Noteworthy Decision Summary

Decision: WCAT-2008-00166 **Decision Date:** January 18, 2008
Panel: Anthony F. Stevens

Section 5(3) of the Workers Compensation Act – Serious and willful misconduct –Item #16.60 of the Rehabilitation Services and Claims Manual, Volume II –Relief of claims costs

This decision is noteworthy as it provides an analysis of section 5(3) of the *Workers Compensation Act* (Act) and policy item #16.60 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) regarding injuries solely attributable to the serious and wilful misconduct of the worker, and the related issue of relief of claims costs.

On October 14, 2006 the worker was injured as a result of an incident that occurred in the course of his employment as a general labourer at a plywood plant. The worker, while attempting to get a piece of material out from between rollers, was struck by a sheet of veneer. He was then knocked onto the rollers, a number of veneer sheets struck him, and he was forced through the machine.

The employer argued that the worker knowingly entered an area with the machine still running, even though he had received training regarding lock-out procedures and was aware that the machine was to be locked out in advance of entering that area. The employer submitted that, as the worker's actions had been in direct violation of the employer's lock-out procedures, this constituted serious and wilful misconduct and the employer ought to be relieved of claims costs following the tenth week of the claim as set out in item #16.60 of RSCM II.

The panel noted that under section 5(3) of the Act, where an injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement. The panel noted that it could be argued that the worker's injuries did not arise solely as a result of serious and wilful misconduct, on the basis that his injuries were caused by moving machinery. On the other hand, it could be argued that the proximate cause of his injuries was the initial action that set the chain of events in motion, such that the worker's injuries could be said to have arisen solely as a result of his serious and wilful misconduct.

The panel preferred the second approach. The panel noted the difficulty in reconciling the first approach with the fact that section 5(3) of the Act provides an exception to the general rule that compensation is a no-fault system. In particular, were all cases of this type decided on the basis of whether there was some employment factor in play, the effect would be to render section 5(3) meaningless. Instead, the panel found that section 5(3) of the Act is not so limited, and requires a broader approach. Thus, a worker can remain in the course of his or her employment, and continue to be subject to consideration under section 5(3) of the Act. When evaluating whether an injury is "solely" attributable to serious and wilful misconduct, it is the degree of responsibility in producing the injury that is relevant.

The panel found that the worker's injuries arose solely due to his serious and wilful misconduct as he had been given training on a number of occasions on the lock-out procedures and his

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decision to remove a chain and access the secured area without locking out the machine was a decision wilfully made. The panel concluded that but for the worker's serious and wilful misconduct in that regard the chain of events that occurred thereafter would not have been set in motion and the worker's injuries would not have occurred. Nevertheless the panel also concluded that the worker suffered a serious disability, such that the claim ought to be accepted on that basis.

The panel further found that it is open for the employer to seek the relief of costs that is contemplated by Board policy for claims of this type. Item #16.60 of the RSCM II provides that where a claim involving serious and wilful misconduct is accepted, the cost of compensation paid after the first 10 weeks of disability is excluded from the employer's experience rating.

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Introduction

The employer appeals the March 26, 2007 decision (*Review Decision #R0072245*) of the Review Division of the Workers' Compensation Board (Board). The Board now operates as WorkSafeBC. The review officer who issued that decision confirmed the Board's earlier October 26, 2006 decision, in which a client services representative allowed the worker's claim for arm injuries that were sustained in the course of his October 14, 2006 employment. During the request for review, the employer agreed that the injury arose out of and in the course of the worker's employment; however, the employer argued that the worker's injuries were the result of serious and willful misconduct pursuant to section 5(3) of the *Workers Compensation Act* (Act). In turn, the employer argued that it ought to be relieved of claims costs beyond the tenth week on the claim, as contemplated by item #16.60 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). In confirming the October 26, 2006 decision, the review officer concluded that the worker was an inexperienced worker who did not sufficiently consider the possible results of his actions in advance of his injuries. Thus, the review officer concluded that while the worker committed an unsafe work act, he did not willfully intend to act in a manner contrary to the employer's safety instructions, such that serious and willful misconduct had not occurred.

This appeal was considered by way of an oral hearing that was convened on January 8, 2008. The employer was represented by a consultant. The worker did not participate in the employer's appeal, although he was invited to do so.

Issue(s)

The issue in this appeal is whether the worker's injuries arose solely as a result of serious and willful misconduct.

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act.

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision based on the merits and justice of the case, but in so doing it must apply policies of the board of directors of the Board that apply to the case, except in circumstances as outlined in

section 251 of the Act. Section 254 of the Act provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it.

This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal.

