WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2296/08

BEFORE: M. Butler: Vice-Chair

HEARING: October 30, 2008 at Toronto
Oral

DATE OF DECISION: November 4, 2008

NEUTRAL CITATION: 2008 ONWSIAT 2870

DECISION UNDER APPEAL: WSIB ARO Decision dated September 12, 2007

APPEARANCES:

For the worker: Mr. Gary Majesky, Union Representative

For the employer: Mr. Lincoln Brown, Office of the Employer Adviser

REASONS

(i) Introduction

[1] In her decision dated September 12, 2007, the Appeals Resolution Officer (ARO) concluded that the worker did not have initial entitlement and entitlement to Loss of Earnings (LOE) benefits as a result of his accident on October 11, 2006.

(ii) The issue

[2] The sole issue on appeal is whether the worker has initial entitlement for a back condition resulting from an accident on October 11, 2006.

(iii) Background

[3] The worker was born in 1978. He began working for the accident employer (the "employer") on December 1, 1998. At the time of the accident he was employed as a licensed electrician.

[4] The ARO succinctly set out the background facts of this case as follows:

> On October 11, 2006, this electrical contractor was [returning] to the work site after having lunch and he stepped in a manhole cover injuring his back. The diagnosis was sciatica for which medication and physiotherapy were prescribed.
>
> The initial adjudicator allowed the claim for no lost time and when the worker had a further spontaneous onset of pain in December 2006 and claimed loss of earnings benefits, the new adjudicator denied initial entitlement as the worker was not injured arising out of and in the course of employment. The letter was dated January 16, 2007.

(iv) Law and policy

[5] Document No. 15-02-02 of the Board's *Operational Policy Manual* (OPM) sets out the following policy for "Accident in the Course of Employment."

> **Policy**
>
> A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time, and activity indicate that the accident was work-related.
>
> **Guidelines**
>
> In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of place, time, and activity in the following way:
>
> **Place**
>
> If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

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

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

Activity

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

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

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

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

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

Application of criteria

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

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the

worker was engaged in a personal activity that was not incidental to the worker's employment.

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

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

[6] OPM Document No. 15-03-03 sets out the following policy for determining "On/Off Employers' Premises":

Policy

A worker is considered to be in the course of employment on entering the employer's premises, as defined, at the proper time, using the accepted means for entering and leaving to perform activities for the purpose of the employer's business. The "In the course of employment" status ends on leaving the employer's premises, unless the worker leaves the premises for the purpose of the employment.

The employer's premises are defined as the building, plant, or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways, and roads controlled by the employer for the use of the workers when entering or leaving the work site.

An accident shall be considered to arise out of the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident

- the accident is occasioned by the injured worker using, for personal reasons, any instrument of added peril such as an automobile, motorcycle, or bicycle, except when the accident was caused by the condition of the road or happening under the control of the employer, or

- the worker is performing an act not incidental to his work or employment obligations.

Guidelines

It is generally considered that workers are in the course of the employment when they reach the employer's premises or place of work. A worker is generally not considered to be in the course of the employment when travelling to or from the workplace, although there are exceptions to this general rule. (See 15-03-05, Travelling.) The WSIB's practice in respect of accidents occurring on an employer's premises centre on geographical location as a determining factor as to whether or not a worker was in the course of employment at the time of the accident. Location has been adopted as the line to be drawn between personal activities and work-related activities.

Without limitation to the following, the WSIB will consider entitlement in claims where a worker is injured when

- going to or from work in transport under the control and supervision of, or chartered by, the employer
- obtaining pay or depositing tools, etc., on the employer's premises after actual work hours
- participating in a work-related sports activity, for example, school teachers and camp counselors, when the employer condones these activities by making the premises available and/or exercising a form of supervision and control
- attending compulsory evening courses
- travelling on company business, by the most direct and uninterrupted route, under the supervision and control of the employer
- travelling to or from a convention and/or participating in convention activities, and
- on a lunch, break, or other non-work period (period of leisure) by ordinary hazards of the employer's premises.

[7] OPM Document No. 15-03-05 sets out the following policy for “Travelling”:

Policy

As a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work.

Guidelines

Travel on employer's business

When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must obligate the worker to be travelling at the place and time the accident occurred.

Proceeding to and from work

The worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place enroute.

"In the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer.

(v) Analysis

[8] On the basis of all of the evidence before me, I conclude that the worker’s appeal should be allowed and that the worker does have initial entitlement for an accident on October 11, 2006. In coming to this decision, I considered the worker’s testimony, the testimony from GT, his

supervisor and foreman, Mr. Majesky's submissions, Mr. Brown's submissions and the documentary evidence before me. The reasons for my conclusions are as follows.

[9] The oral testimony from the worker and GT were very consistent, reliable and not in conflict in any material way. I accept their evidence and, from their evidence, I make the following findings of fact.

(a) Findings of fact

[10] The worker has been employed by the employer, a Schedule 1 employer, which is an electrical contracting company specializing in building automation systems and environmental control. The worker's father is a 20 percent shareholder of the employer and GT is a 10 percent shareholder. There are eight shareholders in all. The worker is not a shareholder of the employer.

[11] The worker is a licensed journeyman electrician, having served his apprenticeship and working as a journeyman electrician for the employer for about 8 years. While working for the employer as an electrican, the worker travelled to different construction sites in southern Ontario. The work involved retrofits and new construction.

[12] Where the worker ate lunch depended on the number of people working on the sites and what facilities were available at the sites. They would eat in their trucks, in a shack, in a make-shift lunchroom, in lunchroom facilities at the construction site or go off-site to a restaurant. They usually stayed on the job site for lunch. The worker usually "brown bagged" his lunch and GT did not ordinarily eat lunch. The collective agreement provides for a half-hour lunch, which is taken from 12:00 noon to 12:30 PM, although there is some flexibility. The half-hour lunch period is not paid.

[13] In the second week of October 2006 the worker and GT were finishing up work on a new building they had been working in that required an additional two or three more days work. GT had picked the worker up at his home those few days and drove him to the job site in Brampton, approximately an hour and a half away. GT was acting as the project supervisor and foreman those few days.

