Noteworthy Decision Summary

Decision: WCAT-2008-02713 **Panel:** Randy Lane **Decision Date:** September 16, 2008

Section 5(4) of the Workers Compensation Act – Presumption that injury arose out of and in the course of employment - Evidence sufficient to rebut the presumption

This decision is noteworthy as it provides an analysis of whether the presumption in subsection 5(4) of the *Workers Compensation Act* (Act) has been rebutted.

On May 16, 2007 the worker was found injured on a road on his employer's premises. His injuries included a traumatic brain injury. He had ridden his bicycle to work, and his bicycle was found nearby. There was some gravel on the road. The Workers' Compensation Board, operating as WorkSafeBC (Board), determined that the worker had suffered an injury arising out of and in the course of his employment. The Review Division varied the Board's decision finding that the presumption in subsection 5(4) of the Act was rebutted with the result that the worker's injuries did not arise out of his employment and the claim was not accepted.

The panel allowed the worker's appeal. The panel noted that there was no dispute that the worker suffered an injury due to an accident, nor that the worker was in the course of his employment. The dispute concerned whether the presumption in subsection 5(4) of the Act was rebutted.

The panel stated that the effect of subsection 5(4) of the Act is that it is presumed the worker's injury arose out of his employment. Given that presumption, the starting point is not the search for affirmative evidence that the injury arose out of the worker's employment. The starting point is identified in item #14.10[1] of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II): Is there opposing evidence that shows it is more likely the injury did not arise out of the employment?

Item #18.01 of the RSCM II contains policy which provides that compensation coverage generally begins when a worker enters an employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift. Item #18.01 establishes that the worker was in the course of his employment after he entered the employer's premises.

The panel found that the gravel on the road was on the employer's premises and any risk of injury associated with that gravel was a risk of injury associated with the worker's employment. There was no need to establish that the gravel on an employer's premises was a "special hazard". Nor should compensation be limited to injuries associated with hazards on an employer's premises which are distinctive in nature or degree when compared to hazards in other locations that a worker may encounter in his daily activities.

The panel noted that it could not be clearly established why the worker fell from his bicycle, but that the presence of gravel demonstrated the existence of an employment hazard. The panel found that the evidence did not establish on a balance of probabilities that the fall from the bicycle was occasioned by non-employment causes. The evidence did not rebut the presumption that the worker's injuries arose out of his employment.

[1] Policy item #14.10 became policy item C3-14.20, effective July 1, 2010.

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Panel: Randy Lane, Vice Chair

Introduction

[1] The worker has appealed to the Workers' Compensation Appeal Tribunal (WCAT) from the January 22, 2008 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer varied a September 10, 2007 Board decision which determined the worker had suffered a May 16, 2007 injury arising out of and in the course of his employment. Early that morning, the worker was found injured on a road on his employer's premises. He had ridden his bicycle to work, and his bicycle was found nearby. In particular, the review officer determined that the presumption found in subsection 5(4) of the *Workers Compensation Act* (Act) was rebutted.

[2] The worker's appeal was initiated by a February 19, 2008 notice of appeal filed by a workers' adviser which was followed by an April 25, 2008 submission. The employer's representative provided a May 13, 2008 submission to which the workers' adviser provided a May 28, 2008 rebuttal.

[3] The notice of appeal asked that the appeal proceed by way of a read and review of the evidence and submissions. By letter of April 4, 2008 the parties were advised that the appeal would proceed by way of written submissions. That decision does not bind me if I consider an oral hearing is necessary. I have considered the rule regarding the holding of an oral hearing set out in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* and the other criteria set out in that item. WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal or policy-based, and the appeal does not involve significant issues of credibility. I have reviewed the issues, evidence, and submissions on the worker's file and have concluded that this appeal may be determined without an oral hearing. The issues on this appeal primarily involve law and policy.

Issue(s)

[4] At issue are whether the presumption in subsection 5(4) of the Act has been rebutted and whether the worker's injury of May 16, 2007 arose out of and in the course of his employment.

Jurisdiction

[5] 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 (section 254 of the Act). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act.

[6] This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

[7] The Board received a May 28, 2007 application for compensation and a May 30, 2007 application for compensation regarding the May 16, 2007 accident. The initial application was accompanied by information from the worker regarding recent maintenance of his bicycle, a map of the route from his home to work, and his statement as to the circumstances of the incident. The time of the accident is given as 5:35 a.m. or 5:40 a.m.

[8] By letter of June 7, 2007 the employer supplied the Board with photographs of the bicycle and scene of the incident, copies of e-mails containing descriptions of the photographs of the scene, information from a member of a police force, a copy of a statement from Mr. V (who was the first person to find the worker), and a drawing of the incident. The police report noted that a skid mark of about eight feet in length preceded the impact point and blood stain. The width and shape of the skid marks suggested that the front wheel of the bicycle was turned 90 degrees in relation to the bicycle's direction of travel. There was no damage to the bicycle consistent with it being struck by a vehicle or hitting a stationary object. There was existing damage to the front forks of the bicycle which undoubtedly impacted its riding safety. The tire had been rubbing for some time on the inside of the forks. The front wheel was warped and bent with some loose spokes. It was not known if the wheel damage was caused by the incident.

[9] Among other matters, the e-mails describing the photographs documented that the worker's head was about five feet from the edge of the road. As observed by the review officer, the photographs establish that there was some gravel on the first one or two feet of the paved portion of the road.

[10] The worker was interviewed by a Board field investigator on June 18, 2007. The claim file includes a compact disc containing a copy of the tape of the interview. May 16, 2007 was the first day the worker had ever ridden his bicycle to work. He always had driven his car to work. Later in the interview, there was some suggestion that he might have walked to work. The worker left home at 5:25 a.m. He remembered turning "onto the property", but did not recall anything about the next 14 hours. He indicated he would have arrived on the property around 5:30 a.m. or 5:35 a.m.

[11] The Board field investigator interviewed Mr. V on June 18, 2007. The tape of the interview is on the compact disc noted above. Mr. V noted that normally the area is very dusty owing to construction. In the past, there had been gravel and loose dirt on the road. He saw the worker and his bicycle. The worker was in the middle of the right lane of the road. The bicycle was two feet ahead of the worker, partially off the road. He spoke to the worker who initially was very groggy. He asked the worker a couple of times if he knew what had happened, and the worker responded that he did not know. Mr. V confirmed there was gravel at the edge of the road.

[12] By letter of July 26, 2007 the employer supplied the Board with a copy of an engineering report regarding the worker's bicycle, as well as a drawing of the alignment of the bicycle's front wheel and several photographs of the bicycle.

[13] The "**Discussion**" section of the engineering report observed that no site photographs were taken at the time of the accident that would assist in the reconstruction of the incident. The author of the report noted it had been reported that the handlebars and steering tube stem were found to be loose immediately after the accident. Inspection suggested that the steering tube was in place and tight at the time of a severe twisting loading. That loading could have occurred during the accident or during a previous accident. There were minor scrape marks on a short section of the "wheel left side radial surface" that may have been sufficient to cause the wheel and handlebars to jump or twist to the right.

[14] The report identified "…several possible scenarios that could result in the observed accident damage":

- It is possible that a the front wheel of the bicycle "turned" on a stone or rock causing the above described resultant damage.

- It is possible that the bicycle struck, or was struck by, or that the rider reacted in a near miss, to an animal such as a medium sized dog, crossing the road at right angles to the direction the bicycle was traveling. This would force the front wheel rapidly to the right, and result in the observed structural damage without severely injuring the animal.

