DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT DECISION DATE: **June 21, 2023**

WCAT DECISION NUMBER: **A2201558**

WCAT PANEL: **Herb Morton**

RE: Heather Nash, Leah Nash, and Andrew Nash v. Daniel Razvan Popescu, Ezio Bennato, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Infrastructure, Brayden Roy Hirsch, Rebecca Jeannette Hirsch, David Garth Helget and 0568063 BC Ltd., Defendants, and Daniel Razvan Popescu, Ezio Bennato, Brayden Roy Hirsch, Rebecca Jeannette Hirsch, David Garth Helget, 0568063 BC Ltd., Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Transportation and Infrastructure, and VSA Highway Maintenance Ltd., Third Parties
Vernon Registry No. VER-S-M-56222
Certification to Court
WCAT No. A2201558

Applicant: VSA Highway Maintenance Ltd. (Third Party)

Respondents: Heather Nash, Leah Nash and Andrew Nash (Plaintiffs)

Daniel Razvan Popescu (Defendant and Third Party)

Ezio Bennato (Defendant and Third Party)

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Brayden Roy Hirsch and
Rebecca Jeannette Hirsch
(Defendants and Third Parties)

David Garth Helget and
0568063 BC Ltd.
(Defendants and Third Parties)

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Infrastructure
(Defendant and Third Party)

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Representatives:

For Applicant:	Brianna Vickers Whitelaw Twining Law Corporation
For Respondents:	
Heather Nash, Leah Nash and Andrew Nash	Michael J. Yawney, K.C., James D. Cotter and Alexandra L. Severn (Articling Student) Nixon Wenger LLP
Daniel Razvan Popescu	Nigel Trevethan Harper Grey LLP
Ezio Bennato	John MacIver Pacific Law Group
Brayden Roy Hirsch and Rebecca Jeannette Hirsch	Christopher C. Godwin KSW Lawyers
David Garth Helget and 0568063 BC Ltd.	Robert E. Ross Kidston Helm Ross Lawyers LLP
Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Infrastructure	Kenn W.M. Inaya Legal Services Branch Ministry of Attorney General

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] Robert Edwin Nash died as a result of a motor vehicle accident or accidents on Thursday, May 16, 2019, on the Coquihalla Highway (Highway 5) at or near Larson Hill, approximately 30 kilometres south of Merritt, British Columbia. The accident occurred while Mr. Nash was driving home after being in the Lower Mainland to attend a tradeshow as well as attending the offices of his employer, PQ Systems Ltd., in Burnaby, British Columbia. The court action has been brought by his wife, Heather Nash, and his children, Leah Nash and Andrew Nash.

[2] The events on May 16, 2019 involved three consecutive accidents in which car drivers lost control of their vehicles. Mr. Nash stopped his vehicle to provide assistance following the first accident, and was subsequently killed when struck in the subsequent accident and/or accidents. The three accidents occurred on a Thursday, prior to the Victoria Day long weekend.

[3] The first accident occurred when a Nissan Micra (the Micra), which was being driven by Brayden Roy Hirsch (traveling with his wife, Rebecca Jeannette Hirsch as a passenger), lost control and was involved in a collision with a Peterbilt tractor trailer being driven by David Garth Helget.

[4] Mr. Helget was hauling produce from Aldergrove, B.C., to Calgary, Alberta. Mr. Hirsch's employment involved installing hardwood flooring for a contractor in Langley. He and his wife were driving to Alberta on a long weekend, to look at apartments. Mr. Hirsch was planning to attend at the University of Alberta the following year. Mrs. Hirsch was going to Edmonton for a job interview.

[5] The second accident occurred when a blue Porsche, driven by Daniel Razvan Popescu (traveling with Imarga Pennylou, their family nanny, as a passenger), lost control and struck Mr. Nash and the Micra. Mr. and Mrs. Hirsch and Mr. Helget were also injured in this second accident.

Workers' Compensation Appeal Tribunal

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[6] Mr. Popescu was the chief financial officer for Harbourfront Wealth Management. He and Ms. Pennylou were traveling to a condominium in West Kelowna, which was a vacation home for Mr. Popescu and his family. They were going to open the condominium to prepare it for the arrival of Mr. Popescu's wife and children.

[7] The third accident occurred when a white Buick, being driven by Ezio Bennato, (traveling with his wife, Mrs. Bennato, as a passenger), also lost control., and allegedly struck the Porsche and Mr. Nash. Mr. Bennato was a retired teacher. He and his wife were driving from their home in Surrey to go to the Shuswap area to a cabin or a residence.

[8] It is alleged that the defendant and third party Province of British Columbia (the Province) was the owner of the highways in the Province of British Columbia and was responsible for the design, supervision, and maintenance of the highways. It is alleged that the third party, VSA Highway Maintenance Ltd. (VSA), had a contract with the Province to provide highway maintenance and service for the area of the highway where the collision occurred.

[9] Where an action is commenced based on a disability caused by occupational disease, a personal injury, or death, a party or the court may ask the Workers' Compensation Appeal Tribunal (WCAT) to make determinations and to certify those determinations to the court. This application was initiated by counsel for the third party, VSA, on July 19, 2022. Transcripts have been provided of multiple examinations for discovery: David Helget (July 12, 2022), Daniel Popescu (July 12, 2022), Ezio Bennato (July 27, 2022), Brayden Hirsch (September 12, 2022), Heather Nash (September 16, 2022), Andrew Nash (September 16, 2022), Leah Nash (September 16, 2022), Brad Bushill, Ministry of Transportation representative (October 12, 2022), and Bob Gilowski, VSA representative (October 28, 2022). On March 31, 2023, the applicant also provided copies of 19 statements by the parties and several witnesses. The court action is scheduled for trial commencing on September 18, 2023.

[10] Certificates have not been requested in the related court actions brought by Braydon Roy Hirsch and Rebecca Jeannette Barbara Hirsch (Vancouver Registry Nos. VLC-S-M-202021 and VLC-S-M-202022). The defendants/third parties Mr. and Mrs. Hirsch are participating in this application but declined to provide a submission.

[11] The other parties to this court action were invited to participate as respondents. The parties to the related court actions were also invited to participate as interested persons in this application.

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[12] Daniel Razvan Popescu and Ezio Bennato declined to participate as a party or interested person. The following are not participating in this application, although invited to do so as interested persons: PQ Systems Ltd., Champ's Fresh Farms Inc., and D. Helget Trucking Ltd.

[13] The following passengers were not invited to participate as interested persons, as it did not appear that they would be affected by the determinations in this application: Imarga Pennylou (passenger in Daniel Razvan Popescu's car) and Mrs. Bennato (passenger in Ezio Bennato's car).

[14] In a memorandum to the WCAT appeal officer dated March 17, 2023 (which was disclosed to the participants in this application), I noted:

> … please disclose a copy of *Decision No. 252*, "Re: The Scope of Employment". In order to reduce the number of sources of policies, the Board of Directors approved a strategy for consolidating *Decisions No. 1 - 423* into the various policy manuals and "retiring" the Decisions over time. While *Decision No. 252* is no longer policy, it provides relevant background to the current policy at item C3-17.00.
>
> A number of prior decisions have addressed situations in which a worker was injured while providing assistance to a stranger. These include *Appeal Division Decision #97-1051 (Wilson v. Thiessen), WCAT-2006-00119-AD*, *WCAT-2007-02604* (noteworthy), *WCA-2013-01142*, and *A1601379* (noteworthy).[1]

[15] Written submissions have been provided by the following parties/interested persons: VSA Highway Maintenance Ltd.; Heather Nash, Leah Nash and Andrew Nash; His Majesty the King in Right of the Province of British Columbia; and David Helget and 0568063 BC Ltd.

[16] The central 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.

[1] All quotations are reproduced as written, unless otherwise noted.

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Issue(s)

[17] Determinations are requested concerning the status of the following persons, at the time of the May 16, 2019 motor vehicle accidents: Robert Edwin Nash (deceased), VSA Highway Maintenance Ltd., Her Majesty the Queen in Right of the Province of British Columbia, and David Helget.

Jurisdiction

[18] This application was initiated under section 311 of the *Workers Compensation Act* (Act). On April 6, 2020, the Act was reorganized and renumbered under the *Statute Revision Act*, RSBC 1996, c. 440. As the revised provisions have the same effect as the provisions which existed at the time the cause of action arose, the revised provisions apply. Under the *Workers Compensation Act*, RSBC 2019, c. 1, section 10 has been replaced by section 127, and section 257 has been replaced by section 311.

[19] Part 7 of the current Act applies to proceedings under section 311, except that no time frame applies to the making of the WCAT decision (section 311(3)). WCAT is not bound by legal precedent (section 303(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 303(2)). Section 308 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 7 of the Act, including all matters that WCAT is requested to determine under section 311. The WCAT decision is final and conclusive and is not open to question or review in any court (section 309(1)). The court determines the effect of the certificate on the court action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

[20] The policies that apply to this decision are set out in the Board's *Assessment Manual* and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The *Assessment Manual* and the RSCM II were amended, as of April 6, 2020, to use the section numbers and language of the revised Act. The policies that apply in this decision are those that were in effect at the time of the accident, as amended on April 6, 2020 to reflect the revised Act.

Status of Robert Edwin Nash (Deceased)

(a) Background and Evidence

[21] A letter dated December 6, 2019 was provided by Randy Buckoll, president of PQ Systems Ltd., concerning Mr. Nash's employment history. Mr. Nash was employed by PQ Systems Ltd. for 18 years prior to his death on May 16, 2019. Mr. Buckoll advised, in part:

> Rob was our technical products and systems manager and served to support his own territory in BC as well as providing technical support and guidance for others within our company and it's operation in Western Canada. In addition he provided marketing plans, insight and material for new products that developed along the way….
>
> Like others at his level within our company Rob was paid a monthly salary and commission as well as a yearly bonus…. As well he was provided a monthly car allowance of $450.00 and all of his fuel costs were paid for by the company. He was expected to provide forty hours a week but I can assure you that of his own volition typically provided much more. Rob had a four week per year vacation entitlement and a summary of his company benefit package is enclosed.

[22] Photographs have been provided of the Toyota Tacoma which was being driven by Mr. Nash on the day of the accident. These show that there were decals on the side windows of the canopy on the back of the truck, bearing the name PQ Motion Control.

[23] Mrs. Nash submitted an application for workers' compensation survivor benefits dated June 19, 2019, in relation to Mr. Nash's death in the May 16, 2019 accident. An employer's report of injury was provided to the Board by PQ Systems Ltd. The employer advised that Mr. Nash was employed as a tech support sales engineer. The accident occurred on the Coquihalla Highway, south of Merritt near Larson Hill. The accident occurred during Mr. Nash's normal shift, and his actions at the time of injury were for the purpose of the employer's business.

