[1]Noteworthy Decision Summary

Decision: WCAT-2006-02659 **Panel**: Marguerite Mousseau **Decision Date:** June 27, 2006

Travelling worker – Injuries arising out of and in the course of employment – Travel essential aspect of work – Normal or regular operating base – Irregular starting points – Chapter 14 of Larson's Workmen's Compensation Law – Policy items #18.00, #18.32 and #18.40 of the Rehabilitation Services and Claims Manual, Volume II

Workers such as community health care workers will be considered travelling workers rather than workers with irregular starting points for the purposes of policy item #18.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) if travelling is an essential part of the service provided, whether or not the worker is paid for the travel.

The worker was employed as a community health care worker providing health care to clients in their homes. She drove directly to see clients from her home in her own vehicle. She was not paid for her driving time and did not receive mileage. The worker was involved in a motor vehicle accident while driving to see her first client of the day, a regular client that she saw twice a week. The Workers' Compensation Board (Board) denied the worker's claim. The Board concluded that under item #18.32 RSCM II, the client's home had become the worker's normal or regular operating base. The worker requested a review by the Review Division of the Board. The review officer varied the Board decision. The review officer concluded the worker was a travelling worker since travelling was an inherent part of the service she provided. She found the worker was in the course of her employment while travelling to the home of the client. The employer appealed to Workers' Compensation Appeal Tribunal.

The employer submitted the worker's situation was similar to that of the worker in *Appeal Division Decision #97-0191* in that the worker travelled from home to the same client two days a week for one year and was injured while on her way to see that client. The employer acknowledged the worker went to other locations on the other days but submitted that on those two days per week item #18.32 RSCM II was applicable. The worker relied on the reasoning in *Appeal Division Decision #98-1256*. The worker submitted the very nature of a home care worker's occupation is to provide services in the homes of various clients. She was employed to travel and the frequency of her travel to a particular client did not alter her status as a travelling worker.

The panel noted that item #18.00 RSCM II sets out the general rule that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable, but where a worker is employed to travel, accidents occurring in the course of travel are covered. The panel noted that item #18.00 and other policies in respect of travelling workers flow from *Decision 190* (2 WCR 299), a decision of the former commissioners that was retired on June 17, 2003. The panel then examined the historical context in which the policy was developed. The panel noted the commissioners relied on Chapter 14 of *Larson's Workmen's Compensation Law* to illustrate the approach they had taken.

[1] Policy items #18.00, #18.32 and #18.40 were consolidated into policy item #C3-19.00, effective July 1, 2010.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The panel concluded that the traveling worker policy is applicable in this circumstance. The trip from the worker's home to the first client was part of the service she provided as a home support worker. Travel was an essential part of the service the worker provided as a home support worker, although she was not paid for it. The concept of a client's home becoming a normal or regular operating base, as described in item #18.32, is not applicable to a travelling worker. The employer's appeal was denied. The panel recommended a clarification of the policies in this area, accompanied by explanations of the underlying principles.

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Panel: Marguerite Mousseau, Vice Chair

Introduction

The employer appeals *Review Division Decision #051614*, dated October 19, 2005. In that decision, a review officer concluded that the injuries sustained by the worker in a motor vehicle accident were compensable and she varied the decision made by an officer of the Workers' Compensation Board (Board).

The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act) as an appeal from a final decision made by a review officer.

The employer is represented by a management consultant who has provided a submission to WCAT on the employer's behalf and also relies on a submission to the Review Division. The worker is participating and is represented by a union representative who has provided a submission on her behalf and also relies on prior submissions to the Review Division.

An oral hearing was not requested and I do not consider that one is necessary in order to address this appeal. There is no dispute regarding the facts. The issue is the interpretation and application of the policies to accepted facts.

Issue(s)

The issue on this appeal is whether the injuries sustained by the worker in a motor vehicle accident arose out of and in the course of her employment.

Background and Evidence

The worker was employed as a community health care worker providing health care to clients in their homes. She also provided services such as taking her clients grocery shopping and transporting them to medical appointments. She worked approximately 30 hours per week, on average, with her actual hours ranging from 27 to 32 hours per week. She drove directly to see her clients from her home. She drove her own vehicle on all calls and was not paid mileage nor was she paid for the time involved in getting to her first client.

