WCAT # 2007-659-AD

CLAIM HISTORY AND APPEAL PROCEEDINGS:

On March 30, 2007, the Worker, an 18 year old employee of a fast food restaurant, suffered a head injury when he fell off a moving car while moving signs for the Employer. Luckily, it appears that after several weeks he had a good recovery from a potentially life-altering head injury.

There is no question that by sitting on top of a moving car, he engaged in an unwise and unsafe activity. At issue is whether his conduct was such a substantial deviation from employment so as to disqualify him from compensation.

On April 26, 2007, a Board Case Manager found that the Worker had suffered a personal injury by accident arising out of and in the course of employment. She rejected the Employer's position that the Worker was engaging in horseplay or was insubordinate to the point of disqualifying himself from compensation.

On August 9, 2007, a Board Hearing Officer confirmed the Case Manager's decision. She found that the lack of judgement on the part of the Worker did not amount to "serious and wilful misconduct".

This decision addresses the Employer's appeal of the Hearing Officer's decision.

It is the Employer's position that the Worker had completed moving a sign when he chose to engage in horseplay by jumping on top of a moving car. It argues that a supervisor advised him to stop what he was doing, but he chose to engage in an "illegal act" and was no longer engaged in his work duties.

It is the Worker's position that he was returning to pick up other signs when he was hurt. His counsel concedes that the Worker may have made an error in judgement in riding on the trunk of the car, but that this conduct did not amount to serious and wilful misconduct.

ISSUE AND OUTCOME:

> **Is the Worker barred from compensation due to engaging in serious and wilful misconduct?**
>
> No. While the Worker's conduct amounted to a serious error in judgement, it did not fall outside the no-fault scheme for compensation under the *Workers' Compensation Act.*

ANALYSIS:

Under s. 10(3) of the *Workers' Compensation Act,* the Board does not pay compensation for a personal injury resulting "wholly or primarily" from the "serious and wilful misconduct" of a worker, unless the injury results in a serious permanent impairment or death.

The few previous Tribunal decisions in Nova Scotia interpreting the phrase "serious and wilful misconduct" primarily arose in claims involving fights or intoxication. Given their particular context, I did not find these decisions provided useful guidance, so I reviewed some Ontario case law where there are far more decisions interpreting the phrase.

I found two Ontario decisions of the Workplace Safety and Insurance Appeals Tribunal (the Ontario equivalent of this Tribunal) particularly helpful - *Decision No. 2412/06* (January 15, 2007) and *Decision No. 717/98* (June 12, 1998). I also found the chapter on "serious and wilful misconduct" found in the looseleaf text *Butterworths Workers' Compensation in Ontario Service,* pages 7.42 to 7.45 helpful.

From those sources I draw the following general principles regarding horseplay:

- That horseplay is more than mere imprudence, negligence, lack of care or error in judgement. The danger involved, and the age and experience of the worker are relevant considerations.

- That the broad purpose of workers' compensation excludes workers from benefits where they form an intent to engage in horseplay.

- Mere involvement in horseplay is not sufficient to disqualify a worker - intent is the key.

- Where there is horseplay, the analysis comes down to a determination of whether a worker was an innocent victim or bystander, or whether the worker intended to participate in the incident, or retaliate against others.

I must decide disputed issues in the Worker's favour if the possibilities supporting his position are at least as strong as the possibilities against it. However, the standard of proof for the Employer is on a "more likely than not" basis (s. 187 of the *Workers' Compensation Act*).

I now review the evidence.

The April 30, 2007 emergency room record indicates that the Worker was unconscious when emergency health services arrived at the scene. The record documents that according to unknown witnesses he had been "surfing" on top of a car roof and fell off landing on his head.

The Report of Accident was filled out by the Employer before they were able to talk to the Worker. It indicates that the Worker injured himself while climbing onto and falling off a moving vehicle that had nothing to do with his work. It indicates that the Worker was instructed not to do this act and that management had no knowledge of his actions.

According to an April 11, 2007 Contact Sheet, the principal of the Employer, Mr. O, advised that the Worker and a co-worker had been asked to move two signs to another location. They moved one sign using a car. When they went to get the second sign, the Worker jumped on the roof of the car and fell off. This did not occur on their property.

According to an April 12, 2007 Contact Sheet, the Worker stated that he was transporting old broken drive-thru signs from the store location to a service station about 200 to 300 feet away. He believed that he fell while sitting on the trunk of the vehicle and securing signs that were on the roof rack.

According to an April 12, 2007 Contact Sheet, Mr. O had a different understanding of what occurred. He understood that his wife had told the Worker to physically carry the sign to the other location. Instead, they drove over. On the way back, the Worker kept jumping on the roof of the car while the driver told him to get down. He understood that the Worker did not recall what happened due to memory issues flowing from the fall.

