Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1011/21

BEFORE: K. Jepson: Vice-Chair

HEARING: June 29, 2021 at Toronto
Videoconference

DATE OF DECISION: December 30, 2021

NEUTRAL CITATION: 2021 ONWSIAT 2053

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

APPEARANCES:

For the co-applicant Co-Operators General Insurance Company:	A.S. Reyes, Lawyer
For the co-applicant Mr. S. Bramham:	M.W. Chadwick, Lawyer
For the respondent Mr. R. Bechard:	S. Rastin, G. Lessard, Lawyers
For the interested party, Simcoe Parts Service:	K. MacNeill, Lawyer
Interpreter:	N/A

REASONS

(i) Introduction

[1] This is an application by the Co-operators General Insurance Company (Co-operators) and Mr. S. Bramham. Co-operators and Mr. Bramham are defendants in a court action brought by Mr. R. Bechard (Court File No. CV-18-1981, filed in the Ontario Superior Court of Justice in Barrie, Ontario). That action arises out of an accident that occurred on September 9, 2017. Mr. Bechard had just finished his shift and was walking to his truck when he was struck by a vehicle driven by Mr. Bramham. In the court action, Mr. Bechard claims damages from the defendant Mr. Bramham for injuries suffered in the September 9, 2017 accident. Co-operators is the insurer for Mr. Bramham.

[2] Both Mr. Bechard and Mr. Bramham were employees of Simcoe Parts Service (SPS). SPS provides labour and services to Honda Canada Manufacturing (Honda). SPS's services to Honda are provided within the overall general premises of Honda's Alliston manufacturing plant/compound. I discuss the relationship between these companies and their use of the premises in more detail below.

[3] In this application, Co-operators and Mr. Bramham seek an order pursuant to section 31 of the *Workplace Safety and Insurance Act, 1997* (the WSIA) that Mr. Bechard's right to sue Mr. Bramham is taken away by the WSIA.

[4] Due to the COVID-19 pandemic, the hearing of the application was held remotely by way of videoconference. Each of Co-operators, Mr. Bechard, and Mr. Bramham were represented by counsel. SPS, the interested party, also participated through counsel. Mr. Bechard and Mr. Bramham each gave evidence. The documentary evidence consisted of the Section 31 Statements filed by Co-operators, Mr. Bramham, and Mr. Bechard, Co-operators' Section 31 Reply Statement, and the Workplace Safety and Insurance Board (WSIB) (the Board) file.

(ii) Issues

[5] The issue in this application is whether Mr. Bechard's right of action is taken away pursuant to section 28 of the WSIA and whether Mr. Bechard has a corresponding right to claim benefits under the WSIA.

[6] Pursuant to undisputed facts, reviewed below, both the plaintiff/respondent Mr. Bechard and the defendant/applicant Mr. Bramham were workers under the Act and were employees of SPS, a Schedule 1 employer under the Act. As a result, the sole issue to be determined in this application is whether Mr. Bechard and Mr. Bramham were in the course of their employment when the September 9, 2017 accident occurred.

(iii) Law and policy: statutory bar to the right to sue

[7] Section 31 of the WSIA provides that a party to an action (or an insurer from whom statutory accident benefits (SABs) are claimed under section 268 of the *Insurance Act*) may apply to this Tribunal to determine whether a right of action is taken away by the Act, whether a plaintiff is entitled to claim benefits under the insurance plan, and/or whether the amount a party to an action is liable to pay is limited by the Act.

[8] Sections 26 through 29 of the WSIA provide as follows:

26(1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

(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.

27(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.

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.

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.

[9] Section 126 of the WSIA requires this Tribunal to apply Board policy when determining appeals. Since this is an application under section 31, rather than an appeal, the Tribunal is not statutorily required to apply Board policy. However, Tribunal decisions have noted that the question of whether a worker is in the course of employment also arises on entitlement appeals which come to the Tribunal, and it is important to maintain consistency between those appeals and section 31 applications (see, e.g., *Decision No. 1460/02*, 2003 ONWSIAT 297; *Decision No. 755/02*, 2002 ONWSIAT 1488). In addition, consistency as between right to sue applications themselves provides a further reason to give weight to Board policy in right to sue applications. I discuss this further, below, in my discussion of Board policies most relevant to this application.

