BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number: **WCAT-2008-02404**
WCAT Decision Date: **August 14, 2008**

Panel: Marguerite Mousseau, Vice Chair

WCAT Reference Number: **071925-A**

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M 065091
Satinder Dhanoa v. Douglas Arthur Trenholme

Applicant: Satinder Dhanoa
(the "plaintiff")

Respondent: Douglas Arthur Trenholme
(the "defendant")

Interested Party: Pacific Salmon Industries Inc.

Representatives:

For Applicant: Brij Mohan
BRIJ MOHAN & ASSOCIATES

For Respondent: Dimple Kainth
PACIFIC LAW GROUP

For Interested Party: Linc Johnson
PACIFIC RISK MANAGEMENT CORP.

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Introduction

On September 14, 2006 the plaintiff, Satinder Dhanoa, was struck by a vehicle driven by the defendant, Douglas Arthur Trenholme, a co-worker. At the time of the accident, the plaintiff had finished working for the day and was standing in the parking lot waiting for her ride home. By letter dated July 24, 2007, the plaintiff requested determinations pursuant to section 257 of the *Workers Compensation Act* (Act).

Section 257 of the Act provides that the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death.

The employer of the parties, Pacific Salmon Inc. dba Scanner Enterprises (Scanner Enterprises), was invited to participate in the application and a representative of the employer has provided a submission.

Issue(s)

The issues on this application are whether, at the time the cause of action arose: the plaintiff, Satinder Dhanoa, was a worker within the meaning of Part 1 of the Act and, if yes, whether injuries she sustained in the accident arose out of and in the course of her employment; and, whether the defendant Douglas Arthur Trenholme was a worker within the meaning of Part 1 and, if yes, whether the conduct that allegedly caused a breach of duty arose out of and in the course of his employment.

Jurisdiction

Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), that

is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action. (See *Clapp v. Macro Industries Inc.,* 2007 BCSC 840.)

Preliminary Matter

By letter dated June 9, 2008, plaintiff's counsel submitted that it was premature to make any decisions and that further evidence was necessary before the determinations of status could be made. Counsel requested that an unstated period of additional time be added to the schedule for providing submissions so that further evidence could be obtained. This request was made after both parties had been examined for discovery, plaintiff's counsel had provided a submission (July 24, 2007) and a supplementary submission (February 14, 2008) and defendant's counsel and the employer's representative had provided reply submissions dated, respectively, May 23, 2008 and June 9, 2008. The additional evidence that counsel was seeking consisted of the following: the plaintiff's sister-in-law's statement as to her time of arrival at the parking lot to retrieve the plaintiff, a witness statement from Parmjit Nandra and a statement from the plaintiff's father-in-law (who was with the plaintiff at the time of the accident). In addition, counsel stated that a series of "undertakings" by both sides had not yet been produced. These consisted of the date that the defendant was provided with a designated parking stall, the defendant's punch card for the week of September 14, 2006, a diagram of the parking lot, the defendant's description of which parking stall he was parked in on the day of the accident, the defendant's employment file and a copy of the defendant's statement to the Insurance Corporation of British Columbia (ICBC) adjuster.

I declined counsel's request by letter dated June 25, 2008 on the basis that the relevance of the evidence described by counsel was not evident and there was an impending trial date to be considered. According to the notice of trial on the application file, the action had been set for trial on September 22, 2008. Documents have since been submitted indicating that the trial will be adjourned. I advised counsel that she could submit further evidence with her rebuttal submission and if there was additional, relevant evidence that remained outstanding at that time, she could indicate that in the rebuttal submission and provide submissions as to why this evidence was required in order to make the decisions requested. At that point, if it appeared necessary, the determinations would be held in abeyance while the additional evidence was obtained. If it did not appear necessary to obtain further evidence, I would proceed with making the determinations requested and would provide my reasons for not obtaining the additional evidence in the decision.

