

Workers' Compensation Appeal Tribunal

Decision #169

Claim No.: 3000-4461

Date of Notice of Appeal: March 11, 2010

Date Notice received at the Tribunal: March 19, 2010

Date of Oral Hearing: June 10, 2010

Date of Decision: June 30, 2010

Appeal Committee Members appointed under s. 24(1) of the *Workers' Compensation Act*, R.S.Y. 2002, c. 231

Committee Chair:	H. Leenders
Member representative of employers:	H. Hermanson
Member representative of workers:	M. McCullough

In attendance: The Worker
The worker's representative - Derek Holmes
Vernna Johanson, Recorder

Location: Room #201, 419 Range Road
Whitehorse, Yukon Territory

Introduction

The worker is employed on a permanent full-time basis as a dental therapist. At the time of the incident she was on a two-week clinical road trip to two Yukon communities. Her employer confirmed that she was on travel status on the day of injury. The worker filed a claim for compensation to the Yukon Workers' Compensation Health and Safety Board (the "board") for an injury she sustained to her left foot when she got up to let her dog out and her foot slipped on the stairs and she fell.

A board adjudicator found the worker had removed herself from the course of her employment and denied the worker's claim. The worker appealed this to a hearing officer. On March 2, 2010 the hearing officer confirmed the adjudicator's decision and denied the worker's claim. The worker asks the tribunal to reverse the hearing officer's decision and to find that her injury arose out of and in the course of her employment.

- [1] The worker attended the hearing and testified by affirmation. She was represented by the Workers' Advocate. The employer was notified of the appeal but did not attend. The proceedings were recorded.

Evidence

- [2] The appeal committee considered the worker's testimony, the advocate's submissions, board policy as noted below, and the entire claim record as provided by the board. The workers' advocate provided the following documents, entered as evidence, at the hearing:

- Exhibit #1 - Completed and authorized Travel Authorization and Claim
- Exhibit #2 – 3 pg. excerpt from Canadian Employment Law Today accompanied by a 41- page document entitled, "A summary of Recent Notable Court Decisions (plus a few classics)" from Nova Scotia's Workers' Compensation Appeals Tribunals.

Jurisdiction

- [3] On March 19, 2010 the worker forwarded an appeal of the hearing officer's March 2, 2010 review, with the tribunal under s. 53 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). The review (appeal) should be determined according to the *Workers' Compensation Act*, S.Y. 2008, c. 12. Section 65(1) of the *Act* gives the appeal tribunal jurisdiction to hear and decide this appeal.
- [4] The worker filed a claim for an injury which occurred on May 8, 2009. Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. In this instance the *Workers' Compensation Act*, S.Y. 2008 should be used to determine the issues of entitlement.
- [5] The board provided Policy EN-01, Arising Out of and In the Course of Employment, effective July 1, 2008 to the tribunal as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*.

Evidence from the Record

- [6] The worker is employed as a dental therapist. On June 2, 2009 she filed a Worker's Report of Injury/Illness stating she injured her left foot while on a two-week clinical road trip. She reported that on May 8, 2009 she was going downstairs to let her dog out when she slipped and fell, causing her foot to roll under her. The Employer's Report of Injury/Illness contains the same information and also notes the claimant was on travel status at the time of injury.
- [7] The worker attended the Ross River Health Centre on May 9, 2009. The worker described the mechanism of injury as "Got up to let the dog out. Foot not on step properly – foot rolled under self." Objective findings include no obvious swelling; no bruising, tender to palpate along the 4th and 5th metatarsals. The diagnosis is "soft tissue injury."
- [8] An x-ray is taken on May 29, 2009 at Whitehorse General Hospital. The radiologist reports "no intrinsic bone lesion, fracture or arthropathy is seen."
- [9] Dr. Pronovost's May 29, 2009 Doctor's First Report diagnoses "fracture 5th metatarsal". The treatment plan is "air cast or hard-sole shoe for 3-4 weeks."
- [10] A June 19, 2009 x-ray of the worker's left foot indicates clinical information as "comparison with previous [x-ray] of May 29, 2009. Findings state: "A healing fracture through the neck of the 5th metatarsal is again demonstrated. The fracture fragments remain slightly displaced with mild medial angulation of the metatarsal head demonstrated."
- [11] On June 23, 2009 a board adjudicator writes to the worker informing her that her claim for compensation would not be accepted because the worker had removed herself from the course of her employment for an activity that was exclusively personal, i.e. getting up to let her dog out.
- [12] The worker appeals this decision to the hearing officer. On March 2, 2010 the hearing officer renders a decision confirming the adjudicator's June 23, 2009 decision and denying the worker's appeal.
- [13] An October 26, 2009 letter to the worker from the Chief of Medical Staff, Whitehorse General Hospital states the following:

