Tribunal Case Law - Arising Out of and in the Course of Employment

Injured on Unpaid Lunch or Personal Breaks Mobile Workstations (Company Trucks)

By: Gary Majesky, *WSIB Consultant & Executive Board Member*

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.

However, many members drive service trucks and sustain injuries after a MVA, or slip and fall in restaurant's, including Tim Horton's, but often times are encouraged by the employer to file claims with the auto insurer, and not WSIB. MVA's in the course of employment are clearly work related, however, the WSIB requires the injured worker to sign an "Election Notice" that they elect to claim WSIB benefits, or alternatively, pursue a third party action (sue another insurer). Be forewarned, this is an irrevocable decision.

Previous Tribunal decisions have consistently held that the fact that a worker on an unpaid lunch break is, by itself, not determinative of the issue of whether that worker is in the course of his employment during the lunch break. It is only one of the factors involved in weighing and balancing the employment features of the situation with the personal features and is part of the totality of the event.

Travelling employees having lunch on the road is an activity incidental to their employment, as the following decisions confirm, especially where the purpose for the worker being in the area is related to their employment.

Notwithstanding the fact employees may be on an unpaid lunch break at the time of an injury, unless there is a distinct departure to attend to personal business (e.g., going to H & R Block, banking, or shopping) workers are considered to be in the course of employment when on lunch and rest breaks. *WSIB policy 15-02-02 – Accident in the Course of Employment* recognizes that attending to "personal needs" such as going to the washroom or eating, are biological activities that must be fulfilled, and therefore incidental to one's employment.

Decision No. 1786/06 (Vice-Chair Marifiotti)

On my consideration of the evidence and, in particular, the nature of the worker's employment and operations, I am satisfied that the accident did arise out of and in the course of employment.

I accept that it is not uncommon for workers to cross the street to obtain food for trips as the employer provides no facility for this. This custom was clearly related by all of the testimony at the hearing.

Furthermore, I am satisfied that the employer was well aware of the custom activity. The employer did not provide any information that, in my view, would contradict that the custom was authorized by the employer.

The crossing of the street to get food for the train trip is an activity reasonably incidental to the worker's employment... There are no food facilities provided by the employer and no opportunity to obtain food while on the train.

It is the nature of the work environment that required the worker to cross the street and obtain food for the train trip... While the worker rests and prepares for the train arrival, the employer retains authority over the worker and his activities, which, in my opinion, are reasonably incidental to the employment.

Decision No. 1484/04I (Vice-Chair Kenny)

The Respondent's lawyer argued that Ms. Ryan's activity of going for lunch was reasonably incidental to her employment - that it was not a personal errand or activity in that it was needed for health reasons. She also noted that Ms. Ryan's employer's break policy meant that no employee could work more than five consecutive hours without receiving a meal break...

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 incidental to the employment of employees whose conditions of employment require them to travel away from the employer's premises.

Decision No. 1785/02 (Vice-Chair Kenny)

As indicated in 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 employers 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 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.

Closing Thoughts

While the law and policy seem reasonably clear, that does not mean the WSIB will side with the injured worker, because I have argued appeals where the Board ruled the member was not in the course of employment re lunch break. However, decision-makers are directed to take into account the nature of the work; nature of the work environment; and the customs and practices of the particular workplace. To all our members who drive a service or company truck, your company vehicle is often times your principal employment tool, so don't get lulled into thinking that because your employer gives you a truck and gas card, there is a shared risk. Bottom line, if you have an MVA during work hours its work related.

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COBT Baseball Tournament

Local 353 entered two teams in the Central Ontario Building Trades Baseball Tournament at Coronation Park on Saturday, May 31, 2014. Our team in the "B" Division won against Sheet Metal 30 but lost to LIUNA 506 and Elevators 50. Our team in the "A" Division rocked the tournament with one loss to the Plumbers/ Steamfitters 46 and wins against the Elevators 50 and Gowing Contractors. Team "A" took revenge in the semi-finals against the Plumbers/Steamfitters and then took the final game over the Elevators for the Division Championship.

Team A

Team B