[14] The building they were working on had been essentially completed and was already functioning. There was a lunch room in the building in a lock-up area that was not accessible to the worker and GT for those days. There was a public washroom in the building that they could use.

[15] GT suggested that they go out for lunch on October 11, 2006 and advised the worker that he would be paying for the worker's lunch, even though the worker had brought his bag lunch. They agreed to go to the pub about 100 feet to 100 yards across the public street from the building they were working in. They crossed the street on a traffic light, walked over the parking lot of the pub and into the pub. Although they wear hard hats on the job, they did not bring their hard hats to the pub.

[16] They ate lunch, which took about a half-hour to 40 minutes. Discussion at lunch time consisted of the work that they would be doing in the afternoon and other "general stuff." When

asked why he did not eat his bag lunch, the worker replied, "My boss was buying me lunch. Wouldn't you go?" GT paid for the lunch out of his own pocket. It was not an expense that for which he could be reimbursed, and he was not reimbursed for it by the employer. GT explained that he and the worker were friends and he bought him lunch.

[17] After lunch, they walked back across the pub's parking lot on the way back to the work site. As they moved around a car parked on the pub's parking lot, the worker stepped on a manhole cover which he assumed was fixed. As they found out, the manhole cover was plastic and was merely floating on a water-filled hole. They cover dropped when the worker stepped on it and he fell into the manhole, which was waist deep - about 2.5 to 3 feet deep. He was up to his groin in the hole with his left leg.

[18] GT grabbed the worker and pulled him out. The pub owner came out and said that he had called the Cable TV Company about it in the morning. GT got his camera and took a picture of the manhole (a copy of which is in the case materials). The hole, which was for the Cable TV Company, was asphalted over within a few hours after the incident. A Form 7 was faxed to them by the employer to complete. They did more work in the afternoon, but the worker was sore and just assisted GT as a helper. The 25 pictures in Exhibit # 5 were taken by Mr. Majesky and the worker some time in the winter of 2006-2007.

[19] They returned to the work site on October 12, 2006 and worked a half day. After returning home early in the afternoon of October 12, 2006, the worker went to the local hospital. The worker took a few weeks off work and then returned to modified duties.

(b) Mr. Majesky's submissions

[20] In his submissions, Mr. Majesky referred to Board policy which is set out in the **"Law and policy"** section above. Mr. Majesky submitted that the worker while at lunch "was engaged in an activity to satisfy a personal need" in accordance with OPM Document No. 15-02-02, as eating lunch is characterized as a "personal need."

[21] Mr. Majesky submitted that because the worker was in a geographical location selected by the employer and he was working in the course of his employment, he was "on a lunch … by ordinary hazards of the employer's premises" within the meaning of OPM document No. 15-03-03. Mr. Majesky noted that the employer did not provide a place for the worker to have lunch at the work site he was working on October 11, 2006. He pointed out that under the collective agreement there is not a requirement for the employer to provide a lunch area in a small project.

[22] Mr. Majesky argued that workers, like other people, are required to have lunch for sustenance purposes. Personal need includes lunch for personal sustenance. People require a lunch break to get their energy back. That, he argued, is a different activity from visiting a bank or the income tax preparer for personal purposes during the lunch hour. Lunch, he argued, is "incidental to employment."

[23] In support of his submissions, Mr. Majesky provided copies of the following Tribunal decisions: *Decision No. 585/93, Decision No. 1288/87, Decision No. 355/93, Decision No. 1484/04I, Decision No. 1785/02, Decision No. 2310/03, Decision No. 1416/98, Decision No. 744/03, Decision No. 823/96,* and *Decision No. 678/02.*

(c) Mr. Brown's submissions

[24] In his submissions, Mr. Brown referred to Document No. 15-02-02 which states that regard must be given to "the surrounding circumstances relating to ***place, time,*** and ***activity*** indicate that the accident was work-related." Furthermore, under section 119 of the *Workplace Safety and Insurance Act, 1997*, each case shall be judged on its own merits and that neither the Board nor the Tribunal is bound by legal precedent. However, Mr. Brown noted, Board Policy is binding on Tribunal decisions.

[25] Mr. Brown noted that the worker was out in the field on October 11, 2006. He took his bag lunch with him. He had no intention of going out for lunch. Mr. Brown argued that the worker was not under the control of the employer when he went to the restaurant. GT picked up the tab as a friend. The worker was not in the course of his employment. OPM Document No. 15-02-02 provides, "A personal injury by accident occurring off those premises generally will not have occurred in the course of employment." The lunch break was unpaid. The worker departed from the premises where the employer did not have control over his activities.

[26] Mr. Brown further argued that the worker was not doing anything incidental for the employer when he went to the restaurant for lunch. There is no "work-relatedness." The worker worked under a collective agreement and the employer was not compelled to provide a lunch room.

[27] Mr. Brown submitted that the worker, as a construction worker, is not a travelling salesman. If lunch is personal, as Mr. Majesky argued, the employer would be compelled to protect workers at lunchtime. The worker left the premises at lunch and the Cable TV Company had left the manhole cover unsecured. The worker's recourse was to sue in a third party action.

(d) Conclusions

[28] The evidence in this case is uncontroverted. The worker was employed by the employer and was working at a job site quite removed from the employer's premises. The worker went off the job site with GT, his supervisor and foreman for lunch at one of their suggestion. GT paid for the lunch and was not reimbursed. The lunch period is unpaid pursuant to the collective agreement. The worker fell into a manhole outside the restaurant that existed because of the needs of the Cable TV Company. The manhole was not on the job site.

(vi) Tribunal decisions

(a) Cases cited by Mr. Majesky

[29] As noted above, Mr. Majesty cited 10 Tribunal decisions. Each case has a different set of facts.