By letter dated July 10, 2008, counsel submitted that, in order to determine the status of the plaintiff, as a "worker," worker status in the parking lot was also a consideration. To this end, it was evident on its face that the additional evidence described above was required. In the alternative, if it was not evident why this evidence was required, the following argument was provided:

a) A person may be working or not working depending on his or her arrival time (or lack thereof) at work, indicating the time he or she acquired worker status;

b) The work punch card will show the time of arrival at work and *mutatis mutandis*, the time of acquiring worker status;

c) The diagram of the parking lot will show the proximity of the motor vehicle accident to the work place premises, whether the pathway of the Plaintiff was in a place contiguous to the workplace, and other matters relevant to worker status and the scope of the worker's employment;

d) The employment file of the Defendant will *inter alia* show the date the worker initially acquired worker status and whether his or her worker status ceased prior to the motor vehicle accident;

e) The Defendant's statements will reveal matters relevant to the motor vehicle accident and other critical and/or corroborative facts which will further assist to define his working or non-working status;

f) Witness statements are always relevant to assist to corroborate or contradict the parties' version of events and are useful in adding further elemental and relevant facts.

[emphasis in original]

Counsel submitted that there was no longer an impending trial date and there should also be a delay in the WCAT proceeding to consider all of the evidence necessary to make the determinations requested.

By letter dated June 13, 2008, defendant's counsel submitted that the evidence described was neither necessary nor relevant to the section 257 proceeding and that the examination for discovery transcripts of the plaintiff and defendant provided all of the information required in order to make the determinations of status.
In view of the statutory provisions and the policies that are applicable to determining whether a party is a worker, I do not consider that the punch card for either party or the

defendant's employment file would assist in determining the status of the parties at the time of the accident. I also do not consider it necessary to have corroborative information regarding the accident to assist in determining the status of either party. I have explained, in my reasons, the basis on which I made the decision as to whether the parties were workers at the time of the accident. I also do not consider that witness statements are necessary since there are no material facts in dispute and the discovery evidence of the parties is sufficient to determine the questions of status. A diagram of the parking lot may have been of some assistance but I consider that the aerial view, the defendant's discovery evidence and statements made by both counsel provided sufficient information to determine the questions posed in the applicable policy. For these reasons, I did not consider it necessary to hold the application in abeyance so that additional evidence of this nature could be obtained.

Background and Evidence

The plaintiff was examined for discovery on May 2, 2008, where she gave evidence with the assistance of an interpreter. She stated that she typically started working at 7 a.m. and finished at 3:30 p.m. (Q 62) She was required to "punch in" when she arrived at work and when she left work and she had done so on the day of the accident. (Q 68 to 71) She had punched the clock at 3:31 p.m. that day. (Q 75) The accident occurred at approximately 4:00 p.m. (Q 73 and 74) In the period between 3:31 p.m. and 4:00 p.m., she had changed her clothes and five or six minutes later she had gone out to the parking lot to wait for her sister-in-law to pick her up. She saw the car arrive and was walking towards it when she was hit by the defendant's vehicle. (Q 73 to 76 and 78)

The parking lot where the accident occurred was used by employees. (Q 110 and 135) The parking lot "belongs" to her employer but it was not used solely by employees. (Q 131) While she was waiting for her ride, other employees were driving into the parking lot because they were going to start the afternoon shift. (Q158)

The defendant was also examined for discovery on May 2, 2008. At that time, he stated that he was employed as a first aid attendant for Scanner Enterprises at the time of the accident. He was still employed there as of the date of the examination for discovery. (Q 13, 14 and 21) He had completed a full day's shift just prior to the accident. (Q 167) He had finished working at 3:30 p.m. (Q 169 and 272) He also was required to punch in at the start of the day and punch out at the end of the work day. (Q 175) He thought he would have been out in the parking lot within 10 to 15 minutes of punching out. (Q 443) During that period, he would have gone to the first aid room and changed out of his overalls and then walked to his car. (Q 444 to 445) He thought he had changed his shoes in his car. (Q 183) He did not recall what else he may have done between punching out and arriving at his car. (Q 459)
The accident had occurred in the employer's parking lot. (Q 186) The premises of Scanner Enterprises are located at 8305 128 Street in Surrey, BC. (Q 22) The address

of the parking lot is also 8305 128 Street, Surrey. (Q 186) When questioned about who uses the parking lot, other than employees, he replied that tractor trailers back up to the front loading dock. Visitors could also use the parking lot. (Q 201, 202 to 205) Some employees had designated parking spots and others parked wherever they could. At the time of the accident, he did not have a designated parking spot. (Q 78, 79 and 83) He had parked in the front of the building, in the parking lot. (Q 301)

He struck the plaintiff, who was a co-worker, while backing out of his parking spot. (Q 265 and Q 290 to 294) He did not recall whether he had filled in an accident report for his employer. (Q 368)

Law and Policy

Section 5(1) of the Act provides that compensation is paid when a worker suffers a personal injury arising out of and in the course of the employment.