Further to our telephone conversation on October 5, 2009, I can advise the following:

- The x-ray taken on May 29, 2009, did in fact demonstrate a fracture of the head of the 5th metatarsal bone, which was not reported by the radiologist. Two subsequent x-rays taken at the hospital, at later dates, also showed this fracture and reporting (by different radiologists) alluded to it being present on the views taken on the May 29th.

- I have brought this to the attention of the first radiologist, who reviewed the original films again and agrees the fracture was present on May 29th and went unreported to him, possibly an oversight, and possibly due to all views not being available to him.

The Worker's Testimony

[14] The worker explained the May 9, 2009 incident as follows:

She said the place she was staying is a lodge consisting of a main floor and a loft where the bedrooms are located. The stairs travel down and make a bit of a turn before reaching the main floor. The day of the injury, she awoke at 6:00 a.m. and was walking downstairs. She was about the third stair from the bottom, where the staircase turns, and she was trying to be quiet so she would not wake others in the lodge. Her foot slipped on the stair and went underneath her and twisted. She fell to the bottom of the staircase. She said it was very painful so she just sat for awhile and waited for the pain to subside – approximately 10 minutes.

The woman who owns the lodge got out of bed and asked whether she was okay. The worker responded that she did not think so, that she had just fallen and hurt her foot badly. The woman helped her up and she sat in a chair.

The worker stated she always brings first-aid tape with her when she travels because she does quite a bit of hiking when she is on road trips. She taped her foot. The next day she went to the Nursing Station. She said it felt like it was a bit more than just a sprain. An x-ray was taken and developed. The worker said there was really old x-ray equipment at the Nursing Station and the nurse was not a radiologist or x-ray technician and was not trained in taking x-rays. The worker said the x-ray was taken at the wrong angle which did not reveal the fracture at the time.

When she returned to Whitehorse she went to the hospital to have her foot x-rayed again. The doctor in Emergency noticed a fracture. By that time 2 ½ to 3 weeks had elapsed.

[15] The worker said that she usually rises between 6:00 and 6:30 a.m. There is only one bathroom in the lodge so it is used on a first-come, first served basis. The lodge only accommodates one guest at a time. The owners' bedroom is located on the main floor. The guest bedroom is located upstairs in the loft area.

[16] The worker said there is other lodging available in Ross River but at the time of the injury, the hotel was closed. She said she would not have stayed at the hotel anyway because it is very noisy and difficult to get any sleep. A suite that is provided to transient/visiting medical professionals at the Nursing Residence was not available. She said this also is a very noisy

place to stay as it is located close to the bar and to two party houses. She needs to be well-rested in order to do her job; both the hotel and the Nursing Residence make it almost impossible for her to get a good night's sleep. She chose to stay at the lodge.

- [17] She said she has a Karelian Bear Dog. She bought that breed specifically because she hikes a lot and it is their natural instinct to keep bears away. It is not unusual for her supervisor and colleagues to travel with their dogs. When the injury occurred, her dog was on the main floor. She said the owners of the lodge have a dog and both dogs slept in the porch together.
- [18] The worker said that after the injury, she taped her foot and worked. She wears hiking boots to work in Ross River for safety reasons. They are made of thick leather and lace up quite high; there are three rivets above the ankle which lend support to her ankle. She believes that because she taped her ankle and wore her hiking boots, it saved her foot, especially because no one had diagnosed a fracture. The hiking boots stabilized her foot. She continued to work for 3 weeks after the injury because she believed her foot was only sprained.

The Worker's Advocate's Submission

- [19] The advocate submits that the board has interpreted Policy EN-01 narrowly resulting in the worker's interests being prejudicially affected.
- [20] The advocate says the worker is a dental therapist who primarily provides dental services to school children but has, on occasion, provided dental services to adults on an emergency basis. As a regular part of her duties she travels to rural communities to provide services to school children. On the day of injury, she was to work at the community school.
- [21] He maintains the worker was in the course of her duties when the injury occurred. A signed request for authorization was submitted to show she had approval to travel.
- [22] The advocate addressed the layout of the accommodation the worker was staying in when the injury occurred as follows:

The lodge is a two-story building. The bedrooms are of a loft design and found on the second floor. Between the second floor and the first floor is an internal set of steps that lead from the private bedroom lofts to the shared kitchen/bathroom area located on the main floor of the building.

