DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT DECISION DATE: **October 15, 2021**

WCAT DECISION NUMBER: **A1702186**

WCAT PANEL: **Herb Morton**

RE: Sudarshan Singh Gill v. Carol-Lynn Michelle Hughes
New Westminster Registry No. NEW-S-M-170433
Certification to Court
WCAT No. A1702186

Applicant:	Carol-Lynn Michelle Hughes ("Defendant")
Respondent:	Sudarshan Singh Gill ("Plaintiff")
Interested Persons:	BC Maritime Employers Association
	GCT Canada GP Inc - GP for GCT Canada Limited Partnership

Representatives:

For Applicant:	Andrew Jow ICBC Litigation Department
For Respondent:	Inderbir Buttar Brij Mohan & Associates
For Interested Persons:	
• BC Maritime Employers Association	Gordon Rumohr
• GCT Canada GP Inc - GP for GCT Canada Limited Partnership	Michelle Jansen Jansen Claims Group Inc.

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] The plaintiff, Sudarshan Singh Gill, and the defendant, Carol-Lynn Michelle Hughes, were involved in a motor vehicle accident on July 21, 2014. The accident occurred at approximately 8:20 p.m. in the parking lot at the Deltaport Terminal in Delta, British Columbia. The defendant was pulling out of a parking stall in the parking lot when her vehicle collided with a passing vehicle driven by the plaintiff.

[2] The plaintiff and the defendant were both longshore workers employed at the Deltaport Terminal. The accident occurred as the plaintiff was leaving work to go home, and the defendant was leaving for her lunch break.

[3] The Deltaport Terminal is operated by GCT Canada GP Inc - GP for GCT Canada Limited Partnership (GCT). GCT leased the parking lot from its owner, the Vancouver Fraser Port Authority (VFPA).

[4] GCT is a member of the BC Maritime Employers Association (BCMEA). BCMEA is an association of maritime employers that enters into collective bargaining agreements with the International Longshore Workers Union (ILWU) on behalf of its members.

[5] Where an action is commenced based on a disability caused by occupational disease, a personal injury, or death, a party or the court may ask the Workers' Compensation Appeal Tribunal (WCAT) to make determinations and to certify those determinations to the court. This application was initiated by counsel for the defendant on June 30, 2017, and was held in abeyance until February 5, 2021 at the applicant's request. Transcripts have been provided of the April 24, 2018 examinations for discovery of the parties. The legal action is scheduled for trial commencing on February 7, 2022.

[6] A certificate has not been requested in the related legal action, *Sudarshan Singh Gill v. Insurance Corporation of British Columbia*, New Westminster Registry No. NEW-S-S-174034. The Insurance Corporation of British Columbia (ICBC) was invited to participate in this application as an interested person. ICBC adopted the submissions of the defence counsel in the tort action, but is not otherwise participating in this application.

Workers' Compensation Appeal Tribunal

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[7] Written submissions have been provided by the parties to the legal action, and by the BCMEA and GCT as interested persons. The central background facts are not in dispute, and this application does not involve any significant issue of credibility. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[8] Determinations are requested concerning the status of the parties to the legal action, at the time of the July 21, 2014 motor vehicle accident.

Jurisdiction

[9] This application was initiated under section 257 of the *Workers Compensation Act* (Act). On April 6, 2020, the Act was reorganized and renumbered under the *Statute Revision Act*, RSBC 1996, c 440. As the revised provisions have the same effect as the provisions which existed at the time the cause of action arose, the revised provisions apply. Under the *Workers Compensation Act*, RSBC 2019, c 1, section 10 has been replaced by section 127, and section 257 has been replaced by section 311.

[10] The policies that apply to this decision are set out in the Workers' Compensation Board, operating as WorkSafeBC (Board) *Assessment Manual* and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The *Assessment Manual* and the RSCM II were amended, as of April 6, 2020, to use the section numbers and language of the revised Act. The policies that apply in this decision are those that were in effect at the time of the accident, as amended on April 6, 2020 to reflect the revised Act.

[11] Part 7 of the current Act applies to proceedings under section 311, except that no time frame applies to the making of the WCAT decision (section 311(3)). WCAT is not bound by legal precedent (section 303(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 Board, that is applicable (section 303(2)). Section 308 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 7 of the Act, including all matters that WCAT is requested to determine under section 311. The WCAT decision is final and conclusive and is not open to question or review in any court (section 309(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Background and Evidence

[12] The plaintiff did not make a claim for workers' compensation benefits for any injury sustained in the July 21, 2014 accident.

[13] The plaintiff provided evidence in an examination for discovery on April 24, 2018. The July 21, 2014 accident occurred at 8:20 p.m., during the evening shift (Q 100 to 101). The evening shift was from 4:30 p.m. until 1:00 a.m. (Q 102). The accident occurred in the Deltaport parking lot (Q 106 to 107). The plaintiff was working for Deltaport (Q 109). The plaintiff described the use of the Deltaport parking lot as follows (Q 111 to 113):

> Q And as of the date of the accident, who was allowed to park in the parking lot?
>
> A The workers.
>
> Q Was anybody else allowed to park in the parking lot?
>
> A First of all, this far, nobody goes. It's that far. Nobody goes that far, first of all.
>
> Q But as far as you knew, as of the date of the accident, were other people that didn't work there allowed to park in the parking lot?
>
> A There are hundreds of cars parked there. I don't check every car, individually. 99 percent, the people that work there are the people that park there.