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[24] In a telephone memorandum dated July 22, 2019, a case manager, Special Care Services, noted the following based on a telephone call with the employer:

> They work in sales – and are distributors of machine automation and motion control sensors. Mr. Nash lived in Salmon Arm. He was in the Vancouver area (staying in Burnaby) to attend a tradeshow in Abbotsford). He arrived in Vancouver on Tuesday. The trade show was on Wednesday. He had business in the Burnaby office on Thursday after which he was heading back to Salmon Arm. The incident happened when he was on the highway back to Salmon Arm… Randy noted that Mr. Nash had been with them as an employee for 18 years plus one day

[25] The Board case manager requested assistance from the Board's Field Investigations Department, in obtaining a copy of the police report concerning the accident from the Royal Canadian Mounted Police (RCMP). The following summary was provided:

> On May 16, 2019, at approximately 17:30 hours, driver 1 and passenger 1 were travelling north on Highway 5, in a Nissan car. The Nissan collided with a north bound semi-truck, without injuries being incurred. The driver of the semi-truck, driver 2, and the driver of the Nissan exchanged information. Robert NASH stopped to assist and was going to provide a ride for driver 1 and passenger 1.
>
> During this time, a Porche car driven by driver 3 with passenger 2, lost control of the car in the rainy weather and wet roads. The Porche collided with the concrete barrier, and then hit the Nissan car. NASH was struck by the Porche, and driver 1 and passenger 1 were struck by the Nissan. NASH was thrown into the far north bound lane.
>
> Another northbound vehicle, a Buick car driven by driver 4 with passenger 3, struck the Porche and NASH.
>
> NASH was pronounced dead at the scene. Driver 1 and passenger 1, of the Nissan, were flown to hospital by helicopter with critical life threatening injuries. Driver 2, of the semi-truck, sustained minor injuries. Driver 3 and passenger 2, of the Porche, sustained minor injuries. Driver 4 and passenger 3, of the Buick, were not injured.

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[26] In a decision memorandum dated September 18, 2019, the case manager summarized the background facts and evidence as follows:

> In considering this claim I have reviewed the following facts and evidence:
>
> - Mr. Nash worked as a Tech Support Engineer for the employer: PQ Systems.
> - He was visiting the Vancouver area from his home in Salmon Arm, B.C. for the purposes of a business conference.
> - His spouse, Heather, has submitted an application for survivor benefits dated June 27, 2019.
> - A Field Officer has surmised a report from the RCMP and this has been reviewed and placed to file; this document notes the following in regards to what occurred:
>
> - He was returning from this business conference and traveling in his vehicle along Highway 5 to Salmon Arm, B.C. on May 16, 2019.
> - Mr. Nash came across the aftermath of a collision south of Merritt when he stopped to assist the individuals involves, including offering to take them to hospital.
> - While he was assisting, Mr. Nash was fatally injured by an oncoming vehicle which had lost control.
> - Mr. Nash was deceased at the scene, which was visited by paramedics and RCMP.
>
> - The representative on file confirmed that Mr. Nash had stopped with the intention of providing assistance and transporting the victims of the prior accident to hospital.

[27] The case manager reasoned, in part:

> Given the circumstances as summarized, I have considered policies noted above, including: *business trips.* I accept that Mr. Nash had travelled to the Vancouver area for the purposes of his work – and that, as outlined in policy: *an employment connection generally exists continuously during a business trip*. Mr. Nash' traveling to the business conference required the use of his vehicle.

> However this policy also notes the possibility that, during a business trip, an employee may make a "distinct departure" – which is characterized as *more than a brief and incidental diversion.* These types of departures may fall outside of the scope a worker's employment.
>
> *Policy #17.00 Deviations from Employment,* as indicated above, also explains an occurrence whereby *something was unauthorized by the employer, the employer condoned an unsafe practice, or some emergency forced the worker to act.*
>
> Mr. Nash stopped his vehicle in order to provide assistance to those who had been involved in a collision. It was his intention to provide transportation to the victims of the prior accident to hospital.
>
> I find that these circumstances would be most similar to an emergency which forced him to act, or which caused him to act on the basis that he would be helpful to others; it may also be consider an action which the employer would consider unauthorized. While a commendable and selfless act, attending to a scene of an accident to provide assistance does not fall within Mr. Nash's employment type.
>
> Based on available information, I must conclude that Mr. Nash's actions would be consistent with a distinct departure from his work and a deviation from his employment pursuant to *policy C3-17.00 Deviations from Employment.*
>
> Unfortunately, the circumstances surrounding his death do not meet the test under Policy C3-14.00 of the *RSCM, Vol. II.* The cause of the worker's death does not meet the test of employment causation and therefore I find that the requirements of *Section 5(1)* of the *Workers Compensation Act* ("*the Act*") have not been met….

[28] By decision dated September 24, 2019, a case manager, Special Care Services, denied the claim for survivor benefits. The case manager concluded that Mr. Nash's death did not arise out of and in the course of his employment. The case manager noted that Mr. Nash was a traveling employee, and that he was on a business trip.

[29] The case manager found, however, that Mr. Nash's actions, in stopping to provide assistance at the scene of an accident, involved a distinct departure of a personal nature from his employment.

[30] Heather Nash provided evidence in an examination for discovery on September 16, 2022. Robert Edwin Nash was her husband (Q 6). At the time of the May 16, 2019 accidents, they resided in Salmon Arm (Q 12 to 13). They had two children (Q 34). At the time of the accidents, Mr. Nash had been employed by PQ Systems for 18 years (Q 47). His work involved both selling motion systems and designing the systems (Q 50). Mr. Nash was required to travel for his work (Q 51). With respect to the frequency of such travel, Mrs. Nash explained (Q 52 to 54):

> A It did vary throughout the year. On average I would say he was usually gone two or three days of a week, maybe two weeks of a month.
>
> Q I'm sorry, there was just a little bit of interference there. You said he was gone two to three days?
>
> A Of a week. Probably on average about two weeks in a month, but it did fluctuate.
>
> Q So that would be on average about, like, four to six days a month he was gone?
>
> A Yes. Sometimes more, sometimes less.

[31] Mr. Nash worked the remainder of his work time from home (Q 55). On an average day, he would work from 8:00 a.m. to 4:30 p.m. (Q 57). He reported to Randy Buckoll, the owner of PQ Systems (Q 58). PQ Systems was based in Burnaby, British Columbia (Q 62).

[32] Mr. Nash's travel for work could be anywhere in Canada. His travel was mostly in British Columbia, as well as Saskatchewan. He sometimes traveled to the United States. (Q 63).

[33] Mr. Nash received a salary (Q 64). The larger part of his remuneration was commission-based (Q 65). His company provided him with a car allowance (Q 179). He drove a Toyota Tacoma (Q 182). Mrs. Nash had her own vehicle, a 2015 Toyota Highlander (Q 185). In addition, they had a 2007 four-by-four camper van (Q 187).

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[34] Mr. Hirsch provided a signed statement on July 16, 2019, in which he described the circumstances regarding the accidents on May 16, 2019. He described his interactions with Mr. Nash following the first accident as follows:

> Our car was not drivable, and was sitting diagonally in the right lane. A middle-aged man in a pickup truck pulled over and put his hazards on. He introduced himself to us, but I can't remember his name. He talked us through pulling our car over to the side of the road as much as possible and he suggested I put the hazards of my car on. I exchanged insurance information with the semi-truck driver. We put our bags in the bed of the pickup truck; the passerby had kindly offered to drive us to the next town, Merritt, where we might be able to sort things out. We were standing on the side of the road, on the far side of our car, away from ongoing traffic, for a few minutes, before the next collision….

[35] Brayden Roy Hirsch provided evidence in an examination for discovery on September 12, 2022. He was involved in a motor vehicle accident on May 16, 2019, at or near Larson Hill on Highway 5, when his vehicle collided with a semi-truck and trailer and became disabled (Q 6). This was the first collision (Q 7). His vehicle, a Nissan Micra (the Micra), was subject to a second collision (Q 8 to 9). At the time of the second collision, he was standing outside his Micra, on the side of the road (Q 9).

[36] Following the first collision, Mr. Hirsch was in a little bit of shock (Q 77). Mr. Nash, who was passing by, pulled over, and talked Mr. Hirsch and his wife through moving the Micra over as far as possible to the right along the barrier so that it was out of the way (Q 77, 90). The Micra had spun 180 degrees, and was parked facing the oncoming north-bound traffic (Q 60, 84 to 87). Mr. Hirsch explained (Q 95):

> He was quite aware that we were in a dangerous situation and that we should just get the vehicle to be as little of a hazard as possible and then get out of there, which is essentially what happened.

[37] Mr. Nash stopped his car within a couple of minutes following the first accident (Q 89). Mr. Nash was driving a Toyota Tacoma pickup truck with a canopy on it (Q 91). Mr. Hirsch was outside of his vehicle by the time Mr. Nash stopped (Q 93). The Micra was not driveable after the accident, apart from moving it a foot or so in order to get out of the way of traffic as much as possible (Q 99). Mr. Nash's vehicle was parked further down (north) of where the Micra had stopped (Q 121).

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[38] Mr. Nash was providing assistance to Mr. Hirsch and his wife following the accident (Q 124). Mr. Hirsch noted (Q 125):

> Q Did you have any discussions with Mr. Nash prior to the second collision occurring?
>
> A We were exchanging insurance information with the, with the semi-truck driver and we were not having discussions so much as okay quick I will grab the bags, you know, we were making a plan.

[39] Mr. Hirsch had grabbed the bags from his car, and Mr. Nash was going to drive Mr. and Mrs. Hirsch to Merritt (Q 132 to 133). Mr. Hirsch had placed their bags in the back of Mr. Nash's truck, prior to the occurrence of the second accident (Q 134 to 137). Mr. Hirsch advised that he was not injured in collision number one, but was injured in collision number two (Q 169).

[40] David Helget provided evidence in an examination for discovery on July 12, 2022. He advised that Mr. Nash stopped his vehicle and attended the accident scene within minutes after Mr. Helget went up to the Micra (Q 139 to 140). After Mr. Nash arrived, Mr. Helget returned to his vehicle to get his insurance papers and then came back to the Micra (Q 154). Approximately 20 to 30 minutes passed between the first collision and the second collision (Q 27, 291). Mr. Helget advised there was a steady flow of traffic (Q 53 to 54):

> A Northbound in the direction I was going, it had kind of thinned out a little bit from getting out of Hope and getting up onto the Coq[uihalla] I mean, it was still steady traffic, but not bumper to bumper by any means.
>
> Q Were there always vehicles around you in the sense of beside and in front and behind, as far as you recall?
>
> A Yes. But, like I say, not as close as you would assume on a holiday weekend. It was relatively quiet.

