

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (Worker)**

Participants entitled to respond to this appeal: **Victorian Order of Nurses (Employer) and
The Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representatives: Anthony Magliaro, Workers' Adviser for the Worker
Monique Arnfast for the Employer

Form of Appeal: Oral hearing held December 10, 2008 in Sydney, NS

WCB Claim No.(s): **[*]**

Date of Decision: February 9, 2009

Decision: The appeal of the August 12, 2008 Board Hearing Officer decision is denied, according to the reasons of Appeal Commissioner Leanne M. Rodwell Hayes.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker is a Registered Nurse employed as a District Nurse with the Employer. On the evening of March 18, 2008, the Worker went out to her vehicle to retrieve a work-related form. She slipped and fell, fracturing her left ankle. The Worker filed an Accident Report with the Board seeking recognition of this accident as a compensable injury under s. 10 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"].

Under appeal to the Workers' Compensation Appeals Tribunal [the "Tribunal"] is the Hearing Officer's August 12, 2008 decision denying recognition of the Worker's March 18, 2008 injury as a personal injury by accident arising out of and in the course of her employment pursuant to s. 10 of the Act. The appeal to the Tribunal proceeded by oral hearing held on December 10, 2008. The Worker; her spouse, PA, and her sister/co-worker, HJM, testified. Her manager, EM, testified on behalf of the Employer. One document was entered into evidence as Exhibit 1 at the hearing: a Home Care Services Progress Note, Nova Scotia Department of Health, Continuing Care Branch, with the Worker's handwritten notes describing the type of information generally included on a completed version of the document. Also circulated at the hearing, but not entered into evidence as an exhibit, was the Worker's Certificate of Excellence for professional practice which she was awarded in 2007.

The Board did not actively participate in the appeal.

ISSUE AND OUTCOME:

Did the Worker sustain a personal injury by accident arising out of and in the course of her employment pursuant to s. 10 of the *Act* on March 18, 2008?

No. While the Worker sustained a personal injury by accident on March 18, 2008, it did not arise out of and in the course of her employment.

ANALYSIS:Review of the Law

Section 10(1) of the *Act* provides that compensation shall be paid to a worker who suffers a personal injury arising out of and in the course of employment. Section 10(4) states additionally: "where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

The issue before the Tribunal in this appeal is whether the Worker's accident 'arose out of and in the course of her employment'. This phrase is not explicitly defined in the *Act*, the Workers' Compensation General Regulations, or the Board's Policy Manual.

Terence D. Ison's text Workers' Compensation in Canada (2nd edition), Butterworths, 1989 lists, at p. 26, factors relevant to the determination of whether an accident has arisen in the course of employment. These are:

- 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 also noted, at page 29, distinctions with respect to 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. Thus in the case of a factory work who commutes from home to work in his own automobile, the highway travel is outside the course of employment. However, if a construction worker is employed by the same employer to work at successive sites, travelling to each of them directly from home so that he has no fixed place of employment, that travel is in the course of employment.

In arriving at my conclusion on this appeal, I have also considered the following previous decisions of this Tribunal, the Nova Scotia Court of Appeal, and the Ontario Workplace Safety and Insurance Appeals Tribunal, listed below in chronological order:

Decision No. 759/88, 1990 ONWSIAT 5044 (CanLII), considered the case of a school bus driver who, having finished her morning trip, was involved in a motor vehicle accident while

going to buy groceries. Her employer allowed her to use the bus for personal purposes, and keep the bus in her home driveway. The Tribunal found that the predominant character of the activity at the time of the accident was personal, and the worker was not in the course of employment. I note in particular the following comments of the Tribunal:

As both counsel pointed out, there is no single test to determine whether a person is acting in the course of employment at a particular time. All of the facts surrounding the incident must be considered in order to arrive at a decision on this issue. Various panels of the Appeals Tribunal have held that a person is acting in the course of employment when the activity performed is reasonably incidental to the employment. The best that can be achieved is a weighing of all factors in an attempt to decide whether the predominant character of the activity is personal or employment-related. Although employment features will usually overlap personal features, producing a blurred picture, or a mosaic of different features, nevertheless the predominant character of the activity - either personal or employment-related - should emerge.

The Tribunal then referred with approval to the decision of the Court of Appeal - Civil Division in the English case of *Nancollas v. Insurance Officer*, [1985] 1 All E.R. 833 (C.A.) where the Court concluded: "We cannot overemphasise the importance of looking at the factual picture as a whole and rejecting any approach based on the fallacious concept that any one factor is conclusive."

Decision No. 428/97, 1997 ONWSIAT 14172 (CanLII) involved a home support worker who was injured in a motor vehicle accident on her way to work. Like the Worker here, her employment required her to visit and assist patients, who were her Employer's clients, in their homes.

