

Workers' Compensation Appeal Tribunal

Reopen and Vary – Decision # 28

Claim No.: 2000-0237

Date of Notice of Appeal: November 1, 2001

Date of Hearing by appeal committee: December 13, 2001

Date Final Submissions Received: January 29, 2002

Date Hearing Closed: February 7, 2002

Date of Decision: * **March 12, 2002**

Appeal Committee Members appointed under s. 18.3(1) of the *Workers' Compensation Act*

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Joseph Radwanski

In attendance: The Worker's wife
The Worker's representative – Julie Docherty
Reporter/Recorder – Doug Ayers

Location: Boardroom 1B, 419 Range Road
Whitehorse, Yukon Territory

[* This decision replaces an earlier Decision #28 dated March 11, 2002 which contains some typographical and other errors at paragraphs 50, 59 and 61. The appeal committee reopened Decision #28 on March 12, 2002 under section 18.4 (6) of the *Workers' Compensation Act* to correct these errors.]

Summary for the Reader

Decision under review: Hearing officer's decision dated October 24, 2001.

Sections of Act considered or applied by the hearing officer: ss. 3.1, 5, 17 and 101.1 of the *Workers' Compensation Act* S.Y. 1992 as amended to the present.

Policies considered or applied by internal review committee: Policy CL-42

Issue addressed by the hearing officer:

Whether the worker suffered an injury due to a work-related accident and was therefore entitled to compensation benefits.

Decisions made by the hearing officer: The hearing officer decided that the worker did not sustain a work-related injury and confirmed the adjudicator's decision as set out in a letter dated July 31, 2000.

Sections of the Act considered or applied by appeal committee: s. 3, 5 of the *Act* as it was on November 15, 1999 and s. 90.(1)(c), (1.2), 17, 18, 18.1, 18.3 (1) and (4), 18.4(1), 19.5, 19.6 of the *Workers' Compensation Act* S.Y. 1992 as amended to the present.

Policies applied or considered by appeal committee: Policy CL-42

Issues addressed by appeal committee:

- (1) What is the appropriate legislation for review of this appeal?
- (2) What is the appropriate legislation and policy to use to determine the issues of entitlement in this case?
- (3) Was the hearing officer correct in finding that the worker did not suffer a work-related disability?

Decisions made by appeal committee:

1. The worker did not suffer a work-related disability.
2. Therefore, there is no entitlement to compensation.

Introduction

This is an appeal by a worker who was seriously injured in a motor vehicle accident on November 15, 1999. The issue is whether or not the worker's injuries arose out of or in the course of his employment as a real estate agent.

In the decision under appeal, the hearing officer found that the worker was on personal business the morning of this accident and that, in any event, merely driving by a real estate property while doing personal business did not constitute a sufficient link to employment. He confirmed the adjudicator's decision to deny entitlement.

The worker disagrees with the hearing officer's findings and requests that the appeal tribunal (1) reverse the hearing officer's decision of October 24, 2001 to deny entitlement, and (2) order the board pay for compensation for loss of earnings benefits as well as all medical expenses due to the work-related injury.

The worker did not participate in the hearing but his wife was present and testified under oath. The deputy workers' advocate, Julie Docherty, made submissions on behalf of the worker. The employer was notified of the hearing but declined to participate.

The appeal committee considered all of the worker's record as provided by the board. In addition, the board's hearing officer provided Claims Policy No. CL-42, "Arising Out of and In the Course of Employment", as relevant to the matter under appeal according to section 18.3(4) of the *Act*.

The appeal committee has decided that it has jurisdiction under section 18.4(1) of the *Act* to hear this appeal.

Entered as exhibits in this appeal are:

Exhibit 1: A map showing the area in which the motor vehicle accident occurred as well as the location of the real estate lot in question, the worker's residence, and the two schools of the worker's children.

Exhibit 2: Report on the time of sunrise and weather conditions on the day of the accident, provided by William Miller of Meteorological Service of Canada, Pacific & Yukon Region [by e-mail].

Exhibit 3: December 13, 2001 letter from R. Realty Co. concerning the worker's listings and deals under offer in November 1999.

Exhibit 4: Letter from M. Winstanley to the appeals officer dated December 13, 2001.

