

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

WCAT Decision Number : WCAT-2007-03626
WCAT Decision Date: November 22, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker, a police officer, claimed compensation for a right foot injury on April 18, 2006 while running (not on the employer's premises). The worker was a member of a "crowd management team," and was running in preparation for an upcoming mandatory fitness test.

By decision dated June 2, 2006, an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), denied the worker's claim. This decision was confirmed by the Review Division on January 23, 2007 (*Review Decision #R0070073*). The review officer found that the worker's injury did not arise out of and in the course of his employment.

The worker has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). He requested that his appeal be heard on the basis of written submissions. A written submission dated July 29, 2007 was provided by his union representative, which incorporated his prior submission of October 31, 2006 to the Review Division.

On April 19, 2007, the employer advised that it was rescinding its notice of participation in the worker's appeal.

On October 1, 2007, the worker's representative forwarded copies of medical records concerning the worker's medical treatment for his right foot injury. He explained that it had taken longer than anticipated to obtain these hospital records by way of a request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. He submits that "The production of this Emergency Report rectifies a previous deficiency on this claim, that of a lack of any record of medical treatment and diagnosis to support the fact that the worker did, in fact, sustain an injury as discussed." I agree that such evidence is helpful, and have received it for consideration. As the employer is not participating, it is not necessary that I invite comments concerning this new evidence.

I find that the worker's appeal primarily involves issues of law and policy. The background facts are not in dispute (apart from the prior lack of medical evidence regarding the worker's injury), and there is no issue of credibility. I find that the worker's

appeal can be properly considered on the basis of written evidence and submissions without an oral hearing.

Issue(s)

Did the worker suffer a right foot injury on April 18, 2006 while running, and if so, did this arise out of and in the course of his employment?

Jurisdiction

The Review Division decision has been appealed to WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (sections 250(2) and 251 of the Act).

Preliminary – Adequacy of Reasons

By submission dated July 29, 2007, the worker's representative argues that there was almost a complete lack of discussion in the Review Division decision of the worker's position regarding the interpretation of the applicable policies. He argues that "the Review Division decision is so brief and lacking in rationale in support of the decision that it is a completely unsatisfactory document and should really be set aside."

Section 253(3) of the Act provides that WCAT's "final decision on an appeal must be made in writing with reasons." There is no similar statutory requirement that the Review Division provide reasons. However, the *Review Division – Practices and Procedures Manual* provides:

A4.3. Form of decision

The decision on a review will be issued in the form of a letter. It will state the conclusion of the Review Officer on each of the issues covered by the initial request for review and provide reasons for the Officer's decision.

The provision of reasons serves many purposes. The primary purposes are to explain the basis on which the decision was made, and to show the parties that their positions were heard. Such reasons also provide a basis, in the event of a subsequent appeal, for WCAT to determine whether the decision involved any error in reasoning.

In this case, the review officer provided succinct reasons to set out the basis for her decision. However, these included only a brief reference to the lengthy arguments provided on behalf of the worker.

A decision of the British Columbia Supreme Court in *Harley v. BC (Employment and Assistance Appeal Tribunal)*, [2006] B.C.J. No. 2119, 2006 BCSC 1420, September 20, 2006, found that the question as to whether adequate reasons were provided was subject to review on a correctness standard under section 58(2)(c) of the *Administrative Tribunals Act* (ATA). For the reasons set out in *WCAT Decisions #2007-00756* and *#2007-00900*, a lack of adequate reasons for a decision may also be characterized as a procedural fairness issue, which would be addressed under section 58(2)(b) of the ATA.

In *Thornton v. Canada (Minister of Social Development)*, [2007] F.C.J. No. 200, 2007 FCA 65, February 15, 2007, the Federal Court of Appeal reasoned:

[6] It is argued for Mr. Thornton that the Board failed to engage in a meaningful analysis of certain evidence favouring Mr. Thornton's claim, indicating that it either disregarded relevant evidence or failed to provide an adequate explanation of why it did not find that evidence to be determinative in Mr. Thornton's favour.

[7] **According to the jurisprudence of this Court, the Board's obligation is to reach its conclusion on the basis of all of the evidence, and to provide reasons that are sufficient to permit meaningful judicial review.** That does not imply that the Board is necessarily obliged to address every piece of evidence that might be inconsistent with the evidence it accepts: see *Palumbo v. Canada (Attorney General)*, [2005] F.C.J. No. 557, 2005 FCA 117, *Canada (Minister of Human Resources Developments) v. Bartelds*, [2006] F.C.J. No. 466, 2006 FCA 123, *McKerrow v. Canada (Minister of Human Resource Development)*, [2002] F.C.J. No. 1561, 2002 FCA 433, *Kellar v. Canada (Minister of Human Resources Development)*, [2002] F.C.J. No. 732, 2002 FCA 204.

[emphasis added]

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: LexisNexis, 2006), Sara Blake states at pages 90 and 91, as follows:

Regardless of whether there is a duty to give reasons, any reasons given must be adequate. It is not sufficient simply to outline the evidence and argument and to state the tribunal's conclusion. Nor is it sufficient merely to repeat the applicable statutory provisions. That does not reveal the rationale for a decision. With respect to each important conclusion of fact, law and policy, the reasons should answer the question, "Why did the tribunal reach that conclusion?"

Reasons should state the findings of fact that support the conclusions and identify the evidence on which they are based. The rejection of important items of evidence and findings of credibility should be explained. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified. If a statute requires the consideration of certain factors, they should be discussed in the reasons. If several incidents of misconduct were alleged in the notice of hearing, the reasons for decision should identify which incidents are proven and the reasons for the disciplinary order.

However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence. Tribunals that consider many applications on similar issues may use standard form reasons or follow precedents provided each decision is based on the facts in each case.

