# Client Services Procedure Manual

**Procedure: 27.00**
**Subject: Arising Out of and In the Course of Employment**

## 27.01 Preamble

This procedure provides further direction regarding the adjudication principles to be followed when determining the limits of coverage under the Act. It follows the principles which underlie policy EN-19 “Arising out of and in the course of employment”.

It is impossible to cover all potential issues that may arise, but the procedure highlights the most common kinds of cases. Matters not specifically covered must be adjudicated using the principles in the policy and these procedures and by considering the individual merits of the case.

While entitlement decisions are made countless times during the life of a claim, the most important initial decision is always whether a worker sustained an injury arising out of and in the course of employment.

## 27.02 Determining Entitlement

The legislative basis for determining entitlement is provided under Section 43 of the Act which states:

(1) Compensation under this Act is payable

(a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and

(b) to the dependents of a worker who dies as a result of such an injury.

When an adjudicator is making a determination on entitlement, there are three important questions that must be addressed before compensation can be approved.

***Question # 1:***
***Is the person a Worker under the Act?***

In order for anyone to receive compensation, they must meet the definition of worker under section 2(1)(z) of the Act which states:

"worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

(i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for

his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,

(ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,

(iii) a part-time or casual worker, and

(iv) an executive officer, manager or director of an employer.

If an individual does not meet this definition, they cannot be considered for compensation and there is no need to determine whether the injury arose out of and in the course of employment.

Decision makers must be aware of certain factors that may impact on the determination of who is a "worker", for example:

(i) workers injured outside the province who are employed by employers in the province;

(ii) special provisions for students;

(iii) coverage for active directors of a company who may not be taking any remuneration from the business enterprise; or

(iv) proprietors and partners of a non-incorporated business and independent operators who require Optional Personal Coverage (OPC) which may only be in place for a specific period of time and for a specific amount of coverage.

Where there is any uncertainty about coverage for specific types of workers, the decision maker must consult the Assessment Services Department for clarification.

***Question # 2:***
***Was there personal injury?***

Once the adjudicator determines that the worker meets the definition under the Act, he/she must ensure that the injury meets the definition under section 2(1)(o) of the Act which states:

"injury" means
(i) an injury as a result of a chance event occasioned by a physical or natural cause;
(ii) an injury as a result of a wilful and intentional act, not being the act of the worker;
(iii) disablement;
(iv) industrial disease; or
(v) death as a result of an injury

arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a pre-existing condition but does not include stress other than stress that is an acute reaction to a sudden and unexpected traumatic event.

Section 2(2) of the Act is also relevant in determining an injury. It states:

"Notwithstanding paragraph 2(1)(o), stress that may be the result of an employer's decision or action relating to the employment of a worker including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment does not constitute an injury.

***Question # 3:***
***Did the injury arise out of and in the course of employment?***

Policy EN-19 explains this concept and provides a list of "indicators" that the adjudicator must consider to determine whether the injury arose out of and in the course of employment. Simply stated, the injury must have happened at a time and place, and resulted from an activity that is consistent with and reasonably essential to the employment. (See policy EN-19 pp. 1 & 2)

## 27.03 Natural Causes Not Compensable

It is necessary to distinguish between injuries resulting from employment (which are compensable) and injuries resulting from purely natural causes (which are not compensable).

An injury is not compensable simply because it happened at work. It must be one arising out of and in the course of employment. If it happened at work, that usually indicates that it arose in the course of the employment. But it must also have arisen "out of" the employment. This means that there must have been something in the employment relationship or situation that had causative significance in producing the injury.

But if the injury was one arising out of purely natural phenomena – the internal workings of the human body – the employment situation may then be an irrelevant coincidence, and if so, the injury is not compensable.

Examples of Natural Causes:

i. A worker turns his head to look out the window and suffers a neck strain. This is not compensable.

ii. A worker at the place of employment suffers a stroke and subsequently falls from a scaffold. Although the stroke is not compensable, injuries sustained as a result of the fall may be compensable. Here the employment situation resulted in injuries beyond those that might have flowed from the natural causes.

## 27.04 Presumption

There are often cases where a worker is injured in the course of employment (i.e., the time and place of injury are consistent with employment), but it is uncertain whether the injury arose out of the employment (i.e., that the injury was actually caused by an employment activity). However, the legislative presumption states that where an injury occurs in the course of employment it must be presumed that it arose out of the employment, unless the contrary is shown.

Determinations of whether "the contrary is shown" must be based on the balance of probabilities by considering the weight of evidence for and against (see policy EN-20 Weighing Evidence).

An example of how the presumption works is where a worker is found dead at the work site during the work shift (i.e., in the course of employment). It must be presumed that the death arose out of the employment and the claim accepted, unless the weight of evidence is to the contrary. For example, the contrary would be shown and the claim denied if autopsy reveals the death resulted from natural causes.

The presumption does not apply to disablement injuries. Typically these are strain and sprain type injuries that occur gradually over time. They may or may not be related to work activities. For example, it will not be presumed that an injury has occurred in the course of employment simply because a worker reports disabling pain in the course of employment (i.e, reports pain at work). Where disablement injuries occur the evidence must be weighed to determine if, on the balance of probabilities, the pain arose out of the employment.

