

WCAT Decision Number : WCAT-2009-02013
WCAT Decision Date: July 30, 2009
Panel: Randy Lane, Vice Chair
Hélène Beauchesne, Vice Chair
Michael Redmond, Vice Chair

Introduction

- [1] The worker has appealed to the Workers' Compensation Appeal Tribunal (WCAT) from the July 2, 2008 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer confirmed a January 4, 2008 Board decision that the worker's August 14, 2007 injury did not arise out of and in the course of his employment as a motorcycle salesman. On that date the worker was rendered paraplegic as a result of a single-vehicle motorcycle accident which occurred in the evening.
- [2] An oral hearing was held on April 8, 2009. A number of witnesses gave affirmed evidence, including the worker, the worker's father, a former co-worker of the worker (Mr. C), the worker's former sales manager (Mr. D), the owner of the dealership which employed the worker (Mr. E), and a former service manager of that dealership (Mr. F). Those are not their real initials. Other witnesses also testified.
- [3] The worker's representative filed an April 15, 2009 written submission to which the employer's representative provided a May 20, 2009 response. The worker's representative provided a June 3, 2009 rebuttal submission.

Issue(s)

- [4] At issue is whether the worker's August 14, 2007 injury arose out of and in the course of his employment.

Jurisdiction

- [5] 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 *Workers Compensation Act* (Act)). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act. Section 250 of the Act provides at subsection (2) that WCAT must make its decision on the merits and justice

of the case, and provides at subsection (4) that WCAT must resolve the issue in a manner that favours the worker where evidence supporting different findings is evenly weighted.

- [6] This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

- [7] In his September 14, 2007 application for compensation the worker indicated that he was involved in a motorcycle accident at 9:00 p.m. on August 14, 2007.
- [8] A copy of the crew report filed by paramedics noted that they attended the accident scene. The mechanism of injury noted in the report involved the worker riding a dirt motorcycle along a road when he crashed into a ditch. In a section concerning diagnostic and additional comments, the report noted the worker had consumed "2 beer & one 'joint'" earlier that evening.

The worker's first interview

- [9] In her October 25, 2007 claim log entry, the case manager documented information supplied by the worker during an October 17, 2007 telephone conversation.
- [10] The worker had been an employee of his employer about 3.5 months prior to his injury. He had been a motorcycle salesman for various employers for about the previous 12 years.
- [11] The worker indicated the motorcycle he was riding at the time of the accident was owned by the dealership where he worked. It had very low mileage on it, and he had been instructed to run the mileage up to about 1,000 kilometres so it could undergo its initial servicing. It was going to be entered or used in some type of motorcycle event the following weekend, and it needed servicing prior to that event.
- [12] On the afternoon of August 14, 2007, the worker left the dealership on the motorcycle and met up with Mr. I, a sales representative who worked for another dealership.
- [13] The worker and Mr. I rode to a lake located close to where his accident occurred. He and Mr. I were looking for trails and interesting rides to take prospective buyers on the following weekend during the event. The worker was riding off-road for much of the time.

- [14] When it neared dusk the worker and Mr. I decided to turn around and head back. The case manager noted she did not ask the worker where he was heading (to his home or to the dealership to return the motorcycle). The worker described the circumstances of his accident.
- [15] No other vehicles were involved in the accident. The worker was driving at approximately 50 to 60 kilometres per hour at the time of the accident, the roads were dry, and it was near dusk. The case manager noted she did not ask the worker if there were any alcohol or drugs involved.
- [16] The worker stated his employer, Mr. E, who was the new owner of the dealership, was aware of him taking the motorcycle out on the afternoon of August 14, 2007, and Mr. E was agreeable to the plan of putting some miles on the motorcycle so as to “break it in”. The worker had done this before at other shops he has worked at, and he understood it to be a common practice at all dealerships, including his employer at the time of his accident.
- [17] The worker felt his injuries were work-related. When asked why he delayed applying for compensation, the worker stated he knew not long after his injury that Mr. E and several of his co-workers were aware of his injury as early as the following day. Given the state he was in, he did not formally report to his employer as he knew his employer was aware. Given all he was going through at that time, making a formal report to his employer did not seem necessary.
- [18] The worker stated Mr. C, the other salesperson in the dealership, had also been asked at some point to put some miles on this same motorcycle. Mr. D was the sales manager who was in place at the time of his injury. The case manager believed the worker stated that Mr. D was the one who instructed the worker to put some miles on the motorcycle on August 14, 2007. A finance manager was aware of the direction the worker had been given about riding the motorcycle and putting some miles on it prior to servicing. No direction was given to the worker about where to ride the motorcycle or how to ride it, so he felt he was acting appropriately when he took the motorcycle off-road.

