Ontario

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

# DECISION NO. 2501/09

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| **BEFORE:** | B. Kalvin : Vice-Chair |
| **HEARING:** | April 14 and 15, 2010 at Toronto<br>Oral |
| **DATE OF DECISION:** | April 21, 2010 |
| **NEUTRAL CITATION:** | 2010 ONWSIAT 972 |

**APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE**

**APPEARANCES:**

| | |
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| **For the applicant:** | Ms D. Eichler, Lawyer |
| **For the respondent:** | Mr. H.A. Fancy, Lawyer |
| **Interpreter:** | **N/A** |

## REASONS

### (i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997*, (the "WSIA") by the defendants in an action filed in the Ontario Superior Court of Justice between Courtney Nevins, plaintiff, and Angelo Fiorini, ("Fiorini"), Municipal Maintenance Inc. ("Municipal"), and Carnival National Leasing Ltd. ("Carnival"), defendants. The plaintiff, Courtney Nevins, who is the respondent to this application, commenced an action on July 10, 2006, seeking damages for personal injury sustained when she was struck by a vehicle driven by Fiorini.

[2] The applicants seek a declaration from this Tribunal that the action commenced by the respondent is one which is barred by the WSIA. The applicants claim that Fiorini and the respondent were workers in the course of their employment at the time of the incident, and therefore, the respondent's right of action against is taken away by the WSIA. The respondent Carnival seeks an alternative declaration, namely, that if the respondent's right of action against it is not taken away, that the damages which it is liable to pay in the civil action are limited by the WSIA.

### (ii) Background

[3] The background to this application is as follows. In 2004, the respondent began working as a general labourer for Municipal which was in the business of landscaping and snow removal. Municipal was a Schedule 1 employer for the purposes of the compensation scheme established by the WSIA.

[4] Municipal conducted its business from a leased lot at 845 Nashville Road. Municipal's business office was in a trailer located on the lot. Each morning, Municipal's workers would meet at the lot. The workers were assigned to one of several crews, each of which was supervised by a crew chief. The crew chief and his or her workers would leave the lot in a truck at approximately 7:00 am and head for the location at which the landscaping or snow removal work was to be done. The workers would arrive at Municipal's lot some time prior to the 7:00 am departure of the trucks. The trucks used were leased by Municipal from Carnival. Carnival is a Schedule 1 employer.

[5] Prior to October 14, 2005, the respondent was a worker who was assigned to a crew which was led by Fiorini. Over a period of time, tensions developed between the respondent and Fiorini. Following work on October 13, 2005, the respondent requested that she be assigned to a different crew. Her request was accommodated by her employer, and she was assigned to a different crew as of October 14, 2005.

[6] On October 14, 2005, the respondent arrived at Municipal's lot at between 6:30 and 6:45 am. Shortly thereafter, the respondent was walking across the lot when she was struck by a truck driven by Fiorini. The respondent sustained personal injuries. She was taken to the hospital. As a result of this incident, Fiorini was charged with two criminal offences, namely, assault with a

weapon and assault causing bodily harm. Fiorini was convicted of assault causing bodily harm after pleading guilty to that charge. The charge of assault with a weapon was withdrawn.

[7] The respondent sued Fiorini, Municipal and Carnival for damages for personal injury as a result of the incident in which she was struck by the vehicle driven by Fiorini. The defendants, who are the applicants in this proceeding, claim that at the time of the incident, both the respondent and Fiorini were workers in the course of employment. Accordingly, they claim that the respondent's right of action against them is taken away by the WSIA. They seek a declaration from this Tribunal to that effect.

### (iii) Issues

[8] As noted, the applicants responded to the respondent's civil action by bringing this application under section 31 of the WSIA. That provision reads as follows:

> **31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.
>
> **(2)** The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

[9] Under the WSIA, a worker who sustains a personal injury by accident arising out of and in the course of employment is entitled to benefits under the insurance plan established by the WSIA. However, that worker is prohibited by the WSIA from suing certain persons with respect to the injuries arising from the accident. First, subsection 26(2) prohibits the worker from suing his or her own employer. It reads as follows:

> **(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

[10] Second, subsection 28(1) prohibits the worker from suing, among other persons, another Schedule 1 employer and another worker. It reads as follows:

> **28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.

