

DISCUSSION PAPER

1. TITLE

Coverage During Educational or Training Activities

2. ISSUE

At issue is policy item #20.30, *Educational or Training Courses*, in the *Rehabilitation Services & Claims Manual*, Volume II (“RS&CM”). This policy addresses coverage for workers injured while engaged in educational or training activities. It has been identified for review due to a lack of clarity in the policy, which has resulted in inconsistent adjudication, disputes on claims and differing interpretations on appeal.

3. BACKGROUND

i. Law & Policy

Section 5(1) of the *Workers Compensation Act* (“Act”) is the gateway to entitlement to compensation for a work-related injury. It directs the Workers’ Compensation Board (“WCB”) to pay compensation “where personal injury or death arising out of and in the course of employment is caused to a worker”.

Policy item #14.00, *Arising Out of and in the Course of Employment* is the principal policy in the RS&CM that provides guidance in deciding whether an injury arose out of and in the course of employment. This policy lists ten factors to be considered in this determination. It also clarifies that the list of factors is “by no means exhaustive” and that no one factor can be used as an exclusive test.¹

Policy item #20.00, *Extra-Employment Activities* provides that generally speaking, activities that people undertake outside of their employment are for their own benefit, so that injuries occurring in the course of such activities are not compensable.² There are, however, some activities which, because of their relevance to the worker’s employment, may be accepted as being part of that employment.

Policy item #20.30 is intended to define when an injury that occurs during an educational or training course is considered to arise “out of and in the course of employment.”³ The policy makes a distinction between things done to become or maintain a job qualification and things done as part of a job. It specifies that coverage is not extended to injuries occurring in the course of first aid training that is undertaken off an employer’s premises and outside of work hours, even if the worker received payment or other consideration from the employer. The policy refers workers injured in the course of a Board approved

¹ Appendix 1 of this discussion paper reproduces policy item #14.00 in its entirety.

² Appendix 2 of this discussion paper reproduces policy item #20.00 in its entirety.

³ Appendix 3 of this discussion paper reproduces policy item #20.30 in its entirety.

vocational rehabilitation program to policy C11-88.50 to determine their compensation coverage.

ii. How This Issue Arose

The need for a review of policy item #20.30 was identified as a result of issues raised by the former Rehabilitation & Compensation Services Division, appellate decisions⁴ and external stakeholders.⁵

In particular, concern has been expressed that policy item #20.30 is too brief and does not clearly define the circumstances in which attendance at a course will be considered part of a worker's employment.

5. DISCUSSION

(i) General Principles

Policy item #14.00 describes an important general principle for determining whether an activity arose out of and in the course of employment. It states that "activities within the employment relationship, which would not normally be considered as work or in any way productive" may still be compensable, depending upon a consideration of all relevant factors.

Policy item #20.00 articulates a similar general principle. It provides that "activities people undertake outside of their employment are for their own benefit", so that injuries occurring in the course of such activities are not compensable. The policy then qualifies this general principle with the statement that "there are, however, some activities which, because of their relevance to the claimant's employment, may be accepted as being part of that employment".

(ii) Contentious Policy

Policy item #20.30 is meant to provide more specific guidance in determining whether an injury during an education or training course arose out of and in the course of employment. However, the opening paragraph of the policy contains ambiguous language which has given rise to interpretations that conflict with the general principles outlined above. In particular, the following language in the policy has been problematic:

"...A distinction must be drawn between things workers must do to become and continue to be qualified to perform a particular job and the things they must do as part of the job. Generally speaking, only the latter activities are covered..."

It is the compensability of "things workers must do to continue to be qualified" once employed that has raised concerns, particularly the implication that coverage will be

⁴ See, for example, Appeal Division decisions #99-1242 & #98-1726.

⁵ The Vancouver Police Department has submitted that policy item #20.30 should be amended to confirm that police who are injured during target practice cannot be denied coverage solely on the basis that such activities were undertaken for qualification purposes.

denied on the sole basis that an educational or training activity is undertaken to maintain a worker's qualifications, with no regard to other factors.

The above quoted opening paragraph has been interpreted narrowly by some decision-makers and appellate authorities, in isolation of other relevant law and policies, to mean that ongoing qualification activities cannot be considered to be "part of the job" -- and are therefore not generally covered. In so doing, policy item #20.30 has been used to preclude coverage for educational or training activities that were undertaken for the purpose of maintaining qualifications.

For example, coverage is clearly favoured under policy item #14.00 for an office worker injured during a computer course where attendance was at the direction of the employer, for the benefit of the employer, on work premises, during working hours, and while being paid. Under policy item #14.00, the injury would likely be found to have arisen out of and in the course of employment.