The policies in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), provide direction on the types of activities that may be included in the term "employment" for the purposes of section 5 of the Act.

The policy at item #19.00 of the RSCM ll, "Use of Facilities Provided by Employer," states:

> Where a worker is injured in the course of using some facility supplied or provision made by the employer, the use of such facility or provision may be part of the employment relationship; and injuries resulting therefrom may be injuries arising out of and in the course of employment.

The policy at item #19.20 of the RSCM ll, "Parking Lots," specifically addresses injuries that occur while a worker is in a parking lot used by employees. It describes five factors that must be considered in deciding whether injuries sustained in a parking lot are compensable. These are set out in the following questions:

> 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.
>
> 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.
>
> Fourth, was the parking lot contiguous to the place of employment? The word "contiguous" is defined as meaning both adjacent to and attached to. While desirable, it should not be deemed a mandatory prerequisite for acceptance. Non-contiguous lots, particularly those under the direction, supervision or control of an employer do qualify although coverage does not normally extend to workers while they are making their way to them across and along public thoroughfares.
>
> Finally, did the injury occur proximal to the start or stop of the shift? If there is a significant time gap between the time of an accident and the start or stop of the shift, the matter is investigated to determine whether there is an employment relationship.
>
> [emphasis added]

Item #14.00 of the RSCM II, "Arising Out of and In the Course of Employment," discusses the interpretation of this phrase. It states:

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

> Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the Act at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.
>
> No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance

The policy goes on to describe the following non-exhaustive list of indicators: whether the injury occurred on the employer's premises; whether it occurred while doing something for the benefit of the employer or in response to instructions from the employer or while using equipment supplied by the employer; whether it occurred during a time period for which the employee was paid or while the employee was receiving payment; and, whether the injury was caused by some activity of the employer or as a result of exposure to a risk which was the same as that to which the employee would be exposed in the normal course of employment.

Counsel have also cited policies at item #20.40, "Acts for Personal Benefit of Principals"; item #21.10, "Lunch, Coffee and Other Breaks"; item #21.00, "Personal Acts"; item #18.11, "Captive Road Doctrine"; and item #18.00, "Travelling to and from Work."

Submissions

In a submission dated July 24, 2007, appended to the request for a certificate, plaintiff's counsel noted that the plaintiff punches in and out on a time clock for every shift. On the day of the accident, the plaintiff had finished her shift at exactly 3:31 p.m. She was not working overtime; she had punched out from her shift and was on her way home. The plaintiff was not accountable to her employer once she had punched out and her

shift was over. She did not receive any form of gas, car or travel allowance nor was she paid travel time to and from work. The defendant had also punched out from his shift and was on his way home. The defendant struck the plaintiff with his personal vehicle. She specifically noted that, at the time of the accident, the employer had no control over the activities of the plaintiff, presuming that once an employee punches out of his or her shift, "the employer has discharged the employee of his/her duties." She submitted that, at the time of the accident, there was no employer-employee relationship between the plaintiff and her employer on the basis that:

- the plaintiff was not employed at the time of the accident to do any work or provide services for the employer which would entitle her to obtain wages;
- the employer had no control or direction over the plaintiff;
- the employer had no control over the manner in which her services were to be provided;
- the employer was not responsible for paying any wages to her; and
- the injury did not occur at work nor did it occur as a result of the work itself.

She stated that there was no dispute that the accident occurred in the parking lot of the employer. However, since there was no longer an employee relationship between the plaintiff and her employer once the plaintiff had punched out, the parking lot was no different than any other parking lot.

In a supplementary submission dated February 14, 2008, plaintiff's counsel cited policy at item #14.00 of the RSCM II and she restated the points made in her earlier submission, noting also that the plaintiff had not been engaged in any activity that might be beneficial to the employer at the time of the accident; that the injury was not work-related; that it had not occurred in the course of productive activity; it had not occurred as a consequence of job related duties; and, there was no benefit whatsoever to the employer or the employer's business.