[30] In *Decision No. 585/93*, a right to sue application, the Panel considered whether the plaintiff (worker) was in the course of his employment at the time of the accident. On August 6, 1990, the worker, who worked on a garbage truck and was travelling his route, stopped at a restaurant for lunch and slipped in the washroom of the restaurant. The Panel applied the test of **whether the activity was reasonably incidental to employment.** The Panel found that the lunch break and the work route were intertwined sufficiently to make the lunch routine,

including the trip to the restaurant washroom, reasonably incidental to the worker's employment and concluded that the worker was in the course of his employment at the time of the accident and that his right to sue had been taken away

[31] In *Decision No. 1288/87*, a right to sue application, the Panel considered whether one of the plaintiffs, i.e. the worker, was in the course of his employment when on May 1, 1985 he was a passenger in a vehicle that was struck by the defendant. At the time of the accident, the worker was a salaried sales representative in training travelling in a company-owned vehicle and had an expense account for lunches. Because of traffic congestion, the worker's supervisor, who was driving the company vehicle, and the worker decided to have lunch prior to going to visit a customer. It was determined in the evidence of the hearing that lunch was always paid for by the employer regardless of whether a customer was involved and there was no time allotted for lunch. In finding that the worker was in the course of his employment at the time of the accident and concluding that the worker's right to sue had been taken away, the Panel gave the following reasons:

> The decision to have lunch first did not, in the Panel's opinion, remove [the worker] from the course of his employment. First, because [the worker] and [Mr. G, the worker's supervisor], whatever their intention, had not yet departed from the route which would have taken them to the employer's customer. Second, even if they had departed from that route, such a departure could not, in the circumstances, constitute for [the worker] a personal errand. [The worker] intended to have lunch with his supervisor of the day. Presumably, much of their discussion would have focused on their work. Moreover, that lunch would have been paid for by the employer. Although [the worker] stated that he felt he could have departed from [Mr. G] and attended to personal business while [Mr. G] had lunch, the Panel finds that such a step could not have been taken by [the worker] without first obtaining [Mr. G's] permission. Consequently, in the Panel's opinion, until such time as [Mr. G] released [the worker] from his assignment of spending time with [Mr. G], [the worker] would have to be considered to be in the course of his employment.

[32] In *Decision No. 355/93*, a right to sue application, the Panel considered whether the plaintiff (worker) was in the course of his employment on August 30, 1990, when she slipped and fell while leaving the employees' washroom at a mall where she worked. The worker had commenced an action against the owner of the mall and the cleaning company that had contracted with the owner to clean the mall. In concluding that the worker was in the course of her employment at the time of the injury and that her right to sue had been taken away, the Panel gave the following reasons:

> We think it is helpful to refer to guidelines established by the Workers' Compensation Board in April 1990, to apply to claims registered after July 1, 1990, addressing the issue of work relatedness (*Operational Policy Manual*, Document #03-01-02). These guidelines require a consideration of the criteria of time, place and activity in determining whether an accident occurs in the course of employment. Of particular relevance to this case is the portion of the guidelines addressing activities relating to personal needs. Generally, the guidelines provide that an accident arises out of the course of employment when it occurs while the worker is engaged in the performance of work-related duties or in an activity which was "reasonably incidental" to the employment. The guidelines recognize that a worker engaged in an activity to satisfy a personal need may still be engaged in an activity which is reasonably incidental to employment. To determine whether an activity is reasonably incidental to employment, a decision maker is to consider the nature of the work, the nature of the work environment, and the customs and practices of the particular work place.

> Here, [the worker] had not yet left the mall to embark on her shopping trip with her fiance. Although some time was spent on the question of whether she had commenced her lunch break at the time of the accident, we do not think that this is determinative. She was preparing to leave for her lunch hour, and this involved her use of washroom facilities which were provided for all mall employees. **In our view, a worker's use of washroom facilities provided by the employer during the normal working day is an activity which is reasonably incidental to employment, whether it takes place during a lunch or other break period. It is obvious that employees will have to satisfy personal needs at some point during the working day.** This is clearly acknowledged by the employer, who provided a key for its workers to have access to washroom facilities. It was the practice in the worker's store that only one person could leave for the washroom at a time, so that there would always be an employee in the store. It was necessary for the worker to return the key of the washroom to the store before leaving the mall. In our view, she was carrying out an activity which was reasonably incidental to her employment at the time of the accident in question. [Emphasis added]
>
> This conclusion is not affected by the fact that the accident occurred outside the employer's store. **In our view, the facts of this case are distinguishable from those referred to above, where workers were injured in accidents during a lunch or other break while travelling by car on public roads. In those cases, it could not be said that the workers were on the employer's premises.** Here, the employer did not provide washroom facilities inside the store for its workers. However, the washroom facilities were in a location to which only mall employees, and not the general public, were authorized to have access. The employer's possession of a key to the hallway leading to the washroom suggests that the provision of this facility to the employer for the use of its workers was part of the employer's rental arrangement with the mall owner. In these circumstances, we consider that [the worker's] position is no different than if she had been using a washroom within her employer's premises. Accordingly, we conclude that [the worker] was in the course of her employment at the time of the happening of the injury. As a result, her right of action against the Defendant [cleaning company] is taken away by the provisions of the Act. [Emphasis added]

[33] In *Decision No. 1484/04I*, a right to sue application, the Vice-Chair considered whether the plaintiff (worker), a registered nurse, was in the course of her employment on November 20, 2000 when she was involved in a motor vehicle accident. At the time of the accident, she was working full time as a psychiatric nurse and travelled and visited clients in the community. She normally saw clients in their homes but she could see them anywhere. She worked a full-time shift, in which she had a 15-minute break in the morning and in the afternoon and she had a half hour lunch, which was not paid.

[34] The Vice-Chair considered the wording of "Travel On Employer's Business" set out in OPM Document No. 03-02-03, which is identical to the policy set out in OPM Document No. 15-03-05, now in force and applicable in this case before me:

> **Travel On Employer's Business:** When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must obligate the worker to be travelling at the place and time the accident occurred.