In *Appeal Division Decision #2001-1794*, "Whether Previous Appeal Division Decision Provided Adequate Reasons," 17 W.C.R. 453, the then chief appeal commissioner reasoned:

(37) In my view, where there is an opportunity to write a short and clear decision this should be done. The authorities support this approach and there are also policy reasons for doing it. There are finite resources in all tribunals and the task is to allocate resources to decision making in a way that is proportionate to the complexity of appeals. Writing shorter decisions when they are appropriate assists in obtaining clarity in decision making and it ensures that valuable resources can be assigned to the more complex appeals. Every appeal is important to the Appeal Division but not all appeals require the same allocation of resources.

(38) Others have pointed out that it can take more time to write a short decision than a long one (assuming both are adequate) and this statement captures the difficulty in writing concise decisions. Thoroughly understanding an appeal, applying relevancy, getting the right mix between general conclusions and specific ones, and actually writing a timely decision requires skill and experience. These aspects of decision making should not be underestimated. Nonetheless, also being concise in the sense of providing clarity is an important value for decision makers because it makes decisions more easily understood by the community affected by those decisions.

(39) I am satisfied that the decision of the previous Appeal Division panel was entirely adequate to the circumstances of the case. It was brief but it addressed the substance of the appeal before the panel and it acknowledged the position put forward on behalf of the employer.

Concerns with respect to the “adequacy” of the reasons provided for a decision may provide grounds for setting aside the decision on judicial review (or on an application for reconsideration of a WCAT decision). However, the courts generally require that the parties exhaust their internal avenues of appeal before considering such a remedy.

Within the framework provided by the Act for review and appeal, I do not consider that arguments regarding the adequacy of reasons provide a basis for WCAT to set aside a Review Division decision. The March 3, 2003 restructuring of the workers’ compensation appeal bodies was based in large measure on the recommendations contained in the March 11, 2002 *Core Services Review of the Workers’ Compensation Board* by Alan Winter, accessible at: <http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf>. At page 26, the core reviewer identified six factors as pointing to an “overwhelming need for the current appeal processes and structures within the workers’ compensation system to be reformed.” These included a concern with respect to the so-called “treadmill” effect, and the associated lack of finality for a worker’s claim:

Fourth, the existing multiple levels of appeal on claims issues foster a lack of finality with respect to a worker’s claim. There are many examples where, after going through one or more levels of appeal, a worker’s claim is referred back to the WCB for further adjudication – which then leads to the potential of further appeals. This process has been referred to as the “treadmill” effect.

Under the heading “Standard of Review,” the core reviewer recommended (at page 50) that the external appeal tribunal (WCAT) be given full substitutional authority to conduct a broad review of the disputed issue and render a final decision on the matter:

As was the case with respect to the internal review process, it is my recommendation that the appeal should be conducted on a substitutional basis, whereby the Appeal Tribunal would have the discretion to confirm, vary or cancel the decision which is the subject matter of the appeal. Since this stage of the appeal process will be the first (and only) opportunity for the appellant to express his/her dissatisfaction with a WCB decision to a body which is external from the WCB, it is imperative that the appellant has (and, as importantly, perceives he/she has) a full opportunity to have an independent tribunal conduct a broad review of the disputed issue, and render its final decision on the matter.

Under section 96.4(8)(a), a review officer may confirm, vary or cancel the decision by the Board officer which is under review. A review officer also has a discretion under section 96.4(8)(b), to refer the decision or order under review back to the Board, with or without directions. The legislature chose not to provide WCAT with this latter authority. It is evident, therefore, that the legislature intended that WCAT normally proceed to rehear an appeal and reach its own final conclusion regarding the disputed matter, rather than returning the matter to the Board for further consideration.

Accordingly, even in a case where a review officer's reasons were lacking, it would not be in keeping with WCAT's statutory mandate to refer the matter back to the Review Division for further consideration (apart from the situation where the decision involved a refusal to review, in which case a decision to allow the appeal would normally necessitate returning the matter to the Review Division for consideration).

Given the existence of a right of appeal to WCAT, and WCAT's full substitutional authority to rehear the case, I do not consider it necessary to reach a separate determination regarding the adequacy of reasons provided in the Review Division decision. I have, therefore, proceeded to hear the worker's appeal on the merits.

Background

The worker, age 42, was employed as a municipal police officer. On April 18, 2006, he was running in preparation for a mandatory fitness test. The employer's report of injury advised:

Claimant injured right foot while running. Claimant was preparing for a mandatory fitness test for the Crowd Management Unit. Claimant sustained ligament/stress fractures to right foot/ankle.

The worker attempted to continue working after his injury. He worked two nights following his injury, and when the pain did not get better, he sought medical attention at a hospital emergency on his way to work on April 24, 2006. Records concerning this treatment were not provided to the Board, but have now been provided in support of the worker's appeal.

On May 12, 2006, the Board entitlement officer contacted the employer to obtain additional information regarding the circumstances of the worker's injury. She noted that a representative for the employer explained:

...the worker's injury happened earlier on in the day prior to his night shift and on his personal time. She did note he was preparing for a mandatory fitness test. [She] noted they are not directed but it is expected they be in shape for this fitness test.

In a claim log entry dated May 12, 2006, the entitlement officer recorded additional information provided by the training sergeant for the employer's crowd control management section:

- the worker's aren't directed to exercise in preparation for the test but it is expected they would so they would be successful
- should they be unsuccessful in passing the fitness test, they do not lose their regular job as a police officer, but rather they do not get to become part of the crowd management team
- the worker's do not receive extra pay should they be successful in the fitness requirement test.

