NOVA SCOTIA COURT OF APPEAL

Citation: Puddicombe v. Nova Scotia (Workers' Compensation Board), 2005 NSCA 62

Date: 20050408
Docket: CA 232210
Registry: Halifax

Between:

The Nova Scotia Department of Transportation and Public Works

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, The Workers' Compensation Board of Nova Scotia and William Puddicombe (Worker)

Respondents

Judges:	Roscoe, Cromwell and Hamilton, JJ.A.
Appeal Heard:	March 22, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	Dale Darling, for the appellant Alexander MacIntosh, for the respondent Nova Scotia Workers' Compensation Appeals Tribunal Madeleine Hearns, for the respondent, The Workers' Compensation Board of Nova Scotia Anne Clark and Kenneth LeBlanc, for the respondent, William Puddicombe Attorney General of Nova Scotia not appearing

Reasons for judgment:

I. INTRODUCTION:

[1] Mr. Puddicombe is a snow plow operator. Early one morning, he was called in to plow and salt the roads which, as a result of an unexpected snow storm, were thick in snow and slush. On the way to his base, his car slipped off the road. He was injured and claimed workers compensation benefits. To be eligible, his injury by accident had to be one that arose "out of and in the course of" his employment as provided for in s. 10 of the **Workers Compensation Act**, S.N.S. 1994-95, c. 10 ("**WCA**"). The Board's benefits administrator, a hearing officer and the Workers' Compensation Appeals Tribunal ("WCAT") all decided that it was. The employer now contends on appeal that they all were wrong and that this Court should reverse their decision.

[2] In my view, WCAT stated and applied the correct legal principles and its application of them to the particular facts of this case was reasonable. We ought not, therefore, to interfere and the appeal should be dismissed.

II. OVERVIEW OF FACTS AND PROCEEDINGS:

[3] As a snow plow operator, Mr. Puddicombe was an hourly paid employee whose paid employment began when he arrived at his base and punched in to work. Getting to work and paying the costs of doing so were his responsibility.

[4] During the winter season, Mr. Puddicombe was on call 24 hours a day. However, on the date relevant in this case – April 29, 2002 – the winter season was over. Outside the winter season, if he were needed at work before the beginning of his scheduled shift, he would be called in on the basis of seniority. He was not required to go to work, but if he accepted the call in, he had to be at work within 30 minutes and was paid overtime from the time he punched in.

[5] As a result of an unexpected snow storm, Mr. Puddicombe was called in to work at about 5:00 a.m. on April 29, some two hours before his scheduled start time. Twelve crews were called in, suggesting that the roads were a mess. They were needed to salt and plow the roads which had accumulated inches of wet snow and slush. Of course, a snow storm (regrettably even in late April) is a normal occurrence in Nova Scotia and so cannot be

considered an unforeseen emergency. Nonetheless, the work is urgent so the roads can be cleared as soon as possible.

[6] On his way into work, as he was driving down a mountain at about 25 kilometres per hour, Mr. Puddicombe's car slid off the road due to the slippery conditions. He was injured and claimed workers' compensation benefits. The Workers' Compensation Board had to decide whether his injuries arose "out of and in the course of" his employment as they must to be compensable under the **WCA**.

[7] Mr. Puddicombe's claim was at first denied by a Board benefits administrator. She decided that his work day did not start until he reached the work site and that, therefore, an injury on the way to work, and before the work day started, was not an injury arising out of and in the course of his employment. However, the benefits administrator reconsidered this decision and reversed it. She found that the worker had been injured "... in the course of action taken [in] response to instructions from the employer ..." and because of the need for him to start work early as a result of an unpredicted snow storm. These factors, she concluded, provided sufficient evidence to warrant a finding that the injury arose out of and in the course of employment.