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[41] Mr. Nash initially pulled his vehicle over in the slow lane close to where the Micra was stopped (Q 141 to 144). Mr. Helget acknowledged that the police photo showed Mr. Nash's vehicle further north of the Micra. Mr. Helget commented (Q 145):

> I seen those photos as well. What had taken place was he had offered to give the couple a ride to Merritt. And at that point, I believe he pulled his pick-up past the - - the Micra to load their stuff into the back of his pick-up.

[42] Mr. Nash moved his vehicle to a point at which he was between the Micra and Mr. Helget's tractor unit (Q 161). When the Hirschs went to the back of the Micra to get some of their belongings, Mr. Nash provided his contact information to Mr. Helget as a witness (Q 171).

[43] Mr. Helget advised that at this point, 15 to 20 minutes had passed since the first collision (Q 184). Mr. Helget was standing with the Hirschs in front of their vehicle (Q 180 to 181). Traffic was going by (Q 185). No other vehicles stopped to assist (Q 186). Vehicles were able to pass through the collision scene in the centre and fast lanes going north (Q 188). Mr. Helget advised that he remembered Mr. Nash walking around back of the Micra, and there was then a horrendous crash and Mr. Helget lost consciousness (Q 190, 198 to 199). When he regained consciousness, he saw that Mr. Hirsch's legs were trapped under the Micra, and Mrs. Hirsch was unconscious (Q 207 to 209). Mr. Helget advised that he regained consciousness just in time to see a white vehicle run over a body in the middle of the road (Q 212 to 213). This occurred approximately 30 seconds after he regained consciousness (Q 282).

[44] Mr. Helget described the situation following the three accidents as follows (Q 221):

> Chaos. People running all over the place. The people heading southbound had stopped on their side. A nurse had come over and was tending to the body of the person that was just run over by the white vehicle. And the police showed up …

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[45] There was a concrete barrier at the side of the road (Q 91, 101 to 102, 114 to 115, 116, 120, 155). Mr. Helget advised that there was a 6-inch space between the edge of the white line and the bottom of the concrete barrier (Q 179). At the time of the second collision, he and the Hirschs were standing in that 6-inch space. He advised (Q 178 to 179):

> Q Was there a fog line there? A white fog line between the no post and the slow lane?
>
> A Yeah, it's about 6 inches from the bottom of that no post. The no post sits on the pavement, shoulder. So it's - - the fog line is really close to that no post.
>
> Q So the fog line at that point is only 6 inches wide?
>
> A No, it's a 6-inch space between the edge of the white line and bottom of the concrete barrier.

[46] Mr. Helget advised that at one point they stepped over the no post and stood on the other side of the concrete barrier (Q 292):

> Q Okay. So in that 20 or 30 minutes while you're standing in the slow lane, was there any discussion about stepping over the no post and being on the other side of the barrier?
>
> A Oh, we did at one point, yes.

[47] However, they needed to obtain their insurance documents to exchange information. They went to the front of the vehicle so as to have something to write on (Q 293). He explained (Q 294):

> A I think we were still getting our bearings, and we thought maybe we would be better off on the other side. But on reality, once you get on the other side, there's not much room to stand. It's - - it kind of drops off shortly right there.
>
> Q But you were all able to stand on the other side of the - - the no post?
>
> A Yeah, [indiscernible], like, three in a row. You wouldn't be able to fit two people.

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[48] Daniel Popescu provided evidence in an examination for discovery on July 12, 2022. At the time of the accident (the second collision), he was driving a metallic blue 2016 Porsche Cayman GT4 sports car (Q 37). He felt the car lift and the tires no longer having grip, and the car headed from the left lane to the concrete barrier at the right side of the three lane highway heading north (Q 307 to 310). Mr. Popescu advised (Q 397):

> … Just before I hit the barrier, through the left side of my eye, I could see on - - in the left lane - - sorry, the far right lane people and a car. Then I felt like I hit something with the left side of my car, and then the car spun around after hitting the other car either to the right or to the left….

[49] He advised that approximately five seconds after his vehicle came to a stop, it was struck by a white car (the third collision) (Q 399, 404). Mr. Popescu's evidence was that prior to the third collision, he saw Mr. Nash on his back on the ground but still breathing (Q 421 to 423) and that he saw the white car drive over Mr. Nash prior to colliding with Mr. Popescu's vehicle (Q 433, 445).

[50] Ezio Bennato provided evidence in an examination for discovery on July 27, 2022. At the time of the accident (the third collision), he was driving a 2011 while Buick Regal (Q 36). Mr. Bennato saw a blue car in front of him and he could not figure out what the car was doing. Mr. Bennato started to brake and his car began fishtailing and ended up colliding with the blue car (Q 90, 96 to 100). Mr. Bennato had no recollection of seeing or running over a body on the highway (Q 206 to 208).

[51] A copy has been provided of a transcription of a telephone statement provided to the RCMP by Darren Svenson on July 20, 2019. Mr. Svenson was a motorist who drove by the scene of the accident on May 16, 2019. Mr. Svenson was traveling with his wife and two children. Mr. Svenson saw the blue Porsche lose control. Mr. Svenson was able to weave through the debris following the accident. He saw a person with an injured leg screaming for help. Mr. Svenson was trained in first aid and had a Level 1 first aid kit in his car. He advised:

> … And we were going to stop but it was with the conditions and the kids, I had two small kids in the back. I, and my wife really wanted to help cause that's the type of person she is. And I said, no we got to keep going….
> …So and we knew it was bad. Really bad. So then we just called 9-1-1 and ask, asked for the multiple ambulances and air medi-vac up here cause there were multiple bodies on the ground. And, and it seemed really bad. So we were there for approximately 10 minutes on the phone when

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> we realized that there were multiple people stopping. Uhm and I was on, we're on the phone with 9-1-1 and we said it was just too dangerous for us to stay with our children… And as we're on the phone I looked in my side mirror at, at back at the accident which was quite far but I could actually hear, cause I had my window down, another vehicle came in and collided with the two vehicles on the, on the far uh slow lane shoulder….

[52] Mr. Svenson advised that there was probably an inch of water coming across the road.

(b) Submissions

[53] VSA provided a submission on March 10, 2023. His Majesty the King in Right of the Province of British Columbia provided a submission on March 14, 2023, adopting the submissions of VSA in relation to the status of Mr. Nash at the time of his death. The plaintiffs provided a submission on April 13, 2023. David Helget and 0568063 BC Ltd. provided a submission on April 25, 2023 (but did not make submissions concerning the status of Mr. Nash). VSA provided a rebuttal on May 15, 2023.

(c) Policy

[54] Item C3-14.00 is the principal policy for determining whether a worker's injury arises out of and in the course of the worker's employment. Item C3-14.00 provides that the test for determining if a worker's personal injury or death is compensable is whether it arises out of and in the course of the worker's employment. In applying the test of employment connection, it is important to note that employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment. The test of employment connection has two components.

[55] The component "arising out of a worker's employment", generally refers to the cause of the injury or death. In considering causation, the focus is on whether the worker's employment was of causative significance in the occurrence of the injury or death. Both employment and non-employment factors may contribute to the injury or death. The employment factors need not be the sole cause. However, in order for the injury or death to be compensable, the employment has to be of causative significance, which means more than a trivial or insignificant aspect of the injury or death.

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[56] The component "in the course of a worker's employment", generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment. Time and place are not strictly limited to the normal hours of work or the employer's premises.

[57] In addition to medical evidence, the policy sets out a non-exhaustive list of nine non-medical factors to be considered in determining whether a worker's injury arises out of and in the course of the worker's employment. All of these factors may be considered in making a decision, but no one of them may be used as an exclusive test for deciding whether an injury or death arises out of and in the course of the worker's employment. Relevant factors not listed in policy may also be considered. Other policies in Chapter 3 may provide further guidance as to whether the injury or death arises out of and in the course of the worker's employment in particular situations.

[58] Item C3-19.00, "Work-Related Travel", sets out the general policy concerning travel:

> The general policy related to travel is that injuries or death occurring in the course of travel from the worker's home to the normal place of employment are not compensable. On the other hand, where a worker is employed to travel, injuries or death occurring in the course of travel may be covered. This is so whether the travel is a normal part of the job or is exceptional. In these cases, the worker is generally considered to be traveling in the course of the worker's employment from the time the worker commences travel on the public roadway.
>
> In assessing work-related travel cases, the general factors listed under Item C3-14.00 are considered. Item C3-14.00 is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of a worker's employment.

[59] Additional specific policies from Chapter 3 of the RSCM II are addressed in the reasons below.

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(d) Decisions Concerning Assistance to Strangers

- *Appeal Division Decision #97-1051 (Wilson v. Thiessen)*

[60] The central issue in *Appeal Division Decision #97-1051* concerned the status of the defendant. The plaintiff was injured in a motor vehicle accident on December 12, 1995. The plaintiff was driving a pick-up truck, and struck the back of a logging truck which was stopped on the road. The defendant had been driving the loaded logging truck, and had stopped to render assistance to a motorist whose vehicle had gone off the road in the snow. He advised that he stopped to render assistance to the vehicle in the ditch "simply as a good deed or whatever you want to call it". He did not know the occupants of that vehicle. The defendant intended to hook a cable to the other vehicle to pull it out of the ditch. That decision reasoned:

> … The relevant action or conduct of the defendant in this case relates to the parking of the logging truck on the travelled portion of the road, rather than the further actions of the defendant in actually providing assistance to the other motorist. The accident which occurred could have happened in just the same fashion if the defendant had stopped to inspect his tires or brakes or for some other reason related to his employment.
>
> This is not a situation such as might be encountered where an accident or fire occurred in front of an office building or factory resulting in employees leaving their employer's premises to render assistance. The circumstances of the defendant's provision of assistance to the stranded motorist and the resulting accident in which the logging truck was rear-ended were, in my view, more directly related to the defendant's employment in the operation of the logging truck.
>
> Plaintiff's counsel submits that it was where the trucked was stopped, not the characteristics of the truck itself, which caused the accident. While the accident in this case did not involve the employer's "premises", I find that the hazards relevant to the accident centred on the logging truck and the defendant's driving and parking of the truck. I do not consider that the defendant's conduct, in stopping the truck for the purpose of rendering assistance to another motorist, was such as to remove him from the scope of his employment. I find, therefore, that the action or conduct of the defendant, at the time the cause of action arose, which caused the alleged

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> breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

- *WCAT-2006-00119-AD*

[61] *WCAT-2006-00119-AD* concerned a truck driver. On July 5, 2001, he was driving on River Road when he saw a sinking car in the Fraser River. He parked his truck on the side of the road and attempted to rescue a person in the sinking car. The rescue was unsuccessful and the driver of the sinking car died. The truck driver applied for compensation benefits for post traumatic stress.

