Noteworthy Decision Summary

Decision: WCAT-2006-02497 **Panel**: Teresa White **Decision Date:** June 13, 2006
Sherryl Yeager
Michael Redmond

Whether personal injury arising out of and in the course of employment – Sports Injury – Amended policy items #14.00 and #20.20 of the Rehabilitation Services and Claims Manual, Volume II – Public Relations for Benefit of Employer

(1) This decision is noteworthy as an example of the application of the amended policy items #14.00 and #20.20 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) relating to recreational, exercise or sports injuries; (2) where a worker is injured playing a sport, the injury cannot be said to arise out of and in the course of employment where the only connection between the injury and the worker's employment is a job requirement that the worker be physically fit; and (3) the mere existence of an employment related sports team, or a regular game such a team might play in, is not sufficient to establish a clear intention on an employer's behalf to foster good community relations.

In this case, the worker was a police officer who volunteered to play on a hockey team identified with the local police force. In the course of a regular game the worker was injured. At the time of the game the worker was not on shift or getting paid by his employer. The Workers' Compensation Board operating as WorkSafeBC (Board) determined that the worker's injury did not arise out of and in the course of his employment. That decision was confirmed by the Review Division of the Board. The worker appealed to WCAT.

On appeal, the three member non-precedent panel reviewed a large number of decisions by WCAT and the former Appeal Division of the Board involving similar facts. The panel noted that, in many of those earlier decisions, it was determined that the injuries arose out of and in the course of employment. While acknowledging the importance of consistency in decision-making, the panel noted that it was required to apply published policy and that, since those decisions were issued, the Board had amended the applicable policy items (#14.00 and #20.20 RSCM II).

Among other things, the worker argued that he was injured while engaged in a sporting activity that was clearly designed by his employer to foster good community relations, and that this was a factor favouring coverage as set out in policy item #20.20. The panel noted that community relations have been noted in previous decisions to be the primary purpose of the police hockey team. However, the submissions in this case stressed the physical fitness benefit. Furthermore, the game may have been "open to the public," but the panel found that this does not demonstrate a clear intention, on the employer's behalf, to foster good community relations. Lastly, the panel noted that it could be said of any profession that its members' participation in recreational, sports, and other activities in the community fosters good relationships and goodwill.

The panel determined that its analysis of the facts in conjunction with law and policy revealed that there was only one criterion favouring the worker's entitlement to worker's compensation benefits. That was the need for physical fitness. The panel accepted that the worker was participating in an activity that would promote his own physical fitness, and in particular that

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hockey is one of the activities that is appropriate for police officers to maintain and improve their fitness. However, 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. The panel concluded that, 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 *Workers Compensation Act*.

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Michael Redmond, Vice Chair

Introduction

The worker is employed by a municipality as a police officer. On September 26, 2004, at 10:30 p.m., he injured his neck while playing ice hockey at an arena located on an armed forces base near the employer municipality. The worker was playing hockey on a team identified with the local police force. He was not on shift at the time. During the game, the worker was "holding/riding out" an opposing player when he fell or was pushed to the ice. The worker sustained an injury to his cervical spine (a stable fracture at the C7 level).

The worker appeals a June 6, 2005 decision of the Review Division of the Workers' Compensation Board (Board) to the Workers' Compensation Appeal Tribunal (WCAT). The Review Division denied the worker's request for review of the Board's November 2, 2004 decision that his cervical spine injury did not arise out of and in the course of his employment.

This appeal is being considered by a three-person panel, as assigned by the Chair of WCAT pursuant to section 238(5) of the *Workers Compensation Act* (Act). A panel assigned under section 238(5) of the Act is a non-precedent panel.

This appeal is proceeding on the basis of a read and review of the evidence and submissions on file. We have reviewed the criteria respecting oral hearings found in the WCAT *Manual of Rules of Practice and Procedure* (MRPP). The rule in item #8.90 in the MRPP states that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. This appeal does not.

An oral hearing may also be granted where there are significant factual issues to be determined. In this case, the facts are limited and not significantly in dispute.

An oral hearing may also be held where there are multiple appeals of a complex nature, complex issues with important implications for the compensation system, or other compelling reasons for convening an oral hearing. The example given is where an unrepresented appellant has difficulty communicating in writing.

The MRPP states that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based and credibility is not at issue. The issue in this appeal is largely legal and policy based. As credibility is not an

issue, and there is no other compelling reason for convening an oral hearing, this appeal will proceed on a read and review basis.

