Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 147/11

BEFORE: M. Crystal: Vice-Chair

HEARING: January 18, 2011 at Windsor
Oral hearing

DATE OF DECISION: April 28, 2011

NEUTRAL CITATION: 2011 ONWSIAT 981

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant: Mr. Alexander Paul, Lawyer

For the respondents: Ms. Dina Mejalli, Lawyer

For additional party: Mr. Stephen Jovanovic, Lawyer

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* ("the Act") by the Defendant, Aviva Canada Inc., in an action filed in the Ontario Superior Court of Justice as Court as No. 07- CV-10118CM ("the action"). The respondents to the application are the plaintiffs in the action, Margo Davies and her daughter, Amanda Trepanier, who makes her claim pursuant to the *Family Law Act*.

[2] Mr. Alexander Paul, legal counsel, represented the applicant, Aviva Canada Inc. Ms. Dina Mejalli, legal counsel, represented the respondents. In addition, Mr. Stephen Jovanovic, legal counsel, represented a company that is a manufacturer of automobiles and automotive products (hereinafter referred to as "the employer"), who, at the relevant times, was the employer of both Ms. Davies and Gerald Hartman, who is a defendant in the action, but who is not a party to this application. In this application, the employer has the status of an interested party.

[3] Testimony was given by Mr. Hartman. In addition, at the hearing, counsel collaborated to draft an Agreed Statement of Facts, dated January 18, 2011, which was made an exhibit to the proceeding. Submissions were made by Mr. Paul, Ms. Mejalli, and Mr. Jovanovic.

(ii) The issue

[4] The issue to be determined in this application is whether the action commenced by the plaintiffs is taken away by the Act. At the hearing, the parties agreed that in determining whether the plaintiffs' action has been taken away by the Act, the sole question which requires determination is whether the defendant, Mr. Hartman, was in the course of his employment, on November 8, 2005, when he and Ms. Davies were involved in a motor vehicle accident (MVA). As is noted below, at the hearing, the parties agreed that Ms. Davies was in the course of her employment at the time that the accident occurred, and I agree that such was the case.

[5] Section 28 of the Act states, in part:

> **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.
>
> ....
>
> **(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.
>
> ....

[6] Section 30 of the Act applies to the situation where a worker, who is entitled to benefits under the Act, is also entitled to commence an action against a person. Section 30 states in part:

> **30(1)** This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.
>
> **(2)** The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.
>
> ....
>
> **(4)** The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.
>
> **(5)** The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so.

[7] It follows that, notwithstanding the fact that Ms. Davies was a worker employed by a Schedule 1 employer, was in the course of her employment at the time of MVA, and would otherwise be entitled to claim benefits under the Act for injuries she sustained as a result of the MVA, should it be determined that Mr. Hartman was not in the course of his employment at the time of the MVA, pursuant to section 30, Ms. Davies would be entitled to elect to commence an action as provided by section 30, and her action would not be taken away by the Act.

[8] It was on this basis that the parties agreed that the sole question which requires determination in this application is whether Mr. Hartman was acting in the course of his employment at the time of the MVA.

(iii) The evidence

The Agreed Statement of Facts

[9] As noted above, at the hearing, the parties and their counsel collaborated on an Agreed Statement of Facts. That document stated:

> At the time of the motor vehicle accident ("MVA") Mr. Hartman and Ms. Davies were employed under a contract of service with [the employer].
>
> [The employer] is a Schedule 1 employer pursuant to s. 21 of the [the Act] Schedule 1 [i.e., pursuant to section 21 of the Schedule].
>
> Mr. Hartman and Ms. Davies were Schedule 1 workers [sic – workers employed by a Schedule 1 employer ?]
>
> Ms. Davies was in the course of employment at the time of the MVA.
>
> The MVA between Ms. Davies' and Mr. Hartman's vehicles occurred in the [the employer's] parking lot at [address of the employer's premises].
>
> [The employer] owned and controlled the parking lot where the MVA occurred.
>
> Ms. Davies had been a worker for [the employer] since 1984 and Mr. Hartman since August of 1996.
>
> At the time of the MVA, Ms. Davies was returning from her regularly scheduled lunch break.
>
> Ms. Davies' shift was from 7 a.m. to 3:30 p.m.
>
> Ms. Davies had performed a coffee run for her and fellow employees during the break.