Background and Evidence

This claim was established by the Board for injuries that the worker sustained as a result of an October 14, 2006 incident that occurred in the course of his employment as a general labourer at a plywood plant. The worker was 23 years of age at the time.

The employer's report to the Board indicated that the worker commenced his employment with it on March 10, 2006.

The worker completed his application for compensation on October 15, 2006 to indicate that his injuries arose when a piece of veneer became stuck and when he went to dislodge the veneer it hit his wrist, causing him to stumble forward. He indicated that his wrist was then hit by more veneer, following which his left arm was pulled into the stacker. He said that more veneer hit the back of his head, and the machine "sucked entire body up over the roller."

That description is similar to that which is contained in the history that was incorporated in an October 15, 2006 consultation report on file. In particular, that report outlined that the worker attempted to get a piece of material out from between rollers, and in doing so was struck by a sheet of veneer as it came through. He was then knocked onto the rollers, a number of veneer sheets struck him, and he was forced through the machine and out into the bins.

The worker also provided a further description to a case manager when contacted by telephone on November 14, 2006. He indicated that his left arm got caught and pinned between the vacuum box and a roller, and that the veneer sheets continued to pile onto his left arm until it snapped, following which he was pushed further into the gap. He then tried to reach in with his right arm to pull his left arm out, but the system pulled both arms and his head into the gap as the sheets of veneer continued to pile up and strike him on his back. He said that the roller ultimately succeeded in pulling him all the way through, and into an out-feed bin.

Other information provided by the worker to the case manager was that two sheets of 4 feet by 8 feet veneer travel by every second, and that if a sheet goes sideways and he does not catch it right away and shut the machine down he may have to pull up to 50 or 60 pounds of material to clear away.

A report in relation to first aid treatment on October 14, 2006 described the worker's injuries as lacerations and bruises, discolouration and deformity of the left arm, and bruises and lacerations of the right arm.

X-rays confirmed that the worker sustained an oblique fracture of the distal shaft of his left ulna.

The worker's left arm injury was treated surgically on October 15, 2006, at which time debridement with open reduction and internal fixation was performed.

The Board issued the October 26, 2006 decision to accept the worker's claim. The employer requested a review of that decision.

According to a November 1, 2006 claim log entry, the worker advised the Board that he was experiencing anxiety and nightmares.

The Board approved health care expenses associated with counseling that the worker commenced in relation to his anxiety and nightmares. The Board also arranged for a psychological assessment to take place.

The treating orthopaedic surgeon, Dr. B, completed a November 27, 2006 progress report to indicate that the worker had progressed in his recovery to the point that he could commence physiotherapy. That treatment was to involve gentle strengthening and range of motion activity. Dr. B indicated that the worker was not yet ready to resume employment.

A registered psychologist, Dr. L, assessed the worker on November 29, 2006 and concluded that he had post-traumatic stress disorder, which had directly followed the work incident. Dr. L also concluded that the worker would likely have difficulty returning to work on the same machine, or to highly-paced work around dangerous machinery. However, the prognosis with treatment was considered to be good, with recovery expected over one to six months.

The worker commenced a graduated return to work on December 4, 2006.

A Board psychologist recommended on December 14, 2006 that the worker's continuing treatment with his counselor be maintained.

The Board arranged for the worker to be assessed at a hand program. That assessment took place on January 10, 2007. The worker was considered fit to continue with his reduced hours of modified work, and was advised to wear a splint for lifting in excess of 20 pounds.

The worker ultimately resumed his full-time work with the employer on February 1, 2007.

The Board issued a decision on February 9, 2007 to advise the worker that his wage loss benefits were terminated, on the basis of his full return to work. The case manager also indicated that the worker ought to follow up with his attending physician if he had ongoing complaints. The associated claim log entry on file indicates that the case manager did not believe that the worker had sustained permanent disability, although he was prepared to review that issue if further medical evidence was received.

No further medical reports were forwarded to the Board.

Insofar as the employer's request for review of the October 26, 2006 decision, the employer's representative provided the Review Division with a submission to contend that the worker's actions on October 14, 2006 had been in direct violation of the employer's lock-out procedures. The employer's representative argued that the worker received training regarding lock-out procedures, such that his action of not locking out the machine on October 14, 2006 constituted serious and willful misconduct. The employer's representative referred to item #16.60 of the RSCM II, to argue that the employer ought to be relieved of claims costs following the tenth week of the claim.

The worker participated in the earlier request for review, and provided a written submission to suggest that the training he had been given by the employer was not as comprehensive as it ought to have been. He did not argue directly against the employer's submission that he was aware that the area in which he had been working on October 14, 2006 was required to be locked out.

