

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: [*]
 (Survivor of [*], deceased Worker)

Participants entitled to
respond to this appeal: **Province of Nova Scotia (Employer) and**

 The Workers' Compensation Board of Nova Scotia
 (Board)

APPEAL DECISION

Representative: [*] acted in her own behalf

Form of Appeal: Oral hearing held at Sydney on October 24, 2008

WCB Claim No.: [*]

Date of Decision: December 11, 2008

Decision: The appeal of the June 25, 2008 Board Hearing Officer
decision is denied, according to the reasons of Appeal
Commissioner K. Andrew MacNeil.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This decision addresses an appeal by the surviving spouse* of a deceased Worker following a Board hearing officer decision dated June 25, 2008. In that decision, the hearing officer determined that the spouse's claim for survivor benefits was not supported by the evidence. Specifically, it was determined that the Worker's death did not arise out of and in the course of employment.

The spouse appealed that decision to this Tribunal by Notice of Appeal received on August 7, 2008. The matter was set down to proceed by way of an oral hearing, and the hearing was held at Sydney on October 24, 2008.

The spouse was the only statutory participant to attend the hearing. The Employer's position had been communicated by mail, and the spouse had received a copy.

No new documentary evidence was adduced at the hearing.

ISSUE AND OUTCOME:

Did the Worker's (fatal) injury arise out of and in the course of employment, so as to give rise to entitlement to survivor's benefits?

No. The Worker's death did not arise out of and in the course of employment. As a result, there is no entitlement to survivor benefits.

ANALYSIS:

This decision is taken in accordance with the provisions of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended [*Act*].

In the course of the hearing, sworn testimony was received from the deceased Worker's surviving spouse. She offered both evidence and argument. Her evidence was consistent in material particulars with the documentary evidence recorded in the file; I accept her evidence as truthful.

The Employer's evidence, communicated in a letter dated September 25, 2008 and provided to the Worker's spouse, was also reviewed. In my view, it can be better characterized as a recitation of fact, rather than of argument.

* This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

The essential facts underlying the claim are not in dispute. The Worker was employed by the Province of Nova Scotia at the time of his death on July 6, 2007. The immediate cause of death was a fatal motor vehicle crash. At the time of the crash, the Worker was travelling between Sydney and Port Hawkesbury, to attend a cultural event of importance to his family. He was driving his own vehicle. He was not making the trip at the request, or to advance the interests, of his Employer. The cultural event was unconnected to his employment.

On the day of the accident, the Worker was an acting regional manager for the Employer (he had been appointed to act from July 4th through July 23rd). On July 6, 2007 the Worker was scheduled to be out of the office – it was a “modified day” or “earned day off” [“EDO”]. Despite this, he did attend at his workplace that day for several minutes and, while there, made several telephone calls related to his employment.

The question before me is whether the Worker’s death arose out of and in the course of his employment.

The Worker’s spouse argued that, as acting regional manager, the Worker had a special relationship with his employer. That because the potential existed during his “acting status” for him to be required to respond to employment demands wherever he might have been, at any hour of the day, that he was effectively “on duty” at all times. In her view, it is irrelevant whether he was engaged in a purely personal activity – driving to a family cultural event in Port Hawkesbury – or engaged in the performance of an employment duty.

Setting aside, for the moment, the question of the Worker’s acting status, the broader question remains whether the Worker’s death arose out of and in the course of employment.

It is helpful to refer to standard references on workers’ compensation law in beginning one’s analysis. Consider the opinion of Terence D. Ison, writing in his text Workers’ Compensation in Canada (2nd edition), Butterworths, 1989. At p. 26, Ison writes, in part:

- 3.3.6. Relevant variables.** While no single criterion is conclusive in classifying an injury as one arising out of and in the course of the employment, various factors are used for guidance. These include:
- whether the injury occurred on the premises of the employer;
 - whether it occurred in the process of doing something for the benefit of the employer;
 - whether it occurred in the course of action taken in response to instructions from the employer;
 - whether it occurred in the course of using equipment or materials supplied by the employer;
 - whether it occurred in the course of receiving payment or other consideration

- from the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he is exposed in the normal course of production;
- whether the injury occurred during a time for which the worker was being paid;
- whether the injury was caused by some activity of the employer or fellow worker

Ison considers at pp. 28 and 29 injuries suffered during travel. At p. 29, Ison writes:

In some cases, a trip may be divisible [between work-relatedness and not] by reference to the different purposes. For example, where a worker is travelling for an employment purpose and makes a collateral side-trip for a personal reason, the journey on the main route is in the course of employment, but not every journey on a side trip. Conversely, where a worker is travelling primarily for a personal reason but makes a collateral side-trip for a business purpose, the journey on the side-trip is in the course of employment.

