Noteworthy Decision Summary

Decision: WCAT-2011-02370 **Panel:** Herb Morton Decision Date**:** September 21, 2011

Arising out of and in the Course of Employment – Deviations from Employment – Assault – Policy item #C3-17.00 of the Rehabilitation Services and Claims Manual, Volume II

The worker was injured in an assault at work. The Workers' Compensation Board, operating as WorkSafeBC (Board), denied the worker's claim for compensation because the worker was considered to have abandoned his employment activities by taking part in an altercation with another worker. This was considered a substantial deviation from employment. The Review Division of the Board confirmed the initial decision.

The injury occurred on August 25, 2010, which meant the version of Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* that came into effect on July 1, 2010 applied to the worker's claim. Policy item #C3-14.00 (Arising Out of and In the Course of the Employment) is the principle policy that provides guidance in deciding whether or not an injury arose out of and in the course of the employment. Policy item #C3-17.00 addresses substantial deviations from employment. It specifically addresses assault.

In this case, the subject matter of the dispute was an un-repaid loan of $10.00 and some cigarettes. The panel reviewed the criteria in policy item #C3-14.00 and found the evidence favouring coverage and non-coverage was mixed. The panel noted that there are three items considered in regard to assaults. Consideration is given to the spontaneity of the assault, whether the worker's response was in proportion to the triggering incident or provocation, and whether there is a connection between the employment and the subject matter of the dispute that led to the assault. Where the actions or response of a worker are extreme or out of proportion, that may be an indication that the assault is of a more personal nature. If the subject matter of the dispute that led to the assault is a personal matter, the injury or death is not considered to have arisen out of and in the course of the employment.

The panel considered the subject matter of the dispute, and had reference to previous policy on the basis that while it has no particular status, it may be persuasive by reason of the force of its logic. The previous policy gave an example of a worker running out to his car to get a package of cigarettes and twisting his ankle. The claim was denied. While it could be argued that the worker having his cigarettes so he was "comfortable" might benefit the employer, the activity of running out to the car was a secondary activity that was for a personal reason. The panel adopted that reasoning as providing an explanation as to why a particular action may be characterized as primarily personal rather than employment-related. The panel found the worker's actions of borrowing money from a co-worker to buy cigarettes, and his non-payment of the loan, were not connected to his employment. The subject matter of the dispute that led to the assault was a personal matter, and the injury is not considered to have arisen out of and in the course of the employment.

Given the strong guidance provided by policy concerning situations where the subject matter of the dispute that led to the assault is a personal matter, the panel did not consider it necessary to reach a determination regarding the other policy considerations.

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WCAT Decision Number: WCAT-2011-02370
WCAT Decision Date: September 22, 2011
Panel: Herb Morton, Vice Chair

Introduction

[1] The worker was employed as a driver, and was involved in a physical altercation with a co-worker (X) on August 25, 2010. The worker's claim for compensation for an injury as a result of this incident was denied.

[2] The worker has appealed the April 19, 2011 Review Division decision (*Review Decision #R0123225*) to the Workers' Compensation Appeal Tribunal (WCAT). The review officer confirmed the September 27, 2010 decision by an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), to deny the worker's claim for compensation.

[3] By notice of appeal dated May 17, 2011, the worker requested that his appeal be heard on the basis of written submissions. He attached a written submission. He subsequently provided a copy of a left shoulder MRI arthrogram report dated August 5, 2011, which identified a large full-thickness tear involving the anterior half of the supraspinatus tendon. The employer is not participating in this appeal, although invited to do so.

[4] The worker's appeal concerns questions of mixed fact, law and policy. I find that the worker's appeal can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[5] Did the worker's injury on August 25, 2010 arise out of and in the course of his employment?

Jurisdiction

[6] The Review Division decision has been appealed to WCAT under section 239(1) of the *Workers Compensation Act* (Act).[1]

[1] WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent. WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. If the evidence supporting different findings is evenly weighted on an issue respecting the compensation of a worker, WCAT must resolve that issue in a manner that favours the worker.

