## Noteworthy Decision Summary

**Decision:** WCAT-2007-02492 **Panel**: Herb Morton **Decision Date:** August 20, 2007

***Horseplay – Item #16.20 of the Rehabilitation Services and Claims Manual, Volume II – Larson's Law of Workmen's Compensation, 1972, Volume 1, Paragraph 23.61.***

This decision is noteworthy for its analysis of whether participation in horseplay in a forestry camp involved a substantial or insubstantial deviation from employment.

The worker and a co-worker were joking around while bringing their bags into tent accommodation. They began to push and punch each other. The worker tripped over a bag and both of them fell backwards with the co-worker falling on top of the worker. The worker sustained a leg fracture. The Workers' Compensation Board, operating as WorkSafeBC, denied her claim because the injury resulted from the worker's participation in horseplay which involved a substantial deviation from her employment. This Review Division confirmed this decision. The worker appealed to WCAT.

The worker's appeal was allowed. The panel indicated that the essential question was whether there was a sufficient basis for concluding that the worker was no longer engaged in her employment at the time of injury. He stated that it was evident from policy item #16.20 of the *Rehabilitation Services Claims Manual, Volume II* that there was no clear guiding line as to what distinguished an insubstantial deviation from a substantial deviation from employment. It was similarly evident from the court decisions cited in *Larson's Law of Workmen's Compensation*, 1972, volume 1, paragraph 23.61, that it could be difficult to draw the line between them. The use of the phrase in policy "at the other extreme" indicated that the examples provided there could be viewed as illustrations from two ends of a spectrum. The fact that a particular situation concerned conduct that involved somewhat more extensive participation in horseplay than one example did not automatically mean that the situation should be viewed as a substantial deviation. Rather, all the circumstances must be considered, with a view to determining whether the situation was closer to one end of the spectrum or the other.

One factor to be considered was the degree of participation of the worker. A worker who instigated or provoked horseplay, or who had been involved in previous episodes of horseplay, would more likely be considered to have made a substantial deviation than one who simply reacted to actions commenced or provoked by someone else. Policy provided that the duration and seriousness of a worker's horseplay was also of relevance in considering whether there had been a substantial deviation from the course of employment.

The panel found that the worker's participation in horseplay had not involved a substantial deviation from the course of her employment. He found the worker had been a willing participant in horseplay. There was no evidence the worker had previous been engaged in horseplay. The worker had not been cautioned directly not to engage in horseplay. Although the light punching and pushing with her co-worker was somewhat more extensive than the example provided in policy, the panel did not consider that this involved a complete and extensive abandonment of her employment. Rather, this appeared to have been a diversion of a relatively short duration during the performance of her work duties. Thus the worker's injury arose out of and in the course of her employment.


Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

**WCAT Decision Number:** WCAT-2007-02492
**WCAT Decision Date:** August 20, 2007
**Panel:** Herb Morton, Vice Chair

---

## Introduction

The worker has appealed the December 13, 2006 Review Division decision (*Review Decision #R0070519*). The review officer confirmed the August 23, 2006 decision by an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), to deny the worker's claim for compensation. The entitlement officer found that the worker's left leg fracture on July 31, 2006 resulted from her participation in horseplay which involved a substantial deviation from the course of her employment.

The worker is represented by her union representative/lawyer. In her notice of appeal, the worker requested an oral hearing. The Workers' Compensation Appeal Tribunal (WCAT) registry determined, on a preliminary review, that the appeal would proceed on the basis of written submissions. The worker's representative provided a submission dated March 29, 2007, the employer's representative provided a submission on May 2, 2007, and the worker's representative provided a rebuttal submission on May 18, 2007. It remains open to me to convene an oral hearing, if I consider this necessary. I find that the worker's appeal involves issues of law and policy, and does not involve any significant issue of credibility. I find that the worker's appeal can be properly considered on the basis of written submissions without an oral hearing.

