Noteworthy Decision Summary

Decision: WCAT-2011-02468 **Panel**: Herb Morton **Decision Date:** September 30, 2011

Section 5 of the Workers Compensation Act – Arising Out of and In the Course of Employment – Deviations from Employment – Policy item #C3-14.00 and #C3-17.00 of the Rehabilitation Services and Claims Manual, Volume II

Section 5 of the *Workers Compensation Act* (Act) provides for compensation for personal injury arising out of and in the course of employment**.** Policy item *#C3-17.00* of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provides guidance with respect to what may be considered unauthorized employment activity, and notes that a worker's conduct must substantially deviate from the reasonable expectations of employment to be considered "unauthorized"

The worker was employed as a security guard. He worked in an outdoor kiosk that was subject to infestations of spiders. He was injured when he fell while standing on a chair spraying insecticide into the roof on the outside of the kiosk. The employer submitted that the worker was not responsible for spraying insecticide, was not instructed or authorized to perform spraying, and should have known that standing on a chair near concrete steps had an extremely high risk of fall and suffering injury.

The panel noted that policy item #C3-17.00 of the RSCM II addresses deviations from employment and states that it is clearly impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity. Workers may be uncertain as to the limits of their work. Carelessness or exercising bad judgment are not bars to compensation where it is reasonable that a worker may exercise some discretion as part of the worker's employment. Policy also states that employment is a broader concept than work and includes more than just productive work activity.

The panel considered the nine non-medical factors set out in policy item #C3-14.00, and interpreted consideration of whether the activities were for the employer's benefit to involve consideration of the worker's subjective intentions. In this case, the worker's subjective intentions (control of the spiders) supported coverage, despite the harm that resulted from his actions. Both the fact that the insecticide was provided by the employer and the worker was injured during his regular shift also favoured coverage.

The panel referred to two decisions made under the former version of the policy on deviations from employment, *Appeal Division Decision #94-0563*, 10 WCR 645, and *WCAT-2007-03680* (summarized as noteworthy). In both cases, the workers by conduct engaged in a substantial deviation from employment. In this case, general housekeeping duties were a reasonable activity for the worker, and the employer acknowledged it might have been reasonable for the worker to spray the interior of the kiosk, but compared the worker's activities to those of a worker crawling out on a ledge to clean exterior windows. The panel did not consider the worker's actions in standing on the chair to be comparable to that extreme example. At most, the worker was careless or exercised bad judgment. The panel referred to the historic compromise and noted an act done in good faith may form part of a worker's employment even if not specifically authorized. The panel agreed with the entitlement officer and review officer in accepting the claim.

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

WCAT Decision Number: WCAT-2011-02468
WCAT Decision Date: September 30, 2011
Panel: Herb Morton, Vice Chair

Introduction

[1] The worker was employed as a security guard. His primary work station was at a security kiosk (the kiosk) which served as a point of entry and exit to the employer's premises. On September 27, 2010, the worker was advised that the maintenance crew had sprayed the kiosk for insects. The worker took a can of bug spray from the closet of the kiosk, and stood on a chair to spray under the eaves of the exterior of the kiosk. He was injured when he fell from the chair and landed on some steps.

[2] By decision dated October 20, 2010, an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for compensation. The employer requested a review. By decision dated March 24, 2011 (*Review Decision #R0122235*), a review officer confirmed the entitlement officer's decision.

[3] The employer has appealed the March 24, 2011 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). By notice of appeal dated April 20, 2011, the employer requested that its appeal be heard through written submissions. The employer provided a submission on July 19, 2011. The worker provided a submission which was received by WCAT on August 23, 2011. The employer did not provide a rebuttal, although invited to do so. By letter dated September 15, 2011, a WCAT appeal coordinator advised that submissions were considered complete.

