NO. M105294
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

KONSTANTIN YUSHCHENKO

PLAINTIFF

AND:

DIANE GAYLE COSTA

DEFENDANT

CERTIFICATE

UPON APPLICATION of the Defendant, DIANE GAYLE COSTA, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

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

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

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

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, April 9, 2009:

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

2. The injuries suffered by the Plaintiff, KONSTANTIN YUSHCHENKO, did not arise out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 21st day of August, 2013.

H. Morton

Herb Morton
Vice Chair

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SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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121829-A

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WCAT Decision Number: **WCAT-2013-02339**
WCAT Decision Date: **August 21, 2013**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 121829-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M105294
Konstantin Yushchenko v. Diane Gayle Costa

Applicant: Diane Gayle Costa
(the "defendant")

Respondent: Konstantin Yushchenko
(the "plaintiff")

Interested Person: City of Port Moody

Representatives:

For Applicant: Matthew G. Howard
HARRIS & BRUN

For Respondent: Eric L. Goodman / Elliot S. Holden
MUSSIO LAW GROUP

For Interested Person: Raymond Amyot
Employers' Advisers Office

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Section 257 Determination
In the Supreme Court of British Columbia
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Konstantin Yushchenko v. Diane Gayle Costa

Introduction

[1] The plaintiff, Konstantin Yushchenko, was injured in a motor vehicle accident on April 9, 2009. The accident occurred in the 2800 block of Murray Street in Port Moody, B.C. The plaintiff was employed as a sales department manager for A1 Window Manufacturing Ltd. On the day of the accident, the plaintiff was performing work at the Quality Auditing Institute (QAI) located on Murray Street in Port Moody, B.C. He returned to his home (on Waterford Place in Coquitlam) and had lunch with his mother. At the time of the accident, the plaintiff was returning to the premises of QAI. The accident occurred as he was stopped, waiting to make a left hand turn leading to the parking lot for QAI.

[2] The defendant, Diane Gayle Costa, was employed by the City of Port Moody as a building services worker. On the morning of the accident, she had been working at the Kyle Centre. She had driven to the recreation centre/civic ice arena to have her lunch. The accident occurred as she was returning to the Kyle Centre.

[3] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury, or death. This application was initiated by counsel for the defendant on July 24, 2012. Transcripts have been provided of the examinations for discovery of the plaintiff and defendant on September 23, 2011. The legal action is scheduled for trial commencing on February 3, 2014.

[4] The City of Port Moody and A1 Window Manufacturing Ltd. were invited to participate in this application as interested persons. The City of Port Moody is participating in this application but did not provide a submission. A1 Window Manufacturing Ltd. is not participating in this application.

[5] Written submissions have been provided by the parties to the legal action. The 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)

[6] Determinations are requested concerning the status of the parties to the legal action, at the time of the April 9, 2009 motor vehicle accident.

Jurisdiction

[7] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the plaintiff, Konstantin Yushchenko

(a) Background and evidence

[8] The plaintiff submitted an application for workers' compensation benefits dated April 15, 2009 in relation to the injuries he sustained in the April 9, 2009 accident. He advised that he resided on Waterford Place in Coquitlam, B.C. He was employed as a sales manager by A-1 Window Manufacturing Ltd. on a permanent full-time basis. He had a fixed shift working from 9:00 a.m. until 5:30 p.m., Monday to Friday. The accident occurred at 1:00 p.m. on April 9, 2009. He was west bound on Murray Street in Port Moody. He advised:

> I was driving to Quality Auditing Institute to test our windows and obtain testing reports when my own vehicle was rear-ended by a truck and pushed across the oncoming lane of traffic.
>
> [all quotations are reproduced as written, except as noted]

[9] An employer's report of injury from A-1 Window Manufacturing Ltd. stated that the plaintiff had been hired on August 20, 2001 and was employed on a permanent full-time basis.