- Another possibility is that the handlebar stem came loose in the front fork steerer tube, allowing the wheel to suddenly turn to the right a full 90°. The cyclist was completing a left turn which should put a lateral load on the left side of the front tire resulting in the observed damage. The handlebars would continue to point forward.

- A fourth, but unlikely occurrence would involve impact on the left rear seat stay which would tend to send the bicycle counter-clockwise

about the front steerer tube. However, this would not apply a structural load onto the front wheel as it would continue in a straight line with no lateral loads on the fork.

[all quotations in this decision are reproduced as written, save for changes noted]

[15] The "**Comments**" section of the report provides as follows:

1. It is our opinion that the accident was not caused by contact with a vehicle.

2. It is our opinion that the bicycle was well maintained and had only minor wear and tear prior to the accident.

3. It is our opinion that there is no evidence of a material or manufacturing defect that could have caused the accident.

4. It is possible that the front wheel left rim may have contacted a stone or other object that would cause the wheel to immediately turn towards the right resulting in the observed structural damage.

5. It is possible that the front wheel of the bicycle struck or was struck by an animal, or that the rider reacted in a near miss, forcing the front wheel to the right and resulting in the observed damage.

6. It is possible that the front handlebar stem came loose in the fork steerer tube allowing the front wheel to suddenly turn 90° to the right with the same observed structural damage.

7. Other accident site and/or personal injury analyses could determine additional potential accident causes. With no available "accident" photos, the specific cause of the physical damage to the bicycle can be only be speculated upon.

[16] By letter of August 24, 2007 the police force supplied the Board with a copy of its investigative report, copies of photographs, a compact disc containing investigative reports, audio excerpts of statements, a set of photographs, and a compact disc containing taped statements of five individuals. Mr. V was interviewed by a police officer. The claim file includes a compact disc containing a copy of the tape of the interview. The worker was found one foot from the edge of the road and the bicycle was in the gravel. Mr. V indicated he asked the worker a couple of times, but the worker could not tell him what had happened. That compact disc also contains copies of tapes of interviews of others who arrived on the scene after Mr. V.

[17] By decision of September 10, 2007 the case manager determined that on May 16, 2007 the worker had suffered an injury arising out of and in the course of his employment. She cited subsection 5(1) of the Act and items #14.00 and #14.10 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). She reviewed the evidence and advised that she found "...sufficient evidence for the application of Section 5(4)." She indicated that the reasons for accepting the worker's claim were as follows:

- You were on the employer's premises at the time of the accident.
- Your bicycle was in good working order before the accident.
- There was loose gravel on the edge of the roadway.
- There is an absence of opposing evidence.

[18] By memorandum of October 4, 2007 the Board field investigator provided the case manager with documentation regarding the results of his investigation. Of interest is the crew report of the ambulance that attended the worker. The attendants arrived at the scene at 5:53 a.m. and left the scene at 6:05 a.m. The "Examination" section of the crew report noted that the worker was "Alert + Calm." The "Diagnostic And Additional Comments" section of the report documented the following information concerning the cause of the accident: "Pt states riding bike when he lost his balance & fell. Pt. states he fell directly on head."

[19] The medical section of the file contains a copy of a hospital spine assessment form documenting an assessment on May 16, 2007 at "1025" (a.m. or p.m. is not specified, but a.m. seems likely given that an ambulance crew report of May 16, 2007 indicates that the worker arrived at the hospital at 9:45 a.m.). The form noted that the worker had fallen from his bicycle and had landed on his head. The worker had not been wearing a helmet, and he had "Ø recollection of accident."

[20] Also in the October 4, 2007 memorandum, the Board field investigator commented that photographs and videotape provided to the Board depicted small stones, loose gravel, and sand on the edge of the travelled portion of the roadway where a bicycle rider would be expected to be. The field investigator noted the comments in the police report with respect to pre-existing damage to the front forks. He observed that evidence of an individual at the firm which performed maintenance on the worker's bicycle indicated there was no such obvious defect. He commented it was more than likely the damage occurred during the "crash."

[21] The employer requested a review of the September 10, 2007 decision. Its representative provided an October 15, 2007 submission to which the worker's former representative provided a December 12, 2007 response. The employer's representative provided a December 21, 2007 rebuttal to which the worker's former representative provided a January 14, 2008 response to what he considered to be a new issue raised in the December 21, 2007 submission.

[22] In her January 22, 2008 decision the review officer reviewed the evidence on file and cited subsections 5(1) and 5(4) of the Act. She found the worker suffered an accident as defined by section 1 of the Act. Further, she cited RSCM II item #18.01 entitled "*Entry to Employers['] Premises*" as part of her conclusion that the worker was in the course of his employment as he had entered his employer's premises for the commencement of a shift. As the accident occurred while the worker was in the course of his employment, she found that the presumption in subsection 5(4) of the Act was applicable. She commented there were several policies which might provide assistance in determining the application of the presumption.

[23] The review officer noted items #19.20, #18.12, and #17.00:

> The employer's representative submits that, although the accident did not occur in a parking lot, policy item #19.20, *Parking Lots*, contains principles which are applicable. That policy provides a number of questions to help determine whether an injury occurring in a parking lot is compensable. One of those questions is whether the injury was caused by a hazard on the premises. The policy indicates that it is not an absolute requirement that there be a hazard on the premises in order for the claim to be compensable but that this illustrates the distinction between injuries resulting from personal causes and those resulting from the employment. It notes that the type of injury that would qualify for acceptance if it occurred on a factory floor would also qualify for acceptance if it occurred in a parking lot.
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> The worker's representative submits that the loose gravel on the road constituted a hazard and points out that the investigation indicated that the loose gravel was located right where a bicyclist heading to the work site would be expected to be riding.
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> The employer's representative submits that there was no hazard in that the road was dry and bare. It also submits that it is clear from the photographs and accident investigation that the worker did not slip or fall as a result of the loose gravel on the side of the road. Also, even if the worker did slip on the gravel, the claim should be disallowed as the gravel would not have amounted to a special hazard. The employer's representative submits that loose gravel is a common occurrence on the side of virtually any road.
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> This principle is outlined in policy item #18.12, *Special Hazards of Access Route*, which provides that, if an accident occurs on the way to or from work, it is not compensable if it results from normal risks of highway travel. This is similar to the principle enunciated in policy item #17.00,

> *Hazards Arising From Nature*, which provides that injuries resulting from natural hazards are not compensable unless the employment exposed the worker to a greater risk than the public at large.

[24] In considering the first possibility suggested by the engineering report, the review officer determined that loose gravel would be considered a non-employment cause:

> Having reviewed the photographs of the roadway and the investigative reports, I acknowledge that there was loose gravel on the side of the road and a small amount of fine gravel and sand-like material on the edge of the pavement. However, the amount does not appear to be excessive or in any way more hazardous than gravel that would be found on the side of any other road. In applying policy item #18.12, and the distinction contained in policy item #19.20 between personal causes and those resulting from the employment, I conclude that the loose gravel at the side of the road was not a hazard specific to the employment and must be considered a non-employment cause.

[25] She considered that the second possibility involving a small animal was speculative and involved a non-employment cause:

> In my view, this possible scenario being caused by a small animal, possibly a dog, is very speculative. The employer's representative submits this would also be a common hazard on virtually any road. I agree. In the absence of some evidence that small animals are more prevalent in this area than normal, I conclude that, if the accident did occur this way, it also must be considered a non-employment cause.