[8] The employer appealed unsuccessfully to a hearing officer. The hearing officer acknowledged that it is generally accepted that workers travelling to and from work are not in the course of their employment. However, she reviewed some authorities setting out exceptions and qualifications to this general rule. She concluded that Mr. Puddicombe's situation fell within the exception for workers responding to emergency situations: it was urgent that the roads be cleared and the storm had not been predicted. This, she found, met the definition of an emergency because the storm was "a sudden juncture demanding immediate action."

[9] The employer appealed, again unsuccessfully, to WCAT. The appeal commissioner, who found that Mr. Puddicombe's injuries arose out of and in the course of his employment, relied on two main points. First, he found that there was a close nexus between Mr. Puddicombe's work and the risk of injury in a motor vehicle accident resulting from poor road conditions. Second, he found that the snow storm constituted an emergency or a situation of urgency: the worker and others were called in to work early because the existing snow removal capacity was not sufficient to ensure safe roads by the start of the work day. The appeal commissioner summed up his conclusions this way:

> In the circumstances of the present appeal, the Worker was called to work outside of his normal work hours, to address the urgent situation of a snowstorm in progress. The Worker was obligated to reach his place of employment within a half an hour. It is fair to infer the Worker faced risks not faced by the general public, given that he was called to work at approximately 5 a.m., before snow removal would have been fully underway. Moreover, the Employer asked the Worker to work early precisely because a snowstorm was in progress; driving in such a snowstorm exposed the Worker to a particular hazard. In the light of all the various circumstances, it is fairly clear-cut that the Worker's motor vehicle accident (sliding off the road due to a snowstorm) on April 29, 2002, while proceeding to work constituted a compensable incident.

[10] The employer was granted leave to appeal to this Court on consent.

III. ISSUES:

[11] The appeal raises two questions: what is the appropriate standard of judicial review of WCAT's decision and whether, judged by that standard, WCAT made a reviewable error.

IV. ANALYSIS:

1. Standard of review:

a. The positions of the parties:

[12] The parties disagree on the standard of appellate review that we should apply to WCAT's decision. The employer submits that the standard should be correctness: there is a right of appeal from WCAT to this Court on questions of law and the point at issue is one of statutory interpretation which is a question of law. Mr. Puddicombe, on the other hand, submits that the appropriate standard of review is reasonableness. He characterizes the issue as involving the application of legal principles to the particular facts of his case. This, he submits, is a mixed question of law and fact with respect to which WCAT, a specialized tribunal, is entitled to a measure of deference.

b. Overview of conclusion on standard of review:

[13] Both of these submissions are partially correct. In deciding whether a particular injury by accident arose out of and in the course of a worker's

employment, WCAT must do two things. First, it must determine the legal principles to be derived from the statutory requirement; and second, it must apply those principles to the particular facts and circumstances of the worker's employment and injury. In my view, for reasons I will develop, WCAT must be correct when it determines the applicable legal principles, but when it applies them to the facts, its decision is one of mixed fact and law which, in my view, should be reviewed on the reasonableness standard. I will explain.

[14] The standard of review is determined by resort to the pragmatic and functional approach. Ultimately, the question is of the intention of the Legislature with respect to the relative roles of the courts and the tribunal in making decisions required under the statute. Determining that intent is an exercise in statutory interpretation which must pay due regard to the statute's text, purpose and context. Four factors must be considered and I will review them briefly.

c. Mechanism for review:

[15] The first is the statute's provisions relating to judicial review. This is obviously a good place to start an analysis of what the legislature intended to be the respective roles of the courts and the tribunal: such provisions, when present, may address this issue expressly or at least provide strong clues respecting legislative intent.

