As of June 29, 2015, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2004-01349-AD
WCAT Decision Date: **March 17, 2004**
Panel: Sarwan Boal, Vice Chair

Introduction

The worker was employed as a merchandise clerk. On July 29, 2000, he broke his ankle while assisting a security guard who was tackling a shoplifter in the employer's parking lot.

In a September 5, 2000 decision letter, an entitlement officer of the Workers' Compensation Board (Board) advised the worker that he breached a strict written policy of the employer regarding violence in the workplace. The officer further advised that his actions would be considered as that of a public-spirited citizen, and he was not in the course of employment when he left his workplace to assist the security guard.

The worker appealed to the Worker's Compensation Review Board (Review Board). In the December 3, 2002 findings, the Review Board found the worker was engaged in a personal undertaking when he suffered the injury, and he was not in the course of his employment. It denied the worker's appeal.

A trade union representative has provided June 24 and August 8, 2003 submissions. A consulting firm is representing the employer, and has provided a July 23, 2003 submission.

The worker did not request an oral hearing, and I agree that an oral hearing is not necessary to fully and fairly adjudicate this matter.

Issue(s)

Whether the worker's left knee injury, when he assisted the security guard in the employer's parking lot, arose out of and in the course of his employment.

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

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Background and Evidence

The worker and the employer do not appear to dispute the foundational facts set out in the Review Board finding under "Relevant Information". The Review Board described, in part:

> On the day in question the security guard had apprehended the suspect, read him his rights, and recovered the stolen merchandise, before the suspect bolted for the back door of the premises. The claimant's acting supervisor was blocking the door, but the suspect pushed her through the door and to the ground and continued running out to the parking lot. The security officer gave chase. The claimant went to check on his supervisor. She said she was all right, but observed that the security guard might need some help. The claimant noted the security guard was wrestling with the suspect but did not have him under control. He proceeded into the parking lot to assist the guard. A second staff member joined the fracas. In the course of the scuffle the claimant suffered a broken ankle.
>
> [reproduced as written]

There are six exhibits on file. Exhibit #1 is a handout from a workshop on "*Protection of Workers from Violence in the Workplace*"*.* This handout basically talks about various methods to deal with violence in the workplace and protection of workers from undue risk. However, this handout does not contain a specific written policy regarding violence or engaging in altercations with shoplifters at work. Exhibit #2 is a branch incident report by the branch manager, Mr. R, describing the incident of July 29, 2000. Exhibit #3 is a letter dated June 13, 2002 from the branch manager Mr. R. Exhibit #4 is a letter from a co-worker. Exhibit #5 is a Merchandise Clerk Handbook which specifically deals with theft and robbery in chapter five. At page 71 it reminds the workers that it is their responsibility to read and understand a Loss Prevention Manual. At page 72 and 73 it contains tips on detection and recovering products and warns "DO NOT try to physically restrain a customer you suspect of shoplifting. Your safety is more important!". Exhibit #6 is a policy manual on Prevention of Workplace Violence. Chapter 2.1a deals with customer theft and places total emphasis on prevention rather than apprehension. It says:

> Apprehension of a customer for suspected theft by trained staff should occur only after all preventive measures have failed.
>
> [reproduced as written]

A memo dated December 14, 1998 to all store managers, regarding violence in the workplace and shoplifting procedures, is entitled "PLEASE POST". It cautions the

workers to focus their attention on shoplifting prevention and disengage in any activity where it becomes clear there is a risk of injury to yourself, other employees, or customers. The memo goes on to state:

> These instructions are not meant to undermine or diminish the dedication and pride that each and every employee takes to secure Branch assets. They are meant to focus on safety, common sense and avoid the "adrenaline rush" which occurs with the apprehension of shoplifters.
>
> [reproduced as written]

At the Review Board oral hearing, the worker confirmed that he had been working for the employer in December 1998, and there was a bulletin board on which such memos were posted. The worker also said that he had participated in the workshop on the prevention of violence in the workplace in November 1999, and had been given the handout during the workshop marked "*Protection of Workers from Violence in the Workplace*". The worker told the panel that there was no specific directive in the handout against engaging in altercations with shoplifters, but confirmed that he had been told in the course of the workshops that employees were not to engage in altercations with shoplifters. The worker also acknowledged that there were posters in the workplace telling employees not to be a hero, and to maintain a safe distance when approaching or being confronted by a member of the public.