Exhibit 5: Covering letter dated November 18, 1999 from N. J., P.Engineer, to L.Z., with attached site development potential report.

Exhibit 6: Unsigned Contract of Purchase and Sale Addendum/Agreement, dated November 5, 1999 for Lot 433-4, Mile 918, Alaska Highway.

Evidence from the Record and Hearing

The Accident

- (1) The worker was the driver of a passenger van involved in a motor vehicle accident at 8:00 a.m. on November 15, 1999, according to the motor vehicle accident report in the record. This report provides further details as follows.
- (2) The site of the accident was the intersection of W. Road and the Alaska Highway.
- (3) The accident occurred as the worker passed another vehicle on W. Road, went through the stop sign, and turned his vehicle left onto the highway. (If the worker had completed the turn, he would have been travelling eastbound on the highway).
- (4) His van was struck on the driver's side (not head on) by a sander truck, fully loaded, travelling at highway speed westbound on the highway.
- (5) At the time of the accident, three of the worker's children were also in the passenger van with their father. All four were injured, the worker seriously. The truck was imbedded into the driver's side of the van .83 meters.
- (6) The report says "the [worker's] van, for some unknown reason went around the vehicle at the stop line on the right side and started to proceed through the intersection turning left. The collision occurred at a point where the van was passing over the westbound lane. The point of impact [was] the middle of the intersection".
- (7) The speed limit for this portion of the highway is 70 km per hour.
- (8) As a result of the accident the worker received a serious head injury. The worker's wife testified that after the accident, the worker was not mentally competent to deal with his claim. He was treated in hospital in Alberta.

- (9) She says that he is now experiencing all the effects of a brain injury: he is very emotional and easily confused. His doctor has told her that the worker will never be able to go back to his real estate work but he might be able to do some volunteer work.
- (10) She says that the worker currently does not have the stamina to sit through a hearing and he remembers nothing of the accident. He also has no recollection of events shortly prior to the accident, such as the visit of a cousin who left a few days before the accident.
- (11) At the time of the accident the worker was a real estate agent. His employer provided a letter (Exhibit 3) stating that in November 1999 the worker had 11 listings and six deals under offer.
- (12) One of those deals under offer was for a commercial/industrial property on the Alaska Highway at approximately Mile 918.
- (13) As the worker's wife explained, and faxes in the record also indicate, the vendor (seller) of this property did not live in the territory. The worker's advocate submits that it is reasonable to assume that the worker was therefore required to inspect the property from time to time.
- (14) We will look more closely at the nature of this real estate deal shortly. It is important to do so because the worker's advocate submits, and the worker's wife believes, that because of the nature of the deal and other circumstantial evidence about the worker's route at the time of this particular accident, the worker's disability "arose out of or in the course of employment." This is the requirement in s. 3 of the *Act* for entitlement to compensation. They both assert that the worker was turning onto the highway in order to drive by and inspect Lot 433-4.

The Real Estate Deal

- (15) On October 4, 1999, the vendor lists Lot 433-4 on the Alaska Highway for sale with the worker as his real estate agent. The price is \$410,000 for eight acres of commercial development property. The commission set out in the listing agreement is 5% of \$150,000 plus 2% of the balance of the purchase price. The listing agreement termination date is January 30, 2000.
- (16) On October 7, 1999 the worker prepares an offer to buy the property for \$400,000 executed by company I.K. (the "purchaser") with a completion date of January 7, 2000. In addition, there are a number of "subject to" conditions to be satisfied no later than December 10, 1999 (or the deal will not go ahead). These are: (1) city

approval of adequacy of water supply; (2) approval of a left hand turn lane for access to the site with agreement of neighbouring lot owner; (3) phase one environmental clearance; (4) zoning changes to permit a heavy truck equipment sales and service facility; (5) completion of site investigation report confirming six acres net at relatively level grade for buildings, etc.; (6) clearance of the site and “leveling to hard rock level as discussed between [purchaser] and [vendor]”. The agreement does not specify which party is responsible for fulfilling each of these conditions.