[11] Subsection 28(3) sets out an exception to subsection 28(1). The general prohibition against suing another worker only applies if the workers were acting in the course of their employment:

> **(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

[12] As noted above, there is no dispute in this case that on October 14, 2005, both Municipal and Carnival were Schedule 1 employers. The parties agree also that at all relevant times both the respondent and Fiorini were "workers" for the purposes of the WSIA. Accordingly, the question on which this application turns is whether the respondent and Fiorini were workers who "were in the course of employment" when the respondent was struck by the truck driven by Fiorini. If the respondent was not in the course of employment, then she is not a person entitled to benefits under the WSIA and there is nothing in that statue which prevents her from suing the applicants. If the respondent was in the course of employment, then her right of action against Fiorini is only extinguished if Fiorini was in the course of his employment when the respondent was injured. Simply stated, this application turns on the answer to the following questions:

1. When the respondent was struck by the truck driven by Fiorini on October 14, 2005 was she in the course of employment?
2. When the respondent was struck by the truck driven by Fiorini on October 14, 2005, was Fiorini in the course of employment?

### (iv) Analysis

### Was the respondent in the course of employment?

[13] Having considered the evidence and submissions, I find that the respondent was in the course of employment when she was struck by the truck driven by Fiorini on October 14, 2005. My reasons for this conclusion are as follows.

[14] The Workplace Safety and Insurance Board (the "Board") has several policies which are instructive with respect to the issue of whether a worker's accident occurred "in the course of employment." While not binding on the Tribunal for the purposes of a right to sue application, the policy is nevertheless instructive. The policy entitled *Accident in the Course of Employment* is set out in *Operational Policy Manual* Document #15-02-02. It provides that:

> If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment.

[15] The definition of "premises" is set out in the policy entitled *On/Off Employer's Premises* contained in *Operational Policy Manual* Document #15-03-03, and includes parking lots. It states:

> **Policy**
>
> A worker is considered to be in the course of employment on entering the employer's premises, as defined, at the proper time, using the accepted means for entering and

> leaving to perform activities for the purpose of the employer's business. The "In the course of employment" status ends on leaving the employer's premises, unless the worker leaves the premises for the purpose of the employment.
>
> The employer's premises are defined as the building, plant, or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways, and roads controlled by the employer for the use of the workers when entering or leaving the work site.
>
> An accident shall be considered to arise out of the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident
>
> - the accident is occasioned by the injured worker using, for personal reasons, any instrument of added peril such as an automobile, motorcycle, or bicycle, except when the accident was caused by the condition of the road or happening under the control of the employer, or
> - the worker is performing an act not incidental to his work or employment obligations.

[16] In this case, at the time of her injury, the respondent was on her employer's premises. She entered the employer's premises between 6:30 and 6:45 am for a shift which began at 7:00 am or shortly thereafter. When she was struck by the truck she was walking across the employer's lot. There is no evidence that rebuts the general presumption that a worker injured on the employer's premises is in the course of employment. The worker was not using an instrument of added peril, or performing an act "not incidental to [her] work or employment."

[17] At the hearing of this application, counsel for the respondent submitted that the worker was not in the course of employment because she was paid on an hourly basis which was calculated from the time that the trucks left the employer's lot. Thus, the respondent's shift had not formally begun when she was injured. Counsel submitted further, that the respondent was not in the course of employment because the actual work that she did was not carried out in the lot where she was injured. The respondent did her work at various remote locations to which she was transported each day in the truck driven by her crew chief.