He said it was while navigating these steps that the worker was injured.

- [23] He contends the board seized on the worker's going to let the dog out. He quotes from the May 8, 2009 adjudicator's letter as follows:

You reported on May 8th you were on travel status and slipped while going downstairs of your accommodations causing injury to your left foot. Medical reporting of May 9, 2009 indicated that you described the mechanism of injury as "got up to let the dog out. Foot not on step properly – foot rolled under self". In reviewing the above information, I find that at the time of the

injury to your left foot, [you had removed yourself from the course of your employment for an activity which is exclusively personal.] Getting up to let the dog out is an exclusively personal activity.

- [24] He maintains the board used this activity – letting the dog out – to deny this worker’s claim because she had removed herself from the course of her employment. He says had the worker got up and gone downstairs to use the washroom, get ready for work or have breakfast, it would have been compensable.
- [25] He submits this is far too narrow an interpretation of the legislation. He asks the committee to use their authority under Policy EN-02, Merits and Justice of the Case, and to apply the policy to this appeal.
- [26] The advocate contends that the worker would not have been where she was but for her employment. She would not have been at the lodge where the injury occurred. In this particular instance the worker was submitted to particular risks associated with her employment. She had to stay at the lodge in order to carry out her employment duties.
- [27] The worker’s advocate relied on a recent Court of Appeal decision from Nova Scotia – *Puddicombe v. Workers’ Compensation Board (N.S.), 2005 NSCA 62*. In this case, the court said, at paragraph 27: “The phrase ‘in the course of employment’ does not simply refer to things done pursuant to an employment contract, but also things reasonably incidental to the performance of a contractual duty.”
- [28] He says the words/phrase “in the course of employment” refers to the time, place and circumstances under which the accident takes place. The phrase “arising out of employment” refers 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 was received.
- [29] The facts indicate the worker had to let her dog out. In this case, he emphasizes that unless the worker was to stay in bed all day, she would have had to navigate down the stairs in order to do anything – use the washroom, have breakfast, or any other activity to prepare for work.
- [30] They feel this injury should be accepted by the board because each of the activities, in their opinion, qualifies as reasonably incidental to the worker’s employment. If not for her employment, she would not be at the lodge in Ross River.
- [31] The advocate submits the board adjudicator took the narrowest of interpretation of what “arising out of and in the course of employment” means and created an injustice for this worker. They ask the committee to rely on the reasoning outlined in *Puddicombe* and apply a more enlightened and expansive view to address the injustice.
- [32] He uses section 3.3.14, “Residential employees”, from Terence G. Ison’s, *Workers’ Compensation in Canada*, 2nd ed. to support his submission.

- [33] The advocate asks the appeal committee to reverse the hearing officer's decision and find that the contributing factors to the accident were sufficiently work-related to support a finding that the worker's employment made a significant contribution to the event.
- [34] The worker is asking for wage loss replacement for the time she was convalescing due to the workplace injury. She was on sick leave from May 29 to July 30, 2009.

Issue: Did the worker sustain a work-related injury?

Answer: Yes

Analysis

- [35] The issue has to be considered using Policy EN-01 Arising Out of And In the Course of Employment as the whole crux of the matter rests on the interpretation of that policy. The preamble of that policy under the heading "GENERAL" reads as follows:

Entitlement for compensation will be awarded when an injury arises out of and in the course of employment. This means that an injury happens at a time, place and circumstance consistent with the employment.

The committee will address each of the three requirements.

- [36] The worker, in her capacity of dental therapist to the school children in Yukon's rural communities, was in Ross River early in May 2009. At around 6:00 a.m. on May 8, as she was descending the stairs from her second-floor room at her lodging she slipped on one of the steps and fell to the floor in pain. At first it was assumed she had a severe ankle sprain and she treated it as such. About three weeks later she was still in considerable pain and her doctor had the foot x-rayed again which revealed a broken bone in her foot causing her to be off work for two months.
- [37] The worker was in Ross River as part of her employment requirement. Time and place have thus been identified and are consistent with the worker's employment. Both the board's adjudicator and the hearing officer agree to those facts; however, they question whether the circumstance was consistent with the employment.
- [38] The worker testified regarding the layout of her accommodation at the time of the injury. Her bedroom was upstairs; the living quarters for the owner and the bathroom/kitchen for use by the owner and their guests were downstairs. The stairs lead from the bedroom loft area to a landing from which three or four steps angle at 90° to the main floor. She also testified that since the bathroom was a shared bathroom she tried to use it before anyone else in the morning.
- [39] The appeal committee questioned the worker as follows (in italics):
- What time do you usually get up in the mornings?*
- The worker answered that she usually gets up anywhere from 6:00 to 6:300 a.m. to get ready for her day.