[62] A Board officer denied the worker's claim, finding that the worker was not injured through the presence of a hazard of the premises of the employer. Rather, his actions during the emergency situation were clearly one of "a good Samaritan." The worker appealed to the former Workers' Compensation Review Board (Review Board), which denied his appeal. found the worker was simply, by circumstances, at the scene of a tragedy in progress and he responded in a manner that is to be expected of any public minded citizen. There was nothing to connect the employment to the unfortunate incident. The Review Board vice chair denied the worker's appeal.

[63] A WCAT panel allowed the worker's appeal. The WCAT panel cited the policy at item #16.50 of the RSCM I, which provided:

> Where an emergency occurs at a time when a worker is in the course of employment, the worker is considered to be covered if injured when acting to protect a fellow worker or protect the employer's property. If, however, the action is that of a public spirited citizen, she or he would be doing no more than anyone would do, whether or not working for an employer at the time. This cannot be considered to be related to the employment.
>
> However, there is an exception to this general proposition, notably where the injury occurs through the presence of a hazard on the premises of the employer.

[64] The WCAT panel further noted:

> The policy further addresses the situation of workers, whose ordinary work does not involve responding to an emergency, but has the potential:

> Even if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property, **claims may still be accepted from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation. An excellent example of this "positional risk" would be all employees in the various aspects of the operation of an airport.** The Board is of the understanding that, for example, at Vancouver International Airport groups or "teams" are formed to act in cases of emergency. The members of these groups will be drawn from various aspects of the operation and the nature of their specific employment may be totally unrelated to emergency rescue. Baggage handlers or concession operators could not be considered to have as part of their employment the need to react in the event of a crash of an aircraft. Nevertheless, their very presence as employees at the airport places them in the position of being the logical choices to become members of such teams. Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation….
>
> [emphasis added]

[65] The WCAT panel reasoned:

> The sole question before me is whether the worker had temporarily taken himself out of his employment when he parked his truck, got out of his truck and dove into the river to rescue the man in the sinking car. There is no doubt the worker was in the course of his employment and met at least items (b), (d), (f) and (g) in policy item #14.00. It is also the worker's undisputed evidence that he was driving on River Road at approximately 2:20 a.m. when he spotted lights of a sinking vehicle in the river. Although, I do not consider River Road a "remote road," I do take notice of the worker's evidence that there would be no more than three or four motorists driving on that road at 2:20 a.m. In that sense, it might be considered a very quiet road at that time.

> The evidence on file indicates that the nature of the worker's work involves driving on this road throughout the year after midnight. The worker has been driving on this road for the past seven yea[r]s. It does not appear from the file evidence that he ever encountered such a situation before. The sole reason for the worker to be on this road at that very late hour was his employment situation which became the site of an emergency. I am satisfied that he was a worker who, in the ordinary course of his work, was "situated in an environment which by its very nature might become the site of an emergency situation," as noted in policy item #16.50.

- *WCAT-2006-02357*

[66] The worker, a transit operator, claimed workers' compensation benefits for workplace stress. He had witnessed a man assaulting a woman during the course of his shift on February 26, 2005, and stopped the bus he was driving to come to the woman's assistance. He also described several other incidents which had occurred prior to that date. The WCAT panel found that the requirements of section 5.1 of the Act were not met, for awarding compensation for a mental stress injury. The WCAT panel further reasoned, in confirming the denial of workers' compensation benefits:

> … In particular, the worker was not acting to protect a fellow employer or the employer's property when, on February 26, 2005, he stopped his bus to intervene in the assault he saw occurring. Although the worker's description of the incident confirms that the assault resulted in the victim being dragged to a position beside the bus stop where the worker stopped, this occurred only after the worker had pulled into the bus stop and secured the bus. Any stress the worker suffered as a result of the incident did not arise out of and in the course of the worker's employment.

- *WCAT-2007-02604*, *Johnston v. Lemky* (noteworthy)

[67] The plaintiff was injured in a motor vehicle accident on March 18, 2004, while traveling on Highway 97 (Alaska Highway). The plaintiff had stopped his car to provide assistance to individuals whose car had gone into the ditch, and the defendant's vehicle collided with the plaintiff's truck. The WCAT panel found that the plaintiff was a worker who was in the course of his employment in traveling on the Alaska Highway. The central question was whether the plaintiff removed himself from his employment when he stopped to assist the individuals whose car had gone into the ditch. This involved

consideration of item #16.50 of the RSCM II "Emergency Actions". The WCAT panel found that the plaintiff's injuries arose out of and in the course of his employment. The panel reasoned:

> Returning to policy item #16.50, I find that one aspect or principle appears particularly relevant to the situation in this case. The policy states that claims may be accepted "from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation." The policy goes on to state, "Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation." Accordingly, this appears to provide quite a narrow scope for compensation coverage when a worker takes emergency actions. The example provided is of employees in an airport who would become part of a rescue team in an emergency, even though emergency response is not part of their work. In such a case, there appears to be a fairly strong employment connection in any event since an emergency would likely involve risk to clients of the employer and/or other employees and/or the employer's premises. However, the policy states that claims may be accepted in this circumstance "[e]ven if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property." Accordingly, it does not appear that it is the risk to clients, employees or property which provides for coverage of workers who take emergency actions in an employment situation which, inherently, holds risks for emergencies.
>
> **I find that the plaintiff's situation falls between that of employees in an airport who may be required to act in an emergency because of the risks inherent in their employment environment and that of an employee whose employment situation merely puts him in a position to observe an emergency. It is in a gray area but I find that it is closer to the situation of the employees in the airport in that the plaintiff's employment required him to drive late in the evening, through a snow storm, under icy road conditions, on a remote stretch of the Alaska Highway. In my view, this is "an environment which by its very nature may become the site of an emergency situation."** Therefore, I find that the plaintiff's circumstances come within that limited field of coverage for workers who undertake to provide emergency

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> assistance as described in policy item #16.50. **Because the defendant was driving in quite hazardous conditions which could reasonably become the site of an emergency situation and did become such a site, he was covered under the Act while providing emergency assistance.** Accordingly, I find that the accident arose in the course of the employment and I do not find sufficient evidence to rebut the presumption under section 5(4) of the Act.
>
> [emphasis added]

- *WCAT-2008-03818*

[68] The worker, a railway conductor, was at work on August 29, 2007 when he was advised by a previous train crew that a vehicle had gone over an embankment and that there was a possibility there a person was in danger. The worker, after discussion with the locomotive engineer, advised the rail traffic controller by radio of the situation and that he was stopping the train at the site in order to render any possible assistance. He got off the train and went to the site of the vehicle, after which he climbed a steep bank in order to mark the location or flag down any emergency vehicle that may have been dispatched to the scene. While on his way back down the embankment, the worker slipped and twisted his right knee. The WCAT panel confirmed the denial of workers' compensation benefits. The WCAT panel reasoned:

> [20] I find, therefore, as did the EO [entitlement officer] and the review officer, that while the worker's actions were commendable, they would be best characterized as those "of a public spirited citizen" and "no more than anyone would do, whether or not working for an employer at the time." As such, while the nature of the worker's job could result in him being "situated in an environment which by its very nature may become the site of an emergency situation" I find the particular circumstances in this claim do not amount to a "positional risk" as provided for in item #16.50 and the injury sustained while performing those actions would not be considered to have arisen out of his employment.
>
> [21] In arriving at this conclusion, I have also taken into consideration the fact that the previous train crew, who obviously passed the site of the incident earlier, did not feel the situation warranted stopping the train and undertaking further investigations.

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- *WCAT-2012-02166*

[69] The worker was employed as a protection officer at a pulp and paper mill. On April 25, 2011, he accompanied a law enforcement officer in checking an alarm at a nearby commercial property (a grocery store). While doing so, he slipped and fell and injured his right knee. *WCAT-2012-02166* confirmed the denial of workers' compensation benefits, reasoning in part:

> [64] Policy at item #C3-17.00 provides that a worker's injury is not likely to be considered to arise out of and in the course of the employment if the emergency action is that of a public-spirited citizen, where the worker was doing no more than anyone else would do, whether or not working for an employer at the time. In this case, the worker was not responding to a situation which posed a direct threat to the employer's property or to a person associated with the employer's business. While I accept that there is some basis for the worker's view that he was acting to advance his employer's interests, I consider that the worker's actions were more those of a public-spirited citizen. In addition, I view the worker's actions as relating more to his role as an auxiliary RCMP member (a personal interest) than to his employment duties. On balance, I consider that the personal features were predominant, in respect of the worker's decision to accompany the RCMP officer in patrolling a private property to investigate an alarm.

- *WCAT-2013-01142*

[70] This decision concerned an appeal by a worker, who was injured in an incident on December 30, 2011. He was driving his employer's truck, when other truckers advised on the radio that there was a fellow trucker on the side of the road in apparent medical distress. The other truckers had called an ambulance (but did not stop to render aid). When the worker arrived at the scene, the fellow trucker was outside of his truck in the roadway. The worker stopped his truck and upon exiting it, he slipped on some ice and suffered a back strain.

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[71] The WCAT panel found that the worker's injury on December 30, 2011 arose out of and in the course of his employment. The WCAT panel reasoned in part:

> [34] On the facts before me, I accept the worker's evidence that the employer required the worker to have first aid training. I also accept the worker's evidence that the employer's reputation was important. I find that there is insufficient evidence to indicate that the employer specifically prohibited its drivers from stopping to render assistance to other drivers, or that the worker should have reasonably known not to stop. It seems reasonable, given the test in *Faryna v. Chorny* [1952] 2 D.L.R. 354 at 357, that if a worker has first aid training they use it when presented with an emergency situation. The worker's testimony with respect to the employer's views with respect to the importance of reputation further supports my conclusion in this regard.
>
> [35] I am satisfied based upon the evidence before me that this worker was acting in good faith for the purpose of the employer's business when he stopped to assist a third party, for these reasons.
>
> …
>
> [37] I also find as a fact that the worker was not acting as a public spirited citizen and "doing no more than anyone would do" when he stopped to assist the third party. This is clear from the facts before me which indicate that other truckers saw the third party in distress and called 911, but did not stop to assist the third party. I find as a fact that the worker went beyond what anyone else would do when he stopped to assist the third party.