The statutory presumption also applies to occupational diseases and harmful exposures. In short, certain named diseases (see disease schedule in Regulations) will be presumed compensable if they are reported and workplace exposure to associated harmful substances is confirmed.

### 27.05 Serious and Wilful Misconduct

It is impossible to provide a specific list of behaviors which will always constitute "misconduct" under section 43(1) of the Act. Because the word "misconduct" is modified by the phrase "serious and wilful", the adjudicator must consider a range of factors to determine whether the behavior is "serious", "wilful", and represents "misconduct". Policy EN-19 provides some guidelines and examples of what WorkplaceNL considers serious and wilful misconduct (see policy EN-19 pp. 11 and 12).

For further discussion of the serious and wilful misconduct see Gellately case below.

### 27.06 Drunkenness and Intoxication

There is no authority in the Act to allow WorkplaceNL to adopt a policy which states that injuries caused by intoxication are never compensable. There are no easy answers to the issue of intoxication, but for injuries where intoxication is a contributing factor, the adjudicator must apply the same rigorous analysis to the facts as in any case involving serious and wilful misconduct, namely,

i) determine whether the injury arose out of and in the course of employment;

ii) if so, whether the injury is attributable solely to the worker's serious and wilful misconduct; and,

iii) if so, whether subsection 43(2) nonetheless applies because the injuries are serious and permanent.

The leading case in this jurisdiction on the subject of intoxication is Gellately v. (Newfoundland) W.C.A.T., in which the Newfoundland Court of Appeal interpreted section 43(1) and 43(2) of the Act. The Court's interpretation is binding on WorkplaceNL. This landmark case is summarized below.

> Gellately v. (Newfoundland) W.C.A.T.
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> Mr. Gellately was driving home from a business trip when involved in a motor vehicle accident causing him serious and permanent injuries (paraplegia). He was in the course of his employment at the time because his employment involved travel to visit clients located outside the city. Furthermore, vehicle travel was approved by his employer.
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> Blood alcohol tests taken a few hours after the incident revealed levels approximately four times the legal limit. WorkplaceNL rejected his claim based on the level of intoxication. W.C.A.T. upheld WorkplaceNL's decision on the grounds that the accident would not have occurred but for the level of alcohol and its effects on Mr. Gellately.
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> The case went to court and the trial judge (Hickman C.J.) agreed with the W.C.A.T. It agreed that Mr. Gellately's gross intoxication constituted an act that was not work related and, as a consequence, broke the employment connection.
>
> Next the case went to the Newfoundland Court of Appeal, where the Hickman decision was overturned. The appeal court directed their decision toward the question of whether the injury occurred in the course of employment rather than whether it arose out of employment.

The Newfoundland Court of Appeal set out a three part test:

> ***Step 1***: Whether the injury arose out of and in the course of employment - at this stage there is no consideration of fault and the presumption in section 61 comes into play.
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> ***Step 2***: Once the injury is determined to have arose out of and in the course of employment, then the question becomes whether the injury was solely attributable to the serious and wilful misconduct of the worker - at this stage an analysis of the worker's fault is permissible.
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> ***Step 3***: Finally, if WorkplaceNL concludes that the injury was solely attributable to the serious and wilful misconduct of the worker, then recovery is precluded, unless section 43(2) applies, i.e., the worker is seriously and permanently disabled or impaired.

The Court noted that in applying this test, the decision maker must guard against a consideration of cause under Step 1 becoming an assessment of fault under step 2. In other words, in the case of Gellately, Step 1 leads to the answer that the injuries occurred in the course of employment and, by presumption, arose out of employment. There must be no consideration of fault in that first level of analysis. As for Steps 2 and 3, where it is determined that the injury arose out of and in the course of employment -- and the worker is seriously and permanently disabled or impaired -- then it is immaterial whether the injuries are attributable solely to serious and wilful misconduct.

***Guidelines for Determining Serious and Permanent Disability or Impairment***

Because the application of section 43(2) requires payment of compensation for workers who are seriously and permanently disabled or impaired regardless of whether the injury is attributable solely to the serious and wilful misconduct of the worker, the following guidelines may assist decision makers to determine “serious and permanent disability or impairment”:
***Serious Physical Injuries*** - may include life threatening injuries, traumatic limb amputations, serious or terminal industrial diseases, etc. Where there is uncertainty about the seriousness of the injury the medical consultant may be consulted.

***Non Serious or Non-Life Threatening Injuries*** - may include soft tissue injuries (e.g. sprains or strains) non-life threatening fractures, or injuries that result from lifting, adverse posturing, repetitive use, trip and fall, etc. Again, where there is uncertainty about the seriousness of the injury, the medical consultant may be consulted.

In any case, where an adjudicator is uncertain about the application of section 43, the case will be discussed with WorkplaceNL legal division.

**Reference:** *Workplace Health, Safety and Compensation Act, Section 43*
*Policy EN-19 Arising Out of and In the Course of Employment*

**Amendment History**

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