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

Issue(s)

[5] Did the worker's injuries on September 27, 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

Background and Evidence

[7] In his application for compensation, the worker described the occurrence of his injury on September 27, 2010 as follows:

> A nest of spiders hatched inside and out of the the security kiosk that morning. I proceed to clean up some of the areas that maintenace had missed just underneath the roof of the security kiosk (entrance side) by spraying the numerous nests of spiders and spider webs with a can of bug spray left by maintenance for our further use,. To access the corners of the rooftop, I used a chair to get on and began spraying the spiders and spider webs on the entrance side of the security kiosk. I was standing on top of a chair that was on top of the concreate stairs leading up to the entrance door of the kiosk. As i was spraying, i lost my balance and fell down tunto the concreate steps of the security kiosk and landed finally on the blacktop pavement leading up to the concreate stairs of the security kiosk.
>
> [all quotations in this decision are reproduced as written, except as marked]

[8] The worker advised that the accident occurred at approximately 9:15 a.m., that it occurred during his normal shift, that he was performing his regular work duties, and that his actions at the time of injury were for the purpose of the employer's business.

[9] A report of injury was also provided to the Board by the employer. The employer stated that the worker was employed as a security guard, and that "In no way is it part of his employment duties to fumigate the workplace or otherwise deal with insect control." The employer submitted that the worker's actions had absolutely no connection to his employment or the employer's business activities. The employer objected to the worker's claim, stating:

> It is our position that the worker's conduct was a substantial deviation from the reasonable expectations of his employment as a security guard and as such, his claim should be disallowed.

[10] By decision dated October 20, 2010, a Board entitlement officer advised the employer that the worker's claim had been accepted. The entitlement officer cited the policies at items #C3-14.00, "Arising Out of and In the Course of Employment," and #C3-17.00,

---

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 (see sections 250, 251 and 254 of the Act).

"Deviations from Employment," of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The entitlement officer reasoned, in part:

> In reviewing the criteria listed in Policy item #C3-14.00 while I acknowledge that the worker was not acting in response to specific instructions; the injury occurred on the employer's premises during the worker's shift and while using equipment supplied by the employer. All of these factors favour coverage and I find that in this case, they outweigh the fact that the worker's actions were not requested or directed.
>
> Furthermore, I agree that the worker was not performing activities that would normally be associated with those of a security guard however, it would be reasonable to conclude that he would be provided some latitude to ensure that the work area is safe, clean and devoid of such things such as insects and other potential hazards. Therefore, I find that in attempting to maintain a safe, clean work area, the worker was performing duties that fall within the employment relationship.

[11] The entitlement officer noted that while the worker's actions may not have been authorized or directed, the employer had not provided any evidence to show that his actions were forbidden. The entitlement officer concluded:

> The worker may have exercised poor judgment in standing on a chair with a potential hazard such as steps nearby however that is not a reason to deny a claim. The worker was performing a duty for the purpose of personal safety for the benefit of himself as well as the employer in good faith and even though his actions were not specifically instructed, I find that the injuries arose out of and in the course of employment.

[12] On December 6, 2010, the employer issued a disciplinary letter to the worker regarding the September 27, 2010 accident (upon his return to work). The letter was entitled "Written Warning – Unsafe Act." That letter, signed by the employer's general services manager, stated as follows:

> This letter is to address the incident of September 27, 2010, in which you suffered multiple injuries after falling from a chair outside the Security kiosk.
>
> On this day, you had just finished your morning patrol duties and were switching to kiosk duty. When you arrived back at the kiosk, the other guard informed you that there was a spider problem. She advised you that the inside of the kiosk had been vacuumed and that Maintenance had just finished spraying Raid up and around the outside roof of the kiosk.