[16] Here, there is an appeal from WCAT to this Court (with leave) on questions of law and jurisdiction but not on questions of fact: **WCA**, s. 256. There is no privative clause in relation to such questions of law or jurisdiction. The existence of this right of appeal, while only one factor, tends to support a more searching standard of judicial review with respect to questions of law and jurisdiction. Similarly, the absence of a privative clause tends to support the same conclusion. However, it by no means follows from the existence of a right of appeal and the absence of a privative clause that the correctness standard applies to all questions of law: see **Halifax Employers' Association v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [2000] N.S.J. No. 216 (Q.L.) (C.A.). All of the contextual factors must be considered and the indications which emerge must be balanced.

d. Relative Expertise:

[17] The second factor is concerned with the relative expertise of the Tribunal and the Court in relation to the questions in issue. Analysis of this factor has

three dimensions: the court must characterize the expertise of the tribunal, consider its own expertise relative to that of the tribunal, and identify the nature of the issue before the tribunal in relation to that expertise: **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 at para. 33; **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at para. 28. The question of relative expertise is closely inter-related with the third and fourth contextual factors, the purpose of the legislation and the nature of the problem: see **Pushpanathan** at pp. 1007-8. I will make some initial observations concerning relative expertise now, but will also return to this factor while considering the other two.

[18] There are various ways in which tribunals may be said to have expertise. Here, the tribunal consists generally of lawyers who acquire expertise in workers' compensation matters through the continual exercise of their specialized functions. As I said, in **Halifax Employers' Association** at para. 49, WCAT is highly specialized, dealing on an ongoing and day-to-day basis with the interpretation and application of the **Act** and Regulations, and policies made under it. Courts, too, however, have considerable expertise in deciding questions of law and in interpreting statutes. While I do not think that, in general, WCAT has markedly greater relative expertise with respect to legal questions arising under the **WCA**, the tribunal's specialized functions, in my view, support a measure of deference with respect to certain types of legal questions falling squarely within the tribunal's specialized functions.

e. Purpose of the legislative scheme:

[19] The third factor is the purpose of the statute. In general, "[a] statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court ...": **Dr. Q.** at para. 31. Broad discretionary powers tend to command increased deference and the "... breadth, specialization, and technical or scientific nature of the issues..." are highly relevant considerations. On the other hand, the "... more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the

tribunal, the less deference the reviewing court will tend to show...": **Dr. Q.** at para. 32.

[20] The functions of WCAT tend to be similar to the adjudicative functions of courts. WCAT resolves particular disputes through adjudication. However, one ought not to lose sight of the fact that WCAT was set up as part of a larger workers' compensation scheme. The overall purpose of workers' compensation legislation is to take decisions about compensation for workplace injuries out of the tort system and out of the courts. Thus, WCAT's role as an adjudicator of particular disputes tends towards less curial deference with respect to jurisdictional questions, general questions of statutory interpretation and the application of general legal principles. However, the overall purpose of the **Act** – getting workers' compensation problems out of the courts – suggests that a measure of deference should be shown in relation to fact specific matters arising in the day-to-day operation of the workers' compensation system.

f. Nature of the problem:

[21] The final factor is the nature of the problem. Pure legal questions tend to militate against deference while pure factual questions tend to favour it. The application of law to facts is a question of law for the purposes of the jurisdiction of the court on appeal, but a more nuanced analysis is required to determine the standard of appellate review.

[22] Generally, for the purposes of determining the applicable standard of appellate review, a problem requiring the application of legal principles to particular facts is a question of mixed law and fact: see, e.g., **Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.**, [1997] 1 S.C.R. 748 at para. 44. The more fact specific the issue and the less precedential value the result will have, the more likely a court should accord the determination a measure of deference.

[23] The question in this case involves the interpretation and application of the statutory requirement that, to be compensable under the **WCA**, the worker must have suffered "... personal injury by accident arising out of and in the course of employment...". In my view, there are three features of this problem which are particularly relevant to the standard of review analysis.