On December 8, 2004 she was in a motor vehicle accident while driving from her home to the home of a client at about 7:55 in the morning. This was a regular client that the worker saw twice a week, always in the client's home. She had been seeing this client for approximately one year.

The Board officer referred to policy at item #18.32 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), and, based on the first paragraph of that policy, concluded that the worker was not covered under the Act while travelling from her home to see this client because the client's home had become a normal or regular operating base.

The review officer, however, varied this decision. She concluded that the worker was a travelling worker since travelling was an inherent part of the service she provided. She found that the worker was in the course of her employment while travelling to the home of the client.

Submissions

In their submissions to the Review Division and to WCAT, the representatives discussed two published decisions of the Appeal Division in which the panels considered the application of the policies regarding compensation coverage during travel in cases involving home care workers. *Appeal Division Decision #97-0191* (15 WCR 145) involved a request for a certificate for court under what was then section 11 of the Act. The issue was the status of a home care worker who had been involved in a motor vehicle accident while travelling from her home to see her first client of the day.

The worker had seen the same client at the same time each day, five days a week, for seven months. The panel reviewed the published policies regarding compensation coverage during travel, as well as the principles regarding compensation coverage for travel as described in the texts "Larson's Workmen's Compensation Law" (Larson's) and "Workers' Compensation in Canada". The panel also described how panels had applied these policies and principles in similar situations in prior Appeal Division decisions.

It is evident from the discussion and analysis in *Decision #97-0191* that the panel was not satisfied that any of the policies provided clear direction regarding compensation coverage in the particular circumstances of the case before the panel. At pages 19 and 20, the panel made the following comments:

> The difficult aspect of this case, however, involves the very settled nature of her starting point as she had attended the same client as her first client of the day, every day for five days a week, for seven months. Such travel would seem very much in the nature of routine commuting. It must be

> considered, therefore, whether her work at this client's home may be considered as constituting an assembly point, a "normal or regular operating base", or a "normal place of employment" so as to support the conclusion that the worker was engaged in routine commuting while travelling to that location.
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> While the policies are by no means clear concerning their application to such circumstances, on balance I find that the defendant's travel, in attending to the same client on a regular basis at the same time each day for seven months, is properly characterized as routine commuting to a normal place of employment. This travel had become such a regularized feature of the defendant's employment that the client's home may be seen as a "normal place of employment". Additionally, notwithstanding the reservations expressed above concerning the policy at #18.32, the client's house may also be seen as a "regular" starting point. I consider, therefore, that the defendant's circumstances are properly addressed by reference to the general position that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. I find no contradiction in characterizing this part of the defendant's travel as routine commuting, outside the scope of her employment, while her other travel in attending to her other clients would be within the scope of her employment.
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> Given the very regular pattern of travel which was established in this case, in which the defendant had travelled to see the same client, from Monday to Friday of each week for the previous seven months, I find, on balance, that this amounted to routine commuting to a normal place of employment. This travel was, therefore, outside the course of her employment.

Appeal Division Decision #98-1256 (15 WCR 231) also involved a home care worker who was involved in a motor vehicle accident while driving home from seeing her last client of the morning. She worked a split shift, with a seven hour gap between the morning and evening clients. The worker submitted a claim for compensation and the claims adjudicator decided that the worker was not in the course of her employment in that her journey home from her last client involved routine commuting.

The claims adjudicator had arrived at this conclusion because the worker's schedule had been known to the worker for two weeks before the accident and since the worker regularly attended the same clients at the same times, those clients were considered the worker's regular or usual place of employment.