The employer, although notified of this appeal and invited to participate, is not participating.

Issue(s)

The issue is whether the worker's injury arose out of and in the course of his employment.

Jurisdiction

This appeal is brought pursuant to section 239(1) of the Act.

Subject to statutory limitations, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

The law and policy applicable to this appeal is found in the Act, the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), and other published policy in effect on the date of injury. It should be noted that the worker's date of injury was after the amendments made to the Act by the *Workers Compensation Amendment Act, 2002*.

It is also important to note that the worker's claim arose after amendments made to policy items #14.00 and #20.20 in the RSCM II, which were effective on June 1, 2004.

Background and Evidence

The employer's report is dated October 5, 2004. It states that the employer did not at "this time" have any objection to the claim being accepted.

The physician's first report is dated September 27, 2004 and was received from Dr. Riddler, who reported that the worker was "playing hockey for the [employer] police department." The worker was "driven to ice," striking his head and flexing his neck. On September 30, 2004 Dr. Riddler advised that the worker had persisting C6/7 parasthesia. On October 6, 2004 Dr. Riddler advised an urgent MRI/CT scan, and possible neurosurgery consult.

There are no further medical reports in the file, but the worker was asked by the Board to answer some questions, which he did, in writing. The information provided by the worker in response is summarized as follows:

- Playing hockey was not part of the worker's regular job duties. Playing hockey for the police team was voluntary.

- The injury occurred outside the worker's regular working hours, and he was not being paid during the incident. There was no "supervision" by the employer.

- Physical fitness is a requirement of the worker's job as a police officer. He engages in a number of activities to stay in shape for the job.

- The worker said that hockey was an excellent way of staying in shape for the job as it involves going from a dormant state (sitting on the bench) to skating as fast as you can. This the worker likened to police work, which required going from sitting in a car to a foot chase. The worker said that any training that can reflect activities on the job is beneficial.

- The police hockey team is made up of 95% police members.

- During the game in which the injury occurred, the team consisted of police officers and reserve police officers only.

- The team is partially funded by the police athletic association. Information on file does not explain how the remaining funds supporting the team are obtained.

- The game was arranged in advance, but it is not "league play." The public is welcome. There were three people in the stands.

- The purpose of the game is to prepare for charity events.

- The police team had already that year donated their hockey jerseys to a charity, and they were planning a charity event during the Christmas season and a charity game in March 2005.

- The team "wants to put on a decent show" for these events, that the public would attend, in the spirit of good public relations and to show that the police department has members in good physical condition.

- If members of the police were not in shape and/or could not play hockey, the charity events would not take place, benefiting no one.

- The worker submitted that any exercise to stay in shape has risks of injury.

In the Review Division appeal, the worker provided documents regarding the physical requirements for police work. Applicants for the position of constable must demonstrate that they have the musculoskeletal function, neurological function, motor coordination, gross power gripping, strength, endurance, and flexibility to carry out a number of physical demands, including:

- Frequent to constant sitting and driving.
- Occasional to frequent standing, walking, stooping, crawling, kneeling and crouching.
- Occasional dynamic balancing on all kinds of surfaces.
- Occasional climbing.
- Bilateral gross and fine motor control.
- Lifting up to heavy physical strength demands (over 20 kg).

Constables must also be able to wear a duty belt or external vest weight of approximately four kilograms and body armour up to one kilogram. There are visual and auditory acuity requirements.

The worker also provided a job demand analysis prepared by an occupational health consultant in November 2003. We have reviewed this entire document, and note in particular that constables may be required to work in compromised body positions such as searching a vehicle and responding to a foot chase.

The worker also provided a copy of a December 9, 2002 memorandum on the employer's letterhead, addressed to the "labour/management committee" from an individual with a title suggesting he was on the police union's executive. The memorandum quotes a decision of the former Workers' Compensation Review Board (Review Board) that allowed an appeal respecting another police officer and a claim for injuries suffered during a hockey practice. The quoted passage notes:

- The evidence on file showed the employer supported participation in sporting activities, but did not financially support the hockey team.

- The hockey team was not part of a league.

- All the participants were police officers.

- The team was involved in charity events, which were a "direct benefit to the public at large" and a "betterment of community relations."
- The team existed for the purpose of fostering better police/community relations through participation in charitable events.

- Further, one cannot successfully participate in any team sport unless there are team practices.

