

Decision of the Appeal Division**Number: 2002-0773****Date: March 27, 2002****Panel: Herb Morton****Subject: Subsequent Injury Following Verbal Abuse —
In the Course of Employment**

PERSONAL INJURY (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) — The worker appealed a decision by the Review Board that the worker's injury did not arise out of and in the course of his employment — The worker punched a wall during an emotional outburst while meeting with his supervisor — The worker's behaviour resulted from his subjection to a customer's abusive and racist comments — The Appeal Division panel evaluated the relative significance of the unauthorized conduct and found that it did not substantially deviate from the course of his employment, after considering the degree, duration and seriousness of the conduct — The panel applied section 5(3) of the *Workers Compensation Act* and found that the injury was not attributable *solely* to the conduct of the employee because the conduct was held to be part of a chain of events — Appeal accepted, the worker's injury arose out of and in the course of his employment.

Law: WCA: s. 5(1), s. 5(3), s. 5(4), s. 91(1), s. 96(3),**Policy:** Appeal Division Decision No. 75, 10 *Workers' Compensation Reporter* 753; RSCM: #16.00–#16.60**Decisions:** Appeal Division Decision No. 194, 2 *Workers' Compensation Reporter* 309; *Bridge v. Workers Compensation Board* (1985) 14 Admin L.R. 312; Appeal Division Decision No. 94-0563, 10 *Workers' Compensation Reporter* 645; Appeal Division Decision No. 2001-2270; Appeal Division Decision No. 98-0673, 15 *Workers' Compensation Reporter* 335; Appeal Division Decision No. 2001-0626 (published on Board website); Appeal Division Decision No. 2001-0254 (published on Board website); Appeal Division Decision No. 2001-2310 (published on Board website)18 *Workers' Compensation Reporter* p. 813

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- (1) The worker appeals the October 26, 2001 Review Board finding.
 - (2) While working as a customer service representative, the worker was subjected to abusive and racist comments from an irate customer. Some time later the worker received a telephone call from the customer, who reiterated his abusive and racist statements. Upon reviewing this matter with an assistant manager in a back room, the worker punched a wall in a moment of emotion and suffered a right fifth metacarpal fracture. The claims adjudicator denied the worker's claim for compensation, and that denial was upheld by the Review Board. The Review Board concluded the worker's unauthorized activity was sufficient to take him out of the course of his employment.

Issue(s)

- (3) Did the worker's action of punching a wall, in an emotional response following abusive and racist comments from a customer, involve a departure from the course of his employment? Did the worker's injury arise out of and in the course of his employment? If so, should compensation be denied under section 5(3) of the *Workers Compensation Act* (the Act) on the basis of misconduct by the worker?

Jurisdiction

- (4) The worker's appeal is brought under section 91 of the Act. Section 96(3) provides that on an appeal under section 91(1), the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board. Governors' policy in Decision No. 75 (*Appeal Division Administration, Practice and Procedure*, 10 *Workers' Compensation Reporter* 753) further provides that the Appeal Division has the discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Background

- (5) A detailed statement was taken from the worker by his union representative on February 7, 2001. This was nearly one year after the March 17, 2000 incident. While prepared by the representative, it is signed by the worker and dated on February 28, 2001, as being an accurate account. This statement is consistent with the other information on file, but provides a more detailed description of the events.
- (6) The worker was a student and part-time clerk cashier in a supermarket, working approximately 20 hours per week. He commenced work with his employer in 1990. On March 17, 2000 (St. Patrick's Day), he was working a 3:45 to 12:15 p.m. shift at the customer service desk. At approximately 9:00 p.m., a customer requested a brand of cigarettes and the worker erred and selected a related brand. The customer corrected the worker and he picked out the correct brand. The worker apologized, stating he was really not up on his cigarette knowledge. The customer stated, "Well you should get acquainted boy!" The worker replied, "Boy, you're pretty cantankerous." The customer initially responded by stating he had never encountered such arrogance before. He left, and returned a few minutes later to belittle the worker with abusive and racist comments while the worker was serving another customer.
- (7) Approximately a half hour later, the worker met with the assistant manager who had received a phone call from the customer. While they were meeting, the phone rang and it was the customer again, and the worker passed the call to the assistant manager. The customer apologized for being rude to the assistant manager in his previous phone call, but stated the worker was a "dumb punk." The worker returned to work at the customer service counter, and about 10-15 minutes later the customer phoned for him by name. The call was put through to the worker, and the customer repeated his abusive and racist comments. The worker stated, "Listen, sir, what does race have to do with any of this?", and the customer swore at him and hung up. The worker returned to the assistant manager's office. The worker's statement indicates:

I went to the back office and [the assistant manager] came into the back office with [the worker's co-worker] shortly thereafter. I told him what just happened, my heart is pounding and I am quite upset. Mainly because it's an emotionally trait, remarks on racism get to me. If you complain about my service, okay. This touched a nerve. As I'm telling them this I faced the wall and punched the wall. My hand hit the stud. . . .

[reproduced as written]

(8) The worker reports that subsequent to this incident, the first assistant manager told the customer he did not tolerate racial remarks against employees and told him not to shop in the store. Ultimately, the store manager told the customer not to shop at the store any more. The worker reports that he wound up losing a month due to his injury, but he had previously booked 2-3 weeks off for school purposes and is seeking one week's wage loss.

(9) By decision dated May 24, 2000, the case manager denied the worker's claim, stating:

I regret that you were subjected to abusive and racist comments, however, I cannot conclude that the action of punching the wall would be considered an authorized activity and as such, it is my decision to disallow your claim for compensation benefits.

(10) The worker appealed to the Review Board. Several statements were provided by the worker's co-workers, attesting to the worker's personable and courteous nature, and the challenging nature of the work at the customer service desk.

(11) By finding dated October 26, 2001, the Review Board reasoned:

The panel has no doubt that [the worker] is a polite and courteous individual as described by his references. We also accept that working in a customer services department can lead to arguments with customers that result in heated discussions. We also note the striking of the wall took place not while in the presence of the customer, but shortly thereafter in the back office with the assistant manager. The panel acknowledges that there are any number of examples where, in a fit of rage, any number of violent acts can be committed while releasing the anger, stress and frustration of the moment. This however, does not make the resulting injuries of these actions, compensable.

The fact remains, [the worker] wilfully punched an immovable object and suffered an injury. This plainly is not a required part of his job, and the panel finds this is one of those situations contemplated by Policy #16.00 where the unauthorized nature of the activity is sufficient to take [the worker] out of the course of his employment.

(12) The worker's union representative has provided written submissions. No submission has been provided by the employer.

Findings and Reasons

(13) The case manager and the Review Board found the worker's injury did not arise out of and in the course of his employment, as his action of punching a wall was an unauthorized activity. The Review Board relied on the policy at #16.00 of the *Rehabilitation Services and Claims Manual* concerning *Unauthorized Activities*. That is a general subject heading, followed by policies on several related particular topics. These include policies on *Intoxication or Other Substance Impairment* (#16.10), *Horseplay* (#16.20), *Assaults* (#16.30), *Injury While Doing Another Person's Job* (#16.40), *Emergency Actions* (#16.50), and *Serious and Wilful Misconduct* (#16.60). It is useful to consider all of these related policies together, in considering the effect of the general policy at #16.00.

(14) The policy at #16.00 concerning *Unauthorized Activities* provides:

The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of the employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take the worker out of the course of employment or to prevent an injury from arising out of the employment.

(15) The general policy at #16.00, and the specific policies which follow, make it clear that there is no absolute bar to compensation in respect of unauthorized activities. Rather, there must be an evaluation and assessment of the relative significance of the unauthorized conduct in connection with the employment circumstances, in order to determine whether the worker had in fact abandoned his or her employment (even if only temporarily).