> Without any direction, immediate need or other reason to do so, and almost immediately after being advised that Maintenance had just finished spraying the roof of the kiosk, you decided to take it upon yourself and re-spray the area. You positioned a chair directly in front of the concrete steps on the outside landing of the kiosk with two of the chairs four legs resting atop two stacked rubber mats. You then got up on the chair and started spraying the roof. While doing so, you lost your balance and fell off the chair and down the concrete stairs. As a result, you suffered multiple injuries and were totally disabled from work for over 6 weeks.
>
> **Although not specifically communicated to you, you ought to know that standing on a chair of such lightweight construction carries an extremely high risk of falling and suffering injury, the severity of which dramatically increases when that chair is positioned on an unstable surface immediately adjacent to descending concrete steps. While I appreciate that your intentions may have been good, it does not excuse the fact that you carried out an extremely unsafe act and placed yourself at undue risk of injury.**
>
> **Your actions were a significant deviation from your employment duties as a Security Guard and carried an obvious and significant risk of injury. While general housekeeping activities such as sweeping the floor or emptying the garbage could be considered a reasonable activity for you to undertake in the course of your employment, the same cannot be said for attempting to spray cobwebs on the outside roof of a building.** Further, if you felt that further spraying was necessary, nothing prevented you from contacting Maintenance personnel who were working in the immediate vicinity at the time.
>
> In the future, it is expected that you will consider your safety and that of others when planning and carrying out your work activities and that you will contact your supervisor should you have any doubt about how to carry out a task safely. It is further expected that you will not attempt to perform work that is clearly outside the scope of your employment as a Security Guard unless you are specifically instructed by your supervisor to do so and have all the necessary training and equipment to do so safely.
>
> [emphasis added]

[13] The employer requested a review by the Review Division of the October 20, 2010 decision. By decision dated March 24, 2011, a review officer confirmed the decision by

the entitlement officer to accept the worker's claim for compensation. The review officer reasoned, in part:

> In support of its position, the employer relies on policy item #C3-17.00, *Deviations from Employment*. This policy provides guidance with respect to what may be considered unauthorized employment activity, and notes that a worker's conduct must substantially deviate from the reasonable expectations of employment to be considered "unauthorized". The policy goes on to state that an insubstantial deviation does not prevent an injury from being held to have arisen out of and in the course of employment, and that :
>
> > It is clearly impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity, so workers may be uncertain as to the limits of their work. Carelessness or exercising bad judgment are not bars to compensation where it is reasonable that a worker may exercise some discretion as part of the worker's employment.
>
> In this case I do not find it unreasonable that the worker would use a can of insecticide present in the workplace to spray spiders which had apparently been missed by the maintenance crew earlier that morning. I also note that the examples of unauthorized activity activities cited in policy item #C3-17.00 are such things as horseplay and engaging in physical assault, which I do not find to be related to the nature of the activities engaged in by the worker here.

Submissions

[14] In addition to its earlier submissions, the employer has presented four points to support its appeal:

- The review officer found that spiders on or around the kiosk posed a safety and health issue. The employer submits that the presence of spiders on or around the kiosk posed no safety or health risk to the worker. This was especially true as Maintenance had just finished cleaning and spraying the area when the worker returned to the kiosk. There was no reason for the worker to do what he did. There was no threat to safety or health, and no urgency.

- The review officer found that the kiosk has spider problems from time to time and the employer knew this. The employer points out that there was no ongoing issue with insect infestation at the kiosk. The employer did not pre-schedule a maintenance crew to spray the kiosk. Rather, a maintenance crew was sent to the kiosk

two hours after the worker started his shift, after a request was made by the other guard on shift, to help clean up some baby spiders that had hatched at the kiosk.

- The review officer found that it was reasonable for the worker to use the bug spray that was left behind by maintenance, and to take steps to spray areas where spiders were noted. The employer states that while it may be considered reasonable for the worker to spray inside the kiosk, it is an entirely different situation to go outside, get up on a chair and spray the exterior of the building. In its submission to the Review Division, the employer similarly submitted:

  > It is similar to the difference between an office worker cleaning the inside windows of his/her office versus an office worker climbing out on the ledge of the building to clean the outside of the windows. Where the former would be reasonable, the latter would not.

- The employer further notes that horseplay and assaults are only policy examples of unauthorized activities amounting to substantial deviations, and that "unauthorized activities" are not limited to these types of situations.