The author of the memo concluded that it appeared to be settled that the nature of the hockey team practices was "sufficient to warrant WCB support."

Findings and Reasons

The issue is whether the worker's injury was a personal injury that arose out of and in the course of his employment. The evidence does not suggest that this claim should be adjudicated as an occupational disease under section 6 of the Act.

The starting point for analysis is section 5 of the Act, and in particular sections 5(1) and 5(4). Section 5(1) provides:

> 5(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.

Section 5(4) provides:

> 5(4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

The remaining subsections of section 5 do not have specific applicability here, and thus are not reproduced.

Policy item #14.00 in the RSCM II provides specific guidance in determining whether a personal injury arises out of and in the course of employment. It provides that confusion often occurs between the term "work" and the term "employment." There are activities that would not normally be considered work or in any way productive, such as 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.

Policy item #14.00 in the RSCM II also states that lack of control of a situation by an employer is not a reason for barring a claim that is otherwise acceptable. The policy provides that no single criterion can be regarded as "conclusive." Various indicators are commonly used for guidance, and these include:

a. whether the injury occurred on the premises of the employer;
b. whether it occurred in the process of doing something for the benefit of the employer;
c. whether it occurred in the course of action taken in response to instructions from the employer;

d. whether it occurred in the course of using equipment or materials supplied by the employer;
e. whether it occurred in the course of receiving payment or other consideration from the employer;
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;
g. whether the injury occurred during a time period for which the employee was being paid;
h. whether the injury was caused by some activity of the employer or of a fellow employee;
i. whether the injury occurred while the worker was performing activities that were part of the regular job duties; and
j. whether the injury occurred while the worker was being supervised by the employer.

The policy provides that this is "by no means" an exhaustive list. All of these factors can be considered but no one of them is an exclusive test.

Policy item #20.20 provides guidance in the case of recreational, exercise or sports activities. It states that the organization of, or participation in, exercise or sports activities or physical exercises is not normally considered to be part of a worker's employment. However, there are "exceptional cases" when such activities may be covered. The obvious one is where the main job for which the worker is hired is to organize and participate in recreational activities.

There may also be cases where the circumstances are such that a particular activity can be said to be part of a worker's employment. The general factors found in policy item #14.00 in the RSCM II are considered. Policy item #14.00 is the "principal policy." In considering specific cases, the following factors are also among those considered. Policy states that, "all relevant factors must be considered and no single factor is determinative." Relevant factors that are not listed in policy may also be considered. The factors listed in policy item #20.20 are:

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.

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.

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 labelling an off duty recreational, exercise or sport activity as mandatory.

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.

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.

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.* [panel's emphasis]

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.

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.

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.

The policy directs a decision-maker to consider the factors listed in policy items #14.00 and #20.20, and to weigh the evidence to determine whether the injury arose out of and in the course of employment. The standard of proof is the balance of probabilities, and consideration is given to section 99 of the Act.

Policy item #20.00 in the RSCM II further states that, generally speaking, activities, which people undertake outside of their employment, are for their own benefit and injuries occurring in the course of them are not compensable. There are, however, some activities, which, because of their relevance to the worker's employment, may be accepted as being part of their employment.

There have been a number of previous appellate decisions involving participation in fitness or recreational activities. Some have involved injuries sustained by police officers playing hockey on the same team as the one involved in this appeal. However, none of these previous decisions involved interpretation of the amended policy items #14.00 and #20.20.

A number of decisions of the former Appeal Division have involved worker's participation in recreational and fitness activities.

In *Appeal Division Decision #98-1477* (reported at 15 WCR 237), the panel was considering the claim of a police officer injured while lifting weights during his paid lunch hour. He was hoping to qualify for an emergency response team. The panel pointed to the fact that the employer provided fitness facilities and a fitness coordinator. They considered that although the worker's participation in lifting weights was not an integral part of his employment, as it would be in the case of a physical education or ski instructor, the employer strongly encouraged but did not expressly direct the worker to become fit. Although fitness fell short of being required by the employment contract, it was "more than a request, but less than a direction." The appeal was allowed, on the basis that the injury occurred on the employer's premises, in the course of exercise while on duty and being paid, where exercise was encouraged and the activity was relevant to the needs of the worker's normal job.