(iv) The basic facts underlying the application

[10] Prior to the hearing, the parties to this application filed an Agreed Statement of Facts. The Agreed Statement of Facts stipulates the following (for any parties or other short form references already defined above in these reasons I have substituted those terms; the language is otherwise as drafted by the parties):

1. SPS's head office is located at 6795 Industrial Parkway in Alliston, Ontario (the "SPS Head Office").

2. Honda's automobile plant is located at 4700 Industrial Parkway in Alliston, Ontario (the "Honda Plant").

3. SPS and Honda are separate companies with separate ownerships.

4. SPS maintained its own bank accounts, payroll, management, employee benefits program and was solely responsible for the management of SPS employees including hiring, firing, discipline, and scheduling.

5. In 2017, the Applicant, Mr. Bramham, and the Respondent, Mr. Bechard were employees of SPS.

6. SPS has Schedule 1 WSIB coverage for all employees.

7. On September 9, 2017 at approximately 12:10 a.m., Mr. Bramham struck Mr. Bechard with a personal vehicle (the "motor vehicle accident"), while Mr. Bechard was walking across a parking lot owned by Honda.

8. Mr. Bechard sustained injuries, including a fracture to his right leg as a result of the motor vehicle accident.

9. Mr. Bramham and Mr. Bechard's shifts both ended at 12:00 a.m. on September 9, 2017.

10. Honda was responsible for management and maintenance of the parking lot where the motor vehicle accident occurred.

11. The Honda Plant parking lot is a private parking lot.

12. SPS employees had no designated parking spaces and parking was on a "first come, first served" basis.

13. Before the accident, building areas at the Honda Plant were made available for use by SPS employees. At the Honda Plant, there are two manufacturing lines: Honda Plant 1 and Honda Plant 2.

14. There is an associated building made available to SPS employees for each of Honda Plant 1 and Honda Plant 2.

15. There is no formal lease agreement between Honda and SPS for the building areas made available to SPS employees at the Honda Plant.

16. SPS' permission to use the building areas made available to SPS employees at the Honda Plant is governed by an agreement between Honda and SPS, entitled the "Statement [of] Work." The Statement of Work provides that SPS is to provide a stable, qualified workforce and required material handling equipment to operate its contracted consolidation services within the Honda OSCC and that Honda shall provide necessary facilities to SPS employees at the Honda Plant to perform daily tasks. Under the Statement of Work, the facilities at the Honda Plant provided by Honda to SPS employees include associate parking, associate locker rooms, cafeteria/lunchroom/break areas and/or access, swipe cards for building access, administrative space, and housekeeping/janitorial services.

[11] A number of other ancillary facts emerge from the transcripts for discovery and the testimony in this application as not substantially in dispute. Combining those facts with the Agreed Statement of Facts, the following basic background emerges. In determining these facts, I have also taken into account images of the Honda Alliston facility that were in evidence (taken from Google Maps satellite view).

[12] Honda's Alliston facility is a large area that includes a number of buildings, but the two dominant structures are two very large, somewhat sprawling buildings which are known as Honda Plant 1 (or Line 1) and Honda Plant 2 (or Line 2). SPS has its head office south of a road known as Industrial Parkway. Industrial Parkway can be viewed as the south boarder of the main Honda facility, such that SPS' offices are essentially just across the road to the south from the Honda Plant facilities. In 2014, both witnesses confirmed, SPS took over shipping and receiving of auto parts for Honda. At or about that time SPS moved its active operations for Honda north of Industrial Parkway and onto the Honda manufacturing facility. Mr. Bramham testified that SPS takes care of shipping and receiving. As part of that function SPS delivers parts to the Honda manufacturing lines.

[13] It is clear, in my view, that when SPS took over the role of shipping and receiving and delivery of parts to Honda's line, SPS became an integral subcontractor in Honda's manufacturing process.

