General Rule – Workers Not In Course of Employment When Travelling to/from Work, However, There are Exceptions - When Being Paid, Driving Company Trucks & Performing Activities That Benefit the Employer

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

Over the past year I have received numerous inquiries from members, stewards and Business Reps. whether a member has a viable WSIB claim when injured while traveling to and from work?

Often times this involves a slip and fall outside of the workplace or a Motor Vehicle Accident (MVA). One member was on a public street 10 ft. from the jobsite entrance when he was struck by a car turning a corner. Another member was working at the CNE and crossing Strachan Ave. one morning and lost his footing after stepping on a street car track, fell, and broke his wrist. These cases involve the application of the **boundary rule** and these members were not in the course of employment because they had not entered the jobsite.

It is important to understand the circumstances necessary to attract WSIB coverage for a worker who is injured while traveling to and from work. There is less controversy when workers are driving to and from work in a company van when they are involved in a MVA, being paid travel time (not just mileage), or performing a task that is reasonably incidental and a benefit to the employer, regardless whether they are being paid.

Both WSIB policy and the case law confirms workers are generally not in the course of employment when traveling to and from work, however, there are exceptions.

Law & Policy

In this regard, *Operational Policy Manual* Document No. 15-03-05 entitled "In the Course of and Arising Out of – Traveling" provides in part;

Policy

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.

Guidelines

Travel on employer's business - 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. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must obligate the worker to be traveling at the place and time the accident occurred.

Proceeding to and from work

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 en route.

"In the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer.

As the policy suggests, the general rule is that a worker is not considered to be in the course of his or her employment while traveling to or from the workplace. The policy does provide however, that there are certain exceptions to this rule and indicates that a worker would be considered to be in the course of his or her employment "when the conditions of the employment require a worker to drive a vehicle to and from for the purpose of that employment, except when a distinct departure on a personal errand takes place en route". Another exception to the general rule involves situations where a worker is traveling to and from work "in a conveyance under the control and supervision of the employer".

> The Tribunal has considered the issue of workers being injured in the course of traveling to and from the workplace on a number of occasions. *Decision No. 547/87* for example, sets out the general compensation rule for traveling to and from work, which is similar to that in OPM Document No. 15-03-05, and states:
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> The general compensation rule is this: A worker is not considered to be in the course of employment while traveling to or from the workplace. However, if traveling is part of the employment service provided by the worker to the employer, or if the travel is reasonably incidental to the service provided by the worker, then an injury sustained while traveling will be compensable. There must be something about the traveling that lends an occupational flavor or characteristic to the activity beyond the normal activity of commuting to and from work – for example, a situation where the conditions of the employment require a worker to use his own automobile or to travel away from the employer's place of business.

The logic behind the general rule for traveling is that a worker, while traveling 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 the general rule, to bring a worker within the course of employment (see for example *Decision No. 165/96*).

> In *Decision No. 165/96* the Vice-Chair 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:
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> **In the course of employment**
> As both representatives pointed out, 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…

Over the years, the question has arisen whether receipt of the downtown parking allowance, mileage, or for instance, when an employer provides a worker with a gas card, places the member in the course of employment? That answer is NO, because it falls short of the "arising out of and in the course of employment" test, and seen as more of a benefit, as opposed to a work-related activity.

Some recent examples highlight the myriad situations that arise. A member was working the midnight shift when a concern arose whether they were allegedly sleeping on top of a ladder, and sent home. Driving home, the member was in a MVA, but not traveling their usual route. The member in this case was not in the course of employment, notwithstanding the member left work early under some dubious circumstances.

Another member who drove a company van, but was also responsible for driving several crew members to and from the jobsite each day, was at his residence one morning, when he climbed out of his company truck, planted his foot awkwardly, fell and broke his leg. He was going to get his lunch, and a drill from his garage that he was bringing to the jobsite. Yes, he stored some tools and materials at his home. WSIB denied the claim and an appeal is pending because the member was given a company truck which is a benefit to the employer. Looking closely at the work related test, the member was driving co-workers to and from the jobsite, which was sanctioned by the employer. And finally, at the moment the accident happened he was exiting the company vehicle (mobile workplace), and performing a task reasonably incidental to his job (obtaining a drill).

More recent examples involve members traveling to jobsites using their personal vehicles when they are involved in an MVA, regardless whether they are North and East members traveling to the South jurisdiction, or conversely, South members traveling to the North or East jurisdictions when they are involved in an MVA. They are essentially caught in the same net that workers are not generally considered to be the in course of employment when traveling to and from work.

It's important to understand that workers are not in the course of employment the moment you open your eyes in the morning, even if you are mentally focused on how you're going to plan and go about your work day. Please note that this article **does not** address other policies and case law regarding jobsites in multi-story buildings, or workers who must use public conveyances (malls) to get to their jobsite, or walking to/from the jobsite parking lot when they slip and fall.

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Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on February 8, 2018 at 7:00 p.m. to receive their pension gifts:

Paolo Angelucci, Stacy Barnes, John Chubey, Kestutis Jasaitis, Gerald Kirkpatrick, Wilfred Morozs, Tom Phillips, Renato Rossl and Don Wilson.

Family Day

The Statutory Holiday will be observed on Monday February 19, 2018.

If your employer asks you to work on this day, you must be paid double time for working on this holiday!