Counsel again noted that it was undisputed that the accident occurred in the parking lot of the employer; however, she submitted that the policy at item #19.20 was not applicable for the following reasons:

1. The injury was not caused as a result of *any hazards in the Parking lot*, rather, by the ***negligence of Mr. Trenholme*** while operating his vehicle when backing out of a parking stall;
2. Mr. Trenholme's conduct was not in any shape or form authorized by the Employer;

3. Mr. Trenholme collided with the Plaintiff while operating his privately owned vehicle;
4. The Plaintiff was in the process of entering a privately owned vehicle when she was struck by Mr. Trenholme's vehicle;
5. Both vehicles were privately owned and operated;
6. The Employer did not pay or contribute to the payments of Insurance, ownership or maintenance of either vehicles;
7. Even though the parking lot belonged to the Employer, neither Mr. Trenholme [who also had punched out his shift], nor the Plaintiff was in the course of their employment;
8. Further the *accident was not proximal to the start or stop of the Plaintiff's shift*. The accident occurred at or after 4:00 PM, while the Plaintiff had punched out of her shift at 3:31 PM. There is a considerable time gap between the stop of the Plaintiff's shift and the time of the motor vehicle accident.

[reproduced as written, emphasis in original]

Counsel submitted that the circumstances of a particular case must be viewed in light of the requirements of section 5(1) of the Act and that the policies simply provide guidance on the interpretation and application of the Act. She submitted that the accident in which the plaintiff was injured did not meet the statutory definition of "accident." Finally, she submitted that the plaintiff was not in the course of her employment, as any employer – employee relationship had ceased the moment she punched out of her shift. She submitted that any decision to the contrary would be setting an erroneous precedent and would be an error of law. In this case, the parking lot adjacent to the place of employment was no different from a parking lot owned by Sears or a mall.

In a reply submission dated May 23, 2008, counsel for the defendants submitted that both parties were workers in that they were both employees of Scanner Enterprises at the time of the accident. She submitted that the injuries sustained by the plaintiff arose out of and in the course of her employment and the conduct of the defendant that allegedly caused the breach of duty, arose out of and in the course of his employment.

Counsel submitted that the policy at item #19.20 of the RSCM II was applicable in the circumstances of this case. In this regard, she stated that the employer confirmed with ICBC, on October 3, 2006, that the property where the accident occurred is the property of Scanner Enterprises and that it is used by the employees while they are at work. The parking lot is controlled by the employer. The injury was caused by a hazard of the premises as that is described in the policies, noting that the circumstances in this case were essentially the same as the example provided of a hazard of the premises in the policy. She submitted that the parking lot was contiguous to the place of employment and appended an aerial photograph of the premises in support of that submission. Finally, she submitted that the accident occurred at approximately 3:45 p.m., which did

not constitute a significant gap between the time the parties punched out and the time that the accident occurred.

She submitted that the circumstances in the present case were very similar to those in *WCAT Decision #2006-02656* and, in that case, the WCAT panel had found that the worker had sustained an injury arising out of and in the course of employment based on the application of the criteria in policy item #19.20 of the RSCM II.

Counsel also submitted that the term "employment" is not limited to productive activities and that the circumstances in the present case were analogous to the situation of a worker sustaining injuries while engaged in an activity such as drawing pay. She submitted that both parties were engaged in an activity incidental to the employment, when the accident occurred, in that they were on the employer's premises and engaged in leaving those premises.

By submission dated June 9, 2008, the employer's representative submitted that the plaintiff may have been a worker at the time of the accident, according to the policy at item #19.20, but the defendant was clearly not a worker. The representative submitted that the defendant's actions of removing his boots after he got into his vehicle introduced a personal element which severed the employment relationship. He submitted that policy at item #19.31 which addresses injuries caused by the personal property of a worker was applicable. He submitted that there was no hazard of the employer's premises to account for the accident. The plaintiff's injuries had been inflicted due to the personal actions and personal property of the defendant.