[18] The fact that the respondent was not was not paid for the time she spent on the employer's lot immediately prior to the start of her shift is not persuasive evidence that she was not in the course of employment. At the hearing of this application, the respondent testified that while on the employer's lot, she was required to wear her safety vest at all times. She testified further, that while on the employer's lot, prior to the formal start of her shift, she was required to do as asked by her foreman. Thus, once she entered the employer's premises she was under the control of the employer and did certain things, such as wearing a safety vest, because she was required to do so by her employer. Further, although the respondent testified at the hearing of this appeal that she did not fill fuel cans prior to getting onto the truck to leave the employer's lot, her testimony on this score was at odds with testimony which she gave at an Examination For Discovery on August 10, 2007, where she described her routine after arriving at the employer's premises as follows:

> Q. What time would you normally arrive?
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> A. I'd say 6:45 a.m.
>
> Q. And what would – would you first do when you got there?

A. I'd put on my work boots.

Q. Is there a location for you to store them there or you just bring them with you?

A. I just bring them in my car.

Q. Okay. And then what?

A. And then I get in my work bag, put on my safety vest and head to our truck. Make sure all our equipment was in the truck. And make sure like the jerry cans were filled with fuel.

[19] I prefer the evidence which the respondent gave at about the nature of her morning routine once she arrived at the employer's premises to the more qualified answer which she gave at the hearing of this application. In my view, the evidence establishes that after she arrived at the employer's lot, she performed a variety of tasks which were required by her employer. She put on her safety vest, she checked to make sure the appropriate equipment was on the truck, she made sure the fuel cans were full, and she felt bound to do other tasks which a supervisor might have asked her to do. These facts are persuasive evidence that the respondent was in the course of employment once she entered her employer's premises at 6:00 or 6:45 a.m.

[20] In my opinion, the fact that the respondent was not paid prior to the time that her truck left the lot does not mean that she was not in the course of employment immediately prior to that time. There are many Tribunal decisions in which a worker who was injured immediately prior to the start, or after the end of a shift, was determined to be in the course of employment. The governing principle is whether at the time of the injury the worker was engaged in an activity which was reasonably incidental to his or her employment. Thus, in *Decision No. 2677/07* a worker who was struck by a car while walking to her own vehicle in the employer's parking after her shift had ended was found to be in the course of employment. Similarly, in *Decision No. 764/89*, two workers were involved in a motor vehicle accident in their employer's parking lot. One worker had just finished a shift and the other was arriving to begin a shift. Both workers were determined to be in the course of their employment. The Panel noted that the predominant nature of their activity was related to their employment. In *Decision No. 339/91* a worker who was injured in a washroom on her employer's premises prior to the start of her shift was found to be in the course of employment because she was engaged in an activity that was reasonably incidental to her employment. There are many other cases to similar effect.

[21] For similar reasons, the fact that the actual landscaping work which the respondent did was carried on at other sites, and had not commenced when the respondent was injured, has little bearing on the question of whether the respondent was in the course of employment. She was on the employer's premises, she was wearing safety equipment at the direction of her employer, she was expected to perform a variety of preparatory tasks, and she was walking across a lot, in anticipation of boarding a truck to set out for a remote worksite. All of these tasks were either part of her job duties or were reasonably incidental to them.

[22] I note further, that the Board determined that at the time she was injured, the respondent was a worker in the course of her employment and therefore was entitled to benefits under the WSIA. In a memorandum dated October 25, 2005, a Board Claims Adjudicator wrote:

The injury arose out of and while in the course of the worker's employment.

As a result of the Claims Adjudicator's determination, workers' compensation benefits were paid to the worker. I agree with the Claims Adjudicator's determination.

[23] In my view, this is a case which does not come close to the line. When the facts of this case are measured against the established tests and jurisprudential principles, I find on an overwhelming preponderance of the evidence that the respondent was in the course of her employment when she was injured on October 14, 2005.

**Was Fiorini in the course of employment?**

[24] For the reasons which follow, I find that Fiorini was not in the course of his employment when he drove the truck which hit the respondent on October 14, 2005.

[25] As a result of this incident, Fiorini was convicted of assault causing bodily harm. Based on this conviction, I find that Fiorini intentionally drove the truck into the respondent. In this regard, I note that intention is element of the offence of assault. Paragraph 265(1)(a) of the *Criminal Code* states:

> 265.(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person directly or indirectly.