[35] The Vice-Chair addressed this policy:

> Thus, Board policy distinguishes between workers with fixed workplaces and those whose conditions of employment require them to travel away from the employer's premises. **A worker whose conditions of employment require him/her to travel is considered to be in the course of employment continuously except when a distinct departure on a personal errand is shown. Generally, such a worker will be found to have been in the course of employment at the time of the accident if the accident occurred at a time when the worker's employment obligated the worker to be travelling and at a place where he/she might reasonably have been expected to be while engaged in work-related activities.** [Emphasis added]

[36] The Vice-Chair found that although the worker in *Decision No. 1484/04I* was not paid for her lunch period, the conditions of her employment required her to have lunch at some time during the day. It was up to her to decide when she took her lunch. In finding that the worker was acting in the course of her employment at the time of the accident, the Vice-Chair gave the following reasons:

> I am satisfied that, given the nature of the worker's work and the practices associated with her employment, having lunch was an activity that was reasonably incidental to her employment. **As stated in Board policy, when the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. Having lunch would not have been a "personal errand". It was an activity that was reasonably incidental to her employment.** As indicated in Tribunal *Decision Nos. 1785/02 and 62/94*, **taking a lunch break at a restaurant close to the next jobsite will normally be an activity that is reasonably incident to the employment of employees whose conditions of employment require them to travel away from the employer's premises.** In this case, going for lunch when and where [the worker] intended to go for lunch would not, in my view, have been a "personal errand". It was an activity that was reasonably incidental to her employment. [Emphasis added]

[37] In *Decision No. 1785/02I*, a right to sue application, the Vice-Chair considered whether the plaintiff (worker), a residential home cleaner, was in the course of her employment on November 3, 2000 when she was involved in a motor vehicle accident. She was driving a company vehicle supplied to her by her employer. The Vice-Chair found that the worker having lunch at a Wendy's restaurant was an activity that was "reasonably incidental" to her employment. As travelling employees, taking a lunch break at a restaurant close to the jobsite would "normally be an activity that would be reasonably incidental to employment." The Vice-Chair distinguished this case from *Decision No. 280/91* and *Decision No. 833/95*, as this worker had not gone home for lunch, thereby not exposing herself to personal risks associated with household activities. Furthermore, this was not a case where the route to the restaurant they (the worker and co-workers) chose deviated substantially from the route to the next job. The Vice-Chair found that their motive for having lunch at that time was related to their employment. The Vice-Chair considered the "premises rule":

> As indicated in the Tribunal decisions cited by the parties, the "premises rule" that is generally applied to trips going to and from work is generally applied when a worker takes a lunch break at a location off the employer's premises. This is because the duration of an off premise lunch break and the freedom of movement the worker has during such a lunch break usually removes a worker from the activities associated with his/her employment, as well as from the risks the employer controls. **However, this general rule with respect to off-premises injuries does not usually apply to workers who are normally expected to work away from the employer's premises.** For such

> workers, the journey to such off-premises work is part of the service for which the worker is employed. **Accordingly, workers whose conditions of employment require them to travel away from the employer's premises are considered to be in the course of their employment continuously except when a distinct departure on a personal errand takes place. Because such workers are considered to be in the course of employment continuously when they travel away from the employer's premises, acts such as eating meals during the hours of employment are usually considered to be reasonably incidental to that employment. If, however, there is a distinct departure from the employment trip for personal reasons, this may take the worker out of the course of employment.** [Emphasis added]

[38] The issue for the Panel to decide in *Decision No. 2310/03* was whether the worker, a police officer working on modified duties as a police court case manager, had initial entitlement to benefits for a low back injury sustained as a result of an incident the worker alleged occurred on December 24, 1997, when she slipped on ice in a restaurant parking lot while attempting to open the door of her van and wedged her left leg under the running board of her van after spending a Christmas lunch with her assistant. The ARO had determined that the accident did not occur from work-related activities. The lunch was not claimed as a work expense nor was the mileage to the restaurant.

[39] The Panel considered that the worker and her assistant had gone out for lunch many times in the past but usually to places closer to the courthouse. The purpose of the lunch was to make up for the fact that her assistant had not been invited out to the sergeant's annual lunch and the worker wanted to make up for the lunch missed. The worker testified that they usually went to the eatery next door to the courthouse. However for the Christmas lunch that day they decided to they would attend the best restaurant in the area, at her expense, located a fair distance away from the courthouse. She was on-call during the lunch despite the fact that she was not paid by the employer while on lunch.

[40] The Panel concluded that the worker was not in the course of her employment at the time of her December 24, 1997 injury on the basis that the Christmas lunch was not an activity reasonable incidental to her employment.

[41] The issue in *Decision No. 1416/98* was whether the worker was injured by accident arising out of and in the course of her employment when she slipped on December 10, 1996, twisting her right knee. The worker left the employer's premises before a seminar was to begin to drive to a nearby restaurant to buy a take-out lunch. As she was returning to her vehicle with her take-out lunch on December 10, 1996, she slipped on ice and twisted her knee. The Vice-Chair considered other Tribunal decisions, noting the factors suggested by panels to be considered when deciding whether a worker is engaged in an activity that is reasonable incidental to employment, which include:

- whether the worker was on the premises of the employer,
- whether the activity involved something for the benefit of the employer,
- whether the activity occurred in response to instructions from the employer,
- whether the activity involved the use of equipment or materials supplied by the employer,

- whether the risk to which the worker was exposed was the same as the risk to which he/she was normally exposed in the course of employment, and
- whether the activity occurred during a time period for which the worker was being paid.

[42] The Vice-Chair found these factors to be of assistance in determining whether a worker is in the ordinary course of employment, but that no one factor is determinative of the issue. In coming to her decision that the worker was in the course of her employment, the Vice-Chair gave the following reasons:

> In keeping with the approach taken in many Tribunal decisions, a worker is in the course of employment if that worker is engaged in an activity which is reasonable incidental to employment. There must be a reasonable connection between the activity and the employment: reasonable as to time, reasonable as to place, and reasonable as to nature of activity.
>
> My review of the evidence indicates that the worker was in the course of her employment for the employer on December 10, 1996, when she slipped on ice twisting her right knee. In my view, the worker was engaged in an activity that was reasonably related as to time, place and nature of her employment for the employer.
>
> The worker was a regular full-time employee and worked fixed hours. She was required by the employer to attend a seminar on December 10, 1996, from 11:00 a.m. to 4:00 p.m. which was to run through the normal lunch break. The employer allowed those attending the seminar to leave the employer's premises during regular working hours before the seminar began at 11:00 a.m. to obtain something to eat while they watched a video during what on other days would be their normal lunch break. Accordingly, the worker left the employer's premises at about 10:00 a.m. and drove to a nearby restaurant to obtain a take-out lunch. She slipped on ice twisting her right knee as she walked back to her vehicle to drive back to the employer's premises. The worker was treated in hospital the same day for an injury to her right knee and returned to work in February 1997.