Background and Evidence

[7] The worker completed an application for compensation by Teleclaim on September 15, 2010. He described the occurrence of his injuries as follows:

> Worker drove into the client's site in [location] parking lot and his shift started and he was ready to work. He saw his co-worker [X] coming towards him. Worker owed [X] $10.00 and some smoke. [X] started calling worker names of not returning the $10.00 and smoke, and [X] had his elbow hit worker's chest. [X] turned around, Worker talked back, and [X] came back, put his hand up and wanted a fight. During the fight worker was able to push [X]'s head onto the ground. Worker told [X] to smarten up, and left [X] up. [X] started yelling, worker went into the building and phoned the owner of the company [T] to report the incident. Worker then went back to work. Worker continued to work and he loaded [X]'s truck with forklift. After some loads worker he went to the security gate and found the owner [T] had been calling him. [T] wanted to know if worker had been working, worker told him he had been, and [T] says that's all he wanted to know.
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> Worker finished his shift. On August 26 Worker worked 4.5 hours which was the entire shift. He was told by [T] that there was no delivery on August 27. On August 27 [T] advised that worker was let go due to that incident. On the next day worker was arrested and was charged of assault from the [location] detachment. Worker admitted himself to [location] Hospital on August 30. Doctor advised he suffered from left shoulder and ribs fracture, there was bruising and bleeding which supports an assault.
>
> [all quotations reproduced as written, except as marked]

[8] The worker advised that the altercation occurred at a customer's site, in the loading dock parking lot.

[9] An employer's report of injury was provided to the Board on September 23, 2010. The employer objected to the worker's claim, stating:

> From what we understand from the police report and the other driver involved, [the worker] assaulted another driver of ours, [X] because he made some rude remarks towards [the worker] regarding $10.00 he had owed him for awhile. [X], said [the worker] then went in a rage and began to assault him severly, so severly that according to the police he should have been hospitalized. Upon receiving a phone call [the worker] that night, his exact words to [T] was "[X] is bleeding in his truck, because I have just beat him up". There was no report from [the worker] that he was injured in any way.

[10] The employer further advised:

> [The worker] never once expressed any injuries to us until after he was told he was being let go for the incident. On the day in question he was at our shop in [location] bragging to everyone what he had done to [X] right down to how he did it…. Fighting does not constitute compensation as it is not a prerequiste of his employment and it is grounds for immediate dismissal.

[11] By decision dated September 27, 2010, an entitlement officer denied the worker's claim for compensation. The entitlement officer cited the policy at item C3-17.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), "Deviations from Employment," concerning "Assault," and reasoned:

> I find you abandoned your employment activities and were taking part in an altercation with your coworker at the time of your reported injury. I consider this to be a substantial deviation from the course of your employment.

[12] On September 30, 2010, an entitlement officer spoke with the worker by telephone and noted:

> [The worker] advised he feels he was defending himself and feels he was not a willing participant in the altercation that caused his injuries; therefore, he feels it should be considered work related. He said he did not start the fight and did not want to fight. He said his coworker came at him because of a small debt he owed him ($10 and cigarettes). [The worker] said he was hit in the chest with his coworker's elbow. His coworker walked away and when [the worker] said he couldn't believe he wanted a fight over this his coworker turned back and came at him again.
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> He said he was not bragging to his coworkers about the fight as reported by the employer, he said he was explaining what happened.
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> He said his coworker lost it and he defended himself.

[13] On October 4, 2010, the Board received a written statement from the worker dated September 1, 2010, in which the worker described the occurrence of the incident on August 25, 2010. The worker reported that X had lent him $10.00 in the past to buy cigarettes and the worker had promised to repay X but had failed to do so. The worker explained that he rarely saw X and when he did, it was just before payday and he did not have any money. On August 25, 2010, they met in a parking lot, and X asked the worker if he had the money or cigarettes, and the worker responded in the negative.

The worker stated that X began calling him insulting names. The worker stated:

> I stood there teeth clenched & hands at my side as [X] was walking towards me. I've never seen [X] this mad and I was prepared for him to hit me. [X] walked up to me and hit me in the chest with his forearm. His elbow hit my chest & my left shoulder. After [X] hit me he turned and walked away. I replied "You are wanting to fight over this?" [X] turned around & came at me again grabbing me by the coat, I grabbed him back, we wrestled a bit & I pushed [X] away. [X] had his hands up in a fighting stance & I thru a left jab which almost buckled me out of pain. I saw [X] coming in and sidestepped & hit him with a right. [X] bent over and I pulled him to the ground with my left arm….