[26] She considered that the third possibility of a bicycle malfunction would involve a non-employment cause:

> The third possible scenario suggested in the July 23, 2007 engineer's report, was that the handlebar stem of the bicycle became loose allowing the wheel to suddenly turn to the right 90°, causing the accident. Policy item #19.31, *Injury Results from Worker's Personal Property*, provides that an injury which arises in the course of employment will not be compensable if it arises out of exposure to a hazard or risk which is not related to the worker's employment. If the injury resulted through exposure to a hazard which the worker, as a personal matter, introduced into the workplace, that injury is not considered to have arisen out of the worker's employment. As a result, if the accident occurred as a result of any type of problem with the worker's bicycle, it is not considered to be related to the worker's employment.

[27] The review officer concluded that the engineering report rebutted the presumption with the result that the worker's injuries did not arise out of his employment:

> I have considered the three most likely scenarios suggested in the engineer's report which could account for the occurrence of the accident. When those scenarios are analyzed in light of the policies outlined above, all of the possible scenarios are not employment related. As such, the engineer's report constitutes opposing evidence which rebuts the presumption contained in section 5(4) of the *Act* and the presumption does not apply. The worker's injuries did not arise out of the employment and the claim cannot be accepted. As a result, I allow the employer's request.

[28] In his January 29, 2008 submission to the chief review officer the workers' adviser requested reconsideration of the January 22, 2008 decision. In his February 8, 2008 response the acting chief review officer declined to reconsider the review officer's decision. He was not persuaded by the argument that items #18.12 and #19.20 did not apply to the worker's claim:

> The WA [workers' adviser] argues that policies #18.12 and #19.20 do not apply as policy #18.12 only applies to roads outside the employer's premises and policy #19.20 applies to parking lots, not access roads. I am unable to accept this. It seems to take a very literal approach to interpreting and applying the policies in Chapter 3 of the *RSCM*. The individual policies within the Chapter often relate to specific situations but at the same time contain general principles applicable different types of situations. Several of the policies in Chapter 3 rely on a basic distinction between the normal hazards of everyday life and the specific hazards of the work place. In addition to policies #18.12 and #19.20, the Review Officer refers to policies #17.00 and #19.31, which also apply this principle. I can find no error in using policies to illustrate general principles applicable under Chapter 3 even though the specific situation dealt with is different.

[29] The acting chief review officer was not persuaded by the argument that the engineering report was not sufficient to rebut the presumption:

> The WA also refers to policy #14.10 where it states that that the presumption in section 5(4) is rebutted "if opposing evidence shows that a contrary conclusion is more likely" and states there is "no opposing evidence in this case which shows that [the worker's] accident did not arise out of his employment." He adds that the engineer's report "speculates as to possible causes of the Accident, but is not able to

> provide a firm conclusion as to the actual cause of the accident. This can not be viewed as evidence showing the contrary to the presumption".
>
> The main issue before me is whether the Review Officer committed a clear error of law or policy in finding there was sufficient evidence to conclude that the presumption was rebutted. The implication of the WA's argument is that, if it is possible to imagine a possible cause of the accident that would make the injury work related, then, no matter how unlikely the scenario, the presumption cannot be rebutted unless the actual cause of the accident can be shown. However, the policy does not say this. Policy #14.10 states that the presumption is rebutted if opposing evidence shows that a contrary conclusion is "more likely". It appears to me that this means that the evidence need not show the actual cause of the accident but only that it is more likely than not that the accident did not arise out of the employment. Decision makers must exercise judgment as to whether the evidence is sufficient.
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> I consider that the engineer's report is expert evidence as to the cause of the accident that the Review Officer was entitled to consider. As the WA points out, the report does not conclude that the accident resulted from a specific named cause. It sets out some possible scenarios, but also states there may be other possible scenarios. However, it appears to me, that in stating possible scenarios, the engineer is stating an opinion as to what might reasonably have happened in the context of the known facts. It is obviously possible to imagine other scenarios but a reasonable inference might be taken that the engineer considered that any other scenarios it could think of were less likely. The engineer specifically suggested that the last scenario it listed was unlikely. It seems improbable that the engineer would have omitted other potential scenarios that in its opinion were more likely than the ones it did suggest.

[30] The acting chief review officer did not consider that the review officer erred in considering the worker's bicycle to be a personal hazard:

> I consider that the evidence required to rebut the presumption depends in part on the nature and circumstances of the accident. A significant point in your case is that you were riding your bicycle to work when the accident occurred. The Review Officer reasonably concluded that the bicycle was a personal hazard that you introduced into the workplace under Policy #19.31. The use of the bicycle in itself provided a potential cause of the accident that could result in the injury being found non-compensable. Use of the bicycle did not mean that your claim must necessarily be denied, but it was not unreasonable for the Review Officer to consider this in determining that the presumption was rebutted.

[31] The acting chief review officer attached considerable significance to the worker's statement to the ambulance crew:

> In reviewing your file, I have become aware of another significant item of evidence that was referred to by the Review Officer but not specifically relied on in the final decision. Though many of the reports on the file indicate that you could not recall what happened at the moment of the accident, there is one at the outset that includes evidence from you describing what happened. This is the "crew report" relating to the attendance of the ambulance at the accident scene right after it happened. This report states that "pt. states riding bike when he lost his balance & fell. Pt. states he fell directly on head". Ideally, it would be desirable to obtain further details from you, for example, as to whether there was anything external that caused you to lose your balance. However, the inability to do so does not remove the validity of this statement as evidence. It appears to me that a simple statement by someone that they lost their balance might in normal conversation reasonably be taken as indicating there was no external cause. Otherwise, they would have immediately referred to that cause. I recognize that you had just suffered a serious injury and might not have all your normal faculties, but the report states that you were "alert+calm". It would be open to a decision maker to take the statement at face value. I consider this statement in the ambulance report is evidence supporting a decision that the presumption in section 5(4) was rebutted. It provides an additional reason for not directing a reconsideration.

Reasons and Findings

[32] There is no dispute that the worker suffered an injury due to an accident. Further, there is no dispute that the worker was in the course of his employment. The dispute concerns whether the presumption in subsection 5(4) of the Act is rebutted.

Presumptions

[33] The Act contains three evidential presumptions. They are found in subsections 5(4), 6(3), and 6(11). The final presumption is a conclusive presumption which was added to the Act in 1974 (see *Workmen's Compensation Amendment Act*, *1974*, s. 8, which added subsection 7(11) which is now subsection 6(11)).

[34] The presumptions in subsections 5(4) and 6(3) are not conclusive. They contain similar, but not identical, language. Subsection 5(4) contains the expression "unless the contrary is shown." Subsection 6(3) contains the expression "unless the contrary is proved." Of interest is the fact that the *Workmen's Compensation Act*, S.B.C. 1916,

c. 73 contained the same expressions (see subsections 6(4) and 7(2)). Thus, the rebuttable presumption language is over 90 years old.

Policy regarding subsection 6(3) of the Act

[35] The RSCM II contains policy relevant to the application of subsections 6(3) and 5(4).