## Issue(s)

At issue is whether the worker's participation in horseplay, which resulted in her injury, involved a substantial or insubstantial deviation from her 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 that is applicable (section 250(2) and 251 of the Act).


Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

**Background**

The worker, age 19 years, was employed as a crew member to fight forest fires. In her application for compensation, the worker reported:

> At 20:30 on July 31 2006 I was setting up my cot in the Ranger tent & was currently bringing my bags into the tent when I started joking around with a co-worker. We lightly punched each other a couple times for fun & then we pushed each other & fell over on the ground. I landed on my back with my left ankle twisted out & my leg bent at my knee, & underneath me.

The worker identified the site of the firefighting camp as being near a town in the interior of British Columbia, a considerable distance from her home town.

A first aid report provided the following account of the worker's statement of injury:

> I was in the tent setting up my cot & began to joke around with [B] – he bumped me → and I then fell over onto my back with my knee bent & my foot twisted out.

A supervisor's accident/incident investigation report stated:

> [The worker] was setting up her cot in the tent while joking around with [B, a co-worker]. While joking around she stepped backwards & tripped over a bag & she landed on her back with her knee bent & her left ankle under her.

An employer's report of injury indicated the worker worked seven hours a day from Monday to Friday, that she was paid $17.5762 per hour, and that she had earned $10,963.07 during the three months prior to her injury.

In a claim log entry dated August 22, 2006, a Board entitlement officer noted the following based on her telephone conversation with the worker:

> On July 31, 2006 [the worker] explained she was walking into the ranger tent with her bags and began joking with a coworker. She advised they were playing around and bumping each other. She tripped over a bag after being bumped by her coworker and they both fell over backwards. Her coworker landed on her.
> [The worker] advised she had been spoken to about horseplay at the beginning of the season in a general staff meeting and again a second time during a general staff meeting. She confirmed she was aware she should not take part in horseplay at work.
> [The worker] advised the horseplay was instigated by herself. She advised she was a willing participant.

[reproduced as written]

The entitlement officer further noted that the worker had been hired as a firefighter starting May 8, 2006. This was her first regular season. The fire-fighting season had been extended to September 4, 2006.

The worker was diagnosed as having suffered a fractured fibula – lateral malleolus.

By decision dated August 23, 2006, the entitlement officer denied the worker's claim. She found, on an application of the policy at item #16.20 of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), that the worker had engaged in a substantial deviation from her employment by her participation in horseplay. She noted: "You had been previously warned about horseplay from the employer and advised this was discussed at two prior general staff meetings." She denied the worker's claim for compensation, finding that she had abandoned her employment activities by her participation in horseplay.

The worker requested review by the Review Division. In a written submission dated September 9, 2006, the worker explained:

> I was stationed in a fire camp in [town], BC while employed by [the employer] to control wildfires in the province of British Columbia.
>
> …
>
> I was unaware that the conversations I was having with [the Board entitlement officer] and the vocabulary I used was going to be dissected as objectively as it was. I suggested that I started the horseplay. By that, I meant that I had initiated a verbal discussion about the work day that included some light jokes made at [B's] expense. This conversation was initiated while we were on assignment setting up ranger tents and organizing equipment and supplies.
>
> In retaliation to the verbal joke that I had made, [B] then initiated the physical contact in jest. While staying on assignment and continuing to hold the bag that I was moving, I defended myself against [B's] physical contact. After being bumped by [B] I stepped backwards and tripped over a bag that had been lying on the ground. [B] fell with me and landed on top of me. It was this action that caused my injury.
>
> During this whole process I have remained on task by continuing to carry the bag that I was moving to another location, as part of my general assignment to set up ranger tents and organize equipment and supplies. At no point did I abandon the bag….

> Furthermore, I was still dressed in full work attire including my fire line boots.