Ison considers the case of the commuting worker at pp. 29 - 31:

3.3.12. Commuting. Where the choices of a worker determine the journey to be undertaken and the method of travel, the journey is outside the course of employment...

...

2. Where a worker is using his automobile for travelling to and from work rather than in the course of employment duties, and where he is injured through contact with his own automobile, that is not compensable though it may occur on the premises of the employer. For example, it is not compensable if a worker slams his hand in his car door, even though on the company parking lot...

...

5. A worker who is not on shift and is called in by the employer to deal with some emergency is covered for compensation from leaving home. Similarly, where a worker who has not finished work for the day goes home for an employment-related purpose, that journey is in the course of employment.

Ison's analysis stresses the need to establish some substantive connection between the mechanism or circumstances of a worker's injury and the particular requirements of the worker's employment, in order for an injury to give rise to entitlement to compensation.

In this analysis, had the Worker been driving from Sydney to Port Hawkesbury for an employment-related purpose – even if he had had additional, personal business to attend to while there – then his death would more likely be seen to have occurred “arising out of and in the course of his employment”. As I understand it, this was not the case. The sole reason for travel to Port Hawkesbury on that day was to attend this personal event.

The analysis also renders immaterial the fact that the Worker had called in to the office to report that he was taking the day off, as the analysis stresses the work-relatedness of the place, time and activity giving rise to the injury.

The Tribunal has had occasion to consider previous claims where workers have suffered injury while travelling. While none are perfectly analogous to the present facts, there is instruction to be found in prior analysis.

In *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Puddicombe)* (2005), 231 N.S.R. (2d) 390 (C.A.), the Court of Appeal considered the definition of “compensable accident” contained in a Tribunal decision. A snow plow driver, who had a car accident on a snow-covered road while commuting to work in response to an urgent call outside of normal work hours, was found to have suffered a compensable injury. The Court stated that, generally, a worker will not be acting in the course of his employment while driving to or from work. However, while not performing a work duty, this particular snow plow driver was performing something directly related to his work duties. Also, he was exposed to a special risk different than the general public when he responded to the employer’s call to remove the very snow which caused his accident.

The Court said there is no comprehensive test for when an injury arises out of and in the course of employment. However, it did state at paragraph 27:

... the phrase ‘in the course of employment’ does not simply refer to things done pursuant to an employment contract, but also to things reasonably incidental to the performance of a contractual duty.

It also quoted with approval this passage at paragraph 37:

The words “in the course of employment” refer to the time, place and circumstances under which the accident takes place. The words “arising out of employment” refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received

I adopted this same analysis in *Decision No. 2005-298-AD* (November 9, 2005, NSWCAT) and *Decision No. 2005-381-TPA* (January 16, 2006, NSWCAT).

I have also reviewed Butterworths Workers' Compensation in Ontario Service, and have found no deviations from Ison's principles in the reviewed decisions of the Ontario WCAT or WSIAT, the appeal body [and successor] mirroring in Ontario this Tribunal's function in this province.

What impact, if any, does the Worker's acting-managerial status have on the issue? The Worker's spouse argued that the unstated requirement "to be available to respond" changes the work relationship. The authorities canvassed above make no distinction between managerial roles and non-managerial roles: the key relationship is between worker and employer. A worker is a worker, unless he is an officer, director, owner, and so on.

Consider the following, hypothetical scenario: a worker attended at the office on his day off to make a few work-related calls, and then went to a golf course with family members. While golfing, he was struck by lightning and was killed. Does the death on the golf course give rise to entitlement to survivor benefits because, despite his day off work, he was acting manager? The only difference between the actual circumstances of the Worker's death and the hypothetical golfer's death is in the nature of the death: by motor vehicle accident or by electrocution. Under Ison's analysis, the Worker's managerial status would be irrelevant because there is no nexus between the fatal activity and the Worker's employment. Neither activity – driving to the cultural event or golfing – was performed "in the course of employment". Neither occurred "out of employment".

If, in the Worker's spouse's view, the golfing death were compensable because the worker had been an acting manager at the time of his death, then it could be argued that any death of any manager, regardless of circumstances, must be compensable, to the extent that any manager would be expected to be available to respond to exigencies.

I am sympathetic to the Worker's spouse. To lose a husband, together with a child, in any circumstance would be devastating. However, I cannot find that the circumstances of this Worker's death are within the scope of the *Act*.

The appeal is denied. The Worker's spouse is not entitled to survivor benefits.

CONCLUSION:

The appeal is denied.

The Worker's death did not arise out of and in the course of employment. As a result, there is no entitlement to survivor benefits.

DATED AT HALIFAX, NOVA SCOTIA, THIS 11th DAY OF DECEMBER, 2008.

K. Andrew MacNeil
Appeal Commissioner