



## Fighting, Horseplay and Larking – Policy 15-03-11 How WSIB & Employers Use This Policy to Deny Claims

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



There is a WSIB Policy, OPM 15-03-11 that states “workers who sustain a personal injury as a result of participating in a fight, horseplay or larking at work are generally not entitled to LOE benefits”.

This should come as no surprise, because violence (fighting) in the workplace falls under Bill 168 now known as Section 32 of the Occupational Health and Safety Act (Ontario) which became law in June 2010, and represents a significant change in how, and to what extent, both workplace violence and workplace harassment are regulated in Ontario.

Over the years, I have argued appeals where members engaged in behaviour that escalates into physical confrontation, and someone gets hurt. Leaving aside that fighting at work can result in termination of your employment, it comes as a shock when one of the participants gets injured and files a WSIB claim, only to be told they took themselves out of the course of employment, even though they were injured at work.

### Fighting at Work a Serious Breach

The policy does state if a fight results solely over work, the claim may be accepted if the injured worker was not the aggressor, did not provoke the fight, or was an innocent bystander. Aggressors and participants, however, take themselves out of the course of employment, and are not entitled to benefits for injuries sustained in confrontations.

Turning now to horseplay and larking, this typically involves some act of tomfoolery (buffoonery, mischief, nonsense, monkey business). A common controversy involves playing games, such as football and injuring yourself running into a wall or falling. Although these incidents take place at work, you take yourself out of the course of employment when engaging in non-work related activities.

### Employer Alleged Foreman Drove Forklift Recklessly, Without Permission

In a recent appeal, I dealt with a novel case involving a foreman who was working at a car plant during a Christmas shutdown when he hurt his shoulder after trying to reposition a forklift tine that dislodged after driving the forklift from the plant to the employers site trailer at the end of the shift to complete paperwork.

The employer argued that the foreman was engaged in horseplay and larking that created added peril due to driving a forklift at high speed, and that he was unauthorized to use the forklift for personal transportation. They contended that the foreman chose not to walk to the site trailer, and as such he broke the chain of employment. The employer rep furnished an affidavit from the construction manager to support the employer’s position.

### Foreman Was a Car Plant Veteran

The union argued in its submission that the foreman was not speeding, was well aware how to appropriately use a forklift given his myriad certificates and training, was in a position of responsibility and trust, nor disciplined, as alleged. The union contended that the foreman had been at the car plant for a number of months and had regularly used the forklift to move tools and materials from the site trailer to the crews working in the plant.

### Foreman Allegedly Disciplined (Verbally)

The employer argued the WSIB should deny the claim as the foreman was engaged in an unsanctioned activity which removed him from the course of employment. I often invoke the mantra that “documentation trumps conversation” and this is one of those labour relations situations because the employer alleged the worker’s supervisor provided a verbal warning two days previous to the accident. The employer argued that the foreman was “absolutely not required” to drive a forklift and that there was a “walking policy” in place. However, no such policy was ever produced.

### Driving a Forklift Tantamount to Horseplay

The nub of the employer’s argument was the foreman “chose” to drive a forklift for personal convenience over rough terrain at a high speed. The contention was that given that the tines were uncocked and the worker did not have consent or authority to drive a forklift, that this was tantamount to horseplay.

The employer submitted evidence of the duties of an electrical foreman, which involved responsibility for supervising and coordinating the workings at the job site. This was consistent with the union’s position that the foreman was required to complete documentation at the site trailer to perform his job.

### No Prior Issues Involving Use of the Forklift

A factual discrepancy arose regarding the length of time the foreman worked onsite, as the employer alleged he was there for only four days. However, the foreman had been there for several months and the Appeals Resolutions Officer (ARO) found it instructive that there had been no previous issues regarding the use of the forklift during that time frame. Finding in favour of the foreman, the ARO concluded the foreman would have been responsible for ensuring safety, tools and materials used by his crew.