However, under the narrow reading of policy item #20.30 described above, such coverage would be denied solely on the basis that the activity was necessary to maintain the worker's ongoing qualifications. Under this interpretation, the factors listed in policy item #14.00 would not be applied. The fact that the injury occurred while maintaining ongoing qualifications would be the singular, decisive factor in determining that the injury did not arise out of and in the course of employment.

In practice, the former Compensation Services Division recognized that the narrow approach was not in keeping with more broadly applicable key principles. When determining whether coverage extends to a training course undertaken for ongoing qualification purposes under policy item #20.30, staff are advised to consider the factors listed in policy item #14.00. However, despite the broader approach adopted by the WCB and by appellate authorities, the wording of policy item #20.30 remains ambiguous and open to contrary interpretation.

This ambiguity could be reduced by clarifying in policy item #20.30 which of the two interpretations should be applied. Specifically, either maintaining qualifications is the primary factor, or the factors listed in policy item #14.00 are paramount in determining whether an injury arose out of and in the course of employment.

(iii) Pre-Employment

A related issue arising in the review of policy item #20.30 is the question of coverage for pre-employment education or training courses. Pre-employment qualification activities (e.g., obtaining a university degree or a trade certificate) generally occur without the involvement of an employer and therefore, by definition, are outside the scope of employment. This is confirmed in the context of training activities under policy item #17A.10, *Commencement of Employment Relationship*, which explains how to determine whether an employment relationship has begun for compensation purposes.⁶

⁶ Appendix 4 of this discussion paper reproduces policy item #17A.10 in its entirety.

One exception to this general exclusion, however, may apply to learners, who are defined under section 1 of the *Act* as follows:

“worker” includes

(b) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work **specified or stipulated by the employer as a preliminary to employment.** (Emphasis added.)

Appeal Division decision #00-0659 considered coverage in this situation. In this case, the employer had formed a relationship with the claimant that included testing and screening before paying the educational institute for the cost of the claimant attending the course. For all intents and purposes, the claimant was considered to be hired on completion of the course.⁷ The Appeal Division panel found that a considerable pre-employment connection had been established between the claimant and the employer and that the training in which the claimant was involved had been stipulated by that employer. The panel concluded the following:

- The claimant was "a worker" within the meaning of section 1, definition (b). In particular, he was a learner subject to the hazards of an industry for the purpose of undergoing training specified or stipulated by the employer as preliminary to employment.
- Although the worker's injuries did not arise out of and in the course of employment because he was not yet employed, some possibility of coverage must have been contemplated by the legislature when they defined "worker" to include this "learner". Thus, the test in section 5(1) was applied, and the worker's injuries were found to be compensable.

To address this issue, policy item #20.30 could be expanded to refer to the general exclusion of coverage for participants in pre-employment education or training courses, but remind decision-makers to consider whether the claimant qualifies as a learner under subsection (b) of the definition of worker in section 1 of the *Act*.

(iv) Vocational or Training Programs

A related issue arising in the review of policy item #20.30 is the question of coverage for students participating in a vocational or training program approved by the Minister of Education, Skills and Training or the Minister of Labour. Under section 3(6) of the *Act*, these students may be deemed “workers”, and injuries arising out of and in the course of their training, including during the period of attendance at the school component of their program, may be compensable under the *Act*.

⁷ This situation can be distinguished from an employer setting pre-requisites for a job which any potential applicant must have in order to be considered for hiring.

To address this issue, policy item #20.30 could be further expanded to remind decision-makers to consider whether the injury is arising out of and in the course of a Board-recognized vocational or training program by an Order-In-Council pursuant to section 3(6) of the Act.

6. OTHER JURISDICTIONS

No other Canadian jurisdiction precludes WCB coverage for injuries sustained by workers during training solely on the basis that the activity was undertaken for ongoing qualification purposes. Rather, more general policies, similar to the WCB's policy item #14.00, regarding whether an activity "arose out of and in the course of employment" apply to such workers. Most Canadian jurisdictions will consider a number of factors under such policies.

7. OPTIONS

Option #1: Status quo

Implications:

- Concerns regarding clarity, consistency and predictability in decision-making would not be addressed.
- It would remain unclear whether coverage under policy item #20.30 can be precluded solely on the basis that an activity was undertaken for ongoing qualification purposes – or conversely, whether the factors in policy item #14.00 must be considered.
- Decisions under policy item #20.30 would remain open to contrary interpretation by review/appellate authorities.