[reproduced as written]

By decision of June 2, 2006, the entitlement officer denied the worker's claim. Following an analysis of the policies in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), at items #14.00 and #20.20, she reasoned:

In your case, I do not feel that the fact that training to meet the requirements of a semi annual physical fitness test is enough to bring you within the scope of the Workers' Compensation Act and make this an injury arising out of and in the course of his employment. There is an expectation that as a police officer you stay physically fit, however, while doing so, this would not generally be considered as arising out of and in the course of your employment. The position on the crowd management team does not involve any extra salary and is an opportunity in addition to your position as a police officer.

[reproduced as written]

The worker requested review by the Review Division. By decision dated January 23, 2007, the review officer confirmed the entitlement officer's decision. The review officer summarized the relevant facts and evidence as follows:

- There is no medical evidence on file and no confirmed diagnosis concerning the worker's right foot / ankle complaints (pain).
- The worker reports that he felt pain in his right foot and ankle while running on April 18, 2006. The pain progressed throughout the day. He reported it to his employer on April 19, 2006.
- This running activity (April 18) was performed in the community on his own personal time and did not occur during working hours.

- The worker was training for an upcoming fitness test that is taken semi annually for the crowd management section. The fitness test requires the worker to be able to run 1.5 miles in 12 minutes; complete 50 push ups and 55 sit ups; bench press half his weight and complete 10 pull ups.
- The crowd management team is separate from the worker's regular duties as a police officer. There is no extra pay other than some overtime if it falls after a regular shift or on a day off.
- The employer did not direct the worker's exercise in preparation for the test. There is an expectation that the worker is physically able to pass the fitness test.
- If the worker fails the fitness test, it does not cause him to lose his regular job as a police officer, but rather he would not become part of the crowd management team.

The review officer found that the worker met none of the ten criteria at item #14.00, and only one of the eight criteria at item #20.20 (namely, that the worker's job required that he maintain a level of physical fitness). She concluded:

The requirement for physical fitness in a job does not, in itself, confirm coverage for such activities. Although I acknowledge that physical fitness is a requirement in the worker's job, that factor alone, in my view, is not sufficient to bring his running activity performed during his own personal time into the realm of employment as envisioned by the *Act*. I find that the evidence leads to a conclusion that the worker did not sustain an injury that arose out of and in the course of employment.

In addition, the Board Officer is correct in stating there was no medical evidence submitted, therefore, I am unable to establish that the worker sustained a personal injury due to his accident on April 18, 2006.

The worker has appealed the Review Division decision to WCAT.

Policy of the Board of Directors

By resolution dated May 18, 2004 (2004/05/18-01, "Re: Recreational, Exercise Or Sport Activities"), the board of directors of the Board approved amendments to the policies at items #14.00 and #20.20 of the RSCM II. These amendments were stated to apply to all injuries on or after June 1, 2004. *Decision No. 343 of the Workers' Compensation Reporter* was retired effective June 1, 2004.

The March 1, 2004 “Discussion Paper” entitled “Coverage for Recreational, Exercise or Sports Activities,” served as the basis for consultation by stakeholders regarding the review of the policies of RSCM II items #14.00 and #20.20. That paper is accessible on the Board’s website. The paper identified a number of ambiguities and inconsistencies in the prior policies, giving rise to concerns regarding clarity, consistency and predictability in decision-making. Three options were identified, including maintenance of the status quo, amendment of item #20.20 to eliminate conflicts and ambiguities, and deletion of #20.20 so that only item #14.00 would apply. With respect to the second option, the discussion paper identified the following proposals:

Policy item #20.20 would be amended to eliminate conflicts between policy items #14.00 and #20.20 and to clarify ambiguities and inconsistencies within policy item #20.20. To accomplish this:

- It would be specified that all factors listed in the policy must be considered and that no single factor is determinative.
- Language in the policy which implies that some factors always have more weight than others would be removed.
- The policy would specify more clearly which factors favour coverage and which do not.
- The four factors listed in policy item #14.00 that are not listed in policy item #20.20 would be included in policy item #20.20. Alternatively, policy item #20.20 would refer readers to the list of factors in policy item #14.00 for consideration.
- Ambiguities and inconsistencies within policy item #20.20 would be clarified and examples that have given rise to confusion would be deleted from the policy. More instructive examples would be provided.

Other Appellate Decisions

To assist in my consideration of this appeal, I have reviewed prior WCAT decisions concerning the interpretation and application of the amended policies at RSCM II items #14.00 and #20.20 concerning recreational, exercise and sports activities. I have also reviewed the Appeal Division decisions cited by the worker’s representative dealing with the former policies. While WCAT is not bound by legal precedent, the reasoning in prior decisions may provide useful guidance. As well, even though prior decisions concern the effect of the former policies, they may provide useful background to assist in understanding or interpreting the amendments to the policies.

Relevant WCAT decisions concerning injuries on or after June 1, 2004 include the following:

- **WCAT Decision #2005-04326, August 18, 2005**

This decision concerned a police officer who was also a member of a crowd management unit (CMU). On July 21, 2004, the worker was injured in a bike accident while cycling from his home to work. The factual background considered in that decision included the following:

The crowd management unit requires semi-annual physical testing which is generally done in the fall and spring. Unit members are required to pass a physical test which also includes either a 1.5-mile run or they have the option of a 16-kilometre mountain bike course. The crowd management unit is required to be extremely physically fit as they must carry a lot of heavy equipment including heavily padded clothing, fire retardant overalls, helmets and shields. The supervisor in charge of the unit has directed them to maintain their level of fitness in order to pass the semi-annual physical test.

The worker rides his bike to work on an almost daily basis as part of his training routine. He also does circuit training at home in his off hours. The worker varies the route that he takes to work and his training runs can range from 10 to 20 kilometres, taking anywhere from 30 to 45 minutes.