[24] The first is that the statutory requirement is phrased in very broad and general terms. It must be applied in an array of situations. The number of situations is as large as the number of types of jobs which may be done and the types of injures which may be suffered. The number is virtually

limitless. The standard must be applied, for example, to the case of a waitress injured while swimming on the employer's premises on a break (see **New Brunwick (Workers/Workmen's Compensation Board) v. Canadian Pacific Railway Co. Noell**, [1952] 2 S.C.R. 359), a worker living in employer- provided premises in a remote area and who is injured when he slips in the shower (**Winnipeg (City) v. Manitoba (Workers' Compensation Board)**, [1998] 3 W.W.R. 378; [1997] M.J. No. 645 (Q.L.)(C.A.)), a sailor who dies of a perforated ulcer while on board his ship at sea (**Canada Steamship Lines Inc. v. Antenucci** (1991), 37 Q.A.C. 113; A.Q. No 640 (Q.L.)(C.A.)) and a worker who is injured by a medical caregiver while seeking medical attention for a previous workplace injury (**Keddy v. New Brunswick (Workplace Health, Safety and Compensation Commission)** (2002), 247 N.B.R. (2d) 284; N.B.J. No. 91 (Q.L.)(C.A.)).

[25] As a result of the generality of the statutory language and the array of situations to which it must be applied, Courts have generally despaired of reducing the "arising out of and in the course of employment" requirement to a set of rules or even firm guidelines. The requirement has been said to have produced "... a bewildering vagueness in interpretation and conflict in judicial application." (**Noell** at p. 368) It has been said that the "atmosphere of legal subtlety" which has grown up around the judicial interpretation of this requirement may "... defeat the obvious purpose of the Legislature..." to afford a simple and speedy method of claiming compensation. (**Noell**, p. 368). As Viscount Haldane wisely observed in **Charles R. Davidson & Co. v. M'Robb,** [1918] A.C. 304 at 316 (H.L.), in applying the statute to particular facts, efforts should be directed "... to giving effect to broad principles with freedom in applying them to individual circumstances..." rather than trying to search "... for guidance from mere apparent analogies with the particular facts of previous cases, analogies which rarely embody the full truth." More recently, the House of Lords approved the remarks of Sir John Donaldson, M.R. in **Nancollas v. Insurance Officer**, [1985] 1 All E.R. 833 (C.A.) at 840 pointing out that it is not possible to lay down firm rules or even guidelines for the application of this requirement other than the need to look "... at the factual picture as a whole and [to reject] any approach based on the fallacious concept that any one factor is conclusive." (See **Smith (Administratrix of Machin) v. Stages**, [1989] H.L.J. 30 at para. 45)

[26] The second aspect of the problem is that the "arising out of and in the course of employment" requirement must be applied in the particular context of workers' compensation law. Divorced from that context, the requirement that the injury be "in the course of employment" could be viewed as being concerned simply with the employee's contractual duties. The requirement that the injury "arise out of employment" could be viewed as a matter of whether the work caused the injury. However, it is generally accepted that such approaches are too narrow and inappropriate given the workers' compensation context in which the provision must be interpreted.

[27] So, for example, it has been held that the phrase "in the course of employment" does not simply refer to things done pursuant to a contractual duty, but also to things reasonably incidental to the performance of the contractual duty: see e.g. **Noell**. As Lord Denning, M.R. put it with customary panache in **R. v. Industrial Injuries Commissioner**, [1966] 1 All E.R. 97(C.A.) at 102:

> This idea that a duty is necessary is all wrong. It does not stand with the decision of the House of Lords itself in *Armstrong, Whitworth & Co. v. Redford*, [1920] All E.R. Rep. 316, where there was no duty on the young woman to go to and from the canteen, yet she was held to be in the course of her employment. Nor does it stand with the decision of the Court of Appeal in *Knight v. Howard Wall, Ltd.*, [1938] 4 All E.R. 667, where a boy, who was having his midday meal in a canteen, was injured by a dart. There was no obligation on him to go there. Yet it was held to be in the course of his employment. In *Harris's* case Lord Atkin made it clear that a duty is not necessary, [1938] 4 All E.R. at pp. 835, 836:
>
> > "There are many things done which the workman is not obliged to do, for he is given a complete discretion as to what to do and where (within limits) to do it - as, for instance, in the case of gamekeepers, and often gardeners. Accidents happen to workmen when taking their meals or in other respects not pursuing for the moment their employment."
>
> Nevertheless it is in the course of the employment. ...

