Client Services Policy Manual

Policy Number: **EN-19**
Subject: **Arising Out of and In the Course of Employment**
Chapter: **Entitlement**

Policy Statement

Entitlement to compensation is based on two fundamental statutory requirements:

1. the worker meets the definition of "*worker*" under subsection 2(z) of the Act; and
2. the injury as defined under subsection 2(o) is one arising out of and in the course of employment.

This policy focuses on the established principles that have evolved to define "arising out of and in the course of employment" within the compensation system. It also provides established guidelines on the extent and/or limitations of coverage in varying circumstances.

General

Arising out of and in the course of employment

Section 43 of the Act 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.

The term "arising out of and in the course of employment" means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the employment. *Arising out of* refers to what caused the injury; *in the course of* refers to the time and place of the injury and its connection to the employment.

While no single criterion is conclusive in classifying an injury as one arising out of and in the course of employment, various indicators are used for guidance, including:

- whether the injury occurred on the premises of the employer (see also **"Employer's Premises"** section);
- whether it occurred in the process of doing something for the benefit of the employer;

- whether it occurred in the course of action in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether it occurred in the course of paid employment;
- whether the risk to which the worker was exposed was the same as the risk to which he/she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid; and
- whether the injury was caused by some activity of the employer, a fellow worker, or a third party.

Workers are not considered to be in the course of the employment while traveling to and from work, unless the conditions apply under the provisions for **Travel for the Purpose of Employment** or **Transportation Controlled by the Employer** contained in this policy.

Presumption

Section 61 of the Act provides that where the injury arose out of the employment, it shall be presumed, unless the contrary is shown, that it occurred in the course of the employment, and where the injury occurred in the course of the employment, it shall be presumed, unless the contrary is shown, that it arose out of the employment. In other words, entitlement is based on a two part test.

The presumption provision ensures that workers are covered where one condition of compensability applies, i.e. the injury either *arose out of* or *occurred in the course of* employment, but there is insufficient evidence to establish that the other condition applies. The standard of proof to be applied when determining either of these shall be that established under section 60 (Policy EN-20 Weighing Evidence).

Principles of the scope of coverage (spectrum, boundaries)

Coverage generally begins when the worker enters the employer's premises to start the work shift, and usually terminates on the worker leaving the premises at the end of the shift (refer to section **Employer's Premises**). Coverage may extend beyond the specific

work shift or cycle in certain cases, such as captive or traveling workers, specifically discussed throughout this policy.

However, in all cases, coverage is not so broad or expansive as to include personal hazards or deviations, removing oneself from employment, or serious and wilful misconduct.

1. Employer's Premises

Employer's premises is any land or buildings owned, leased, rented, controlled, or used (solely or shared) for the purpose of carrying out the employer's business. It also includes captive roads and parking lots as described in this section of the policy (refer to **Captive Roads** and **Parking Lots**).

Coverage is extended to a worker in the course of employment while entering or exiting the employer's premises using an accepted means of entering and leaving the employer's premises, all in relation to performing activities for the purposes of the employer's business.

Where the premises is occupied by more than one employer, the employer's premises includes the exclusive premises of the employer and the shared or common areas such as entrances, exits, elevators, stairs, and lobbies.

Employer's premises does not include public or private land, buildings, roads (except captive roads as discussed in this section) or sidewalks, used by the worker to travel to and from home and the employer's premises, or private parking arrangements made by the worker independent of the employer.

Employer premises does not include a picket line established by workers during a labour dispute or strike.

(a) Captive Roads

A captive road is one which may be considered a public road, but leads only to the premises of the employer and is, for practical purposes, under the control of the employer (i.e. the employer is responsible for repair and/or maintenance of the road). It is considered part of the employer's premises.

The nature of the use of a road and its relationship to the operations of the employer must be considered. For example, significant use of the road by the public and other employers not related to the employer's operations can indicate that it is not a captive road. However, the occasional or incidental use by the public will not necessarily preclude the determination as a captive road.

(b) Parking Lots

A parking lot is considered the employer's premises when it is owned, maintained, or controlled by the employer.

When the lot is leased or rented (or included as part of the lease or rental agreement) but the employer is not the owner and is not responsible for the maintenance or control, then it is not considered to be the employer's premises.

Because of the multitude of arrangements associated with parking, WorkplaceNL must obtain specific information regarding the ownership of parking lots, and the arrangement of the employer before an entitlement decision can be made regarding an injury that occurs in a parking lot.