[10] In a telephone memorandum on April 19, 2009, a Board entitlement officer noted:

> [The worker] confirms he was returning from lunch back at home to the Quality Auditing Institute. He says he seldom travels for business but that day was assigned to work at the Institute for the full day. He lives near Westwood Plateau in Coquitlam and the Institute is in Port Moody which was a short drive - he has also walked that distance before - it took an hour to walk. However he says its only a matter of minutes when driving. He didn't make any other stops - he just drove home for lunch and was heading back to work.
>
> He was pushed from behind by the truck into oncoming traffic and he then t-boned another vehicle and lost conciousness.

[11] On April 19, 2009, an entitlement officer contacted the defendant and noted as follows:

> I called Diane Costa today at [number]. She confirms she works [for] the City and her job is maintenance - she looks after two buildings - Kyle Community Centre and Port Moody Art Centre. She drives a couple miles between the two in the normal course of her work. On this date she was at one building where she took her lunch with coworkers. She left and while still on her unpaid lunch time she was driving to her other building with the MVA [motor vehicle accident] occurred.

[12] In a memorandum dated April 19, 2009, the entitlement officer reasoned:

> For the purposes of determining whether there is a possible third party action, I have considered the two parties involved in the MVA of April 9/09. It is my opinion that both the client Mr. Konstantin Yushchenko and third party, Diane Costa, are within the scope of employment at the time of the MVA. They were both traveling back to work after lunch. I accept there was no significant deviation involved with either party.
>
> As such it is my opinion that this is a worker vs worker situation.

[13] The plaintiff's claim was accepted by the Board and wage loss benefits were paid.

[14] Item #18.1 of WCAT's *Manual of Rules of Practice and Procedure* provides that in a section 257 application, WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer.

[15] The plaintiff provided a signed statement to the Insurance Corporation of British Columbia on April 15, 2009. He stated the accident occurred at 1:00 p.m. on April 9, 2009. He advised:

> On the day of the accident, April 9, I took my own vehicle for business purposes to got "Quality Auditing Institute" located at 2800-block of Murray Street in Port Moody. I had to be there for 9:00am for testing to our windows. I then went for lunch from 12:00pm – 1:00pm. Then I returned to Quality Institute to finish these tests and pick up reports. Quality Institute is approximately 5 kilometres from my home so I went home for lunch. When I was returning to Quality Institute I was involved in a motor vehicle accident.... My intention was to pick up the reports, finish the tests then go home. This would probably have taken a couple more hours. On that day I was assigned to work at that location and do this job. That is not my normal work location. When the accident happened I was stopped and waiting to turn left from west-bound Murray Street to the driveway of Quality Auditing Institute.
>
> [block capitalization removed]

[16] The plaintiff provided evidence in an examination for discovery on September 23, 2011. His place of employment with A-1 Window Manufacturing Ltd. was located at 8038 Glenwood Drive in Burnaby (Q 32). That was "pretty much" the only location at which he worked (Q 33). He was employed as a sales manager and was also involved in window development (Q 52 to 53). He primarily worked out of an office at his employer's premises (Q 59). On the day of the accident, he was supposed to spend the day at QAI (Q 65). QAI performed physical testing and computerized thermal testing of windows (Q 67). The plaintiff was required to be present to observe the testing (Q 69). He would attend QAI's premises approximately five times per year for testing windows (Q 103 to 104).

[17] At the time of the accident, the plaintiff was coming from his home on Waterford Place, where he had lunch (Q 85 to 88). He went for lunch with his mother (Q 88 to 89). His mother lived at the same residence (Q 92). He went home just to meet his mother for lunch (Q 92). He had lunch between noon and 1:00 p.m.

[18] The accident occurred as he was stopped waiting to make a left hand turn (Q 105). He was going was going to turn into the parking lot of the business beside QAI, and then go to QAI's parking lot (Q 109).

[19] A letter dated May 5, 2011 has been provided by Terry Lee, a director of A-1 Window Manufacturing Ltd. He advised that the plaintiff was a full-time employee, and his regular working hours were from 9:00 a.m. until 5:30 p.m., Monday to Friday. The plaintiff would normally take his unpaid lunch break somewhere between the hours of

noon to 2:00 p.m. He did not receive mileage or a vehicle allowance. All of the plaintiff's vehicle expenses were his own responsibility.