- (17) According to document on file, around the middle of October, a local company clears and cleans the lot by “running a CAT” on the property for 4 –5 days.
- (18) On October 20, 1999 the vendor (but not the purchaser) executes an amendment to the contract of purchase and sale which says the “offer is subject to the vendor leveling the property to hard bedrock levels only and prior to closing date” and also to a phase one environmental clearance no later than November 5, 1999. Had both parties executed this amendment, it would have extended the time for work on the site and shortened the time for obtaining the environmental clearance.
- (19) The next day, on October 21, 1999 the purchaser writes the worker enclosing a \$20,000 deposit for the property. The letter says the purchaser is waiting for an engineer (N.J.) to report on approval for the turn lane, adequacy of water to the property, confirmation of “how much bedrock has to be removed”, and phase 1 study results.
- (20) The worker faxes a note to the vendor a week later on October 28, 1999. In it, he says according to the purchaser clearing the lot to bedrock means “removing dirt” as opposed to “moving it around”. He suggests that the vendor should call the purchaser himself and clarify things. In bold letters he says, “**CLARIFICATION AND CONSENSUS AT THIS POINT IS VERY IMPORTANT**”. He also says that failure of the parties to come to the same understanding about the “dirt and scrub” on the property, might be a “deal breaker”. We note there is no record in the file materials of any phone call from the vendor to the purchaser as the worker had recommended.
- (21) Exhibit 5 is a copy (requested by the appeal committee and obtained after the hearing adjourned) of the site investigation report dated November 4, 1999 (with covering letter, later date) referred to by the purchaser in its November 8, 1999 letter (see para.23). For our purposes, the key points are that the engineer reports that (1) the site has been “cleared and grubbed”; (2) significant earth and rock excavation will be required to develop the site for the purchaser’s use (up to 95,000 m³ removed and up to 20,000 m³ of material brought to the site for base of access road, parking, etc.); (3) only one access to the site will be permitted and it must be shared

with the neighbouring lot whose owner had objected to changing the access two years prior; and, (4) the necessary rezoning application to accommodate the purchaser's intended use of the property could take 2 – 3 months to process, would cost \$500, and would require City council approval - - outcome uncertain. Because of the rezoning uncertainty, the engineer recommends that the purchaser investigate other properties while a rezoning application is made by the purchaser with the vendor's permission. We also note that the engineer calculates that the property will only yield 5.9 acres net for the intended use when the site is cleared. (The original agreement requires 6 acres net.)

We also point out that there is no indication in the record that the worker ever received a copy of this report. However, in our view, it is reasonable to assume that as a successful realtor he would be familiar with the process and timelines for rezoning applications. Given the completion date of January 7, 2000 and the date for satisfaction of the rezoning condition of December 10, 1999, we think this would have been the deal breaker. There is no indication in the record of a rezoning application ever having been made.

- (22) Exhibit 6 is a [proposed] amendment to the original October 7, 1999 contract of purchase and sale dated November 5, 1999 and faxed by the worker to the purchaser. It is not signed by either the purchaser or vendor. The only amendment reads as follows: "to amend closing date to January 7, 2000". A handwritten note at the bottom says "if above suits you, please sign both and forward to [vendor's] office". There is no indication this document was ever executed. We note that the closing date in the original contract is already January 7, 2000, which might explain why this document was never signed: it would be redundant.
- (23) On November 8, 1999 the purchaser faxes the worker a letter in response to the amendment proposed by the vendor on October 20, 1999) (see para.18). The response is that a new offer agreement should be prepared, rather than an amendment to the original agreement. The purchaser says it has received the engineer's site investigation report and it raises issues which need to be dealt with. He suggests four conditions for inclusion in the new offer agreement - - these are essentially #1, 2, 4, and 5 as set out in the earlier agreement [see para. 16].

However, we note and emphasize that there is no longer a request for clearance of the site to hard rock as the original agreement stipulated. As set out in our analysis of the evidence, we attach a great deal of significance to this change in the purchaser's position.

- (24) The workers' wife testified that she was aware of the deal but didn't know any details, including whether or not there was any urgency to it.

