

WCAT Decision Number :

WCAT-2010-01816

WCAT Decision Date:

June 30, 2010

Panel:

Julie C. Mantini, Vice Chair

Introduction

- [1] The worker applied for compensation for multiple soft tissue injuries. Both the worker and the employer believe that the worker's injuries arose out of and in the course of his employment.
- [2] The Workers' Compensation Board, also known as WorkSafeBC (Board), denied the worker's claim in a decision dated March 9, 2009. The Review Division of the Board (Review Division), in a decision dated November 27, 2009 (#R0106390) confirmed the denial of the worker's claim.
- [3] Both the worker and the employer appealed the Review Division's decision to the Workers' Compensation Appeal Tribunal (WCAT). They each participated in the other's appeals. Under section 239(1) of the *Workers Compensation Act* (Act), WCAT has the authority to decide both the worker and the employer's appeals. WCAT joined the appeals so they were heard as one.
- [4] An oral hearing took place in Richmond, B.C. on June 10, 2010. Both the worker and the employer were represented. Both parties made submissions in support of the worker's claim for compensation. The parties also agreed on the manner in which the oral hearing was to be conducted. The worker presented his case along with a witness, the worker's supervisor and Chief Officer. The employer asked questions of the worker and the supervisor. In essence, the oral hearing was conducted as if it were only the worker's appeal being heard with the employer present to support the worker's appeal.
- [5] A second employer, who was in charge of the worker's benefits, was also invited to participate. Although the second employer indicated they were going to participate, they did not appear at the oral hearing. Accordingly, I find that the second employer has waived its right to participate further in this appeal according to WCAT's *Manual of Rules of Practice and Procedure* (MRPP) item #14.2.3.5.

Issue(s)

- [6] The issue on this appeal is whether or not the worker's multiple soft tissue injuries arose out of and in the course of his employment entitling the worker to compensation under section 5(1) of the Act.

Background and Evidence

- [7] The worker is a transit police officer. On December 19, 2008, he sustained multiple soft tissue injuries. The facts surrounding his injury are not in dispute.
- [8] On December 23, 2008, the worker was on his way home with his family in his own personal vehicle. The worker was not on duty. He was on a scheduled day off.
- [9] As the worker was driving, he and his wife saw a truck stopped in the middle of an intersection. A man was standing by this truck urinating on himself and the truck. The man was not steady on his feet. The man then entered the truck and drove away.
- [10] The worker believed the man was intoxicated, and he telephoned 911. He identified himself as an off duty transit police officer. The operator said she would not be able to send police officers to the scene immediately because they were busy at the scene of a shoplifting.
- [11] The worker continued to follow the truck, and he continued speaking to the operator while doing so. The worker witnessed the truck hit a vehicle in the oncoming lane. He also saw the truck driving along the far shoulder in the oncoming lane and driving onto curbs. It was travelling at a high rate of speed. The driver of the truck also had trouble negotiating left turns and lost control of the truck on one of them.
- [12] The driver of the truck pulled over at the edge of the road near a cliff. The road was covered in snow, and a snow bank was next to the driver's door of the truck.
- [13] The worker stopped his vehicle. His wife continued to speak to the 911 operator. The operator was still unable to dispatch officers to the scene. The worker believed that about three to four minutes had elapsed from when he first saw the truck driver to when the truck driver pulled to the side of the road.
- [14] The worker approached the truck. The worker saw that the driver had his eyes closed and his mouth open. The worker believed that the driver had passed out. He could not access the driver from the driver's side of the truck because a snow bank was blocking the worker's access. The worker opened the passenger door. It made a creaking sound. The driver opened his eyes.
- [15] The worker identified himself as an officer and showed the driver his badge. The worker placed his knee on the passenger seat. He was trying to pull the keys out of the ignition. The driver yelled profanities at the worker, grabbed the worker's collar, and began punching the worker. The driver pushed the worker out of the vehicle. The

driver managed to put the truck in gear and the truck started to move dragging the worker with it as his boot had caught on the passenger door.