[15] The worker submits he acted in good faith. The worker provides examples of other cleaning/maintenance duties he has undertaken in the past even though they were not expressly authorized or in his job description. He states:

> After 9 years of service to this company, I have removed plenty of snow from the security kiosk steps; as well as placed salt adjacent to the steps leading up to the kiosk on many occasions, and never have I been instructed not to remove snow by either the employer or any union representative for that matter.
>
> …
>
> Another example, where I have never received any instruction from the company, or unionized personnel who to be sure, have seen me do it, is washing the security truck. The pick up truck (***GMC CANYON WHITE***) gets very dirty inside and out, especially after repeated patrols on and off road. Also, as it is my duty to work very closely by physically handling cones and signs in the back of the truck,(for the purposes of traffic control during car ship offload); if I don't wash the truck and cones regularly, my work clothes become very messy to be sure. I am not a construction worker after all, and it is not normal for security to patrol with a dirty uniform. So the need and reason to wash the security truck despite never having been instructed to do so by the employer remains[.]

[16] The worker submits:

> It is for this reason when such unforeseen working conditions occur, that the policy item #C3-17.00 applies. If for instance I had to ask permission to perform every work detail, what duties will get done? What truly matters here were my intentions. And I can say with a free and clear conscience that my purpose was honourable, performed in good faith, well within reasonable grounds given circumstances; for the benefit of myself; my co workers as well as my employer.
>
> My purpose, to speak plainly, was to do a good job; and there was nothing more to my inten[t]ion….

Policy

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

[18] 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. This makes it clear that an injury may be found to "employment-connected," even though the worker's actions were not part of a productive work activity. 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.
>
> **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.**
>
> A. Meaning of "Arising Out of the Employment"
>
> "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.
>
> 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.
>
> B. Meaning of "In the Course of the Employment"
>
> "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.
>
> [emphasis added]

[19] Policy at item #C3-14.00 also sets out a list of nine non-medical 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.
>
> 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.

[20] The nine factors set out in item #C3-14.00 are addressed under separate headings under (a) to (i) of the Reasons and Findings below. Policy at item #C3-17.00, "Deviations from Employment," is also reproduced below.

Reasons and Findings

[21] For the purposes of my decision, I rely on the factual evidence presented by the employer, and as outlined by the employer in its December 6, 2010 warning letter to the worker.

[22] As noted above, 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 considering the employer's appeal, I have considered the nine factors set out in item #C3-14.00, and then the policy in item #C3-17.00 concerning deviations from employment. The nine factors set out in item #C3-14.00 are addressed under separate headings below.

(a) On Employer's Premises

[23] The worker's injury occurred on the employer's premises. This factor supports coverage.

(b) For Employer's Benefit

[24] On September 27, 2010, a maintenance crew had performed spraying at the kiosk. I consider that the worker's actions in "reinforcing" this work by further spraying (even if misguided or over-zealous) were carried out in good faith as being for the employer's benefit. The warning letter issued to the worker by the employer similarly acknowledged that his intentions in carrying out the spraying may have been good.

[25] This was not a case in which the worker was doing something solely for the worker's own benefit. Indeed, the initial spraying by the maintenance crew followed the expression of concern by the worker's co-worker regarding the presence of bugs around the kiosk.

[26] I appreciate that the effect of the worker's actions may in fact have been contrary to the employer's interest. The actions of the worker in carrying out this activity in an unsafe manner created a safety risk in the workplace which was adverse to the interests of the employer. Thus, the net effect of the worker's actions was not for the employer's benefit.

[27] I interpret this factor as being concerning with the worker's subjective intentions at the time the actions which gave rise to the injury were carried out. Accordingly, I find that this factor supports coverage, notwithstanding the actual harm which resulted from the worker's actions.

(c) Instructions From the Employer

[28] The worker was not instructed to perform spraying. At the same time, he was not contravening any instruction by the employer in carrying out the spraying. I find that this factor is neutral or does not support coverage.

(d) Equipment Supplied by the Employer

[29] While the fourth factor listed in #C3-14.00 only refers in its heading to equipment, the accompanying policy wording refers to equipment or materials.

[30] The worker used a bug spray which had been left in the closet of the kiosk by the maintenance workers. This was not a case involving the use of spray brought to the workplace by the worker. He also stood on a chair provided by the employer. To the extent the worker may be characterized as having been using equipment or materials, these were supplied by the employer. This factor favours coverage.

[31] I note, however, that this was not a case in which the worker was injured while using equipment or materials which had specifically been assigned for his use by the employer. I consider, therefore, that this weakens the support for coverage provided by this factor.