[36] The following passage from item #26.21 of the RSCM II[2] establishes that the purpose of Schedule B is to relieve decision-makers from reviewing the medical and scientific literature:

> **The fundamental purpose of Schedule B is to avoid the repeated effort of producing and analyzing medical and other evidence of work-relatedness for a disease where research has caused the Board to conclude that such disease is specific to a particular process, agent or condition of employment (see #26.01). Once included in Schedule B, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related.** A claim covered by Schedule B can be accepted even though no specific evidence of work relationship is produced. A review of the available medical and scientific evidence would establish a likely relationship between the disease and the employment. The listing in the Schedule avoids the effort of producing the evidence in every case. Where the research does not clearly relate the disease to particular employments, the disease is not listed in Schedule B and the issue of work-relatedness must be determined on a case-by-case basis (see #26.22).
>
> [emphasis added]

[37] Item #26.21 of RSCM II includes the following passages[3] with respect to the type of evidence that is capable of rebutting the presumption:

> Inclusion of the words "unless the contrary is proved" in section 6(3) means that the presumption is rebuttable. Even though the decision-maker need not consider whether working in the described process or industry is likely to have played a causative role in giving rise to the disease, they must still consider whether there is evidence which rebuts or refutes the presumption of work-relatedness.

[2] This passage was added to policy effective January 1995 when item #25.21 in the *Rehabilitation Services and Claims Manual* became item #26.21.
[3] These passages were also added to policy effective January 1995.

> **The standard of proof to be applied in determining whether the presumption has been rebutted is proof on a balance of probabilities.** This is the same basic standard of proof applicable in the workers' compensation system. If the evidence is more heavily weighted in favour of a conclusion that **it was something other than the employment that caused the disease,** then the contrary will be considered to have been proved and the presumption is rebutted. The gathering and weighing of evidence generally is covered in #97.00 through #97.60.
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> [emphasis added]

[38] Is it is open to a decision-maker to say that the presumption in subsection 6(3) is rebutted on the basis that the exposure was not sufficient in amount? The decision of the court in *Evans v. British Columbia (Workers' Compensation Board)* (1982) 138 D.L.R. (3d) 346 (BCCA) dealt with the Schedule B item concerning "a process or operation where there is exposure to silica dust, 'hard metal' grinding, tungsten carbide grinding." The court commented as follows:

> In the first step that is directed to be taken by s. 6(3) it is improper to consider whether the exposure was sufficient to cause disease. What matters at that stage is whether there was any exposure. **The extent of the exposure is a matter to be weighed only after the tests in s. 6(3) have been applied.** Then it is to be weighed with the strong presumption that "the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved".
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> [emphasis added]

[39] Of interest is the fact that the *Evans* decision preceded the promulgation of the RSCM in May 1984 (and the RSCM I and RSCM II in 2002). The *Evans* decision preceded item #26.21 and its predecessor item #25.21. It is true that portions of item #26.21 are derived from *Workers' Compensation Reporter Series, Decision No. 326*, issued on June 18, 1980, approximately two years before the *Evans* decision. However, the critical passage in item #26.21 concerning the standard of proof needed to rebut the presumption was added to policy in January 1995 when chapter 4 of the RSCM underwent significant revisions. My point in reciting this history is to illustrate that the Board's policy on this critical point was created after the *Evans* decision.

[40] I find that the Board has identified in policy what is required to rebut the presumption found in subsection 6(3). The evidence must establish that it was something other than employment; that requirement is not satisfied by determining that the exposure was insufficient and therefore something else must have been the cause. **There must be**

positive proof of another cause of the disease rather than some question as to the adequacy of proof that employment is the cause of the disease. Had the Board wanted to avoid that requirement, the policy could have stated as follows:

> If the evidence is more heavily weighted in favour of a conclusion that employment was not the cause of the disease, then the contrary will be considered to have been proved and the presumption is rebutted.

[41] That formulation of policy would have made it clear that the adequacy of the evidence supporting employment as the causative agent was the concern when determining whether the presumption was rebutted.

Policy regarding subsection 5(4) of the Act

[42] The above analysis of policy regarding subsection 6(3) may be contrasted with the policy regarding subsection 5(4).

[43] I note that in 1979 item #13.11 of the *Claims Adjudication Manual* provided as follows regarding the nature of the evidence sufficient to rebut the presumption in subsection 5(4):

> Thus once it is established that the injury was caused by accident, and that the accident arose in the course of employment, the injury is presumed to have arisen out of the employment unless there is affirmative evidence that the injury was caused by factors external to the employment.

[44] That language was considerably altered when the RSCM came into force in May 1984. Item #14.10 of the RSCM declared as follows:

> First, it is not a conclusive presumption. It only operates when there is an absence of opposing evidence. It follows from this that all reasonable efforts must be made to obtain any available evidence. Only after this has been done can the presumption be considered.

[45] One could interpret that policy as providing the presumption became inapplicable once there was any contrary evidence. That has been termed as the “bursting bubble” theory: once some evidence to the contrary has been produced, the presumption disappears.

[46] That language in policy remained unchanged until August 1996 when item #14.10 was amended to reflect its current language:

> First, it is not a conclusive presumption. It is rebutted if opposing evidence shows that the contrary conclusion is the more likely. All reasonable efforts must be made to obtain all available evidence.

[47] The amendment makes it clear the presumption is rebutted when evidence establishes it is more likely the injury did not arise out of a worker's employment (the conclusion contrary to the presumption that the injury arose out of a worker's employment). The amendment did not return policy to its pre-May-1984 state. Policy does not currently expressly require identification of causal factors external to employment. Policy provides that the presumption is rebutted by evidence that satisfies a "more likely" standard. That is, a reference to evidence satisfies a balance of probabilities standard of proof.

[48] *Resolution 08/27/96-8* of the former panel of administrators of the Board establishes that the impetus for the 1996 amendment of item #14.10 flowed from *Appeal Division Decisions #94-0793* and *#94-1149*. Those decisions are not published. They are briefly summarized in the 1994 Annual Report of the Appeal Division, which was published at pages 393 to 464 of *Volume 11* of the *Workers' Compensation Reporter*.[4]

Other judicial commentary

[49] Of interest to the interpretation of rebuttable presumptions is the decision in *City of Vancouver v. Workers' Compensation Board of British Columbia*, Vancouver Registry No. A931447, a December 16, 1993 decision of the British Columbia Supreme Court (BCSC).[5] That case concerned the application of subsection 6(3) of the Act, but its discussion of the appropriate standard of proof is relevant:

> The petitioner's counsel has submitted that neither Professor Ison's nor the Ontario Workers' Compensation Board Tribunal Decision No. 224/90 appears to be in accord with current judicial decisions. Nor, he says, have such comments found any support in recent Workers' Compensation Review Board decisions in British Columbia. (See the Commissioners' decision in ***Hirshkorn, (supra)*** and ***Lorraine Black and Corporation of the City of New Westminster***, Workers' Compensation Review Board findings, November 28, 1990.) In the final analysis, he submits that none of the decisions, whether judicial or administrative decisions, are binding on this Court.

[4] The *Workers' Compensation Reporter* may be viewed at http://www.worksafebc.com/publications/newsletters/wc_reporter/.
[5] This decision may be found on the court's website at http://www.courts.gov.bc.ca/.