[14] In their testimony, Mr. Bechard and Mr. Bramham, with the assistance of references to the images in evidence, elaborated on the information in the Agreed Statement of Facts about the SPS buildings on the Honda Plant site. These structures are attached to the main Honda Plant building. Although they are apparently referred to as the SPS "buildings," in my view they would be more precisely described as extensions of the main Honda Plants rather than separate buildings. Mr. Bechard is a shunter-driver: his job is to use a shunt truck to move trailers of parts around the premises as required. As such, he testified, his actual work takes place entirely outside on the Honda Plant grounds. However, he did confirm that he changes his clothes in the SPS area attached to Honda Plant 2, and that he punches in and out through that building. Mr. Bechard confirmed in his testimony that SPS employees can pass through the main Honda Plant buildings as necessary and vice versa; there is no barrier between the parts of the building.

[15] As I interpret the evidence, since 2014 the SPS employees and Honda employees all work in the same broad Honda Plant physical premises or compound (including outside areas), even if SPS employees typically spend time most of their time in their designated areas of the buildings. Thus, in 2014 SPS became in effect an "on-site" integrated subcontractor in Honda's manufacturing facility.

[16] The witnesses' testimony also confirmed, again with the assistance of reference to the images, that there are two main parking lots on the Honda facility premises north of Industrial Parkway: one is adjacent to the Honda Plant 2 building, on the west side; the other is adjacent to the Honda Plant 1 building, located on the east side of that building. Since at least 2014, both Mr. Bechard and Mr. Bramham routinely park in Honda lots north of Industrial Parkway, on what was considered the Honda general facility premises or compound. Mr. Bechard testified he had his locker in Honda Plant 2 and typically parked in the west lot. Testimony and discovery evidence also indicates that both Mr. Bechard and Mr. Bramham were provided with parking passes for the Honda lots. These were passes that stated "Honda" on them and the employees were instructed to hang them from their vehicle mirrors. The Honda parking passes were provided to them by their employer, SPS.

[17] On the date of the accident, Mr. Bechard punched out and exited the Honda Plant 2 building, walking west across the west parking lot, on his way to his parked vehicle. Mr. Bramham had already finished his shift and walked to his car. He was making a left hand turn at a stop sign in the parking area. Mr. Bechard was crossing the road at that point. Mr. Bramham's vehicle struck Mr. Bechard.

[18] From my review of the evidence, including the agreed facts, the following key facts emerge that are particularly relevant for determining whether Mr. Bechard and Mr. Bramham were in the course of their employment:

- The Honda Alliston manufacturing facility/compound includes buildings, open areas, and parking lots. As I interpret the evidence, including the images, the Honda Alliston facility has fairly well-defined borders. There is green space or fallow space to the northwest, north, and northeast of the manufacturing compound. The southern border is formed by Industrial Parkway. From the images it appears that the ingress and egress to the facility by car is from the southern border on Industrial Parkway. This is a relatively self-contained industrial site.

- At least since 2014 Honda and SPS are highly integrated, to the extent that SPS is in effect an on-site subcontractor in Honda's manufacturing process.
- The evidence indicates that SPS and Honda were integrated to the extent that virtually all "front-line" employees worked on the Honda premises (there was no evidence about executives or office staff), in portions of buildings that were contiguous with those housing Honda staff and Honda operations.
- Mr. Bechard and Mr. Bramham, employees of SPS, worked on the premises of the Honda Alliston manufacturing facility compound. Both Mr. Bechard and Mr. Bramham spend all of their work time in locations within Honda's general Alliston manufacturing compound – either in the buildings (in the case of Mr. Bramham) or outside but still within the Honda manufacturing facility compound (in the case of Mr. Bechard).
- The integration of SPS employees into the physical Honda premises, including buildings and parking lots, was done by way of an express agreement between Honda and SPS – the Statement of Work.
- Honda owned and maintained the parking lots, but both Mr. Bechard and Mr. Bramham parked regularly in the Honda parking lots. They did so with the permission of, and at the direction of, their employer SPS, in keeping with the express agreement between SPS and Honda.