- [16] The worker said that the wheel of the truck drove over his right arm. He eventually managed to free himself from the truck. His jacket and pants were torn. His right arm was sore. As snow was on the road, the worker believed the snow had protected him from more serious injury.
- [17] The truck came to a stop once again, and the worker approached the vehicle identifying himself as an officer and showing the driver his badge. The worker was not armed.
- [18] The driver reached underneath his seat and pulled out a significant amount of marijuana, about 80 grams. The worker, with the assistance of a passerby, apprehended the driver until officers arrived at the scene. The driver's blood alcohol level registered .250 at the scene.
- [19] The worker assisted the officers in handcuffing the driver and also assisted with the investigation both at the scene and afterwards. Prosecutors charged the driver with offences such as impaired driving and assault of a police officer amongst others. The worker said that the driver was found guilty of impaired driving. For sentencing reasons, the worker said that the prosecutors did not proceed with the charge of assault of a police officer.
- [20] The worker informed his direct supervisors about what had happened on December 23, 2008. The worker was paid four hours of overtime for the incident. He was also reimbursed for the replacement of his jacket and jeans, which were shredded as a result of the incident. His supervisors approved both the overtime and his expenses.
- [21] The worker said, within days, he felt fully healed. His right arm had not been broken. It was bruised, however. He still feels some pain in his right arm when he lifts weights.
- [22] Prior to the oral hearing, the parties provided a binder with information in it to WCAT. In this binder were documents pertaining to the worker's appointment as a transit police officer. The worker was appointed as a designated constable (transit police officer). The appointment document says as follows:

Subject to any restrictions in the Greater Vancouver Transportation Authority Police Service Regulation, the duties and powers hereby conferred are to preserve and maintain public peace and serve the needs of transit passengers, transit employees and the general public with respect to crime and other significant criminal activity reduction within and

around the regional transportation system in the transportation service region as defined by the Greater Vancouver Transportation Authority Act and to aid in the administration of justice and the enforcement of the laws in force in British Columbia, including without limitation all enactments and statute law and the Criminal Code of Canada

[23] As well, a copy of the oath the worker swore when he was made a transit police officer was included in the binder. It states as follows:

I, [the worker] do [swear/solemnly affirm] that;

- I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, her Heirs and Successors;
- I will, to the best of my power, cause the peace to be kept and prevent all offences against the persons and properties of Her Majesty's subjects;
- I will faithfully, honestly and impartially perform my duties as a Designated Constable for the Greater Vancouver Transportation Authority Police Service.

[24] In this binder was also a letter dated July 23, 2008 from Mr. Kevin Begg, who was then the Assistant Deputy Minister and Director of Police Services at the time. This letter was written to clarify the jurisdiction of the transit police, otherwise known as designated constables.

[25] The jurisdiction of the transit police was described as follows:

[The employer] will provide for a safe travelling environment for the general public and safe working environment for transit employees by providing immediate response capability on or in respect of transit vehicles and other transit property to preserve and maintain public peace and serve the safety and security needs of transit passengers, transit employees and the general public. [The employer] will also handle breaches of the law, including the processing of charges and persons who are apprehended for or suspected of unlawful activity on or around transit vehicles and other transit property by

- A. Enforcing the bylaws of local government, the criminal law and the laws of the province of British Columbia – Police Act section 4.2(2)(c)(i)(A);
- B. Maintaining law and order (Police Act section 4.2(2)(c)(i)(B)) on transit vehicles and other transit property (both as defined in the Greater Vancouver Transportation Authority Act, SBC 1998, Chapter 30);
- C. Preventing crime – Police Act Section 4.2(2)(c)(i)(C);
- D. Conducting investigations of offences against the Criminal Code of Canada and Statutes of British Columbia, the Immigration Act, and the Controlled Drugs and Substances Act;
- E. Providing designated policing services directed at reducing criminal activity and unlawful behaviour on transit vehicles and other transit property.