Mr. E's first interview

- [19] In a second October 25, 2007 claim log entry the case manager documented information gathered from Mr. E during an October 24, 2007 telephone conversation. Mr. E purchased the dealership and took possession on June 1, 2007.
- [20] Mr. E advised that he hired Mr. F as a new service manager. As part of Mr. F's compensation package, he was given the use of a brand new motorcycle. According to Mr. E, it was that motorcycle the worker was riding at the time of his injury. Mr. E stated frequently car and motorcycle salespeople and service representatives are given the

temporary use of a vehicle, but it is typically a demonstrator vehicle and very rarely is anyone ever given a brand new vehicle to use. However, Mr. E indicated that, to some extent, the promise of the motorcycle enabled him to lure Mr. F to come to work for him. Mr. F started at the dealership the day of the worker's injury.

- [21] Mr. E stated he was out of town on business from August 11 until the morning of August 14, 2007. He confirmed that the following weekend (August 18 and 19, 2007) there was a motorcycle rally taking place in the Interior; Mr. F needed to put a few miles on his new motorcycle so it was "broken in" prior to the event. The case manager believed that Mr. E stated the intent was to put enough miles on the motorcycle for it to undergo its first servicing prior to the event.
- [22] Mr. E stated that Mr. F would have been expected to put the miles on this motorcycle. Under no circumstances would the worker have been asked to take this duty on.
- [23] To demonstrate his point, Mr. E advised that a few weeks earlier a journalist had approached the dealership in connection with writing an article on energy-efficient transportation. As part of the article, the journalist wanted some pictures of someone riding a scooter, and the worker was selected. Apparently, the worker thought the picture would be more impressive if he was doing a "wheelie", so he was seen ramming the scooter into a curb in an attempt to do a wheelie. He apparently did this several times, and Mr. E saw the worker from a distance and was quite appalled to see someone mistreating the scooter in this manner. Mr. E asked, after the fact, who had been riding the scooter and he was advised it was the worker. When he approached the worker about it, the worker admitted it had been him.
- [24] Mr. E stated Mr. D, the former sales manager and the worker's direct supervisor, spoke to the worker about this incident; Mr. D banned the worker from riding any motorcycle for a period of three weeks. It would have been very bad for sales if a potential customer had seen any staff member abusing a motorcycle in that way.
- [25] The worker was therefore banned from riding for about three weeks in early July 2007. Mr. E stated that, given this incident, there was absolutely no way the worker would have been asked to ride Mr. F's new motorcycle only a few weeks later. Mr. E was aware at that time that the worker had the potential to abuse motorcycles.
- [26] Mr. E stated that when he reported for his first day of work on August 14, 2007 Mr. F became aware that someone had been riding the new motorcycle that was on loan exclusively to him. Mr. E stated that, when he offered the use of the motorcycle to Mr. F as part of his compensation package, he made it clear to Mr. F that no one else was to ever ride this motorcycle, and Mr. F was in agreement with this.