[43] In *Decision No. 744/03*, a right to sue application, the Vice-Chair considered whether the plaintiff (worker), a front shop manager for a pharmacy company, was in the course of her employment on March 8, 2000 while she was in the arena area of a municipal Civic Centre attending a trade show and tripped on a flange protruding from the ramp to the exhibitor area as she returned to the arena from a 15 to 20 minute smoke break. She suffered a fracture of her right foot and ankle. In coming to her decision that the worker was in the course of her employment, the Vice-Chair gave the following reasons:

> Generally speaking, activities such as a lunch break or trip to the washroom are considered to be reasonably incidental to a worker's employment, unless the worker removes himself or herself from the course of employment by making a distinct departure on a personal errand. This was the case in *Decision No. 367/02* (December 4, 1992). In that case, the plaintiffs decided to eat lunch at one of the plaintiff's houses on the day of a seminar. They were involved in a motor vehicle accident en route to lunch. In that case, the Panel found that the plaintiffs removed themselves from the course of employment by deciding to eat lunch at a plaintiff's home, rather than at a location closer to the seminar location. This is consistent with OPM Document No. 03-02-03, which provides "When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown."
>
> I find that the Plaintiff's accident in this case occurred in the course of her employment. She ate lunch with her co-workers, provided by the trade show organizers in the same building where the trade show was taking place. The decision to go outside did not

> represent a distinct departure, but was reasonably incidental to the employment as a routine break. In any event, the worker's injury occurred on the premises of the trade show while she was making her way back to the trade show floor. There is a strong employment connection in her activities at the time of the accident, and she made no distinct departure from her employment. In these circumstances, I am satisfied that the Plaintiff was in the course of her employment at the time of the injury. [Emphasis added]

[44] The issue in *Decision No. 823/96* was whether the worker was injured by accident arising out of and in the course of her employment when she slipped on the sidewalk of a plaza as she was going for lunch on January 15, 1992. The Panel accepted the worker's evidence that she planned to get toilet paper as well as her lunch when she left the store. The Panel found that the purpose of the worker going out on the sidewalk served a dual purpose of obtaining supplies and obtaining lunch and that the worker did not depart from her job-related route before she fell. The Panel considered that the lunch break was paid time, the worker had permission to leave the store for lunch and that there were no lunch facilities at the store. The Panel concluded that the worker's brief departure from the store to obtain something to eat and then return to the store to eat it, as was her practice, was reasonably incidental to her employment, as well as beneficial to the employer.

[45] In *Decision No. 678/02*, a right to sue application, the Vice-Chair considered whether the plaintiff (worker), a full time delivery truck driver, was in the course of his employment at approximately noon on February 12, 1998 when he fell at a McDonalds' restaurant, where he had stopped for lunch. The Vice-Chair found that travelling employees having lunch on the road is incidental to their employment, especially where the purpose for their being in the area is related to their employment. The Vice-Chair cited six Tribunal decisions where workers were held to be in the course of their employment, notwithstanding the fact that they were on unpaid lunch breaks (*Decision No. 729/92, Decision No. 429/91, Decision No. 280/90, Decision No. 1000/89, Decision No. 62/89,* and *Decision No. 21/88.* The Vice-Chair also cited three Tribunal decisions where workers on unpaid lunch breaks were held not to be in the course of their employment (*Decision No. 817/87, Decision No. 367/92,* and *Decision No. 280/91.*

(b) Other Tribunal decisions

[46] A search of Tribunal decisions relating to workers who have been injured during the lunch break reveals a number of decisions. Factors that were considered include:

- The plaintiff (worker) was found not to be in the course of his employment when injured during the lunch break taken after 3:00 PM after completing their work and on their way back to the employer's yard. They left the highway on which they had been travelling and drove approximately one kilometre to a restaurant selected by the worker's co-worker. (*Decision No. 1238/08*)
- The plaintiff (worker) was found not to be in the course of his employment when injured during in an accident while proceeding from the work site in Oakville to meet a personal friend for lunch in Rexdale. (*Decision No. 906/06*)
- The plaintiff/worker was found to be in the course of his employment when injured after he had completed his work for the day in the early afternoon and after he had made stops for coffee and lunch. The Vice-Chair was satisfied that driving from home to the job site and back was an essential condition of the plaintiff's employment. The worker had made two

stops after finishing work that day but did not deviate from the most direct route from the job site to his home. In that case, the accident did not happen at one of the stops. He had resumed his travel home, which was an activity that was reasonably incidental to his employment. (*Decision No. 1029/06*)