The Tribunal considered that Board policy restricting the finding of being in the course of employment for the period of travel to and from work did not address the reality of the industry in which the worker was employed. Because they had to travel to the premises of their employers' clients, workers were exposed to an increased risk as an integral part of their employment. On the real merits and justice of the case, the majority of the panel concluded that the worker was in the course of employment while traveling to her first appointment of the day. A dissenting judgment focused on the fact that the worker had been traveling to the same place of employment for a year; thus her place of employment had become fixed, and the policy should have applied in the normal course.

Decision No. 1506/97, 2000 ONWSIAT 2846 (CanLII) involved a regular part-time registered nurse who was called in to work at a time that was not her normal shift. She broke her leg when she slipped on her driveway as she was going to the taxi to take her to work.

The Appeals Tribunal found that the situation constituted an emergency. Although the patient whose condition prompted the worker being called in was stable and not a life-threatening condition, the worker was required to alter her routing and proceed to the hospital within 40 minutes. Under those emergency conditions, the Tribunal found that the worker was in the course of employment in traveling to work on short notice in response to an emergency. The situation removed her from the normal circumstances of her employment, under which she would not normally be considered to be in the course of employment while traveling to and from the employer's premises.

In *Decision 2003-648-TPA* (February 24, 2004, NSWCAT) this Tribunal considered the case of a worker who slipped and fell near the front entrance door of her Employer's building. The Tribunal first referenced the Ison text, at paragraph 3.3.8 on p. 27, which reads:

Access to and egress from the premises of the employment are part of the employment. Thus, for example, an injury sustained by a worker in the company parking lot is generally compensable. Also an injury sustained while en route from the company parking lot to the particular place of work is generally compensable, even though it may have occurred on a highway.

The Tribunal then turned to a decision of the New Brunswick Court of Appeal which also concerned a worker who suffered a slip and fall accident on the way to work, and commented:

The basis for compensating a worker for injuries incurred while entering or leaving a workplace seems to be related to the notion of exposure to risk. The worker takes on a different risk than members of the general public. This was explained by the New Brunswick Court of Appeal in *Gallie v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [1996] N.B.J. No. 436. At paragraph 2 of its reasons, the Court quoted from Halsbury's Laws of England (3rd Ed.), Vol. 27, p. 806, as follows:

. . . If the place where the accident occurs is a private road or on the property of the employer, the accident is in the course of employment because he is then at the scene of the accident by reason only of his employment and he has reached the sphere of his employment. The test is whether the employee was exposed to the particular risk by reason of his employment or whether he took the same risks as those incurred by any member of the public using the highway.

The Tribunal concluded that where the worker had no choice but to walk up to and through the building at about the time of her accident, it was sufficient to place her within the sphere of her employment.

Gallie was also referenced in *Decision 2004-113-TPA* (April 30, 2004, NSWCAT). There, the worker was a product demonstrator. She was returning paperwork and equipment used in a demonstration to her area manager's home, as required by her job, and slipped and fell in the foyer of the home. The Tribunal found that but for the employment relationship, she would not have been at the home, and so her presence was reasonably incidental to her employment.

Decision No. 987/04, 2004 ONWSIAT 1475 (CanLII) was a case where a teacher, after being dropped off at her school, realized that work materials had been left in the vehicle. She left the school grounds, retrieved the materials from the car driven by her spouse, but slipped and fell on an icy sidewalk while returning to the school.

The Appeals Tribunal found that the reason for leaving the Employer's premises was for the Employer's benefit and was an activity reasonably incidental to employment. The Tribunal also noted that the risks the worker encountered in retrieving the materials were distinct from those she usually encountered. She was found to be in the course of employment.

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 commented, at paragraph 27, that: "... the phrase "in the course of employment" does not simply refer to things done pursuant to a contractual duty, but also to things reasonably incidental to the performance of the contractual duty". At paragraph 37, the Court added that:

... there are two main aspects of the "arising out of and in the course of employment" inquiry: the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work. As Cameron J.A. succinctly observed in *Gellately v. Newfoundland (Workers' Compensation Appeal Tribunal)* (1995), 126 D.L.R. (4th) 530; N.J. No. 225 (Q.L.)(C.A.) At p. 534 (D.L.R.):

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

In *Decision 2007-312-TPA* (October 26, 2007, NSWCAT), the worker slipped and fell in a public washroom in his Employer's premises, outside of his usual working hours. The Tribunal concluded that regardless of the worker's usual working hours, "if he was in that building because he was employed there, that is, in my opinion, reasonably incidental to his employment. One's entitlement to workers' compensation coverage does not ordinarily

lapse because one is working overtime or after hours. “

In *Decision 2007-777-AD* (October 28, 2008, NSWCAT), a mine worker who was off work due to a compensable injury when all of his shiftmates were killed in a mine explosion filed a claim for compensable post-traumatic stress disorder. This Tribunal found sufficient evidence of a causal connection to work, noting: “Causation is established when it is shown that a worker’s condition would not have occurred but for his employment. Causation does not need to be established to scientific certainty. It may be inferred as a matter of common sense, provided that such an inference is reasonable in the circumstances.”