> The run was her practice on a regular basis.
>
> Ms. Davies had parked at [the employer's premises] before starting her shift that day and was returning to the lot to resume her work duties when the MVA occurred in the lot.
>
> Ms. Davies was seeking to part her car at the time of the MVA.
>
> Other than the coffee run, Ms. Davies did nothing else between when she left for her break and returned.
>
> It was Ms. Davies' regular practice to park in this parking lot for work.
>
> Traffic comes in and out of this parking lot often and it is busy at lunch time
>
> This Agreed Statement is to be used for the purposes of the hearing before the [Workplace Safety and Insurance Appeals Tribunal] only.

[10] As is noted above, Mr. Hartman testified at the hearing. As is noted in greater detail below, he testified that he attended at the employer's premises to discuss a matter with the employer's sickness and accident private disability insurer (hereinafter referred to as "the private disability insurer"). After Mr. Hartman completed his testimony, the parties and their counsel collaborated further on an addendum to the Agreed Statement of Facts, noted above, in order to avoid the need to call further witnesses who had information relating to the activities of the private disability insurer, and its representatives. After a break when the parties and their counsel discussed the matter, counsel advised me that they had agreed to an addendum to the Agreed Statement of Facts, which stated:

> [Ms. E.] is a [name of employer] Specialist, employed by [the private disability insurer] and stationed at [the employer's premises] located at [address of the employer's premises, as noted above] on November 8, 2005.
>
> [Ms. C.] was the Senior [name of employer] Specialist, employed by [the private disability insurer] and stationed at [the employer's premises] located at [address of the employer's premises, as noted above] on November 8, 2005.
>
> [Ms. E and Ms. C] were responsible for the administration of the benefits plan offered through [the private disability insurer].
>
> [Ms. E and Ms. C] worked in the human resources office located at [address of the employer's premises, as noted above].
>
> [The employer's] workers can attend the human resource office at [address of the employer's premises, as noted above] to complete all benefit forms.
>
> The worker [sic] can use the [employer's] parking lot for this purpose and [the employer] consents to that use.
>
> The Group Weekly Indemnity Benefits is a form required by [the private disability insurer]. This form is required prior to a claim for benefits being approved.
>
> [Ms. E] does not remember whether or not she met with Mr. Hartman on November 8, 2005. Her signature is found on Mr. Hartman's claim for Group Weekly Indemnity Benefits located at Tab G of the Applicant's Right to Sue Statement.
>
> Mr. Hartman was not yet approved for benefits on November 8, 2005, at the time of the MVA, when he attended at [address of the employer's premises, as noted above]. He was subsequently approved for benefits retroactive to November 6, 2005.

> In order to receive benefits, Mr. Hartman had to be approved by a Senior [name of employer] Specialist of [the private disability insurer].
>
> The Senior [name of employer] Specialist deals only with [the employer's] workers because there are enough [employer] workers to require a full time person.
>
> The [private disability insurer] benefits for [the employer's] workers are arranged by [the employer]. [The employer's] workers gain the benefit due to employment with [the employer].
>
> There is no requirement for workers to attend the human resources office at [address of the employer's premises, as noted above] to complete such forms. Such forms can be mailed in to the human resource office instead.

Testimony by Mr. Hartman

[11] As noted above, Mr. Hartman testified at the hearing on January 18, 2011. He stated that he is a defendant in the action referred to above. He stated that he was involved in an MVA on November 8, 2005, which occurred in the employer's parking lot. He indicated that he had been an employee of the employer since 1996. Mr. Hartman testified that his employment with the employer was discontinued in late 2007.

