Tribunal Case Law - Arising Out of and in the Course of Employment Injured on Unpaid Lunch or Coffee Breaks

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

With the influx of new members over the years, including our veteran members, a timely reminder is in order regarding your entitlement to workers compensation when injured on coffee or lunch breaks.

In 2020, I reported on a decision (Decision No. 698/20), where a member broke his leg early one morning getting out of a company truck parked in front of his house to fetch a drill and his lunch. The Tribunal ruled the member was in the course of employment even though he was not on the clock, nor being paid. This decision is applicable to members who drive and take home company vehicles after finishing work. All other workers, which is the vast majority of our membership are not in the course of employment until they reach the job site, or parking lot, if that parking lot is controlled by the employer. The fact members receive a parking travel allowance does not place them in the course of employment.

This month I want to review the case law when workers are injured on coffee and lunch breaks. Workers do not need to be paid during these times in order to be considered in the course of employment. There are several WSIB policies decision makers use to determine whether a worker is in the course of employment:

- Accident in course of employment - Time, Place & Activity test
- Accidents on/off employer's premises
- Traveling

The following cases illustrate that workers are in the course of employment in unique and varied circumstances when injured on a coffee or lunch break.

Decision No. 678/02 (Vice-Chair McIntosh-Janis)

Previous Tribunal decisions have consistently held that the fact that a worker is 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.

> In my view, in circumstances involving 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.
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> Notwithstanding the fact that he was on an unpaid lunch break at the time, I do not consider that the worker made a distinct departure from his employment.

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

On my consideration of the evidence and, in particular, the nature of the worker's employment, 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 workers 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 workers lawyer argued the workers 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 the employers 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 workers 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 employers 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 employers premises.

Majesky Note – Going to a strip bar and guzzling 4 beers, would not be in the course of employment.

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

As indicated in Tribunal decisions, the premises rule is generally applied to trips going to and from work when a worker takes a lunch break at a location off the employers 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 employers 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.

Decision No. 744/03 (Vice-Chair McCutcheon)

In *Decision No. 585/93* the Panel considered a case where the plaintiff, a driver of a garbage truck, stopped on his route to have lunch at a restaurant and slipped in the washroom of the restaurant. In finding that the plaintiff was in the course of employment, the Panel reasoned as follows:

> We find that, given the nature of the plaintiff's employment, it was impractical to return to the employer's depot for lunch. The reality of the job situation dictated that the two workers eat lunch en route. The Plaintiff's trip to the washroom occurred while making a regular lunch stop. The routine followed by the two workers was, in our view, an efficient use of their time and was made in accordance with the limited discretion granted to these workers by the employer.

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 each case has different fact situations, 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 or a distinct departure by visiting HR Block. 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.

Decision No. 2296/08 (Vice-Chair Butler)

The Vice-Chair in this case had to decide whether a worker who left the job site by foot with his friend, co-worker, supervisor and foreman, for lunch at the nearest restaurant and was in the course of employment when he was injured off the job site while walking directly back to the job site:

> 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.
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> I do not consider the fact that the worker opted not to eat his already prepared bag lunch on October 11th 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.
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> For these reasons, I find that the worker was in the course of this employment on October 11th 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 an accident on October 11th.
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> In *Decision No. 698/20,* the Vice-Chair who heard the employers appeal regarding a member who broke his leg existing his company truck early in the morning, made an obiter comment when the worker testified that in addition to fetching a drill in his garage, he also grabbed his lunch in the house.

Decision No. 698/20 (Vice-Chair Dimovski)

There was also some dispute whether the drill was for personal use or belonged to employer. As such, there is a question of credibility that has been raised as the retrieval of a drill used in construction is something that would likely not be considered a personal errand. I do not address this issue as I am satisfied that retrieving his lunch while in the course of employment (proceeding to work) is not a personal errand. In this regard, I have relied on Tribunal decisions which have specifically addressed and supported that lunch or coffee breaks are incidental to employment. In particular, I rely on *Decision No. 1999/18* which supports such breaks are not a distinct departure from employment. I find the act of stopping the company van on his way to work to obtain the worker's lunch whether at his home or at a fast food restaurant is seen reasonably incidental to his employment. *Decision No. 1999/18* relied on a review of the Tribunal's developed case law on the subject and followed it. The Vice-Chair wrote, in part:

> Taking a break for necessities of life, including the need to use the bathroom while travelling, does not take a worker out of the course of employment. Such would not constitute a distinct departure, and nor would going for coffee. I thus find that the above-referenced decisions well-explain the applicable law, and I adopt the analysis to this case.

In this appeal, there was no dispute that the worker had stopped his van in a rushed fashion to retrieve his lunch as he had to proceed to work before his shift started. This activity, in and of itself, is not a personal errand but an activity incidental to employment. As a result, I find that the worker did not take himself out of employment at the time of his injury

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