Submissions

The worker's representative concedes the employer had a policy where the employees were not to become involved in altercations with shoplifters. However, she argued the employer had no clear cut policy on whether the action of assisting an employee who is being overpowered in an altercation with a shoplifter would be covered by these policies. She further argued that the worker did not know that he was not supposed to come to the aid of a fellow employee who was already involved in an altercation with a shoplifter and whose physical safety was in jeopardy. The representative submitted that there was no specific policy against assisting other employees who were already in danger or trouble with the shoplifter. She further submitted that if there were such a policy, it was not consistently enforced because the manager and the other employee who went to the aid of the security guard were not disciplined. The representative contended that the worker's actions were in the context of an emergency, which forced him to act. The potential crisis was the injury of the security guard. She finally argued the worker believed the security guard to be an employee of the employer. The representative provided three letters in support of the appeal, including an undated letter from Mr. C who was the instructor in November 1999. Mr. C states:

> Prior to the incident in which [the worker's] ankle was broken I was aware of no specific [the employer] policy forbidding staff from leaving the store to apprehend shoplifting suspects…

A letter dated June 18, 2003 from Mr. R, who was the worker's supervisor on July 29, 2000, states in part:

> On this evening, there was a shoplifter apprehended by the private company, [company name], who is employed by the [employer]. During his apprehension, I was in the warehouse observing what was going on when the suspect decided to escape custody. I was physically assaulted when the suspect pushed me through the back warehouse door in his attempt to escape. [The worker] saw me falter and came to see if I was all right. I told him that I was okay but that the [company name] officer was in trouble with the suspect.…
>
> [The worker] acted as any other concerned co-worker would if one was i[n] a situation where they needed assistance. Both [the worker] and myself acted to assist the [company name] officer on the grounds that it is morally right to assist another human being when they are in trouble.

A letter dated June 14, 2003, from the worker who also joined to assist the security guard, states in part:

> So out of compassion for another human being [the worker] + myself bolted out to save this guys life. It seemed like a natural thing to do.

The employer's representative argued in essence that the employer had a specific policy in place that specified that employees must not go out of the store to apprehend a shoplifter and "In the event that a suspect resorts to violence employees must back off and let the suspect leave if they so desire." He further argued that the worker was well aware of the policy, and decided to contravene that policy. The representative contended that there was no evidence that the security guard's life was in any danger. He submitted whether the employer disciplined the other two employees was not relevant. The representative further submitted that it could be argued that, in this case, the worker was responding to an emergency situation. However, the suspect had been apprehended and the property recovered, so the worker was neither acting to protect the employer's property nor acting to protect a fellow worker. He contended that the worker knew that he was not to tackle shoplifters, and knowingly and deliberately elected to break that rule for his own reasons. He further contended the security guard was not an employee of the employer. The representative submitted the worker knowingly broke the safety rules and knowingly exposed himself to risk of injury. He argued the application of section 5(3) of the *Workers Compensation Act* (Act) in this case.

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Law and Policy

Subsection 5(1) of the Act provides that compensation is payable to a worker where personal injury arises out of and in the course of employment.