[12] Mr. Hartman testified that the employer had more than one workplace, and that his regular place of employment was not at the address of the employer's premises, referred to above, but that it was at another address which was remote from the location of the employer's premises where the accident occurred. He stated that he was attending at the employer's premises where the accident occurred because that was the location where employees of the employer applied for benefits through the employer's private disability insurer. Mr. Hartman noted that the private disability insurer maintained an office at this location. He stated that it was not necessary to make an appointment to apply for benefits at this location, and that on the day that the MVA occurred, he was attending at the employer's offices to apply for private disability benefits.

[13] Mr. Hartman stated that, on November 6, 2005 (a Sunday), he had sustained an injury while moving a refrigerator, and that this injury did not occur at work and was not a work related injury. He stated that he was attending at the employer's premises (i.e., at the office on the employer's premises where Ms. E. and Ms. C, who were employees of the private disability insurer, were stationed) on November 8, 2005, in order to apply for benefits from the private disability insurer as a result of an injury that resulted from the non-work related accident. He stated that the last day he worked for the employer prior to the MVA was November 1, 2005.

[14] Mr. Hartman testified that the form that was required to claim private disability benefits, included a section to be completed by his physician. He testified that after he finished meeting with Ms. E. and Ms. C, he went to his vehicle. He stated that he was involved in the MVA with Ms. Davies when he was leaving the employer's premises with the required form, which he was taking to his physician's office so that his physician could complete the required section. Mr. Hartman stated that after the MVA, he took the form to his physician who completed the appropriate section of the form. The case materials included a copy of the form, which includes the portion completed by Mr. Hartman's physician.

[15] The portion of the form completed by Mr. Hartman's physician indicated that Mr. Hartman had sustained a "lumbar sprain" and that he "cannot bend or lift". It stated that the worker had been unable to work at his own occupation from November 7, 2005 to the date when the form was completed (i.e., November 8, 2005) and that the worker was expected to be able to return to work on November 16, 2005. At the hearing, the worker stated that, in fact, he returned to work on November 20, 2005, but that he was on paid vacation leave from November 16 – 20, 2005. He stated that although he subsequently worked at the location where the MVA occurred, in 2007, he had not worked at that location prior to the MVA. He stated that the employer had several workplace locations in the geographical area, and that his work location was changed from time to time.

[16] Mr. Hartman stated that at his meeting with Ms. E and Ms. C., he was told verbally that his claim to the private disability insurer would be approved. The case materials included correspondence, dated November 11, 2005, from the private disability insurer to Mr. Hartman, which advised him that his claim had "been approved from November 6, 2005" and that "benefits will continue to November 15, 2005." The correspondence stated that if the worker continued to be disabled beyond that date, a supplementary report was to be completed by his physician and submitted.

(iv) Applicable law and policy

[17] The accident which is the subject of this application occurred on November 8, 2005. Accordingly, this application is governed by the *Workplace Safety and Insurance Act, 1997.*

[18] In their submissions, counsel on behalf the applicant and the respondents referred to the Board's *Operational Policy Manual* Document No. 15-02-02, on the subject of "Work-Relatedness; Accident in the Course of Employment". That policy document states, in part:

> **Policy**
>
> A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time, and activity indicate that the accident was work-related.
>
> **Guidelines**
>
> In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of place, time, and activity in the following way:
>
> **Place**
>
> 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. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.
>
> If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.
>
> **Time**

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

In all other circumstances, the time and place of the accident are less important. In these cases, the decision-maker focuses on the activity of the worker and examines all the surrounding circumstances to decide if the worker was in the course of employment at the time that the personal injury by accident occurred.