Jurisdiction

[The employer's] jurisdiction, as stated in the application and limited by Order in Council, is limited to "transit vehicles" or other "transit property" (as defined in the Greater Vancouver Transit Conduct and Safety Regulations) within the "transportation service region" and owned by the [employer]. If they are policing outside [employer] property or vehicles, they are limited to responding to or investigating an incident directly related to the [employer's] mandate.

In exigent circumstances, the [employer's] Designated Constables can provide police services when the incident is not directly related to the safety or security needs of transit passengers, transit employees and general public; however, if they are policing routinely in these circumstances, they are not primarily directing their policing as described in the application.

- [26] The worker said that he has the same qualifications as a municipal police officer. He was trained at the police academy with other municipal officers. The training he received was the same as the municipal police officers'. The worker said that the only thing different between a transit police officer and a municipal police officer is their uniform. However, the worker has the tools (handcuffs, pepper spray, baton, etc.) and a gun like a municipal police officer.

- [27] The worker said that he can enforce any offence under the *Criminal Code of Canada*. The offence by the truck driver would be one offence he could enforce, according to the worker.
- [28] The worker also referred to the *Police Act*. Section 10 provides that a designated constable, such as a transit police officer, has jurisdiction throughout British Columbia while carrying out the duties of his or her appointment, subject to the restrictions in their appointment and the Act's regulations. No restrictions are contained in the regulations, according to the worker's supervisor, the Chief Officer.
- [29] At the oral hearing, the Chief Officer said that, at the time of the worker's injury, the location of the incident was outside the territorial jurisdiction of transit police officers. However, the location had recently been incorporated into their territorial jurisdiction.
- [30] The Chief Officer said that the transit police officers' territorial jurisdiction now ranges from Hope to Whistler. Transit police officers' mandate is to protect the public against offences committed on light rail, buses, and sea buses. However, transit police officers can travel anywhere in their jurisdiction to make arrests.
- [31] The Chief Officer also said that no policy exists for his department with respect to how off duty transit police officers should conduct themselves when they see an offence being committed. He would not be able to write policy for every possibility.
- [32] The Chief Officer expected transit police officers to observe the events surrounding an offence so that they could act as a witness. He would also expect them to use their judgment to decide when they should intercede. The Chief Officer said that transit police officers have the same powers as municipal police officers. They are meant to be a police force supplemental to municipal police.
- [33] In the worker's case, the Chief Officer said he would not have expected anything less from the worker than what he actually did. The Chief Officer ordered a legal opinion regarding whether or not the worker's injuries were compensable when he had heard that the Board had denied the worker's claim.
- [34] The parties included excerpts from the textbook "Legal Aspects of Policing", written by Paul Ceyssens, of the Ontario and British Columbia Bars. The excerpts refer to police officers who sustain injuries while off duty. Mr. Ceyssens refers to a case from the British Columbia Workers' Compensation Review Board, (1993) 1 P.L.R. 587, which granted a police officer compensation because he had sustained an injury while apprehending a suspect trying to remove a stereo from an automobile parked in the police officer's driveway. The police officer was off duty, out of uniform, and armed with

a tomato stake at the time. The Review Board found that, once the police officer saw objective evidence of a crime in progress, his role as a police officer was engaged.

Reasons and Findings

- [35] The standard of proof required in this appeal is proof on a balance of probabilities, subject to section 250(4) of the Act. Section 250(4) provides that, where the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.
- [36] I find that the worker's multiple soft tissue injuries which occurred on December 23, 2008 arose out of and in the course of his employment under section 5(1) of the Act. Therefore, I allow the appeal.
- [37] Section 5(1) of the Act provides that the Board must compensate workers whose personal injuries arise out of and in the course of their employment. Chapter #3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) contains policies which help interpret section 5(1) of the Act.
- [38] I find that the information provided by the employer and the worker indicates that police officers can put themselves "on duty" while not technically on a scheduled shift. I have read excerpts from Larson's *Workers' Compensation Law*, Lexus Nexus Mathew Bender Online (Larson) which support their position. For instance, Larson says in the section regarding "Police Officers on Call" the following:
- ...police officers who are "on call" at all times have sometimes been brought within the rules just discussed as to on-call employees generally. But in other cases it has been recognized that police officers are "on call" in a special sense. That is, while the usual on-call employee is subject to the possibility of a specific summons emanating directly from the employer, the police officer may be at any moment "called" into duty by events taking place in the officer's presence, whether technically off duty or not. Awards have accordingly been made to officers injured in the course of an ordinary going or coming journey. (footnotes deleted)
- [39] In this appeal, the worker's argument that he was "on duty" when he apprehended the impaired truck driver is further bolstered by the employer's actions after the incident. The employer paid the worker overtime wages for assisting in the arrest. The employer also reimbursed the worker for the expenses he incurred to replace his torn jacket and jeans.