The Appeal Division panel noted that the worker had seen the same client as the last client of her morning shift at noon every day for three months but the panel did not view this as a basis for characterizing that client's home as the worker's "normal place of employment." The panel distinguished the facts in this case from those in the earlier Appeal Division decision cited above but also expressed reservations about the approach taken in the earlier decision. The panel went on to say, at page 3:

> We find the case before us can be distinguished from the fact situation in Appeal Division decision #97-0191. A telephone memo of February 15, 1996 reports the employer representative said the worker had been seeing this client every day for three months. The June 26, 1998 submission on behalf of the employer states that for three months, the worker saw the same client from 12:00 noon to 1:00 p.m., ending her morning shift. While this demonstrates some continuity and regularity in the shift, we note the employer's submission to the Review Board dated April 4, 1997 indicated the employer had been servicing this client for five years. The regularity of the last three months must be examined in light of the overriding responsibility and right of the employer to schedule the home support workers clients as they see fit. The schedule of the last three months before the accident does not indicate the client's home had become a "normal place of employment".
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> That said, we also question whether persons employed to travel can lose their status as "travelling workers" on the way to the first client just because they have repeatedly visited that client first. If a courier had a standing order for a pick-up first thing in the morning and always went straight from home to that client's premises, the nature of the job is still that of a travelling worker, and the hazards of the journey are part of the employment. The same could be said of travelling salespersons who might have a regular route. We would be extremely cautious in reclassifying such a worker's journey to the first client as a "normal commute".

The employer's representative submits that the worker's situation in the present case is similar to that of the worker in *Decision #97-0191* in that the worker travelled from home to the same client two days a week for one year and was injured while on her way to see that client. He acknowledged that the worker went to other locations on the other days but on those two days per week, the representative considered that the policy at item #18.32 of the RSCM II was applicable.

He submits that, if a worker regularly travels to two or three places of employment, that worker would be travelling to a regular place of employment. He states that there is no increased risk to a worker who travels to the same location for work regardless of whether it is the employer's premises or some other location although a worker travelling between clients would be at an increased risk, compared to a worker travelling to one set location. He suggested that, if a worker travelled to a different location each day, there might be some increased risk owing to unfamiliarity with the route travelled. In his view though, a worker who travelled to the same location twice a week for a year was in the same position as the worker commuting to work. He submits that extending coverage to that worker would provide more coverage than that received by a regular (non-travelling) worker.

Finally, the employer's representative submits that the policies are vague and he recommends therefore that the travel should be treated in a way that is consistent with the general approach to entitlement when commuting to work.

The worker's representative relies primarily on the reasoning in *Decision #98-1256*. She submits that the very nature of a home care worker's occupation is to provide services in the homes of various clients. She is employed to travel and the frequency with which she travels to any particular client's home should not alter the compensation coverage extended to her as a travelling worker.

Reasons and Decision

Decisions of the former Appeal Division do not constitute policy nor do they establish legal precedents but, in some cases, the analysis assists in interpreting policy and legislation and, for the purposes of consistency, it is appropriate to apply similar standards and approaches to similar cases. The two Appeal Division decisions cited are useful because they explore some of the issues associated with compensation coverage for a worker deemed to be a "travelling worker."

This issue quite frequently arises in the context of a request for a certificate under section 257, formerly section 11, of the Act. The Appeal Division and WCAT have issued a number of decisions in which a worker has been characterized a travelling worker and it has not been disputed that this establishes a certain "status" for the worker, as suggested by the panel in *Appeal Division Decision #98-1256*. The issue then arises as to what extent the other policies respecting compensation coverage apply to a "travelling worker", most of which provide exemptions to the general rule that compensation coverage is not extended to workers during their commute to and from work.

The policy at item #18.00 sets out the general rule under the title "Travelling To and From Work" as follows:

> The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

The policies that follow, items #18.01 to #18.33 inclusive, discuss exceptions to the general rule that the journey to and from one's place of employment is not compensable. These policies are applicable to those workers whose employment does not generally involve travel as part of the service.

Policy items #18.40 to #18.43, on the other hand, are directed to situations involving travelling workers/employees but they address primarily the situation of a business trip and are not readily applicable to a worker such as a home support worker where travel is part of the service provided on a daily basis.

Policy item #18.40 specifically addresses compensation coverage for "Travelling Employees". It states:

> Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

This expands on the statement in item #18.00 which states that, "where a worker is employed to travel, accidents occurring in the course of travel are covered." These policies flow from *Decision 190* (2 WCR 299), a decision of the former commissioners which was "retired" on June 17, 2003. Although this decision is no longer policy, it is useful in that it provides the historical context in which the policy was developed and the principle relied on in the development of the policy.