- (25) In the record there is a fax from the purchaser dated October 2, 2001 which appears to have been prepared for use in the appeal to the hearing officer. In it, the purchaser says the vendor “had agreed to clear [the property] for purpose of site investigation”. The purchaser also says the site clearing was done in late October/early November and the engineer provided his report on November 5, 1999. He also states that ultimately the purchaser chose to purchase another site.
- (26) We note that this fax indicates to us that the purchaser’s understanding was that the clearing required was not to bedrock but only enough to allow the engineer to go in and do a site investigation. Both were completed by early November, well before the accident on the 15th.
- (27) The record shows that a week before the accident the worker was advised by letter (see para. 23) that the purchaser had the engineer’s report and was willing to execute a new sale agreement without any further requirement for work at the site. In light of this evidence, we cannot infer or find that there would be any reason for the worker to drive by the Lot 433-4, after November 8, 1999 to check on work at the property.
- (28) In our view, if the deal were to proceed, the parties’ efforts as of November 8, 1999 would need to be directed at the rezoning application process.

The Way the Worker Did Business

- (29) There is affidavit evidence in the record from the worker’s wife and three of his children (as well as sworn testimony from the worker’s wife) indicating that the worker often made side trips for work (dropping off papers, checking or pulling up signs, checking on a property, etc.) while driving with his family out to dinner, dropping children at school, or driving family members to or from various places. His wife says he took business calls at all times of the day, even through dinner. He was very hardworking: in 1999 was one of the 50 top realtors in his company across Canada. We accept this evidence.
- (30) In a letter to the adjudicator dated June 21, 2000, the worker’s lawyer provided additional information about the nature of the worker’s employment as follows:
- (a) the worker had no schedule of working hours;
 - (b) he normally left for work at 8:00 a.m.;
 - (c) travel time was not paid as part of his employment and each realtor had to use his or her own vehicle and pay expenses out of his or her commission(s);
 - (d) it was not the worker’s custom to use a daytimer;
 - (e) no one could determine whether or not the worker had any specific appointment on the day of the accident;

- (f) his pocket notebook could not be located;
- (g) if a realtor had no specific appointments on a given day, he or she would be fully occupied contacting prospective buyers and sellers; and,
- (h) the employer directed a realtor to do whatever he or she considered reasonable and prudent to complete a sale or obtain a listing within the employer's policies and guidelines.

- (31) In a note to file July 25, 2000 the adjudicator reports on a phone call from the worker's employer who said that no customers called on the day of the accident to say that the worker had not shown up. In addition, a coworker who worked closely with the worker was not aware of any bookings or appointments for the worker on the day of the accident.
- (32) The worker's wife testified that the worker did not have an appointment book. She says that it was "generally in the worker's head what he was up to and no one knew". She says C., the employer's front desk person/secretary would also not necessarily have a good idea of what the worker was doing on a given day: he was very spur of the moment; often his coworkers would think he was back at the office when he wasn't.

The Worker's Route

- (33) According to his wife's testimony (as well as affidavit evidence from three of his children and also his wife), when the worker drove the children to their two respective schools, he usually took the same route: that is, he left home heading east onto the highway, then left the highway to drop the first child at his school and then continued along a route through a residential area to the next school, without returning to the highway again.
- (34) However, on the day of the accident, the worker departed from his usual route. He left the highway and dropped one of his sons at the first school and then changed direction and attempted to return to the highway with the rest of the children. The accident occurred in the intersection as he turned onto the highway. We accept that this was not his normal route to the second school. However, based on our examination of Exhibit 1 (a map entered in evidence by the worker's advocate showing the location of the worker's residence, office, the two schools, and the real estate property in question) we find the worker could reach the second school using the highway route.
- (35) We note that the letter by one of the worker's sons to the worker's adjudicator dated June 21, 200 states "at the time of the accident on November 15th Dad was

dropping off my two brothers and myself at [my school], on his way to work".
[Emphasis added.]

- (36) This indicates to us that this child understood the worker was taking him to school and then continuing on to work. He does not say that the worker was taking him to school after he did some work.