[14] There was no parking pass or sign or label required for users of the parking lot (Q 114 to 115). At the time of the accident, there was no gate at the entrance to the parking lot. Subsequent to the accident, a gate was installed and a driver had to show identification to be allowed entry (Q 116). At the time of the accident, there was no security guard at the entrance and exit to the parking lot (Q 117). At that time, anybody could go and park in the parking lot (Q 119).

[15] The parking lot was on eight acres of land. Four acres were close to the shipyard. The other four acres were close to a workshop or other activities (Q 123). At the time of the accident, there were no other businesses being operated at the Deltaport which used the parking lot close to the shipyard (Q 124).

[16] On the day of the accident, the plaintiff started work at 4:30 p.m. (Q 132). He worked for four hours until the lunch break at 8:30 p.m., and was then scheduled to work for four

hours from 9:00 p.m. until 1:00 a.m. The plaintiff initially intended to work eight hours, but decided to book off and to go home after four hours of work. (Q 132 to 134)

[17] The plaintiff would not be paid for the lunch break from 8:30 p.m. to 9:00 p.m. (Q 146). When the lashing work was completed, they were allowed to leave prior to 8:30 p.m. (Q 148 to 149). On the day of the accident, the lashing work was completed and the plaintiff left work with a co-worker at 8:10 p.m. (Q 154). He would have been paid until 8:30 p.m. (Q 158). The plaintiff informed his co-worker, his foreman, and the union business agent, that he was going home (Q 175 to 183). The business agent would arrange for another worker to replace the plaintiff (Q 185).

[18] The plaintiff advised that the evening shift was for eight hours. Some companies paid $51.00 per hour, and some paid $52.00 per hour (Q 240). If they went by car to Richmond, they were paid for nine hours (Q 242). The work in Richmond involved taking vehicles off a ship at Annacis Island (Q 244 to 245). The plaintiff did not recall where he worked the day prior to the accident (Q 246).

[19] The plaintiff had an identification card, which he used to scan himself into and out of the dockyard (Q 220 to 221). On the day of the accident, he had parked very close to the entrance to the dockyard (Q 263 to 264). He reversed out of his parking spot, and was driving west in the parking lot, when the accident occurred (Q 265 to 274).

[20] The defendant provided a copy of an independent adjuster report dated January 12, 2021 by Ryan Yasayko. He summarized the information he had obtained from Pia Wong in the Risk Management department at Global Terminals concerning the parking lot in which the accident occurred.[1] He advised:

- the VFPA owned the parking lot. The VFPA leased the parking lot to GCT;
- GCT maintained the parking lot, and managed the access restriction and surveillance, which were done in accordance to GCT's operational needs;
- in 2014, there were no restrictions on access to the parking lot. However, Deltaport's geographic location was such that it would be expected to be mainly used by the longshore union workforce (who were not employed directly by GCT but were employed through the collective agreement with the ILWU);

[1] Pursuant to section 298(1) of the Act and items #11.2 and #11.5.1 of WCAT *Manual of Rules of Practice and Procedure*, WCAT is not precluded from admitting hearsay evidence although hearsay evidence is generally given less weight than direct evidence. Direct evidence is generally considered more reliable than indirect (hearsay or circumstantial) evidence.

- there was nothing preventing members of the public from parking in the parking lot. However, there was no reason for the public to park there;
- no part of the parking lot was leased to others;
- the parking lot was typically used by longshore labour who were ILWU members;
- currently there is a security controlled/restricted access gate system maintained by the VFPA restricting access to the terminal.

[21] In a further report date March 9, 2021, Mr. Yasayko reiterated the information provided by GCT, in a document entitled "Interview with Global Terminals". He described an exchange of emails, although copies of the emails were not attached. He further noted:

> 6. What is the relationship between Global Terminals and the BCMEA regarding the parking lot?
> It seems Global Terminals allows members of the ILWU to park at the parking lot. First, we should explain the relationship between GCT and BCMEA. The BCMEA is an association of 67 maritime employers and other maritime companies, of which GCT is a member. The purpose of the BCMEA is to act as an employers association to enter into a collective bargaining agreement with the ILWU, on behalf [of] maritime employers in B.C., as well as to provide the training and dispatch of those ILWU union members. BCMEA does not itself operate any terminals. The Deltaport terminal (including the parking lot) is leased directly by GCT from the Vancouver Fraser Port Authority. GCT allows members of the ILWU to park at the parking lot. The BCMEA has no role in the leasing or operation or use of the parking lot. GCT does not have a business relationship with BCMEA outside of being a member of the BCMEA.
>
> 7. Does the BCMEA and Global Terminals have a lease agreement? (if not, what is the nature of their agreement?)
> No. The BCMEA hires members of the ILWU and dispatches them to work at GCT based on GCT's operational requirements.
>
> 8. Does BCMEA have any control over the parking lot, or is control left solely up to Global Terminals?
> BCMEA does not have control over the parking lot

[22] The defendant also provided evidence in an examination for discovery on April 24, 2018. She advised that the accident occurred in the GCT parking lot terminal (Q 8). The

terminal had a yard for storage containers, as well as electric cranes that were mounted on rails (Q 9). The accident occurred near pod five, near the dock face (Q 10), facing the east side of the terminal (Q 11). She was employed by GCT at the time of the accident (Q 12 to 13), as a tractor-trailer driver (Q 14). She was a casual worker (Q 15). At the time of the accident, she was leaving to go on her lunch break at 8:30 p.m. (Q 16). She was still getting paid at 8:15 p.m. (Q 16). A shift was from 4:30 p.m. until 1:00 a.m. (Q 17).

[23] As a casual worker, she did not have any fixed days to work (Q 18). She would go to a dispatch hall on a daily basis. Alternatively, she could get a callback, which meant she could go directly to Deltaport without going to the dispatch hall (Q 19).