Section 5(3) of the Act provides an exception to the general requirement in section 5(1), and states:

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

Policy item #16.00 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) deals with unauthorized activities, and provides:

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

Policy item #16.50 of the RSCM deals with emergency actions. The policy distinguishes whether the worker's actions are to protect a fellow worker or the employer's property, versus acting as a public-spirited citizen. It provides, in part:

> Where an emergency occurs at a time when a worker is in the course of employment, the worker is considered to be covered if injured when acting to protect a fellow worker or protect the employer's property. If, however, the action is that of a public spirited citizen, she or he would be doing no more than anyone would do, whether or not working for an employer at the time. This cannot be considered to be related to the employment.

The policy continues and talks about the importance of the reasons for the emergency actions:

> However, there is an exception to this general proposition, notably where the injury occurs through the presence of a hazard on the premises of the employer.
>
> The situation can perhaps best be illustrated by an example. Suppose a worker receives a telephone call at work indicating that there is a fire in a portion of the employer's premises. The worker races from the office and,

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> due only to haste, trips over his or her own feet, falls and injures an arm. There is no doubt that in light of the relationship of the emergency to the employment this injury would be compensable. In other words, it would be found to have arisen out of the employment.
>
> Suppose, then, that the same worker receives a telephone call to the effect that a family member has been seriously injured in an accident. Once again the worker races from the office and, due only to haste, falls and injures an arm. In these circumstances there is no relationship to the employment. The reason for the worker's departure is totally unrelated to the employment and nothing about the employment contributed to the injury. However, if the worker were to race from the office and trip over a poorly laid carpet, a relationship to the employment would be present. In other words, the injury would not have occurred had it not been for a hazardous condition on the employment premises.
>
> Therefore, while it is incorrect to say that compensation will be payable when a worker is injured while leaving the premises of the employer for whatever reason, it is correct to say that any injury will be compensable which was suffered in any emergency and which also arose out of a hazard on the employment premises.

The policy further addresses the situation of workers, whose ordinary work does not involve responding to an emergency, but has the potential:

> Even if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property, claims may still be accepted from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation. An excellent example of this "positional risk" would be all employees in the various aspects of the operation of an airport. The Board is of the understanding that, for example, at Vancouver International Airport groups or "teams" are formed to act in cases of emergency. The members of these groups will be drawn from various aspects of the operation and the nature of their specific employment may be totally unrelated to emergency rescue. Baggage handlers or concession operators could not be considered to have as part of their employment the need to react in the event of a crash of an aircraft. Nevertheless, their very presence as employees at the airport places them in the position of being the logical choices to become members of such teams. Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation….

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Reasons and Findings

I have reviewed a number of previous Appeal Division decisions, which have dealt with the interpretation and application of policy items #16.00, #16.40 and #16.50 of the RSCM in situations which are not specifically covered by these policies. *Appeal Division Decision #2002-0773* (available on the internet from the Board's web site at: http://www.worksafebc.com) dealt with a situation where a student was working as a part-time clerk cashier in a supermarket. One day, a customer requested a brand of cigarettes, and the worker erred and selected a related brand. The worker apologized. However, the customer left and returned a few minutes later to belittle the worker with abusive and racist comments while the worker was serving another customer. The customer later telephoned the worker's assistant manager and complained about the worker's behaviour. The customer then telephoned the worker again, and repeated his abusive and racist comments. Subsequently, the worker met with the assistant manager and a co-worker in a back office and, while the worker was telling his story, he punched the wall and injured his hand. The Board and the Review Board denied the worker's appeal, essentially because of the unauthorized nature of the activity of punching the wall. The Appeal Division panel allowed the worker's appeal, and stated:

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

Another *Appeal Division Decision #2003-0544* (available on the internet from the Board's web site at: http:\\www.worksafebc.com) dealt with a situation where the worker was employed as a concession supervisor at a bingo hall. The worker noticed several elderly ladies outside the door, near the wheelchair ramp, were attempting to assist another elderly woman who had fallen. The worker went out to investigate, and recognized the woman as a regular customer. The worker and another customer assisted the elderly woman who was unable to walk, so the worker carried the woman to her car, and in so doing he suffered a back strain. The Board and the Review Board denied the worker's appeal on the basis of policy item #16.50 of the RSCM, stating the worker was merely acting as any public-spirited person would. The Appeal Division panel allowed the worker's appeal and stated, in part:

> This is the policy which seems most applicable to the situation in this case but it is not clear that it excludes the possibility of compensation where a worker is injured while assisting one of his employer's customers. In other words, it is not clear that compensation is payable only where a worker injures himself while protecting a co-worker or the employer's property.