The Adjudicator's Decision

- (37) In her July 31, 2000 decision letter (less than a full page) the adjudicator says the worker did not suffer an injury due to a work-related accident and is therefore not eligible for compensation. She states her reasons as follows: (1) the employer cannot confirm the accident was work-related; (2) there is no evidence to confirm the worker was doing business; and, (3) evidence confirms that the worker was driving his children to school.
- (38) As we have seen in other files, the record contains a more detailed summary of evidence and rationale (including interpretation of policy) for the adjudicator's decision that is not set out in the decision letter itself. (We recommend that for thoroughness and fairness, this information should be disclosed in the actual decision letter to the worker.) In this internal document, the adjudicator states, "it would appear the worker deviated from his employment at the time of the accident as evidence clearly shows he was driving his children to school". She says, "therefore, there is evidence to the contrary under section 5, and there is no evidence that would link the accident to the course of employment".

The Hearing Officer's Decision

- (39) The hearing officer sets out the relevant sections of the *Act* and policy and makes a number of findings of fact as follows:
- (1) the worker had conducted business while going about personal business in the past;
 - (2) the worker took four children on the trip to drop the first child in a suburb far from the family residence which was within walking distance of the school for the remaining three children. [This was an error with respect to the location of the family residence. The hearing officer subsequently corrected the error in a letter to the worker which states that his recognition of the correct location of the family home does not alter his decision.];
 - (3) the accident occurred at 8:20 a.m. within 10 – 15 minutes remaining for the worker to drive to the second school by 8:30 – 8:35 a.m., the time the worker's wife testified the children were required to be at school;
 - (4) it was not urgent that the worker inspect the property for his work because:
 - the site had been cleared and the engineer had reported on it to the purchaser (the hearing officer refers to the document discussed at our para. 23);
 - conditions for the sale proposed by the potential purchaser in a letter November 8, 1999 (see our para. 23) are not ones that likely could be dealt with in a week or two, therefore removing any urgency; and,

- one of these conditions was a change to the zoning for the property and the questions why any party would do more work on the property if the zoning bylaw in effect at the time did not permit the intended use.
- (5) at 8:20 a.m. on November 15th Whitehorse is in darkness [no evidence cited for this finding of fact] and therefore no work could be done by driving by the property in the dark during a busy traffic period;
 - (6) no intended route was conclusively established and [had the accident not happened] the worker could have left the highway again to return to his normal route [to the second school] without passing the property; and,
 - (7) nobody can “verify” that the worker was doing anything work-related that particular morning.

We note with respect to (5) above, that the appeal committee obtained a report (Exhibit 2) on the light conditions at the time of the accident. This report indicates that although sunrise had not yet occurred, it was not dark – rather it was “twilight” at 8 a.m. on November 15, 1999. In addition, the worker’s wife testified as to the light conditions she observed at approximately 8 a.m. on November 15, 2000 as well as to road lights located near the property. Although we initially thought such evidence would be relevant, we no longer do for the reasons set out in our analysis of Issue #3.

Issues/Analysis

Issue 1: What is the appropriate legislation for review of this appeal?

- (40) Section 90.(1.2) of the current *Act* provides that where an worker has commenced an appeal pursuant to s.18 on March 31, 2000 or earlier, the review shall be decided pursuant to predecessor legislation as it was in force before April 1, 2000.
- (41) The worker commenced his appeal to the tribunal pursuant to s. 18 on November 1, 2001 (that is, after April 1, 2000). Therefore, the appeal should be determined according to the present *Act*. In other words, the appeal tribunal has jurisdiction to hear and decide this appeal.

Issue 2: What is the appropriate legislation to use to determine the issues of entitlement in this case?

- (42) Section 90.(1)(c) says: “Where a worker a worker is entitled to compensation as a result of a disability caused in
 March 31, 2000 or earlier, the worker’s entitlement to compensation shall be determined to predecessor legislation as it was in force before April 1, 2000.

- (43) This worker was injured in a workplace accident on November 15, 1999: therefore, the *Act* as it was in force on that date must be used to decide the issues in this case.
- (44) In addition, the hearing officer provided the following policy as relevant to this appeal: Board Policy CL-42, "Arising Out of and in the Course of Employment", effective date, November 17, 1993.

Issue 3: Did the hearing officer err in finding that the worker did not suffer a work-related disability?