[26] Tribunal has ruled, on several occasions, that it is required to give full effect to a criminal conviction and that it is not open to an administrative tribunal to re-litigate the conviction. In *Decision No. 296/09* the Panel stated:

> First, it is not open to this Tribunal, in our view, to go behind the fact of the worker's conviction of fraud and to review the accuracy of that determination. In *Ontario* v. *O.P.S.E.U.*[1] the Supreme Court of Canada considered the case of two workers who were convicted of sexually assaulting people under their care and were subsequently fired. The workers grieved their firings. The Supreme Court held that it was not open to the grievance arbitrator to consider rebuttal evidence with respect to the criminal convictions. Writing for the majority of the Court, Arbour J. stated:
>
> > The facts and issues in this combined appeal are substantially similar to the facts and issues in C.U.P.E. For the reasons given in that case, I am of the view that the doctrine of abuse of process bars the relitigation of the grievors' guilt for the offences of which they were convicted.

[27] Similarly, in *Decision No. 1688/03*, the Panel ruled as follows:

> Recent Supreme Court of Canada decisions have confirmed that administrative tribunals are required to give full effect to a criminal conviction and that the criminal conviction may not be re-litigated in the administrative law proceeding (See Canadian Union of Public Employees v. City of Toronto (2003 CLLC 220-073) and Ontario v. OPSEU (2003 CLLC 220-0272)).

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[1] [2003] 3 S.C.R. 149

[28] At the hearing of this appeal, counsel for Fiorini submitted that while the *res judicata* and abuse of process doctrines bar re-litigation of a legal determination, there are exceptions to those doctrines which apply in this case. Counsel invoked these exceptions and invited me to give effect to Fiorini's testimony at the hearing of this application that he did not intend to drive his truck into the respondent. Counsel referred to *Toronto (City)* v. *Canadian Union of Public Employees (C.U.P.E), Local 79*[2] which states the following:

> It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.
>
> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
>
> The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

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[2] [2003] 3 S.C.R. 77 at paragraphs 50 to 55

> These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.
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> In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

[29] In my opinion, there is nothing in the circumstances of this case which warrant application of the exceptions to the rule against re-litigation. There is nothing to suggest that the criminal conviction was tainted in any way. Fiorini pled guilty to a criminal offence. He was represented by legal counsel. I find further that a criminal charge will rarely be considered a matter which "to minor to generate a full and robust response" thereby liberating a resulting conviction from the rule against re-litigation. Similarly, a criminal charge will rarely, if ever, be capable of coming within the exception to the rule against re-litigation on the ground that it was a legal proceeding in which there was an "inadequate incentive to defend." I am fortified in the view that a criminal conviction will rarely, if ever, fall within the exception to the rule against re-litigation by the passage in the C.U.P.E. case in which Arbour J. stated:

> These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not.

[30] In my opinion, counsel's submission that I give heed to Fiorini's testimony that he did not intend to drive his vehicle into the respondent runs contrary to the principles enunciated in the C.U.P.E. case and necessarily involves casting doubt over the criminal conviction. I acknowledge that the picture is muddied somewhat by comments made by crown counsel who read in the facts on which the criminal conviction was based. In particular, crown counsel stated:

> Her ankle was broken, it would appear that he was playing chicken with her so to speak probably did not intend to strike her but unfortunately the car did strike her.

[31] Although, as noted, crown counsel's comments muddy the picture somewhat with regard to Fiorini's intentions, I find the fact that the criminal conviction for assault causing bodily harm means that Fiorini intended to assault the respondent when he drove a truck into her on October 14, 2005. As noted earlier, intention to commit the act is an element of the offence assault. Fiorini was convicted of that offence after having pled guilty to it. He was represented by legal counsel. There is no evidence that he has appealed his conviction. I find that the fact that Fiorini was convicted of assault causing bodily harm means that he intended to assault the respondent when he drove a truck into her on October 14, 2005.