Appeal Division decisions after January 1, 2000 are publicly available on the Board's website. *Appeal Division Decision #00-0125* (dated January 27, 2000) involved a teacher, who was injured while participating in a "running game," at 7:00 p.m., while at a staff retreat. While the retreat was contiguous with a "professional day," the injury occurred in the evening at a time when the worker was not required to attend. However, the worker's representative submitted that the worker was expected, although not directed, to attend the retreat. The employer's representative submitted that the activity "arose out of a staff desire to engage in a collaborative event," and the suggestion for the activity had been made by a staff member. While the activity may have been an opportunity for team-building, it was primarily a staff social gathering.

A colleague of the worker submitted a letter stating that it was her understanding that staff members were expected to attend the evening session and that one would have to have a "very good reason" not to attend.

The panel found that the activities were of a social or recreational nature. There was a work-related aspect because the activity was "team building," but the running games took place outside of normal working hours, and off the employer's premises. Attendance or lack of attendance did not have an impact on salary. The employer requested but did not direct participation. The application of policy item #20.20 (the former version) led the panel to the conclusion that the worker was not in the course of her employment during the running games.

Appeal Division Decision #00-1778 involved a police officer, who injured himself while working out in the police station exercise room on his paid lunch break. At the time, he was training for the physical exam to advance in his rank. The employer had a "new incremental pay increase process," which included exercises using weights. The panel referred to a previous decision (*#97-1348*), in which factor 7 (Requirement of the Job) in the previous policy had been interpreted less stringently, as a sense of "need" rather than a "demand." On that basis, the panel concluded that physical fitness was a job requirement. Furthermore, the injury took place on the employer's premises.

The worker's injury was found to have arisen out of and in the course of his employment.

Appeal Division Decision #2001-1289 also involved a police officer, working out during his paid lunch break on the employer's premises. The panel said that he determined the appeal based on "heavy reliance on previous Appeal Division decisions," again referring to the conclusion that the word "requirement" be construed as a less stringent sense of need rather than a demand. On that basis, the worker's appeal was allowed.

In *Appeal Division Decision #2001-1406*, the worker, another police officer, was injured while playing badminton on the employer's premises with other officers, during a paid lunch break. The panel referred to *Decision #343* in the *Workers' Compensation Reporter* series (*Re: Scope of Employment*, 5 W.C.R. 117)[1], which described three situations.

The first situation was a case of a firefighter. His claim was denied in respect of an injury incurred while performing exercises at home. The employer had set up a mandatory physical fitness program, which included home exercises. The claim was denied, but it was noted that the physical exercises performed while on shift were part of the worker's employment.

[1] Decision #343 was "retired" effective June 1, 2004 and no longer constitutes published policy.

The second situation involved a corrections officer, who injured himself while using a punching bag in the gymnasium of the penitentiary, during his lunch hour. This was distinguished from the case of the firefighter on the basis that the injury occurred on the employer's premises while using the employer's equipment.

The third situation involved a worker who had no physical fitness requirement, but was injured while playing badminton in the employer's gymnasium during lunch hour. The fitness programme was considered to have been primarily established for the personal benefit of the employees.

The panel concluded that these examples indicated that a sufficient connection to employment may be established where the job requires physical fitness, the employer encourages the worker to participate in physical fitness and a worker is injured while engaged in such activity on the employer's premises during a lunch break.

The panel agreed with the reasoning and analysis of the previous Appeal Division panels. It was necessary for the worker to maintain a certain level of fitness, although there was no contractual requirement. The employer provided facilities and encouraged their use. The activity was one that would assist the worker in maintaining his physical fitness, during a paid lunch break. The injury was found to have arisen out of an in the course of his employment.

Appeal Division Decision #2001-2160 also involved a police officer, who injured his knee while playing a game of baseball with other police officers. The baseball team was not "an official police team," and the game took place in regular off-duty hours. The team was recreational. There was some dispute about whether the opposing team was made up of police officers or members of the community, but the panel accepted for the purposes of the appeal that the opposing team was community-based.

The panel referred to *Decision #343*, noting that it listed four factors directly related to police officers:

- Where the police officer, although off-duty, was receiving full salary or wages;
- Whether the team was financially supported by the police department;
- Whether the police officer was directed by superiors to participate; and,
- Whether the contest was with a community, school, or other group, which would reflect a clear community relations aim on the part of the police team.

The worker's representative submitted that the police teams were "only allowed into the community as representatives of the police department, as part of an active attempt to improve the department's image and community relationships."