[24] She was entitled to a half hour non-paid lunch break (Q 22). She had been working as a casual worker since 2003.

[25] The defendant reviewed a satellite image of the GCT terminal and parking lot (Q 28). She confirmed that Roberts Bank Way bifurcates into two parts before it entered the terminal (Q 30). One side went to the coal port on the west, and the other one went to Deltaport, where the administration building was located (Q 31 to 35). She noted (Q 37):

> This is the parking lot. You can park as close as you can to the ship where myself and Mr. Gill would be working.

[26] At the time of the accident, there was no requirement to provide any identification to use the parking lot (Q 42). A port pass was required to go through into the port, but not to access the parking lot (Q 49).

[27] The defendant's evidence was that she did not see the plaintiff's vehicle prior to the accident (Q 57, 167). She stated that she was blinded by the sun when she looked to the right (Q 57, 168). The first time she saw the plaintiff's car was after the impact had occurred (Q 175).

[28] At the time of the accident, she was going to the maintenance building to pick up her boyfriend to leave the premises for lunch. She intended to go to Ladner for lunch. Her lunch break was on her own time, and she was free to do as she liked as long as she was back before 9:00 p.m. (Q 156).

[29] The accident occurred at 8:15 p.m. (Q 161). She was being paid until 8:30 p.m., but was released to go wash up from working and to go to her car so that she could have a full 30-minute lunch break (Q 162). She was not injured in the accident (Q 217).

[30] By memorandum dated July 10, 2017, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that the BCMEA, account number 683, was registered with the Board at the time of the July 21, 2014 accident. In a further memorandum dated May 17, 2021, the research and evaluation analyst advised that GCT, account number 1436, was registered with the Board at the time of the July 21, 2014 accident.

[31] In a submission dated July 27, 2021, Gordon Rumohr, manager, Claims Services, BCMEA, provided the following explanation regarding the role of the BCMEA:

> The Plaintiff, Mr. Sudarshan Gill was registered in the industry as a longshoreman by the BCMEA on March 25, 1994, registration No. 39444. Mr. Gill[’] s work history for the month of July 2014 is also attached for reference.
>
> Both Ms. Hughes and Mr. Gill are members of the ILWU Local 502.
>
> The BCMEA is an association of maritime employers operating within British Columbia, including GCT at Deltaport. The BCMEA provides labour relations, payroll, training, recruitment, and safety services to the longshore industry. The BCMEA is GCT’s bargaining agent for the purposes of collective bargaining with the ILWU 502.
>
> **For both longshoreman the Employee Work History demonstrates the Employer on record for each shift recorded.** The dispatch process is quite complex. In essence, longshoreman are dispatched to BCMEA member companies based on the “orders” placed by the companies and the specific ratings held by the longshoreman, based on seniority. Dispatch is by 3 shifts per day:
>
> Shifts patterns and work allocation were somewhat explained in the examination for discoveries.

The Employee Work Histories for the date of the MVA, July 21, 2014 is recorded to show Delta Port (GCT Canada Limited partnership) as the Employer for both longshoremen as working an Afternoon shift (Shift 3) on July 21, 2014.

The BCMEA is on occasion classified as the accident employer for Longshoreman; however, this is not one of those occasions. When longshoreman are injured while in the course of training for a specific skill enhancement, or working as a trainer involved with upskilling of another worker then the BCMEA is considered the accident Employer. WorkSafeBC also registers Occupational Disease or exposure claims to the BCMEA.

If either of these longshoreman has been working the Afternoon shift on July 21, 2014 as a trainer or a trainee the Employee Work History would indicate the BCMEA as the Company Name, as it does on July 1, 2014 (statutory holiday pay) for both Mr. Gill and Ms. Hughes.

Summary:

We appreciate how on occasion longshore workers can interpret the BCMEA to be their Employer. As an Employers Association and on behalf of our member companies we:

- Recruit, test, register and train workers.
- Dispatch workers
- Discipline workers.
- In partnership with ADP, a third party payroll company the BCMEA distributes pay cheques to longshore workers.

Many workers list the BCMEA as the accident employer when registering a claim with WorkSafeBC, later corrected when it is identified through work history who is the actual accident employer. **Outside of the previously identified examples longshore workers are not employees of the BCMEA.**

[emphasis added]

[32] Mr. Rumohr attached copies of the employee work histories for the month of July 2014. These showed that on the afternoon shift (shift #3) of July 21, 2014, both the plaintiff and the defendant performed work for GCT. These records further showed that in July 2014, the plaintiff worked for GCT on 15 shifts, DP World (Canada) Inc. on 4 shifts, BCMEA on 1 shift, and Western Stevedoring Co. Ltd. on 1 shift. In July 2014, the defendant worked for GCT on 20 shifts, and for BCMEA on 1 shift.

Submissions

[33] There is no dispute regarding the status of the plaintiff and the defendant as workers at the time of the accident.

[34] The defendant submits that she and the plaintiff were workers at the time of the accident, as they were both employed at Deltaport Terminal as longshore workers.

[35] By submission of July 23, 2021 on behalf of GCT, Ms. Jansen submits that the plaintiff and defendant were workers employed by the BCMEA but the accident did not arise out of and in the course of their employment.

[36] Mr. Rumohr submits on behalf of the BCMEA that neither Mr. Gill nor Ms. Hughes were employed by the BCMEA on July 21, 2014.