(16) An example of a case in which a worker was found to have abandoned his employment due to horseplay is contained in policy in Decision No. 194 (*Re Horseplay, 2 Workers' Compensation Reporter* 309). The worker in that case was employed as a concrete mixer-truck driver. Decision No. 194 states:

On the day of the injury there were frequent interruptions in the flow of concrete. This was due either to deficiencies in the pump-truck or to delays caused by the carpenters working on the site. During these interruptions the claimant engaged in conversation with the pump-truck driver and "horsed around" with him. On one such occasion the claimant attempted to grab some food from the pump-truck driver's lunch box, but moved into the roadway when the pump-truck driver appeared to be reaching for the water hose on the claimant's truck. The claimant apparently feared that the pump-truck operator was going to spray him in retaliation, but this did not occur. The claimant was struck by a car travelling west, his view of which was blocked by another mixer-truck of his employer parked behind the pump-truck. . . .

Although the time period involved was quite small, it is felt that the conduct of the claimant which resulted in his injury was sufficient to constitute an abandonment of his employment. . . . In no way could “horsing” around with the pump-truck operator be considered part of his employment.

- (17) If the worker is found to have abandoned his or her employment, no compensation is payable no matter how serious the consequences of the injury. As stated in policy at #16.60:

Before Section 5(3) can be considered, it must have been determined under Section 5(1) that the injury arose out of and in the course of the employment. The actions or conduct of the worker may induce the Board to conclude that the injury does not meet that requirement. If such a conclusion is reached, the claim will be denied even though the worker has suffered death or serious or permanent disablement.

- (18) In another case, compensation was denied where a worker hid another worker’s lunch bucket and was then killed when he was run over by a forklift while chasing the other worker and attempting to climb onto the moving forklift. A petition for judicial review was dismissed by the British Columbia Supreme Court (*Bridge v. Workers Compensation Board* (1985) 14 Admin. L.R. 321). Similarly, compensation was found not to be payable in the case of a security guard who plunged head first into a shallow pool and suffered a neck injury resulting in quadriplegia (Appeal Division Decision #94-0563, *The Course of Employment*, 10 *Workers’ Compensation Reporter* 645; application for reconsideration denied – Appeal Division Decision #2001-2270).

- (19) Policy at #16.20 concerning *Horseplay* explains:

A worker who is injured through participation in horseplay is not for that reason alone denied compensation. The conduct of the claimant which caused the injury must be examined to determine whether it constituted a substantial deviation from the course of the employment. An insubstantial deviation does not prevent an injury from being held to have arisen in the course of employment.

No definite rules can be laid down as to what constitutes a substantial deviation. One factor to be considered is the degree of participation of the claimant. For instance, a claimant who instigates or provokes horseplay, or who has been involved in previous episodes of horseplay, will more likely be considered to have made a substantial deviation than one who simply reacts to actions commenced or provoked by someone else.

The duration and seriousness of a claimant’s horseplay is also of relevance in considering whether there has been a substantial deviation from the course of employment. For example, if a worker walks over to a co-employee to engage in a friendly word, and accompanies this with a playful jab in the ribs, this is a trivial incident which would probably be considered an insubstantial deviation. As Larson notes,

“At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitate the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horse-play enterprise.” [Notes: Law of Workmen’s Compensation, A. Larson, 1972, Vol. I, para. 23.61]

When this abandonment is sufficiently complete and extensive, it must be considered a substantial deviation from the course of employment.