The WCAT panel confirmed the denial of the worker's claim. The panel reasoned:

In considering this matter, policy items #14.00 and #20.20, which are described by the review officer in *Review Reference #23006*, provide guidelines in determining whether an injury arose out of the employment and in the course of the employment. I am also guided by policy item #18.00 which sets out a general position that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable as the worker is not considered to be in the course of employment during that travel. I have also reviewed policy item #20.20 and agree with the review officer that the worker met only one of the criteria outlined in that policy. **Although I acknowledge that physical fitness is a requirement in the worker's job, that factor alone, in my view, is not sufficient to bring his fitness activities whether at home or on his bicycle into the realm of employment as envisioned by the Act.** I accept the worker's testimony as evidence of a

personal injury but find that he does not meet the policy requirements under policy items #14.00, #20.20 and #18.00 of the RSCM II and I deny the worker's appeal.

[emphasis added]

- **WCAT Decision #2006-04775, December 28, 2006**

This decision concerned a firefighter who was injured on June 13, 2005. He started work at 8:00 a.m. At 9:30 a.m., he was exercising in the fire hall weight room when he hurt his back. The WCAT panel reasoned at page 6:

In considering these factors, I find that if the injury occurred while the worker was lifting weights using a leg press at work, that the injury: occurred on the premises of the employer; in the course of using equipment supplied by the employer; in the course of the worker receiving payment from the employer; and during a time period for which the worker was being paid. I find that although the worker was not in the process of doing something for the direct benefit of the employer, there was an indirect benefit in that the worker was exercising to enhance his fitness to perform his very physical job duties. He was not involved in a course of action taken in response to instructions to the employer; he was not exposed to a greater risk than he would be exposed to in some of his fire fighting duties; he was not injured by some activity of the employer or of a fellow employee; he was not performing regular job duties, and he was not being supervised by the employer.

The panel further reasoned at pages 7 and 8:

The worker's shift started at 8:00 a.m. If he had completed his morning tasks and was exercising by 9:30 a.m. this indicates that a longer period of time than a "normal" 15-minute coffee break was being paid by the employer. Once the worker had completed his assigned tasks, he was allowed to exercise while being paid. I find that the worker had not deviated from or left the course of his employment to perform the exercises.

...

I am bound by policy #20.20 which directs me to consider whether physical fitness was a requirement of the worker's job. Although the employer states there is no mandatory requirement for physical fitness to be maintained after a firefighter is hired for their fire department, I accept that by the very nature of their jobs, firefighters must be physically fit to do them. In a general sense, then, and as recognized by the policy, the

maintenance of physical fitness is an inherent part of their employment. I find that the worker needs to be physically fit to perform his job duties.

Having considered all the relevant factors, as discussed above, I find that the worker was in the course of his employment on June 13, 2005.

- **WCAT Decision #2006-02497, June 13, 2006** (summarized as “noteworthy” on the WCAT website)

This decision concerned a police officer who volunteered to play on a hockey team identified with the local police force. The WCAT three-member non-precedent panel reasoned:

In this context, we have also considered the point that regular hockey games are “practice” for a regular (once or twice per year) charity game and as such should be covered by workers’ compensation. We do not consider the necessity for “practice” in preparation for a charity game sufficient to bring the remainder of the year’s games within the bounds of an activity clearly designed to foster good community relations, as might be a well-publicized and employer-supported charity game.

...

Our analysis of the facts in conjunction with law and policy reveals that **there is, in essence, one criterion favouring the worker’s entitlement to worker’s [sic] compensation benefits. This is the need for physical fitness. We accept that the worker was participating in an activity that would promote his own physical fitness, and in particular that hockey is one of the activities that is appropriate for police officers to maintain and improve their fitness.**

However, the activity did not occur on the employer’s premises, during work hours, in response to instructions from the employer, or while the worker was receiving pay.

The necessity for physical fitness does not mean that virtually any sports or recreational activity undertaken by a police officer can be considered to “arise out of and in the course of” employment. **It may be that working out in the employer-provided gym, during a paid lunch break, is within the scope of the employment. However, in the absence of more indicators suggesting an employment connection, playing hockey on a “police” team, outside the employer’s premises, and on time off, is not sufficiently connected to the employment.** Had

physical fitness been the only criterion necessary to make the claim compensable, coverage could extend far beyond the scope of the Act.

The worker's representative has provided submissions concerning four decisions of the former Appeal Division, made under the former policies. These decisions were as follows:

- **Appeal Division Decision #96-1018, June 27, 1996**

The worker, a police officer, hurt his back while exercising during his paid lunch break in the weight room provided on the employer's premises. In finding that the worker's injury arose out of and in the course of his employment, the panel reasoned:

I find it significant that the work of a corrections officer or a police officer is different in nature from that of other physically demanding jobs. There are many other occupations where the regular nature of the work is physically demanding. However, the performance of such employment activities by the worker provides its own conditioning. Police work differs in that the general nature of the employment may contribute to a deconditioning of the police officer, but the police officer needs to be fit to respond to emergencies. The need to maintain fitness for dealing with sudden demands or exigencies, while carrying out a job in which the regular duties may not be particularly physically demanding and do not ensure maintenance of the police officer's fitness, creates a special need for fitness training by police officers at their own initiative.

...Having regard to the need by police officers for personal physical fitness for dealing with emergency situations, and the occurrence of the worker's injury on the employer's premises while utilizing equipment provided by the employer, I find that the worker's injury on March 18, 1993 arose out of and in the course of his employment.