With reference to the suggestion that the worker had previously been spoken to regarding horseplay, the worker further explained:

> Although horseplay was a topic of discussion in two general staff meetings, it was a very vague comment and was never reiterated by my direct supervisor. Furthermore, I have never caused problems in the past, and have never been directly spoken to about horseplay.

By decision dated December 13, 2006, the review officer confirmed the August 23, 2006 decision, finding that the worker's participation in horseplay involved a substantial deviation from the course of her employment. The review officer reasoned:

> I consider the worker's actions to be a substantial deviation from the course of her employment. The worker has consistently stated that she instigated the horseplay by joking around with [B]. While she states in her submission that she only initiated the verbal joking, I find from her earlier statements that she was also a willing participant in the "playful punching" and physical "bumping" that eventually led to her injury. The worker and [B] were playing around, bumping each other when the worker tripped over a bag, fracturing her left leg. I find the statements that the worker made earlier in the claim a better reflection of her actions than those she made with her submission.
>
> The policy provides an example where a worker walks over to a co-worker to engage in a friendly word and accompanies this with a playful job in the ribs. This is considered a trivial incident and an insubstantial deviation. However, I find that the worker's actions were more than an insubstantial deviation. The worker was joking around with [B], which included light punching and bumping each other. I find these actions to be more of a deviation than illustrated by the example.
>
> I also find it persuasive that the worker admits she has been cautioned about engaging in horseplay. I am mindful that horseplay was discussed only in general terms in a two meetings. However, the worker is aware that horseplay is not tolerated and by engaging in horseplay, she would be breaking a rule of the employer's.
>
> [reproduced as written]

The worker's representative submits that the worker's actions did not involve a substantial deviation from the course of her employment as she was in the process of setting up tents and organizing equipment and supplies when she was injured. He argues that making "some light jokes" while working did not involve a substantial

deviation. The employer's representative notes that the worker admitted being aware she should not be participating in horseplay, and that she had been the instigator of the horseplay, as well as an active participant. She points out that "on two separate occasions during a staff meeting it was discussed that horseplay was not to take place." The employer submits that the decision to deny the worker's claim was correct.

**Law and Policy**

Section 5(3) of the Act provides:

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

This provision only applies where the injury arose out of and in the course of the worker's employment. If the worker's participation in horseplay was such as to involve an abandonment of the employment, a claim for compensation may be denied even where the injury results in death or serious or permanent disablement.

At the time of the worker's injury on July 31, 2006, policy at RSCM II item #16.20 provided:

> **#16.20 Horseplay**
>
> A worker who is injured through participation in horseplay is not for that reason alone denied compensation. The conduct of the worker which caused the injury must be examined to determine whether it constituted a substantial deviation from the course of the employment. An insubstantial deviation does not prevent an injury from being held to have arisen in the course of employment.
>
> No definite rules can be laid down as to what constitutes a substantial deviation. One factor to be considered is the degree of participation of the worker. For instance, a worker who instigates or provokes horseplay, or who has been involved in previous episodes of horseplay, will more likely be considered to have made a substantial deviation than one who simply reacts to actions commenced or provoked by someone else.

> The duration and seriousness of a worker's horseplay is also of relevance in considering whether there has been a substantial deviation from the course of employment. For example, if a worker walks over to a co-employee to engage in a friendly word, and accompanies this with a playful jab in the ribs, this is a trivial incident which would probably be considered an insubstantial deviation. As Larson notes,
>
> > "At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitate the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horseplay enterprise." (3)
>
> When this abandonment is sufficiently complete and extensive, it must be considered a substantial deviation from the course of employment. It is also relevant to consider whether the "horseplay" involved the dropping of active duties calling for the worker's attention as distinguished from the mere killing of time while the worker had nothing to do. The duration and seriousness of a deviation from the course of employment which will be called substantial will be somewhat smaller when the deviation necessitates the dropping of active duties than when it does not.