[28] Similarly, courts have rejected the simple transfer of common law causation principles to the "arising out of employment" requirement. In remarks approved by the Supreme Court of Canada, Donald, J.A. said in **Kovach v.**

British Columbia (Workers' Compensation Board), [1999] 1 W.W.R. 498; [1998] B.C.J. No. 1245 (Q.L.)(C.A.); [2000] 1 S.C.R. 55:

> No single theory of causation can be said to be infallible or universally applicable. What works for a tort system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system.

[29] The third aspect of the problem is that it is one that lies at the root of the entire statutory scheme. The "arising out of and in the course of employment" requirement is not only the test for recovery of benefits under s. 10 of the **WCA**, but also a key element of whether the bar of civil proceedings under s. 28 applies. Thus, the requirement is at the very centre of the historic trade off of the employee's no fault benefits for the right to sue and the employer's freedom from civil actions for the obligation to contribute to the accident fund. As Sopinka, J. observed in **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at 915, this issue relates intimately to the purposes and structure of the workers' compensation system.

[30] I would conclude that the nature of the problem before the Tribunal informs the standard of review analysis as follows. It suggests that the broad principles to be deduced from the statutory requirement are matters of general law, but that these guiding legal principles must of necessity be of a highly general character. Courts should be leery of attempting to rule this area at anything other than the level of general principle. History does not bode well for success in generating detailed rules or guidelines. Beyond those general, guiding principles, the application of the "arising out of and in the course of employment " requirement is a fact-driven exercise which must be undertaken in light of the broad policies and purposes of the workers' compensation system. When WCAT is operating in that sphere, the nature of the exercise supports a measure of deference to that highly specialized tribunal.

g. Conclusion on standard of review

[31] On standard of review, I would conclude that in determining the applicable, broad legal principles to be deduced from the statutory requirement, WCAT must be correct. However, when applying those broad legal principles to the facts of a particular case, the outcome should be reviewed on the reasonableness standard.

2. The Applicable Legal Principles:

[32] The appellant submits that WCAT was wrong in point of legal principle. The error, it is submitted, consists of relying on a text book statement which is not supported by authority, applying principles developed in clearly and materially different cases to this one and by relying on an Ontario board policy which does not apply in Nova Scotia.

[33] I do not accept this characterization of WCAT's reasoning and would conclude that it did not err in the legal principles which it applied to this case.

[34] It is true that WCAT cited texts, case authorities and the Ontario policy to which it was referred by counsel. However, WCAT pointed out more than once that the question before it was mainly fact-specific. For example WCAT said:

> The question of whether a particular incident constitutes an accident arising out of and in the course of employment is to a great extent fact specific, involving the application of general principles and related exceptions to the particular circumstances.
>
> . . .
>
> ... As I indicated previously, determinations concerning recognition and the flip side to recognition - the statutory bar to a civil action - tend to be fact and situation specific.

[35] As I read the decision, WCAT applied the following principles.

[36] First, it correctly acknowledged that, in general, injuries suffered going to and from work do not arise out of or in the course of employment: **Noell**, **supra**; **New Brunswick (Workers/Workmen's Compensation Board) v. Boissonneault** (1977), 80 D.L.R. (3d) 33; N.B.J. No 182 (Q.L.)(N.B.S.C.A.D.). A number of explanations may be given for this general principle. The work day begins once the employee reaches the work place. The employee is not paid for travel time and therefore it is not part of his or her contract. The risks of getting to work are the same risks that everyone faces and therefore have no special link to the employment context.

[37] Second, WCAT recognized that there are two main aspects of the "arising out of and in the course of employment" inquiry: the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work. As Cameron J.A. succinctly observed in **Gellately v. Newfoundland (Workers' Compensation Appeal Tribunal**) (1995), 126 D.L.R. (4th) 530; N.J. No. 255 (Q.L.)(C.A.) at p. 534 (D.L.R.):

> The words “in the course of employment” refer to the time, place and circumstances under which the accident takes place. The words “arising out of employment” refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received. ...