In a submission dated June 23, 2008, in reply to the employer's submission, defendant's counsel submitted that the defendant's activity of removing his work boots was a necessary activity incidental to his employment. Counsel also submitted that, according to the defendant's discovery evidence, there is a designated walkway which is not used by employees. Since the use of the walkway is not enforced by the employer, it was submitted that there was a hazard of the employment that was responsible for the accident. She submitted that policy item #19.31 was not applicable to the circumstances of this case in that it is usually applied to personal items taken into the workplace. Accidents occurring in parking lots were intended to be adjudicated under policy item #19.20. In the alternative, she submitted that the activities of entering and leaving a parking lot prior to or at the end of a shift are activities related to the employment. She also submitted that the vehicle was not an exceptional hazard introduced onto the premises for the defendant's own use, given that the employer provided a parking lot so that employees could drive their vehicles to work.

In a submission dated July 11, 2008, counsel for the plaintiff referred to policy at items #20.40,"Acts for Personal Benefit of Principals"; item #21.10, "Lunch, Coffee and Other Breaks"; item #21.00, "Personal Acts"; item #18.11, "Captive Road Doctrine"; and

item #18.00, "Travelling to and from Work," which address a range of activities from those that are clearly personal and not employment related to those that are clearly employment related and the gray areas in between. Counsel notes that under these policies, activities undertaken after completion of a job such as cleaning clothes, removing equipment and travelling to and from a work site are not covered under the Act, as they are not sufficiently related to the employment. Since both parties had completed their work and had embarked on their journeys home, the injuries of the plaintiff and conduct of the defendant did not come within what is usually recognized as employment activities.

In addition, injuries caused by personal items which have been brought into the workplace are not compensable. This is distinct from injuries that are caused by hazards of the employment or hazards of the workplace. The latter refers to inherent defects of the premises or other aspects of the employment and injuries sustained as a result of such injuries are compensable whereas the former or not. In the present case, the plaintiff's injuries were caused by the personal property of the defendant. There was no hazard of the employment as that term is usually understood. Counsel submitted that the negligent driving of a vehicle should not be used to establish worker status for the person who was driving negligently nor the person who was struck by that vehicle.

Counsel also submits that none of the factors in item #14.00 are applicable and, therefore, under this item, the accident did not arise out of and in the course of employment.

Status of the Plaintiff

The definition of "worker" in section 1 of the Act includes

> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise.

The plaintiff submitted a provisional application for compensation dated February 10, 2007 in which she indicated that her occupation was that of a fish packer and that her employer was Scanner Enterprises, a fish canning plant. At the time of the accident, she worked eight hours a day, five days a week and earned $9.50 per hour. According to her examination for discovery evidence, she worked full time on a seasonal basis.

Since the plaintiff was an employee of Scanner Enterprises at the time of the accident, she was a worker pursuant to the definition of a worker in section 1 of the Act. Status as a worker continues for the duration of the contract of service. Accordingly, although the

plaintiff had finished working for the day, she was still a worker of Scanner Enterprises at the time of the accident.

The next question is whether any injuries the plaintiff sustained in the accident arose out of and in the course of her employment.

In considering this aspect of the plaintiff's status, I note that WCAT is required, under section 250(2) of the Act, to apply a published policy of the board of directors that is applicable to the matter being decided. In this instance, policy item #19.20 specifically addresses injuries sustained by workers in parking lots. Other policies indicate, as stated by plaintiff's counsel, that injuries caused by personal property introduced into the employment environment are not usually recognized as compensable. In addition, the policy regarding compensation coverage during travel states that compensation coverage does not extend to travel to and from the work site. These policies would suggest that injuries sustained after work, in a parking lot, and caused by a private vehicle would not come within the ambit of the Act. Similarly, the application of the policy in item #14.00 might lead to the conclusion that injuries sustained in a parking lot do not arise out of and in the course of employment. However, the existence of policy item #19.20 makes it clear that there is an intention to extend coverage under the Act to injuries sustained in parking lots, in certain circumstances.

Turning to the factors cited in policy item #19.20, the first question is whether the parking lot in which the accident occurred was provided by the employer for its employees. The evidence is that the parking lot was used by employees, tractor trailers that were loading and unloading and visitors to the plant. Some employees had designated parking spots; otherwise, employees parked wherever they could find a spot. Based on this evidence, I would characterize this as a parking lot provided for employees.