- *WCAT Decision A1601379* (noteworthy)

[72] The worker, a registered nurse, was driving back to her office on September 18, 2015, when she saw an injured person (the victim of a stabbing) lying on the road. The worker stopped and performed cardiopulmonary resuscitation until an ambulance arrived. In the course of doing so, the plaintiff's hands came into contact with the victim's blood. The worker sought workers' compensation benefits. A board officer, and a review officer, found that the worker had removed herself from the course of her employment, and was acting as a public spirited citizen, at the time of the incident which resulted in her exposure to blood. Accordingly, it was not necessary for the entitlement officer or review

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officer to proceed to consider whether the worker's exposure to blood resulted in a personal injury of a physical or psychological nature. On appeal, *WCAT Decision A1601379* found that the worker's exposure to blood arose out of and in the course of her employment.

[73] *WCAT Decision A1601379* reasoned, in part:

> [55] I do not interpret the email responses by the worker's supervisor or manager as indicating that her actions were inconsistent with the scope of her employment. One manager commended the worker, stating that her actions "exemplified all that is beautiful about the commitment we have made to our clients." These comments suggest that the employer's relationship with the community was important to its functioning, and that there was no clear expectation that its personnel would limit their actions during the work day to the provision of assistance to the pregnant women and new mothers who were its direct clients. The manager's comments suggest that while the worker's direct mandate was to provide assistance to pregnant women and new mothers with drug and alcohol issues, it was not seen as inconsistent with this role to provide incidental assistance to other persons in the neighbourhood who were found to be in medical distress. While the comments of a manager are not necessarily representative of the employer's views, they are germane to consideration of the worker's understanding of the scope of her employment.
>
> …
>
> [57] The circumstances of this case are in a grey area. However, based on the facts of this particular case, I am not persuaded that the worker's rendering of assistance to the injured woman should reasonably have been known to the worker to be unauthorized and/or as being outside the scope of her employment. I find that to the extent the worker deviated from her employment, this was not a substantial deviation. Taking into account the nine factors listed in item #C3-14.00, and the additional guidance provided in item #C3-17.00 concerning the application of these factors, I find that the weight of the evidence supports a conclusion that the worker's actions in the incident on September 18, 2015 arose out of and in the course of her employment, and her exposure to blood in

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> that incident similarly arose out of and in the course of her employment. I allow the worker's appeal on this issue.

- *WCAT Decision A2100658*

[74] The worker was employed as a silviculture/first aid attendant. On July 14, 2020, he was travelling in the company pickup with a co-worker who was driving the pickup. His co-worker noted a car in a ditch on the side of the road. They pulled over their pickup to help the passenger in the car. The worker grabbed his first aid kit and rushed to provide first aid assistance to the occupant in the car when he slipped and fell, injuring his right ankle and right knee.

[75] A Board officer found that the worker was a traveling employee and was in the course of his employment on July 14, 2020. However, the Board officer found that the worker's action of getting out of the company pickup to provide first aid assistance to the occupant in the car in a ditch constituted a substantial deviation from his employment. This decision was confirmed by a review officer. On appeal to WCAT, the WCAT panel confirmed the review officer's decision. The WCAT panel reasoned:

> [22] … the worker' adviser submitted, in essence, that the worker's injuries arose out of and in the course of his employment because it was an insubstantial deviation when the worker stepped out of the crew truck to provide medical assistance to the occupant in the car in the ditch. However, I agree with the review officer's finding that leaving the crew vehicle and walking towards the car in the ditch exposed the worker to the risk of stumbling or falling. This was a substantial deviation from his employment. I appreciate the worker's actions of stopping and getting out of his pickup to provide medical assistance to the occupant in the car in the ditch. However, according to policy item C3-17.00 as noted above, the worker's action was that of a public-spirited citizen and he was doing no more than anyone would do, whether or not working for an employer at that time.

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(d) Analysis

(i) WCAT Jurisdiction

[76] Mr. Nash is not a party to the court action. However, section 311 of the Act provides that WCAT may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act. Section 311(2)(b) provides that this includes determining whether:

> (b) a worker's injury, death or disability arose out of, and in the course of, the worker's employment,

[77] I find that Mr. Nash's status at the time of his death is a matter that is relevant to the court action, and within WCAT's jurisdiction to determine in this application.

[78] The applicant cited item #18.1 of a former version of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) which provided:

> WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer or a review officer. There is no appeal from the matters determined in a section 257 certificate.

[79] The plaintiff submits that the passage cited by the applicant is out-dated. The cited passage was deleted from the MRPP at the time it was amended on December 1, 2020. In rebuttal, VSA submits that the absence of the prior language in MRPP item #18.1 is irrelevant, given WCAT's jurisdiction to determine those matters required for its decision.

[80] The plaintiff has provided full submissions concerning the merits for consideration by WCAT. The plaintiff does not suggest that WCAT must provide a certificate pursuant to the September 24, 2019 decision by the case manager, Special Care Services (which found that Mr. Nash's death did not arise out of and in the course of his employment). I have, nevertheless, considered WCAT's jurisdiction in this certification to court application.

[81] The deletion of the cited passage from MRPP item #18.1 does not relate to any change in the statutory framework (which is binding upon me). Section 311 of the Act provides a mechanism for the provision of a final decision under the Act for the purposes of a court action, separate from the normal processes for initial adjudication by a Board officer,

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review by the Review Division, and appeal to WCAT (which are subject to time limits for requesting review and appeal). Section 311(3) provides that Part 7 of the Act (except section 306(4) concerning the time for the making of the WCAT decision), applies to certification to court proceedings under section 311 as if the proceedings were an appeal. Under section 303 of the Act, WCAT may consider all questions of fact and law arising in an appeal, and must make its decision based on the merits and justice of the case. Section 308 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 7, including all matters that WCAT is requested to determine under section 311.

[82] MRPP item #9.1 sets out the following general principles regarding WCAT proceedings:

> WCAT proceedings combine many features. They are hybrid in nature. They are partly inquiry based and partly adversarial (as in the court system), that is, reliant on the evidence and arguments provided by the parties to the appeal. WCAT proceedings are referred to as rehearings because they are not completely new hearings, nor are they simply reviews of the record from the previous proceedings (either the Board or the Review Division). How much of each feature (inquiry and adversarial) influences a particular rehearing depends on the circumstances of each appeal and may vary from appeal to appeal. WCAT exercises an independent adjudicative function.
>
> **WCAT has full substitutional authority. A WCAT panel can reweigh the evidence and substitute its decision for the decision below.** This authority is found in the statutory discretion to confirm, vary or cancel the appealed decision or order [s. 306(1)].
>
> [emphasis added]

[83] I consider that the reasoning in MRPP item #9.1 similarly applies to WCAT certification to court proceedings under section 311 of the Act. Where there has been a prior decision on an issue by a Board officer or review officer, the WCAT certification to court proceeding involves a rehearing. I consider it clear, in any event, that in providing a certificate to court, WCAT must weigh all the available evidence and reach its own decision on the merits, rather than simply certifying as to the effect of a prior Board decision.

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[84] In providing a certificate to court under section 311, WCAT will commonly be asked to address a range of issues concerning a plaintiff and one or more defendants. It may be that a prior decision has been made by a Board officer on an issue (such as the September 24, 2019 decision by the Board officer in this case). To date, it has not been WCAT practice to make an express finding to confirm, vary or cancel a prior decision by a Board officer or review officer, where the application came before WCAT under section 311 of the Act rather than as an appeal.

[85] There is a possible ambiguity as to whether section 311(3) is simply intended to provide WCAT with the same powers and authority in addressing certification to court applications as WCAT has in addressing an appeal, or whether it also means that WCAT's decision concerning the application should expressly confirm, vary or cancel a prior decision by a Board officer or review officer on an issue in the application.

[86] However, providing a decision to confirm, vary or cancel the prior decision of the Board officer or review officer, as if it were the subject of an appeal under Part 7, has the benefit of providing clarity as to the status of the prior decision, following WCAT's decision under section 311 of the Act. It resolves any possible contradiction between section 122 of the Act (concerning the Board's exclusive jurisdiction) and section 308 of the Act (concerning WCAT's exclusive jurisdiction).

[87] Accordingly, in this decision, I will consider whether to confirm, vary or cancel the September 24, 2019 decision by a case manager, Special Care Services (which found that Mr. Nash was a worker but that his death on May 16, 2019 did not arise out of and in the course of his employment). My decision regarding the weight of the evidence with respect to Mr. Nash's status at the time of his death is the same, in any event.

(ii) Worker's Status

[88] Section 1 of the Act defines "worker" as including a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise.

[89] There is no dispute regarding Mr. Nash's status as a worker of PQ Systems Ltd. I find that at the time of his death on May 16, 2019, Mr. Nash was a worker within the meaning of the compensation provisions of the Act. I confirm the September 24, 2019 decision by the Board officer in this regard.

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(iii) Arising out of and in the Course of the Employment

[90] The central issue is whether Mr. Nash's death on May 16, 2019 arose out of and in the course of his employment.

[91] I have considered the nine factors listed in item C3-14.00 as follows. For the purpose of considering these nine factors, I have considered Mr. Nash's travel on May 16, 2019 generally, as well as his actions in stopping to render assistance at the scene of the first accident.

1. *On Employer's Premises*

[92] The accident occurred on the Coquihalla Highway. This was not on the employer's premises.

[93] Policy item C3-19.00 provides that if an employer provides a specific vehicle, like a crew bus, to transport its workers to and from the employer's premises, injuries or death occurring while traveling in this employer-controlled vehicle may be considered to arise out of and in the course of a worker's employment, as the crew bus is considered to be an extension of the employer's premises.

[94] VSA notes that Mr. Nash's employer would provide him with money to put towards his work vehicle, as opposed to supplying him with a car. Mr. Nash would receive a monthly car allowance of $450.00 from PQ Systems, and they would pay for all his fuel costs. VSA submits that the Toyota Tacoma was a work vehicle as described in policy item C3-19.00, provided to Mr. Nash to travel across the province and Western Canada to attend various worksites.

[95] I consider that there is a distinction between the employer providing a specific vehicle, and the employer providing the worker with a monthly vehicle allowance in connection with the worker's use of a personal vehicle for work purposes. Accordingly, I would not characterize Mr. Nash's travel in his Toyota Tacoma as being in the nature of travel in an employer-controlled vehicle (like a crew bus). In any event, at the time of the second collision, Mr. Nash was standing at the side of the highway, and was not traveling in the Toyota Tacoma. I find that this factor does not support workers' compensation coverage, in respect of Mr. Nash's travel on the Coquihalla Highway, or in relation to his actions at the time of his death.

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2. For Employer's Benefit

[96] Mr. Nash's travel between his home in Salmon Arm and the Lower Mainland was for the purpose of attending a tradeshow as well as attending the offices of his employer. I find that this travel was for the employer's benefit. This factor supports coverage, in relation to Mr. Nash's travel on the Coquihalla Highway.

[97] However, his actions in stopping to render assistance at the scene of an accident were not for the employer's benefit. This factor does not support coverage in relation to Mr. Nash's actions which lead to his death.