It is also relevant to consider whether the “horseplay” involved the dropping of active duties calling for the claimant’s attention as distinguished from the mere killing of time while the claimant had nothing to do. *The duration and seriousness of a deviation from the course of employment which will be called substantial will be somewhat smaller when the deviation necessitates the dropping of active duties than when it does not.*

[emphasis added]

- (20) Similarly, the policy at 16.30 concerning *Assaults* explains:

In considering cases of assault, the first question is whether the claimant was the aggressor and therefore the agent which caused the injuries. The answer to this question is not always clear cut *and may involve an evaluation of the degree to which a claimant is an aggressor in a given situation.* However, the fact that a claimant is less than friendly with another employee and is at least equally responsible for ill feeling that may prevail between them is not, by itself, grounds for disallowing a claim for injury arising out of an assault by that other employee.

[emphasis added]

- (21) Appeal Division decisions in which acts of aggression by a worker were found to represent a departure from (abandonment of) the worker’s employment include #98-0673 (*Section 11 determination—whether altercation between employees arose in course of employment*, 15 *Workers’ Compensation Reporter* 335), and #2001-0626, March 30, 2001. The action of an aggressor may be found to be outside his or her employment, even though the incident involved a spontaneous reaction to a workplace dispute. In Decision #98-0673, the action of a worker in grabbing and pushing a co-worker was found to be so out of proportion to the nature of the work dispute, that the assailant had removed himself from the course of his employment.
- (22) The decisions of the case manager and Review Board in this case appear viable, in connection with the broad analytical framework applied in these other decisions which deal with unauthorized conduct involving horseplay or assaults. It must be considered, however, whether the decisions of the case manager and Review Board were correct based on all the evidence in this case.

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- (23) Section 1 of the Act defines “accident” as including “a wilful and intentional act, not being the act of the worker. . .” This case involves the act of the worker, and therefore falls outside the meaning of the term “accident” even though the consequences of the worker’s act (involving his injury) were not intended by him. Accordingly, the worker’s appeal is not assisted by the section 5(4) accident presumption. It is necessary to consider the dual requirements of section 5(1) of the Act, as to whether the worker’s injury arose out of and in the course of his employment.
- (24) At the time of the worker’s injury, he was at work on the employer’s premises, meeting with a supervisor during paid time. The encounter with the customer was part of the worker’s employment. The central issue in this appeal is whether the worker’s separate and independent action of punching a wall was such as to involve an abandonment of his employment.
- (25) In the events which occurred on March 17, 2000, the worker had no acquaintance with the customer. His encounter with that customer occurred as part of his work. The fact that the customer chose to personalize the dispute by focussing on a personal characteristic of the worker (race), did not make this a personal dispute.
- (26) The worker’s representative submits:

Had [the worker] not been at work he would have had any number of options open to him. He could have walked away. He would not have been required to remain polite and peaceful in the presence of the employer’s store customers. He could have dealt with the situation. The work situation, however, prevent any of these “normal” reactions.

Any normal person could be expected to “lose it” given the same circumstances. What this individual’s reactions were at the point of peaked frustration may differ from other workers but it still remains that it was the employment situation that was responsible for his injury.

- (27) I agree with the prior decisions on file, that the worker’s action of punching a wall was unauthorized and inappropriate. However, as stated at #16.00, the mere fact that a worker’s action which leads to an injury was unauthorized does not mean that the injury did not arise out of and in the course of the employment. In this case, the worker’s response to the customer’s initial ill-mannered comment, by asking why he was so cantankerous (i.e. bad-tempered or quarrelsome), appears to have been a poor choice of words, albeit possibly intended as light-hearted banter or jest. It is apparent it was received by the customer as an insult, and the customer escalated the situation into a personal attack on the worker. The use of racial epithets was obviously intended to demean or be hurtful to the worker.
- (28) As part of his employment, the worker was subjected to racist epithets which would reasonably be expected to trigger an emotional response (whether or not this was revealed or expressed). Due to his duties as a customer service representative, it was important for the worker to maintain an appearance of calm and civility, notwithstanding any emotional reaction he might have been experiencing. It was only when he was in the back room, meeting with a supervisor

away from the eyes of the employer's other customers, and immediately following a further telephone call from the customer with additional abuse directed to the worker, that the worker released his frustration by punching a wall. This was a momentary impulsive gesture, in the heat of a moment of emotion, which was directed to an inanimate object with the only risk of injury being to the worker himself.