An injury that is caused by the worker's own vehicle in the employer's parking lot that is not the result of the parking lot or the employment is not covered (e.g. slamming the door on one's hand).

(c) Shopping Mall Parking Lots

A worker is covered if the employer owns and maintains the entire parking lot, or if the injury occurs in a parking area assigned or directed by the employer and where the employer has a contracted agreement with a lessor covering maintenance of the parking lot. However, a worker is not covered while traveling from an assigned parking area to a shopping mall or while in public parking areas not under the control of the employer.

(d) Shopping Malls versus Multi-Employer Buildings

The worker is considered to be in the course of employment upon entering the particular premises assigned to the employer.

In multi-employer buildings (multi-level office buildings occupied by more than one employer or tenant) the worker is covered in common areas such as entrances, lobbies, stairs, elevators, escalators, and exits. This is based on the principle that workers have a right of way in certain areas of buildings used by employers and their workers as opposed to buildings provided for the general public such as shopping malls. However, an injury in a common area may not be covered if the reason for being in that area is a deviation from the employment.

A worker is not covered while in the common areas of a shopping mall shared by workers and the public unless the entire area is owned and maintained by the employer. Such areas are not controlled by the employer.

(e) Lunchrooms, Rest and Coffee Breaks*, *Personal Needs and Comfort

Where the employer provides a lunchroom or similar facility on the employer's premises, or where an injury occurs during lunch hour, coffee break, or other similar rest period on the premises of the employer, or where an injury results from activities related to personal need or comfort, the injury is considered to be compensable providing:

- it occurs while the worker is making reasonable and proper use of the employer-provided facility; and,
- it arises from a hazard of the facility, not from a personal hazard (see also **Personal Risk**).

Workers taking lunch or breaks at worksites (e.g. construction sites) are covered while at the site.

Workers are not covered if they choose to leave the employer's premises to eat or perform other personal activities or errands.

(f) Captive Workers

Captive workers are workers who, because of the circumstances and nature of their employment, have no reasonable alternative to living in an employer-provided facility.

For example, workers whose employment requires that they live in

remote or wilderness campsites are considered captive workers. These workers are considered to have less control over their environment and therefore coverage is more comprehensive. Therefore, unlike other situations, injuries that occur during leisure or recreational activities may be an extension of employment if the injury results from a hazard of the equipment or facility such as loose flooring or employer provided equipment that fails.

Coverage is not provided, however, when the worker clearly introduces a hazard into the environment or when the injury, such as back strain, results from the recreational activity itself.

(g) Employer-Provided Fitness Facilities

Many workplaces provide fitness facilities on the employer's premises to support and promote employee wellness. Injuries incurred while workers are participating in athletic activities of employer-provided facilities are not considered compensable except where the injury occurs while the worker is making reasonable and permitted use of employer-provided facilities in order to reach or maintain a mandated level of physical fitness required for the worker's occupation.

Where a worker is a captive worker [as defined in 1.(f) above], injuries that occur due to the hazard of the premises while making permitted and reasonable use of the recreational facilities are covered.

Coverage does not extend to private, independent fitness or recreational facilities that are not on the employer's premises, even though the employer may contribute to or reimburse the worker's membership fees.

2. Coverage during Travel

a) Travel for the Purpose of Employment

Workers are covered while traveling where such travel is required either specifically or as an expected part of employment duties. Coverage begins when the worker begins the employment related travel and extends continuously while the travel is taking place, unless there is personal deviation that removes the worker from the course of employment. An injury sustained during a refreshment

break while traveling for the purpose of employment is covered.

Any deviation from the reasonable and most direct route for personal or non-work related reasons constitutes removal from employment and coverage is not extended.

b) Routine Commuting

Coverage is not extended for routine commuting to and from the normal place of employment, regardless of any remuneration the worker may receive for that travel or the length/distance of the commute. Routine commuting is travel to and from the workplace with no employment obligations or duties included in the travel other than the obligation of being at the worksite for the work shift. Travel by workers outside the normal work schedule at the request of the employer is considered routine commuting, unless such travel places the worker at an increased risk of injury or exposes him or her to greater hazard than is normal.

3. Transportation Controlled by the Employer

A worker who suffers injury while using transportation provided by the employer is covered, even though the worker may be traveling to or from work. Transportation provided by or for the employer (e.g. a company-chartered bus) is considered to be under the control or direction of the employer and therefore is covered.