Decision 2008-298-AD (January 30, 2009, NSWCAT) considered a similar situation to the within appeal. The worker was a home care worker who, like the Worker herein, travels to patients’ homes to provide them with home care and assistance. When leaving for her first on the day of her accident, she slipped in her driveway and injured her tailbone and low back. The worker completed her shift that day, but experienced pain after a lifting a patient that evening. As the slip and fall incident was the only incident reported on the Accident Report, the Tribunal concluded that it was the only incident perceived as a possible cause for the worker’s pain. As a result, the Tribunal found:

... it is quite straightforward and clear that the slip and fall did not occur in the course of the Worker’s employment. There was no special request by the Employer for the Worker to travel that day; rather, the Worker was starting her regular shift. The Worker slipped in her own driveway, even before entering her vehicle. Thus, although the Worker would have been acting in the course for employment (*sic*) had she been injured while driving or otherwise travelling to see patients (given the nature of her employment), in this instance the Worker never commenced the process of travelling on a public highway to see patients. Rather, she slipped on her own property prior to commencing her employment activities. Therefore, in the light of all the circumstances, the accident did not occur in the course of her employment.

Facts of this case

The Worker’s testimony with respect to the occurrence of the March 18, 2008 incident was forthright, and consistent with the documentary evidence on file. Both HJM and EM acknowledge that the Worker is a very conscientious, responsible, and dedicated employee. There is no suggestion that the testimony of any of the witnesses is anything but entirely credible.

The Worker’s duties are to conduct home visits at client homes and provide nursing services as required. The Worker sees between six and twelve clients per shift. The Worker is paid for an 8-hour shift, generally 8:00 a.m. to 4:00 p.m., but the exact hours depend upon client needs, the assigned work schedule and duties for a particular work

day. The Worker's vehicle is her sole means of travelling between client locations; without it, she would, effectively, be unable to perform her employment duties.

The Worker is provided with a home fax machine by her Employer, primarily for the purpose of providing her with her client schedule for her next shift. It is a means of Employer/employee communication for which the Worker receives an income tax benefit. As a result, it provides the means by which she receives and takes instruction from her Employer, and otherwise communicates with her Employer. The tax credit she receives reflects that at least a small part of her home is connected to her employment.

The Employer does have a local office, staffed by a local support officer between 8:00 a.m and 4:00 p.m., when it is available for use by all staff. Outside of those hours, the office is not available, as keys are not provided to the Employer's nursing staff such as the Worker.

Generally, any supplies the Worker needs are available at each client location, although she can pick up extra supplies at the office, and she also maintains supplies in her car. The only other reason to go to the local office is to attend meetings. Primarily, she operates out of her car, and her home.

On March 18, 2008, the Worker worked her normal shift, from 7:30 a.m.-3:30 p.m., accompanied by a student, who was not present at the hearing. When the Worker leaves home at the beginning of her shift, she travels directly to the location of her first client of the day. Thereafter, she travels from one client location to the next. The Worker does not have a single workplace location; her workplace varies, depending upon the location of her clients. The one consistent factor in her day is her vehicle.

One of the Worker's assigned visits that day was to an elderly woman who had recently returned to her own home after being in a nursing home. During the client visit, the Worker found that there seemed to be some confusion with respect to this client's medication, and that clarification as to dosage, and the appropriate frequency of home visits, was needed. Because of her concerns, the Worker had made several telephone calls during her visit to the client's home, and sought ensure that she was scheduled to return to the client's home the following day to address the issues outstanding. The Worker did not complete a Progress Note, a document which would be forwarded to the Department of Health Home Care Coordinator, regarding this client during her shift.

When the Worker completed her shift at 3:30 p.m. , she followed her usual after-work routine, and went to her gym before heading home to prepare the evening meal. During the evening, she decided to complete paperwork outstanding from her client visits that day, including the Progress Note pertaining to the client mentioned above.

EM and the Employer's representative emphasized that completion of the Progress Note was not required by the Employer, nor was it necessary for the continued care of the client to whom it was intended to pertain. The Worker acknowledged that completion of Progress Notes pertaining to any client rests within her discretion.