This policy contains a reference (Footnote 3) to Professor A. Larson's *Law of Workmen's Compensation,* 1972, Vol. 1, para. 23. 61. In this decision, I have also referred to the analysis currently provided in Larson's *Workers' Compensation Law*, Lexus Nexus Mathew Bender Online (Larson). To the extent the policy at RSCM item #16.20 is based on the principles and analysis contained in Larson, it may be useful to review those materials in more detail to better appreciate their meaning or effect.

**Reasons and Findings**

The worker's injury occurred in a forestry camp set up for the purpose of fighting forest fires. Tents were set up for the workers in this camp. Policy at RSCM II item #19.00 concerns the "Use of Facilities Provided by the Employer." In circumstances where a worker must reside on the employer's premises, or in some facility supplied by the employer, the scope of the employment relationship is broadened.

The forestry camp may be viewed as similar to a bunkhouse. Policy at RSCM II item #19.10 concerns bunkhouses. This provides that the use of residential premises by a worker is considered as part of the employment where the worker is required to use those premises by the employer, where there is no reasonable alternative accommodation, or their use is encouraged or contemplated by the employer. The policy provides that in the case of an isolated camp, workers' compensation coverage extends to injuries arising from both residential and recreational facilities. However, an

injury occurring on the premises of the employer will not be compensable if it results from the introduction to the premises of a hazard by the worker (such as where the worker accidentally shoots himself or herself with the worker's own shotgun).

Even if the forestry camp is not viewed as being part of the employer's premises, I would view the worker as a travelling employee within the meaning of policy at RSCM II item #18.40. Policy at RSCM II item #18.41 explains:

> The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:
>
> > "Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." (5)
>
> This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

The worker's injury occurred at 10:30 p.m., and the details of her normal working hours have not been provided. It is apparent from the policies concerning bunkhouses and travelling employees, however, that workers' compensation coverage would apply whether or not the worker was engaged in active employment duties (subject to consideration of the policy concerning horseplay).

I would note, at the outset, that analysis of the worker's participation in horseplay is not concerned with "fault." In *Pasiechnyk v. Saskatchewan* (W.C.B.), [1997] 2 S.C.R. 890, 149 D.L.R. (4th) 577, [1997] 8 W.W.R. 517, the Supreme Court of Canada reviewed the "history and purpose" of workers' compensation legislation and cited a decision which identified the four fundamental principles on which this system was based:

> 27 Montgomery J. also commented on the purposes of workers compensation in Medwid v. Ontario (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that **the scheme is based on four fundamental principles:**
>
> **(a) compensation paid to injured workers without regard to fault** ;
>
> (b) injured workers should enjoy security of payment;

> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.
>
> I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. **The principle of no-fault recovery assists the goal of speedy compensation by reducing the number [of] issues that must be adjudicated**.…
>
> [emphasis added]

An analogy may be drawn between the tests for a distinct departure on a personal errand, and for a substantial deviation from the course of employment. Neither is concerned with fault, *per se*. The essential question is whether there is sufficient basis for concluding that the worker was no longer engaged in his or her employment at the time of injury. At §23.07[1], Larson states (in connection with the example cited in policy concerning the prankster):

> When this abandonment is sufficiently complete and extensive, it can only be treated the same as abandonment of the employment for any other personal purpose, such as an extended personal errand or an intentional four hour nap.

Larson states, at Volume 2, chapter 23, that:

> Injury to a non-participating victim of horseplay is compensable. As to instigators or participants, some states permit recovery if such activity has become customary. When an instigator is involved, the question is primarily one of course of employment rather than "arising-out-of-employment,"' **and thus minor acts of horseplay do not automatically constitute departures from employment**.
>
> [emphasis added]



Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Under the heading "Insubstantial Deviations for Horseplay" at §23.07[3], Larson further explains:

> We next come to the class of cases in which there is some slight deviation from the straight and narrow path of the employment, but one which is so trivial in extent and duration that it can be said to resemble the deviations that are disregarded as insubstantial in the cases on traveling, seeking personal comfort, running personal errands and the like.
>
> Such a "deviation" was that of a ditch-digger who, while waiting for a co-employee to loosen dirt for him to shovel, snatched a rule from another employee and was injured when the latter tried to grab it back. Compensation was awarded on the ground that the employee had not, by so doing, stepped aside from his employment, especially since at that instant there was no active work for him to do.
>
> A similar result was reached as to a claimant who, pausing for a cigarette while cleaning the wheels of a truck with gasoline, offered one to a co-employee, and while holding a match for him, teasingly drew the match away so that the other had to follow it. There ensued a friendly scuffle, during which the match fell and ignited spilled gasoline. The theory of the award was that the true cause of the injury was not the horseplay but the falling of the match. This rationale seems a little strained. It might have been better merely to characterize the trifling horseplay incident as too insubstantial to be called an abandonment of the employment.
>
> **That is exactly what a Florida court did in the case of a firefighter/paramedic who was injured when he and another paramedic began "wrestling around" outside the fire station during a shift change. The entire incident lasted for only a few minutes. The JCC denied compensation, finding that the claimant had been involved in noncompensable horseplay. The appellate court reversed, holding that the claimant was involved in only a momentary deviation from his work duties which would not bar his ability to recover**.
>
> ...
>
> However, in the later *Ognibene* case, although the New York Court of Appeals had an opportunity to put its stamp of approval on the "substantial deviation"' test as applied to horseplay, it did not do so. It was left for the dissent to call attention to this possibility. This was the case in which a stockroom clerk threw a small piece of rubber tubing at a stenographer, and then ducked so that she would not see him. In so doing

he hit his nose on the handle of a hand-truck and sustained rather serious injuries. The incident was undoubtedly all a matter of two or three seconds out of the day's work, but the majority reversed the award, leaving open only the possibility, discussed in Ch. 23, §23.05[1], … of demonstrating a custom of engaging in this kind of horseplay. Judge Desmond dissented, with this comment:

> **To say that this claimant, by this trifling act of foolery, stepped completely out of his role of workman and because an aggressor in an encounter during which he was hurt, would be to magnify unfairly what was a most insignificant antic.**

More recently, the New York Appellate Division has stressed the brevity of the "deviation" in awarding compensation in an air hose case which began when the decedent harmlessly directed a stream of air at a co-worker's stomach. The court said:

> It is entirely reasonable and natural that workers will indulge in momentary diversion to play a prank. When it is accomplished on the employer's premises, with a tempting instrumentality furnished by the employer and readily available, it becomes a risk of the employment and part and parcel of the employment.

…

The substantial character of a horseplay deviation should not be judged by the seriousness of its consequences in the light of hindsight, but by the extent of the work-departure in itself….

This type of analysis is particularly important when the claimant's act, standing alone, would have been clearly insubstantial, but led to trouble because of more substantial acts then undertaken by a co-employee…..

…

In each of these cases denying compensation the majority opinion is silent on the question of the extent or seriousness of the horseplay deviation. One gets the impression that horseplay, however trivial or

> innocent, is regarded with such revulsion by the courts that the most infinitesimal trace of it will be deemed sufficient to transport any employee immediately and decisively outside the boundaries of his employment. The foolish prank which is over in a fraction of second--the loud bang, the thrown object, the turned-off faucet--has been here used to deny compensation in blindness and death cases, although the interruption of or interference with the service was virtually zero. **It is submitted that Judge Desmond's appraisal of such incidents as "insignificant antics," not to be magnified into a constructive abandonment of the employment, is the only interpretation of the Act which is consistent with the law of insubstantial deviations in other fields.**
>
> [emphasis added, footnotes deleted]

The dissent by Judge Desmond was provided in the case of *Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85, 80 N.E. 2d 749 (1948), noted 34 Corn. L.Q. 462 (1949). Judge Desmond reasoned:

> I cannot agree that the inconsequential, sportive act of claimant, in tossing the piece of rubber, was such a complete deviation from his employment that he is barred from receiving workmen's compensation even though he was on an errand for his employer at the time, was in the employer's place of business and received his injuries from a piece of equipment belonging to his employer.… To say that this claimant, by this trifling act of foolery, stepped completely out of his role of workman and became an aggressor in an encounter during which he was hurt, would be to magnify unfairly what was a most insignificant antic.