That decision involved a case in which a worker had been fatally injured while travelling some distance to the mine in which he worked. He was paid a small sum which was characterized as a travel allowance. In deciding whether the worker's travel should be covered under the Act, the commissioners formulated the test as "whether or not the journey itself is a substantial part of the service for which the worker is employed."

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The commissioners provided the following excerpt from Larson's which they stated was illustrative of the rule:

> Suppose that an employee who lives a considerable distance from the mine where he is employed, has as part of his job, the duty of returning to the mine at night and throwing the switch to turn on the pumps so that the mine will be ready for operations in the morning. His actual work consists of a single motion which takes but a fraction of a second, the closing of the switch, but anyone appraising that job as a whole would immediately agree that the essence of the service performed was the making of the journey to the mine and back at the precise time when the pumps had to be turned on. It follows that the entire journey to and from the mine is in the course of employment.

This passage was excerpted from chapter 14.01 of Larson's and it is followed by the passage:

> Carried to its logical extreme, this principle can be considered the justification for the well-settled rule that traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.

The policy at item #18.41 of the RSCM II, addresses compensation coverage during business trips and also quotes directly from Larson's. It starts with the following paragraph:

> The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:
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>> "Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." (5)
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> This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

In chapter 14.03 of Larson's, the author states that, "A comparatively recent application of the journey-as-part-of-service principle may be seen in the growing business of providing temporary labour." The example is provided of a worker who was sent to a client to provide services and the court found that he was entitled to benefits "because traveling…was an integral part of his employment. The travel was in furtherance of the

employer's commitment to provide labor at a specific place and time, and the risk of accident during travel was interrelated with the commitment."

I note that caution must be exercised in using Larson's to assist in understanding the principles underlying a policy in this jurisdiction because the principles flow from American jurisprudence and there may be some fundamental differences in approaches between the different jurisdictions. However, often enough, the policies developed by the Board are founded upon principles outlined in Larson's, as appears to be the case with respect to compensation for travelling workers.

Returning to the situation used to illustrate the original rule regarding travelling workers, the frequency with which a trip occurs does not appear to be a relevant consideration when deciding whether the trip is covered. In that example, the employee returned to the mine every night to throw the switch and his journey to and from the mine was covered under the Act because the making of the journey was "the essence of the service performed." Even though he returned to his usual place of employment to perform this duty, the travel was not considered a commute to work because it was such a significant aspect of the service he was employed to provide.

It appears that, at least at the appellate level, the policy rule described by this example has been extended to cover working situations, such as home care workers, which may not have been contemplated when the policy was developed. But, if travel is an integral or essential aspect of the service provided, there does appear to be a sound rationale for extending the policy on travelling workers to those workers. From that perspective, the trip from the worker's home to the first client is covered because it is part of the service provided even though the worker may not be paid for that aspect of the service.

The frequency with which the trip is repeated does not affect the worker's coverage if the basis for coverage is that the trip is an essential aspect of the service provided. It is not a commute to work; it is part of the work. The concept of a client's home becoming a "normal or regular operating base" as described in item #18.32, "Irregular Starting Points", would therefore not be applicable to a travelling worker.

I note that the Board officer applied the policy on irregular starting points and concluded that the worker's travel to her client's home was not covered under the Act, whereas the review officer applied the policy regarding travelling workers and concluded that the worker's travel was part of her employment. The worker's representative and the employer's representative have both provided reasoned arguments as to why one or the other policy should be applied. For the reasons I have set out above, I consider that the travelling worker policy is applicable and the policy on irregular starting points has no application. It appears though that a clarification of the policies in this area, accompanied by explanations of the underlying principles, would likely assist with adjudication of these cases at all levels.

I find that the worker's journey from her home to her first client was part of the service she provided as a home support worker. As a result, the injuries she sustained in the accident arose out of and in the course of her employment.

Conclusion

I find that the injuries sustained by the worker in the motor vehicle accident on December 8, 2004 arose out of and in the course of her employment.

I confirm *Review Division Decision #051614*, dated October 19, 2005.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Marguerite Mousseau
Vice Chair

MM/gw