A worker who receives a company vehicle as part of the employment benefit package is not covered while routinely commuting to and from work.

4. Special Assignments, Training and Educational Courses

Workers who are on special employer-directed assignments, including courses and conventions, and are paid regular wages are considered to be in the course of the employment during such special assignments. Where such assignments are at a place other than the normal or usual place of employment, travel to the place of the special assignment is covered, as long as the worker travels on a direct route without deviation for personal reasons.
Where the conditions of the special assignment require the worker to use overnight hotel accommodations, coverage is extended to activities related to the reasonable use of such facilities (e.g.

restrooms, restaurants, etc.) However, activities under taken for purely personal reasons such as visiting a movie theatre or a lounge are not considered to be in the course of the employment.

5. Substantial Deviations

A worker will not be covered if the worker's actions at the time of injury are a substantial deviation from the expectations and conditions of employment.

Examples of actions that are a substantial deviation from the employment include:

- criminal acts;
- injuries while intoxicated;
- horseplay, where the worker initiated the action and the action is a serious deviation from or abandonment of employment; and
- exclusively personal activities that have no relationship directly or indirectly to the employment duties or employer's operations.

6. Horseplay

A worker is covered for injury resulting from horseplay if it can be established that the worker was a non-participant and was in the course of employment at the time of injury.

A worker who is injured while initiating or participating in horseplay is not covered if the activity was a substantial deviation from the course of employment.

The activity may be considered in the course of employment where:

- the interruption of production is too brief to be considered a substantial deviation from the employment;
- horseplay is a common occurrence at work and is condoned by the employer;
- the horseplay is initially harmless and escalates into a dangerous activity and the worker is not a willing participant in the escalation; or
- the worker continues productive employment activity while participating in the horseplay even though the horseplay is unprofessional or non-businesslike.

7. Personal Risks

Coverage does not extend to an injury resulting from a personal risk of the worker, or a risk imported to the employer's premises by the worker.

An imported risk by a worker includes any food, drink, or equipment introduced to the workplace by the worker. For example, a worker brings a knife to the workplace and sustains a laceration to the hand while cutting fruit. The knife represents an imported risk of the worker and coverage is not extended.

8. Serious and Wilful Misconduct

Where it is determined that an injury arising out of and in the course of employment is due to the serious and wilful misconduct of the worker, then compensation shall be denied. However, where a worker is seriously and permanently disabled or impaired as a result of the injury, the Act requires compensation to be paid.

Serious and wilful misconduct is the deliberate and unreasonable breach of rule or law designed for safety, well known to the worker, and enforced. It is the voluntary act of a worker with reckless disregard for the worker's own safety and which the worker should have recognized as being likely to result in personal injury.

Some factors to consider in this determination include:

- Has the worker deliberately violated an enforced order or law?
- Are the actions at the time of the accident deliberate and intentional with a complete disregard for probable consequences?
- Are the consequences reasonably predictable by the worker?
- Has the employer permitted that type of activity or behavior at the work place?

9. Drunkenness and Intoxication

For health and safety reasons WorkplaceNL considers drunkenness and intoxication to be serious and wilful misconduct. An injury that occurs as a result of intoxication (alcohol or substance abuse) is not compensable, unless it arose out of and in the course of employment and the worker is seriously and

permanently disabled or impaired.

10. Injury During Compensable Treatment or Return to Work Programming

Where a worker is undergoing compensable treatment for an injury, any further disablement or subsequent injury resulting from that treatment is compensable.

Where a worker is involved in a WorkplaceNL-sponsored return to work program or training program, any injury that arises out of the return to work or training program is compensable. In any case, the injury must be shown to arise out of and in the course of the return to work program or the training program.

11. Subsequent Injuries /Conditions and Compensable Consequences of Injuries

Where a worker experiences a subsequent injury or condition as a direct result of a compensable injury, then the subsequent injury or condition is compensable***.*** There must be evidence satisfactory to WorkplaceNL that establishes a causal link between the initial work injury and the subsequent injury or condition. For example, a worker who develops frozen shoulder secondary to a compensable elbow injury.

Similarly, any direct and natural consequence that flows from a compensable injury is also compensable, unless it is the result of an independent intervening cause. An example is where a medical complication stemming from the original injury leads to a condition more serious than the original injury.

Reference: *Workplace Health, Safety and Compensation Act, Sections 2(g.1), 2(k), 2(o), 2(z), 43, 60 and 61.*

Amendment History

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