3. Instructions From the Employer

[98] It is not clear whether Mr. Nash's travel to the Lower Mainland involved instructions from the employer, or whether he was self-directed in this regard. I will treat this factor as neutral in relation to Mr. Nash's travel, or as possibly supporting coverage. However, his actions in stopping to render assistance at the scene of an accident were not pursuant to any instructions from the employer. This factor does not support coverage in relation to Mr. Nash's actions which lead to his death.

4. Equipment Supplied by the Employer

[99] Mr. Nash's travel on May 16, 2019, and his actions relating to the accidents on that date, did not involve the use of equipment supplied by the employer. As noted above, I do not consider that Mr. Nash's receipt of a monthly car allowance means that the vehicle was provided by the employer. Nevertheless, the employer's provision of a vehicle allowance and payment of fuel costs provides some support for coverage in relation to Mr. Nash's travel. It does not provide support for coverage in connection with Mr. Nash's provision of assistance at the scene of the first accident.

5. Receipt of Payment or Other Consideration from the Employer

[100] Mr. Nash was not in the process of obtaining payment or other consideration from the employer, such as in going to the employer's premises to pick up a paycheque. This factor is not applicable and does not support coverage.

Workers' Compensation Appeal Tribunal

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6. During a Time Period for which the Worker was Being Paid or Receiving Other Consideration

[101] Mr. Nash received a salary. He was expected work 40 hours per week. The accident occurred on a weekday. I infer that the accident occurred during a time period for which he was being paid. He was also receiving other consideration, in relation to his vehicle allowance and payment of fuel costs. This factor supports coverage.

7. Activity of the Employer, a Fellow Employee, or the Worker

[102] The accidents on May 16, 2019 did not involve any activity of Mr. Nash's employer or any fellow employee. This factor does not support coverage.

8. Part of Job

[103] Work-related travel was a significant component of Mr. Nash's employment. Mrs. Nash advised that Mr. Nash was away from home for work travel an average of four to six days a month. I find that Mr. Nash's return trip on May 16, 2019 from the Lower Mainland was part of his job. This factor supports coverage, in respect of his travel generally. However, his actions in stopping to provide assistance at the scene of an accident were not part of his job. This factor does not support coverage in respect of Mr. Nash's actions in stopping to provide assistance at the scene of an accident, and his subsequent death.

9. Supervision

[104] Mr. Nash was not being supervised in his travel. This factor does not support coverage.

[105] In summary, the evidence concerning the factors in item C3-14.00 (particularly items 2, 6, and 8, in combination with the employer's payment of a vehicle allowance and fuel costs) provides strong support for workers' compensation coverage in relation to Mr. Nash's travel on May 16, 2019, but not in relation to his actions in stopping to render assistance at the scene of the first accident.

[106] I have also considered the more specific policies contained in Chapter 3 of the RSCM II.

[107] Item C3-19.00 provides guidance concerning traveling employees:

> "Traveling employees" are workers who:

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- typically travel to more than one work location in the course of a normal work day as part of their employment duties; or

- have a normal, regular or fixed place of employment, and are directed by the employer to temporarily work at a place other than the normal, regular or fixed place of employment.

An employment connection generally exists throughout the travel undertaken by traveling employees, provided they travel reasonably directly and do not make major deviations for personal reasons. This is so regardless of whether public or private transportation is used.
…

An employment connection generally exists for traveling employees during normal meal or other incidental breaks, such as using the washroom facilities, so long as the worker does not make a distinct departure of a personal nature.

[108] Item C3-19.00 provides additional guidance concerning "Business Trips":

D. Business Trips

The general factors listed under Item C3-14.00 are used to determine whether a trip undertaken by a worker is sufficiently connected to the worker's employment as to be a business trip. For example, if the trip is taken for the employer's benefit, on the instructions of the employer, or paid for by the employer, these are all factors that weigh in favour of finding that the trip is a business trip.

An employment connection generally exists continuously during a business trip, except where the worker makes a distinct departure of a personal nature.

This means that injuries or death that result from a hazard of the environment into which a worker has been put by the business trip, including hazards of any overnight accommodation itself, are generally considered to arise out of and in the course of a worker's employment. However, injuries or death resulting from a hazard introduced to the premises by the worker for the worker's personal benefit may not be

considered to arise out of and in the course of the worker's employment, if no other factors demonstrate an employment connection.

Personal activities associated with and incidental to business trips, such as traveling, eating in restaurants, staying in overnight accommodations (including sleeping, washing etc.) are normally regarded as within the scope of a worker's employment where a worker is on a business trip. **On the other hand, when a worker makes a distinct departure of a personal nature while on a business trip, this may be regarded as outside the scope of the worker's employment. There is an obvious intersection and overlap between employment and personal affairs while a worker is on a business trip. However, a "distinct departure" is more than a brief and incidental diversion.**

If a worker simply stops for a short refreshment break, this may be regarded as a brief and incidental diversion from the business trip and an employment connection may still be found. The employment connection may be broken where the injury or death occurs as a result of the worker's involvement in social or recreational activities that are not incidental to the business trip.

In the marginal cases, it is impossible to do better than weigh the business trip features of the situation against the personal features to reach a conclusion as to whether the injury or death arises out of and in the course of a worker's employment.

[emphasis added]

[109] VSA submits that Mr. Nash was a traveling employee, or, in the alternative, was on a business trip, within the meaning of the policies at item C3-19.00, in connection with his travel between Salmon Arm and the Lower Mainland. The plaintiffs submit that Mr. Nash was engaged in a business trip.

[110] The policies provide for a broad scope of workers' compensation coverage for traveling workers, and workers on business trips. Under both policies, the worker is covered for workers' compensation purposes from the time they commence their journey until they return home, apart from a distinct departure of a personal nature (and subject to a possible exception for travel between the worker's home and the employer's premises, which is not relevant in this case). I consider that Mr. Nash's circumstances, which involve travel out of town with overnight stays, fall more neatly within the policy

concerning business trips, rather than the policy concerning traveling employees. I consider this distinction to be largely moot, however, given that the same test applies under both policies with respect to the question as to whether the worker was engaged in a distinct departure of a personal nature at the time of injury or death. I consider the reasoning provided in prior decisions regarding the meaning of this test to be relevant, whether provided in the context of the traveling worker policy or the policy concerning business trips.

[111] On May 16, 2019, Mr. Nash was in the course of a business trip, in returning to Salmon Arm from the Lower Mainland. He arrived in the Lower Mainland on Tuesday, May 14, 2019, to attend a tradeshow on Wednesday, May 15, 2019. On Thursday, May 16, 2019, he attended the employer's Burnaby office in the morning, and was then driving back to Salmon Arm. Policy provides that an employment connection generally exists continuously during a business trip, except where the worker makes a distinct departure of a personal nature.

[112] According, it becomes necessary to determine whether, at the time of his death, Mr. Nash was engaged in a distinct departure of a personal nature, due to making a stop to render assistance at the scene of the first accident.

[113] VSA submits that that the exclusion of compensation coverage for major deviations from work-related travel for personal reasons applies only for the duration of time that the employee deviates from the normal course of their employment (*WCAT Decision A1605182*, *WCAT Decision A1603711*, and *WCAT-2015-00089*). VSA submits that Mr. Nash was on his way back to his home following regular travel to Vancouver, and there was no deviation from the regularly traversed route. Mr. Nash had briefly stopped on the road on which he intended to continue to travel home to Salmon Arm.

[114] VSA submits that a number of WCAT decisions addressing travel with employment and personal features have applied a "predominant purpose" approach to determine whether an accident arose out of and in the course of the worker's employment (*WCAT Decision A1801568*). VSA submits Mr. Nash did not make any major or substantial deviation as he pulled to the side of the highway he was directly travelling on to return from his business trip. This was not a significant deviation for personal reasons, as he had come across an accident scene and briefly stopped to assist. The scene of the first collision was directly on his route home. This was not a substantial deviation or personal act which Mr. Nash undertook such that it would warrant a severance of the employment connection. This brief stop is not dissimilar to the situation if Mr. Nash had stopped to stretch his legs or otherwise take a break from driving.

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[115] VSA submits that in this case, the dominant purpose of Mr. Nash's journey was a business trip from which he was returning home. He was always on the direct route home being Highway 5 (albeit stopped on the side). Further, the timing of the journey as a whole was not greatly affected, as this was a very brief pause in his journey. This was not a significant timing issue or deviation away from his route, but rather a brief pause in his travel of no more than 15 to 20 minutes. He and the Hirschs were loading their bags into his vehicle to continue on their way when the second collision occurred. They had not discussed any set plans apart from Mr. Nash taking them along the route he was already travelling on to drop them off in Merritt, B.C.

[116] The plaintiffs submit Mr. Nash made a distinct departure of a personal nature when he pulled over to assist at the scene of the first accident, thus exposing himself to a danger that would not have existed had he maintained his travel. The plaintiffs submit that the length of time in which Mr. Nash was engaged in this departure is not an appropriate factor to consider, due to his death. There is no way to measure what the duration of his stop would have been, had the further accidents not occurred which resulted in his death. The plaintiffs submit that, as was found in *WCAT Decision A2100658*, Mr. Nash deviated from his employment as soon as he stepped out of the vehicle to render assistance. The plaintiffs submit that due to Mr. Nash's death, he never returned to the course of his employment. There was no connection between Mr. Nash's employment as an engineer with PQ Systems and his decision to stop and render assistance to third parties. His deviation from his work travel was for solely personal purposes. His actions were those of a public spirited citizen which, pursuant to item C3-17.00, and *WCAT Decision A2100658*, *WCAT-2008-03818* and *WCAT-2006-02357*, supports a conclusion that his death was not employment-connected.

[117] Policy at item C3-17.00 concerns "Deviations from Employment". The policy provides:

> **A. Introduction**
>
> Item C3-14.00 is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of a worker's employment. **In some circumstances, evidence supporting one component of the employment-connection test may be clear, while evidence supporting the other component is questionable, because** the worker did something that was unauthorized by the employer, the employer condoned an unsafe practice, or **some emergency forced the worker to act**.

In considering whether an injury or death arose out of and in the course of a worker's employment, all relevant factors are taken into consideration including the causative significance of the worker's conduct in the occurrence of the injury or death and whether the worker's conduct was such a substantial deviation from the reasonable expectations of employment as to take the worker out of the course of the employment. An insubstantial deviation does not prevent an injury or death from being held to have arisen out of and in the course of a worker's employment.
…

B. Instructions of the Employer

It is clearly impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity, so workers may be uncertain as to the limits of their work. Carelessness or exercising bad judgment are not bars to compensation where it is reasonable that a worker would exercise some discretion as part of the worker's employment. Thus an act that is done in good faith for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer.