[19] Counsel also referred to *Operational Policy Manual* Document No. 15-03-03, on the subject of "In the Course of and Arising Out of; On/Off Employers' Premises". That policy document states, in part:

> **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.
>
> **Guidelines**
>
> It is generally considered that workers are in the course of the employment when they reach the employer's premises or place of work. A worker is generally not considered to be in the course of the employment when travelling to or from the workplace, although there are exceptions to this general rule. (See 15-03-05, Travelling.) The WSIB's practice in respect of accidents occurring on an employer's premises centre on geographical location as a determining factor as to whether or not a worker was in the course of employment at the time of the accident. Location has been adopted as the line to be drawn between personal activities and work-related activities.
>
> Without limitation to the following, the WSIB will consider entitlement in claims where a worker is injured when
>
> - going to or from work in transport under the control and supervision of, or chartered by, the employer
> - obtaining pay or depositing tools, etc., on the employer's premises after actual work hours
> - participating in a work-related sports activity, for example, school teachers and camp counselors, when the employer condones these activities by making the premises available and/or exercising a form of supervision and control
> - attending compulsory evening courses
> - travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer
> - travelling to or from a convention and/or participating in convention activities, and

- on a lunch, break, or other non-work period (period of leisure) by ordinary hazards of the employer's premises.

[20] At the hearing, it was noted that section 126(1) provides:

> **126(1)** If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision.

[21] As a result of this provision, in appeals from final decisions of the Board, the Appeals Tribunal is required to apply the Board's policies which apply to the subject matter of the appeal. This application, however, is not an appeal, within the meaning of section 126(1). Rather it is an application made pursuant to section 31(1)(a) of the Act. That provision states:

> **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;
>
> ....

[22] Since this application is not an appeal from a decision of the Board, but rather, an application in respect of which, the Appeals Tribunal has exclusive jurisdiction, section 126(1) does not apply in the circumstances of this application. Nevertheless, the Tribunal's jurisprudence has provided that, in appropriate circumstances, Board policy should be given significant weight in determining "right to sue" applications commenced pursuant to section 31 (see *Decision No. 814/06,* among other decisions on this point). I agree that, although not directly applicable to this proceeding, weight should be attributed to the policy documents referred to above. As is noted in *Decision No. 814/06,* the overall integrity of the insurance scheme provided for in the Act could be undermined if the issue of whether an individual was in the course of their employment were to be addressed in one manner for entitlement cases and in a different manner for right to sue applications.

(v) Analysis

[23] In his submissions at the hearing, counsel for the applicant indicated that Mr. Hartman should be considered to have been in the course of his employment at the time that he was involved in the MVA with Ms. Davies. Noting the criteria relating to "place, time and activity" which are referenced in the relevant policy document, as well as in the Tribunal's jurisprudence, he stated that the activity in which Mr. Hartman was involved immediately prior to the MVA was that he was applying for disability benefits from the employer's private disability insurer. He expressed the view that this activity was "reasonably incidental" to his employment, within the meaning of the policy document. In this regard, it was his submission that:

- Mr. Hartman was seeking benefits to replace the wages that he earned from the employer;
- The benefits that the worker was seeking were benefits to which he became entitled as a result of his employment;
- The person whom the worker was seeing about the benefits, although an employee of the disability insurer, had the title of "[name of employer] Specialist", who was stationed on the employer's premises;

- Although it was possible for Mr. Hartman to have mailed in his application, he believed that the appropriate practice to apply for the benefits was to attend at the employer's location where the MVA occurred;
- The employer did not object to employees attending at the premises in question to apply for benefits, and it was a common practice for the employer's employees to do so;
- The fact that employees of the private disability insurer were stationed on the employer's premises to serve the employer's employees, supports the conclusion that the activity of seeing these employees for the purpose of applying for private disability benefits is work related;
- The MVA occurred as a result of an activity that happened on the employer's premises; and
- But for his employment relationship with the employer, Mr. Hartman would not have been present at the employer's premises on the day that the MVA occurred.