[14] On December 6, 2010, the worker advised the Board that the Crown had dropped the criminal charges against him on November 18, 2010 and that the Employment Insurance Appeal Board advised him on November 19, 2010 that they felt there was no misconduct and he was now eligible for Employment Insurance Benefits.

[15] The worker requested a review of the September 27, 2010 decision. He provided a copy of the Employment Insurance Board of Referees' decision of January 27, 2011, accepting the employer's withdrawal of its appeal. He also provided an excerpt from a document setting out the Commission's position. That document stated, in part:

> The claimant states that in both incidents, he was merely acting in self-defense. The employer may have reasons in their own rights to dismiss the claimant, but fair grounds for dismissal do not automatically amount to misconduct. All in all, the Commission failed to establish that the claimant's action constituted misconduct and thus misconduct is not proven.

[16] The employer furnished the Review Division with three signed statements. One statement was provided by T, the company president. T advised:

> When I talked to Const. [name], [X] had already been to see him. Const. [name] told me that [X] should have gone directly to hospital after this assault. [X] was apparently put in a headlock and hit at least 5 times according to Const. [name]. He had broken dentures, broken glasses, cuts and bruises on face and ear.

[17] A statement was also provided by the employer's shop foreman. He advised:

> On Aug. 25/10, [the worker] came into the shop and was telling me about the fight he had with [X]. [The worker] said [X] was swearing at him about a pack of smokes he owed him and [X] came towards [the worker] and [X] bumped his chest into [the worker]. So, [the worker] gave the first punch

> and threw [X] down. As [X] was going down, [the worker] Kneed [X] in the face. While [the worker] was holding [X] down with his knee on [X's] chest, [the worker] punched [X] two more times. This was told to me directly from [the worker].

[18] A third statement was provided by another worker. She stated:

> On August 25,2010 I was in the shop in [location] I was listening to [the worker] tell his story of the incident he had with [X]. He was showing the motions and describing what he had just done to [X]. He told us all that this was all over a pack of smokes from about a year ago. He was describing how he was hitting [X] in the face well while he was down on the ground with his fist and his knees….

[19] By decision dated April 19, 2011, a review officer confirmed the September 27, 2010 decision to deny the worker's claim for compensation. The review officer summarized the effect of the policy at item C3-17.00 as follows:

> It provides, in part, that if a worker's injury is the result of an assault that he or she initiated, this may constitute a substantial deviation from the course of the worker's employment. In doing so, the Board must consider:
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> - the spontaneity of the assault;
> - whether the worker's aggressive response is in proportion to a triggering incident or provocation; **and**
> - whether there is a connection between the employment and the subject matter of the dispute that led to the assault.
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> The policy goes on to say that if the subject matter of the dispute that led to the assault is a personal matter, any injury is not considered to have arisen out of and in the course of the employment.
>
> [emphasis added]

[20] The review officer reasoned, in part:

> In disallowing the worker's claim, I refer to the first bullet above, in that the fight was not a spontaneous event. Without looking at the Board's and employer's evidence, I need only look at the worker's submission, where he said the coworker began insulting him because of the unpaid debt. Then after the insults, the worker "stood there teeth clenched and hands at my side as [the coworker] walked towards me… and I was prepared for him to hit me." This evidence indicates that the fight was not spontaneous

> given that the worker anticipated the impending hit and that he "was prepared."
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> I also conclude that the worker's response was not proportional to the coworker's provocation. The worker explained that after being insulted the coworker struck him once against the chest and shoulder, then turned and walked away. The worker's response after being struck was to say to the coworker, "you wanting to fight over this?" I find that this statement was not a proportional response. The proportional response was to walk away from the situation just as the coworker did. The worker's disproportionate response clearly antagonized the coworker, which was the worker's intent given that he "was prepared" to fight and he just had been struck by the coworker.
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> My last finding under the policy is that the assault was a personal matter and not arising out of the worker's employment. In reaching this conclusion, again I note the worker's submission that the coworker approached the worker regarding an outstanding personal debt. The fact that it was a personal debt and did not involve the employer's operations leads me to conclude this was a "personal matter."