Option #2: Amend policy item #20.30 to clarify the narrow interpretation

Under this option, policy item #20.30 would be amended to clarify that:

- Injuries that occur during education or training activities undertaken for ongoing qualification purposes are not normally compensable, regardless of the presence of other factors;
- *Pre-employment* training and educational activities are not normally considered to be within the scope of employment, however, consideration should be given to whether the person is a learner; and
- Injuries occurring in the course of a Board-recognized vocational or training program pursuant to section 3(6) may be covered.

Implications:

- It would be clarified that coverage under policy item #20.30 can be precluded solely on the basis that an activity was undertaken for ongoing qualification purposes and that the factors in policy item #14.00 are not considered.
- Concerns regarding clarity and ambiguity would be addressed.
- Decisions under policy item #20.30 would be less open to contrary interpretation, promoting predictability and a reduction in appeals.
- Policy would not reflect the current direction in the Worker and Employer Services Division (“W&ESD”) or the approach taken by the Workers’ Compensation Appeal Tribunal (“WCAT”).
- This approach would not be consistent with that taken in other Canadian jurisdictions.

Option #3: Amend policy item #20.30 to improve clarity through the broad interpretation

Under this option, policy item #20.30 would be amended to specify that:

- Policy item #14.00 is the principal policy to provide guidance in deciding whether or not an injury arose out of and in the course of employment, all relevant factors must be considered and no single factor is determinative. Relevant examples of how the factors in policy item #14.00 are considered would be provided;
- *Pre-employment* training and educational activities are not normally considered to be within the scope of employment, however, consideration should be given to whether the person is a learner; and
- Injuries occurring in the course of a Board-recognized vocational or training program pursuant to section 3(6) may be covered.

Set out as Appendix 5 is a draft of the proposed policy changes.

Implications:

- Concerns regarding clarity and ambiguity would be addressed.
- Decisions under policy item #20.30 would be less open to contrary interpretation, promoting predictability and a reduction in appeals.
- Policy items #20.30 and #14.00 would be harmonized, promoting consistency.
- Policy item #20.30 would be more consistent with section 5(1) of the *Act*.
- This approach would be consistent with that taken in policy item #20.20, *Recreational, Exercise or Sports Activities*.
- This approach would be consistent with the direction taken by the W&ESD and the WCAT.

Option #4: Delete policy item #20.30 – policy items #14.00 and #20.00 would apply

Under this option, policy item #20.30 would be deleted.

Implications:

- Policy items #14.00 and #20.00 would guide decisions on injuries arising from training or educational activities. Policy item #14.00 would set out the majority of factors to be considered. Policy item #20.00 would continue to exclude compensation for most injuries resulting from activities undertaken outside of a worker's employment, with some exception for injuries that resulted from activities that were of relevance to the worker's employment.
- Concerns regarding inconsistency between policy item #14.00 and policy item #20.30 would be addressed.
- Consistency and predictability in decision-making would be improved, thereby promoting a reduction in appeals.
- There would be less detailed guidance, as compared to that envisioned under option #2.
- This approach would be most consistent with that taken in other Canadian jurisdictions.
- This approach would be consistent with the direction taken by the W&ESD and the WCAT.

8. CONSULTATION

Stakeholders are invited to provide feedback on the options provided and may provide any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **July 30, 2004**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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The WCB's governing body, the Board of Directors, will consider the opinions expressed by stakeholders before it adopts any amendments to the current policies. Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

APPENDIX 1

#14.00 Arising Out of and in the Course of Employment

Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.

Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship, which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors, which demonstrate an employment connection.

No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:

- a) whether the injury occurred on the premises of the employer;
- b) whether it occurred in the process of doing something for the benefit of the employer;
- c) whether it occurred in the course of action taken in response to instructions from the employer;
- d) whether it occurred in the course of using equipment or materials supplied by the employer;
- e) whether it occurred in the course of receiving payment or other consideration from the employer;
- f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
- g) whether the injury occurred during a time period for which the employee was being paid;
- h) whether the injury was caused by some activity of the employer or of a fellow employee.
- i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

- j) whether the injury occurred while the worker was being supervised by the employer.

This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

APPENDIX 2

#20.00 Extra-Employment Activities

Generally speaking, activities which people undertake outside of their employment are for their own benefit and injuries occurring in the course of them are not compensable. There are, however, some activities which because of their relevance to the claimant's employment may be accepted as being part of that employment.

APPENDIX 3

#20.30 Educational or Training Courses

A distinction must be drawn between things workers must do to become and continue to be qualified to perform a particular job and the things they must do as part of the job. Generally speaking, only the latter activities are covered. A person may, for example, need to spend some time in an educational or training institute to obtain or maintain the qualifications necessary for a particular job, but that person is not normally covered while attending that institution.

Compensation coverage does not extend to injuries occurring in the course of first aid courses being taken off the employer's premises and outside work hours. This is so, even though the worker receives additional pay for a first aid ticket and is reimbursed the course fees by the employer.