[20] The plaintiff provided an affidavit sworn on July 9, 2013. He advised:

> 17. The day before the Accident, I had made plans to have lunch with my mother, [name], at my home.
>
> 18. The purpose of this lunch was personal, and was not related to my work at A-1 in any way.
>
> 19. On the day of the accident, my mother had been cooking all morning in preparation for our lunch.
>
> 20. When I arrived at my home shortly after 12:00PM, we ate a meal that was prepared by her for us. We ate lunch for approximately 30 to 45 minutes.
>
> 21. I see my mother very infrequently during the daytime, so this lunch was a special occasion.
>
> ...
>
> 23. I could have taken my lunch break on the Quality Auditing Institute premises had I chosen to do so.
>
> 24. When I left for lunch on the day of the Accident, I had not yet completed the testing at QAI. After lunch, I had a few more hours of testing to complete. During my lunch break, I was not waiting for reports to be completed.
>
> 25. The reports that are generated from the testing are not generated the same day as the testing. The reports were not related to the tests that were done on that day.
>
> 26. The reports that I was going to pick up on the day of the Accident were ready to be picked up all day.
>
> 27. On the day of the Accident, I was not waiting for testing to complete during my lunch break.

[21] A print-out from Google Maps has been provided by the defendant, showing that the distance between the plaintiff's home and QA1 was 6.6 kilometres, involving 11 minutes of driving time (round trip travel time of 22 minutes).

[22] By memorandum dated February 15, 2013, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that A1 Window Mfg. Ltd., account number 461130, had been registered with the Board since February 10, 1992.

(b) Law and policy

[23] At the time of the accident on April 9, 2009, the policies in Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) included the following:[1]

> **#14.00 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**
>
> Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.
>
> Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.
>
> No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:
>
> (a) whether the injury occurred on the premises of the employer;
>
> (b) whether it occurred in the process of doing something for the benefit of the employer;
>
> (c) whether it occurred in the course of action taken in response to instructions from the employer;
>
> (d) whether it occurred in the course of using equipment or materials supplied by the employer;
>
> (e) whether it occurred in the course of receiving payment or other consideration from the employer;

[1] In this decision, I have applied the policies in effect at the time of the accident on April 9, 2009. While the board of directors of the Board has approved a revision to the policies in Chapter 3 of the RSCM II, those new policies only apply to injuries or accidents that occur on or after July 1, 2010.

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(g) whether the injury occurred during a time period for which the employee was being paid;

(h) whether the injury was caused by some activity of the employer or of a fellow employee;

(i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

(j) whether the injury occurred while the worker was being supervised by the employer.

This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

#18.00 TRAVELLING TO AND FROM WORK

The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

#18.12 Special Hazards of Access Route

Where a place of work is so located that for access and egress the worker must pass through special hazards beyond the ordinary risks of highway travel, an injury sustained from those hazards is one arising out of and in the course of employment. On the other hand, an injury to a worker on the way home from work, even though on the only egress route from the employer's premises, is not compensable if it results from other normal risks of highway travel, such as a collision between two automobiles.

#18.22 Payment of Travel Time and/or Expenses by Employer

The payment of wages or travelling allowances etc. may in some circumstances be a factor to be considered, but it usually will not be a significant factor, nor is it ever the sole criteria in determining the acceptability of a claim.

#18.32 Irregular Starting Points

Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than the regular place of employment, the worker is covered for compensation while travelling to and from that temporary place, and this is so whether the worker goes

there from the regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery person who goes direct from home to make deliveries.

#18.40 Travelling Employees

Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

#18.41 Personal Activities During Business Trips

The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:

> "Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown."

This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

What is meant by the reference to a "distinct departure on a personal errand"? It clearly does not simply refer to such everyday activities as eating, sleeping or washing which, in the case of most non-travelling employees would be regarded as personal activities outside the scope of the employment when performed outside normal work hours. Such activities will normally be regarded as within the scope of the employment of an employee who is required to travel. On the other hand, if, for example, a person on a business trip attends a theatre or spends the evening in a public house, these would probably not be regarded as activities in the course of employment.

The test to be applied is set out in policy item #21.00.