[21] The review officer also noted that he was not bound by the decision of the Crown and the decision on the worker's Employment Insurance claim.

[22] The worker appealed the Review Division decision to WCAT. He submits:

> …[the review officer] indicates that I was prepared to fight and gave a response to the accused to antagonize him. These statements are not correct.

[23] The worker states that X had a history of aggression and complaining. He further states:

> When [X] came at me angry & calling me insulting names, I felt like he was going to hit me. As [X] had a history of being angry I prepared myself for the worst. I hadn't seen [X] this angry since I've known him. I was shocked after [X] elbowed me in the chest & turned & walked away. He looked over his right shoulder almost expecting me to retaliate which I didn't. I was in shock & disbelief when I made the comment "You were wanting to fight over this??" (Like you must be kidding, $10.00 a pack of smokes?) I couldn't believe he did that ? [X] then came back at me & grabbed me at which time I defended myself. (This consisted of me hitting him once when he came at me & pinning him on the ground & made him promise not to fight anymore. At which time I let him up. I did not hit [X] on the ground or any other time).

> There is probably 100 different things a person can say to instigate a fight & I don't feel my comment made of shock & disbelief, should be considered an antagonizing comment.

[24] The worker submitted that he was assaulted during his employment, and that he did not feel that protecting himself was a deviation from his employment.

Policy

[25] As the worker's injury occurred on August 25, 2010, the version of Chapter 3 of the RSCM II that became effective July 1, 2010 applies.

[26] Item C3-14.00, "Arising Out of and In the Course of the Employment," is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of the employment. Policy at item C3-14.00 provided:

> The test for determining if a worker's personal injury or death is compensable, is whether it arises out of and in the course of the employment. The two components of this test of employment connection are discussed below.
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> In applying the test of employment connection, it is important to note that employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment.
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> **A. Meaning of "Arising Out of the Employment"**
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> "Arising out of the employment" generally refers to the cause of the injury or death. In considering causation, the focus is on whether the worker's employment was of causative significance in the occurrence of the injury or death.
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> Both employment and non-employment factors may contribute to the injury or death. The employment factors need not be the sole cause. However, in order for the injury or death to be compensable, the employment has to be of causative significance, which means more than a trivial or insignificant aspect of the injury or death.
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> **B. Meaning of "In the Course of the Employment"**
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> "In the course of the employment" generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the

> employment. Time and place are not strictly limited to the normal hours of work or the employer's premises.

[27] Policy at item C3-14.00 also set out a list of nine factors to be considered in determining whether a worker's injury arose out of and in the course of the worker's employment. The policy stated:

> All of the factors listed may be considered in making a decision, but no one of them may be used as an exclusive test for deciding whether an injury or death arises out of and in the course of the employment. This list is by no means exhaustive, and relevant factors not listed in policy may also be considered.
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> Other policies in this chapter may provide further guidance as to whether the injury or death arises out of and in the course of the employment in particular situations.

[28] The nine factors listed in item C3-14.00 are addressed separately as (a) to (i) in the reasons and findings below.

[29] Policy at item C3-17.00 included the following:

> Item C3-14.00, *Arising Out of and In the Course of the Employment*, is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of the employment. In some circumstances, evidence supporting one component of the employment-connection test may be clear, while evidence supporting the other component is questionable, because the worker did something that was unauthorized by the employer, the employer condoned an unsafe practice, or some emergency forced the worker to act.
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> **In considering whether an injury or death arose out of and in the course of the employment, all relevant factors are taken into consideration including the causative significance of the worker's conduct in the occurrence of the injury or death and whether the worker's conduct was such a substantial deviation from the reasonable expectations of employment as to take the worker out of the course of the employment. An insubstantial deviation does not prevent an injury or death from being held to have arisen out of and in the course of the employment.**
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> Once it has been established that a worker's injury or death arose out of and in the course of the employment, consideration may be given to whether the injury or death is attributable solely to the serious and wilful

misconduct of the worker under section 5(3) of the *Act*. (See Item C3-14.10, *Serious and Wilful Misconduct*.)