[32] I find that when he intentionally drove his truck into the respondent, Fiorini was not in the course of employment. In recent years this Tribunal has consistently ruled that a worker who commits a criminal offence is not acting in the course of employment. The germination of this principle is generally regarded to be the dissenting reasons in *Decision No. 804/89* which stated:

> In my opinion, there comes a point where the nature of the offending or harmful act is such that it, of itself, breaks the employment nexus because such an act is so remote from the normal workplace activity that it cannot be said to come within the course of employment...
>
> I would hold that the point at which a harmful act loses its work-relatedness is a question of fact for individual panels to determine. It is simply not feasible to develop a universal test for all types of activity. However it is possible to determine, on a case by case basis, whether an activity is so obviously outside the employment sphere that it cannot be said to come within the course of employment. In considering the employment context, the initial focus should be on the offending or harmful activity itself to determine whether the activity, by its very nature, breaks the employment connection and thus does not come within the course of employment...

[33] This passage has been quoted many times in support of the proposition that a worker who commits a criminal offence is not acting in the course of employment. For instance, in *Decision No. 977/03*, the Vice-Chair held that "the assault in a storage area is a harmful act that lost its work-relatedness." In *Decision No. 452/09* the Vice-Chair noted that several Tribunal decisions have held that the WSIA does not shield persons who commit physical or sexual assaults on other workers who are in the course of their employment. In *Decision No. 1688/03*, a worker assaulted a co-worker as a result of a disagreement about a work-related matter. The Panel ruled that the assault broke employment nexus and took the perpetrator out of the course of his employment.

[34] *Decision No. 286/96* dealt with a worker who had sexually assaulted a co-worker. The Panel stated:

> Now it is true that the case before us deals with sexual not physical assault but, for the purposes of determining whether the scope of the activities removes a worker from the course of his employment, the principles in this Panel's mind, are the same. Since we had found that sexual assault, like a physical assault, is to be characterized as a "wilful and intentional act", it logically flows from this that, in deciding whether a physical assailant or a sexual assailant was in the course of his employment, consideration will be given to the same indicia of whether the actions were reasonably incidental to the nature of his employment.
>
> ...
>
> In our opinion, the *Workers' Compensation Act* is not intended to shield persons who commit physical or sexual assaults on other workers who are, themselves, in the course of their employment. Where the facts in a case clearly establish that there was an aggressor and a victim, it is, in our view, nonsensical to speak of the action being reasonably incidental to employment. Tribunal decisions have established that broad latitude is given to bringing commonplace, everyday activities in the workplace that result in injuries within the scope of reasonably incidental to employment. In *Decision No. 339/91*, the Panel provided an overview of the case law and concluded as follows:
>
> We agree with the *Decision No. 470/88* Panel's conclusion that the basic test for compensability should be one of work-relatedness within the meaning of the Act.

> This case requires the Panel to balance two general compensation principles in considering the worker's entitlement. First, the intent of workers' compensation legislation is to protect workers against the risks to which they are exposed as a result of their employment. Equally significant is that the legislation is a no-fault insurance scheme, in which a worker's role in causing accidental injury is not relevant except where the injury is attributable solely to the serious and wilful misconduct of the worker.
>
> Here, the worker was on the employer's premises in good time for the beginning of her shift, and she was preparing herself so that there would be no unnecessary interruptions in her work. Thus, her activities were no different than if she had interrupted her work in order to use the washroom. In the Panel's view, the normal use of washroom facilities in preparation for or during a shift is an activity which is reasonably incidental to employment, or in the terms used on the WCB guidelines, reasonably expected during the course of employment.
>
> To bring someone's actions in assaulting another person within the scope of "reasonably incidental to employment" one would, in our view, be reduced to suggesting that an assault is on par with using the washroom at the beginning of the shift. The protective umbrella of compensation may well have been intended to cover workers from the unexpected results of apparently benign activities; it was not, in our view, designed to provide cover for essentially criminal acts. It is fair, this Panel finds, to suggest that workers are not in the course of their employment when they are committing malign acts with predictable results - harm to another person.