[37] The plaintiff does not dispute that both he and the defendant were workers at the time of the accident, insofar as both parties were employed as longshore workers. The plaintiff submits that in this application, it is critical to apply the relevant policy items with regard to the context of the unique longshore worker employment structure, as involving a tri-part relationship among the workers, the BCMEA, and member employers such as GCT whereby the latter do not directly employ the workers, and the workers retain an unusual degree of independence vis-à-vis "member employers" with regard to timing and frequency of shifts as well as the length of shift once dispatched. The plaintiff submits that his injuries, and the defendant's action and conduct, did not arise out of and in the course of their employment.

Prior WCAT Decisions

[38] WCAT is not bound by legal precedent. However, the reasoning in prior decisions may provide useful guidance. The parties have cited several prior WCAT decisions involving longshore workers, as well as concerning injuries in employer-provided parking lots.

[39] The plaintiff cites *WCAT-2008-00816*, in which a WCAT panel addressed a worker's appeal concerning his claim for workers' compensation benefits for a finger injury. Under the heading "Background and Evidence", the WCAT panel noted:

> One of the problems on this file is the set up of the employer-employee relationship in the maritime industry. The worker is a member of the union and is assigned to an employer through a union hiring hall. The worker does not have to accept employment from the union hall. The accident employer in this case is the firm that the worker was employed with at the time of his injury. The worker, however, may work for several different legal employers, and accordingly, would not be considered to be a full-time employee of the accident employer in the legal sense. Additionally, from the Board's point of view the BC Maritime Employers Association (BCMEA) is considered to be the employer.

[40] The defendant cites *WCAT-2008-02404*, *Dhanoa v. Trenholme*, in which a WCAT panel found that an injury sustained by a plaintiff in the employer-provided parking lot arose out of and in the course of her employment. At the time of the September 14, 2006 accident, the plaintiff was standing in the parking lot waiting for her ride home, when she was struck by a vehicle driven by the defendant, a fellow employee. Both the plaintiff and the defendant were finished work for the day and had "punched out." The WCAT panel found that any injuries sustained by the plaintiff in the accident arose out of and in the course of her employment, and that the action or conduct of the defendant arose out of and in the course of his employment. The WCAT panel reasoned in part (in relation to the version of the policy which existed prior to July 1, 2010):

> 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.

[41] The defendant cites *WCAT Decision A1800286*, *Cummins v. Gorsky*, which involved a motor vehicle accident between two co-workers on January 9, 2017. The accident occurred in the parking lot of the sawmill at which they were both employed, as they were arriving for work and before they commenced any productive work. The WCAT panel concluded:

> [44] When I consider the fact that the injury was on the employer's premises, and occurred between two co-workers, and when I also consider the factors set out in policy C3-20.00, I am satisfied that there was more than a trivial or insignificant connection between the accident and the workers' employment. The evidence supports a finding that the accident arose out of and in the course of employment. …

[42] The defendant also cites *WCAT-2007-02634* (noteworthy[2]). That decision concerned an appeal by a worker, who was employed as a food service worker at a hospital. She was injured on March 9, 2006 in a slip and fall on icy ground after getting out of her car in a parking lot beside her place of employment. The worker's employer paid the costs for maintaining the parking lot, and the parking lot was used by its workers as well as visitors and workers of other employers. The worker's injury was accepted as having arisen out of and in the course of her employment, notwithstanding the fact that the parking lot was used by persons other than workers of the employer:

> …I consider it reasonable to infer that there is some correlation or logical connection between the extent of the employer's financial responsibility for maintenance of the parking lot, and the extent to which use of the parking

[2] As set out in item 19.3 of WCAT *Manual of Rules of Practice and Procedure*, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

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> lot was related to the employer's operations. In the absence of other more detailed evidence from the employer, I find that the fact that the employer bore total responsibility for the costs of maintenance is the best evidence before me regarding the actual use of the parking lot.
>
> On balance, I consider that the circumstances of the worker's injury more closely resemble those of a worker who suffered a fall in a company parking lot, rather than those of a store employee injured in a fall in a shopping mall parking lot used by multiple employers. Having regard to the five factors in item #19.20, as well as the other policies cited above, I find that the worker's injury arose out of and in the course of her employment. The worker's appeal is, therefore, allowed.

[43] *WCAT-2014-02894 / WCAT-2014-02895*, *Olver v. Appleton*, concerned an injury sustained by a plaintiff in a single vehicle accident on September 9, 2009, on the causeway leading to Deltaport Terminal. The defendant picked up the plaintiff and they were headed to Deltaport Terminal for the start of their shift, when the vehicle struck a concrete barrier that was part of a security barrier on the causeway. In that case, there was no dispute regarding the fact that Olver and Appleton were employed by TSI Terminal Systems Inc. as longshore workers.

[44] *WCAT-2014-02894 / WCAT-2014-02895* cited the policy at item #18.12 in the pre-July 1, 2010 version of the RSCM II, concerning "Special Hazards of the Access Route", and reasoned:

> [61] The road on which the accident occurred (the causeway) was built and maintained by the Province. However, the employer (TSI) built the security barrier, and contracted for the provision of security personnel to staff the security barrier during regular hours. TSI had responsibility for the design of the security barrier, and any associated risks with regard to lighting, the use of painted chevrons on the pavement, and the placement of the concrete barrier. While technically a public road, TSI was in a practical sense exercising control over that portion of the road.
>
> [62] I find that the circumstances of the plaintiff's accident are ones which come within the terms of the policy set out in the last paragraph of item #18.12. While on a public road, the accident may be characterized as being analogous to one having occurred