Normal activities such as eating, sleeping and washing can be regarded as personal activities which are incidental to the stay in the hotel required as a result of the employment. Where a worker goes out for a purely social evening, the worker may be staying in a hotel as a result of employment, but this employment feature of the situation may be clearly outweighed by the personal nature of the social activity.

#18.42 Trips Having Business and Non-Business Purpose

Whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the worker is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the worker is making a significant deviation from that route for non-business purposes.

#19.30 Lunchrooms

Claims for injuries occurring in lunchrooms are acceptable if the lunchroom is provided by the employer. Again coverage is limited to reasonable use of the premises and would not extend to injuries sustained through eating food, unless this had been provided by the employer, and the employees had been specifically required to eat food provided by the employer, or it was provided as part of the worker remuneration.

People who have to travel in the course of their employment are covered during normal meal breaks. But a non-travelling employee who chooses to have a coffee break in a coffee shop across the street from the employment, rather than use the company facilities, would not be covered.

#21.00 PERSONAL ACTS

There is a dilemma that is always inherent in workers' compensation. The difficulty, of course, is that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers' compensation must be mapped. An incidental intrusion of personal activity into the process of work will not require a claim, otherwise valid, to be denied. For example, it has long been accepted that compensation is not limited to injuries occurring in course of production. Where persons are injured while at work in the broader sense of that term, claims will not be denied on the ground that at the precise moment of injury they were blowing their noses, using the toilets or having their coffee break. **Similarly it has long been accepted that when a truck driver stops for a meal in the course of a long journey and is injured while crossing the road the driver is just as much entitled to compensation as a factory worker injured on the way to the works canteen.** Conversely, the intrusion of some aspect of work into the personal life of an employee at the moment an injury is suffered will not entitle the employee to compensation. For example, if someone slips in the living room at home and is injured, that person is not entitled to

compensation simply on the ground that at the crucial moment the person was reading a book related to work. In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.

Where the common practice of an employer or an industry permits some latitude to employees to attend to matters of personal comfort or convenience in the course of employment, compensation for injuries occurring at those moments is not denied simply on the ground that the employee is not at the crucial moment in the course of production. This is within the scope of the established doctrine relating to acts which, though not in themselves productive, are nevertheless a normal incident of employment.

#21.10 Lunch, Coffee and Other Breaks

A worker is considered to be acting in the course of employment not only when doing the work the worker is employed to do but also while engaged in other incidental activities. For example, a worker does not cease to be in the course of employment while having a lunch or coffee break on the employer's premises, while going to the toilet, having a smoke or other such activities. Therefore, if while engaged in such activities the worker is injured by virtue of some aspect of the work environment, a claim will be accepted. On the other hand, not all injuries occurring while engaged in such activities will be compensable. The injury must "arise out of" the employment as well as "in the course of" it. Thus, for example, if a worker has a heart attack while having a smoke during working hours a claim will likely be denied. This is because the heart attack probably arose from natural causes and was not caused by any aspect of the employment rather than because, in having a smoke, the worker was no longer in the course of employment.

In one case the worker, during a paid coffee break, went out from her place of work to her employer's parking lot with the intention of moving her car closer to the mill entrance. However, before she could do this, she trapped her finger in the car door while shutting it. The purpose of moving the car was to allow her to leave work more quickly and easily at the end of the day. She did not cease to be in the course of her employment when she walked out to the parking lot. It was not unreasonable for her to go out to her car during her coffee break. The evidence established that there was a common practice for employees to do this which was acquiesced in by the employer. If, for example, she had tripped over a pot hole in the lot, any resulting injury would have been compensable. It would have arisen out of the employment, as well as in the course of the employment, as it

was caused by a hazard of the employer's premises. It was considered that, in trapping her finger in her car door, she had not suffered an injury which arose out of her employment. The car was her personal property which she had brought onto the employer's premises for her own convenience. It was a hazard arising from the use of this property which caused her injury.