The panel found that there was no evidence that the game was designed to benefit the police department, as a whole, and to foster a better relationship with a segment of the community with which the police have an ongoing contact. The game was "not

organized as a friendly contest with an emphasis on profiling either the worker's team or the community team, or both teams."

In order to establish a community-based component, the contest must have been clearly designed for that purpose. The evidence revealed that the worker was not receiving full salary, the team was not financially supported by the police department, and the game was not with a group that reflected a clear community-relations aim. However, there was implicit sanctioning of the event by the employer.

The panel concluded that although fitness was needed to do the job effectively, it was not in the sense required by the policy. The worker's participation was voluntary and not expressly directed by the employer. The panel noted:

- The employer did not fund or subsidize the activity;
- This did not involve a commercial exercise facility;
- The activity was not part of a formal exercise or training program;
- The activity was not directly supervised by a representative of the employer;
- The activity did not occur during normal shift hours for which salary was being paid;
- The activity was strongly encouraged or at least sanctioned by the employer; and,
- The nature of the job function is that a high level of physical fitness is desirable.

In summary, the overall weight of the evidence did not favour coverage. The worker's appeals (there were two claims) were denied.

WCAT Decision #2004-03322-RB involved the death of a worker, a district sales manager, after participating in "go-cart" racing, which had been organized by the employer. The panel considered evidence that although the go-cart racing was not part of the worker's job, the worker's widow gave evidence that the worker felt compelled to attend the function, as he feared for his job if he did not participate.

The panel found that go-carting was a recreational rather than a sports activity. The go-cart races were intended to build team spirit amongst employees. However, it took place off the employer's premises, and the evidence did not establish that the worker's salary was paid while participating. The panel concluded that go-carting was not an employment activity, and denied the appeal.

There are at least three decisions of the former Review Board concerning the same hockey team as this appeal. Review Board decisions are not publicly available. We considered whether it was necessary to disclose the three decisions and invite submissions from the parties. However, as these three decisions involved the same employer and the same hockey team as is involved in this appeal, and the worker's were members of the same union (or its predecessor), the parties must be taken to have notice, and to be well aware, of those Review Board decisions. All three found that the workers' injuries arose out of and in the course of employment.

The first is dated in or about 1996. The worker was participating in a hockey practice. The panel, without setting out the evidence in any detail, found that the preponderance of evidence support a conclusion that the worker was participating in a sporting activity that was supervised at the time of the injury, was open to the public, and was an extension of his employment.

The worker gave evidence that the "only reason" the hockey team was endorsed by the employer was for police officers to reach out to the public. The chief of police endorsed the activity, and there had been a "directive" that if a police officer who is on the team was on shift, he would be given time out of his shift to participate in the practices, which were "crucial for the hockey players to play their games." The worker said that the only reason for the "charity games" throughout the year was to prepare for a bigger community event involving the Vancouver Canucks old-timers, an annual event.

The panel noted that the hockey team involved police officers only, and the practice was supervised. It was "clearly not a casual or recreational game of a drop-in nature." The panel noted policy item #20.20 (the previous version), and its discussion of the significance of whether the worker had been directed, requested, or had voluntarily participated in recreation activities. The panel concluded that although it was important to look at the policy as a guideline, it was "also important to look at the merits of each case." The panel concluded that the sole nature of the team was to foster good public relations, and allowed the appeal, finding that the hockey practice was part of the worker's employment.

The second was an appeal from a November 15, 1999 decision of the Board. The worker was playing for the hockey team at a scheduled game. The reasons are very short (just over one page), and the panel noted the previous decision, and stated that it was important to note that the employer considered the injury to have resulted from actions which were part of the worker's "regular work." The appeal was allowed.

The third Review Board finding involved the same worker as was involved in the first. The worker was playing on the hockey team and injured his knee during a "practice game." A memorandum from the chief of police was tendered as evidence. It notes that the team had a regular weekly 1.5-hour ice time for its games, and that the purpose of the team was to foster better relations with the public and other professions. The schedule was to give priority to "other emergency services and related fields with whom police officers regularly interact." This included fire department, ambulance, BC transit, a TV station, sheriffs, lawyers and the RCMP. The remaining dates were to be filled in with other teams.

Also submitted as a letter from the deputy chief which stated that there was no department direction but there was a "long-standing tradition" of police involvement in recreational athletics. Members were encouraged to participate. The police hockey team participated in charitable events. The team was made up of police officers, occasionally supplemented with reserve officers. The only exception was when a "local

radio personality" had been made an honorary member to attract sponsors for a charity fundraiser.