[emphasis added]

- **Appeal Division Decision #97-0263, February 24, 1997**

The worker, a police officer, injured his left shoulder on July 29, 1994 while lifting weights in the employer's gymnasium during his lunch hour. In concluding that the worker's injury arose out of and in the course of his employment, the panel adopted the reasoning from *Appeal Division Decision #96-1018*. The panel further reasoned:

The panel finds that a police officer is not simply on call during lunch break but remains on duty. As stated by the worker's representative, the members of the [City] Police Department work a set shift consisting of a

specified number of hours. They are not “entitled” to any breaks during that time. Within those hours they are granted their requested breaks at the discretion of a police dispatcher as circumstances allow. The employer’s representative stated in an October 7, 1996 submission to the Appeal Division that the worker was on duty at the time of the injury and, therefore, in the course of his employment. We find that the worker was in the course of his employment at the time of his accident and, therefore, he is entitled to the presumption in section 5(4) of the Act.

[underlining in original]

- **Appeal Division Decision #97-1348, October 15, 1997**

The worker, a police officer, injured her left ankle while playing badminton in the employer’s gymnasium on March 30, 1995, during a paid lunch hour. This activity was not supervised by the employer. In finding that the worker’s injury arose out of and in the course of her employment, the panel reasoned in part:

We have found physical fitness was encouraged by the employer and required for performance of the worker’s duties. We therefore also find that, for the purposes of factor 2, at the time of this injury, physical fitness was not purely voluntary (2(c)) and was also not expressly directed (2(a)), but rather fell between the two; there was "active" encouragement which amounted to a request for the purposes of factor 2 (b), at least implicitly. However, a finding that participation in activities was not directed by the employer as contemplated in factor [sic] does not alter our finding that, as a matter of fact, the performance of the particular duties of a police officer required physical fitness.

- **Appeal Division Decision #98-1477, September 17, 1998**

The worker, a police officer, injured his back on November 26, 1994 while lifting weights in the employer’s gymnasium during his paid lunch break. The employer had a fitness coordinator who would instruct workers on how to use the equipment, but the workouts were not supervised. There were also illustrations posted in the gymnasium which showed how to use the equipment correctly. At the time of his injury, the worker was hoping to meet the physical requirements to qualify for the Emergency Response Team. The panel concluded:

In this case of a worker who was injured on the employer’s premises in the course of exercise activity while on duty and being paid, where the exercise activity was encouraged by the employer and the activity was relevant to the needs of the worker’s normal job, we find the injury arose out of and in the course of his employment.

Reasons and Findings

(a) Occurrence of personal injury

The medical records which have been provided concerning the worker's assessment at a hospital emergency on April 24, 2006 show that he reported a six-day history of pain to his right foot. The primary nurse assessment noted that the worker described a "6 day history of pain to [right] foot. Initially hurt while running during mandatory [sic] physical for [employer]." The physician's notes taken regarding the worker's history indicate: "Recently started running. Since 3K run last week [complains of] pain [right] forefoot." An x-ray was reported as showing that "No acute bony or joint abnormality is present." An overuse injury was diagnosed. A treatment plan of rest and anti-inflammatories was provided, with follow-up by the worker's attending physician in four to five days if the worker was not better (in which case a bone scan should be considered to rule out a stress fracture).

These records serve the dual purpose of providing medical evidence that the worker suffered a right foot injury on April 18, 2006, and of providing confirmation that the injury occurred at the time and in the manner reported by the worker. I accept that the worker suffered a right foot injury on April 18, 2006.

(b) Arising out of and in the course of the employment

Policy at RSCM II item #14.00, as amended, provides:

#14.00 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

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

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

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. **Control by an employer is an indicator that a situation is covered under the Act at a particular time, but if that**

control does not exist there may be other factors which demonstrate an employment connection.

No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment.

[emphasis added]

The policy at item #14.00 further provides that various indicators can be and are commonly used for guidance. Item #14.00 further specifies that:

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

For convenient reference, I have quoted these ten criteria, listed as (a) to (j) below (with bolding and italics added) and considered them with reference to the submissions by the worker's representative.

(a) *whether the injury occurred on the premises of the employer;*

The worker's representative acknowledges that this criterion is not met. I am mindful of the express statement in policy that no one factor can be taken as an exclusive test. However, the reasoning provided in Larson's *Workers' Compensation Law*, Lexus Nexus Mathew Bender Online (Larson), is of interest, regarding the potential significance of this criterion:

§ 22.03 On the Premises During Lunch or Recreation Period

[1]--Effect of Presence on Premises

It has been repeatedly and consistently observed that in borderline course-of-employment situations, such as going and coming, or having lunch, the presence of the activity on the premises is of great importance. Consistency is maintained by applying the same distinction to recreation cases: recreational injuries during the noon hour on the premises have been held compensable in the majority of cases. While, as noted in connection with the other situations mentioned, there is a tinge of the arbitrary about this distinction, there is also a sound basis in both theory and reality for it. **When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment, and even further when one has associated**

the time of the activity somehow with the employment. This done, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection, and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might.

Conversely, if the recreational activity takes place on some distant vacant lot, several hours after the day's work has ceased, some independently convincing association with the employment must be built up to overcome the initial presumption of disassociation with the employment established by the time and place factors.

[emphasis added, footnote deleted]

(b) whether it occurred in the process of doing something for the benefit of the employer;

The worker's representative submits that by fitness training, the worker was performing an activity which was essential to allow him to do the job for which he was hired. He submits:

Although the details for the CMU as listed in the Core Log Entries in the claim file are not totally accurate (for example, the situps and pushups must be performed in one minute, the bench press must actually be at least 80% of the individual's weight to a maximum of 225 pounds and there is also a leg press component of twice the body weight to a maximum of 400 pounds), the pertinent point for our purposes is that it includes a timed road run. In order to train properly for road runs, one must actually get out of the gym and train on the road in realistic conditions, as the worker was doing at the time of his injury.