- [40] The information provided by the parties also demonstrates that the worker, as a transit police officer, has similar powers as a municipal police officer. Section 10 of the *Police Act* and the information from the Deputy Minister and Director of Police Services also demonstrate that the worker had the jurisdiction to enforce the *Criminal Code of Canada* in exigent circumstances outside of transit property or territory. In other words, the worker had the jurisdiction to arrest a person suspected of impaired driving outside of transit property or territory if the circumstances were such that the worker's immediate attention was necessary to protect the safety of others.
- [41] I further find that the worker exercised his jurisdiction appropriately according to the facts of this appeal. The worker was faced with exigent circumstances when he spotted an impaired driver sideswiping vehicles, driving at a high rate of speed, and driving into oncoming traffic. Lives were placed in danger because of the impaired driver's conduct. The impaired driver was still a danger even when he had pulled his vehicle to the side of the road. The impaired driver still had his keys in the ignition of the truck and was seated in the vehicle. He could have placed the vehicle in motion, which he ended up doing in any event causing harm to the worker. The impaired driver could have also exited his vehicle and may have been a danger if he had tried to walk in the area. A car may have hit him or he may have fallen.
- [42] I also agree with the parties' argument that policy item #16.50, entitled "Emergency Actions", is not determinative in this appeal. This policy deals with workers whose job does not regularly place them in emergency situations. However, police officers duties regularly place them in emergency situations. The very nature of a police officer's duties is to handle emergencies.
- [43] I note that the policies in Chapter #3 of the RSCM II are not specific enough to apply directly to a fact situation that was as unique as in this appeal. However, once it was established that the worker was "on duty" and exercised his jurisdiction appropriately when he apprehended the truck driver, some of the criteria in policy item #14.00 "Arising Out of and the Course of Employment", were met thus fulfilling the requirements of section 5(1) of the Act. The worker's actions were those the employer would have expected in the worker's role as a transit police officer and the worker received remuneration from the employer as if he were actually on a shift at the time of the incident.

Conclusion

- [44] I allow the appeals. The worker's multiple soft tissue injuries arose out of and in the course of his employment. The Review Division's decision dated November 27, 2009 (#R0106390) is varied.
- [45] Costs are not applicable in this appeal. Expenses were incurred during this appeal. The worker is entitled to mileage calculated in accordance with the Board's fee schedule. The worker did not take time away from his duties to attend the oral hearing. Therefore, he is not entitled to any wage loss expenses. The employer requested reimbursement for the expenses he incurred to obtain a legal opinion on whether or not the worker was entitled to compensation for his injuries. I find that this type of expense is not one that WCAT can order reimbursement under item #16 of the MRPP. WCAT can order reimbursement of expenses incurred to attend an oral hearing, expenses incurred in producing evidence, and expenses incurred to attend an examination by an Independent Health Professional. A legal opinion regarding whether or not the worker's injuries are compensable is not reimbursable. In particular, it is not an expense incurred in attending an oral hearing, which encompasses mileage incurred to travel to the oral hearing and time missed from job duties to attend an oral hearing, for instance.
- [46] There has been no request for reimbursement of any other appeal expenses. Therefore, I make no order in that regard.

Julie C. Mantini
Vice Chair

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