Low-Rise Foreman Wins Important Tribunal Appeal. Member Broke His Leg Exiting a Company Truck Parked in Front of his House to Get his Lunch & Drill for Work

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

In October 2018 I published an article that a Low-Rise Foreman won his appeal at the WSIB Appeal Services Division who ruled the member was in the course of employment when he exited his company van that he parked in front of his house to obtain his lunch and a drill for work. The first appeal recognized the act of obtaining a drill placed the worker in the course of employment when he exited his company truck and stepped awkwardly on the curb, fell and broke his leg below the knee.

The employer disagreed that a worker who was not physically at work, was not being paid, could have a viable workers compensation claim after he broke his leg getting out of his company truck that he parked in front of his house.

The employer with the assistance of the contractors association appealed the decision to the Workplace Safety and Insurance Appeals Tribunal. In July 2020 we argued the appeal via tele-conference hearing since in-person oral hearings were cancelled during the COVID-19 lockdown. These hearings are somewhat awkward when parties are not in the room at the same time, but the hearing process works when experienced parties are involved.

In a precedent setting case for constructions workers who drive company vehicles, the Vice-Chair in *Decision No. 698/20* reviewed the appeal history noting:

> The ARO reversed the Board's decision and allowed initial entitlement to benefits. After concluding the worker was required to drive the employer's vehicle to the construction worksite, the ARO then considered whether the worker had been injured while performing a personal errand taking him out of the course of employment as opposed to performing an activity associated with his employment. The ARO determined the worker was not on a personal errand when he stopped his vehicle to go inside his home.

[17] The worker testified he received a vehicle when he was made a foreman, most foremen had a company vehicle at their disposal. He was provided a full sized van with a roof rack which carried all sorts of things, i.e. ladders and tools. The employer paid for the van's insurance, gas and maintenance. At the time of his injury, the worker noted he lived 35 minutes away from the construction worksite (FH) he had worked on for some time. He noted if he had to pick up the van from the employer's premises and then drive to FH his commute time to the worksite would have been significantly longer. Given this, the employer allowed him to keep the van near his home. He only used the van for company business and he did not park the vehicle on his driveway as there was no room for it. The worker also noted he was out of the house by 7 am so he could pick up a worker and be at the construction site by the start of his shift at 7:30 am. The worker was not paid until he started his shift.

[18] The employer's lawyer briefly argued that utilizing OPM Document No. 15-03-05 the worker was not in the course of his employment until he reached his construction site since none of the exceptions listed in the policy were met. The employer's representative submitted there was no employer supervision of his driving, no written policy pertaining to using the van and thus he argued the worker was not using the van as an employee.

[19] In *Decision No. 83/19*, the Tribunal stated that a broad liberal interpretation should be used in assessments like these, which allows compensation to be provided to as many workers in as many circumstances as the legislative scheme will reasonably permit. *Decision No. 83/19* is noteworthy because it has attempted to set out a new straightforward approach to assessing travelling cases than the approach developed in *Decision No. 165/96*. In obiter, the Vice-Chair in *Decision No. 83/19* addressed the relevant policy more broadly, and its applicability to construction workers more particularly, rejecting the approach taken in *Decision No. 165/96*. The Vice-Chair wrote:

> [146] In summary, the submissions on behalf of the parties revealed that the development of the Tribunal's case law has led to variations in the approach to whether a worker is in the course of employment when travelling away from the employer's premises. I prefer the approach that applies the clear terms of the relevant policies in a straightforward manner, with more consistent results. The multi-factorial approach set out in *Decision No. 165/96* and followed in other decisions has led to inconsistent results over time and has unintentionally given rise to arbitrary distinctions based upon field of employment. For example, sales representatives and community support workers are more likely to be found to be in the course of employment while construction workers and landscapers are not found to be in the course of employment in similar circumstances. I find that a straightforward application of Board policy would yield more consistent results than the application of the ten factors listed in *Decision No. 165/96*, an earlier decision adjudicated under different legislation. I have adopted the approach which is based upon a large and liberal interpretation which best achieves the objects of the WSIA. As noted above, the courts have recognized that the interpretation of workers' compensation regimes should adopt an approach that results in broader coverage, in the absence of legislative direction to the contrary. [emphasis added]

[20] With *Decision No. 83/19*, there is an attempt to depart from the Tribunal's usual approach in determining whether a construction worker is in the course of employment in "traveling cases". The recent divergence in approach set out in *Decision No. 83/19*, however, is more relevant for construction workers who are passengers travelling in a company owned vehicle than it is for this particular worker who as a foreman drove the company van to his worksite. As such, I am satisfied that the worker's circumstances are clearly addressed by the policy and I agree with *Decision No. 83/19* that a straightforward application of Board policy is warranted in these circumstances.

[21] Whether this worker proceeded to the worksite from his home or picked up the van from the employer's premises, whether he was formally tasked with this duty or permitted to do so with the employer's acquiescence is immaterial because once he entered the van with the intention of proceeding to work he became a worker in the course of employment. In particular, this worker comes within the ambit of OPM Document No. 15-03-05 under the exception of "proceeding to and from work" as the policy notes the worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place enroute." As such it is not relevant whether he was paid or not for driving or that he was given the benefit of parking the van near his home. Rather, once he entered the van that November morning, he was driving it with the intention of proceeding to the construction worksite he had worked at for some time with tools and material stored in that van provided to him to be used for the purposes of the employer's business and the worker's job duties. P's testimony did not suggest that the van had been provided to the worker for personal use. It was a van which the worker as foreman needed on the job site and otherwise to perform work in relation to the employer's business and as such I find the conditions of employment required the worker to drive a vehicle to and from work for the purpose of that employment. As the driver of that van, therefore, I find the circumstances in which he was in possession of the van during the relevant time for this appeal comes within the exception "proceeding to and from work".

[22] I note the employer emphasized that there was no supervision of the van by the employer since there was no written policy on the use of the van among other things. Aside from the clear language set out in the policy, the traditional approach set out in *Decision No. 165/96* provides that the ultimate test in assessing such circumstances involves determining whether a worker was engaged in an activity of employment as opposed to an activity which is personal in nature. For the reasons set out above, in spite of the lack of written policy etc., I find that the worker drove the van on November 16, 2017 for a work-related purpose.

The central question is whether the worker made a distinct departure from his journey for a personal errand.

[28] I note that that the worker indicated he was also retrieving a drill left in his house. He did not initially report to the Board that he was retrieving a drill. 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.

[29] 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.

[30] In any event, even if I considered the retrieval of any items at his home was a personal errand, I am satisfied that the worker was still in the course of employment when he sustained his injury as he was injured while in the course of exiting his vehicle. Given the mechanism of injury, I am satisfied that his injury occurred before he transitioned from driving towards the worksite and leaving the company van to make his way towards his home. In this regard, even if I accept there was a break in employment to obtain the worker's lunch on the basis that this was a personal errand I cannot recognize the worker was injured while he was on a personal errand because his transition from a work-related pursuit (proceeding to work) into a personal errand had been not been fully completed at the time of his injury as he was still in the process of exiting the vehicle at the time of the accident. Therefore, I find the worker was in the course of employment at the time of his left knee injury and thus his injury arose out of employment. As a result I confirm the worker is entitled to benefits under the WSIA for the left knee injury. Accordingly, I deny the employer's appeal.

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