The reason these specialty squads utilize these standards is because there is a very specific requirement for fitness in those areas, even more so than for other police officers.... In order to have any hope of passing the physical standards for the CMU an individual must weight and strength train extensively and get out on the road to train for the running portion of the test, which is what the claimant was doing at the time of his injury, and for that specific purpose.

Please note that the twice yearly fitness testing for the CMU is 'mandatory', creating an even more specific requirement by the employer for fitness testing.

I accept that the fitness training by the worker was of benefit to the employer, which went beyond enhancing the worker's general health and enjoyment of life. This is evident from the fact that if the worker did not meet the minimum fitness requirements, he would not be eligible to serve on the CMU. If none of the workers met the fitness requirements, the employer would not be able to provide a CMU (according to its established standards). In that event, the employer would not be able to provide an important service to the standards which it had established. Accordingly, there was a benefit to the employer in having the worker pursue fitness training so as to ensure his continued eligibility for service on the CMU.

(c) *whether it occurred in the course of action taken in response to instructions from the employer;*

In his submission to the Review Division, the worker's representative advised that the officer in charge of the employer's Human Resources Section had called him to pass along the fact that management of the employer, himself included, supported the worker's appeal. The officer advised that the employer fully supported claims for employees injured while training for the CMU test. He confirmed that members of the CMU were not specifically directed to train for the test, but were expected to do so in order that they can pass the test. The worker's representative submits that this confirms his submission regarding "tacit direction."

I appreciate the basis for this argument, that the existence of certain fitness requirements might be viewed as a *de facto* direction to employees to pursue fitness activities to ensure compliance with these requirements. I consider, however, that this interpretation would tend to deprive the term "instruction" of its ordinary meaning. The list of criteria set out in policy should be read as being meaningful, and as concerning a range of different factors, rather than being redundant forms of referring to essentially the same factor.

The Concise Oxford dictionary defines the word "instruct" as having the meanings of giving information to, or to direct or command a person to do something. I consider that this latter definition is the one intended by this criterion.

By way of analogy, a drugstore pharmacist may be required to maintain his or her registration with the College of Pharmacists of British Columbia. The pharmacist's contract of employment may expressly require that such a registration be maintained. The College may require the pharmacist to undergo testing every six years to ensure that he or she is remaining current in education and training. An employer's stipulation that the employee must maintain his or her registration with the College does not mean that the employer has provided any instructions regarding preparations for this testing. A distinction may reasonably be drawn between the situation of a pharmacist studying at home on the weekend, and a pharmacist attending a course at the direction of his or her employer.

Accordingly, the existence of a requirement or an expectation need not amount to a direction, instruction or command. As well, the lack of any specific instruction means that a police officer has the ability to consider a range of options as to how to maintain his or her fitness level. For example, he or she might have the option of performing certain exercises at home or in the employer's gymnasium. Alternatively, the police officer may maintain fitness, at least in part, through participation in other sporting activities.

The question may be posed as to whether there is any meaningful distinction between a pharmacist studying at home for a College examination, for the purpose of maintaining his or her registration, and a police officer running or jogging in his or her neighbourhood to ensure compliance with certain fitness requirements. In both cases, the activity is required for the purposes of the employment. The situation might be different, for example, if the CMU had a jogging team and workers were required to go on team runs a specified number of days per week.

I find that the employer's expectations in this case, and strong encouragement of fitness in general, fall short of amounting to an instruction. Accordingly, I agree with the conclusion of the review officer that the employer did not direct the worker's exercise in preparation for the test. (I also agree with the worker's representative, however, that this point would have been better addressed under the heading "Reasons and Decision," with reference to the arguments provided by the worker's representative, rather than being listed as part of the relevant facts and evidence as though there was no dispute on this point).

The application of this criterion is discussed further below in relation to the second criterion under item #20.20.

(d) whether it occurred in the course of using equipment or materials supplied by the employer;

This criterion is not met.

(e) whether it occurred in the course of receiving payment or other consideration from the employer;

This criterion is not met.

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

The worker's representative submits that the risk to which the worker was exposed during his running was less than that to which he might be exposed in the regular course of his duties. He submits that the nature of police work is such that physical altercations with recalcitrant individuals, or the need to pursue and apprehend them on foot, may occur on a regular basis. Those encounters are fraught with much greater risk of physical injury than running for the purposes of fitness training.

Similar arguments were accepted in *WCAT Decisions #2004-05489-RB* and *#2004-05491-RB*, dated October 21, 2004. Those decisions were issued under the former policies concerning injuries prior to June 1, 2004. The WCAT panel reasoned:

There is one remaining factor in policy #14.00 to consider: was the risk to which the worker was exposed the same risk to which he or she was exposed in the normal course of his or her job? My view of the judo club activities was that the risk undertaken in the club was similar to the physical risks to which a police officer is exposed in the course of duty, although the judo club activities, being undertaken in a controlled and supervised environment, were likely less risky. The evidence is that the judo training in the club was focused on improving the ability of police officers to react appropriately in on-duty situations posing a physical threat to them. On balance, I find that this factor favours compensation coverage to the worker.

For similar reasons, I accept the argument of the worker's representative on this issue. I find that this criterion is met.

(g) whether the injury occurred during a time period for which the employee was being paid;

This criterion is not met.

(h) whether the injury was caused by some activity of the employer or of a fellow employee.

This criterion is not met.

(i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

This criterion is not met.

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

This criterion is not met.

