

## Is an injury work-related?

*Basic 2-part test answers the question but there are complicating factors to consider*

BY SYLVIE GUILBERT,  
CARISSA TANZOLA  
AND 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. But, to be eligible for these benefits, the person's injury or illness must be related to the job.

In some cases, determining whether an injury qualifies as a workplace injury is easy. There is little doubt a worker who cuts her hand while operating an employer's machine during working hours has sustained a workplace injury.

Assessing whether an injury is a workplace injury is less clear, however, if the injury occurred as a result of a worker engaging in horseplay, being intoxicated or using a workplace machine after hours for personal use.

### The 2-part test

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 the result of the conditions, duties or environment of 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 linked to work? That is, the accident must have occurred at a time and place consistent with the obligations and expectations of the job.

As 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.

But there are a number of complicating factors to consider.

**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 mis-

conduct." This is because serious and wilful misconduct is often linked to a worker removing 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 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 where alcohol was served may be considered a workplace injury. So too might an injury caused by horseplay if an 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 general, a worker away from the workplace is 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, a 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 a worker decides to go skiing during a break from a conference, she will not be covered in the event of an injury unless she can 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 of 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. On 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 lead to 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 disciplines wilful misconduct and horseplay.
- Providing workers with appropriate and ongoing safety education and training.
- Keeping records of contraventions and steps taken by the employer and worker.

In the event of an injury, employers should review the circumstances carefully and thoroughly. An injury should not be assumed to be a workplace injury until an employer is certain of the facts. If there is reason to question whether an 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.

---

*Sylvie Guilbert, Carissa Tanzola and Lisa Bolton are lawyers at Sherrard Kuzz, a management-side employment and labour law firm in Toronto. They can be reached at (416) 603-0700 (main), (416) 420-0738 (24 hours) or by visiting [www.sherrardkuzz.com](http://www.sherrardkuzz.com).*