Other passages in Larson are revealing in their acknowledgment of certain aspects of human behaviour. At §23.07[5], Larson discusses the effect of a lull in work:

> If the primary test in horseplay cases is deviation from the employment, the question whether the horseplay involved the dropping of active duties calling for the claimant's attention as distinguished from the mere killing of time while the claimant had nothing to do assumes considerable importance. There are two reasons for this: first, if there were no duties to be performed, there were none to be abandoned; and second, it is common knowledge, embodied in more than one old saw, that idleness breeds mischief, so that if idleness is a fixture of the employment, its handmaiden mischief is also.
>
> Most cases now give considerable weight to this factor in dealing with participants in horseplay. They recognized that workers whose jobs call for vigorous physical activity cannot be expected, during idle periods, to sit with folded hands in an attitude of contemplation. They must do

> something, and the most natural thing in the world to do is to joke, scuffle, spar, and play with the equipment and apparatus of the plant.
>
> [footnotes deleted]

At §23.07[6], Larson further identifies “curiosity” as a feature of human behaviour:

> Closely similar in principle to participation in horseplay is deviation from the claimant's immediate employment path to satisfy his or her personal curiosity. The modern decisions tend to support the suggestion urged in this subsection that if the deviation be trifling and momentary it should be disregarded like any other insubstantial deviation. Along with all the other frailties of the average person--carelessness, prankishness, a tobacco habit, a cola habit, the inclination to rest once in a while and chat with one's neighbor--there must also be expected one more: the natural human proclivity for sticking one's head in mysterious openings, putting one's fingers in front of fan blades, and pulling wires and pins on strange mechanical objects that one finds.

Two cases decided in the British Columbia context provide examples of situations involving a substantial deviation from employment. One such example is provided by *Decision No. 194*, “Re Horseplay”, 2 WCR 309 (retired from policy effective February 24, 2004). The worker in that case was employed as a concrete mixer-truck driver. *Decision No. 194* states:

> On the day of the injury there were frequent interruptions in the flow of concrete. This was due either to deficiencies in the pump-truck or to delays caused by the carpenters working on the site. During these interruptions the claimant engaged in conversation with the pump-truck driver and "horsed around" with him. On one such occasion the claimant attempted to grab some food from the pump-truck driver's lunch box, but moved into the roadway when the pump-truck driver appeared to be reaching for the water hose on the claimant's truck. The claimant apparently feared that the pump-truck operator was going to spray him in retaliation, but this did not occur. The claimant was struck by a car travelling west, his view of which was blocked by another mixer-truck of his employer parked behind the pump-truck....
>
> Although the time period involved was quite small, it is felt that the conduct of the claimant which resulted in his injury was sufficient to constitute an abandonment of his employment.... In no way could "horsing" around with the pump-truck operator be considered part of his employment.

One of the factors cited as relevant to that decision was that "the claimant had a previous history of misconduct on the job for which he had been twice suspended by his employer." As well, the worker in *Decision No. 194* had engaged in "horsing around" on several occasions on the day in question (due to "frequent interruptions" in the flow of concrete).

In another case, compensation was denied where a worker hid another worker's lunch bucket and was then killed when he was run over by a forklift while chasing the other worker and attempting to climb onto the moving forklift. A petition for judicial review was dismissed by the British Columbia Supreme Court in the case of *Bridge v. BC (WCB),* [1985] B.C.J. No. 1505, 14 Admin. L.R. 321, 33 A.C.W.S. (2d) 87.