- The worker was taken to lunch by his supervisor for the purpose of the worker's performance appraisal. The lunch extended for about five to six hours. The supervisor paid for lunch, including the drinks. The Panel found that lunch was work-related. The supervisor set the stage for the ensuing problems by encouraging and paying for alcohol consumption during the lunch that was intended as a performance appraisal. The Panel concluded that the worker did not take himself out of employment. (*Decision No. 1506/04*)
- The worker was injured in a motor vehicle accident. The worker was proceeding to the bank to do the employer's banking. After doing the banking, the worker did not return to the employer's office using her usual direct route. The Vice-Chair found that she was going for lunch. The route taken by the worker was a distinct departure from her usual route. The Vice-Chair concluded that she was not in the course of employment at the time of the accident. (*Decision No. 1281/04*)
- A dietary aide fell and broke her ankle as she was demonstrating self-defence kicks to her co-workers while on a coffee break in the employer's lunch room. The Vice-Chair found the worker's activity to be reasonably characterized as horseplay and that it was not reasonably incidental to employment. (*Decision No. 2403/03*)
- The worker was injured on a paid lunch break on the employer's premises while peeling an orange with a paring knife and cutting the tendon of his finger when the knife slipped. The Vice-Chair found that taking a break is a reasonable incidental activity to being at work. Eating while on the break is also incidental to being at work. The Vice-Chair concluded that the worker was in the course of employment at the time of the accident. (*Decision No. 1403/02*)
- The plaintiff (worker) had stopped on an unpaid lunch break after finishing a delivery nearby. He had to return the truck to his employer's yard. The Vice-Chair concluded that he was in the course of his employment at the time of his accident. (*Decision No. 678/02*)
- The worker, a police officer, was injured in 1995 during a soccer practice for the police women's soccer team. The Panel found that she was on a paid lunch and was available for duty. Although the accident did not occur on the employer's premises, it was in a location known and approved by the employer. The Panel concluded that the worker was in the course of employment. (*Decision No. 1234/00*)
- The worker had entitlement for an onset of back pain when she sat down to have lunch in the employer's lunch room. The Vice-Chair found the activity to be reasonably incidental to employment. (*Decision No. 1678/00*)
- The worker left her office at 12:30 PM to meet a friend for lunch, after which she intended to go to the other office for the meeting. The accident occurred on her way to meet her friend for lunch. The Vice-Chair found the trip to be purely personal in nature. There would have been no business or employment purpose until after the plaintiff/worker

finished lunch and departed for the meeting. The Vice-Chair concluded that the she was not in the course of her employment. (*Decision No. 428/01*)

- The plaintiff (worker) had just returned from a lunch break, taken off premises, when she fell while walking from the parking lot to the building in which she worked. The Vice-Chair found that the plaintiff had not re-entered the employer's premises at the time of the incident. However, he found that it would have been impossible for her to gain access to her office building without first being on the intermediate premises, owned by the defendant where the incident occurred. The Vice-Chair found that, while the plaintiff may have been subject to the same risks as the general public while walking on the intermediate premises separating the parking lot from the office building, those risks were completely unavoidable, given the location of the designated parking spots provided by the defendant. The Vice-Chair concluded that the incident was a work-related accident because she was on the most direct route, from the parking lot to the office building, at a time consistent with her clear intent to fulfil her work obligations for her employer. (*Decision No. 1437/98*)
- The worker was struck by a motor vehicle while crossing the street on his lunch break while at school in 1995. The Vice-Chair considered that a worker who is injured while attending a rehabilitation program is generally analogous to a worker who is injured while employed. The general rule for injuries on a lunch break is that lunch is considered a personal activity and not an employment-related activity. Generally, a worker on lunch break is considered to be a member of the general public and is subject to the risks to which the public is exposed, unless the worker is doing something that is reasonable incidental to employment at the time of the accident. The Vice-Chair found that the worker was not doing something which was reasonably incidental to his rehabilitation program at the time of the accident. The Vice-Chair concluded that the worker was not entitled to benefits for injuries suffered in the accident while on a lunch break. (*Decision No. 2142/99*)
- The worker was injured in the parking lot used by the general public. Board policy provides for entitlement when a worker is injured in parking spaces regulated and allocated by the employer but provides, generally, that workers are members of the general public once they leave the allocated areas and remain so until they reach the employer's premises. The Vice-Chair found that the worker was not in the designated area at the time of the accident and that she was a member of the general public. (*Decision No. 755/98*)
- The Panel considered that it is well-established that where a worker's employment requires that he drive most of the day, stops for coffee breaks, even if they involve minor detours, are not considered distinct departures that take the worker out of the course of employment. The same applies for stops for lunch unless a personal errand takes the worker considerably out of the way, in which case it would be considered a distinct departure. (*Decision No. 62/94*)
- The worker was proceeding in his employer's van at lunch time from the work site to his home where he was going to lunch with his wife. By agreement, he had use of the van for work purposes and for personal use at other times. The Panel found that at the time of the accident, the plaintiff/worker was not engaged in any activity to benefit the employer. The purpose of the trip was personal and the activity involved a distinct departure from

employment-related activity. The Panel concluded that the plaintiff was not in the course of employment and his right of action was not taken away. (*Decision No. 833/95*)

- The worker completed some work-related banking that required her to travel away from the office. She then had lunch and did some shopping at a mall. She was on her way back to the office at the time of the accident. She normally travelled away from the office for lunch. She was paid for lunch in her weekly salary and the length of her lunch period was at her own discretion. The Panel found that the accident occurred at a location well off the direct route between the bank and the employer's office. This was due only to the worker's decision to have lunch and shop at the mall. The Panel concluded that the accident did not involve a work-related risk. (*Decision No. 1/94*)
- On the day of the accident, the plaintiff (worker) loaded a van belonging to his father's business. He drove the other plaintiff from the business premises to the job site. They worked until around noon, when there was no more work to be done. They went to lunch, did some personal shopping and were returning to the business premises when the accident occurred. The Panel found that the plaintiffs were in the course of employment at the time of the accident and concluded that the right of action was taken away against the defendant driver and the defendant employer. (*Decision No. 24/94*)
- During his unpaid lunch break, the plaintiff (worker) was buying his lunch from a catering truck that was allowed on the premises by the employer. The catering truck was struck by a tractor-trailer, causing its door to fly open and strike the plaintiff. The Panel found that the worker was in the course of employment at the time of the accident and, consequently, his right of action was taken away. It was reasonably incidental to employment for a worker to obtain lunch from a catering truck with the intention of eating it in the employer's lunch room. (*Decision No. 729/92*)
- The plaintiff (worker) was a travelling salesman who was making calls, or intending to make calls, on prospective customers at the time of the accident. The Panel found that the fact that he was planning to have lunch at a restaurant would not take him out of the course of his employment. Having lunch of the road is incidental to the employment of a travelling salesman. While the plaintiff may have been intending to have lunch with a friend in the area, his purpose of being in the area was not to visit his friend. The Panel found that the plaintiff was in the course of his employment at the time of the accident. (*Decision No. 473/92*)
- The accident occurred during the lunch break, as the plaintiffs and another co-worker were proceeding to one of their homes for lunch. The Panel could not conclude that the plaintiffs were paid for lunch on that day. In any event, whether the plaintiffs were paid for the lunch break was only one factor to consider in determining whether the plaintiffs were in the course of their employment. There were a number of places where lunch was available in the area of the seminar. The Panel found that the decision to eat at one of the plaintiff's homes removed the plaintiffs from an employment-related situation. (*Decision No. 367/92*)
- The plaintiffs were on their way back to the office after an unofficial pre-Christmas lunch. The lunch was arranged informally by the workers without the employer's involvement. There were other social activities, including Christmas parties, in which the employer was