(v) Analysis

[19] The Board has several policies which are relevant to the types of fact situations presented by this application. Although the Tribunal is not required to apply these policies in an application (as opposed to an appeal), as noted above Tribunal case law has held that the Board policies remain relevant. In my view, the relevant Board policies should be given considerable weight in these applications. It is in the interests of administrative justice that decision-making at all levels be consistent to the extent possible. Moreover, within the Tribunal's own jurisprudence, all parties are best served when Tribunal decisions are decided consistently when faced with similar facts. This is a particularly important goal in the case of right to sue applications, where the parties' potential time, energy and costs related to court proceedings can be affected by the consistency—and therefore predictability – of the Tribunal's approach. The determination of these applications should be principled, not impressionistic. Applying relevant Board policy is one important way to help achieve that desired consistency and predictability.

[20] *Operational Policy Manual* (OPM) Document No. 15-02-02, "Accident in the Course of Employment," indicates that when determining whether a worker is in the course of employment the decision-maker should consider the elements of time, place and activity. However, OPM Document No. 15-02-02 is a general policy, setting out broad overarching principles. Within the suite of policies addressing "in the course of employment" there are more specific policies dealing with more specific variables, circumstances and situations. In my view, by analogy to the well-accepted principle of statutory interpretation, the more specific policies take precedence over the general policy. In so doing, those more specific policies do not necessarily give equal weight to considerations of time, place and activity. Instead, the more specific Board polices guide which of these three indicators weigh more heavily in certain specified classes of fact situations. This is consistent with a statement in OPM Document No. 15-02-02, the general

policy, which itself notes that the relative importance of time, place and activity vary depending upon the case.

[21] OPM Document No. 15-03-03 "On/Off Employers' Premises" indicates that, subject to two exceptions, a worker is generally in the course of employment when on the employer's premises "as defined" and not in the course of employment when off the employer's premises. The policy defines the employer's premises to include, *inter alia,* parking lots.

[22] OPM Document No. 15-03-03 includes parking lots as part of the general definition of employer premises but there is, in addition, a more specific that provides additional detail about elements that may form part of a broader employer premises such a parking lots and employer controlled roads. That policy is OPM Document No. 15-03-04, "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries." The relevant portion of that policy states:

> **Employer's premises**
>
> **Definition**
>
> The building, plant or location of work, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways and private roads.
>
> **Parking lots**
>
> The employer must own or lease the parking lot.
>
> - If driving, the condition of the employer's lot must cause the accident.
> - If walking, the condition of the lot need not be a contributing factor.
> - Workers are not entitled to compensation if injured by their own vehicle.

[23] OPM Document Nos. 15-02-02, 15-03-03 and 15-03-04, read together, create a clear *prima facie* priority on location as the first parameter to be considered, and the one that will govern unless exceptions apply. This approach has sometimes been called the "premises test" in Tribunal case law, and while some cases cite multi-factor tests, the primacy of the premises test has been acknowledged in the dominant line of Tribunal cases (see, e.g., *Decision No. 764/91,* 1991 CanLII 4741 (ON WSIAT); *Decision No. 1058/11,* 2012 ONWSIAT 651; *Decision No. 2675/08,* 2008 ONWSIAT 3329; *Decision No. 550/19*, 2019 ONWSIAT 1844).

[24] The first question to be determined, then, is this: was the parking lot in which this accident occurred one that falls within the scope of parking lots as set out in OPM Document No. 15-03-03 and, more particularly, OPM Document No. 15-03-04? If it does, it follows from my analysis above that both he and Mr. Bramham were *prima facie* in the course of their employment at the time of the accident.

[25] On the agreed facts, Honda owns and maintains the parking lot at issue. However, the Statement of Work between Honda and SPS created specific rights and obligations for both of these companies. The Statement of Work was a form of contract between the two companies. Mr. Bechard and Mr. Bramham were directed to park in the Honda lots and were provided passes to do so.

[26] The fact that the agreement between Honda and SPS regarding SPS' use of the Honda parking lots is not formally a "lease" is not, in my view, determinative.