Policy at RSCM II item #20.20, as amended, provides six criteria, some of which overlap with those set out in item #14.00. This item provides:

#20.20 Recreational, Exercise or Sports Activities

The organization of, or participation in, recreational, exercise or sports activities or physical exercises is not normally considered to be part of a worker's employment under the Act. There are, however, exceptional cases when such activities may be covered. The obvious one is where the main job for which a worker is hired is to organize and participate in recreational activities. There may also be cases where, although the organization or participation in such activities is not the main function of the job, the circumstances are such that a particular activity can be said to be part of a worker's employment.

In assessing these cases, the general factors listed under policy item #14.00, Arising Out Of and In The Course of Employment are considered. Policy item #14.00 is the principal policy that provides guidance in deciding whether or not an injury arose out of and in the course of employment.

In considering specific cases relating to recreational, exercise or sports activities, the following factors are also among those considered in determining whether an injury is compensable. All relevant factors must be considered and no single factor is determinative. Relevant factors not listed in policy may also be considered.

[emphasis added]

I have considered the six additional criteria in item #20.20 as follows (emphasis and bolding added):

1. Activities Part of Job

Were the activities part of the job? If so, this is a factor that favours coverage. For example, a ski instructor injured while engaging in personal skiing activities unrelated to the instruction of pupils would not be covered. However, coverage may be provided if the skiing activity involved the instructor's pupils and was deemed part of the teaching activities.

The worker's representative argues that the worker's running activities were part of his job. He submits that if the employer sanctions and encourages the activity, benefits from the activity, facilitates the worker's involvement, and there is a correlation of need between fitness and the job, then the activity should be considered job related. I find that this argument is directed to the ultimate issue as to whether the worker's running activities should be considered as ones arising out of and in the course of his employment, and does not attach meaning to this particular criterion. As set out above, I consider that an attempt should be made to read each criterion as having meaning, and as concerning a different aspect by which the activity may be evaluated in terms of its connection to the employment. From the examples provided, I find that this criterion concerns the performance of "sporting" activities in the course of the workday. For example, if police officers were required to undertake judo training during the workday, it would be clear that participation in such activities was part of the job.

I find that this criterion is not met.

2. Instructions from the Employer

Was the worker instructed or otherwise directed by the employer to carry out the exercise activity or to participate in the sports, exercise or recreational activity? For example, did the employer direct, request or demand that the worker participate in an activity as part of the employment? The clearer the direction, the more likely this will favour coverage.

Was participation purely voluntary on the part of the worker? In some instances the employer may simply sanction participation without directing or requesting participation. If so, this is a factor that does not favour coverage.

The worker's representative submits that the employer strenuously encourages its police officers to maintain a high level of fitness. He provides evidence and argument as follows:

This emphasis is begun during training, when fitness activities are an essential part of the process. The Police Act sets out training regulations establishing a physical fitness requirement for police officers. In order to proceed through the various training levels and advance in pay and rank over the first three years of employment, mandatory fitness testing to established standards must be passed. The prerequisite for passing is successful completion of P.O.P.A.T (Police Officers Physical Abilities Test), a rigorous series of timed physical events. It is at this initial stage

of training that the fitness component of the job, and it's [sic] active encouragement by the Department, becomes ingrained in a police officer. The Department then continues to encourage fitness in a variety of ways.

The main building that officers of the Department work from has a weight room which also includes exercise bikes, stairmasters, et cetera.

There are regular notices and bulletins informing members of a multitude of fitness activities.

The Chief Constable of the Department has, in the past, publicly urged members of the Department to stay in good physical condition.

The Department has also identified a number of approved off-site locations for various supervised activities such as racquetball and squash.

The combined weight of all the factors mentioned above leads to the inescapable and compelling conclusion to be inferred by all police officers that the Department encourages them in the strongest possible terms to remain fit, and provides the time, equipment and facilities for them to do so. This strong encouragement is active, ongoing sanctioning of fitness and amounts to implicit direction to become and remain fit.

In *WCAT Decisions #2004-05489-RB* and *#2004-05491-RB*, dated October 21, 2004, issued under the former policies, the WCAT panel reasoned:

Further, with respect to policy #20.20's factor of whether the judo activity was "directed, requested or voluntary," I find that the employer's position of active encouragement and sponsorship of the judo club amounts to something less than a direction, but more than a simple request. I would not categorize the worker's participation in the judo club as a purely voluntary extra-curricular activity. In that regard, I disagree with the entitlement officer's finding that the worker's participation in the judo club was not an activity related to his employment. On balance, the circumstances in this case weigh that factor in favour of compensation coverage for the worker.

That finding was, however, reached in connection with a situation in which the employer provided equipment and sponsorship through the judo club, and the worker was injured during normal working hours on a paid break, on the employer's premises at the employer-sponsored judo club.

In the present case, I find that the evidence on this point is mixed. Current policy recognizes that the evidence on such issues may be viewed as being in various "shades of grey," by stating that the clearer the direction, the more likely this will favour

coverage. On balance, and for the same reasons expressed above in relation to item #14.00(c), I find that the strong encouragement of fitness provided by the employer in this case falls short of amounting to an instruction.

3. During Working Hours

Did the recreational, exercise or sports activity occur during normal working hours? If so, this is a factor that favours coverage.

Where recreational, exercise or sports activities occur outside of normal working hours, including paid lunch breaks, this does not favour coverage. However, this factor does not automatically preclude coverage. For example, coverage may be extended where a teacher is injured while coaching or supervising a student soccer game in the schoolyard during his or her lunch break or after school.

Coverage under the Act cannot be extended by an employer simply by labeling an off duty recreational, exercise or sport activity as mandatory.

This criterion is not met.

4. Receipt of Payment or Other Consideration from the Employer

Was the worker paid full salary or other consideration while participating in the activity? The payment of salary favours coverage. The fact that salary or other consideration was not paid does not favour coverage.

This criterion is not met.