On the other hand, a worker's injury or death may not be considered to arise out of and in the course of the worker's employment if the worker's act is specifically prohibited by an employer or is known or should reasonably have been known to the worker to be unauthorized, or if the worker has been previously warned against doing it. This is so even if the act could legitimately benefit the employer.

C. For Employer's Benefit

A worker's injury or death may be considered to arise out of and in the course of the worker's employment if the worker is acting to protect the employer's interests during an emergency. This may include protecting the employer's property or protecting an individual who is associated with the employment, such as a fellow worker or customer.

A worker's injury or death is not likely to be considered to arise out of and in the course of the worker's employment if the emergency

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> **action is that of a public spirited citizen, where the worker was doing no more than anyone would do, whether or not working for an employer at the time.**
>
> **The distinction can perhaps best be illustrated by an example.** A worker's injury or death may be considered to arise out of and in the course of the worker's employment where the worker receives a telephone call at work indicating that there is a fire in a portion of the employer's premises. The worker races from the office and, due only to haste, trips over his or her own feet, falls, and injures an arm. There is no doubt that in light of the relationship of the emergency to the employment, this injury would be compensable.
>
> **On the other hand, a worker's injury or death is not likely to be considered to arise out of and in the course of the worker's employment where the worker receives a telephone call to the effect that a family member has been seriously injured in an accident. Once again the worker races from the office and, due only to haste, falls and injures an arm. The reason for the worker's departure is unrelated to the employment and nothing about the employment contributed to the injury.**
>
> **The fact that the employment places a worker in a position to observe an emergency cannot be of itself a determinative factor in granting compensation.**
>
> [emphasis added]

[118] *Decision No.* 252, "Re: The Scope of Employment", 3 W.C.R. 147, a decision of the commissioners of the Board in 1977, is no longer policy. However, it provides relevant background to the current policy item C3-17.00. *Decision No. 252* concerned a worker who was employed by a marine supply company located close to Vancouver International Airport. While in his office, he observed a light plane crash into the Fraser River. He decided to attempt to rescue the occupants of the plane and chose the shortest route between his office and the scene of the accident. This involved descending the fire escape of the company premises. One of the rungs on this ladder gave way and the worker was injured in a fall.

[119] The worker made a claim for workers' compensation benefits. A Board adjudicator concluded that the worker's actions were "precipitated solely by [his] concern as a

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private citizen with the welfare of the crash victims and not anything related to [his] employment". The adjudicator referred to a portion of the *Claims Adjudication Manual* (Manual) which stated generally that, where injuries are suffered in the course of an emergency which involves fellow workers or the premises of the employer, those injuries will be compensable. However, the Manual further stated that injuries suffered while responding to an emergency unrelated to the employment and involving actions that any other public-spirited citizen would take are not compensable.

[120] The claimant appealed to the boards of review. In *Decision No. 252*, the commissioners quoted extensively from the decision of the board of review to illustrate the issues arising in that case. The board of review reasoned, in part:

> The decision of the Claims Adjudicator obviously reflects his conclusion that the presumption that the accident arose out of the worker's employment has been rebutted by the workers' revelation that the purpose of his summary exit from his place of employment was to effect a rescue, rather than to further the interests of his employer. We do not think that that conclusion represents a relevant consideration with respect to a claim for compensation benefits. There is no question but that this worker was, at the time that he sighted the downed aircraft, involved in the course of his employment. He was seated within the premises of his employer. If, for whatever reason, he then decided to leave the premises of his employer, any injury which he sustained in the course of doing so would have to be viewed as an injury arising out of and in the course of his employment. There was no element of serious or wilful misconduct in the manner in which the worker attempted to exit the premises. He simply chose the quickest route, and regardless of what his intentions were in choosing that route, the condition of the route (which was part of the premises of his employer) was the ultimate cause of his fall and his serious injuries. For this reason alone, we consider his injuries to be compensable.
>
> There are two additional reasons for our conclusion that the decision of the Claims Adjudicator was incorrect**. First, we believe it is settled law in other jurisdictions that injuries incurred in the course of rescuing strangers are compensable if the conditions of employment placed the worker in a position which required him, by the ordinary standards of humanity, to undertake the rescue.** The situation with respect to the rescue of fellow employees is obvious. **But the Supreme Court of the United States has further extended the rescue doctrine,**

> **by covering the rescue of complete strangers when the connection with the employment is furnished not by the nature of the employment, but solely by the fact that the employment brought the employee to the place where he observed the occasion for the rescue attempt. It was held that the test of recovery is not a [causal] relationship between the nature of employment of the injured person and the accident, nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer.** [O'Leary v. Brown-Pacific-Maxom, Inc., 340 US 504, cited at Page 28.23 *Larson's Workmen's Compensation Law*.] In commenting upon the O'Leary case, **the authors of Larson state that the case 'adopts the positional risk theory in its purest form, by finding work-connection if the employment merely brings the employee to the place where he encounters a moral obligation to rescue a stranger.** Presumably it would follow that an office worker who observed a street accident from a third floor window would remain in the course of employment when rushing to aid the victims, since the employment would have provided the contact between the employee and the rescue opportunity'.
>
> [emphasis added]

[121] The commissioners found that workers' compensation benefits were payable, due to the fact the worker's injury occurred in an emergency and also arose out of a hazard of the employer's premises. However, they rejected a broad application of the "positional risk" theory. They reasoned:

> **As was pointed out by the adjudicator it has generally been felt that, unless the emergency was one related to danger to fellow employees or to the employer's premises, it could not be said that injuries suffered in response to an emergency arose out of the employment. However, this claim brings to light an exception to this general proposition which was alluded to but not emphasized by the board of review. Specifically, the Commissioners take particular note of the question of the presence of a hazard on the premises of the employer.**
>
> The situation can perhaps best be illustrated by an example. Suppose a worker receives a telephone call at work indicating that there is a fire in a portion of his employer's premises. He races from his office and,

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due to his haste, trips over his own feet, falls and injures his arm. There is no doubt that in light of the relationship of the emergency to his employment this injury would be compensable. In other words, it would be found to have arisen out of the employment.

Suppose, then, that the same worker receives a telephone call to the effect that a member of his family has been seriously injured in an accident. Once again he races from his office and, due only to his haste, falls and injures his arm. In these circumstances there is no relationship to his employment. The reason for his departure is totally unrelated to his employment and nothing about his employment contributed to his injury. However, if he were to race from his office and trip over a poorly laid carpet or, as in the case in question, fall as a result of a faulty ladder, the relationship to the employment would be present. In other words, the injury would not have occurred had it not been for a hazardous condition on the employment premises.

Therefore, while it is incorrect to say that compensation will be payable when a worker is injured while leaving the premises of his employer for whatever reason, it is correct to say that **any injury will be compensable which was suffered in any emergency and which also arose out of a hazard on the employment premises.**

The issue of "positional risk" raised by the board of review is one which the Commissioners also feel requires some comment. There is no doubt that certain employees, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation. An excellent example of this would be all employees in the various aspects of the operation of an airport. The Commissioners are of the understanding that, for example, at Vancouver International Airport groups or "teams" are formed to act in cases of emergency. The members of these groups will be drawn from various aspects of the operation and the nature of their specific employment may be totally unrelated to emergency rescue. **Baggage handlers or concession operators could not be considered to have as part of their employment the need to react in the event of a crash of an aircraft. Nevertheless, their very presence as employees at the airport places them in the position of being the logical choices to become members of such teams. As such, the Board would have no**

> **hesitation in considering the application of "positional risk" to those circumstances.**
>
> **However, the Board is not satisfied that the doctrine is applicable to the circumstances as they have arisen in this claim. The fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation.**
>
> **The Commissioners therefore conclude that the board of review decision should be implemented but that the basis for accepting any future claims of this kind should be the principles set out above and not those set out in the board of review.**
>
> [emphasis added]

[122] The cited case of *O'Leary v. Brown-Pacific-Maxon, Inc.* (whose reasoning was not followed by the Board in *Decision No. 252*), concerned a situation in which a contractor, engaged in construction work for the Navy on the Island of Guam, maintained for its employees a recreation centre adjoining a channel so dangerous that swimming was forbidden. Signs to that effect were erected. After spending the afternoon at the centre, an employee was drowned while attempting to swim the channel in order to rescue two men in distress. An award of workers' compensation benefits was reversed by the Court of Appeals, which reasoned:

> The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided, and not in the course of Valak's employment.

[123] The majority of the U.S. Supreme Court reinstated the award. The majority reasoned, in part:

> The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2(2), 44 Stat. 1425, 33 U.S.C. § 902(2). As we read its opinion, the Court of Appeals entertained the view that this standard precluded an award for injuries incurred in an attempt to rescue persons not known to be in the employer's service, undertaken in

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forbidden waters outside the employer's premises. We think this is too restricted an interpretation of the Act. **Workmen's compensation is not confined by common law conceptions of scope of employment.** *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, 330 U. S. 481; *Matter of Waters v. William J. Taylor Co.,* 218 N.Y. 248, 251, 112 N.E. 727, 728. **The test of recovery is not a causal relation between the nature of employment of the injured person and the accident.** *Thom v. Sinclair,* [1917] A.C. 127, 142. **Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.** *Ibid.* **A reasonable rescue attempt, like pursuit in aid of an officer making an arrest, may be "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute.**" *Matter of Babington v. Yellow Taxi Corp.,* 250 N.Y. 14, 17, 164 N.E. 726, 727; *Puttkammer v. Industrial Comm'n,* 371 Ill. 497, 21 N.E.2d 575. This is not to say that there are not cases

> "where an employee even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment."

Matter of Waters v. William J. Taylor Co., 218 N.Y. at 252, 112 N.E. at 728. We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in as frolics of their own.

[emphasis added]

[124] It is evident that the former commissioners adopted a very limited version of the "positional risk" doctrine. They rejected a broader application of this doctrine, in specifying that the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation. This wording is replicated in the current policy at item C3-17.00, under the heading "C. For Employer's Benefit". Nevertheless, the statement that such a positional risk "cannot be

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of itself a determinative factor in granting compensation" leaves open the possibility that other factors may support a finding of employment connection.

[125] Having regard to the foregoing, I have considered the circumstances leading up to Mr. Nash's death. I have considered, first of all, the relatively short duration of time that was involved in Mr. Nash's stop to provide assistance at the scene of the first accident.

[126] Mr. Helget advised that Mr. Nash stopped his vehicle and attended the accident scene within minutes after Mr. Helget went up to the Micra following the accident. I interpret Mr. Helget's evidence as showing that Mr. Nash spent at least 15 minutes at the scene of the first accident, prior to the occurrence of the second accident. This is a relatively short period of time, in the context of the policy concerning business trips which provides that a "distinct departure" is more than a brief and incidental diversion.