involved. The Panel concluded that the plaintiffs were not in the course of their employment and concluded that their right of action was not taken away. (*Decision No. 778/92*)

- The accident occurred on the employer's parking lot. The plaintiff had completed his regular shift but had stayed to eat lunch and was going to make an additional delivery in the afternoon. He was struck while eating lunch. The Panel reviewed prior Tribunal decisions and adopted the premises in *Decision No. 531/90*. The Panel found that the defendant was in the course of employment while in the employer's parking lot and that the plaintiff was in the course of employment while he was on his lunch break. (*Decision No. 606/92*)
- The worker was injured during her unpaid lunch break when she was struck by a delivery van while crossing the employer's parking lot to go to a catering truck. The Panel found that the worker was in the course of employment. (*Decision No. 1000/89*)
- The worker worked at a flower stand in the mall. The accident occurred at a nearby delicatessen in the mall where she had gone to pick up her lunch which she would bring back to the flower stand. The Panel found that the injury arose out of and in the course of employment. Purchasing her lunch expeditiously was an activity which was incidental to her activities for her employer. It was to the employer's benefit that she return to the stand. She was not engaged solely in a personal activity. (*Decision No. 1230/87*)
- The worker slipped and fell on a patch of ice on a public sidewalk adjacent to the grounds of the employer's premises while returning to work from her lunch break. The Panel found that the worker was not in the course of her employment and that the accident did not occur on company premises. The Panel found that the sidewalk was not part of the employer's premises and, although there were no lunch facilities on the employer's premises, the course of employment would not extend to cover a lunch period. The Panel concluded that the accident was not compensable. (*Decision No. 485*, November 1986)

[47] I note the following consideration made by the Vice-Chair in *Decision No. 1238/08,* cited above, regarding workers taking a meal break while travelling as part of their employment:

> There have been several decisions that found that a worker taking a meal break while travelling as part of his duties remained in the course of employment: *Decisions No. 276/90, 585/93* and *678/02*. At page 4 of *Decision No. 276/90* (January 24, 1991), the Panel stated:
>
> Both Counsel cited a number of Tribunal decisions dealing with accidents which occurred during lunch periods. These decisions indicate that workers are generally not in the course of their employment if they are injured during a lunch break and they are not on their employer's premises when they are injured. However, if the worker's employment requires him/her to be travelling at the place and time the accident occurred, or where the employer benefits in some way from the activity the worker was engaged in at the time of the accident, the worker has, in some cases, been found to be "in the course of employment".
>
> In each case, Panel's have weighed the employment features and the personal features of the particular case and decided which predominate.

(vii) Conclusions

[48] I accept Mr. Brown's submissions that each case must be decided on its own merits and that Tribunal decisions are not binding on the Board or the Tribunal. I accept Mr. Brown's

submission that I must follow Board policy in deciding this case. While Tribunal decisions are not binding, they are indeed persuasive. The Tribunal relies on its own decisions both to assist in the decision-making process and to provide consistent decisions for the benefit of the public who relies on the Tribunal to make final decisions on appeals from the Board.

[49] As can be seen from the above-noted cases, there are situations when a worker who is injured during an unpaid lunch break is found to be in the course of employment. While not one of these cases has a fact situation that is so intrinsically linked to this case before me, in general the cases are consistent that a worker injured during the lunch break while on the employer's premises is in the course of employment, unless the worker was involved in "horseplay" at the time of the accident. The cases also confirm that a worker who is injured during a lunch or washroom break while travelling off the employer's premises is generally considered to be in the course of employment unless he or she deviated from the most direct route or is solely on a personal errand.

[50] Thus, I am left to decide this case of a worker who left the job site by foot with GT, his friend, co-worker, supervisor and foreman, for lunch at the nearest restaurant and was injured off the job site while walking directly back to the job site.

[51] As noted above, OPM Document No. 15-03-05 (and its predecessor, Document No. 03-02-03) provides that:

> When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown.

[52] I find this is the operative policy for deciding this case because the worker was required to travel away from the employer's premises to do the electrical contracting job. In order for this policy not to apply in this case, I must determine that the worker's going to lunch with GT on October 11, 2006 was a "distinct departure on a personal errand."

[53] The Panel in *Decision No. 550/93* considered what constitutes a distinct departure from employment. The Panel relied on a passage from *Decision No. 2*, British Columbia Workers' Compensation Reporter, Vol. 1, 1973-74, page 7:

> The claim raises a dilemma that has always been inherent in workmen's compensation. The difficulty, of course, is that the activities of man are not neatly devisable into two categories, their employment functions and their personal lives. There is a broad area of intersection and overlay between work and personal affairs, somewhere in that broad area we must map the perimeter of workmen's compensation and incidental intrusion of personal activity into the process of work will not require a claim otherwise valid to be denied. For example, it is long been accepted that compensation is not limited to injuries occurring in the course of production. Where a person is injured while at work in the broader sense of that term a claim will not be denied on the ground that at the precise moment of injury he was blowing his nose, using the toilet or having his coffee break. **Similarly, it has long been accepted that when a truck driver stops for a meal in the course of a long journey and is injured while crossing the road, he is just as much entitled to compensation as a factory worker injured on his way to the work's canteen.** Conversely the intrusion of some aspect of work into the personal life of an employee at the moment when he suffers an injury will not entitle him to compensation. For example, if someone slips in the living room at home and is injured, he is not entitled

> to compensation simply on the grounds that at the crucial moment he had in his hand a book relating to his work that he was reading. In the marginal cases it is impossible to do better than weight the employer features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant. [Emphasis added]

[54] In coming to its decision, the Panel in *Decision No. 550/93* embarked on an exercise of balancing the employment features with the personal features in reaching a conclusion which would be best supported by the specific facts of the case and Board policy applicable for travelling on employer's business. The Panel considered the application of the "but for" test in determining that the worker was in the course of her employment when the accident occurred and her right of action against the defendants had been taken away.