> Certainly, these are obvious examples of situations where there is a close connection between the employer and the person or item rescued and consequently, interactions between the worker and those items or persons would come within the course of employment. A customer, however, although not a co-worker, is not entirely a stranger to the employer and the worker has a relationship to that person through his employment.
>
> The distinction between the actions undertaken to assist a fellow worker and the actions of a public spirited citizen is useful but it cannot be the only consideration used to determine whether a rescue is employment related since the two are not mutually exclusive. Accordingly, the fact that a worker states he would have assisted someone in the same way even if that person had no connection to his employment does not necessarily take that action outside the scope of his employment.

I also note the published *Appeal Division Decision #92-0634*, in which the chief appeal commissioner stated, in part, that:

> There is ample judicial authority for the proposition that workers' compensation legislation is to be regarded as remedial legislation and interpreted liberally and non-technically to facilitate the expeditious and fair handling of injured workers' claims.

I find the reasoning and analyses in the above-noted decisions very helpful in the adjudication of the present case. The situation in the present case is somewhat similar, where the worker injured himself in the parking lot while assisting a security guard who was actually not an employee of the employer, but whom the worker considered a fellow worker.

I agree with both the employer's and the worker's representatives that policy item #16.50 of the RSCM is most relevant in the present situation. The employer argues that the worker's action of leaving the store and chasing the shoplifter was unauthorized, and the worker was neither recovering the employer's property nor helping a fellow worker. I agree with the employer to the extent that the employer's property had long been recovered, the employer's policy emphasizes prevention rather than apprehension, and the worker knew that he was not to engage in altercations with shoplifters. However, I disagree with the employer's representative that the security guard could not be considered "a fellow worker". Although the security guard was not technically an employee of the employer, he was hired by the employer to work along with their employee. Therefore, he was not a complete stranger to the worker, and the worker had a relationship to the security guard through his employment.

It is clear from the file evidence that the worker went to the aid of the security guard, who was trying to control the suspect. Technically, he may have been performing unauthorized action. However, the reason for taking that action is critical in this case. The worker's representative argues that when the branch manager told the worker that the security guard "was in trouble with the suspect", she in fact instructed the worker to assist the security guard. The employer's representative argues the manager did not give any direction to the worker. Although the word "direction" does not appear in the manager's letter, from a careful reading of the letter, it becomes apparent that the manager was essentially implying that the worker should go to assist the security guard. Also, the manager, being in a position of authority, even a hint from her meant a lot to the worker. Furthermore, the worker viewed the security guard as a fellow employee and went out to help him. I accept the worker's statement, given the circumstances surrounding this case. In my view, it is likely the worker would not have gone out if the suspect had not assaulted the manager, and the manager had not told the worker that the security guard was in trouble. While the evidence in this regard is not as clear as it ought to have been, I am not satisfied that the worker's unauthorized act was of such a nature as to remove him from his employment.

With respect to section 5(3) of the Act, I do not find the worker's breach of the safety rules amounted to "serious and wilful misconduct". In the circumstances, it is not likely that his action involved an intentional breach of the safety rule or misconduct. In view of my findings above, his action was more likely a spontaneous response to the manager's call for help.

I find the weight of the overall evidence on file leads me to conclude the worker's injury arose out of and in the course of his employment.

Conclusion

I allow the worker's appeal, and vary the Review Board findings of December 3, 2002.

Sarwan Boal
Vice Chair

SB/jd/jyo

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