[38] Lord Atkin in **Blee v. London & North Eastern Railway Co.**, [1937] 4 All E.R. 270 (H.L.) addressed the first of these aspects. In considering whether there was evidence to support the arbitrator’s conclusion that the worker’s injury arose out of and in the course of employment, Lord Atkin looked to the employment duties of the worker and the activity in which he was engaged at the time of the injury in order to determine whether, at the time of the injury, he was actually performing his contract of service: at p. 273. In considering that question, he took into account whether the employee was duty bound to obey his employer’s emergency call and whether he was paid from the time he set out for work: p. 273. The learned Law Lord, however, recognized that the inquiry was not limited to the employee’s contractual duty. He referred to statements that the activity at the time of the accident must be within the discharge of the employee’s duty, directly or indirectly, or something which is a natural incident connected with the employee’s work: at p. 272. The same approach was taken in **Noell** by the Supreme Court of Canada.

[39] WCAT recognized and applied these principles to the facts before it. It reviewed the terms of the workers’ contractual obligations, noting that he was not obliged to accept the call in and was not paid until he arrived at work. It also noted that once he accepted the call in, he was obliged to arrive at work within 30 minutes and would be responding to a request by his employer to work outside his regularly scheduled hours of work. However, and consistent with the governing legal principles, WCAT also recognized that the terms of the contract were not dispositive of the issue and that all relevant factors had to be examined. Specifically, WCAT took into account that Mr. Puddicombe was called in to work outside his normal hours of work to respond to a situation of urgency. I see no error of legal principle in this approach.

[40] The second aspect of the inquiry is concerned with the strength of the link between the injury and the risk created by employment. This was discussed by Rand, J. in **Noell**. He observed, at p. 369 that the purpose of workers’ compensation legislation is to protect employees against the risks to which

they are exposed by reason of their employment. The focus under this approach is not so much on the nature of the job but on the scope of the risk to which the work exposes the employee and the link between that risk and the employee's injury. This aspect relates most clearly to the "arising out of employment" requirement: it is the employment that is seen as creating the risk and the question is whether the injury arises out of that risk. Injuries while travelling to work are generally excluded by this principle because the risks of getting to work are the general risks of life, not risks of employment.

[41] WCAT recognized and addressed this aspect of the inquiry. It observed that there was "... a close nexus between the Employer's course of activity (clearing the highways), and the particular risk to which the Worker was exposed (the motor vehicle accident due to poor road conditions.) In other words, the Worker was asked to undertake additional employment obligations precisely because of the existence of the added risk. But for the dangerous highway conditions, the Worker would not have been asked to attend at work prior to his ordinary start time ... ." WCAT therefore considered the causal link between the risk of employment and the injury, but did not limit its consideration to strict, common law notions of causation. I see no error in legal principle in this.

[42] One must remember that under the **WCA**, there is a presumption that if an accident arose out of employment, it occurred in the course of employment and, conversely, that if an accident arose in the course of employment, it is presumed to have arisen out of employment: see s. 10(4). Thus, the principles relating to the nature of the employment and the scope of employment risk must be assessed and applied in light of these presumptions.

[43] I do not accept the appellant's argument that WCAT somewhat blindly applied text book passages, case authority and an Ontario board policy at the expense of following the text of the statute. WCAT considered the so-called "emergency" exception to the general rule that travel to work is not in the course of employment, but only as an example of how general principles must be applied to specific fact situations. WCAT took into account the urgency of the need for snow plow operators to get to work and this was an appropriate consideration. WCAT properly considered and distinguished relevant case law. It properly rejected the employer's submission that the collective agreement was dispositive of the issue of whether the travel to work was in the course of employment. The Ontario policy was considered as "simply codifying principles which have developed over time, rather than

enacting a new exception." The policy was not treated as binding but simply as an indication of the range of situations that have been recognized in another jurisdiction as being in or outside the course of employment. Contrary to the appellant's submission, WCAT did not treat the Ontario policy as being "automatically available in Nova Scotia." I see no error in legal principle in any of this.