[27] First, the policy itself contains language supporting a conclusion that the phrase "owned or leased" is not to be strictly or narrowly construed, because to do so would render the policy

internally inconsistent. The present case is not a case of employees parking in a plaza or mall parking lot. However, the section of the same policy that deals with plazas and malls—a section that follows immediately after the language on parking lots – is instructive. That portion of the policy states:

> **Plazas and malls**
>
> Workers are not in the course of employment in public parking areas not under the employer's control.
>
> Workers injured in parking spaces regulated and allocated by the employer may be entitled to compensation.
>
> Workers are members of the general public once they leave the allocated areas and remain so until they arrive on the employer's premises.
>
> Workers have no entitlement if their injuries occur on indoor streets and walkways open to the general public and not under the employer's control.
>
> Entitlement is allowed if accidents occur on the actual premises of the employer within the mall or plaza.

[28] The policy statements about plazas and malls, together with numerous Tribunal cases applying them, provides that even where the accident occurs in these shared, public parking lots the accident is still considered to have occurred in the course of employment if certain spaces are allocated to that employer's employees and/or the employees are directed where to park. In the plazas/malls section of the policy, there is no specific language about the parking spaces being leased or even a requirement that there be a formal agreement for their use. The policy would be internally inconsistent if plaza or mall parking areas were considered part of the employer's premises merely through elements of direction or control, while in another case a parking lot for which an employer has acquired exclusive use for its employees (or perhaps its own and one other company, as in this case) was not considered part of the employer's premises because there was no formal lease. In short, the language on mall and plaza situations supports a broader reading of the language that immediately precedes it regarding an employer's "owned or leased" parking lot.

[29] Second, Tribunal cases have, on balance, accepted that an employer can exercise the requisite degree of direction and control over parking without necessarily leasing the parking spaces (see, e.g., *Decision No. 2270/08,* 2008 ONWSIAT 3157; *Decision No. 1785/12,* 2012 ONWSIAT 2119). In *Decision No. 2675/08*, the Vice-Chair reviewed a number of parking lot cases. He noted, as I have, the *prima facie* emphasis on the "premises test." He also noted, again as I have, that Board policy should be given considerable weight. After reviewing a number of parking lot cases he concluded:

> In my view, when an employer directs a worker to park in a particular area of a parking lot, then a worker who is following that direction is in the course of employment, even if the employer does not own or lease the parking lot. In my opinion, it defies logic to accept that an employer has the authority to require a worker to do something which advances the employer's commercial interests, and at the same time find that a worker who is doing that exact thing is not in the course of employment. The Board's policy accepts a worker injured in a parking lot that is neither owned nor leased by the employer may still, in certain circumstances, be in the course of employment. Those circumstances occur if the parking spaces are "regulated and allocated" by the employer. I have come to the conclusion that where an employer directs its workers to park in specific areas of a

> parking lot, the employer may be regarded as having regulated and allocated the parking spaces for the purposes of the Board's policy.

[30] I agree with the Vice-Chair's general summary of the trend in Tribunal decision and their interpretation of the Board policy: there need not always be ownership or a formal lease of the parking lot.

[31] On this point, I acknowledge *Decision No. 2081/16*, 2016 ONWSIAT 2996, cited by the respondent, which appears to take a different approach. In that case the employer had an agreement with the building landlord for its employees to use common areas, including the parking lot. The worker drove to work and parked his car in the parking lot, and was proceeding to the building to start his shift when he slipped and fell. Notwithstanding the agreement between the employer and the building landlord, the Vice-Chair found the lot was not part of the employer's premises because it was not owned or leased by the employer. In my view, this case is an outlier, not consistent with the more dominant line of Tribunal cases on parking lot accidents. For that reason I decline to follow it.

[32] The respondent argued that SPS exercised no control at all over the parking lot at issue. I do not agree. As noted in *Decision No. 1785/12* and *Decision No. 2675/08*, it is not necessary for the employer to actually assume maintenance responsibilities to exercise direction and control. Where an employer makes arrangements for parking by its employees, as in this case, and they do so in such a way that maintenance is not assumed by the employer but remains with the lot owner, the employer has nonetheless made a choice about how maintenance will be done, and condoned that their employees will rely on that maintenance. By making such an arrangement the employer has procured use of the parking but effectively subcontracted or delegated the maintenance of those spaces back to the lot owner (i.e., by leaving the responsibility with the owner). The question, I would note, is not whether the employer's choice about how the maintenance will be arranged, understood, or delegated is a sound one; the point is that they made a choice. In this case, SPS made an agreement with Honda for its employees to park in the Honda lots, fully understanding that Honda would be responsible for maintaining the lots. This is a conscious choice made by SPS about how it would manage the risks to which its employees would be subjected. As it happens, on the particular facts here, it appears that SPS could perhaps reasonably rely on Honda for the parking lot maintenance because it knew Honda's own direct employees would also be parking in the same lots. However, I would stress that whether that arrangement was a reasonable one is not an issue before me and I make no finding on that point.