In response, the employer provided the Review Division with new evidence, including in relation to several "Safety Performance" sheets that bear the worker's signature. Those sheets were in relation to a number of positions in the plant, including the green stacker. In particular, there are separate sheets in relation to the following positions: #1 Dryer Feeder, Patch Line Patcher, #1 Grader Dryer, and Green Stacker. Those sheets incorporate the worker's signature to confirm the statement in the sheets that the supervisor had instructed the worker as to the lock-out procedures, and that the employee understood such procedures. Also confirmed by way of the worker's signature was that he had a complete and thorough understanding of what each specific position entailed. Moreover, the worker acknowledged his understanding that any failure to lock out a machine was a violation of the employer's lock-out policy, and that he had a "complete and thorough understanding and knowledge of what has to be locked out." The sheets further state:

> …Remember when you're in a bite situation, lockout, lockout, <u>lockout</u>!
>
> [emphasis in original quote]

The employer also provided the Review Division with minutes of meetings that the employer held with its employees, during which safety issues had been discussed. A further document that was provided by the employer to the Review Division was a March 10, 2006 "New Employee Indoctrination" form, which served to confirm that as a new employee the worker had been trained in relation to a number of matters, including with respect to lock-out procedures.

At the oral hearing, the employer's production supervisor described that the signatures that the worker attached to the "Safety Performance" sheets were intended to confirm an employee's awareness of operating and safety procedures in relation to each position that an employee worked at. Moreover, the production supervisor noted such training is provided to new employees, then thereafter either every six months, or at the commencement of a new position, whichever came first. The production supervisor also indicated that the situation that arose in the course of the worker's October 14, 2006 employment was clearly a "bite" situation, which he said included situations where someone could get hit, grabbed, or become directly involved in some way due to the proximity to moving machinery, belts, cylinders and the like. Insofar as the workstation that the worker had been employed at on October 14, 2006, the production supervisor indicated that the green stack area was about 10 feet across. Moreover, there is a chain that is across the access point, and in order to access the area an employee would need to remove the chain. He said that the chain was to ensure that employees did not have ready access to the area, and that instead it would serve as a "final reminder" to any employee that wished to enter the area that this was a "bite" situation. The production supervisor stated that employees were required to lock out the machinery if they wished to enter that area, and that the instruction to do so was part of their training. The production supervisor noted that the lock-out was directly across from where the chain blocked access to the green stacker area. He said that each employee carries three locks on their belt to ensure that locks are readily available to lock out the machinery when the situation requires such action to take place.

Also in attendance at the oral hearing was the superintendent. He indicated that the "Safety Performance" sheets were used in their operation to establish that employees had been trained in relation to safety matters, including lock-out procedures. He indicated that the worker's training in that regard had included the green stacker operation that he had been employed on during his October 14, 2006 shift. The superintendent asserted that the worker's training would have included the edict to lock out the machine in advance of entering the area that the worker accessed on October 14, 2006.

The employer's representative argued that the worker's actions of accessing the work area on October 14, 2006 without locking out the machine resulted in his injuries. He submitted that the worker knowingly entered an area with the machine still running, even though he was aware that the machine was to be locked out in advance of

entering that area. As such, the employer's representative argued that the worker's injuries arose solely as a result of the worker's serious and willful misconduct.

Findings and Reasons

There is no dispute that the worker sustained injuries that arose out of and in the course of his October 14, 2006 employment, in the sense the worker was performing employment-related duties in his employment on that day. The employer accepts that was the case, yet is arguing that the worker's injuries arose solely as a result of his serious and willful misconduct.

Section 5(3) of the Act provides:

> Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

Although the employer is seeking a finding that serious and willful misconduct was the sole cause of the worker's injuries, it is not attempting to have the claim denied. I note, in any event, that the worker's injuries resulted in serious disablement, which according to item #16.60 of the RSCM II is generally held to be when two weeks or more of disability arise.

Instead, the employer is seeking such a declaration in order to bring into play the following policy of the Board that is also incorporated within item #16.60 of the RSCM II:

> Effective September 28, 2002, where a claim involving serious and willful misconduct is accepted, the cost of compensation paid after the first 10 weeks of disability is excluded from the employer's experience rating…

Section 5(3) of the Act includes several criteria that must be satisfied in order to bring it into play. Those criteria are as follows: the misconduct must be serious, the misconduct must be willful, and the worker's injury must be attributable solely to the serious and willful misconduct.

Item #16.60 of the RSCM II offers some guidance as to when a situation may be viewed as being willful, and provides:

> The section only applies where the misconduct was serious and "wilful". In determining whether misconduct is wilful it must be considered whether the worker had pre-knowledge or voluntarily elected to break a rule. In other words, the worker must be aware of a rule and knowingly elect to break it.