- [27] Mr. E stated that given this, Mr. F was a bit perturbed to find that the brand new motorcycle he was given had already been driven, and it was learned after the worker's accident the worker had also taken this motorcycle out to ride on the weekend preceding his accident (August 11 and 12, 2007) when Mr. E was out of town. Mr. E was not sure how the worker obtained the keys or how he went about taking the motorcycle, and Mr. E only learned of this when he returned to work on August 14, 2007. Mr. E had been made aware of the fact, and either the worker or Mr. I took some digital pictures of the worker riding the brand new motorcycle in a very rough way on rough, off-road terrain. Mr. E stated that, when breaking in a new vehicle of any type, one never rides it roughly, and no one would ever be expected to take a brand new vehicle off-road. Mr. E stated, if anything, staff take motorcycles for short rides on roads close to the dealership.
- [28] Mr. E became involved in other work duties and did not have a chance to speak to the worker about him having taken the motorcycle and ridden it roughly the previous weekend. Later in the day, when he had an opportunity to do so, he went to find the worker and learned the worker had once again taken the motorcycle at some point in the late afternoon and was gone for the day. Mr. E stated he was not sure how the worker obtained the keys or where the keys were being kept and how or why the worker had them.
- [29] Mr. E stated that anyone who takes a vehicle for a test drive to put miles on it generally drives it within a relatively close distance to the dealership. At no time is anyone encouraged to take a vehicle as far away as the worker was from the dealership when his accident occurred.
- [30] Mr. E stated when the worker did not show up for work the next day, August 15, 2007, a few people started asking about him. Mr. E received word at about noon on August 15, 2007 that the worker had been in an accident.
- [31] Mr. E stated that Mr. D was aware the worker had taken the motorcycle to ride the previous weekend. Mr. E was not sure if Mr. D told the worker not to ride the motorcycle, as apparently Mr. E and Mr. D had some issues and did not see eye to eye on the business. Shortly after the worker's injury, Mr. D took two weeks' vacation, returned to work for a short period of time following his vacation, and then quit work.
- [32] Mr. E stated that, as a result of Mr. D quitting and of him not knowing where Mr. D subsequently went to work, they had not had an opportunity to discuss the worker's accident. Mr. E was not sure what Mr. D's practices were about having salespeople ride motorcycles prior to Mr. E buying the dealership. Mr. E stated several times that it was virtually unheard of that anyone would ever take a brand new motorcycle and ride it. Even as the owner of the dealership, new motorcycles were not available for Mr. E's use and the loaning of a new motorcycle to Mr. F was definitely unusual; it was a "one off deal" to lure Mr. F to accept the service manager position.

- [33] Mr. E stated that, shortly after the worker's injury, Mr. D came to him and said he would not lie for anyone and that despite what might be said he definitely did not tell the worker to take the motorcycle in question nor did he ask or instruct the worker to put miles on that particular motorcycle.
- [34] Mr. E stated he was not aware that the worker was intending to file a workers' compensation claim until approximately September 4, 2007. He told the worker he did not see how it was a work-related matter. The next day the worker's father called him and asked Mr. E if he would work with the worker to put in a claim, and again Mr. E stated he said "no" as it did not appear to be work-related, in his opinion. The worker's father was upset but did not argue the point. The case manager referred the file to a Board field investigator who conducted interviews of the worker and Messrs. C, E, and I. He also interviewed Mr. T, a former accountant at the dealership. The WCAT panel later obtained compact-disc copies of the audiotapes of the interviews and produced transcripts of the interviews, which were provided to the parties.

Mr. C's interview by the field investigator – October 30, 2007

- [35] Mr. C indicated "we" were told to ride and break in the motorcycle so that Mr. F could take the motorcycle to an upcoming event and show off the motorcycle. He indicated "we" were instructed by Mr. E to take the motorcycle, put 1,000 kilometres on it, and break it in. It would then be serviced.
- [36] When asked to describe the circumstances, Mr. C indicated that he, the worker, Mr. D, and "everyone" said it was a bad idea to take a new motorcycle and put kilometres on it. Mr. E and Mr. F wanted to have the motorcycle "up there", and it was their decision. It was a Tuesday morning or Tuesday evening that Mr. E told Mr. C that "we" should take the motorcycle out. Mr. C drove the motorcycle to various locations that evening and then rode into work the next morning. He did not like riding that motorcycle, and the worker took it next. The worker rode the motorcycle for the majority of the first week that he had it.
- [37] Mr. C indicated that he rode the motorcycle either the end of July 2007 or the very first part of August 2007. He thought it was actually July 31, 2007 that he had the motorcycle, and then had it until August 1, 2007. The worker would then have had the motorcycle for Thursday, Friday, Saturday, and Sunday because he took some clients out. The worker was breaking in the motorcycle and took some people for a ride. The worker rode the motorcycle some more. He did not think the worker rode the motorcycle on August 11 and 12, 2007. He knew that the worker took the motorcycle home on Tuesday (August 14, 2007) and then did not show up in the morning.