[emphasis added]

[30] Policy at item C3-17.00 also addressed assaults as follows:

ii Assault

If a worker's injury or death is the result of an assault that arises out of and in the course of the employment, the worker may be entitled to compensation. However, if the worker's injury or death is the result of an assault that he or she initiated, this may constitute a substantial deviation from the course of the worker's employment.

The Board considers the spontaneity of the assault, whether the worker's aggressive response is in proportion to a triggering incident or provocation, […] whether there is a connection between the employment and the subject matter of the dispute that led to the assault. Where the actions or response of a worker are extreme or are out of proportion to a triggering incident or provocation, this may be an indication that the assault is of a more personal nature. **If the subject matter of the dispute that led to the assault is a personal matter, the injury or death is not considered to have arisen out of and in the course of the employment.**

Just as a worker's initiation of an assault may take the worker out of the course of the employment, an assailant's attack on a worker may bring the worker into the course of the employment, even though the assault does not occur at the workplace or during working hours. An assailant may be an employer, fellow worker or a non-worker (for example, a client or customer).

In these cases, the facts of the situation as to whether the assault is clearly related to the employment are carefully considered to determine whether the employment was of causative significance. If the employment aspects of the assault are more than just an incidental intrusion into the personal life of the worker at the moment of the injury or death, the worker may be entitled to compensation.

[emphasis added]

[31] There appears to be a word missing from the first sentence of the second paragraph under the heading "Assaults." I have inserted […] to mark the apparently missing word which may be "and" or "or." The review officer interpreted the policy as including the word "and" so as to require that all three listed factors be considered, and I have similarly taken all three factors into account in making my decision.

Reasons and Findings

[32] Under the revised Chapter 3 of the RSCM II, item C3-14.00 is the principal policy that provides guidance in deciding whether or not an injury arose out of and in the course of the employment. Accordingly, I have considered the nine factors listed in that item.

(a) On Employer's Premises

[33] The worker's injury occurred at a customer's site, in the loading dock parking lot. The incident did not occur on the employer's premises. This factor does not favour coverage.

(b) For Employer's Benefit

[34] The worker was at the client's loading dock as a result of his employment, which was for the employer's benefit. However, his participation in the altercation with his co-worker was not for the employer's benefit. The fact that X was injured due to the altercation adversely affected the employer's interests. This factor does not favour coverage.

(c) Instructions From the Employer

[35] Apart from being at client's loading dock (in the particular time and place) as a result of his employment, the worker was not carrying out instructions from his employer at the time he was injured. His participation in an altercation with a co-worker cannot be said to have been based on any instructions from the employer. This factor does not favour coverage.

(d) Equipment Supplied by the Employer

[36] Apart from having his truck at the client's parking lot, the worker was not using equipment or materials supplied by the employer when he participated in an altercation with his co-worker. This factor does not favour coverage.

(e) Receipt of Payment or Other Consideration from the Employer

[37] The worker was not injured while obtaining payment or other consideration from the employer. This factor does not favour coverage.

(f) During a Time Period for which the Worker was Being Paid or Receiving Other Consideration

[38] The worker's injury occurred during a time period for which the worker was being paid. This factor favours coverage.

(g) Activity of the Employer, a Fellow Employee or the Worker

[39] The worker's injury may be viewed as having been caused by an activity of a fellow employee, as the altercation was with a co-worker. This factor favours coverage.

[40] At the same time, however, the worker's injury could be characterized as being caused by a non-work related activity of the worker. It concerned the worker's involvement in an altercation regarding non-payment of a personal debt. This factor does not favour coverage.

[41] Accordingly, the evidence is mixed on this point.

[42] Reference is made in this part of the policy to item C3-17.00 concerning deviations from employment. That item is addressed separately below.

(h) Part of Job

[43] The worker's presence in the particular location where the altercation occurred was required by his job, and to that extent the worker's activities were part of his job. However, his particular activities relating to his involvement in the altercation were not part of his job. The evidence is mixed on this point.

(i) Supervision

[44] The worker's injury did not occur while he was being supervised by the employer or a representative of the employer having supervisory authority. This factor does not favour coverage.