[24] Counsel on behalf of the applicant also referred to the portion of *Operational Policy Manual* Document No. 15-03-03, under the heading "Guidelines" (excerpted above). He noted that each of the bullet points set out describes an activity where the individual's work relationship has drawn the individual to the activity described, and that in each case, the policy document provides that such a worker would be acting in the course of his employment when pursuing the activity. It was his submission that Mr. Hartman was drawn to the employer's premises on the date of the MVA in a similar manner, to pursue the activity of obtaining disability benefits through the private disability insurer. It was his submission that, accordingly, Mr. Hartman should be considered to have been in the course of his employment when he was attending the employer's premises to file his accident benefits form.

[25] Counsel on behalf of the applicant also referred to Tribunal decisions in his submissions, including:

- *Decision No. 2930/07,* in which the worker injured his neck while turning to back out of the employer's parking lot. The accident happened in the employer's parking lot as the worker was coming to work. The decision concluded that the worker was in the course of his employment.
- *Decision No. 2677/07,* in which the injured party was a pedestrian who was struck by a vehicle in the employer's parking lot. The accident occurred just after completion of a shift when the plaintiff and defendant were heading home. The decision concluded that both parties were in the course of their employment at the time of the accident.
- *Decision No. 678/02,* in which the plaintiff had stopped on an unpaid lunch break, having just finished a delivery nearby. He still had to return the truck to his employer's yard. The Vice-Chair concluded that the plaintiff was in the course of employment at the time of the accident, and his right of action was taken away.
- *Decision No. 792/92,* in which the plaintiff was buying his lunch from a catering truck during his regular unpaid lunch break, when the catering truck was struck by a tractor trailer, causing its door to fly open and strike the plaintiff. The catering truck was allowed on the premises by the plaintiff's employer. The Panel found that the worker was in the

course of employment at the time of the accident and, consequently, his right of action was taken away.

[26] I am not able to agree with the submissions provided by the applicant's counsel. Although I accept that there was some connection between the activity of applying for disability benefits and Mr. Hartman's employment with the employer, the connection is too remote for him to be considered to have been in the course of his course of his employment at the time of the MVA. The fact that there is a remote connection between a particular activity and an individual's employment will not necessarily be sufficient to support a finding that the individual was in the course of his or her employment while pursuing the activity.

[27] In this case, as has been pointed out by the respondent's counsel:

- The employer's premises where the MVA occurred was not Mr. Hartman's place of employment. He was employed by the employer at an entirely different location. He was not reporting for work, leaving work or taking a break from work at the time that the MVA occurred, as is the case in most of the "parking lot" cases, in which employees injured in parking lots to have been found to have been in the course of their employment at the time of an accident;
- Mr. Hartman was temporarily disabled from working at the time that the accident occurred as a result of a non-work related injury that occurred on November 6, 2005, a few days before the MVA. Mr. Hartman was paid benefits by the private disability insurer for the day that the accident occurred. He was not being paid his salary for that day. The fact that the worker was disabled from working at the time of the MVA tends to support the conclusion that he was not in the course of his employment at the time;
- Mr. Hartman's purpose in attending the employer's premises on the day that the MVA occurred was to meet with Ms. E. and Ms. C., who were employees of the private disability insurer, and not employees of the employer; and
- Mr. Hartman was not required by the employer, as a term of his employment, to apply for the disability benefits, which he was seeking on the date that the MVA occurred. The employer had not instructed him to attend at its premises to apply of the benefits. It was not a matter of interest or concern of the employer as to whether Mr. Hartman applied or received the benefits. In any event, it was one of the terms of the Agreed Statement of Facts, that Mr. Hartman could have applied for the benefits by sending his form in by mail. The employer had no concern about whether Mr. Hartman applied for the benefits, and he could have done so without attending at the premises where the MVA occurred.