[33] Control does not consist solely of maintenance. SPS exercised an important type of control by both procuring access to the Honda lots for its employees and directing them to park there, providing parking passes to enable them to do so.

[34] To summarize my findings on this point, I find that both Mr. Bechard and Mr. Bramham were clearly on their employer's premises when the accident occurred. In essence, Honda and SPS employees shared the same general work premises – the Honda Alliston compound. The Statement of Work was an express contractual arrangement for the SPS employees to work and park on Honda's premises, including use of the Honda parking lots. Moreover, given the geographical circumstances, SPS knew that this was not just a parking "option" for their employees, but the place where its employees *would* park. And indeed Mr. Bechard and Mr. Bramham have confirmed that this is what they always did. While SPS did not formally "lease" the use of the lots, it had a formal agreement for its employees to park there. In my view,

there is no magic in the use of the word "lease" in the Board policy. The intent is to capture circumstances where the employer has exercised direction and control over employee parking, thereby bringing that parking area within the ambit of the employer's premises. Tribunal cases have accepted that such exercise of direction and control may exist even where the parking area is not on a shared geographical area, where the parking may be shared, or adjacent to, to the employer's main building or operations (e.g., *Decision No. 1785/12*; *Decision No. 431/09,* 2009 ONWSIAT 1705). The present case is even stronger: the two companies were sharing premises and the lots were on that shared premises.

[35] The respondent argues that Mr. Bechard and Mr. Bramham left their employer's premises when they left the building to walk to their vehicles. This argument is fully rebutted by application of the Board policy in relation to parking lots and employers' premises: I have found that the parking lot was, under that policy, SPS's parking lot because of the formal agreement to use it. Accordingly, pursuant to the policy, it is deemed to be included a part of the employer's premises – regardless of what else might constitute SPS's premises. However, I would in any event disagree with the attempt to characterize SPS's premises as confined to the specific "SPS buildings" on the Honda manufacturing compound. Mr. Bechard did not work inside any buildings, and while Mr. Bramham worked mainly in the portion of one plant designated for SPS, this area was not exclusive to SPS employees, nor was he confined to that portion of the building. To suggest that SPS' premises were only the SPS-designated portions of the plant buildings would be analogous to attempting to define the premises of a particular subcontractor on a commercial construction site by pointing to the area on that site where that subcontractor mainly worked and suggesting that that area was that subcontractor's "premises," (e.g., the area where they happened to installing the drywall that day) and suggesting that those workers are only on the employer's premises when in that area of the construction site. More realistically, such subcontractors have no independent premises on the construction site; the overall construction site is the premises of all trades working on the site. Similarly, SPS operated in effect as a subcontractor to Honda, with all of its employees working on the general Honda manufacturing site (save, perhaps, for corporate or office employees, but such employees were not involved in this accident). The proposition that SPS' premises consisted only of those portions of the plant buildings assigned as the main work areas for most SPS employees would be a fiction that ignores the practical and geographic realities of the day-to-day work of the SPS employees.

[36] I have determined that both Mr. Bechard and Mr. Bramham were on the employer's premises at the time of the accident; they were therefore *prima facie* in the course of employment pursuant to the applicable Board policies and the premises test. I now turn to consideration of the exceptions outlined in Board policy.

[37] OPM Document No. 15-03-03, "On/Off Employers' Premises," provides two exceptions to the general rule that a worker is in the course of employment when on the employer's premises (including employer's controlled parking lots). These are

- the accident is caused by the worker using, for personal reasons, an instrument of added peril (unless the accident is caused by road conditions);
- the worker is performing an act **not** incidental to his work [my emphasis]

[38] With respect to the exception related to using an "instrument of added peril," it is clearly inapplicable as the worker was walking when the accident occurred.