[35] I agree with the approach adopted in these cases. In my view, when Fiorini drove his truck into the respondent, he was engaged in a harmful activity which by its very nature broke the employment connection and was therefore not an act which he committed in the course of his employment.

[36] I wish to point out that had counsel for Fiorini convinced me that it was open to me to take account of Fiorini's testimony that he did not intentionally drive his vehicle into the respondent, and had I accepted Fiorini's testimony on that point, I would still have found that he was not in the course of employment when his vehicle struck the respondent. Even if Fiorini did not intend to strike and injure the respondent, he was still engaged in a reckless form of horseplay. Had I found that Fiorini did not intend to strike the respondent with his vehicle, I would have found that he intended to drive the vehicle towards her and close to her so as to scare her. In my view, his conduct in this regard would have constituted a dangerous form of horseplay which broke the employment nexus and took him out of the course of his employment. The Board's policy entitled *Fighting, Horseplay and Larking*, set out in *Operational Policy Manual* Document # 15-03-11, is instructive:

> **Horseplay and larking**
>
> Similarly, the Act does not provide coverage for workers injured while participating in horseplay and larking.
>
> An injured worker who is an innocent victim has entitlement if the worker
>
> - does not participate in the horseplay or larking, and
> - does not retaliate.
>
> As with fighting, those who initiate the horseplay take themselves out of the course of their employment. As such, any innocent injured worker has a right of third party action.

[37] In *Decision No. 1438/04*, a worker was injured as a result of a prank played by several co-workers. The co-workers removed one of the wheels of the worker's chair. The Vice-Chair found that the prank was a form of horseplay which greatly increased the likelihood of injury and which took the co-workers out of the course of their employment. Similarly, had I found that Fiorini did not intend to drive his vehicle into the respondent and injure her, he was nevertheless engaged in horseplay which greatly increased the likelihood of injury to the respondent. In so doing, the employment nexus was broken and Fiorini was not in the course of employment.

[38] For all the reasons set out above, I find that when the truck he was driving hit the respondent on October 14, 2005, Fiorini was not in the course of his employment.

[39] Having concluded that when the respondent was injured on October 14, 2005, she was in the course of employment and that Fiorini was not, I turn to the implications of these findings for the three applicants.

**Fiorini**

[40] Section 28 of the WSIA shields a worker who was in the course of employment from a civil action brought by a co-worker. Since Fiorini was not in the course of his employment when the incident giving rise to the respondent's civil action occurred, the respondent's civil action against him is not barred by the WSIA.

**Municipal**

[41] Since the respondent was a worker in the course of employment when she was injured on October 14, 2005, she is entitled to benefits under the WSIA for her injuries. Accordingly, subsection 26(2) bars her from suing her own employer, that is, Municipal. While section 28 permits a worker injured in the course of employment to sue another worker who was not in the course of employment, as well as that worker's employer, section 28 does not apply to the worker's own employer. Subsection 26(2) is an absolute bar to an action by a worker injured in the course of employment against his or her own employer. This interplay between subsection 26(2) and section 28, and in particular the fact that section 28 does not apply to a worker's own employer is explained in *Decision No. 977/03* as follows:

> It is clear under the pre-1997 Act that Mr. Taylor's action against his employer would have been barred against his employer and an executive officer. *Decision Nos. 763/92* and *66/97I* confirm that when dealing with an application to bar a worker's action against his own employer, the relevant section is section 16. Subsection 10(1) sets out a worker's right to an election when suing someone other than an employer and subsection 10(9) outlines when that option is available: if the other worker was also in the course of his/her employment, the worker has no option to sue; if the other worker was not in the course of his/her employment, the worker may sue or claim benefits. In the case of section 16, on the other hand, an action against the worker's own employer is barred with a finding that the worker/plaintiff alone was in the course of his employment.
>
> ...
>
> In my view, the effect of subsection 26(2) of the WSIA is the same as that of section 16 of the pre-1997 Act. The language is essentially the same except to the extent that the entire WSIA was rewritten and reorganized and that subsection 26(2) now specifically lists the members of the worker's family who are likewise not entitled to sue. If the