- (45) We think it is useful to point out that generally speaking workers compensation law does not provide compensation for people who are injured on their way to or from work nor while they are doing personal errands like taking their children to school. This is because these injuries are not considered work related: they do not arise out of and in the course of employment - - without these elements, there is no eligibility for compensation.
- (46) It is clear from the evidence and we find that on November 15, 1999 the worker was driving his children to school: at the time of the accident he had just dropped off the first child and he had three children left in the vehicle to take to their school (the second school). We have already found that although it was not his usual route, returning to the highway would provide the worker with an alternative route to the remaining children's school.
- (47) The worker's case really turns on whether or not it is reasonable to infer that the worker's return to the highway was for the purpose of driving by Lot 433-4 in order to see if earthmoving work had been done on the property, as the worker's advocate has submitted.
- (48) We do not think so. We agree with the hearing officer that on the evidence before us there was no urgency for the worker to inspect Lot 433-4 that morning. It is clear from the evidence that there were discussions between the worker and the vendor about work on the site in October. However, by November 8, a week before the accident, the purchaser had written the worker asking for a new agreement without the inclusion of a condition that the site be cleared to bedrock. Clearing an eight acre property to bedrock would require substantial work (we note the engineer's report in this regard) - - and considerable expense. Why would a vendor undertake this work when it was no longer a condition that the purchaser wanted in the deal (see para. 23). Equally, why would the purchaser do this work when it was not at all clear (based on the engineer's report) that the other conditions would be met, in particular a successful rezoning application. As we noted earlier at para. 21, we

think it is reasonable to assume that the worker would be familiar with the process and timeline for a zoning application. There is no indication that such an application was underway nor had the parties agreed to change the December 10th date for satisfying that condition. We find on the basis of the engineer's report that it is very unlikely this condition could be met in less than a month in order for the deal to complete.

- (49) We also think it is likely that the worker already knew in late October about the clearing work already done on the site because his fax to the vendor on October 28, 1999 talks about "removing" dirt as opposed to "moving it around". The evidence is that a CAT (earthmover) operator had worked on the property in October: there is no evidence a dump truck had been used to remove the dirt. We infer from the October 28 fax that the worker knew at that point that dirt had been moved (by a CAT) but not removed. October 28 coincides with the time this work had likely been completed.
- (50) However, for us, the crucial evidence is that after November 8 – a full week before the accident -- the worker had received a fax from the purchaser which made it clear that the purchaser was no longer interested in a condition that the property be levelled to bedrock or hard rock. There is also no evidence that the vendor had any plan to have further work done on Lot 433-4.
- (51) If there was any urgency to this deal at all at the time of the accident, it is not apparent from the record. Without an economic incentive for either party to level Lot 433-4 to bedrock because the deal was unlikely to be complete for other reasons (e.g. failure to satisfy the rezoning condition), there is no reason (or any evidence of a plan) for such work to be undertaken in the week leading up to the accident. Therefore, we do not find that there was a reason for the worker to drive by and inspect the property that particular day, at that time in the morning, while he is taking his children to school in order to see if any excavation work was underway.
- (52) The evidence shows that no one contacted the employer about the worker failing to make an appointment. This indicates that it is likely that the worker did not have any showings or appointments that day, again suggesting that with a full day ahead there would be ample time, if needed, to work on this particular deal after the children were delivered to school.
- (53) The worker's advocate says the worker is entitled to the benefit of the doubt under section 19.6 of the *Act*. [We note that although the workers' advocate argued that section 19.6 is applicable, this provision came into force after the date of the worker's accident.] However, we think it is useful to point out the following. This section says that only where there is doubt on an issue and the disputed possibilities are evenly balanced, is the issue resolved in favour of the worker. In

this case, we do not find that the disputed possibilities are evenly balanced. We find that it is more likely that at the time of the accident the worker was only driving his children to school rather than the much less likely possibility that the worker was doing both work and a personal errand. Therefore, the benefit of the doubt would in any event have no application in this case.