- (29) In sum, the worker did not instigate or provoke the confrontation. He protected his employer's interests by not reacting visibly to the abuse to which he was subjected, while visible to other customers. He acted responsibly in going to a back room to meet with a supervisor, given his state of emotional upset. He then gave vent to his emotions in the momentary impulsive act of hitting the wall, in the heat of an emotional response to a work incident. There was no threat or risk to any co-worker or customer.
- (30) While the evidence may be viewed as being in a gray area, on balance I am not persuaded that the worker's unauthorized act was of such a nature as to remove him from his employment. In the circumstances of this case, I find the worker's action of hitting a wall did not involve a substantial deviation from the employment. I find that the weight of the evidence supports the conclusion the worker's injury arose out of and in the course of his employment.
- (31) The worker's representative argued in part that if the worker had struck the customer instead of the wall, application of the policy concerning assaults would mean that any injury suffered by the worker in striking the customer would be compensable. I need not determine that question for the purpose of this decision. I would note, however, that I would be inclined to view such a hypothetical incident as involving a much more serious and substantial deviation from the employment.
- (32) I find that the worker's injury on March 17, 2000 arose out of and in the course of his employment. However, it remains necessary to consider the application of section 5(3) of the Act. Section 5(3) provides:

Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

- (33) The broad issue raised by the May 24, 2000 decision by the case manager, and the October 26, 2001 Review Board finding, is whether the worker's claim for compensation should be accepted. Neither decision addressed section 5(3) of the Act, as this was unnecessary in view of the findings that the worker's injury did not arise out of and in the course of his employment. The worker's representative does not comment on this issue. The employer completed a notice of participation in this appeal but did not make any submissions.
- (34) The Appeal Division has a discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it. I consider that the applicability of section 5(3) of the Act is a matter incidental to the worker's appeal on the broad issue as to whether his claim for compensation should be accepted. I consider it appropriate to proceed to address this issue in my decision.

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- (35) I find that the worker's action of hitting the wall constituted misconduct. A question arises concerning the meaning of the term "solely" in section 5(3) of the Act. Policy at #16.60 states:

By the terms of Section 5(3), the injury must be attributable "solely" to the worker's misconduct. Thus, for example, where the worker was impaired by reason of alcohol or other substances, investigation will have to be carried out to evaluate the extent of the impairment and its degree of responsibility in producing the injury in order to establish whether this requirement is met. See #16.10 for further details.

- (36) I note the reasoning expressed in recent Appeal Division decisions on this point, such as #2001-0254 and #2001-2310.
- (37) It may be argued that the worker's injury was solely due to his misconduct, as the final act resulting in his injury involved his own voluntary action. However, I consider that the worker's final act of hitting a wall is more properly viewed as part of a chain of events which contributed to the worker's injury. Indeed, without the emotional stresses experienced by the worker, involving the abusive and racist comments from the customer, he would surely not have struck the wall. In viewing the worker's act in this larger context, I find that that the worker's injury was not attributable solely to the misconduct of the worker. I note, in this regard, that section 5(3) uses the word "solely" rather than other terms such as primarily or partly.
- (38) In view of my conclusion on this issue, I need not proceed to consider whether the worker's misconduct was "serious and wilful," or whether the injury resulted in serious or permanent disablement.

Conclusion

- (39) The worker's appeal is allowed. The worker's injury on March 17, 2000 arose out of and in the course of his employment. The worker's claim for compensation is not barred under section 5(3) of the Act, as the worker's injury was not attributable solely to the misconduct of the worker. The worker's file is referred to the Compensation Services Division to determine the benefits payable to the worker.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