The second question is whether the parking lot was controlled by the employer. Counsel for the defendant, in a submission dated May 23, 2008, stated that the employer had provided a statement to ICBC that the property where the accident occurred is the property of Scanner Enterprises and that it is used by the employees while they are at work. It would have been preferable to have had that statement submitted as evidence, but plaintiff's counsel has noted in the submissions dated July 24, 2007 and February 14, 2008 that it is undisputed that the accident occurred in the parking lot of the employer. There is no evidence that the parking lot was used by another employer or business; rather, the evidence was that it was used by employees, those delivering or picking up goods related to the employer's business and persons visiting the employer. Although members of the general public may have used the parking lot for various reasons, I consider that it may be inferred from all of the evidence that the parking lot was used primarily for the business purposes of the employer, Scanner Enterprises, and that it was controlled by the employer.

The third question is whether the injury was caused by a hazard of the premises. The policy goes on to state that this is not strictly limited to hazards inherent in the premises and provides the example of a pedestrian who is struck by a fellow employee's car as a hazard that is not a direct result of the premises. The policy states that a "hazard of the premises" is not an absolute requirement for compensation coverage. What is required is that the injury not result from personal causes.

Counsel for the plaintiff and the employer's representative have both submitted that the vehicle that caused the injuries is clearly personal property and that it cannot be viewed as a hazard of the employment. Although I appreciate this argument, it appears to be an argument against the logic of the policy. The policy clearly contemplates an injury caused by a co-worker's vehicle as an injury arising out of and in the course of the employment. Accordingly, I consider that this question is answered in the affirmative for the plaintiff. The fact of being hit by a vehicle that is driven by a co-worker, while in the employer's parking lot, is considered a hazard of the employment if it happens close to the start or end of a shift.

I also note that being struck by a vehicle has been recognized as a hazard of the employment in prior WCAT decisions. In *WCAT Decision #2006-02656*, which was cited by counsel, the panel noted that it was clear from policy item #19.20 that being struck by a co-worker's car amounted to a hazard of the employment. It was accepted in that case that the worker's injuries arose out of and in the course of the employment.

The fourth factor cited in the policy is whether the parking lot is contiguous to the place of employment. "Contiguous" is defined as meaning both adjacent to and attached to the place of employment and it is also noted that this is not a prerequisite for acceptance of a claim for injuries sustained in a parking lot. According to the defendant's discovery evidence, Scanner Enterprises and the parking lot in which the accident occurred are both located at 8305 128 Street, Surrey, BC. An aerial photograph submitted by counsel for the plaintiff indicates that there is an entry on 128 Street into a parking lot which fronts on a building identified as "8305." Counsel for the plaintiff has also noted in her submission of February 14, 2008 that the parking lot in which the plaintiff was injured was adjacent to the place of employment. As a result, I consider that this question is also answered in the affirmative.

The fifth factor is whether there was a significant time gap between the start or stop of the shift and the occurrence of the injury. If there is, the matter is investigated to determine whether there is an employment relationship. The policy does not indicate what would be considered a significant time gap but it suggests a more substantial delay than a half hour. A sufficient period of time is contemplated that investigation might be required to determine what activities a worker had engaged in prior to the occurrence of the injury. In this case, there was sufficient time for both parties to

change their clothing and to make their way out to the parking lot. The plaintiff had been waiting for her ride for some period of time but I do not consider that one-half hour is a significant time gap for the purposes of this policy.

In view of the above, I find that any injuries sustained by the plaintiff in the accident arose out of and in the course of her employment.

Status of the Defendant

The defendant stated at his examination for discovery that he was an employee of Scanner Enterprises on the date of the accident. Accordingly, I find that he was a worker pursuant to the definition of a worker under section 1 of the Act in that he was employed under a contract of service on the date of the accident.

The next question is whether the defendant's conduct that allegedly caused a breach of the duty of care arose out of and in the course of his employment. The employer's representative submitted that the defendant removed himself from his employment by entering his car and changing his shoes. He submitted that these activities had the effect of severing the employment relationship. Alternatively, the employer's representative and the plaintiff's counsel submitted that the plaintiff's injuries were entirely due to the personal actions and the personal property of the defendant.