The panel noted that the worker was a police officer and must remain physically fit. The employer supported participation in sporting activities, but did not financially support the hockey team. The team was involved in charity events, which was a "direct benefit to the public at large and a betterment of community relations." The appeal was allowed.

WCAT Decision #2004-05489-RB allowed a police officer's appeal from a Board decision denying compensation for an injury incurred while training at the police judo club during a paid break. The injury occurred on the employer's premises, using equipment/material supplied by the employer, and while the worker was doing an activity supervised by the employer. In that case, the panel was satisfied that the worker was on duty at the time of his injury, and although judo was not, strictly speaking, part of the worker's job, physical fitness was strongly encouraged and the judo club taught the officer such things as proper ways to restrain suspects and deal with threatening situations. On balance, the panel concluded that the circumstances weighed in favour of coverage.

WCAT Decision #2004-05201-RB involved a police officer who injured his chest wall and shoulder doing a "bench press" in the employer-owned fitness facility on a scheduled day off, but while participating in a "fitness test." The panel noted that while the employer did not instruct or direct the worker's participation in the fitness test, pay increments were linked to passing a fitness test. A desired degree of fitness was required for effective performance of police duties in physically demanding situations. The panel noted that the factors which weighed most heavily against a finding that the worker's injury arose out of and in the course of his employment were that he was on a day off and not being paid. These factors were not determinative. On balance, the panel found a nexus between the worker's participation in the fitness test and his employment. The appeal was allowed.

In *WCAT Decision #2004-05529-RB*, the panel found that a worker who was exercising in the employer's gym, during a regular work break, was entitled to compensation. *WCAT Decision #2004-05492-RB* is similar.

WCAT Decision #2005-05567 involved the same hockey team as involved here. The worker injured his back while playing hockey. The evidence in that case was that the team was made up entirely of other police officers. The employer participated in that appeal. The "watch commander" wrote a letter to the Board stating that he allows members of his shift to participate in sports-related activities, including playing on the hockey team, while on duty. He cited health-related benefits, the fostering of camaraderie and the improvement of community relations. The watch commander said that time was not deducted from members who participated in these activities during duty hours. There was also evidence suggesting that other police officers playing on the team were on shift at the time of the injury, and continuing to be paid by the

employer. The panel reviewed a number of previous appellate decisions, including some of the former Review Board, which had involved the same hockey team, and thus the same parties. Those previous decisions had all allowed the workers' appeals.

The panel in *WCAT Decision #2004-05567* referred specifically to the WCAT MRPP, and to the value of consistency in decision-making. The panel also noted that the amendments to policy items #14.00 and #20.20 in the RSCM II were not applicable to that worker's claim. The appeal was allowed on that basis.

We too acknowledge the importance of consistency in decision-making, and note in particular that previous appellate decisions have allowed workers' appeals involving injuries incurred while playing on the same hockey team. However, we are required by the Act to apply published policy. Thus, we must analyze this appeal based on the application of the Act and the amended policies.

Before consider the current law and policy requirements, we considered it worthwhile to briefly analyze the changes in policy, particularly as they relate to "sports activities" and police teams in particular.

The amendments removed the title "sports activities" from policy item #20.20. Under that heading, before the amendments, was the comment regarding exceptions in the cases of claims involving police officers. Also removed were the "guidelines," which are considered in the previous appellate decisions, including the employer's direction of the activity, whether the sports activity involved the public, whether full salary or wages were paid, whether the team was supported by the employer, comprised of fellow employees, or was involved with a commercial or recreational league. None of those guidelines remain in published policy.

Added to the policy, under the heading "fitness a job requirement," is the comment that certain professionals such as police or firefighters may require the ability to react quickly to sudden and strenuous emergencies. Reference is specifically made to fitness training or exercise being 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.

Under the heading "on employer's premises," a statement was added that coverage is normally not extended to recreational, exercise or sports activities occurring off the employer's premises, but coverage is "not automatically precluded respecting such injuries." A weighing of all relevant factors is required.

The heading "requested" and "voluntary" were removed, and a statement added that, "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."

Added to policy was the statement that coverage under the Act cannot be extended by an employer simply by labelling a recreational or sport activity as mandatory.

Policy item #20.20 states that policy item #14.00 is the principal policy providing guidance in deciding whether or not an injury arose out of and in the course of employment. The criteria set out in policy item #14.00 are set out above, and we have, as directed by published policy, considered those criteria first.