The Worker did not have the appropriate form in her house. HJM recalled receiving a telephone call from the Worker that evening asking her if she could fax a blank Progress Note to her. HJM did not have a Progress Note form on hand, as she was then on maternity leave. The Worker's spouse offered to get the document from her vehicle trunk for her, but the Worker declined his offer, on the basis that he would not necessarily retrieve the correct form. Attired in her housecoat and sneakers, the Worker went out to her car to retrieve the form herself, despite concerns about doing so because of the weather and its effect on their driveway. She did get the Progress Note from the trunk of her car, but slipped and fell on her way back to her house. Her spouse heard her scream; when he went out to investigate, he found that she had fallen at the foot of the steps to their house, having suffered a fractured ankle.

The injury occurred in the evening, outside of the Worker's shift; therefore, at a time for which she was not being paid. EM emphasized that staff are encouraged to complete their paperwork within the scheduled shift, and are discouraged from taking work home with them or working overtime, be it paid or unpaid. The Employer's work expectations are set out in policies a guidelines developed further to the collective agreement governing the Employer's staff. However, both the Worker and HJM testified that it is not always possible, for various reasons, to complete paperwork at client homes in the time allotted. EM testified that a 66 minute standard for client visits has been set and recommended. She acknowledged that the reality is that some visits may be shorter, and some may be much longer, depending upon the client's requirements.

Application of law to facts

I accept the evidence that the Worker was engaged in work-related activities prior to her injury, which was outside of the hours of her paid work shift. I do not entirely accept the Employer's proposition that it does not expect its staff to engage in any work-related activities outside of their scheduled shift. The Employer sends the Worker a list of appointments in advance of her next shift. I find it is reasonable to infer that the Worker would review her appointments for the following shift sufficiently in advance of that shift in order to be prepared to undertake her work duties. Her purposes in this review could include determining when she would need to leave in order to travel the distance to her first appointment and arrive at the appointed time; to ensure that she has sufficient gasoline in her vehicle to arrive at that location; or to ensure that she has the appropriate supplies if necessary. As well, since her duties require travel, and some of her appointments are time-specific, it is not unreasonable to accept that paperwork may not always be completed within the parameters of an 8-hour shift, or to anticipate that paperwork could be completed at the Worker's home, rather than at her Employer's

office or in her vehicle. Therefore, completion of work-related paperwork at home, after hours, would fall within the course of the Worker's employment.

However, I find that the Worker's accident did not occur in the course of her employment, based on the following facts:

- The Worker's injury did not occur on the Employer's premises, as it did not occur at the Employer's local office.
- Her injury did not occur at the home of any of her scheduled client visits, which would also constitute premises of the Worker's employment.
- The Worker's injury occurred outside of her home, while she was proceeding from her vehicle.
- It did not occur at a time that she was operating or intending to operate the vehicle in conjunction with her work. She was simply retrieving a work document from her vehicle.
- The evidence that the Worker had been engaged in work-related paperwork prior to her injury was not challenged, nor that her reason for going to her vehicle was to retrieve a work-related document. However, it was not necessary for her to complete or retrieve the Progress Note at that time. The Worker had complete autonomy and discretion as to the completion of the Progress Note, and the timing of its' completion.
- There were no direct instructions for completion of the Progress Note by her Employer. Completion of the document was not required or requested by her Employer, nor was there any urgency or emergency with respect to the timing of its completion.
- The Worker was not being paid to work at the time of her injury.
- The risk to which the Worker was exposed was not exclusively by reason of her employment. She would have taken the same risk going out to her vehicle for non-work-related reasons. Her risk was no different than any member of her household or the general public in navigating her driveway and steps. The risk was not distinct from that she could usually have encountered exiting or entering her own home.

I find this situation to be analogous to that described in *Decision 2008-298-AD*, noted above. My intention is not to penalize the Worker for completing work-related documents on her own time at home, nor for leaving a document in her vehicle. Both of these circumstances are well within the normal course for a professional person, and particularly so given the nature of the Worker's job. However, the Worker was not paid or required to be working at the time of her injury. The Progress Note was not required by her Employer. She slipped and fell in her own driveway, a circumstance which posed a normal risk, not specifically related to her employment. Her Employer cannot be held responsible for the risk assumed by the Worker in leaving her home to fetch a document inadvertently left in her vehicle, parked outside her own home, even a work-related document.

CONCLUSION:

The appeal is denied. The Worker did sustain a personal injury by accident, but that injury did not arise out of and in the course of her employment, as required by s.10 of *Act*.

DATED AT HALIFAX, NOVA SCOTIA, THIS 9th day of February, 2009.

Leanne M. Rodwell Hayes
Appeal Commissioner