The questions asked in policy item #19.20 relate to the location and control of the parking lot, the timing of the incident that caused the injury and the cause of an injury. Taken together these questions are intended to determine whether an injury occurring in a parking lot arose out of and in the course of the employment. They are used to determine whether there was a sufficient employment connection between the cause of the injury and the employment. This policy was not directly intended to assist in determining whether the conduct of a person arose out of and in the course of the employment. However, it describes a set of circumstances in which there is a sufficient employment connection for compensation coverage even though the injury occurs outside of productive activities and beyond the area in which productive activities are carried out. Since the policy establishes a framework for determining whether there is an employment connection for parking lot injuries, I consider that it may also be used to assist in determining whether the conduct that allegedly caused the injury arose out of and in the course of the employment.
The questions regarding the location and control of a parking lot go to establishing whether the parking lot may be characterized as a facility that is supplied or provided by the employer. As stated in policy #19.00, the use of such a facility may be part of the employment. In the present case, the evidence indicates that the parking lot is at the same address as the employer's canning plant. The aerial photo indicates that it is adjacent to the building and there has been no dispute that it is "the employer's parking lot". The evidence also indicates that the parking lot is used by employees. All of these

factors indicate that the parking lot may be characterized as an extension of the employer's premises. Accordingly, the use of this facility may be viewed as part of the employment relationship under policy items #19.00 and #19.20.

Another question in the policy at item #19.20 relates to the timing of the incident that causes an injury to a worker. If it occurs in close proximity to the start or end of the shift, then it may be viewed as an injury arising out of and in the course of the employment. The policy contemplates that a worker who has finished their productive activity for the day and left the building may still sustain an injury arising out of and in the course of the employment in the employer's parking lot. To this point, the circumstances of the plaintiff and the defendant are the same in relation to the factors described in this policy. I consider that the accident occurred proximal to the end of the shift.

The fifth question set out in policy item #19.20 relates to the cause of the injury itself and whether it was caused by something outside of the employment. When considering the conduct of the defendant, the policy on parking lots contemplates the extension of coverage to activities undertaken in an employer's parking lot and the activities most likely to occur in a parking lot are walking and driving. It is difficult to say, therefore, that the defendant has removed himself from his employment by getting into his vehicle and starting to drive, or by changing his boots before starting to drive.

Counsel for the plaintiff and the employer's representative have both submitted that the use of a personal vehicle should be sufficient to remove the defendant from his employment, particularly when one considers that the defendant was no longer engaged in productive activities and had left the area of productive work. However, the employer has impliedly condoned the use of personal vehicles by providing a parking lot for them. It seems inconsistent with the extension of coverage to this type of parking lot, as contemplated by policy item #19.20, to find that a worker removes himself from his employment by getting into his vehicle and starting to drive.

If a worker bumped into another worker on the "factory floor", it is unlikely that there would be much dispute that the injuries sustained in such an incident would arise out of and in the course of employment. Similarly, the worker who struck his co-worker would not have removed himself from his employment by that action, unless there was an additional factor involved such as horseplay, intoxication or intentional assault. It appears that the policy on parking lots is intended to provide the same type of coverage to accidents that occur in parking lots, in that the policy states: "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".

Taking into account the intention of the policy to extend compensation coverage to parking lots provided by employers and that the defendant did nothing more than what

he would be expected to do in a parking lot, it seems that his conduct should be viewed as arising out of and in the course of the employment.

I also note that the conduct of a defendant driver has previously been recognized as conduct arising out of and in the course of the employment under the parking lot policy. *WCAT Decision #2005-06036* also addressed injuries sustained in a parking lot. That decision involved a request for determinations under section 257 of the Act with regard to a motor vehicle accident in a parking lot. In that case, the claimant's vehicle was struck by a vehicle driven by another employee, in the employer's parking lot. The panel, applying the policy in item #19.20, concluded that any injuries sustained in the accident arose out of and in the course of the employment. The panel also concluded that the conduct of the defendant who was driving the vehicle arose out of and in the course of the employment on the basis of the policy in item #19.20.