[28] The respondent's counsel also referred to several Tribunal decisions in her submissions, including:

- *Decision No. 23/90*, in which the worker had been discharged from the Board's Downsview Rehabilitation Centre, and was driving home when he was involved in a fatal MVA. The Panel found that the worker was not in the course of his employment at the time of the MVA in that he was not under the control of the employer or the Board at the time of the accident;

- *Decision No. 215/92*, in which the worker sustained a neck injury while entering or leaving the Board's offices, where he had attended in order to pick up a benefit cheque relating to a back disability. In that decision, the Panel found that the fact that the accident happened to be in a public place because the worker had business with the Board was too tenuous a connection to find that the original accident made a significant contribution to the subsequent disability.
- *Decision No. 1721/10,* in which the worker was an education aide, whose regular work hours at her school were from 8:45 am to 3:45 p.m. The worker received a ride to work from her husband, and the worker entered the school at about 7 a.m. so that the husband could get to his work on time. She was injured when she slipped and fell as she entered the school building. The Panel found that the worker arrived early due to her personal situation and not due to employment-related factors. Prior to the start of her shift, she engaged in activities that were at least partially related to her job duties, however, it was not necessary for her to arrive early to get her job done. The Panel found that on balance, the work-relatedness of the elements of place and activity was not sufficiently strong to make up for the unreasonably early time of the accident, and that she was not in the course of her employment at the time of the accident.

[29] At the hearing, the applicant's counsel made the submission that these decisions should be distinguished from the instant case on their particular facts. In relation to the first two cases, Mr. Paul stated that these decisions should be distinguished from the instant case primarily because in those cases, the subject worker/plaintiff was not attending at the employer's premises at the time of the accident, as was the case in the instant case. In relation to *Decision No. 1721/10*, Mr. Paul made the submission that that case should be distinguished from the instant case on the basis that a central fact in *Decision No. 1721/10* was that the accident in that case occurred when the worker was entering her workplace more than ninety minutes before her scheduled start time, which resulted in the Panel's finding that there was not a sufficient connection to work in relation to the policy criterion of "time". It was Mr. Paul's submission that, in the instant case, the accident occurred almost immediately after Mr. Hartman's visit with Ms. E. and Ms. C., and that if one accepts that the visit to facilitate his benefits was work related, the policy criterion associated with "time" is satisfied, unlike the circumstances in *Decision No. 1721/10.*

[30] Although I agree with the applicant's counsel that the facts of the three Tribunal decisions referred to above are different from the facts of the instant case, in my view a principle which can be derived from all three of the decisions, is that a worker/plaintiff should not be found to have been in the course of employment where an accident occurred in circumstances which were beyond the sphere of control which can reasonably be attributed to the employer. I find that this was the situation in the instant case, given that the accident occurred at a place which was a workplace controlled by the employer, but was not the workplace where Mr. Hartman was employed, and given that the activity in question, applying for disability benefits through the private disability insurer, was not an activity which was part of Mr. Hartman's work duties, or an activity which was required or controlled by the employer.

[31] I find that this underlying principle in these three decisions, relating to whether the employer can be reasonably imputed with control of the circumstances at the time of the

accident, is applicable to the analysis of this application. I find that this principle supports the conclusion that Mr. Hartman was not in the course of his employment at the time of the MVA. As I have noted above, the connection between his employment and the activity that the worker was pursuing just prior to the MVA, is too remote for him to be considered to have been in the course of his course of his employment at the time of the MVA.

[32] I find that when the MVA occurred on November 8, 2005, Mr. Hartman was not in the course of his employment. As noted above, section 28(3) provides that the limitations in relation to commencing an action, as set out in section 28(1), apply only if the workers in question were acting in the course of their employment. For the reasons provided above, I have found that Mr. Hartman was not acting in the course of his employment at the time of the MVA. Accordingly, the respondents' action is not taken away by the Act.

DISPOSITION

[33] The application is denied.

[34] The respondents' action against the applicants is not taken away by the Act.

DATED: April 28, 2011

SIGNED: M. Crystal