[44] The appellant placed considerable emphasis on a passage from *Halsbury's Laws of England*, 3rd ed. (London:Butterworths & Co. (Publishers) Ltd., (1963)), which was cited with approval in **Boissonneault**. The relevant passage as now found in the current edition of *Halsbury's Laws of England*, 4th ed., vol. 44(2) (London: Butterworths, 1997) at para. 133 is as follows:

> In order for an accident to qualify as an industrial accident for the purposes of industrial injuries benefit, the first requirement is that it must have arisen in the course of employment. This will be so in relation to an accident if it occurs while he is doing what an employee so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time to do that thing. Several factors may have to be considered in any one case, such as time, place, occupation, actions at the time of the accident and whether the employee was acting under orders. As elsewhere in the industrial injuries scheme, there is a large body of guiding case law (under both the existing scheme and the previous workmen's compensation legislation) but ultimately each case must be decided as a question of fact; excessive reliance on previous, apparently similar, reported cases without applying them fully to the findings of fact may be an error of law.
>
> The place of work will normally cover the actual workplace and the access to it, but may not include accidents in a 'public zone', that is an area to which in practice the public have access. Problems may arise with employees who have no normal workplace, work out in the community or are on call.
>
> With regard to the time of the work, an employee may be in the course of employment not only during actual working hours, but also for a certain period before and afterwards.
>
> Even with a relatively wide interpretation of place and time of employment there could still be harsh distinctions drawn if too literal an approach were taken as to what the course of the employment itself covers, and so it has long been recognised that there must be included

> certain activities which are reasonably incidental to the employment itself.

[45] With respect, I see no inconsistency between WCAT's approach and the legal principles as described in these passages from *Halsbury's*.

[46] I would conclude, therefore, that WCAT correctly stated the governing legal principles in relation to the "arising out of and in the course of employment" requirement: it considered the time, place and circumstances under which the accident took place and the link between the injury and the risk created by or related to the employment.

3. Applying the Principles

[47] WCAT's decision turned on its application of these principles to the particular facts of Mr. Puddicombe's employment, accident and injury. It has long been recognized that this is a fact-driven exercise. Lord Atkin said so in **Blee** at p. 273 and Rand, J. quoted authority in **Noell** expressing the same sentiment. For the reasons set out earlier, I would conclude that this aspect of WCAT's decision should be reviewed for reasonableness.

[48] The appellant contends that WCAT's decision is unreasonable. I do not agree.

[49] A decision is unreasonable if it is not supported by any reasons that can stand up to a somewhat probing examination or if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusions it reached. A decision may satisfy the reasonableness standard provided that it is supported by a tenable explanation even if it is not one the reviewing court finds compelling. Not every element of the reasoning must pass this test, provided that the reasons, read as a whole, are tenable as support for the decision: **Southam** at paras. 56 and 79; **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247 at paras. 55-56.

[50] In my view, WCAT's application of the appropriate legal principles to the facts here passes that test. In essence, WCAT reasoned that Mr. Puddicombe was on his way to work outside his assigned hours because he accepted his employer's request to come into work to deal with an urgent situation. That situation was the poor road conditions and he was injured in an accident caused by those same poor road conditions. While it could not be said that he was performing his duties at the time of his injury, it could reasonably be said that he was doing something which was a natural incident

or was directly related to them. It could also reasonably be said that the risk which his call in to work was directed to alleviate -- the snow and slush on the road -- was causally linked to his injury. Thus it seems to me that there is a rational basis for WCAT's conclusion that his injury by accident arose out of and in the course of his employment, even if not everyone may find its reasoning completely persuasive. There is a tenable process of reasoning supporting WCAT's conclusion.

V. DISPOSITION:

[51] I would, therefore, dismiss the appeal but, following the usual rule in tribunal appeals, without costs.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.