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

[32] This factor differs from (f). The worker was not obtaining consideration from his employer (such as by picking up or cashing a paycheque) at the time of his injury. This factor is neutral or does not support coverage.

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

[33] The worker was injured during his regular work shift. This factor favours coverage.

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

[34] The worker's actions did not involve any activity of the employer or a fellow employee.

[35] The policy relating to this factor notes that the more tenuously the worker's activity is related to the employment, the less this factor favours coverage. In this case, the worker was not pursuing some personal interest unrelated to his employment. Even if misguided, his actions related to the maintenance and housekeeping of his primary workstation (i.e. involving a rotation between manning the kiosk and patrolling the employer's facility every two hours). I find that this factor is neutral.

(h) Part of Job

[36] The worker's actions were not part of his regular assigned job duties. I consider that this factor is neutral or does not support coverage.

(i) Supervision

[37] The worker's actions in carrying out the spraying were not undertaken in the presence of a supervisor. I find that this factor is neutral or does not support coverage.

[38] In sum, the key factors supporting a finding that the worker's actions were employment-connected are that at the time of his injury, the worker was on the employer's premises, he was in the course of his regular paid shift as a security guard, he was using materials and equipment belonging to the employer, and his actions were carried out in good faith for the perceived purpose of advancing his employer's interests. These are strong factors linking the worker's actions to his employment.

[39] A central issue in this appeal then concerns whether the worker's actions involved a substantial deviation from his employment.

[40] Immediately prior to July 1, 2010, policy at RSCM II item #16.40 (which was part of item #16.00 dealing with unauthorized activities of the former Chapter 3) stated as follows:

> **#16.40 Injury While Doing Another Persons Job**
>
> Some latitude must be given to workers to act upon their own initiative. It is clearly impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity. Therefore, workers may be uncertain as to the limits of their work. A worker should not be prejudiced if the worker is careless or exercises bad judgment in an area where it is reasonable to exercise some discretion. Thus an act which is done bona fide for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer. For example, it has long been the policy of the Board to accept claims from workers injured as the result of some emergency action to protect their employer's property or to rescue their fellow workers. Suppose also that a worker, who has ceased to work at a particular machine, goes to the aid of a successor who is having trouble operating the machine. One would expect that the employer would not want the worker to refuse to assist the new employee on the technicality that it was not within the scope of the worker's employment.
>
> On the other hand, there is a clear need to place some limit on the activities which form part of a worker's employment. Thus, for example, if an act is specifically prohibited by an employer or is known, or should reasonably have been known, to the worker to be unauthorized, or, if the worker has been previously warned against doing other persons' jobs, the worker would not usually be covered merely because of a bona fide action for the benefit of the employer. On the other hand, it might be different if, for example, the employer had previously condoned a prohibited practice carried out by employees or some emergency forced a worker to act.
>
> If a worker performs some work activity without the employer's instructions, this is an indicator that any resulting injury did not arise out of and in the course of the employment. On the other hand, this factor does not exclusively determine the compensability of the injury. It must be weighed along with the other factors set out in policy item #14.00 and any other relevant factors. If it is outweighed by other indicators that the injury arose out of and in the course of the employment, the injury will be compensable under the *Act*.

[41] The policy which applies in this case is the one which was in effect at the time of the worker's injury on September 27, 2010. The July 1, 2010 revised Chapter 3 provided similar guidance to that previously contained in item #16.40, albeit without any wording which referred to a worker performing another person's job. Policy at item #C3-17.00, "Deviations from Employment," provided, in part:

> **A. Introduction**
>
> 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.
>
> **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.**
>
> 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*.)
>
> …
>
> The following provides guidance as to how some of the factors in Item C3-14.00 may be applied when considering the causative significance of a worker's unauthorized activity in the worker's personal injury or death.
>
> **B. Instructions of the Employer**
>
> **It is clearly impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity, so workers may be uncertain as to the limits of their work. Carelessness or**

> **exercising bad judgment are not bars to compensation where it is reasonable that a worker would exercise some discretion as part of the worker's employment. Thus an act that is done in good faith for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer.**
>
> **On the other hand, a worker's injury or death may not be considered to arise out of and in the course of the employment if the worker's act is specifically prohibited by an employer or is known or should reasonably have been known to the worker to be unauthorized, or if the worker has been previously warned against doing it. This is so even if the act could legitimately benefit the employer.**
>
> [emphasis added]

[42] The policy provided that an act done in good faith for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer. On the other hand, even where an act could legitimately benefit the employer, it may be found that it did not form part of the worker's employment, if the act is specifically prohibited by an employer or is known or should reasonably have been known to the worker to be unauthorized.