> I am satisfied that there is nothing by way of case authority or administrative decision concerning the applicable standard of proof which is binding on this Court. I have spent some considerable time reviewing the literature, including Mr. Justice Tysoe's Report (***Commission of Inquiry: Workmen's Compensation Act***, Victoria: Queen's Printer, 1966), attempting to better understand the Legislature's intention when the Act was substantially revised in 1968. So far as I can glean, while not specifically considering the burden of proof required to rebut the statutory presumption in issue, Mr. Justice Tysoe did clearly accept that the standard of proof applicable to the entire workers' compensation scheme was that of proof on a balance of probabilities. That standard of proof was addressed and arguments on both sides of the issue were explored at length in the report.
>
> In 1968, when the Act in a somewhat amended form was enacted, the standard of proof sections were left in their original form. While s. 99 was introduced at that time (providing the "benefit of the doubt" in favour of the worker), such a proposed provision had earlier been rejected by Mr. Justice Tysoe as superfluous, given the "balance of probabilities" test already contained in the Act. Indeed, during the course of submissions in the case at bar, all counsel appeared to concede that s. 99 added nothing to the Court's determination of the applicable standard of proof required to rebut the statutory presumption.
>
> **Accepting, therefore, that the proper standard of proof to be applied in determining whether the statutory presumption has been rebutted is the balance of probabilities, the issue is whether, in this case, some other standard of proof was applied.**
>
> [emphasis added in final paragraph]

[50] The BCSC decision was overturned by the BCCA (see *City of Vancouver v. Workers' Compensation Board of British Columbia and Mowatt*, Vancouver Registry No. CA018137, February 10, 1995).[6] The Court of Appeal found that the BCSC failed to follow the principles of curial deference; it did not disagree with the BCSC's analysis of the standard of proof.

Proposed statutory amendments

[51] In *For the Common Good: Final Report Of The Royal Commission On Workers' Compensation In British Columbia*[7] the Royal Commission commented that

[6] This decision may be found on the court's website. It is also reported at page 81 of *Volume 12* of the *Workers' Compensation Reporter*.
[7] See http://www.qp.gov.bc.ca/rcwc/.

consideration of the rebuttal of the presumption in a specific case did not involve examination of whether the presumption was supported by science. The Royal Commission noted concerns expressed by employers as to the onus of proof and the standard of proof:

> …Employers argue that in order to rebut the Section 6(3) presumption, adjudicators generally require proof on a balance of probabilities that the disease was caused by other non-work-related factors. In effect, this puts the onus on employers to prove causation.
>
> The commission agrees that it is not appropriate to impose such an onus of proof on employers, any more than it would be appropriate to impose the contrary onus on workers. Such an interpretation of the requirement for "proof to the contrary" is at odds with the usual approach to presumptions in other areas of law such as criminal and regulatory legal regimes. In those contexts, a presumption typically applies unless evidence is presented which raises a reasonable doubt as to whether the presumption is appropriate on the particular facts of the case. In the commission's opinion, this is the better approach. It can be accomplished by providing that the presumption will only apply in the absence of evidence putting causation in issue. Thus the presumption would not apply and there would be an adjudication on the merits where there is evidence to the contrary regarding causation, as opposed to evidence proving that the process or industry listed in Schedule B is not what caused the worker's disease.
>
> Therefore, the commission recommends that:
>
> > 187. the concluding words of Section 6(3) of the Workers Compensation Act be amended to provide that the disease should be deemed to have been due to the nature of that employment "unless there is clear and convincing evidence to the contrary." **(Dissent: Commissioner G. Stoney)**

[52] Earlier in its report, the Royal Commission noted the following definition of "clear and convincing" in its discussion the nature of proof required when assessing causative significance among multiple factors:

> The "clear and convincing" standard is not terribly well defined as a matter of law, but it is clearly much more onerous than the approach currently applied by the board. It involves proof on a standard falling somewhere between the civil standard of preponderance of evidence or balance of probabilities and the criminal standard of proof beyond a reasonable

doubt, with some sources suggesting that it falls closer to the latter. For example, "clear and convincing proof" is defined as follows in *Black's Law Dictionary (Abridged 5th ed.)*:

> **Clear and convincing proof**. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e. a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, *viz.*, more than a preponderance but less than is required in a criminal case. Proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matters in issue.

[53] Thus, while it appears the Royal Commission considered that a presumption should only apply in the absence of evidence putting causation in issue, it recommended an amendment involving an even stronger presumption.

[54] My review of the *Core Services Review of the Workers' Compensation Board*[8] failed to locate any commentary on subsection 5(4). The core reviewer did recommend that the expression "unless the contrary is proved" be deleted from subsection 6(3).

[55] The proposed amendments found in the above two reports have not been adopted by the Government. Subsections 5(4) and 6(3) continue to use rebuttable presumption language from early in the last century.

Evidence: inference and speculation

[56] What evidence is sufficient to rebut the presumption in subsection 5(4)? Certainly, evidence which establishes on a balance of probabilities that an injury was due to a non-compensable condition would be sufficient to rebut a presumption that an injury which occurred in the course of employment also arose out of a worker's employment.

[57] I strongly question whether the presumption can be rebutted by an argument that there is insufficient evidence establishing that the injury arose out of employment. Such an argument does not involve pointing to an alternate cause for the injury but rather involves arguing that the evidence linking the injury to employment is not robust. I consider that such an argument regarding the evidence would involve rendering the presumption a nullity. The point of the presumption is that it is presumed that the injury arose out of employment. The question is whether there is evidence that supports a conclusion contrary to the presumed conclusion.

[8] See http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf.

[58] In considering the issue of evidence, I note the following passage of interest regarding inference and speculation found in *WCAT Decision #2007-02935*:

> Policy item #97.00 emphasizes that the Board must make its decision according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. The policy gives the example that if one speculates as to causes of unknown origin, one might attribute it to the person's work or any other cause, and "one speculated cause is no doubt just as tenable as any other." The policy states that the Board can only be concerned with "possibilities for which there is evidential support." We have found these policy statements to be particularly apt in this case.
>
> Conjecture or speculation does not constitute evidence. In *Jacques v. British Columbia Council of Human Rights* [1988] B.C.J. No. 990 (QL), (May 5, 1998), the B.C. Court of Appeal applied the following analysis of the distinction between conjecture and inference from *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 (H.L.):
>
> > …the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The court therefore is left to inference or circumstantial evidence. *Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish*. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. *But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture*.
> >
> > [at pgs. 169-170, italic emphasis added]

[59] The decision in *Caswell v. Powell Duffryn Associated Collieries Ltd.* was cited several times by Appeal Division panels and has been cited several times by WCAT panels.

[60] Doherty J.A. described the process of drawing inferences in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at page 209:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An

inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p.351 (Nfld. C.A.):

> 'These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other.'"

[61] A recent lengthy discussion of note regarding inference and speculation may be found in *Nye v State of New South Wales and ors* [2003] NSWSC 1212:

> [140] In resolving that question (indeed any question based on inference from circumstantial evidence) it is important to bear in mind the difference between a legitimate inference on the one hand and speculation on the other. The court must apply what has been stated in the authorities in relation to the difference between the two. In *Luxton v Vines* (1952) 85 CLR 352 Dixon, Fullagar and Kitto JJ said:
>
> > The test to be applied in determining … whether circumstantial evidence sufficies to support a finding … was restated recently by this court in *Bradshaw v McEwans Pty Ltd* ((1951) unreported) and for the purposes of this case it is enough to set out the following passage from the judgment: 'Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture … But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise' (at 358)

[141] The distinction between a legitimate inference on the one hand and conjecture on the other is often difficult to determine. This is recognised in the cases, the more important of which have been authoritatively gathered together by Spigelman CJ in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 . Although that case was concerned with a question of causation and arose in the context of an appeal from the Dust Diseases Tribunal, nonetheless the principles concerning the distinction between conjecture on the one hand and inference on the other are of general application; causation as a fact to be proved, can, like any other fact that requires proof, be established by a process of inference. Spigelman CJ with whom Davies AJA agreed, said:

> The law in Australia is, in my opinion, as stated by Glass JA in this court in *Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190 at 197 :
>
> > … The evidence will be sufficient if, and only if, the materials offered justify an inference of probable connection. This is the only principal of law. Whether its requirements are met depends upon the evaluation of the evidence.
>
> It is often difficult to distinguish between permissible inference and conjecture. Characterisation of a reasoning process as one or the other occurs on a continuum in which there is no bright line division. Nevertheless, the distinction exists.
>
> Lord MacMillan in *Jones v Great Western Railway Co* (1930) 144 LT 194 , in the context of stating that a possibility that a negligent act caused injury was not enough said (at 202):
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

After referring to this passage Sir Frederick Jordan in *Carr v Baker* (1936) 36 SR (NSW) 301 at 306 said:

> The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if it goes no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible.