> "at the gates to the plant." Given that TSI exercised effective control over the security barrier, I consider that the accident involving the plaintiff was one which occurred in the immediate approaches to the place of work, though still on the highway. The hazard causing the injury was one associated with the employer's premises, given TSI's responsibilities in relation to the construction, maintenance, and operation of the security barrier. Just as a crew bus may be characterized as involving an extension of the employer's premises (even though it concerns travel away from the physical location of the employer's premises), so too may the security barrier be characterized as an extension of the employer's premises due to the employer's exercise of control at that location.
>
> [63] I would, in the alternative, also find that the security barrier amounted to a special hazard of the access route in any event. …

[45] *WCAT-2010-02508*, *Neale v. Moore et al.*, concerned an altercation between two longshore workers on July 26, 2008. The altercation occurred in a parking lot at the Lynnterm Terminal operations in North Vancouver, of Western Stevedoring Company Limited. In that case, the BCMEA took disciplinary action in suspending the defendant longshore worker for six months. In that case, no dispute was raised regarding the identity of the workers' employer as Western Stevedoring Company Limited. That decision found that the assault in the parking lot of Western Stevedoring Company Limited occurred on the employer's premises:

> [74] At the time of the assault, Neale was on the employer's premises during paid time, attempting to return to his work duties after a coffee break. He was assaulted by a fellow employee. In terms of the time and place of the altercation, I find that the incident occurred in the course of the plaintiff's employment. …

[46] The plaintiff cites *WCAT Decision A1902978*, *Marusak v. Thompson et al.*, which concerned an injury to a plaintiff in a motor vehicle accident on March 22, 2014. The accident occurred at the Port of Vancouver's east exit gate. The plaintiff and the defendant were longshore workers, who were each on their way home from work at the Port of Vancouver's Vanterm facility. The plaintiff had completed a shift performing electrician duties, and the defendant had completed a shift as a gantry operator.

[47] The WCAT panel summarized the hiring arrangements as follows (referring to the BCMEA as the Association):

> [13] The Port of Vancouver is home to several distinct employers operating at its various terminals, including the Vanterm facility. CGT Canada Limited Partnership operates the Vanterm facility.
>
> [14] The hiring structure for longshore workers is, as the interested party concedes, "quite complex." In simple terms, the Association screens and makes available longshore workers. Each employer member of the Association then identifies its labour requirements and the Association makes the necessary arrangements. The employer member of the Association then pays and provides direction at its worksite to the labour dispatched to it.
>
> [15] The Association does not consider itself an employer in the above arrangement where longshore workers are dispatched to one of the Association's member employers. The Association concedes that, where a longshore worker is undertaking training or other administrative tasks for the Association, a longshore worker may be a worker of the Association itself for that limited purpose; however, in most cases a longshore worker is employed by one of the Association's employer members. The Association filed documents indicating that CGT Canada Limited Partnership was the employer of both the plaintiff and defendant on the day of the Accident. Neither the plaintiff nor the defendant were training or carrying out tasks falling within employment for the Association itself.

[48] The WCAT panel found that CGT was the parties' employer at the time of the accident:

> [37] All the parties agree that the plaintiff was a worker but they disagree about whether he was a worker of the Association, the Port of Vancouver, or CGT Canada Limited Partnership. I find the latter to be the employer at the time of the accident. I prefer and find most persuasive the evidence of the Association. **While I understand that the plaintiff's tax slips mark the Association as his employer, I accept this is a matter of administrative convenience. Other than in training or administrative tasks, the Association is not the plaintiff's employer and there is no**

> **persuasive evidence to establish that the plaintiff was engaged in such exceptional tasks at the time of the accident. Rather, he was simply performing his usual duties in the usual manner for one of his usual employers from the Association.**
>
> [38] **It follows that the plaintiff was a worker of the terminal operator to which he was dispatched at the time.** In this case, that is CGT Canada Limited Partnership. I therefore conclude that the plaintiff was a worker of CGT Canada Limited Partnership at the time of his accident.
>
> [emphasis added]

[49] The plaintiff also cites *WCAT Decision A1800793*, *Prasad v. Woolfries*. That decision concerned a December 14, 2014 accident in a parking lot when the plaintiff was struck by the defendant's vehicle. The plaintiff, a truck driver, was employed by a trucking company, Deoman Trucking Ltd. (Deoman). On the day of the accident, he was working pursuant to a contract between Deoman and a company named A.C.E. Courier Services (ACE), to transport trailers (using Deoman's tractor trucks and drivers). The plaintiff was paid by Deoman a flat rate for each round trip, and drove trucks provided by Deoman. The accident occurred in a parking lot that adjoined ACE's business premises. The plaintiff had parked his personal vehicle and was crossing the yard in the direction of ACE's offices when he was struck by the defendant's vehicle. The WCAT panel did not accept the defendant's argument that the plaintiff had a relationship with ACE as a "pseudo employee", and that the plaintiff was in effect a worker of ACE. The WCAT panel found that the plaintiff's driving services were provided only through his contractual relationship with Deoman. The only reason he transported ACE trailers from ACE business locations was that Deoman had contracted with ACE. The WCAT panel reasoned:

> [36] In light of the evidence concerning the contract between Deoman and Ace, the nature of the plaintiff's work as a truck driver, the way in which the plaintiff was paid by Deoman, the fact that he drove trucks owned by Deoman for trips as assigned by Deoman, the plaintiff's regular five-day work week (albeit with somewhat variable hours), Deoman's scheduling and control of the plaintiff's job assignments, and the lack of any financial dealings between ACE and the plaintiff, I conclude that the plaintiff was an employee of Deoman, and that he was neither an employee or an independent

contractor of ACE. The driving services that were provided to ACE were in the plaintiff's capacity as an employee of Deoman.