[43] I interpret the policy concerning "Instructions of the Employer" as being concerned with the limits of a worker's employment, and not with the manner in which the work is performed. Thus, a machine operator who neglected to use his seat belt and suffered a serious and permanent injury as a result of falling off the machine could be entitled to compensation, even though his or her conduct was in breach of a safety regulation and training/instruction by the employer to use the seat belt at all times. On the other hand, where a labourer had been expressly prohibited from attempting to operate heavy equipment and attempted to operate such a machine when it was temporarily unattended (due to a personal interest in operating such equipment), it might be concluded that the worker had gone outside the limits of his or her employment so as to be disentitled from claiming compensation.

[44] It is of interest to note the analysis provided on this subject from another jurisdiction. In Chapter 32 of Larson's *Workers' Compensation Law*, Lexis-Nexis, Matthew Bender Online, Larson describes the general irrelevance of employee fault:

> Misconduct of the employee, whether negligent or wilful, is immaterial in compensation law, unless it takes the form of deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdictions containing such a defense in their statutes.

[45] In Chapter 33, Larson sets out a general statement of principle:

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the *method* of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.

[46] At §33.01[4], Larson provides the following analysis regarding the prohibited doing of another person's job:

> **[4] Prohibited Doing of Another Person's Job**
>
> **[a] When Unrelated to Own Work**
>
> **It has already been observed that the modern tendency is to bring within the course of employment services outside regular duties performed in good faith to advance the employer's interests, even if this involves doing an unrelated job falling within the province of a coemployee. This, of course, assumes that no prohibition is thereby infringed. But if the unrelated job is positively forbidden, all connection with the course of the claimant's own employment disappears, for the employee has then stepped outside the boundaries defining, not the method of working, but the ultimate work for which the claimant is employed. Decisions on this topic have consistently denied compensation on these facts when the extraneous job was in no sense auxiliary to the claimant's own task.…**
>
> **[b] When Auxiliary to Own Work**
>
> It frequently happens that an employee will have to stop work due to some clogging, lack of oil, or disrepair of the machine. Quite commonly, also, there will be a company rule forbidding the operator to attempt to deal with the situation, and requiring the operator to wait until the specialists, whether oilers, electricians, or other repair personnel, arrive on the scene. Sometimes the operator decides to make the repair without the delay involved in calling the experts, and sometimes gets hurt, either by underestimating the expertise required or by overestimating his or her own versatility. **Now, the question is: has the operator departed from the course of employment? The operator has attempted another**

> **person's job in violation of instructions. Yet the fact remains that the operator is attempting to get the work done, although in forbidden fashion. Cases presenting these facts have gone both ways, depending on whether attention was focused on the fact that the job belonged to another or the fact that the action was a method of advancing the employer's work.**
>
> …
>
> **As a matter of compensation theory, it is quite permissible to treat the incidental invasion of another employee's province as merely a forbidden route on the main journey to the ultimate objective, the performance of the claimant's work.** Realistically, in some circumstances it is quite unfair to the claimant to penalize him for his well-meant short-cut, since in the everyday operation of a factory it is not uncommon and is probably often to the interest of the employer for employees to take direct action rather than "going through channels" when confronted with some minor adjustment which technically they are not permitted to undertake. On the other hand, it is equally true that risk of industrial accident may be increased when amateur electricians and repairmen take upon themselves dangerous jobs for which they have no qualifications. Most of the cases, however, seem to be of the former sort.
>
> [emphasis added, footnotes deleted]

[47] For the purposes of my decision, I am applying the policy set out in RSCM II Chapter 3 at the time of the worker's accident on September 27, 2010. The policy expressly recognized that workers may be uncertain as to the limits of their work. It is impossible for an employer to lay down fixed rules covering every detail of a worker's employment activity. Carelessness or exercising bad judgment are not bars to compensation where it is reasonable that a worker would exercise some discretion as part of the worker's employment.