This case should be contrasted with another claim where the worker during a break in production, ran out to his car in the parking lot to get a package of cigarettes and twisted his ankle. His claim was denied. A person is considered to be in the course of his employment while entering and leaving his employer's premises at the start and end of his shift and at other recognized coffee or lunch breaks. This may also extend to other times when a worker has to leave his employer's premises for good reason, for example, in emergencies. However, not all trips to and from the worker's place of work can be treated in this way. There will be trips for personal reasons unrelated to the work and which cannot be said to be simply incidental to that work. There is no coverage in such cases. The trip made in this case was of that kind.

It was considered that more was involved here than such activities as blowing a nose, smoking a cigarette, or going to the toilet, which would normally be accepted as incidental to the employment. The rationale for accepting such activities is that they benefit the employer by making his employees comfortable while they are working and, therefore, in the long run, more efficient. It can, of course, be argued that the worker's going to get his cigarettes benefited his employer by putting him in a position where he would be able to smoke and make himself comfortable. However, it seemed that this doctrine should be limited to the specific activities which make the worker more comfortable and not to other secondary activities which put him in the position of doing these activities.

[emphasis added, footnotes deleted]

[24] All references to policy in this decision mean the policies contained in Chapter 3 of the RSCM II at the time of the April 9, 2009 accident.

(c) Submissions

[25] The defendant submits that there is no dispute regarding the plaintiff's status as a worker. The real question is whether his injuries arose out of and in the course of his employment. The defendant submits that the plaintiff was a travelling employee, as he typically worked at a fixed location but was required to travel to QAI approximately five times per year. In the case of a travelling employee, policy provides that stopping for

lunch does not involve a distinct departure on a personal errand. The defendant cites *WCAT-2012-02973*, which reasoned:

> [68] In the case of a travelling employee, stopping for lunch would not by itself represent a distinct departure on a personal errand. Some latitude must be permitted regarding the choice of location for lunch, in the case of a travelling employee. **Accordingly, stopping for lunch at home would not involve a distinct departure on a personal errand, if it did not involve a significant departure from the work route**.
>
> [emphasis added]

[26] Accordingly, in the case of a travelling employee, stopping for lunch at home is not *prima facie* evidence of a personal errand.

[27] The defendant cites *WCAT-2008-01866 / WCAT-2008-01867, Makhani v. Diener et al.*, where a plaintiff was assigned to visit a supplier in Delta to drop off some material to be cut. He had to wait until the materials were cut so that he could bring them back to his employer's premises in Port Coquitlam. He drove approximately 5 miles (8 kilometres or 12 minutes of driving time) to go to a Tim Hortons for lunch. That decision reasoned:

> As his employer's premises were located in Port Coquitlam, it was necessary that the plaintiff remain in Delta until the work at FlexyShop was completed so that he could bring the finished product back with him. The evidence in this case does not support a conclusion that the plaintiff's choice of a restaurant in which to take his lunch would have necessitated any substantial change in the timing of the plaintiff's return journey to Port Coquitlam with the finished product.
>
> In this context, I have difficulty in concluding that a five mile drive to a restaurant in order to have lunch amounts to a distinct departure on a personal errand. To conclude otherwise would seem to unduly limit the extent to which a worker could exercise some degree of personal choice as to where the worker wished to have lunch, and thereby place an artificial constraint on the provision of workers' compensation coverage for travelling workers. In the circumstances of this case, it was necessary for the plaintiff to wait for the materials to be cut at FlexyShop, and the additional distance travelled by the plaintiff would likely not have affected the timing of his return journey to any significant degree.
>
> I consider that the plaintiff's circumstances, in respect of his decision to drive to have his lunch at Tim Hortons, are not comparable to those of the truck operator described at RSCM II item #18.41. In view of the facts that the plaintiff had to allow time for the work at FlexyShop to be completed, that it was around noon, **and that there were likely only limited**

> **alternative restaurants to choose from in the area surrounding FlexyShop,** I do not consider that the plaintiff's decision to drive five miles in order to go to a particular restaurant in Delta amounted to a distinct departure on a personal errand. I consider that the plaintiff's decision to travel some additional distance for the sake of exercising an element of personal choice as to where he took his lunch may reasonably be characterized as involving an insubstantial deviation for personal reasons.
>
> [emphasis added]