It is evident from policy at RSCM II item #16.20 that there is no clear guiding line as to what distinguishes an insubstantial deviation from a substantial deviation. It is similarly evident from the court decisions cited in Larson that it can be difficult to draw the line between a substantial and an insubstantial deviation from employment. The use of the phrase "at the other extreme" indicates that the examples provided in policy may be viewed as illustrations from two ends of a spectrum. The fact that a particular situation involves conduct which involves somewhat more extensive participation in horseplay than the example of a worker walking over to a co-worker to engage in a friendly word, accompanying this with a playful jab in the ribs, does not automatically mean that the situation should be viewed as a substantial deviation. Rather, all the circumstances must be considered, with a view to determining whether the situation is closer to one end of the spectrum or the other.

Policy provides that no definite rules can be laid down as to what constitutes a substantial deviation. One factor to be considered is the degree of participation of the worker. A worker who instigates or provokes horseplay, or who has been involved in previous episodes of horseplay, will more likely be considered to have made a substantial deviation than one who simply reacts to actions commenced or provoked by someone else.

With respect to the facts of this case, I agree with the reasoning of the review officer in finding that the worker was a willing participant in the "playful punching" and physical "bumping" that eventually led to her injury. I accept the description provided by the worker on her initial application for compensation as accurately representing the background facts. This factor lends some support to a finding of a substantial deviation.

On the other hand, no evidence has been provided regarding any previous episodes of horseplay involving the worker. In particular, the worker had not been cautioned on any previous occasion as a result of her participation in horseplay. I accept the worker's evidence that the two previous workplace discussions regarding horseplay occurred in the context of staff meetings in which instruction was being provided to all the staff present. These discussions were not held in relation to any prior conduct by the worker in this case. This was not a case where the worker had previously been cautioned by the employer as a result of her participation in horseplay. This factor tends to support a finding of an insubstantial deviation.

Policy provides that the duration and seriousness of a worker's horseplay is also of relevance in considering whether there has been a substantial deviation from the course of employment. The policy identifies the situation of a worker walking over to a co-worker (presumably dropping active productive employment duties, even if only momentarily), and physically jabbing another worker in the ribs, as being at the opposite end of the spectrum from a situation involving a substantial deviation.

I find that the worker's involvement in horseplay was of brief duration. While the worker's participation in light punching and pushing with her co-worker was somewhat more extensive than the example provided in policy of a worker jabbing another worker in the ribs, I do not consider that this involved a complete and extensive abandonment of her employment. Rather, this appears to have been a diversion of a relatively short duration during the performance of her work duties.

While the case is in a grey area, I consider that the worker's actions were not greatly dissimilar from the example provided in policy as to what would constitute an insubstantial deviation (the situation of a worker walking over to a co-employee to engage in a friendly word, and accompanying this with a playful jab in the ribs). That example would similarly appear to require a brief interruption in productive work activity, and the engagement in some "playful" interaction with a co-worker unrelated to the work being performed. As well, the circumstances of this case are similar to those in the case cited by Larson concerning a Florida firefighter/paramedic, who was injured when he and another paramedic began "wrestling around" outside the fire station during a shift change. In that case, the entire incident lasted for only a few minutes, and the worker was found to have been involved in only a momentary deviation from his work duties, which did not amount to a substantial deviation.

Upon consideration of the foregoing, I find that the worker's participation in horseplay involved only an insubstantial deviation. There was no abandonment by the worker of her employment which was "sufficiently complete and extensive" as to amount to a substantial deviation from the course of employment. I find that her injury on July 31, 2006 arose out of and in the course of her employment. The worker's appeal is allowed.

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 make no order regarding expenses.

**Conclusion**

I vary the Review Division decision. I find that the worker's involvement in horseplay involved an insubstantial deviation from her employment. Accordingly, I find that the worker's injury on July 31, 2006 arose out of and in the course of her employment.

Herb Morton
Vice Chair

HM/gw