[45] The evidence concerning the general factors listed in item C3-14.00 is mixed. This evidence provides some limited support for a finding of employment-connectedness in relation to the occurrence of the worker's injury. This primarily relates to the facts that the worker's injury involved the actions of a fellow employee, that the worker was at a time and place required as a result of his employment, and that the worker was being paid at the time the altercation occurred.

[46] I consider it appropriate to also apply the specific policy concerning assaults. Policy at item C3-17.00 indicates that consideration is given to the spontaneity of the assault, whether the worker's aggressive response is in proportion to a triggering incident or provocation, and whether there is a connection between the employment and the subject matter of the dispute that led to the assault. Where the actions or response of a worker are extreme or are out of proportion to a triggering incident or provocation, this may be an indication that the assault is of a more personal nature. If the subject matter of the dispute that led to the assault is a personal matter, the injury or death is not considered to have arisen out of and in the course of the employment.

[47] The interrelationship between these factors is not explained. I am inclined to the view that while all three factors may be considered, if there is strong evidence relating to one factor this may provide sufficient basis for a decision.

[48] In this case, the subject matter of the dispute leading to the assault related to the worker's non-payment of a debt to a co-worker relating to the purchase of cigarettes. This did not involve a dispute relating to purely personal interactions which occurred away from the workplace. Nor did it involve interactions relating to the performance of work activities. The activity of borrowing money from a co-worker could be viewed as being incidental to the employment, in the sense that it was the sort of event which could reasonably arise during the course of the workday. On the other hand, this action had no direct relationship to the employment, and the loan to buy cigarettes was clearly for a personal purpose.

[49] The policy contained in the former version of Chapter 3 stated at item #21.10, "Lunch, Coffee and Other Breaks," as follows:

> This case should be contrasted with another claim where the worker during a break in production, ran out to his car in the parking lot to get a package of cigarettes and twisted his ankle. His claim was denied. A person is considered to be in the course of his employment while entering and leaving his employer's premises at the start and end of his shift and at other recognized coffee or lunch breaks. This may also extend to other times when a worker has to leave his employer's premises for good reason, for example, in emergencies. However, not all trips to and from the worker's place of work can be treated in this way. There will be trips for personal reasons unrelated to the work and which cannot be said to be simply incidental to that work. There is no coverage in such cases. The trip made in this case was of that kind.
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> It was considered that more was involved here than such activities as blowing a nose, smoking a cigarette, or going to the toilet, which would normally be accepted as incidental to the employment. The rationale for accepting such activities is that they benefit the employer by making his employees comfortable while they are working and, therefore, in the long run, more efficient. **It can, of course, be argued that the worker's going to get his cigarettes benefited his employer by putting him in a position where he would be able to smoke and make himself comfortable. However, it seemed that this doctrine should be limited to the specific activities which make the worker more comfortable and not to other secondary activities which put him in the position of doing these activities.**
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> [emphasis added]

[50] The current policy at item C3-18.00 concerning "Personal Acts" contains no such specific example. It states, in more general terms:

> A worker's injury or death is compensable if it arises out of and in the course of the employment, as described in Item C3-14.00, *Arising Out of and In the Course of the Employment*. However, there is a broad intersection and overlap between employment and personal affairs. An incidental intrusion of personal activity into the process of employment is not a bar to compensation. Conversely, an incidental intrusion of some aspect of employment into the personal life of a worker at the moment of an injury or death does not automatically entitle the worker to compensation.
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> In the marginal cases, it is impossible to do better than weigh the employment features of the situation against the personal features to reach a conclusion, which can never be devoid of intuitive judgment, as to whether the test of employment connection has been met. The standard of proof is the balance of probabilities and consideration is given to section 99(3) of the *Act*.
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> Where the common practice of an employer or an industry permits some latitude to workers to attend to matters of personal comfort or convenience in the course of employment, compensation for injuries or death occurring at those moments is not denied simply on the ground that the worker is not in the course of productive work activity at the crucial moment. This is within the scope of the established doctrine relating to acts which, though not in themselves productive, are nevertheless a normal incident of employment.
>
> **A. Lunch, Coffee and Other Breaks**
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> A worker may be considered to be in the course of the employment not only when doing the work the worker is employed to do, but also while engaged in other incidental activities. For example, a worker does not cease to be in the course of the employment while using washroom facilities or having a lunch or coffee break on the employer's premises. An injury or death that occurs in these situations may not, however, also arise out of the employment. While both employment and non-employment factors may contribute to the injury or death, the causative significance of the employment must be more than trivial for the Board to find that the injury or death arose out of the employment.