[50] The WCAT panel further found that Deoman's lack of involvement in providing the parking used by the plaintiff at the facility did not support a connection between the accident and the plaintiff's employment. The fact that the plaintiff's employer did not provide the parking to the plaintiff either directly or indirectly (through its contract with ACE) weighed against workers' compensation coverage for the accident.

Status of the plaintiff, Sudarshan Singh Gill

[51] Section 1 of the Act defines "worker" as including a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise.

[52] There is no dispute concerning the fact that the plaintiff was a worker under the Act, as a longshore worker. I find that at the time of the July 21, 2014 accident, the plaintiff was a worker within the meaning of the compensation provisions of the Act. At issue is whether any injury suffered by the plaintiff arose out of and in the course of his employment within the scope of the compensation provisions of the Act.

[53] At the time of the accident on July 21, 2014, Chapter 3 of the RSCM II contained several policies relevant to this application. Item C3-14.00, "Arising Out of and In the Course of the Employment," is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of the employment. Policy at item C3-14.00 explains that the test of employment connection concerns whether the worker's personal injury arose out of and in the course of the employment. Employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment.

[54] Item C3-14.00 further explains that "arising out of the employment" generally refers to the cause of the injury or death. In considering causation, the focus is on whether the worker's employment was of causative significance (i.e., more than a trivial or insignificant aspect) in the occurrence of the injury. "In the course of the employment" generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment. Time and place are not strictly limited to the normal hours of work or the employer's premises.

[55] Policy at item C3-14.00 sets out a non-exhaustive list of nine non-medical factors to be considered in determining whether a worker's injury arose out of and in the course of the worker's employment. All of these factors may be considered in making a decision, but none may be used as an exclusive test. Other relevant factors not listed in the policy may also be considered. As well, other policies in Chapter 3 of the RSCM II may provide further guidance in particular situations.

[56] For the purpose of applying these non-medical factors, it is necessary to consider the role of the employer, in evaluating the extent to which a worker's injury is employment connected. In this case, such consideration is complicated by the fact that the employment of the longshore workers involved a tri-partite arrangement between the particular companies or terminal operators requiring workers, the BCMEA as the employer association representing a large number of such companies or terminal operators, and the union (which sent out the workers as requested by the BCMEA).

[57] The BCMEA carried out many of the functions normally performed by an employer, such as recruitment, training, dispatching, discipline, and distribution of payment of wages. However, responsibility for the workers' wages was borne by the member companies or terminal operators (the member employers). The member employers were also responsible for providing supervision and direction to the workers at their respective worksites.

[58] The plaintiff submits, in connection with the first factor which concerns whether the injury occurred on the premises of the employer, that this factor should be considered neutral at best given the complex nature of the employment structure whereby GCT does not directly employ the workers and the BCMEA has no ownership or controlling relationship in relation to the parking lot. GCT also submits that the parties were workers employed by the BCMEA.

[59] I have contemplated the hypothetical situation of a longshore worker dispatched to work at GCT, being injured while operating heavy equipment pursuant to GCT's instructions, on GCT's premises. In applying the factors at item C3-14.00, would it be reasonable to consider that the worker's injury did not occur on the employer's premises, that his work was not for the employer's benefit, that his work was not pursuant to his employer's instructions, and that he was not using equipment provided by the employer, due to the complex tri-partite nature of the employment arrangement? I consider that such an analysis would tend to negate the indicia of employment connection in a fashion inconsistent with the practical realities of the worker's employment situation. This would

have the effect of undermining one of the fundamental purposes of the Act, namely, the provision of workers' compensation coverage to workers injured in the course of their employment.

[60] For the purpose of applying the policies in Chapter 3 of the RSCM II concerning the scope of the employment in relation to longshore workers, I consider it reasonable to treat the member employer as the worker's employer (bearing in mind that the member employer had ultimate responsibility for payment of the worker's wages, had requested that workers be dispatched to it to perform the necessary work, and that the work was to be carried out on the member employer's premises, using the member employer's equipment, under the supervision and direction of the member employer). I agree with the conclusion in *WCAT Decision A1902978*, in finding that the plaintiff was a worker of the terminal operator to which he was dispatched at the time. This conclusion is also consistent with the findings in *WCAT-2010-02508*, and *WCAT-2014-02894 / WCAT-2014-02895*, although the treatment of the member employer as the accident employer does not appear to have been disputed in those cases. I find that these circumstances are distinguishable from those addressed in *WCAT Decision A1800793,* where the plaintiff was employed by Deoman and the driving services that were provided to ACE were in the plaintiff's capacity as an employee of Deoman.

[61] Accordingly, while recognizing the complexities of the tri-partite arrangement described by the plaintiff, I consider it appropriate to treat GCT as the accident employer for the purpose of applying the policies in Chapter 3 of the RSCM II. I consider that in evaluating the extent of the employment connection in relation to an injury to a longshore worker, it is appropriate to focus on the role of the particular company or terminal operator for which the worker was performing work around the time of the accident.

[62] I have thus considered the nine factors listed in item C3-14.00 as follows.

1. On Employer's Premises

[63] The plaintiff's accident on July 21, 2014 occurred in the parking lot at the Deltaport terminal. The Deltaport terminal (including the parking lot) was leased directly by GCT from the VFPA. I find that the plaintiff's injury occurred on the employer's premises. This factor supports workers' compensation coverage.

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2. For Employer's Benefit

[64] At the time of the accident, the plaintiff was leaving to go home. His actions in departing from the employer's premises were not for the employer's benefit. This factor does not support coverage.

3. Instructions From the Employer

[65] The plaintiff's actions in leaving work were not pursuant to any instructions from the employer. This factor does not support coverage.