- [38] Mr. C indicated that generally they did not want to take a new motorcycle out unless it was going to be broken in for someone and used as a demonstrator. He found out later that Mr. F was probably going to receive that motorcycle as his personal demonstrator vehicle.
- [39] Mr. C indicated that on the day he was taking the motorcycle home Mr. F was just starting there, getting the feel of the place before he started. Mr. C and the worker stated they were taking the motorcycle home and breaking it in for the weekend. Mr. F declared that was a good idea. Mr. F knew about their activities with the motorcycle. Mr. D did not find out about the worker taking the motorcycle because he was off for some reason on the Tuesday. When Mr. D came to work Wednesday morning, he asked where the motorcycle was and was advised by Mr. C that Mr. E wanted the motorcycle broken in, and therefore the worker was riding it.
- [40] Mr. C identified the circumstances under which he first spoke to Mr. E about breaking in the motorcycle. While in Mr. E's office, Mr. E declared that the motorcycle was going to be at the event, and therefore some miles should be put on it so it could be broken in and the first service performed. Mr. C asked Mr. E whether he was sure, and Mr. E confirmed he was. Mr. C called the worker over and advised him that Mr. E wanted them to break in the motorcycle, and that Mr. C was going to ride the motorcycle first.
- [41] Mr. C confirmed that he rode the motorcycle that night and indicated that Mr. E was out of town for a conference on August 4 and 5, 2007. Before departing, Mr. E told them to take the motorcycle out. It was made very clear that they would break in the motorcycle and get it ready for servicing. Mr. C indicated he told the worker of the plan while standing in front of Mr. E at Mr. E's desk the same day that Mr. C had had spoken to Mr. E. Mr. C thought that the conversations occurred on July 31, 2007, two weeks before the worker's accident.
- [42] Mr. C indicated that the motorcycle in question was a street legal dirt motorcycle. It was a new model, and only three had been sold in British Columbia. It was 53 horsepower, and was not fast like a sport motorcycle.
- [43] Mr. C observed that if they took motorcycles home, they usually took home a used motorcycle. They could kiss their jobs goodbye if they took a brand new motorcycle off the floor without permission.
- [44] Mr. C declared that when he left the dealership Mr. E "flat out denied" that he told Mr. C and the worker to ride the motorcycle. Mr. E basically said they took the motorcycle without permission. Mr. C had an argument on his last day of work and asked Mr. E not to ever accuse him of taking a motorcycle without permission.

[45] Mr. C declared that anyone who knew the worker and Mr. C would know they would not take motorcycles without permission. They had been told to take a brand new motorcycle. Mr. C queried why the motorcycle had been ridden for two weeks if they were not supposed to take the motorcycle. Mr. E should have stopped them after the first night if that was the case. Mr. C returned to his disagreement with Mr. E in which he reiterated he did not appreciate being accused of taking the motorcycle, and Mr. E indicated he never told the worker and Mr. C to take the motorcycle. Mr. C replied that Mr. E told them to take the motorcycle. He indicated that most of the people in the showroom heard the disagreement.

The worker's interview with the field investigator – November 1, 2007

[46] The worker initially said he worked until about 6:00 p.m., but very quickly clarified that he left work after 6:00 p.m. on August 14, 2007. He headed out to a lake with the intent of finding trails to take clients out on the following weekend. He met up with Mr. I on a street in Vancouver. They found some logging roads that would be suitable for clients. They turned around at about 9:00 p.m. The worker indicated that he was travelling somewhere between 50 and 70 kilometres an hour when he suffered his accident.

[47] The worker described the background that led to his operating the motorcycle. He indicated that the motorcycle was brand new, and Mr. C had the motorcycle a couple of nights before him and had put some kilometres on it. The worker, who did not work on Mondays, returned to work on Tuesday and had been advised by Mr. C that Mr. E indicated the motorcycle should be ridden. It was necessary to put some kilometres on it because it would be taken to an event the following weekend.