…

The test is whether, on the basis of the primary facts, it is reasonable to draw the inference: see, eg, *Luxton v Vines* (1952) 85 CLR 352 at 358 .

In my opinion, evidence of possibility, … should be regarded as circumstantial evidence which may, alone or in combination with other evidence, establish causation in a specific case.

Proof on the balance of probabilities … may be established on the basis of circumstantial evidence. As Lord Cairns said in *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279 :

> My Lords, in dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances pout together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand, you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[62] Another lengthy discussion is found in *Barry Edward McDonald (t/as B E McDonald Transport) v Girkaid Pty Ltd and 4 Ors; Robert Bryce and Co Ltd v Girkaid Pty Ltd and 4 Ors; Hudson Resources Pty Ltd and 5 Ors v Robert Bryce and Co Ltd* [2004] NSWCA 297.

[63] I make no assertion that the above discussion of Australian case law is binding on me. I consider that it is useful in reviewing matters of evidence.

What policy is applicable?

[64] In considering whether the presumption has been rebutted, I have examined the policies that the review officer considered were applicable to the case. Applicable policy

provides a significant backdrop for an assessment of whether the presumption has been rebutted. A policy that established an injury did not arise out of employment would be very relevant to a case in which the presumption applied to an injury that occurred in the course of employment.

[65] Chapter 3 of the RSCM II contains policy relevant to matters of coverage under the Act. Item #18.00 provides that the general position is that accidents occurring in the course of travel from a worker's home to the normal place of employment are not compensable. Item #18.01 contains policy relevant to entry to an employer's premises. Notably, it provides that compensation coverage generally begins when a worker enters an employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift.

[66] Item #18.10 concerns the road leading to an employer's premises. It provides that the general rule is that there is no coverage while a worker is travelling along the roads which lie between the worker's place of residence and the employer's premises. It allows that, in some cases, the nature of the road leading to the employer's premises may give coverage. As an example, item #18.11 deals with captive roads which are public highways which, as a practical matter, lead only to the premises of the particular employer and are, for practical purposes, under the control of that employer.

[67] Of particular note is item #18.12 entitled "*Special Hazards of Access Route*" which commences with the following discussion:

> Where a place of work is so located that for access and egress the worker must pass through special hazards beyond the ordinary risks of highway travel, an injury sustained from those hazards is one arising out of and in the course of employment. On the other hand, an injury to a worker on the way home from work, even though on the only egress route from the employer's premises, is not compensable if it results from other normal risks of highway travel, such as a collision between two automobiles

[68] The policy contains two examples which concern injuries on roads leading to an employer's premises. The item concludes with a discussion of hazards on a normal route and hazards that have spilled over from the employer's premises:

> For a claim to succeed on the grounds of a special hazard, the hazard need not lie on the only route to the employer's premises. It is sufficient if it is on the normal route to the place of work from the direction in which the worker is travelling.
>
> If a worker is injured in the immediate approaches to the place of work, though still on the highway, that will be compensable if the hazard causing the injury is a spill-over from the employer's premises. For

> example, if an accident occurs through rush hour congestion right at the gates of the plant, that would be compensable, and the Board would certainly not measure by an exact line whether it occurred inside or just outside the gates.

[69] I consider that item #18.12 has little relevance to the case before me. It is critical to keep in mind that the worker was on the employer's premises at the time of the accident. There is no suggestion that the accident occurred at a location between the worker's residence and the employer's premises.

[70] This is not a case covered in any manner by item #18.00 and related items, save for the provision in item #18.01 that compensation coverage generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift. Item #18.01 establishes that the worker was in the course of his employment after he entered the employer's premises.

[71] That loose gravel on the side of the road on the employer's premises did not appear to be excessive or in any way more hazardous than gravel found on the side of any other road does not make that gravel a non-employment cause. The gravel was on the employer's premises and any risk of injury associated with that gravel was a risk of injury associated with the worker's employment. There is no need to establish that gravel on an employer's premises is a "special hazard."

[72] What if the worker swerved to avoid a small animal on the employer's premises? That such a hazard might be common on virtually any road would not, by itself, render non-compensable an injury associated with encountering such an animal. The animal would have been on the employer's premises rather than on a highway between the worker's home and his place of employment.

[73] The risks associated with encountering animals raises the question of hazards arising from nature. Item #17.00 provides as follows:

> An injury may result from natural elements. For instance, a worker may be stung by an insect or plant or suffer from exposure to extreme weather conditions. Compensation in these cases is limited to situations where the job is of such a nature as to place the worker in a greater position of hazard to these elements as compared with the public at large.

[74] It sets out examples of the application of this rule in items #17.10, #17.20 and #17.30:

> A logger stung while working in the bush would have a claim accepted, as would a letter carrier who is stung while walking through a flower garden in

> summer to deliver a letter. Claims have also been accepted from people bitten by tropical insects while unpacking bananas.
>
> On the other hand, an office worker stung by a bee in the course of office work would not generally qualify. [item #17.10]
>
> An employee of a florist shop is an obvious example of a person who could successfully claim for a plant sting. [item #17.20]
>
> If a worker is working outdoors in below freezing temperatures and sustains frostbite, a claim will qualify for acceptance as resulting from a work related hazard. The same would apply to a worker working for a prolonged period in a walk-in freezer.
>
> Persons suffering abnormal exposure to the sun because of their employment are also covered. [item #17.30]

[75] A sting is an accident and the swelling associated with the sting would be an injury. If a sting occurred in the course of a worker's employment, the issue would switch to an examination of whether the presumption was rebutted. *WCAT Decision #2003-00254* illustrates the effect of subsection 5(4): the presumption is rebutted if evidence establishes the worker was at equal or less risk than the general population. The issue is not whether the evidence affirmatively establishes the worker was in a greater position of hazard.

[76] Returning to a discussion of comparative hazard assessment, if one were to limit compensation to injuries associated with hazards that differ in degree and nature from those found on any other road, one could argue that there would be few compensable injuries on an employer's premises. Potholes, oil patches, and puddles of water may be found on roads on an employer's premises and on other roads. Does that mean that an injury associated with encountering such hazards on an employer's premises would be non-compensable? What of the argument that a 15-pound object lifted by a worker at his place of employment is no heavier than objects he could be required to lift in other aspects of his life? If such an analysis is appropriate, does it establish the non-compensability of an injury associated with the lifting of such a 15-pound object on an employer's premises? I appreciate that the work-necessitated lifting of an object may be seen as differing from encountering gravel, a pothole or a puddle and that the comparison may not be completely apt.

[77] I find that focusing on the question of whether the hazard encountered by a worker on an employer's premises also exists elsewhere unduly limits the scope of compensation. I consider there is no persuasive foundation in law or policy for limiting compensation to injuries associated with hazards on an employer's premises which are distinctive in nature or degree when compared to hazards in other locations that a worker may

encounter in his daily activities. That a worker may encounter hazards in other aspects of his life does not, by itself, mean that injuries associated with encountering similar hazards on his employer's premises are non-compensable as not having arisen out of employment.