The whole of the evidence establishes that the worker had been given training on a number of occasions, including when he commenced his position on the green stacker. Moreover, the evidence of the production supervisor and the superintendent serve to establish that the area in question was known to be a "bite" area, and that employees were aware they were obliged to lock out the machine prior to entering that area. I accept that the worker was aware of the lock out procedures generally. I also accept that he was aware of the requirement to lock out the machine he was working around on October 14, 2006, yet chose not to do so. In turn, I accept that the worker's decision to remove the chain and access the secured "bite" area without locking out the machine was a decision willfully made, and is a situation of the type described in the policy noted above. In short, I conclude that the worker had pre-knowledge and voluntarily elected to break a rule of which he was aware.

I have little hesitation in concluding that his misconduct in that regard was serious, given that it placed him in harm's way by putting him in proximity to moving machinery, including the belt and roller.

As such, the employer's case rests on whether the worker's injuries were "solely" the result of the worker's serious and willful misconduct.

In *WCAT Decision #2007-03473*, a WCAT panel considered a case where a bus driver attempted to detain a passenger who had spit on him, and injured his shoulder in the process of doing so. That panel concluded that the worker's injury in that case was not solely the result of his misconduct, as it was also due to the actions of the passenger in spitting on and striking the worker.

Contrasted to that is *WCAT Decision #2005-04085-RB* in which a WCAT panel concluded that a traveling employee who was in the course of his employment suffered injuries solely as a result of his serious and willful misconduct. The serious and willful misconduct in that case was due to the fact that the worker was impaired by alcohol when a motor vehicle accident occurred.

I have noted those cases in order to fairly describe the differing viewpoints that exist in relation to considerations involving whether an injury arose "solely" due to serious and willful misconduct. In the first case, the premise is that if any type of employment factor was in play, then it cannot be held that an injury was the sole result of serious and willful misconduct. The other decision stands for the proposition that that it is the proximate cause that is paramount, and not the chain of events thereafter. Put another way, the worker in the second case was quite clearly was operating a vehicle on a highway during the course of his employment, and as such it could reasonably be said that employment factors were also in play when his injury arose.

Therein lays the central consideration in the present appeal. On the one hand, it could be argued that the worker's injuries did not arise solely as a result of serious and willful

misconduct, on the basis that his injuries were caused by moving machinery. On the other hand, it could be argued that the proximate cause of his injuries was the initial action that set the chain of events in motion, such that the worker's injuries could be said to have arisen solely as a result of his serious and willful misconduct.

I prefer the second approach. I have difficulty in reconciling the first approach with the fact that section 5(3) of the Act provides an exception to the general rule that compensation is a no-fault system. In particular, were all cases of this type decided on the basis of whether there was some employment factor in play, the effect would be to render section 5(3) meaningless. Instead, section 5(3) of the Act is not so limited, and requires, in my view, a broader approach. I accept that a worker can remain in the course of his or her employment, and continue to be subject to consideration under section 5(3) of the Act.

Board policy seems to accept that to be the case as well. Item #16.60 provides the following:

> By the terms of section 5(3), the injury must be attributable "solely" to the worker's misconduct. Thus, for example, where the worker was impaired by reason of alcohol or other substances, investigation will have to be carried out to evaluate the extent of the impairment and its degree of responsibility in producing the injury in order to establish whether this requirement is met.

As such, when evaluating whether an injury is "solely" attributable to serious and willful misconduct, it is the degree of responsibility in producing the injury that is relevant. In the second case that I referred to above, it was the impairment from alcohol that was found to be the proximate cause, irrespective of the fact that other employment factors were in play due to the fact that that worker was traveling on a highway during the course of his employment.

In the case before me, the worker entered an area of active operation while the machine was still running. That area was secured. I accept that the worker was aware of the rule against entering that secured area without first locking out the machine, and that he voluntarily elected to breach the locking out policy that was in place. As a result, it was that action that was the proximate cause of his injuries and from which all other events were set in motion. In such circumstances, I accept that but for the worker's serious and willful misconduct in that regard the chain of events that occurred thereafter would not have been set in motion. It is for that reason that I accept that the worker's injuries would not have occurred but for his serious and willful misconduct, and that his injuries arose solely as a result of that serious and willful misconduct.

I allow the employer's appeal, and vary the March 26, 2007 decision of the Review Division.

The employer did not seek appeal expenses.

Conclusion

I vary the March 26, 2007 decision of the Review Division.

In summary, I find that the worker's injuries arose solely due to his serious and willful misconduct. Nevertheless the worker suffered a serious disability, such that the claim ought to be accepted on that basis. However, it is now open for the employer to seek the relief of costs that is contemplated by Board policy for claims of this type.

Anthony F. Stevens
Vice Chair

AFS/gl