[48] The worker indicated that he rode the motorcycle a couple of days before "that." He ended up taking some clients with him and obtained a number of pictures with a number of clients. He indicated he gave the pictures to Mr. E and told him about the ride. Mr. E was very excited and asked the worker for copies of the pictures. The worker produced a compact disc that day and gave it to Mr. E, so Mr. E knew the worker was on the motorcycle. The worker indicated that the following Wednesday was when he injured himself.

[49] The worker said he had first ridden the motorcycle beginning on the Tuesday the week prior to the accident. He took some clients out on the weekend, and then he ended up having the accident on the following Wednesday. However, he then agreed with an assertion by the field investigator that August 3, 2007 would have been the first time he rode the motorcycle.

[50] The worker confirmed that Mr. E spoke directly to the worker about riding the motorcycle. Employees talked about the motorcycle, and Mr. E was part of the conversation on many occasions when they were speaking about the motorcycle and riding the motorcycle.

- [51] Later in the interview, the worker indicated that he and Mr. I were not joyriding. They were finding spots that were suitable for beginner riders. The worker indicated he had been instructed to put miles on the motorcycle and break it in. Performing both activities at once would involve killing “two birds with one stone.” He was putting kilometres on the motorcycle via riding it to and from work.
- [52] It was put to the worker by the field investigator that Mr. E disagreed with the proposition that he may have allowed the worker to use the motorcycle. The worker contended that Mr. E was not a “good guy” and that was why he could not “find employees.” He could not explain why Mr. E would say that the worker essentially stole the motorcycle. He asserted that Mr. E knew he was riding the motorcycle and gave him permission to ride it.
- [53] When asked why the Board should believe him, as opposed to Mr. E, the worker indicated he never told a lie in connection with his accident. He had nothing to hide. He did what he was asked to do with the motorcycle. He put kilometres on it and showed it to different people to create some “buzz”. He queried why Mr. E had not called the police if the worker had stolen the motorcycle. He had been riding the motorcycle for a week, a week and a bit, and a week and two days. It was not as if Mr. E had been absent from the dealership for a week during the period of time that he was riding the motorcycle. They had held meetings and talked about the worker riding the motorcycle. The worker had showed pictures to Mr. E and did not understand why Mr. E said the worker was not allowed to ride the motorcycle or that he did not know the worker was riding the motorcycle.

Mr. T's interview by the field investigator – November 5, 2007

- [54] Mr. T stated that, following receipt of the news of the worker's injury, Mr. E stated that the worker had taken a motorcycle off the lot to break in and put kilometres on it. Mr. T declared that about a day or two later Mr. E's story changed; Mr. E stated he never gave the worker permission to take the motorcycle.
- [55] Mr. T confirmed he was not present during any discussion between Mr. E and the sales staff about taking the motorcycle off the lot. The only time he knew that permission had been given was when the news of the worker's injury was received. Mr. E declared he gave permission to the worker to take the motorcycle off the lot and they were going to get in trouble. Mr. T confirmed with Mr. E that he gave permission to the worker and that the worker did not steal the motorcycle.
- [56] Mr. T indicated that the main reason he quit was when Mr. E's story started to change. Mr. E stated to him that he gave the worker permission to put 250 kilometres on the motorcycle; two days later, the story changed.