[78] Item #19.00 deals with facilities provided by the employer. It provides generally that where a worker is injured in the course of using some facility supplied or provision made by the employer, the use of such facility or provision may be part of the employment relationship; and injuries resulting therefrom may be injuries arising out of and in the course of employment. Item #19.10 deals with bunkhouses. Item #19.20 deals with parking lots. It includes the following discussion of note regarding hazards of the premises:

> Third, was the injury caused by a hazard of the premises? This is intended to limit acceptance to only those injuries which have a connotation of "employment relationship". For example, a slip on a pool of oil or a trip over an obstruction would qualify. On the other hand, workers who nip their fingers in their own car doors would not have their claims accepted. (7) There will also be claims which are not a direct result of the premises which may qualify, such as a pedestrian struck by a fellow employee's car. **The term "hazard of the premises" is not an absolute requirement for compensation coverage. Rather it illustrates the distinction between injuries resulting from personal causes and those resulting from the employment. In effect, the type of injury that would qualify for acceptance if it occurred on a factory floor would also qualify for acceptance if it occurred in a parking lot**.
>
> [emphasis added]

[79] I pause at this juncture to consider the presence of gravel (i) in a parking lot and (ii) on a factory floor. I consider that a tripping injury associated with encountering gravel on a factory floor would be compensable. That gravel might not be considered a hazard of the premises on a well-maintained factory floor would not preclude the compensability of an injury. Naturally, compensability would probably not result if the gravel was brought to the workplace by the worker for personal reasons. If a tripping injury associated with encountering gravel on the factory floor would be compensable, it occurs to me that a tripping injury associated with encountering gravel in a parking lot will also be compensable. This would be so regardless of whether the gravel on the factory floor or in the parking lot was similar in nature and degree to the gravel that could have been encountered on a road travelled by the worker *en route* to his place of employment.

[80] Item #19.30 concerns lunchrooms. Item #19.31, "*Injury Results from Worker's Personal Property*", establishes that injuries arising out of exposure to hazards introduced by the worker are not compensable:

> An injury which arises in the course of the employment will not be compensable if it arises out of exposure to a hazard or risk which is not related to the worker's employment. If a worker is injured through exposure to a hazard which the worker, as a personal matter, introduced into the workplace, that injury is not considered to have arisen out of the worker's employment. This principle was applied in a Board decision where the worker fell backwards off a bench on which he was sitting eating his lunch. As a result of the fall, a paring knife which he had brought from home for the purpose of eating his lunch, stuck into his thigh. The claim was denied because the worker had introduced an exceptional hazard onto the premises of the employer for his own personal use. The injury suffered would have been very minor or non-existent if the paring knife brought to work by the worker had not been lying on his lap at the time of the injury.
>
> It is not essential that the personal property that causes the injury be intrinsically hazardous. **It is sufficient that it causes the injury in the particular case.** In general, injuries are not compensable **where they result entirely from personal property** brought onto the employer's premises by workers for their own purposes and have no connection with their employment.
>
> [emphasis added]

[81] While items #19.20 and #19.31 are found in item #19.00, I accept they likely have application to cases that do not involve injuries in parking lots. I consider they may be viewed as illustrations of considerations associated with broader issues of coverage. In that regard, item #14.00 lists various indicators used by the Board to determine whether injuries have arisen out of and in the course of employment. Concerns with injuries arising out of the use of personal property may be seen to reflect considerations associated with the following factors listed in item #14.10:

> (b) whether it [the injury] occurred in the process of doing something for the benefit of the employer;
>
> (c) whether it occurred in the course of action taken in response to instructions from the employer;
>
> (d) whether it occurred in the course of using equipment or materials supplied by the employer;

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(h) whether the injury was caused by some activity of the employer or of a fellow employee;

(i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

(j) whether the injury occurred while the worker was being supervised by the employer.

[82] In considering the application of principles found in items #19.20 and #19.31, it is important to keep in mind that "hazard of the premises" is not an absolute requirement. Further, the concern is associated with injuries resulting "entirely from personal property."

[83] In considering the case before me, I accept that the worker's injury resulted from his fall from his bicycle. The worker's bicycle was his personal property.

[84] However, I consider focusing on a fall from the personal property is too narrow. That fall may have been the immediate cause of the injury, but the cause of the fall is the key issue. The cause of the immediate cause is very relevant as illustrated by the following comment. If the evidence established that the worker was knocked from his bicycle as a result of his bicycle being struck by a forklift operated by a co-worker, the status of his bicycle as personal property would be irrelevant. I consider that there would be little argument as to the compensability of the worker's injuries in such circumstances; an argument stressing that the worker fell from his personal property would be greeted with derision.

[85] Further, I consider that there would be little argument as to the compensability of an injury if the worker's bicycle had entered a pothole that caused him to lose his balance and fall to the ground. That the worker chose to use a bicycle to travel to the employer's premises rather than use a car or walk on foot would not make such injuries associated with the use of his bicycle any less compensable. The injuries could not be said to result entirely from the use of the bicycle.

[86] Certainly if the only reason the worker fell from his bicycle was the existence of a mechanical malfunction of his bicycle his injuries would not be compensable. That would be case where the injury resulted entirely from personal property.

[87] The worker's injuries would likely be non-compensable if he fell from his bicycle as a result of his simply losing his balance due to the internal workings of the body perhaps

arising out of an attack of vertigo or a seizure. However, item #15.30 might have application in the case of a seizure if, owing to the employment situation, the worker suffered injuries beyond those that might have flowed from natural causes.

[88] Item #16.50 dealing with emergency actions demonstrates what might be considered to be interesting limitations on the compensability of injuries in the course of employment. It provides that where an emergency occurs at a time when a worker is in the course of employment, the worker is considered to be covered if injured when acting to protect a fellow worker or protect the employer's property. If, however, the action is that of a public-spirited citizen, she or he would be doing no more than anyone would do, whether or not working for an employer at the time. This cannot be considered to be related to the employment.

[89] The policy identifies an exception to this general proposition, notably where the injury occurs through the presence of a hazard on the premises of the employer. Two examples are noted:

> …Suppose a worker receives a telephone call at work indicating that there is a fire in a portion of the employer's premises. The worker races from the office and, due only to haste, trips over his or her own feet, falls and injures an arm. There is no doubt that in light of the relationship of the emergency to the employment this injury would be compensable. In other words, it would be found to have arisen out of the employment.
>
> Suppose, then, that the same worker receives a telephone call to the effect that a family member has been seriously injured in an accident. Once again the worker races from the office and, due only to haste, falls and injures an arm. In these circumstances there is no relationship to the employment. The reason for the worker's departure is totally unrelated to the employment and nothing about the employment contributed to the injury. However, if the worker were to race from the office and trip over a poorly laid carpet, a relationship to the employment would be present. In other words, the injury would not have occurred had it not been for a hazardous condition on the employment premises.

[90] The policy provides a *caveat*:

> Therefore, while it is incorrect to say that compensation will be payable when a worker is injured while leaving the premises of the employer for whatever reason, it is correct to say that any injury will be compensable which was suffered in any emergency and which also arose out of a hazard on the employment premises.

[91] In his May 13, 2008 submission the employer's representative cites item #16.50 which he notes has "a tenuous relationship to the events under this claim." He contends that the worker's riding to work was a purely personal matter, and, while he has the status of being in the course of his employment, falling off his bicycle does not arise out of the course of that employment.