[28] The defendant notes that *WCAT-2008-01866 / WCAT-2008-01867* was distinguished in *WCAT-2012-02973, Brainard v. Trim et al.*, which reasoned:

> [66] In that case, the plaintiff was precluded from continuing on his work journey by the need to wait for this work to be done. In that context, the travel for lunch could be viewed as being due in part to the work-related need to fill the time while he waited to pick up the materials. Accordingly, the facts of that case were somewhat different.
>
> [67] A different conclusion was reached in *Appeal Division Decision #93-0520* ("Deviation from Route (No. 2)," 9 W.C.R. 725), in which the plaintiff took a different route so that she could stop at a friend's house. In that case, the panel reasoned at page 727:
>
> > In this case, the actual deviation appears not to be significant as the Plaintiff was headed in the same direction and could have taken the Lougheed Highway as an alternative route to the Trans Canada Highway in travelling to her appointments. However, her evidence was that she took a different route in order to stop at her friend's house and, otherwise, she would have been on the Trans Canada Highway. I find that to be a substantial deviation, having regard to the relevant policy items. The Plaintiff was exposed to a risk that she would not otherwise have been exposed to - she was stopped at an intersection which she would not have otherwise used. If she had not been travelling to her friend's house, she would have been on the Trans Canada Highway. While the deviation to her friend's house was a deviation from a business trip, I find that it was a distinct departure for personal reasons and took her out of the course of her employment.

[29] The defendant submits that the reasoning in *WCAT-2008-01866 / WCAT-2008-01867* is applicable to the present case. The plaintiff chose to return to his residence to have his lunch break. He made a personal choice to have his lunch break at home, which could have been made for numerous reasons including personal, financial, time management, or otherwise. However, the sole purpose of travelling home was to have lunch. The element of personal choice exercised by the plaintiff should be characterized as involving an insubstantial deviation for personal reasons.

[30] The plaintiff submits that none of the factors set out in item #14.00 are met, in relation to his circumstances at the time of the accident. The plaintiff was a salaried employee, but was on an unpaid lunch break. His lunch was scheduled personally without any instructions from his employer. The lunch was a social event with his mother, without any business-related purpose and therefore a personal errand. The plaintiff did not intend to submit any receipts from his lunch to his employer as a business expense.

[31] The plaintiff submits that he was not a travelling employee. The plaintiff cites some prior WCAT decisions. He compares his travel to that of the plaintiff in *WCAT-2006-03308*, *Matte v. Douglas Wiltshire et al.*, a drywaller who was injured while driving to a particular job site for a second day. The plaintiff did not regularly travel between job sites and travel was not a significant part of the service being provided by him.

[32] Alternatively, if the plaintiff is considered to be a travelling employee, he submits that he embarked on a distinct departure on a personal errand by leaving QAI to go meet his mother for lunch. The plaintiff had the option of using the lunchroom facilities at QAI, but chose to return to his home.

[33] *WCAT-2010-00440 / WCAT-2010-0441*, *Kam v. Schell et al., Ng v. Schell et al.*, concerned an employee who would travel to meet customers. He was involved in an accident while driving a company car to meet a fellow employee, his wife, for lunch. That decision found that there was no evidence that the plaintiff had any work-related tasks to perform away from the company premises on that afternoon, and that his trip to go for lunch was personal in nature.

[34] *WCAT-2010-02880*, *Thomas v. Eggers et al.*, found that a pipefitter, who was generally considered a travelling employee, was not covered for workers' compensation purposes when he was injured while leaving a restaurant to return to his employer's premises.

[35] *WCAT-2012-01880*, *Robinson v. Noyes et al.*, found that a salesman, who was a travelling employee, was not covered for workers' compensation purposes while driving to meet a long-time friend for lunch.

[36] The plaintiff submits that he had no work-related purpose for traveling home for lunch. His lunch with his mother was not incidental to his work, because it was specifically planned beforehand and was a special occasion.

(d) Findings and reasons

[37] Section 1 of the Act defines "worker" as including:

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

[38] There is no dispute regarding the plaintiff's status as a worker of A1 Window Manufacturing Ltd. I find that the plaintiff was a worker within the meaning of Part 1 of the Act. At issue is whether his injuries in the April 9, 2009 accident arose out of and in the course of his employment.