- (54) The workers' advocate also says the worker must be given the benefit of the presumption in section 5 of the *Act*. First, the presumption is not operative if "the contrary is shown". This means if there is evidence showing that the disability does not arise out of or in the course of work, the presumption does not apply. In this case, we have found that there is evidence to the contrary showing that the worker's accident occurred in the course of a personal errand -- driving his children to school.
- (55) In addition, on our reading of the wording of this section, the presumption applies when the disability either arises out of employment or is in the course of employment.
- (56) We note that section 101 of the *Act* defines "work-related" as "arising out of and in the course of employment of a worker". [Emphasis on the word "and" added.] However, section 5 says that if a disability arises out of or in the course of employment it will be presumed to be "work-related". In other words, either component ("arising out of" or "in the course of") will satisfy, by way of the presumption, the test of "work-related" which requires by definition both components.
- (57) We are confirmed in this interpretation of the *Act's* presumption clause by Terence Ison's explanation of the presumption at para. 3.3.27 of his text, *Workers' Compensation in Canada* (2nd ed.) as follows:

The presumption having the broadest application is that where an injury was caused by an accident that arose out of the employment it is presumed to have occurred in the course of employment, unless the contrary is shown; and where an injury was caused by an accident in the course of the employment it is presumed that it arose out of employment, unless the contrary is shown.

- (58) As the worker's advocate has pointed out, Ison also says at para. 3.3.27 that

Where an injury arose in the course of employment the claim must be allowed unless there is affirmative evidence of an alternative cause, and evidence that the employment was not contributory.

- (59) In this case, we have affirmative evidence of an alternative cause for the disability - - that is, the worker was injured while driving his children to school. We have also found that simply taking a different route to the second school than he did normally does not raise an inference that the activity was therefore work-related. The evidence in this case, that the worker would have passed a property that he had under offer on the way to the second school via the highway, does not constitute evidence that the worker's employment contributed to the accident. We do not infer from the evidence before us with respect to the real estate deal that it was urgent that he inspect the property that morning before dropping the remaining children at the second school.
- (60) However, even if we are wrong in our analysis of the evidence, we find another basis on which the worker would not be entitled to compensation.
- (61) As we have stated, we do not find that the worker was intending to drive by Lot 433-4 to inspect it. However, even if we had, at the time of accident this worker was still completing a deviation for personal reasons from the trip down the highway for what the worker advocate has submitted was a business purpose, that is, to inspect Lot 433-4. When the accident occurred he was not yet travelling eastbound. He was still in the intersection as a direct result of his deviation from the highway for the purposes of dropping off the first child to school. Without the personal errand, he would not have been in the intersection at all but would have travelled instead directly down the highway and this particular accident would not have occurred. If we had found that the worker was returning to the highway for a business purpose, we would still have to take into account that the worker had not yet completed what we find is a significant deviation from (what the worker's advocate has argued) was a work-related route. We did not accept her argument on the evidence. In other words, we do not find the trip to the first school was a minimal incidental intrusion of personal activity into a work-related activity.
- (62) Lastly, the workers' advocate pointed to several mistakes in the hearing officer's decision. We agree that at two points in his decision the hearing officer incorrectly stated the test or standard of proof for issues in a workers' compensation case: at page 4 he says "nobody can verify that the worker was doing work-related that particular morning" and at page 5 he says "the intended route is not conclusively established. [Emphasis added.] The emphasized words indicate a higher standard of proof than the "balance of probabilities" which is normally the highest threshold to be met in workers' compensation cases. (In certain circumstances, a lower threshold is all that is required, i.e., when the benefit of the doubt must be applied.)

(63) However, these errors do not in any way change our analysis of, our conclusions on, or the inferences made from the evidence here.

(64) We have also carefully reviewed Policy CL-42, “Arising Out of and In the Course of Employment”. Nothing in that that policy, given the evidence in this case, enables us to find that the worker’s accident arose out of or in the course of employment, for reasons explained in our earlier analysis.

(65) In conclusion, we do not find on our analysis of the evidence that the worker suffered a work-related disability on November 15, 1999.

Conclusion

The worker’s appeal is denied. The decision of the hearing officer is confirmed.

1. The worker did not suffer a work-related disability.
2. Therefore, there is no entitlement to compensation.

Dated this **12th day of March, 2002** in the City of Whitehorse, in the Yukon Territory.

Joseph P. Radwanski, Member

Heather MacFadgen, Presiding Officer

Jan Stick, Member