Mr. E's interview by the field investigator – November 6, 2007

- [57] At the outset of the interview Mr. E indicated there was no way he could have hired Mr. F at the salary that he deserved. As part of the arrangement, Mr. F was to receive a motorcycle that would also be used as a demonstrator vehicle for customers. Essentially, it would be Mr. F's motorcycle, and he would be driving it back and forth to work. He would take the motorcycle around and improve sales in that area. This was a unique arrangement. No one before had a demonstrator motorcycle; this was the first time a manager would have a demonstrator motorcycle. He was going to come into work on Tuesday, break in the motorcycle (which meant putting 1,000 kilometres on it in the appropriate manner), get the first servicing done, and then take the motorcycle to the event to increase sales.
- [58] Mr. E indicated that he left for a conference on "Sunday" then came back on Tuesday in the early afternoon, between noon and 2:00 p.m. At that time, Mr. F complained that his motorcycle had been ridden by one of the salesmen. That was not the arrangement. He was not very happy about that. Mr. E promised Mr. F he would speak to the worker and tell him that it was Mr. F's demonstrator motorcycle. It was not supposed to be ridden for general purposes by anybody other than Mr. F, unless a customer specifically wanted to demonstrate it for the purpose of buying it.
- [59] Mr. E had made it clear to Mr. D that the motorcycle was Mr. F's motorcycle, and it was not supposed to be ridden by anyone else. Mr. E was very surprised to find out that the worker had taken the motorcycle and had ridden it on the weekend. At the end of the day, he went to the worker to tell him not to take the motorcycle, but the worker had already left and taken the motorcycle. He again mentioned to Mr. D that it was Mr. F's motorcycle and no one should be riding it.
- [60] Mr. E had made arrangements with Mr. F regarding the motorcycle three weeks to a month ahead of time. Mr. F started work the same day as the worker's accident. Mr. F was to break in the motorcycle and take it to the event the following weekend. It was expected that between August 14, 2007 and the event commencing on August 18, 2007 Mr. F would put on 1,000 kilometres and have the motorcycle serviced.
- [61] When asked if he was aware that the motorcycle may have been used the "previous weekend", Mr. E was "virtually positive" the motorcycle had not been used in that manner. He was present that weekend and did not see anyone take the motorcycle which was sitting right there. (It is obvious that Mr. E thought that the reference to the previous weekend was a reference to August 4 and 5, 2007, rather than to August 11 and 12, 2007 which was indeed the weekend previous to August 14, 2007.)
- [62] Mr. E declared that no one was allowed to take a brand new motorcycle. Even he could not ride a new motorcycle. It was unknown to him that anyone would take a brand new motorcycle. He dismissed the possibility that he had authorized Mr. C to use the

motorcycle and break it in. The arrangement was with Mr. F. To his knowledge Mr. C did not use the motorcycle. He certainly did not tell Mr. C to take the motorcycle and break it in. Mr. F told Mr. E that he wanted to break in his own motorcycle. Mr. E queried why anyone would want someone else to break in a brand new vehicle. After the decision had been made that Mr. F would break in his own motorcycle, Mr. E communicated that decision to Mr. D. That discussion would have taken place probably a “week before.” Mr. E declared he never instructed anyone to take the motorcycle.

- [63] Mr. E asserted that Mr. C was a very disgruntled employee, and he was not surprised that Mr. C would say something. Mr. D quit with no notice. Mr. E asserted that Mr. D stated he had been asked to say that he told the worker to take the motorcycle. Mr. D declared that he would not lie for anybody. Mr. E asserted that the logic of him asking the worker to take the motorcycle was a bit “bizarre.” The worker had been banned from riding about two to three weeks before the accident because of his dangerous driving.
- [64] Mr. E was asked if he had reported to the police that an employee had stolen a motorcycle. He had not. He noted that one does not call the police over a management issue with an employee.
- [65] When he was asked whether he believed that the day of the accident was the first time that the motorcycle had been used, Mr. E indicated that apparently the motorcycle had been used on the weekend. He had some pictures of the motorcycle that the worker gave to him. The pictures indicated that the worker was riding the motorcycle “off-road” which Mr. E did not consider was a method to be used to break in a motorcycle. Mr. E was questioned as to whether he believed it was possible that the motorcycle had been used the previous weekend as well. Mr. E indicated he would never say it was not possible, but he considered that the motorcycle remained at the dealership that weekend. He closed the dealership at the end of each day.
- [66] Mr. E reiterated that the worker’s father had asked whether he would assist in putting through a claim by the worker with the Board. Mr. E advised the worker’s father that the accident was not work-related. He referred to the time of day of the accident and the location. People who test-drive motorcycles travel a loop around the block. They do not travel with a salesman and certainly do not travel as far as the location where the worker was injured. In response to the description of a scenario involving the worker breaking in the motorcycle for a manager, Mr. E declared that the worker had just gotten into trouble and had been suspended from driving. He queried why he would pick the worker as someone to break in a motorcycle. That did not make sense.

Mr. I’s interview by the field investigator – November 19, 2007

- [67] Mr. I confirmed that he and the worker were good friends. They performed “customer rides” because purchasers of motorcycles wanted to go riding but might not have

friends to ride with. They had performed a customer ride on the weekend before the accident. He met the worker at the worker's home before heading out on the ride on the day of the worker's accident. They filled up the motorcycles at a gas station, grabbed a couple of drinks and a chocolate bar, and continued on their way. He and the worker looked for locations suitable for a group of riders. He described the circumstances of the accident. The worker had been travelling between 65 and 80 kilometres an hour at the time of the accident.