[39] I find, first of all, that the plaintiff was covered for workers' compensation purposes in respect of his travel between his home and QA1 at the beginning and end of his workday (in the absence of a distinct departure on a personal errand). I consider it significant that the plaintiff's employment primarily involved working at a fixed location (at his employer's premises in Burnaby). Pursuant to the policy in the last paragraph of item #18.32 concerning irregular starting points (quoted above), where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than the regular place of employment, the worker is covered for compensation while travelling to and from that temporary place. This coverage applies whether the worker goes there from the regular place of employment or goes there directly from home. I find that this policy applies to the plaintiff's circumstances on the day of the accident, as he normally worked at his employer's premises and was assigned to do work at QAI only about five times per year. His circumstances are, therefore, distinguishable from those of tradespersons who work at different sites but do not have a regular or usual place of employment.

[40] Policy at item #18.40 concerning travelling employees explains that employees whose job involves travelling on a particular occasion or generally are covered while travelling. The reference to "a particular occasion" makes it clear that such coverage may also apply to workers who are assigned to travel on a particular occasion, even if travel is not otherwise an integral feature of their work. Accordingly, I find that the plaintiff was a travelling employee on April 9, 2009, as his work required him to travel to a temporary work location on that date (rather than to his usual fixed place of employment).

[41] In the case of a travelling employee, workers' compensation coverage will generally apply during normal meal breaks. It is necessary to consider whether, in the circumstances of this case, the plaintiff's travel home for lunch involved a distinct departure on a personal errand.

[42] I consider that the other WCAT decisions cited by the plaintiff are largely distinguishable on their particular facts. This was not a case of a worker who, while generally considered a travelling employee, was working at the employer's premises on the day of the accident and left to have lunch outside for personal reasons (as was the case in *WCAT-2010-00440 / WCAT-2010-0441*, and in *WCAT-2012-01880*). Nor was this a case where the plaintiff had essentially completed his work functions for the day (as was the case in *WCAT-2010-02880*).

[43] Policy explains that the phrase "distinct departure on a personal errand" does not simply refer to such everyday activities as eating, sleeping, or washing. Such activities will normally be regarded as within the scope of the employment of an employee who is required to travel. Accordingly, it is not significant that the plaintiff had an unpaid lunch break, and was not paid for mileage.

[44] In this case, the distance and travel time in relation to the plaintiff's drive to his home (6.6 kilometres, 11 minutes) was slightly less than was the case in *WCAT-2008-01866 / WCAT-2008-01867* (8 kilometres/5 miles, 12 minutes). However, in that case the travelling employee had to spend some time waiting for materials to be cut, and exercised a personal preference for having lunch at Tim Hortons. There was no evidence of any other personal purpose in having lunch at that location. In addition, it seemed that there were only limited alternative restaurants to choose from in the area surrounding FlexyShop (the worksite where the materials were being cut). Those factors supported a finding that the distance travelled by the plaintiff did not constitute a distinct departure on a personal errand.

[45] Given that the plaintiff's mother resided with the plaintiff and his family, and they presumably had dinner together on a daily basis, I have weighed with some caution the evidence regarding this lunch involving a special occasion. Nevertheless, I accept that there was a personal element involved in the plaintiff's decision to travel to his home to have lunch on the day of the accident.

[46] Policy at item #18.41 further provides that in evaluating an activity as to whether it involved a distinct departure on a personal errand, the test to be applied is set out in policy item #21.00. That policy notes that there is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers' compensation must be mapped. When a truck driver stops for a meal in the course of a long journey and is injured while crossing the road, the driver is just as much entitled to compensation as a factory worker injured on the way to the works canteen. In the marginal cases, it is impossible to do better than weigh the

employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.

[47] In the present case, the premises of QAI were located in a central area of Port Moody. Accordingly, it appears that a range of other places to eat would have been available to the plaintiff in vicinity of QA1 in Port Moody. There is also some indication that QAI had a lunchroom which the plaintiff could have used. The plaintiff states that he could have taken his lunch break on the premises of QAI had he chosen to do so.