[48] Two prior decisions (which were decided under the former version of Chapter 3) provide illustrations of circumstances in which the worker's conduct was such as to involve an abandonment by the worker of the worker's employment. *Appeal Division Decision #94-0563*, "The Course of Employment," 10(4) WCR 645, concerned a security guard who was assigned to a work site which had been set up as a simulated spa for the purpose of entertaining company staff and customers the following day. The worker was to guard the premises overnight. He telephoned two of his friends at home to come to join him at the site. The panel noted there was a supply of beer on the site in preparation for the social gathering. The worker and his friends drank beer from this supply while waiting for the water in the tubs to heat. The worker removed his uniform and he and his friends relaxed in the hot tubs. Around 4:00 a.m. the worker climbed a ladder and plunged head first into the tub, and was gravely injured. The Appeal Division panel concluded that the worker took himself out of the course of his employment when

he invited his friends to the workplace, visited with them while drinking beer, removed his uniform and got into a hot tub. The panel found that none of these actions was a part of the worker's employment responsibilities and he removed himself from the course of his employment.

[49] *WCAT-2007-03680*, summarized as noteworthy[2] on the WCAT website, concerned a press operator in a printing operation who sustained serious injuries as a result of an electrical explosion. At the time of the accident, the worker was using a screwdriver, of a particular type which was unrelated to his job functions, to touch components in the electrical room switch box. The WCAT panel concluded that the worker's actions in the electrical room, in particular his investigation of and tampering with the electrical panel, were outside the scope of his employment. In engaging in those activities, he had ceased to engage in his employment activities and had moved on to private activities of personal interest to him. The WCAT panel reasoned at page 23:

> …there is a clear distinction between a worker doing something recklessly or negligently or with poor judgement *which a worker is employed to do*, and the worker doing a thing *altogether outside and unconnected with what the worker is employed to do*. The former action does not take the worker outside the scope of the worker's employment, while the latter does. I have considered RSCM II policy item #16.00 (*Unauthorized Activities*) and acknowledge that the mere breach of an employer's regulation or order does not mean that the worker's injury did not arise out of and in the course of employment. The focus must generally be on whether the breach occurred while the worker was undertaking his or her job duties, and whether the injury arose out of the worker's performance of those duties.
>
> [emphasis in original]

[50] It is evident from these prior decisions that a worker may by his or her conduct engage in a substantial deviation from his or her employment, and be found to no longer be in the course of his or her employment. Accordingly, the death or serious injury to the worker may not be compensable, even where this results from hazards present in the workplace during a time period during which the worker was being paid to work.

[51] I consider that the question as to whether the worker engaged in a substantial deviation is largely evidentiary in nature. The December 6, 2010 warning letter by the employer acknowledged that general housekeeping activities such as sweeping the floor or

[2] As set out in item #19.3 of WCAT's WCAT *Manual of Rules of Practice and Procedure*, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

emptying the garbage could be considered a reasonable activity for him to undertake in the course of his employment. By letter dated February 4, 2011, the employer noted:

> The company does provide basic cleaning supplies for the Kiosk and agrees that the worker is responsible for keeping his work area clean and tidy. This, however, would include light activities like wiping down the counter, sweeping the floor, putting trash in the garbage or wiping up spills. This would obviously not extend to cleaning or spraying pesticides on the exterior of the building. We are also a unionized facility and have a maintenance department for performing activities such as cleaning the exterior of a building. In fact, it is quite clear that union members do not carry out the work activities of another classification, which is what the worker did in this case.

[52] The employer also acknowledged that it might have been reasonable for the worker to spray the interior of the kiosk, but compared the worker's actions in spraying the outside of the kiosk with those of a worker crawling out on a ledge to clean the exterior windows of an office building. I do not consider, however, that the worker's actions of standing on a chair are comparable to the latter more extreme example.