> legislators had intended to limit the application of subsection 26(2), then they would have done so by clearly indicating that subsection 28(3) applied to subsection 26(2) as well as subsection 28(1). Rather, subsection 28(3) clearly only restricts subsection 28(1). To interpret subsection 28(1) as applying to any Schedule 1 employer including a worker's own employer is to essentially render subsection 26(2) meaningless. In my view, a plain language interpretation of subsection 26(2) is that it provides for benefit entitlement under the insurance plan in lieu of all rights of action. It maintains the historical trade off between employers and employees by providing broad protection to the employer of the worker who is injured and qualified protection to other Schedule 1 employers.

[42] *Decision No. 977/03* was followed in *Decision No. 1438/04* where the Vice-Chair stated:

> The Vice-Chair accepts the rationale of the Vice-Chair in *Decision No.977/03* and adopts it as his own. There would be an incorrect result if a worker was allowed to proceed with a civil action against his employer in the light of the general provisions against civil action in section 26 and the fundamental principles of workers' compensation legislation (the historic trade-off).

[43] I agree with these decisions that subsection 26(2) is an absolute bar to an action by a worker injured in the course of employment against his or her own employer. Accordingly, the respondent's right of action against Municipal is extinguished by the WSIA.

**Carnival**

[44] Subsection 28(4) of the WSIA excludes from the protections from civil suit set out in section 28, an employer who supplies motor vehicles, machinery or equipment without also supplying workers to operate those items. Section 28 states:

> **28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> **(2)** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
>
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.
>
> **(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.
>
> **(4)** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

[45] There is no dispute in this case that Carnival supplied trucks to Municipal without also supplying workers to operate those trucks. At the hearing of this application, counsel for Carnival did not concede that the subsection 28(4) operates so as to preserve the respondent's

right of action against Carnival, however, she did not submit that subsection 28(4) is inapplicable. Accordingly, I find that subsection 28(4) applies so as to exclude Carnival from the right to sue protections provided for in section 28. Therefore the respondent's right of action against Carnival is not extinguished by the WSIA.

[46] As noted earlier, as an alternative to a determination that the respondent's right of action against it is extinguished, Carnival seeks a declaration under paragraph 31(1)(b) that damages it is liable to pay in the respondent's civil action are limited by subsection 29(4). For ease of reference, subsection 31(1) is set out again below:

> **31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[47] Section 29 reads as follows:

> **29(1)** This section applies in the following circumstances:
>
> 1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
>
> 2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
>
> **(2)** The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.
>
> **(3)** The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.
>
> **(4)** No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[48] In my view, Carnival is entitled to the determination it seeks under paragraph 31(1)(b) with respect to any negligence which may be apportioned in the civil action to Municipal but not with respect to Fiorini. It is clear that the purpose of section 29 is to allow a defendant in a civil action to be relieved from paying that portion of the damages that may be attributed to the negligence of another defendant who is protected by the right to sue provisions of the WSIA. In other words, in an action against multiple defendants, where the right of action against one of the defendants is extinguished by the WSIA, the other defendants do become liable to pay the portion of damages attributable to the negligence of the protected defendant. In this case, the

only defendant in the civil action who is protected by the prohibitions against civil suit set out in the WSIA is Municipal. Accordingly, Carnival is entitled to a determination that it is not liable to pay damages which were caused by the fault or negligence of Municipal.

**DISPOSITION**

[49] The application is allowed in part.

1. The respondent's right of action against Municipal is taken away by the WSIA.
2. The respondent's right of action against Fiorini is not taken away by the WSIA.
3. The respondent's right of action against Carnival is not taken away by the WSIA.
4. Carnival is not liable to pay any damages, contribution or indemnity resulting from any fault or negligence which is apportioned to Municipal.

DATED: April 21, 2010

SIGNED: B. Kalvin