WHAT CONSTITUTES A WORKPLACE ACCIDENT?

by Sylvie Guilbert, Carissa Tanzola & Lisa Bolton

Every jurisdiction in Canada has a workers' compensation system that provides benefits and services to workers who sustain a workplace injury or occupational illness.

In some cases, whether an injury qualifies as a workplace injury is easy to determine. For example, there is little doubt a worker who cuts her hand while operating an employer's machine during working hours has sustained a workplace injury. However, whether a workplace injury has been sustained is not as clear if, for example, the injury occurred as a result of the worker engaging in horseplay, or because the worker was intoxicated, or while the worker was using the machine after hours for personal use.

The test to determine a workplace accident

Each provincial workers' compensation program applies the same two part test to determine whether a workplace injury or disease "arose out of and during the course of employment":

- **Did the accident arise out of employment**? Is the hazard or activity performed by the worker linked to employment, in the sense that it was the result of the conditions, duties or environment of the employment?

- **Did the accident occur during the course of employment?** Did the injury or illness occur while the worker was at work, performing work or performing an activity that was linked to work? That is, the accident must have occurred at a time and place consistent with the obligations and the expectations of the job.

So long as one element of the test is satisfied the applicable provincial workers' compensation program assumes the second element has also been met, unless proven otherwise.

Complicating factors

Serious and wilful misconduct

As a general rule, except in the case of a serious disability or fatality, a worker is not entitled to benefits or services if the injury or occupational illness is the result of her own "serious and wilful misconduct." This is because a finding of "serious and wilful misconduct" is often linked to a finding the worker has removed herself from employment. Examples of serious and wilful misconduct include:

- The commission of a criminal act
- Intoxication (when it is the sole cause of the accident)
- Self-harm
- Fighting
- Horseplay
- Transacting personal business or going to places that have nothing to do with work activities and are not incidental to work

However, this exclusionary rule is not absolute.

If a worker establishes the conduct giving rise to the injury was consistent with the expectations or conditions of employment, the injury may be treated as a workplace injury. For example, an injury suffered by an intoxicated worker at an employer-approved or sponsored event at which alcohol is served or made available, may be found to be a workplace injury. So too, might an injury

caused by horseplay if the employer directly or indirectly condoned the activity. Each decision is fact specific and, particularly within the realm of workers' compensation rulings, it is difficult to identify a reliable "common thread."

Travelling

In today's global community, workers often travel in the course of employment. Recognizing this, each provincial workers' compensation board has detailed policies addressing mobile workers.

In general, a worker away from the employer's workplace will be deemed to be in the course of employment if the accident occurs while performing work activities under the control and direction of the employer. For example, a worker injured while delivering product will be covered by workers' compensation.

However, the worker will not be covered if she is simply commuting to work or engaged in personal or leisure activities not under the control and direction of the employer. For example, if while at a conference a worker decides to go skiing during a break, she will not be covered in the event of an injury unless she could establish a business purpose for the activity, such as entertaining clients.

Fitness facilities

An injury suffered while exercising at an employer-provided fitness facility is typically not considered a workplace injury. However, in Newfoundland and Labrador, if an employer requires a worker to reach or maintain a specified level of fitness for work and the worker suffers an injury while exercising at an employer-provided fitness facility, the injury is considered to be a workplace injury. An injury suffered at an off-site, independent fitness facility is not considered a workplace injury, regardless whether fitness is required to maintain employment.

Strike activity

An injury arising out of strike or picketing activity does not constitute a workplace injury. In these circumstances the worker is not carrying out the employer's instructions, is not acting with the consent of the employer and is not performing work for the benefit of the employer. To the contrary, the worker is considered to have removed herself from employment and, as a result, is not entitled to receive workers' compensation benefits.

Tips for employers

For employers, reducing the frequency and severity of lost-time injuries can result in enhanced productivity and employee morale, and reduced workers' compensation premiums and surcharges.

Employers can prevent injury and claims by ensuring workers understand workplace expectations. This includes:

- Developing and implementing a clear and transparent policy that prohibits and consistently sanctions wilful misconduct and horseplay
- Providing workers with appropriate and ongoing safety education and training
- Keeping records of contraventions and steps taken in response by the employer and worker

In the event of an injury, employers should review the circumstances carefully and thoroughly. A workplace injury should not be assumed until the employer is certain of the facts. If there is reason to question whether the injury arose out of or during the course of employment, the provincial workers' compensation board should be advised and the employer should be prepared to challenge any subsequent findings.

Reproduced with permission. Sylvie Guilbert, Carissa Tanzola and Lisa Bolton are lawyers with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Sylvie, Carissa and Lisa can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 hours) or by visiting www.sherrardkuzz.com