[92] The relationship of item #16.50 to the case before me is indeed tenuous. However, I consider it illustrates that a hazard on the employer's premises can be very significant when analyzing the cause of an injury which occurred during a personal emergency. Thus, introduction of personal activity does not completely preclude compensability of an injury.

Analysis

[93] At the commencement of his May 13, 2008 submissions the employer's representative stresses "…there must be some evidence that he [the worker] had been a victim of his employer's premises." He asserts that the worker's use of his bicycle resulted in his injury; that bicycle carries with it an intrinsic hazard. In order for the claim to be accepted, there would need to be proof, and not speculation, that the worker was exposed to a hazard of his employer's premises; speculation as to how the worker fell off the bicycle does not constitute proof.

[94] In making the above arguments, I consider that the employer's representative has overlooked the effect of the presumption in subsection 5(4). I consider that such overlooking of the effect of the presumption is clearly illustrated by the following argument made by the representative at the conclusion of his submission:

> …There may be all kinds of speculative reasons why he fell from his bike but he did fall and the injuries occurred from the fall. This does not allow one to conclude that the injury arose from his employment. It does not allow one to use the presumption in Section 5(4).

[95] Also near the end of his submission, the employer's representative argues, "Presumption can only be applied where there is no evidence to rebut the presumption."

[96] The employer's representative appears to argue that the presumption is not applicable. Yet, the worker suffered injuries (including C5 ASIA-D and a traumatic brain injury) due to an accident (his body's contact with the road surface, a traumatic event) that occurred in the course of his employment (he was on his employer's premises). Given those circumstances, the presumption in subsection 5(4) applies to the case before me.

[97] Simply stated, the effect of subsection 5(4) is that it is presumed the worker's injury arose out of his employment. Given that presumption, the starting point is not the search for affirmative evidence that the injury arose out of the worker's employment.

(That starting point is associated with claims governed by subsection 5(1) of the Act.) The search for such proof is not the starting point in analyzing whether the presumption has been rebutted. The starting point is identified in item #14.10: Is there opposing evidence that shows it is more likely the injury did not arise out of the employment?

[98] Both the acting chief review officer and the employer's representative point to the worker's statement to the ambulance crew as evidence rebutting the presumption. I have considerable reluctance in accepting the reliability of such a statement from a person who landed on his head at the time of the accident.

[99] Mr. V, who first found the worker, advised both a police officer and the Board field investigator that he twice asked the worker how the accident happened; the worker was unable to tell him how it happened. Mr. V is not a fellow employee. He was an employee of a contractor on the work site.

[100] The employer's representative engages in speculation when he comments that Mr. V "…would no doubt be very upset at finding a body on the road…." Why would that be so? The worker advised the Board field investigator that, like himself, Mr. V was a "first aider." (This was mentioned in the context of the worker's advice to the investigator that Mr. V refused to turn the worker over at the scene of the accident.) I consider that means Mr. V has had some training and experience in dealing with injured individuals. I have listened to two taped interviews of Mr. V. He does not strike me as a man who is easily upset.

[101] The employer's representative asserts that Mr. V may have misheard the worker. I question whether he would have misheard the worker twice. The assertion by the employer's representative that the worker might not have turned his attention toward answering the question because there was "no value" to providing this information to Mr. V is speculative at best.

[102] I do not doubt that the ambulance crew was composed of professionals trained in dealing with injured individuals. However, the worker's statement to them was provided at a point in time between the worker's statement to Mr. V and to individuals at the hospital who completed the spine assessment form. The information from Mr. V and the information documented in the spine assessment form establish that the worker had no recollection. He suffered a traumatic brain injury. In such circumstances, I question the persuasiveness of the worker's statement to the ambulance crew.

[103] The employer's representative asserts that the statement to the ambulance crew is "first hand evidence." With respect, the statement as documented in the ambulance crew report is hearsay evidence. The assertion that the statement is "corroborated by other physical evidence" is not at all persuasive. The representative provides no convincing argument as to how the physical evidence corroborates the occurrence of a loss of balance.

[104] A further consideration is that losing one's balance does not preclude there having been an antecedent cause to that loss of balance. One could lose one's balance after one rode over a piece of gravel or sought to avoid a small animal. I appreciate the ambulance crew's report did not document the worker having referred to gravel or a small animal.

[105] The assertion by the employer's representative that there is "absolutely no evidence of any occupational hazard" fails to acknowledge the existence of gravel on the employer's premises. As noted earlier in my discussion regarding applicable policies, such gravel on the employer's premises would amount to an occupational hazard. Such gravel would not be a personal hazard similar to a car door on a worker's personal vehicle (cited by the employer's representative). The example of a worker trapping her finger in the door of her car parked in her employer's parking lot is referred to in item #21.10 concerning lunch, coffee and other breaks. Notably, that policy comments that a worker who is injured after tripping in a pothole in the parking lot suffers a compensable injury because the injury is due to a hazard of the premises. There is no suggestion in that policy of the need to analyze whether other surfaces would have potholes.

[106] I consider that an animal on the employer's premises would likely be a hazard of the premises. I accept that had there been proof of the worker having encountered such an animal it would likely have been necessary to consider the type of analysis set out in *WCAT Decision #2003-00254* noted earlier in this decision.

[107] I do not doubt that the worker's bicycle is a personal object that he brought onto his employer's premises and that he fell from that bicycle. His fall was the immediate cause of his injury. As noted above, it is not enough to know that immediate cause of injury. One must consider the cause of the fall (the cause of the cause). The cause of the cause is the critical legal cause.

[108] The employer's representative's submission that we know how the injury occurred because we know that it resulted from a fall from the worker's bicycle fails to take into account the need to examine the cause of the fall rather than to merely identify the fall itself.

[109] It cannot be clearly established why the worker fell from his bicycle. I am very cognizant of the pitfalls of speculation, and I consider I would be engaging in speculation were I to find that the actual cause of the fall was one of the possibilities identified in the engineering report.

[110] As noted above, I have some reluctance in embracing the view that a conclusion that there was insufficient evidence of an occupational cause of an injury would be sufficient to rebut the presumption. I do not need to resolve the matter, as I find the presence of

gravel on the road means there is some evidence of a possible occupational cause of the worker's fall from his bicycle. I am not finding that the worker's fall was due to his encountering gravel.

[111] I should point out I am not stating that the mere presence of a possible employment hazard means that the presumption cannot be rebutted unless the actual cause of the accident can be shown. As noted by the acting chief review officer, policy at item #14.10 does not impose such a requirement. I am saying that the presence of such gravel demonstrates the existence of an employment hazard, and that I am satisfied the evidence in the case before me does not establish it is more likely that the injury did not arise out of the worker's employment.

[112] After considering the matter, I find that the evidence does not establish on a balance of probabilities that the fall from the bicycle was occasioned by non-employment causes. In particular, I do not consider the evidence establishes that the fall was occasioned by a mechanical defect of the bicycle. The evidence does not rebut the presumption that the worker's injury arose out of his employment. There are many possible causes of the worker's fall, but I do not consider that the evidential support for the fall being due to non-employment cause(s) establishes that such cause(s) are more likely.

Conclusion

[113] The worker's appeal is allowed. I vary the review officer's decision. I find that the presumption in subsection 5(4) of the Act has not been rebutted; the worker's injury of May 16, 2007 arose out of and in the course of his employment.

[114] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair

RL/jy