In this appeal, indicators suggesting that the worker's injury did not arise out of and in the course of his employment include the fact that the injury did not occur on the employer's premises, it did not occur in the course of using equipment or materials supplied by the employer, it did not occur in the course of receiving pay, the employer did not supervise the activity, and the injury did not occur while the worker was performing activities that were part of his regular job duties. The injury was also not caused by an activity of a fellow employee or the employer. The evidence is that it was caused by a member of the opposing hockey team.

Some of the other indicators suggest a possible employment connection. The worker submits that he was in the process of doing something for the benefit of the employer, and in particular, that he was engaged in a recreational activity which provided specific fitness benefits for a police officer. There is also a potential "community relations" benefit to the employer which flows from police officers demonstrating their fitness, playing sports with community members, and participating in charitable activities relating to the hockey team. The worker also submitted that the risk was the same as the risks he was exposed to while working as a police officer.

It could also be argued that the worker was doing something in response to instructions from the employer because it is uncontroverted that the employer encourages police officers to remain physically fit.

The police athletic association provides some funds to support the hockey team. The evidence does not establish the source of the athletic association's funds, but, for the purposes of this appeal, we have assumed (without making any specific finding) that the employer facilitates the operation of the police athletic association, and may provide some of the funding.

We turn now to consideration of policy item #22.20 in the RSCM II. It provides that all relevant factors must be considered and no single factor is determinative. It also states that "relevant factors" not listed in policy may also be considered.

The first consideration listed in policy item #22.20 is whether the activities were part of the job. The example given is a ski instructor injured during an activity deemed part of the instructor's teaching activities. Although the hockey team membership involves primarily police officers, the evidence does not support a conclusion that, at the time the injury occurred, playing hockey was part of the worker's job.

The next consideration is whether the employer instructed or otherwise directed the worker to carry out the exercise activity, or to participate in 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?

We consider that, in a case such as this, this is related to the "fitness a job requirement" criterion, so we have considered those two criteria together. It is apparent that the employer encourages physical fitness. The worker, as such, was encouraged by his employer to maintain his level of physical fitness. But participation on the hockey team was purely voluntary.

Previous decisions have turned on whether the employer sanctioned participation, and on a broad interpretation of "requirement of the job" to suggest a "need" rather than a "demand" by the employer. Policy specifically refers to work such as police work, where workers may require the ability to react quickly to sudden and strenuous emergencies, but the work itself does not provide sufficient conditioning. We accept that physical fitness is "needed" for most employment as a police officer. However, that is only one of the factors that must be considered. Policy states that all relevant factors must be considered and no single factor is determinative.

However appropriate hockey may be as a fitness activity for police officers, the evidence does not support a conclusion that the worker was playing hockey because he was instructed or otherwise directed by the employer to do so. His choice of physical fitness activities was his own.

The next question found in policy item #20.20 is whether the activity occurred during working hours, followed by whether the worker was being paid. In this case, the worker was not on shift and was not being paid.

The next question asks whether the activity was supervised by a representative of the employer. An affirmative answer favours coverage. There was no supervision in this case.

The question of physical fitness as a job requirement has been addressed above. Police officers are specifically mentioned in policy item #20.20 as requiring the ability to

react quickly to sudden and strenuous emergencies, thus making it more likely that fitness training or exercise is viewed as a job requirement.

The next criterion is public relations for the benefit of the employer. Although police officers playing hockey with other hockey-playing members of the community may foster good relationships between the players, the evidence does not support a conclusion that the hockey game was clearly designed to foster good community relations. Community relations have been noted in previous decisions to be the primary purpose of the police hockey team. The submissions in this case stress the physical fitness benefit. The game may have been "open the public," and we accept that a small number of people were watching, but this does not demonstrate a clear intention, on the employer's behalf, to foster good community relations. Furthermore, it could be said of any profession that its members' participation in recreational, sports, and other activities in the community fosters good relationships and goodwill.

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.

The next question is whether the activity took place on the employer's premises. In this case, it does not. Policy states that this does not automatically preclude coverage, but rather all relevant factors must be weighed. The example given is a teacher supervising students during an off-site sports day.

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 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.

Conclusion

The appeal is denied and the Review Division decision confirmed.

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

Teresa White
Vice Chair

Sherryl Yeager
Vice Chair

Michael Redmond
Vice Chair

TW/jd