In addressing the employer’s allegation of excessive speed, the ARO concluded there was no evidence to suggest that the employer was



concerned about the speed of the forklift to the extent they placed governors on the machinery. Since the quickest speed of the forklift was approximately 18 km per hour, it was determined that the uneven terrain would likely be more responsible for the fork being dislodged.

### Completing Paperwork at Site Trailer Part of Foreman's Job

Finding in favour of the member, the ARO ruled the foreman:

may have chosen to use the forklift rather than walk; however, he had been there for a period of 14 hours and was traversing to the site trailer to complete paperwork, a necessary function of his employment. There is no relevance to the speculation that the foreman took himself outside the course of his employment. Given that argument, he certainly would have placed himself back in the course of employment when he attempted to repair the tire which had fallen off.

The ARO dismissed another specious argument that the foreman's work zone was restricted to the plant area, finding the nature of his duties, as

confirmed by the employer, make it logical to conclude that he would be in different areas as required to carry out his job.

The fact the foreman chose to utilize a forklift certainly did not remove him from his employment, nor a departure from employment practices which broke the chain of causation. The ARO also noted that the foreman immediately reported the incident, sought immediate medical attention, and returned to appropriate work until the date of surgery.

What's the take-away? This appeal demonstrates the extent some employers will go to fight a members' WSIB claim, and in the process, disparage the reputation of a car plant veteran with a solid gold reputation for hard work, meeting deadlines, ensuring job site safety, and making his employer money.

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## IBEW Local 353 Scholarships

### Officers' Scholarship Award (10 @ \$300.00 each)

#### Terms and Conditions

- Open to members of IBEW Local 353 and their immediate family. (spouse or dependent children)
- Enrolled in a full time publicly funded Canadian University or College for the current academic school year.
- Must be entering the second year or higher, of a full-time program leading to a degree, diploma or a certificate
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- Candidates are required to send the detailed information as outlined above, the completed application form, along with an essay on the following topic:
  - o The media has successfully bombarded Canadians with an "Anti-Union" message; so much so that, before having any firsthand experience with unions, Canadians have a negative impression of who Unions are and what the benefits are of belonging to a union. What must Unions do to overcome the "Anti-Union Message" and educate Canadians, and specifically young persons on the benefits of belonging in a Union?
- Acceptable applicants will be entered into a lottery and scholarships awarded via random draw

### President's Scholarship Award (1 @ \$1,000)

#### Terms and Conditions

- Applicant must be an IBEW 353 member
- Must submit an essay describing "How the union has affected our quality of life and wellbeing of my family"
- Must be enrolled in a publicly funded Canadian University or College leading to a Degree --or--  
Enrolled in a full time (30 weeks or more) program at a publicly funded Post Secondary Institution leading to a diploma or certificate (must include course description/curriculum)
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- Applicant must submit a resume with emphasis on the following volunteer activities:
  - o Social conscience
  - o Political activism

- o Dedication to the Labor movement
- o Leadership quality
- o Valuing integrity and honesty over prosperity
- o Community activism or service
- o Human rights

### Business Manager's Scholarship Award (1 @ \$2,000)

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- Applicant must be an IBEW 353 member
- Applicant must submit an essay describing how the union has affected our quality of life and wellbeing of my family
- Enrolled in a publicly funded Canadian University leading to a degree
- Applicant must include course description/curriculum
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- This scholarship is limited to the following areas of study:
  - o Labour Law
  - o Human Rights
  - o Political Science
  - o Labour Study
- Other areas of study may be considered at the sole discretion of the selection committee:

Member may apply for Business Manager or President Fund as well as officer's fund. Successful recipients of the Presidents and Business Managers Scholarships will be determined by the Scholarship Committee. All scholarships will be awarded in the applicant's name.

**Applications received after December 31, 2016 and incomplete applications will be disqualified.**

\*PLEASE MAIL ALL REQUESTS TO: IBEW LOCAL 353 SCHOLARSHIP COMMITTEE  
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