Appeal Allowed - Low Rise Foreman Broke Leg While At Home, After Exiting Company Truck to Fetch a Drill and His Lunch

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

The following case summary illustrates the policies and law when adjudicating whether a worker is in the course of employment while travelling to or from work. As a general rule, workers are not in the course of employment while travelling to or from work. However, there are exceptions for workers that have mobile work stations (service trucks) or drive a company truck as part of their employment. A recent appeal considered whether a foreman was in the course of employment before heading to work.

On November 16, 2017 a low-rise foreman walked to his company truck which was parked at the end of his street. The member entered the truck and drove to the front of his house where he exited the vehicle in order to go into his house to retrieve items that he had forgot (drill & lunch). As he stepped out of the truck, he tripped on the curb in front of his house and fell. He injured his left knee, and was diagnosed with a fractured left knee.

Reason's Claim Was Denied

The Eligibility Adjudicator determined the accident did not arise out of and in the course of employment, as such, initial entitlement for the left knee injury was denied. The following reasons were cited for denying the claim:

- I note that the injury occurred at 6:40 am, which is before the start of your work shift. I took into account the fact that you pick up other employees before you arrive to the job site, however, you confirmed that you had not yet left your property to pick up these employees.
- The injury occurred at the curb in front of your house, this location is not part of the employer's premises, as it is neither owned nor maintained by your employer, nor is it an approved worksite.
- At the time of the injury you were leaving your company vehicle to retrieve items from your house. While I acknowledge that you were retrieving items in preparation to leave for work, this is an activity that every worker must perform in order to go to work each day, and as such, I cannot consider this to be an assigned work duty or a reasonable act within the scope of your job.
- As I cannot establish that this injury arose out of or occurred in the course of your employment under Policy 15-02-02, I cannot establish that a personal work-related injury has occurred. Per Policy 11-01-01, as there was no personal work-related injury, I cannot allow entitlement to benefits in your claim.

Union Arguments

As noted in our statement of facts, the worker is a foreman and provided with a company truck which is used to pick up and deliver materials, as well as pick-up other workers that he drives to the various jobsites.

On November 16th, as the worker was exiting his company truck at his residence, he misstepped exiting his company truck, fell, causing a complex left leg fracture below the knee.

The worker and union take the position that the worker was in the course of employment at the time of the injury. Given his unique responsibilities, and requirement to use the company truck, he does not fall under the typical limitation / prohibition that a worker enters the course of employment once they arrive at the job site or place of work.

The union relies on *Decision 165/96* that outlined the test for determining whether a worker is in the course of employment, concluding it is "essentially a work-relatedness test" that is flexible and considers a number of factors:

> The basic rule in compensation law is that a worker is not in the course of employment when travelling to or from a work site. However, there are exceptions to that general rule. Counsel for the Applicant pointed out two of the exceptions involving travel under the control or supervision of the employer and travel as a requirement of the employment, when the worker is obliged to be travelling at the place and time the accident occurred. The logic for the general rule appears to lie in the theory that a worker, while travelling to and from work, is essentially exposed to the same general risks as any member of the driving public. While the worker would not be driving were it not for the employment, this somewhat tenuous link is not sufficiently significant, according to this general rule, to bring a worker within the course of employment. In our view, the test employed for "course of employment" is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors including:
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> 1. The nature of the activity performed by a worker at the time of the accident;
> 2. The relationship of the specific activity to the worker's normal employment activity or routine;
> 3. Any personal aspect to the activity which gave rise to the accident;

4. The nature of the risk associated with the activity - i.e. whether primarily an employment related risk or a public risk;
5. Employer control or supervision of the activity;
6. The time of the accident - i.e. whether within or outside working hours;
7. The location of the accident - i.e. whether on premises controlled by the employer or on public premises;
8. The type of equipment or tools involved in the accident - i.e. whether it was equipment supplied by the employer;
9. Specific remuneration (if any) for the activity at the time of the accident; and
10. Contribution to the injury by the activity of the employer or co-worker(s).

While no one factor will normally be determinative of the issue, a consideration of all of the factors may allow a panel to determine the overall character of the activity - whether primarily work-related or primarily personal.

Appeal Resolution Officer Decision

As per Policy 15-03-06, titled Travelling, 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, Policy 15-03-06 also specifically states that a worker is considered in the course of employment when the conditions of employment require the worker to drive a vehicle to and from work for the purpose of employment. The exception to this policy is when the worker makes a distinct departure on a personal errand while enroute.

Based on the information on file, I am persuaded to accept the worker is required to drive the company vehicle to and from work for the purpose of his employment. I make this determination based on the information provided in Mr. Majesky's submission, as well as the worker's statement as noted in Memo # 4. I have also taken into consideration that the employer confirmed that the worker has a company truck, and takes it to and from work. For these reasons, I accepted the criteria in Policy 15-03-06 have been met in order to consider the worker in the course of employment when he entered his company vehicle at 6:40 am on November 16, 2017.

Although I accept the worker was in the course of employment when he entered his company vehicle, it must also be determined whether the worker took himself out of the course of employment when he stopped and exited the vehicle at his house. As noted above, the exception to policy 15-03-06 is when the worker makes a distinct departure on a personal errand while enroute.

As noted in Memo #4, the worker stated that he stopped in front of his house to pickup personal items from inside the house. It was when the worker exited the company vehicle to go in the house that the worker fell and injured his left knee. Although Memo #4 indicates the worker needed to obtain personal items, it is not indicated in this memorandum what the items were.

In determining whether the worker's stop at home is considered a distinct departure on a personal errand, I find it significant to identify what the items were that the worker stopped for. The only information on file that identifies the items is found in Mr. Majesky's submission. In this submission, the worker states that he stopped at his house to pickup both his ***lunch*** and a ***drill*** that he would need for work that day. As one of the items was a drill that the worker stated he would need in order to perform his work duties, I am not persuaded that his stop at home supports a distinct departure on a personal errand.

The definition of accident under policy 15-02-01 includes a chance event, which is an identifiable, unintended event which causes an injury. In this case, the worker related a left knee injury to a specific incident of falling while exiting his company vehicle. For these reasons stated above, I find the worker was in the course of employment at the time of the accident, and that all policy conditions in order to allow initial entitlement have been met.

My Closing Thoughts

This decision does not mean members driving company vehicles have WSIB coverage 24/7. However, it instructs workplace parties and decision makers to examine the circumstances surrounding a work injury and whether a worker has re-entered the employment sphere. The key factor in this appeal was the member obtaining a drill in his garage, which brought the member back into the course of employment.

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Civic Holiday

Civic Holiday Statutory Holiday will be observed on **August 6, 2018**. If your employer asks you to work on this day, you must be paid double time for working on this holiday!