The panel in that case cited the decision of the Supreme Court of British Columbia in *Re Murphy and Dowhaniuk*, [1985] B.C.J. No. 2937, 19 D.L.R. (4th) 456, 66 B.C.L.R. 319. That case involved a petition for judicial review of a certificate issued by the Board under what was then section 11 of the Act. The circumstances were that the plaintiff and defendant were co-workers. The plaintiff was crossing the employer's parking lot to return to work at the end of his lunch break. The defendant, who had gone home for lunch, returned to work on his motorcycle. He entered the parking lot, headed directly at the plaintiff and struck him. Both were injured. The Board determined that both parties were workers. The plaintiff applied for judicial review of the Board's decision submitting, among other things, that the defendant had engaged in horseplay and thereby removed himself from his employment. The court noted, in dismissing the petition for judicial review:

> 21 …The Board simply concluded that Dowhaniuk's "stunting" or horseplay was not a substantial enough deviation from his employment to take the case out of the "parking lot situations". The petitioner was informed by counsel for the Board, in response to his original request of September 29, 1981 for a s. [section] 11 determination, that "the Board generally considers people injured in the parking lots of their employer to be still in the course of their employment".
>
> 22 That policy of the Board is, of course, designed to ensure that injuries, motor vehicle and otherwise, on company premises are handled under the scheme in the Act, no matter who is at fault and whether or not negligence was involved.
>
> An appeal was dismissed by the British Columbia Court of Appeal [1986] B.C.J. No. 987, 32 D.L.R. (4th) 246, 7 B.C.L.R. (2d) 335, 22 Admin. L.R. 81.

In citing these cases, I am aware that WCAT is not bound by legal precedent. I note these cases, however, as illustrations of the application of the parking lot policy in relation to motor vehicle accidents occurring in parking lots. I also note that the WCAT *Manual of Rules of Practice and Procedure* (MRPP) states that WCAT will strive for consistency in decision making. (See items #14.10 and 20.44 of the MRPP.)

I have also referred to Larson's Workers' Compensation, Desk Edition, Volumes 1 and 3, on this issue. This text is based on American jurisprudence and, as a result, it does not necessarily reflect compensation policies in British Columbia. On the other hand, there are areas in which the principles that are explained in Larson's are consistent with the policies contained in the RSCM ll and in those areas Larson's may assist in providing a rationale for the policies. In Chapter 13.04[2][a] the text states:

> As to parking lots owned by the employer, or maintained by the employer for its employees, practically all jurisdictions now consider them part of the "premises" whether within the main company premises or separated from it.

At Chapter 13.04[2][b], the text states:

> The commonest source of harm in these cases is a collision with a co-employee's car, with the case usually assuming "upside-down" form, in that the injured employee is trying to prove that the Act does *not* cover, in order to preserve a damage action in a jurisdiction where co-employees enjoy immunity from suit under the exclusive remedy provisions of the Act. In such cases, as is noted later, there may be a question not only whether the injured employee was within the course of employment but also whether the defendant employee was.

Further on, in the discussion on third party actions in Volume 3, Chapter 111.03[3] the text goes on to describe "marginal course of employment" situations and states:

> Parking-lot accidents are a familiar example of this marginal category, and in one such case, an employee who was struck by a co-employee's automobile after work on the employer's parking lot was held not barred from suing the co-employee, although the co-employee had actually been awarded workers' compensation benefits as for an injury in the course of employment.

All of this indicates that parking lot accidents do involve an area that is at the outside edges of workers' compensation and that they become particularly contentious when there is a third party insurer involved; however, in light of the policy at item #19.20, I see no justification for finding that the defendant removed himself from his employment by

backing out of his parking spot. As a result, I find that the defendant's conduct arose out of and in the course of his employment.

Conclusion

I find that at the time of the September 14, 2006 accident:

1. the plaintiff, Satinder Dhanoa, was a worker within the meaning of Part 1 of the Act and any injuries she sustained in the accident arose out of and in the course of her employment; and,

2. the defendant, Douglas Arthur Trenholme, was a worker within the meaning of Part 1 of the Act and any action or conduct that allegedly caused a breach of duty of care arose out of and in the course of his employment.

Marguerite Mousseau
Vice Chair

MM:gw/cd

NO. M 065091
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

SATINDER DHANOA

PLAINTIFF

AND:

DOUGLAS ARTHUR TRENHOLME

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, SATINDER DHANOA, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

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

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

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

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, September 14, 2006:

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

2. The injuries suffered by the Plaintiff, SATINDER DHANOA, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, DOUGLAS ARTHUR TRENHOLME, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

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

CERTIFIED this day of August, 2008.

_____

Marguerite Mousseau
VICE CHAIR

NO. M 065091
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
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SATINDER DHANOA

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AND:

DOUGLAS ARTHUR TRENHOLME

DEFENDANT

SECTION 257 CERTIFICATE

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