4. Equipment Supplied by the Employer

[66] At the time of the accident, the plaintiff was not using equipment supplied by the employer. This factor does not support coverage.

5. Receipt of Payment or Other Consideration from the Employer

[67] The plaintiff was not in the process of obtaining payment or other consideration from the employer, such as in going to the employer's premises to pick up a paycheque. This factor is not applicable and does not support coverage.

6. During a Time Period for which the Worker was Being Paid or Receiving Other Consideration

[68] The plaintiff's evidence is that the accident occurred at 8:20 p.m., and that he was being paid until 8:30 p.m. Accordingly, the accident occurred during a time period in which he was being paid. This factor supports coverage.

7. Activity of the Employer, a Fellow Employee or the Worker

[69] The defendant was also performing work for GCT on the day of the accident. The July 21, 2014 accident involved an activity of a fellow employee. It involved an interaction between fellow employees on the employer's premises, in connection with their departure from the employer's parking lot. This factor supports coverage.

8. Part of Job

[70] The plaintiff's activities in leaving work to go home were not part of his job. This factor does not support coverage.

9. Supervision

[71] The plaintiff had informed his supervisor of his intention to leave work and not return for the second part of his scheduled shift. He was not being supervised while exiting the parking lot in his personal vehicle. This factor does not support coverage.

[72] In summary, three of the nine factors support coverage. The plaintiff was being paid at the time of the accident, the accident occurred on the employer's premises, and the accident involved the actions of a co-worker. The other six factors do not support employment connection.

[73] Other policies in Chapter 3 of the RSCM II provide additional guidance.

[74] Policy at item C3-20.00 concerns employer-provided facilities. The policy provides that an injury or death that occurs when a worker uses an employer-provided facility may be considered to arise out of and in the course of the employment. The policy provides specific guidance concerning injuries in parking lots:

> **B. Parking Lots**
>
> For the purpose of determining whether an injury or death occurring in a parking lot arises out of and in the course of the employment, the Board considers Item C3-14.00 and the following additional questions. No single criterion is determinative.
>
> **1. Was the parking lot provided by the employer?**
>
> If the employer provides a parking lot for the use of a worker, this weighs in favour of coverage. However, the unauthorized use of a parking lot by a worker would normally weigh against the acceptance of a claim. There may, 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.

2. Was the parking lot controlled by the employer?

If the parking lot is controlled by the employer, this weighs in favour of coverage. If control does not exist, there may be other factors that demonstrate an employment connection.

Control of a parking lot is not determined only by whether the parking lot is owned or leased by an employer. In assessing if an employer controls a parking lot used by a worker, the Board may also consider whether the employer was responsible for the operation, maintenance, or repair of the parking lot, or had the ability to control access to the parking lot.

In the absence of other factors demonstrating an employment connection, an injury or death that occurs on a shopping centre or shopping mall parking lot designed primarily for customer use and not controlled by the individual employer of a worker would not normally be considered to arise out of and in the course of the employment.

3. Was the injury or death caused by a hazard of the parking lot?

If the injury or death was caused by a hazard of the parking lot, this weighs in favour of coverage.

The term "hazard of the parking lot" is intended to limit acceptance to only injuries or death which have an employment connection. This serves to distinguish between injuries or death resulting from personal causes and those resulting from the employment. In effect, the type of injury or death that would qualify for acceptance if it occurred on a factory floor would also qualify for acceptance if it occurred in a parking lot. For example, a slip on a pool of oil or a trip over an obstruction would weigh in favour of coverage. On the other hand, workers who close their own car doors on their fingers would not have their claims allowed. There will also be injuries or death which are not a direct result of the parking lot which may be considered to arise out of and in the course of the employment, such as a worker struck by a fellow employee's car while walking on the parking lot.

4. Did the injury or death occur on a parking lot that was contiguous to the place of employment?

The word "contiguous" is defined as meaning both adjacent to and attached to.

If the injury or death occurs on a parking lot that is contiguous to the place of employment, this weighs in favour of coverage. If the injury or death occurs on a non-contiguous parking lot under the direction, supervision or control of an employer, this also weighs in favour of coverage. In the absence of other factors demonstrating an employment connection, injuries or death that occur while workers make their way across and along public thoroughfares between the place of employment and the non-contiguous parking lot are not normally considered to arise out of and in the course of the employment.

5. Did the injury or death occur proximal to the start or stop of a worker's shift?

In the absence of other factors demonstrating an employment connection, a significant time gap between the time of the worker's injury or death and the start or stop of the worker's shift, does not weigh in favour of coverage.

[75] I find that all five of these factors support workers' compensation coverage, in respect of the plaintiff's injury in the July 21, 2014 accident.

[76] Firstly, GCT provided the parking lot for the use of its workers. GCT leased the parking lot from its owner, the VFPA. GCT maintained the parking lot. The parking lot was on eight acres of land, and four acres were close to the shipyard. At the time of the accident, there were no other businesses being operated at the Deltaport which used the parking lot close to the shipyard. Deltaport's geographic location was such that it would be expected to be mainly used by the longshore workers working for GCT.

[77] Secondly, the parking lot was controlled by GCT, as evidenced by the facts that GCT had leased the land and maintained the parking lot. While GCT did not maintain control over access to the parking lot, this fact does not appear significant given the geographic isolation of the site and its close proximity to the terminal. As well, policy does not state

that control over access must be present before it can be found that the employer has control. As noted above, policy says this:

> In assessing if an employer controls a parking lot used by a worker, the Board **may** also consider whether the employer was responsible for the operation, maintenance, or repair of the parking lot, **or** had the ability to control access to the parking lot.
>
> [emphasis added]

[78] The policy does not say control only exists if an employer has all of those controls.