[48] The plaintiff was not bound to have lunch on the premises of QAI. It was open to the plaintiff to exercise some element of personal choice as to where he took his lunch, without being found to have embarked on a distinct departure on a personal errand.

[49] The accident occurred essentially in front of the premises of QAI. If the plaintiff had chosen to drive to lunch at any nearby restaurant or coffee shop near to QAI, he would have been exposed to the same of risk of having an accident in front of QAI. Accordingly, the fact that he had gone home for lunch does not appear significant in this context.

[50] If the plaintiff's trip home was personal in nature, however, it must be considered whether the entire trip should be characterized as a distinct departure on a personal errand. Policy at item #18.42, concerning trips having a business and non-business purpose, provides that whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the worker is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the worker is making a significant deviation from that route for non-business purposes.

[51] A question arises as to whether it would be appropriate to parse the plaintiff's travel as involving travel within a reasonable distance of QAI and travel outside that zone, and only provide workers' compensation coverage within a limited zone in the vicinity of QA1. I consider, however, that such an analysis better fits the situation where the travel involved different purposes (with one destination having a business purpose, and another destination having a non-business purpose). If a conclusion is reached that the journey involved a distinct departure on a personal errand, then workers' compensation coverage does not apply to the whole journey (notwithstanding the fact that any journey to and from the worksite would involve travel on the street near to the worksite).

[52] The plaintiff's evidence is that he went for his unpaid lunch break from noon to 1:00 p.m. The accident occurred at 1:00 p.m. in front of QA1. Accordingly, the plaintiff's round-trip travel time of approximately 22 minutes (in driving to his home and back to QAI), did not prevent him from returning to QAI by approximately 1:00 p.m.

[53] It is not possible to draw a precise boundary as to the time and distance which may lead to a conclusion that a worker is engaged in a distinct departure on a personal errand while going to have a meal. Such consideration must take into account all the particular circumstances of the work location, as well as any personal or work factors which were involved in the choice of the location to have a meal.

[54] This was not a case of the plaintiff stopping for a meal in the course of a journey. Rather, this was the case in which the plaintiff drove some distance, away from the central area of one municipality where the temporary work location was located, to a residential area of an adjacent municipality for the purpose of going home to have lunch with a family member. While the crossing of municipal boundaries has no significance in itself, it may in some circumstances flag the fact that the journey had a special purpose.

[55] This was also not a situation in which the plaintiff had to travel some greater distance due to limited options for having lunch in the area of the temporary work location. Rather, it appears that the plaintiff was motivated by personal factors in his decision to have lunch at home. In particular, he had arranged in advance to have lunch at home, where a family member prepared lunch for him.

[56] As noted above, the plaintiff left a central area of Port Moody where the temporary work site was located, for the purpose of travelling to a residential area in Port Coquitlam where his home was located. While these circumstances are in a grey area, on balance, I consider that the weight of the evidence supports a conclusion that the personal factors were predominant in the plaintiff's decision to have lunch at home. The fact that he was meeting a family member, and drove some distance beyond what would have been necessary to locate a convenient place to have lunch, support a conclusion that the plaintiff was engaged in a distinct departure on a personal errand.

[57] Accordingly, I consider that workers' compensation coverage did not apply in relation to the plaintiff's travel to go home for lunch, and his return to the temporary worksite at QAI. I find therefore, that the plaintiff's injuries in the accident on April 9, 2009, did not arise out of and in the course of his employment.

Status of the defendant, Diane Gayle Costa

[58] In view of my conclusion regarding the status of the plaintiff, it does not appear necessary to proceed to address the status of the defendant. Accordingly, I have not done so. In the event such a determination remains necessary, a supplemental determination may be requested.

Conclusion

[59] I find that at the time of the April 9, 2009 accident:

(a) the plaintiff, Konstantin Yushchenko, was a worker within the meaning of Part 1 of the Act; and,

(b) the injuries suffered by the plaintiff, Konstantin Yushchenko, did not arise out of and in the course of his employment within the scope of Part 1 of the Act.

H. Morton

Herb Morton
Vice Chair

HM:gw