[53] Policy at item AP1-1-3 of the *Assessment Manual*, "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," provided:

> The Board, for the purposes of the *Act*, has the exclusive power under section 96(1) to determine status. The Board's jurisdiction cannot be excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly by labelling the parties as independent operators (who would therefore be independent firms). The Board makes its own judgment of their status, having regard to the terms of the contract and the operational routines of the relationship. However, decisions made by the Board are for workers' compensation purposes only and have no binding authority under other statutes.

[54] While that policy was stated in relation to a different issue, I consider that its reasoning is similarly applicable in relation to questions regarding the scope of a worker's employment. I do not consider that the scope of workers' compensation coverage is to be determined based on the specific parameters of a worker's job description and/or the terms of a collective agreement. I consider that those items provide relevant background evidence but are not determinative, as illustrated by the quotation from Larson's above.

[55] I am not persuaded that the worker's actions were known, or should reasonably have been known, to the worker to be unauthorized. At most, I consider that the worker was careless or exercised bad judgment in undertaking the spraying of the exterior of the

kiosk (particularly in relation to the fact he undertook the task in an unsafe manner which put him at risk of injury). I accept the worker's explanations regarding the other cleaning or housekeeping activities in which he engaged in connection with his role as a security guard. It is evident that these activities related to the upkeep of the employer's equipment and workstation which were closely related to the performance of his duties. I find compelling the worker's evidence that there was nothing more to his intentions than doing a good job. The worker's actions in spraying the outside of the kiosk were not so dissimilar to his actions in removing snow from the steps around the exterior of the kiosk as to have crossed into clearly forbidden territory.

[56] One of the fundamental principles on which workers' compensation legislation was founded (involving the "historic compromise," under which workers gave up the right to sue employers) was that compensation would be paid to injured workers without regard to fault. In *Pasiechnyk v. Saskatchewan* (W.C.B.), [1997] 2 S.C.R. 890, the Supreme Court of Canada reviewed the "history and purpose" of workers' compensation legislation and cited a decision which identified the four fundamental principles on which this system was based:

> 27 Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that **the scheme is based on four fundamental principles:**
>
> **(a) compensation paid to injured workers without regard to fault ;**
>
> (b) injured workers should enjoy security of payment;
>
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.
>
> I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. **The principle of no-fault recovery assists the goal of speedy compensation by reducing the number [of] issues that must be adjudicated.**…
>
> [emphasis added]

[57] In this case, there was no specific prohibition by the employer, or a previous warning to the worker by the employer. Given the generally "no-fault" nature of the workers' compensation system (which is subject to section 5(3) of the Act), I consider that caution must be exercised in concluding that a worker has stepped outside the boundaries of his or her employment simply because the worker may have been overly zealous or exercised bad judgment in undertaking an action which he considered to be related to his employment. It would be sadly ironic if a worker were to be denied compensation, due to having gone beyond what was expected of him or her while acting in good faith and attempting to advance the employer's interests.

[58] Policy provides that exercising bad judgment is not a bar to compensation where it is reasonable that a worker would exercise some discretion as part of the worker's employment. An act that is done in good faith for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer. I find that the worker's actions in this case come within the terms of this policy. I find insufficient basis on which to conclude that the act engaged in by the worker should reasonably have been known to the worker to be unauthorized and outside the limits of his employment. Accordingly, I am in agreement with the reasoning of the entitlement officer, and the review officer, in accepting the worker's claim.

[59] Upon considering the nine factors set out in the principal policy at item #C3-14.00, together with item #C3-17.00 regarding deviations from employment, I find that the worker's injuries on September 27, 2010 arose out of and in the course of his employment. At most, the worker's actions involved an insubstantial deviation, which was not such as to take the worker out of the course of his employment. The employer's appeal is, therefore, denied.

[60] 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

[61] I confirm the Review Division decision, and deny the employer's appeal. I find that the worker's injuries on September 27, 2010 arose out of and in the course of his employment.

Herb Morton
Vice Chair

HM/gw