Injuries in the course of training programs undertaken under the auspices of the Board following a compensable injury are dealt with in C11-88.50.

APPENDIX 4

#17A.10 Commencement of Employment Relationship

The commencement of compensation coverage is not marked by common law principles relating to the commencement of a contract of service. A decision must be made whether, having regard to the substance of the matter, an employment relationship had begun for compensation purposes.

For example, where the place of employment is some distance from the available labour market, workers may arrive at the place of employment in a number of ways. If workers go there of their own initiative looking for whatever jobs they may find, they take the risk of travel upon themselves. But if an employer extends its network of hiring arrangements to distant places, and induces a worker to leave a distant city and journey to the employer's place of work upon the promise of travel time and expenses, the journey becomes part of the employment relationship, and the hazards of the journey become risks of the employment.

A person offering services to an employer will often be told to come back at a certain time in the future when work might be available. A person may also be promised a specific job but the commencement date may be specified some weeks or months ahead. Such persons would not normally commence to be workers under the Workers Compensation Act until they actually returned to the employer's premises at the future date and commenced work.

It is not essential that a person must actually have commenced productive work for an employer before being covered. If, for example, an injury took place while entering the employer's premises on the way to the first day of work the worker may be covered. The employment relationship would have commenced at the moment of entry to the premises and would not have been delayed until completion of the necessary hiring formalities or actual commencement of work. Coverage might even commence earlier in the journey to work that morning if the situation falls within one of the other exceptional cases when travelling to work is regarded as part of the employment.

APPENDIX 5

#20.30 Educational or Training Courses

~~A distinction must be drawn between things workers must do to become and continue to be qualified to perform a particular job and the things they must do as part of the job. Generally speaking, only the latter activities are covered. A person may, for example, need to spend some time in an educational or training institute to obtain or maintain the qualifications necessary for a particular job, but that person is not normally covered while attending that institution.~~

~~Compensation coverage does not extend to injuries occurring in the course of first aid courses being taken off the employer's premises and outside work hours. This is so, even though the worker receives additional pay for a first aid ticket and is reimbursed the course fees by the employer.~~

An education or training course undertaken outside of a worker's employment is generally for the worker's own benefit and injuries occurring in the course of those activities are not normally compensable. In some instances, however, because of the relevance to the worker's employment, the education or training course may be accepted as being part of that employment, such that injuries occurring during those activities are covered.

Policy item #14.00, *Arising Out of and in the Course of Employment* is the principal policy that provides guidance in deciding whether or not an injury arose out of and in the course of employment. The factors listed under policy item #14.00 are therefore considered in determining whether coverage should be provided for an injury sustained during an education or training course. All relevant factors are considered and weighed, including those not listed in policy, and no single factor is determinative.

For example, two factors that may be relevant in the context of education and training are whether the course is for the benefit of the employer's business, and whether the worker is undertaking it at the direction of the employer. The greater the benefit of the education or training activity to the employer's business, the more likely this is a factor that favours coverage. If the education or training course is undertaken solely for the worker's self-improvement, the more likely this is a factor that does not favour coverage. Similarly, the more clearly the employer directs the worker to attend a course, the more likely it is that this is a factor that favours coverage. If the employer simply sanctions the worker's attendance at the education or training activity, or the worker's attendance is purely voluntary, the more likely this is a factor that does not favour coverage.

To illustrate, coverage may be extended where a security guard is directed by the employer to attend a "defusing hostility" course off-site on the guard's day off. Coverage may not be extended where a security guard is injured while taking a typing course at night to upgrade his skills to enable the guard to apply for a future supervisory position.

1. Pre-Employment Coverage

Pre-employment education or training courses are not normally considered to be within the scope of employment as the employment relationship has not yet been established, and therefore coverage is not favoured.

One exception, however, is in the case of a learner as set out in subsection (b) of the definition of “worker” in section 1 of the *Act*. A learner not under a contract of service or apprenticeship may be covered where the injury arises out of and in the course of training or probationary work, which:

- subjected the learner to the hazards of an industry within the scope of Part 1 of the *Act*; and
- was specified or stipulated by the employer as a preliminary to employment.

2. Vocational or Training Programs under Section 3(6) of the *Act*

Injuries arising out of and in the course of a Board-recognized vocational or training program pursuant to section 3(6) of the *Act* may be covered.

3. Board Training Programs

Injuries in the course of ~~training~~ **vocational rehabilitation** programs undertaken under the ~~auspices of the~~ **as part of a Board approved rehabilitation plan** ~~following a compensable injury~~ are dealt with in C11-88.50.