[51] The wording cited above from the former item #21.10 (regarding the worker who ran out to his car in the parking lot to get a package of cigarettes and twisted his ankle) is not applicable policy. It was not contained in the revised Chapter 3 which was in effect at the time of the worker's injury on August 25, 2010. Nevertheless, I find that the example provided in the former policy provides a helpful illustration. While not policy, the reasoning may still be capable of having some persuasive effect on the basis of the logic contained in it (but not as a statement of a policy position). For this purpose, I have cited this wording, on the basis that it is analogous to the reasoning in a prior decision, a submission or a text concerning the jurisprudence of another jurisdiction, which has no particular status in itself but which may be persuasive by reason of the force of its logic.

[52] I agree with and adopt the reasoning in the example cited above, as providing an explanation as to why a particular action, such as running out to the parking lot to get cigarettes, may be characterized as primarily personal in nature rather than being employment-related. I find that the worker's actions of borrowing money from a co-worker to buy cigarettes, his non-payment of that loan, and the resulting disagreement with his co-worker, were not connected to his employment. I find that this was a personal matter which was unrelated to the employment. As noted above, policy provides that if the subject matter of the dispute that led to the assault is a personal matter, the injury or death is not considered to have arisen out of and in the course of the employment. Accordingly, the policy at item C3-17.00 regarding assaults supports a conclusion that the worker's injury did not arise out of and in the course of his employment.

[53] Having regard to the guidance provided by the principal policy at item C3-14.00 and the specific policy concerning assaults at item C3-17.00, I find that the weight of the evidence supports a conclusion that the worker's injury did not arise out of and in the course of his employment.

[54] Given the strong guidance provided by the policy concerning situations in which the subject matter of the dispute that led to the assault is a personal matter, I do not consider it necessary that I reach a determination regarding the disputed evidence as to whether the worker's response was disproportionate to the triggering incident or provocation. However, I agree with the conclusion of the review officer that the worker's response was disproportionate to the co-worker's actions. Although the co-worker may have initiated the first physical contact, this does not appear to have been in the nature of a blow intended to cause physical harm. The worker acknowledges that when X grabbed at him, he hit X. The worker also referred in his September 2010 statement to having thrown a left jab. The description of the other worker's injuries is also consistent with this conclusion.

[55] With respect to the other factor listed in policy concerning the spontaneity of the assault, I do not consider this to be a significant factor in this case. The evidence appears mixed on this point, in any event.

[56] Section 1 of the Act defines "accident" as:

> includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;

[57] I consider that the worker was in the course of his employment around the time the altercation occurred. I further consider, however, that his involvement in a physical altercation with a co-worker over a personal matter unrelated to his employment involved a substantial deviation. Accordingly, even if the accident presumption applied, I find that it is rebutted in this case by the evidence which shows that the worker's injuries did not arise out of his employment. Accordingly, I deny the worker's appeal.

[58] For the purposes of my decision, I did not consider it necessary to address whether the worker's involvement in the altercation amounted to misconduct. As set out in section 5(3) of the Act, misconduct only serves to bar payment of compensation where the injury is attributable solely to the serious and wilful misconduct of the worker, and the injury did not involve serious or permanent disablement. However, policy at item C3-14.10 specifies that before section 5(3) can be considered, it must first be determined under section 5(1) that the worker's personal injury or death arose out of and in the course of the employment. In view of my conclusion under section 5(1), section 5(3) of the Act was not applicable.

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

Conclusion

[60] I confirm the April 19, 2011 Review Division decision. I find that the worker's injury or injuries on August 25, 2010 did not arise out of and in the course of his employment.

Herb Morton
Vice Chair

HM/gw