[127] Nevertheless, a comparison may be made with the policy concerning traveling employees, which provides that an employment connection generally exists throughout the travel undertaken by traveling employees, provided they travel reasonably directly and do not make major deviations for personal reasons.

[128] A published certification to court decision by the former Appeal Division of the Board concerned a worker who undertook a personal errand in the course of a work-related journey. *Appeal Division Decision #92-1541* ("Deviation from Route (No. 1)," 9 W.C.R 601), involved a worker who chose to travel over the Knight Street Bridge, rather than the Oak Street Bridge, in driving from Vancouver to his hotel in Richmond, so that he could check on the existence of a cherry tree at his grandmother's former residence. The plaintiff had made a work visit to Main Street and 11th Avenue in Vancouver, located between Oak and Knight Streets, and was returning to his hotel in Richmond when the accident occurred. The panel found that as the plaintiff in that case was on a reasonably direct route leading to his work destination (the hotel) at the time of the accident, he remained in the course of his employment at the time of the accident notwithstanding his personal motivation in visiting the location of the cherry tree. The panel reasoned (at page 602):

> According to the map furnished in the submissions, there is very little difference in distance between taking the Oak Street route or the Knight Street route from the Legion Hall at 11th & Main to Mr. Foan's hotel in Richmond. Either is a fairly direct route between those two points. Even if Mr. Foan had not had a personal interest that took him along the Knight Street route, he might have decided to take that route to return to his

> hotel. I do not view it as a significant deviation in comparison to the Oak Street route.
>
> **Therefore, even though he chose the Knight Street route to allow him to also attend to a personal matter, I find that it was not a "distinct departure on a personal errand" as set out in #18.41. If he had been in an accident in the back lane while he was looking for the cherry tree, my finding might be different. However, at the time of the accident he was back on a direct and normal route to his hotel.** It appears that the deviation from this route was a brief and incidental diversion and did not significantly alter his route nor the timing of his trip. Thus, he was in the course of his employment when the accident occurred.
>
> [emphasis added]

[129] In *WCAT-2009-01496*, a WCAT panel held that a short round trip of 1.8 miles each way for personal shopping was a substantial deviation from a work-related journey. *WCAT-2009-01496* reasoned as follows in paragraph 38:

> … A minor diversion for personal reasons can amount to a substantial deviation from a work-related journey, where this involves a clearly marked detour to accomplish a specific personal purpose (i.e. not involving activities of travelling, eating in restaurants, and staying in hotels where these are required by the employment)…

[130] In *WCAT-2015-03841*, a WCAT panel found that a detour of approximately 3 kilometres to an outdoors store, in the context of a 250-kilometre round trip, involved a significant deviation in that it involved travel in the opposite direction from the ultimate destination:

> [40] I find that that Mr. Carson did not travel reasonably directly from his work meeting location back home to Nanaimo, and that his shopping trip to the outdoors store was a major deviation. The outdoors store was not directly on Mr. Carson's route home. Instead, that side trip required him to take an altered route into Victoria, and eventually back to the highway, rather than taking the most direct route onto the highway to Nanaimo from his employer's office (Q 117). While "reasonably directly" is not defined in policy item #C3-19.00, based on his described route Mr. Carson travelled approximately three kilometers away from the most direct route

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> home to go to the outdoors store (Q 108, 117). While this is not a large distance in the circumstances of a 250 kilometre round trip, **I place significant weight on the fact that Mr. Carson travelled in the opposite direction from home in order to go to the outdoors store, and the store was not on his way home.** Based on this evidence, and following the reasoning in *WCAT-2009-01496*, I find that the shopping trip was a major, rather than minor, deviation from his route home.
>
> [emphasis added]

[131] Accordingly, even a relatively short deviation from the work route may be significant in the case of a traveling employee, if it clearly relates to some personal purpose and an accident occurs in the course of that portion of the journey (demarcated from the route leading to the work destination).

[132] Having regard to the policy at item C3-17.00, I similarly consider that a relatively short stop may be significant in the case of a traveling employee or a worker on a business trip, where the stop involves the emergency action of a public spirited citizen rather than action to protect the employer's interests during an emergency (such as by protecting the employer's property or protecting an individual who is associated with the employment, such as a fellow worker or customer).

[133] This was not a case involving risk to the employer's property, or to an individual who was associated with Mr. Nash's employment. It is clear that Mr. Nash's actions were those of public spirited citizen. In general, such actions are held in high esteem by society.

[134] However, policy at item C3-17.00 expressly provides that a worker's injury or death is not likely to be considered to arise out of and in the course of the worker's employment if the emergency action is that of a public spirited citizen, where the worker was doing no more than anyone would do, whether or not working for an employer at the time.

[135] Arguably, Mr. Nash was in fact doing more than anyone else would do. It is evident that following the first accident, many vehicles passed by without stopping. The Coquihalla Highway is a major highway, and the accident occurred on a Thursday preceding a long weekend. There were no obvious injuries to the persons involved in the first accident. It was only following the more serious second and third accidents, which resulted in obvious serious injuries or death, that multiple vehicles stopped on the highway and

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other motorists (including a doctor and nurse) attempted to provide assistance. I consider the fact that Mr. Nash went above and beyond what other motorists were prepared to do, in stopping to provide assistance at the scene of an accident, is a further indication that his actions were not employment-connected. While I note the contrary interpretation of this policy provided at paragraph 37 of *WCAT-2013-01142*, I respectfully disagree with that interpretation.

[136] In stopping to provide assistance at the scene of the first accident, Mr. Nash was exposed to risks that he would not have encountered had he simply continued on his journey without stopping. At the location of the accident, there was only a narrow gap between the line at the side of the road and the concrete barrier. The evidence indicates that this meant that even after the vehicles were pulled over close to the concrete barrier, the vehicles were partially obstructing the right lane of traffic on the highway (although there remained two northbound lanes for vehicles to pass by). In addition, if the road conditions contributed to the occurrence of the first accident, there remained a risk of these conditions contributing to another accident.

[137] The accident in this case occurred on a well-traveled highway, in which cell phone service was available (as shown by Mr. Svenson's evidence that he called 9-1-1 for emergency assistance following the second and third accidents). This was not a situation involving travel in a remote area involving additional risks specific to the nature of the worker's employment, such as was found to be the case in *WCAT-2007-02604*. The WCAT panel in that case found that while the worker's circumstances were in a gray area, they were closer to the situation of the employees in the airport in that the plaintiff's employment required him to drive late in the evening, through a snow storm, under icy road conditions, on a remote stretch of the Alaska Highway. The WCAT panel found that this was "an environment which by its very nature may become the site of an emergency situation", so that the plaintiff's circumstances came within that limited field of coverage for workers providing assistance to strangers.

[138] VSA submits that the circumstances of this case are distinguishable from those addressed in *WCAT-2008-03818* and *WCAT Decision A2100658* as those decisions concerned workers who injured themselves while failing to take care in the situation, whereas Mr. Nash was killed by a third party whilst parked on the side of the road. I do not consider this factual distinction to be significant. My decision concerning Mr. Nash's status requires consideration as to the reasons and purpose for which he stopped to provide assistance, rather than whether there was any negligence on his part.

Workers' Compensation Appeal Tribunal

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[139] Upon consideration of the foregoing, I find that in stopping to provide assistance at the scene of the first accident, Mr. Nash made a distinct departure of a personal nature. While involving the passage of only a short period of time, this stop was not of a nature which was incidental to his employment-related travel. Mr. Nash was not acting to protect the employer's interests during an emergency, such as by protecting the employer's property or protecting an individual who was associated with the employment. His actions, in stopping to render assistance at the scene of an accident, involved the emergency action of a public spirited citizen. The fact that Mr. Nash's employment placed him in a position to observe an emergency (the first accident) is not determinative. This was not a situation in which some hazard of the employer's premises contributed to his death. As well, this was not a situation in which Mr. Nash, in the ordinary course of his work, was situated in an environment which by its very nature may become the site of an emergency situation (as discussed in *Decision No. 252*). Accidents on well-traveled highways are a risk of travel generally, rather than being specific to the circumstances of Mr. Nash's employment.

[140] Having regard to policies at items C3-14.00, C3-17.00 and C3-19.00, I find that Mr. Nash's actions in stopping to render assistance at the scene of the first accident did not occur in the course of his employment and did not arise out of his employment. As neither test is met, the "accident presumption" set out in section 134 is not applicable.

[141] I find, therefore, that Mr. Nash's death on May 16, 2019 did not arise out of and in the course of his employment. I confirm the September 24, 2019 decision by a case manager, Special Care Services, on this issue.

[142] In view of my conclusion regarding the status of Mr. Nash, it does not appear necessary to proceed to address the status of the defendants and third parties. In the event that any further determination remains necessary in relation to the court action, a request may be made for a supplemental certificate.

Conclusion

[143] I confirm the September 24, 2019 decision by a case manager, Special Care Services, in finding that Mr. Nash was a worker, but his death on May 16, 2019 did not arise out of and in the course of his employment.

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[144] I find that at the time of the May 16, 2019 accidents:

(a) the deceased, Robert Edwin Nash, was a worker within the meaning of the compensation provisions of the Act; and,

(b) the death of Robert Edwin Nash, did not arise out of and in the course of his employment within the scope of the compensation provisions of the Act.

Herb Morton
Vice Chair

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NO. VER-S-M-56222
VERNON REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 2019, CHAPTER 1, AS AMENDED

BETWEEN:

HEATHER NASH, LEAH NASH, and ANDREW NASH

PLAINTIFFS

AND:

DANIEL RAZVAN POPESCU, EZIO BENNATO, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE, BRAYDEN ROY HIRSCH, REBECCA JEANNETTE HIRSCH, DAVID GARTH HELGET and 0568063 BC LTD.

DEFENDANTS

AND:

DANIEL RAZVAN POPESCU, EZIO BENNATO, BRAYDEN ROY HIRSCH, REBECCA JEANNETTE HIRSCH, DAVID GARTH HELGET, 0568063 BC LTD., HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE, and VSA HIGHWAY MAINTENANCE LTD.

THIRD PARTIES

C E R T I F I C A T E

UPON APPLICATION of the Third Party, VSA HIGHWAY MAINTENANCE LTD., in this action for a determination pursuant to section 311 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, May 16, 2019:

1. The Deceased, Robert Edwin Nash, was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.

2. The death of Robert Edwin Nash did not arise out and in the course of his employment within the scope of the compensation provisions of the *Workers Compensation Act*.

CERTIFIED this 21st day of June, 2023.

Herb Morton
VICE CHAIR

NO. VER-S-M-56222
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THIRD PARTIES

SECTION 311 CERTIFICATE

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