[39] With respect to the activity-based exception, I would note, first, that in my view the wording of this exception underscores that the premises test creates a *prima facie* rule or presumption: the worker injured on the employer's premises is considered in the course of employment *unless* they were engaged in an activity sufficiently personal in nature and significant enough in nature and time to effectively take the worker out of the course of employment. There is no evidence that either Mr. Bechard or Mr. Bramham were engaged in any personal activity that would fit that description. Rather, they were doing precisely what would constitute normal activities in a parking lot that is part of an employer's premises: Mr. Bechard was walking on the employer premises to get to his vehicle, and Mr. Bramham was driving to exit the employer's parking lot.

[40] Neither of the exceptions applies. Accordingly, under the *prima facie* rule that where an accident occurs on the employer's premises the worker is in the course of employment, Mr. Bechard and Mr. Bramham were both in the course of their employment.

[41] I will briefly address some other arguments raised by the respondent.

[42] The respondent sought to rely on the Board's policy on travelling, OPM Document No. 15-03-05. However, that policy makes it clear that workers are "travelling" when they have either not yet reached, or have left, their employer's premises. This policy only comes into play in circumstances where the answer to the first question – did the accident occur on the employer's premises? – is negative. I have found the accident did occur on the employer's premises. Neither of the two individuals would be "travelling" to or from work until they left the Honda Alliston assembly compound. This case is not a travelling case and the travelling policy does not apply.

[43] The respondent cited a number of Tribunal cases which deal with malls or plazas where employees parked in the mall or plaza lot (e.g., *Decision No. 755/02*, 2002 ONWSIAT 1488 and *Decision No. 1058/1,* 2012 ONWSIAT 651*; Decision No. 1827/08*, 2008 ONWSIAT 2441). As I have noted above, this case is not a mall or plaza case, and in my view the particular plaza and mall decisions cited by the respondent are distinguishable on that factual basis.

[44] I have considered other cases cited by the respondent but I do not find them persuasive in the current application. In *Decision No. 1289/97*, 1998 CanLII 17279 (ON WSIAT), it does not appear that the employer exercised any direction or control over the employee parking. In *Decision No. 624/13,* 2013 ONWSIAT 1007, it also found that the employer had no particular arrangement or rights regarding the parking lot in question. None of the other decisions cited have facts that are on all fours with the current case. In submissions the respondent particularly emphasized *Decision No. 186/18,* 2018 ONWSIAT 2864. In that case, the worker was working on another employer's premises and slipped in that other employer's parking lot. While the facts are not described in detail in the reasons, it appears to me that the facts of that case are different than in the current application. I do not find this a persuasive authority in relation to the facts before me.

[45] I would also observe, more broadly, that in my view older cases, certainly those prior to 1998, must be viewed with caution. More recent Tribunal case law regarding "in the course of employment" has placed greater emphasis on Board policies. In addition, the law has evolved considerably.

[46] To summarize my findings in this application: Mr. Bechard and Mr. Bramham were both workers of the same Schedule 1 employer. They were on their employer's premises at the time of the accident, as their employer's premises included the parking lot in which the accident occurred. Pursuant to OPM Document No. 15-03-03 and OPM Document No. 15-03-04, together with Tribunal case law, Mr. Bechard and Mr. Bramham were thereby *prima facie* in the course of employment. Neither had engaged in any particularly personal activity to remove them from the course of employment. Both had just finished their work shift about 10 minutes earlier, and neither took any detour or departure from the activity of leaving the plant building to go to their cars and drive off the employer's premises (the Honda Alliston facility). Both Mr. Bechard and Mr. Bramham were in the course of employment at the time of the accident for the purposes of the WSIA.

DISPOSITION

[47] The application is granted. The plaintiff/respondent Mr. Bechard's right of action against the defendant/applicant Mr. Bramham is taken away by section 28 of the WSIA.

[48] Mr. Bechard is entitled to claim benefits under the WSIA.

DATED: December 30, 2021

SIGNED: K. Jepson