



Arising Out of and in the Course of Employment An Injury is not an Accident

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The law is very complicated, even in claims that involve straight forward accidents, in which the worker was engaged in some work related activity when an accident/injury happens. Leaving aside delayed reporting and proof of accident disputes, a slip, bang, awkward twist, or injuries where there is some form of single episode trauma are usually clear cut. And that includes gradual onset injuries (i.e., repetitive strain injuries) due to the physical demands of your job.

However, there are workers who suffer injuries at work but there is no mechanism of injury (i.e., accident). For example, a worker is walking along and his leg gives out. Or a worker who has a stroke at work. The fact an injury happened at work does not necessarily make the injury work related. This has been the subject of a rigorous analysis by the Tribunal in a number of cases under the heading - **An Injury Is Not an Accident**.

Was The Bomb Set at Work or Home?

Take for example a stroke, the fact the bomb (injury) blew up at work, does not mean the stroke is work related. Conversely, the fact the bomb (injury) blew up at home, does not necessarily break the chain of causation that the injury is work related, particularly if the bomb was set at work. A few years ago I argued an appeal where our member suffered a knee injury at work, which the WSIB denied, and subsequently his knee blew up while on vacation in Cuba. The Orthopaedic Surgeon concluded the knee injury in Cuba resulted from work injury while crawling on a roof, and installing pot lights under a soffit, even though the members' disability did not fully manifest until he was on vacation.

In an appeal currently before the Tribunal a member at the end of his shift was leaving work and lifted his leg to descend a flight of stairs, when he felt something snap in his knee and he fell down a few steps, holding onto a railing. At this point he was on his ass, in excruciating pain, and was helped to his vehicle. He was clearly in the course of employment when the incident happened (re time, place and activity test), however, the WSIB ruled the act of descending stairs, and feeling a pop before the fall was not a work related accident. This highlights the challenge in determining whether this was a work related accident, and the chicken and egg debate whether the knee pathology resulted when the worker heard a pop as a result of a routine activity (i.e., lifting his leg), or from the trauma of a spontaneous slip/fall down a few steps? What's not in dispute, the member needed help to get to his car, was driven home, then sought emergency health care.

The Law & Policy

Section 13(2) of the *Workplace Safety & Insurance Act* states that,

if an accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. Likewise, if an accident arises out of a worker's employment, it is presumed to have occurred in the course of employment unless the contrary is shown. Board Operational Policy Document No. 15-02-01 provides a definition of accident, as does the WSIA. There are two branches of accident defined in the legislation and policy:

Chance event: An identifiable unintended event which causes an injury. An injury however, is not a chance event.

Disablement: Includes:

- A condition that emerges gradually over time
- An unexpected result of working duties.

Section 43 of the *WSIA* describes when a worker will be entitled to be paid benefits for loss of earnings ("LOE benefits). It states that a worker who has a loss of earnings "as a result of the [compensable] injury" is entitled to LOE benefits for the time period and in the amounts described in that section of the Act. Section 33 of the *WSIA* states that a worker who sustained a compensable injury is entitled to "such health care as may be necessary, appropriate and sufficient as a result of the injury."

Thus to decide whether a worker is entitled to LOE benefits and health care, it is necessary to decide whether the worker sustained a compensable injury (i.e., a personal injury by accident arising out of and in the course of employment). The wording of section 13 of the *WSIA* requires not only a finding that there was an "accident" that arose out of and in the course of employment, but also a finding that the worker sustained an "injury" as a result of that accident. It is a two-part test.

Routine Physical Activities - Walking or Descending Stairs not Accidents

In situations where a worker suffers an injury after merely leaning forward from a squatted position is routinely challenged because this activity is argued to be a normal everyday activity and not a "chance event" or identifiable unintended event. This was addressed in Tribunal *Decision No. 900/06* which found that a normal everyday activity of turning on stairs was not an identifiable unintended event, and therefore it was not a "chance event" accident as defined in legislation and policy.

In a similar vein, I once represented an OPP Constable who suffered a disc herniation after exiting his cruiser at the Whitby OPP Detachment, and crumpled to the ground. The issue under consideration, was the act of twisting to exit the car an accident; an activity that millions of people



perform daily without incident? I won that Tribunal appeal because an occupational physician documented the shear forces the human spine experiences when a person twists in a drivers' seat to exit a vehicle.

Union Has Won Appeals Arising from Squat or Dismounting Ladders

Another frequent source of controversy involves members arising from a squat and their knee pops causing immediate excruciating pain, or when dismounting a ladder they suffer a knee injury. The union has won these appeals even though the workers activities involve routine physical activities, because the mechanical stress applied to the knee is not normal. For instance, when arising from a squat, 3 times the workers weight or Body Mass Index is transmitted through the knee when arising from a squat. Most individuals can tolerate the mechanical loading on the knee, however, it is a tremendous force, particularly if you're up and down all day installing receptacles or performing other low level work.

Similarly, when dismounting a ladder usually involves a twisting motion of the knee with one foot planted, while the worker pivots and turns. Again, lateral twisting transmits stress through the knee (meniscus), because this is not a natural motion or articulation of the knee joint. Most meniscus (cartilage) injuries result from twisting activities e.g., skiing, tennis, soccer, where there is some sudden twisting of the knee, typically with one foot firmly planted. The union has won every appeal involving members who suffered a knee injury after dismounting a ladder. However, in my experience, WSIB decision makers tend to be blind to the micro motions that give rise to knee and other injuries, which is an important part of the work injury analysis that needs to be reported to the WSIB.

Tribunal Analysis, Did Injury Arise out of Employment

As has been discussed in a number of Tribunal decisions, the presumption of entitlement deems the question that a decision maker must ask, "has it been shown that the resultant injury did not arise out of the employment." Instead of asking

whether the injury arose out of the employment. Essentially, if something occurs in the course of employment, at work, the incident is presumed to have arisen out of the employment and is compensable, unless the presumption can be displaced.

Even if an incident happened at work, the focus turns to whether a precipitating event caused the injury. As the Tribunal Vice-Chair noted in *Decision No. 900/06*:

A worker simply placing their left foot down on a step and then turning to go back up to get a forgotten item is not, in and of itself, a chance event [accident]. Turning on stairs, even abruptly, is a fairly normal occurrence. It is not, in my view an "identifiable, unintended event" but is rather part of a normal, everyday activity. That the worker suffered an injury while performing this normal maneuver or activity is not disputed. The [WSIB] policy document provides, however, that the "injury itself is not a chance event."

By way of analogy, in my view it would be difficult to establish for an office worker that reaching for a telephone or for a pencil on one's desk that leads to neck or back pain is a work accident. While the incident occurred at work, the simple act of reaching in that way could hardly be stated to be an "unintended event" that led to an injury.

If this seems complicated, it is; that's WHY members need to call me first before making statements to WSIB. In my experience, WSIB Eligibility Adjudicators typically do not scrutinize a workers accident history with a view to teasing out details that would validate a workers claim, and instead, are more likely to characterize the activity as an every-day routine event and deny a claim.

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