According to a third Contact Sheet that day, the Worker stated that he did not remember everything that happened that day. The driver, CB, told him what happened. He says that they were told to take the signs to the service station, but not specifically told to carry them, so they took the car. He stayed on back of the car to stabilize the signs. He said that CB told him that he stayed on back of the car when they went to get the other sign, but fell off. He does not remember holding a sign when he fell off. He remembers the back seat being cluttered with stuff, so that he could not fit into the car.

On April 16, 2007, the Employer provided two witness statements.

A typed statement signed by CB indicates that JP told him to carry a sign to another building. CB, the Worker and LM decided to put the sign on the roof of his car. When returning to work, the Worker climbed onto the top of his car. He told him twice to come down. The Worker refused. When they turned the corner at the service station, the Worker fell off the roof.

LM wrote that he was asked to help move some large signs. They were heavy so they decided to place them on the roof rack of CB's car. The Worker held the signs so that they would not fall. After unloading the signs, the Worker got back on the car. Both he and CB told the Worker not to get back on the car, but he insisted. When they rounded a corner at the service station, the Worker fell off.

On May 8, 2007, the Worker discussed the Case Manager's decision with her. He stated that the decision had an error in it - he was on the trunk of the car, not the roof.

In the Notice of Appeal to Hearing Officer, Mr. O wrote that JP, the manager, specifically told the staff to carry the signs. He indicated that a supervisor was present when they moved the signs, and that the supervisor told the Worker several times to get off the top of the car.

A letter from the Worker stamped July 16, 2007 states that JP told him to "take" the signs to the other store. He did not believe that CB was a supervisor - he thought he just a cook like himself. He does not recall whether he was told to get off the car. He was never on the roof, only the trunk. They drove back a longer way than they came. He recalls how he came off the car, but can't recall other details after delivering the sign. He wrote that some one from the RCMP advised him that they did not lay charges again CB as they felt both parties were equally at fault.

On January 8, 2008, the Worker made a statutory declaration. He declared that while driving over he sat on the trunk holding a sign, which was on the roof rack of the vehicle. Co-worker CB was driving, while co-worker LM was riding in the front passenger seat. He remained on the trunk for the return trip to pick up another sign. There was no room in the back seat as it was filled with things. He fell while on route.

It was the Worker's view that CB travelled at a faster speed than he should have been driving. He expressed the view that he was not engaged in horseplay as there was no room in the car, and he thought he could remain on the trunk to pick up the next sign. As far as he was aware, SB was not his supervisor. He was not given instructions on how to transport the signs or other safety instructions from management.

I now weigh the evidence and apply the law.

Clearly, the employees transported the signs in an unsafe manner. However, I conclude that this was more likely related to the youth and inexperience of the employees than any deliberate disobedience of an express order.

It is unlikely that the Manager gave the Worker explicit instructions on how to transport the signs. It seems very unlikely that the Manager would have anticipated that the employee might use a vehicle to transport the signs and put her mind to directing that they be carried only by hand.

The evidence is uncontradicted in that the Worker held the signs while sitting on the trunk on route to the service station. This act did not did not amount to horseplay or serious and wilful misconduct. If the accident had occurred then, it is unlikely that arguments of serious and wilful misconduct would be seriously raised.

Instead this conduct was reasonably incidental to his employment, and it was more like negligence or an error in judgement than serious and wilful misconduct. This is particularly so given the Worker's age and lack of experience (two months with the Employer).

Regardless of whether the Worker was returning to pick up additional signs, or just returning to the restaurant when he was injured, he was still in the course of employment when injured. At issue was whether he intended to engage in horseplay during the return trip.

The return trip would be considered horseplay, if in fact the Worker had been "car surfing" on the roof of the car, or if CP had been doing "donuts" in the parking lot with the Worker on top of the car.

Clearly, the appropriate thing for the Worker to have done was to walk back the 200 to 300 feet to his place of employment.

I accept the evidence of CP and LM that they told the Worker not to ride on the car. I accept the Worker's evidence that he was not aware of any supervisory role either of them may have held. Its clear that the Worker made a conscious decision to act in a reckless manner.

I accept the evidence of the Worker that he rode back as he came up - sitting on the trunk of the car.

LM's statement was silent as to how the Worker rode on the car. Only CP claims that the Worker was on the roof of the car, an act more akin to joy riding. CP had motivation to overstate the Worker's role in the accident, as CP faced possible criminal charges. By contrast, it is unlikely that the Worker knew the consequences of a finding of "car surfing" on his eligibility for compensation when he first reported at he sat on the trunk of the car. Also, while most cars could take the weight of someone sitting on their truck, it is unlikely that someone would put their weight on the roof as that could dent the roof, especially a car like the Neon that CP was driving.

In short, I find that the Worker's conduct fell within the no-fault scheme for compensation. There is insufficient evidence to conclude that it amounted to serious and wilful misconduct that would result in no compensation being paid.

CONCLUSION:

The appeal is denied.

The Board properly paid compensation on this claim.