[79] Thirdly, the accident involved a hazard of the premises. The policy specifically notes that there will be injuries which are not a direct result of the parking lot which may be considered to arise out of and in the course of the employment, such as a worker struck by a fellow employee's car while walking on the parking lot. I consider that an accident between two co-workers' vehicles in the parking lot is analogous to this example.

[80] Fourthly, the parking lot was contiguous to the place of employment. The plaintiff's evidence was that he had parked very close to the entrance to the dockyard.

[81] Fifthly, the accident occurred proximal to the stop of the plaintiff's shift. He was in fact still within the scheduled time period for which he was being paid at the time the accident occurred, but had been released from his work duties.

[82] Having regard to the factors in the general policy at item C3-14.00, and the specific guidance provided by the policy at item C3-20.00 concerning injuries in parking lots, I find that the strong weight of the evidence supports a finding of employment connection. The plaintiff's accident occurred prior to his departure from the employer's premises, while he was still being paid, and involved the actions of a fellow employee. All five of the factors concerning workers' compensation coverage for injuries in a parking lot are met in this case. I find that the plaintiff remained in the course of his employment at the time of the accident.

[83] The plaintiff's injury was caused by accident. Section 134(3)(b) of the Act provides, in relation to an injury caused by accident, that if the accident occurred in the course of the worker's employment, unless the contrary is shown, it must be presumed that the injury arose out of that employment. I find that this presumption is not rebutted by the evidence in this case.

[84] In summary, I find that at the time of the July 21, 2014 accident, the plaintiff was a worker, and any injury suffered by the plaintiff arose out of and in the course of his employment within the scope of the compensation provisions of the Act.

Status of the defendant, Carol-Lynn Michelle Hughes

[85] The evidence concerning the defendant is set out above.

[86] There is no dispute concerning the defendant's status as a worker. I find that the defendant was a worker within the meaning of the compensation provisions of the Act.

[87] The defendant's circumstances at the time of the July 21, 2014 accident were largely the same as the plaintiff's. While there were some minor differences, these are not significant. At the time of the accident, the defendant was leaving for her lunch break, while the plaintiff was leaving to go home. In both cases, they had finished their productive work activities for their shift, and were in the course of leaving the employer's parking lot at the time of the accident. They were both being paid at the time of the accident.

[88] With respect to the nine non-medical factors in policy at item C3-14.00, the analysis set out above concerning the plaintiff similarly applies to the defendant. Inasmuch as the workers' compensation system is largely a "no-fault" system, the question as to who was at fault for the accident does not affect the analysis regarding whether the July 21, 2014 accident involved an activity of a fellow employee. The accident involved an interaction between fellow employees on the employer's premises, in connection with their departure from the employer's parking lot.

[89] I find that the analysis set out above regarding the application of the policy at item C3-20.00 concerning injuries in parking lots similarly applies to the defendant. The defendant's evidence was that the accident occurred when she was blinded by sunlight, and did not see the plaintiff's vehicle. I consider that the risk of a motor vehicle accident due to the movement of the co-workers' vehicles while exiting the employer's parking lot involved a hazard of the premises.

[90] The July 21, 2014 accident occurred prior to the defendant's departure from the employer's premises, while the defendant was still being paid, and involved a fellow employee. All five of the factors concerning workers' compensation coverage for injuries in a parking lot are met in this case. Having regard to the factors in the general policy at item C3-14.00, and the specific guidance provided by the policy at item C3-20.00

concerning injuries in parking lots, I find that the strong weight of the evidence supports a finding of employment connection in respect of the defendant's circumstances at the time of the July 21, 2014 accident. I find, therefore, that any action or conduct of the defendant, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of the compensation provisions of the Act.

Conclusion

[91] I find that at the time of the July 21, 2014 accident:

(a) the plaintiff, Sudarshan Singh Gill, was a worker within the meaning of the compensation provisions of the Act;

(b) any injury suffered by the plaintiff, Sudarshan Singh Gill, arose out of and in the course of his employment within the scope of the compensation provisions of the Act;

(c) the defendant, Carol-Lynn Michelle Hughes, was a worker within the meaning of the compensation provisions of the Act; and,

(d) any action or conduct of the defendant, Carol-Lynn Michelle Hughes, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of the compensation provisions of the Act.

Herb Morton
Vice Chair

NO. NEW-S-M-170433
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 2019, CHAPTER 1, AS AMENDED

BETWEEN:

SUDARSHAN SINGH GILL

PLAINTIFF

AND:

CAROL-LYNN MICHELLE HUGHES

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant, CAROL-LYNN MICHELLE HUGHES, in this action for a determination pursuant to section 311 of the *Workers Compensation Act*;

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

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

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

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, July 21, 2014:

1. The Plaintiff, SUDARSHAN SINGH GILL, was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.

2. Any injury suffered by the Plaintiff, SUDARSHAN SINGH GILL, arose out and in the course of his employment within the scope of the compensation provisions of the *Workers Compensation Act*.

3. The Defendant, CAROL-LYNN MICHELLE HUGHES, was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, CAROL-LYNN MICHELLE HUGHES, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of the compensation provisions of the *Workers Compensation Act*.

CERTIFIED this 15th day of October, 2021

Herb Morton
VICE CHAIR

NO. NEW-S-M-170433
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 2019, CHAPTER 1, AS AMENDED

BETWEEN:

SUDARSHAN SINGH GILL

PLAINTIFF

AND:

CAROL-LYNN MICHELLE HUGHES

DEFENDANT

SECTION 311 CERTIFICATE

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