records were provided in the appeal was to support the legal counsel's advice that the worker's manner of giving testimony was affected by his post-traumatic stress disorder, and that I should take this into account when considering his evidence. I find that this was not an unreasonable purpose for tendering this evidence, and in accordance with section 7 of *Workers Compensation Act Appeal Regulation*, I direct the Board to reimburse the worker's legal counsel with the amount of $50.00 to cover the expense of providing that evidence on the worker's behalf.

Heather McDonald
Vice Chair

HM/dw

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