What kind of a dog do you have?

The dog is a Karelian Bear Dog which she got because she does a fair bit of hiking in the bush.

Was the dog with you upstairs?

This question was asked because a fairly large dog going down the stairs with the worker could easily have caused her to lose her footing. The worker stated that the dog was downstairs in the porch with another dog belonging to the owner of the establishment.

- [40] The board denied this claim strictly on the basis that the worker was not considered to be in the course of employment when going downstairs in order to let her dog out. Using some of the criteria listed in Policy EN-01 in determining whether a disability arose out of a worker's employment, it listed the following reasons to support their position:
1. The worker, at the time of the injury, was not doing something for the benefit of her employer. She was going downstairs to let her dog out, a personal activity.
 2. The worker was on her off-hours and under no instruction from her employer. She was on travel status.
 3. The worker was not using equipment or materials supplied by the employer. The dog was owned by the worker and not required as part of the employment.
 4. The employer or another worker were not involved in the activity that caused the worker's injury, she was engaged in the activity by herself.
 5. The activity that caused the injury was not a normal part of the work process.
- [41] The board claims the worker's injury is solely due to the worker taking her dog with her to the community of Ross River. The appeal committee finds that the board has taken a very narrow view and perhaps failed to look at the whole picture. Therefore, we will look at the same criteria from our point of view with the evidence provided to us.
1. The worker testified that besides letting her dog out, she was also going to the bathroom when she got up at around 6:00 a.m. the morning of the incident. We conclude this is her normal routine when she is in any of the outlying Yukon communities; she testified to that fact.
 2. The worker does not need specific instructions from her employer in order to get ready for work when on travel status. Appendix A of Policy EN-01 after the heading, "Overnight travel" states:

Workers required to stay away from home overnight may be considered to be in the course of employment. However, workers may not be considered to be in the course of employment when participating in wellness, entertainment, or other recreational activities.

The worker, in this case, was not engaged in any of those activities. She was going down the stairs at her place of lodging. Had the worker been running outside with her dog and injured herself she would not have been in the course of employment; however, she was engaged in an activity that she would have to perform in order to do anything that day.

3. The board equated the worker's dog as equipment or material not supplied by the employer. We will not argue the point. However, the place of lodging was supplied by the employer (we assume the employer paid to have the employee stay there) and becomes the equipment that caused the worker's injury.
4. The worker was engaged in the activity (descending the stairs) by herself; she did so as part of her employment requirements (getting ready for work).
5. We recognize that getting ready for the day's work is a normal expectation of the employer for any employee on travel status and has to be viewed as a regular part of the work process.

[42] It may seem that the committee has taken a completely opposite stance from the board decision-makers by ignoring or giving little weight to the worker's statement to the nurse at the Ross River Health Centre, "got up to let the dog out". It is our contention that letting the dog out was incidental to the process of getting up in the morning and getting ready for work. The worker had no choice but to descend the stairs in order to start getting ready for her day's work and also to let the dog out. She was not in the process of letting the dog out when she was injured.

Conclusion

[43] The committee concludes the following:

- a) The time of approximately 6:00 a.m. was normal to the worker's routine while working in the communities.
- b) The place of lodging was sanctioned by the employer and thus became the employer's 'bunkhouse' for the worker.
- c) The circumstance was consistent with the employment in that the worker was getting ready for the day's work.

Decision

The worker’s appeal is allowed. The hearing officer’s March 2, 2010 decision is reversed.

The worker’s injury arose out of and in the course of her employment. The board shall provide compensation in the form of wage loss for the time the worker was absent from work due to the workplace injury.

Dated this **30th day of June 2010** in the City of Whitehorse, Yukon Territory.

This decision is made with the full agreement of the appeal committee.

M. McCullough, Member

H. Leenders, Committee Chair

H. Hermanson, Member

Committee Members:

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|---------------|-------------------|
| H. Leenders | Presiding Officer |
| H. Hermanson | Member |
| M. McCullough | Member |