5. Activity Supervised

Was the activity supervised by a representative of the employer having supervisory authority? This favours coverage. The fact that the activity was not supervised does not favour coverage.

This criterion is not met.

6. Fitness a Job Requirement

Was physical fitness a requirement of the job? This factor is concerned with whether fitness is required in order to perform the job (e.g., muscle strength or aerobic capacity). If physical fitness is a requirement of the job, this is a factor favouring coverage.

Fitness training or exercise is more likely to be viewed as a job requirement where a significant degree of aerobic capacity or strength is needed to perform the job properly, but the work itself does not provide sufficient conditioning. This may be the case, for instance, for certain professionals such as police or firefighters, who may require the ability to react quickly to sudden and strenuous emergencies.

It is recognized that any recreation or exercise activity which adds to a worker's general health and enjoyment of life may be said to assist them in their work and, therefore, to benefit their employer. However, to cover these activities under the Act for that reason alone would obviously be to expand its horizons far beyond what the Act intended.

I agree with the review officer that this criterion is met. The fact that the special situation of professionals such as police and firefighters is expressly addressed in the policy supports this conclusion. The policy explains that fitness training or exercise is more likely to be viewed as a job requirement where a significant degree of aerobic capacity or strength is needed to perform the job properly, but the work itself does not provide sufficient conditioning. While I appreciate that the policy does not identify any factor as having more weight than another, I consider that a decision-maker may, nevertheless, find that in the circumstances of a particular case a particular factor is important. I consider that this factor strongly supports coverage,

7. Public Relations for Benefit of Employer

Was there an intention to foster good relations with the public, or a section of the public with which the worker deals? A worker may have been injured while engaged in a recreational, exercise or sport activity, on behalf of the employer, involving the public, or a section of the public, which was clearly designed to foster good community relations. If so, this is a factor favouring coverage.

This criterion is not met.

8. On Employer's Premises

Did the activity take place on the employer's premises? This is a factor favouring coverage.

Coverage is normally not extended to recreational, exercise or sports activities occurring off the employer's premises. However, coverage is not automatically precluded respecting such injuries. Rather, a weighing of all relevant factors is required. For example, coverage may be extended where a teacher is injured while supervising

students during an off-site sports day during regular school hours organized by the employer.

This criterion is not met.

Policy item #20.20 concludes:

After a decision-maker has considered the factors listed in policy items #14.00 and #20.20, he or she must weigh the evidence to determine whether the injury arose out of and in the course of employment. The standard of proof applied is based on a balance of probabilities and consideration is also given to section 99 of the *Act*.

The last sentence of this policy refers to section 99 of the *Act*, which provides in subsection (3):

If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

WCAT decision-making is subject to section 250 of the *Act*, which similarly provides:

250 (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

...

(4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

I view the criteria at items #14.00 and #20.20 as providing different tests to assist in evaluating the “work-connectedness” of an activity. The various tests are aimed at identifying different features. It would be inappropriate to simply count the number of criteria which are met, and which are not met, as a means of determining whether the worker’s injury arose out of and in the course of his employment. Rather, it is necessary to consider the evidence on each point, and to then reach a judgment as to

whether the evidence is at least evenly balanced in support of finding that the worker's injury arose out of and in the course of his employment.

Upon considering the factors listed in policy items #14.00 and #20.20, and weighing the evidence to determine whether the worker's injury arose out of and in the course of employment, I find that two criteria stand out as being of central importance. The fact that fitness was a job requirement strongly supports coverage (for the reasons set out in the policy, which singles out the circumstances of police officers and similar professionals for special consideration). The fact that the worker's training activity occurred away from the employer's premises is a significant factor which supports a denial of coverage. I find persuasive the reasoning in Larson's on this point, as quoted above.

No one factor is determinative, and a judgment must be reached regarding the weight of the evidence. Clearer evidence of instruction or direction by the employer might be sufficient to tip the balance in support of a finding that the activity was part of the employment. In this case, there was no such clear direction.

Factors lending some additional support to the worker's appeal include items #14.00(b) and (f), in that the worker's injury occurred in the process of doing something for the benefit of the employer and the risk to which he was exposed was the same as the risk to which he was exposed in the normal course of production.

I agree with the reasoning in *WCAT Decisions #2005-04326* and *#2006-02497*, which found that the requirement for physical fitness in the worker's job is not sufficient to bring the worker's activities within the scope of his employment. In this case, the worker's running activities were performed in the community away from the employer's premises, during his personal time, and without using equipment provided by the employer. As well, they were performed without pay, direction or supervision by the employer. *WCAT Decision #2005-04326* may be distinguishable, on the basis that it involved an additional factor which did not support coverage, namely, that the worker was injured in the course of commuting to work on his bicycle. *WCAT Decision #2006-02497* may also be viewed as distinguishable, in that the worker in that case was participating in an activity that would promote his own physical fitness (i.e. hockey), but this did not involve an activity on which he would be expressly measured in his fitness test. While I consider that the evidence in the present case is somewhat stronger (i.e. on the basis of those distinguishing features), I nevertheless find that it is less than evenly balanced in support of a conclusion that the worker's injury arose out of and in the course of his employment. I consider that the worker's circumstances are largely similar to those addressed in *WCAT Decisions #2005-04326* and *#2006-02497*. While those decisions are not binding, I consider the reasoning persuasive. I have, therefore, reached a similar conclusion in this case. Accordingly, I deny the worker's appeal.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Conclusion

I vary the Review Division decision but only to the limited extent of finding, on the basis of the medical evidence which has now been provided, that the worker suffered a right foot injury on April 18, 2006 while running. I confirm the decision of the review officer that the worker's injury did not arise out of and in the course of his employment as a police officer.

Herb Morton
Vice Chair

HM/gl/gw