> In the Panel's view, the guideline then goes on to establish the appropriate and determinative test in the case before us by stating that the employment must obligate the worker to be travelling at the place and time the accident occurred. We might call this the "but for" test. Applying this test to the facts of the case before us, the question to be asked is this - is it correct that Reid would not have been at the accident site at that time but for her employment obligation? In order to answer this question we must look carefully at the route travelled and anticipated to be travelled by Reid on the day in question.
>
> As stated earlier, she effectively proposed to travel around a circuit for her various stops with a jog travelled outside the circle to her business appointment and back into it again to continue on her personal errands. Absent the 8:30 business appointment, the worker would have travelled north on Highway 46 and turned left onto Highway 20 to go to the fruit market and continued on her personal errands around the full circle back to her office. Or she might have rearranged her personal appointment agenda and travelled the circuit in a clockwise direction (if looking down on a map) rather than the planned counter clockwise direction. In either event, she would not have taken the jog or spur outside the circuit. This jog or spur, because of her employment consisted of turning right onto Highway 20 from Highway 406 and going northeast to the industrial mall and back again to the intersection of 406 after the business appointment.
>
> Therefore the answer to the above posed question in the "but for" test is that Reid would not have been on that stretch of Highway 20 from the intersection of Highway 406 to the driveway into the industrial mall but for her business appointment. Following this reasoning, if the fruit market had been further along Highway 20 requiring Reid to turn left from the mall's driveway onto Highway 20, and the accident had occurred on Highway 20 just northeast of the driveway, this would have constituted a distinct departure because the only reason for being on that stretch of Highway 20 would have been a personal errand. For the same reason, if Reid had proceeded southwest on Highway 20 back past the intersection of Highway 406 when the accident occurred, she would have been on a distinct departure for personal errands because such was the only reason for her to be on that stretch of Highway 20, rather than turning south on Highway 406 to return to the office the same way that she had come.
>
> We adopt this "but for" test, which is really a paraphrase of the wording in the Board's guideline, as being the appropriate test to be used given the facts of this case. Applying this test to the case before us, it is clear that but for the obligations of Reid's employment, she would not have been at the site of the accident at that particular time.

[55] Applying the "but for" test in this case, I find that but for the worker travelling to Brampton to work on the employer's job site on October 11, 2006, he would not have been out for lunch and returning from lunch across the pub's parking lot when he accidentally stepped on the improperly maintained manhole cover, as evidenced by the Cable TV Company asphalting

over the manhole within a matter of hours after the accident. Moreover, the worker and GT were going for lunch at the **nearest restaurant** that happened to be across the street. They did **not deviate from the most direct route to the pub** and they did **not deviate from the most direct route on the way back to the job site after leaving the pub**.

[56] Furthermore, applying the Vice-Chair's reasoning in *Decision No. 1437/98*, the worker was on the most direct route from the parking lot to the building that he and GT were working in "at a time consistent with [his] clear intent to fulfil [his] work obligations for [his] employer." The Vice-Chair considered that while the worker in that case may have been subject to the same risks as the general public when she was walking on the intermediate premises separating the parking lot from the office building, "those risks were completely unavoidable, given the location of the designated parking spots by the defendant."

[57] I do not think that the worker in this case foresaw in the instant before he stepped on the manhole cover the possibility that he would be waist deep in water with an injured lower back. He had every reason to assume that the cover would be safe to step on and he likely gave it no more than a passing thought. While I do accept Mr. Brown's submission that the worker should have sued third parties (the pub and the Cable TV Company), I considered that in many of the Tribunal decisions discussed above the right to sue was taken away from the injured workers. The worker testified that he had spoken to a lawyer(s), who refused to take the matter on because it was a compensation case.

[58] Ultimately, I find the worker's need for sustenance and the satisfaction of that need to **not** be a "distinct departure on a personal errand." I accept Mr. Majesky's submissions that eating lunch is not a "personal errand." I do not find that eating lunch is any more a personal errand than using washroom facilities. These activates are not a matter of choice, they are matters of necessity in our everyday existence. The only matter of choice may be where to eat and what to eat, not having to eat. The worker testified that by noon he is "very" hungry. Evidently a construction electrician would be very hungry after a busy and hard morning's work. Food is a necessity of life.

[59] I do not consider the fact that the worker opted not to eat his already prepared bag lunch on October 11, 2006 to be critical in this decision. The worker and GT decided to eat at the **nearest** restaurant, a pub, as an alternative to the mundane bag lunch. I do not consider that GT's paying for the lunch for his "friend" and not being reimbursed for it by the employer is critical in this decision.

[60] For these reasons, I find that the worker was in the course of this employment on October 11, 2006 when, after eating lunch at the nearest restaurant and on his way back to the job site, he stepped on the manhole cover, fell into the manhole and injured his back. The worker has initial entitlement for a back condition resulting from the accident on October 11, 2006. Accordingly, I remit this case to the Board to determine the nature and duration of benefits flowing from this decision.

DISPOSITION

[61] The worker's appeal is allowed.

1. The worker was in the course of this employment on October 11, 2006 when, after eating lunch at the nearest restaurant and on his way back to the job site, he stepped on the manhole cover, fell into the manhole and injured his back.
2. The worker has initial entitlement for a back condition resulting from the accident on October 11, 2006.
3. This case is remitted to the Board to determine the nature and duration of benefits flowing from this decision.

DATED: November 4, 2008

SIGNED: M. Butler