The case manager's decision

[68] In her January 4, 2008 decision the case manager reviewed information gathered by her from the worker and Mr. E. She referred to information gathered by the field investigator. The case manager cited subsection 5(1) of the Act and item #14.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II); the latter lists several criteria for considering whether an injury should be classified as one having arisen out of and in the course of employment. She also referred to item #20.20 of the RSCM II regarding recreational, exercise or sports activities.

[69] The case manager determined that, at the time he was injured, the worker had completed his workday, had returned home, and had met up with a friend to participate in a recreational activity which did not form part of his work activities. While his employer may have owned the motorcycle and may or may not have authorized the worker to use that particular motorcycle, she found such circumstances to be essentially irrelevant, as he had not met the vast majority of the criteria outlined in item #14.00 of the RSCM II. She could not conclude that the worker's injury arose out of and in the course of his employment.

Review Division proceedings

[70] The worker requested a review of the January 4, 2008 decision.

[71] The worker's representative provided an April 10, 2008 submission which was accompanied by typed statements from the worker, the worker's father, Mr. C, Mr. D, and Mr. T. As well, the submission was accompanied by a typed statement from Ms. A, a former business manager of the dealership.

- Mr. C's written statement

[72] Of note, Mr. C reiterated that Mr. E indicated to him that the motorcycle needed to be broken in and serviced before Mr. F took it to the event. Mr. C asked Mr. E whether he wanted to use a brand new motorcycle, and Mr. E indicated the dealership would be able to sell the motorcycle if it was seen at the event. Mr. C called the worker over and advised the worker that Mr. E wanted them to break in the motorcycle. Mr. C rode the motorcycle, and then turned it over to the worker who took customers on a ride on the

weekend. Mr. E saw and knew that Mr. C and the worker were using the motorcycle. Mr. C and Mr. D agreed they did not like the fact that they were devaluing the motorcycle, but Mr. E insisted so that Mr. F could take the motorcycle to the event.

- Mr. D's written statement

[73] Mr. D declared that the motorcycle was prepared, ready for sale, and had about 20 kilometres on it as of the morning of August 9, 2007. He left work early in the afternoon of August 9, 2007, sick with the flu, and did not return to work until the morning of August 11, 2007. His first knowledge of the motorcycle being used for any purpose other than it being new and waiting to be sold occurred on Saturday, August 11, 2007, when he noted the motorcycle was not on the dealership floor. He asked Mr. C where the motorcycle was, and Mr. C advised that Mr. E had decided to send the motorcycle to the upcoming event and wanted it to be broken in, so that it could be used for demonstration purposes and test rides. Mr. C stated he had used the motorcycle on the evening of August 9, 2007 and the worker had used it on the evening of August 10, 2007.

[74] Mr. D declared that, prior to his departure from work on August 9, 2007, no discussion regarding the use of the motorcycle for the event took place to his knowledge. Any discussion regarding the use of the motorcycle for that event or for any other purpose occurred after he left the building on August 9, 2007. He stated with certainty that permission for the use of the motorcycle would only have come from either Mr. E or himself. At no time did Mr. D give anyone permission to use this motorcycle. He firmly believed that neither Mr. C nor the worker would have taken a brand new motorcycle without express permission.

[75] Mr. D declared that after his arrival at work on August 11, 2007, and discussion of the use of the motorcycle with Mr. C, the worker arrived at work on the motorcycle and parked it outside. There was no secret that the motorcycle was being used; everybody in the building knew it was to be broken in for the event. Mr. E, Mr. C, the worker, and Mr. D had regular interactions throughout the day and, at no time, did Mr. D hear any negative comments regarding the use of the motorcycle from Mr. E or anyone else.

[76] Mr. D declared that the worker rode the motorcycle home on the evening of August 11, 2007, used it on Sunday and Monday, and rode it to work on Tuesday, August 14, 2007. The worker rode off after 6:00 p.m. on August 14, 2007. At no time did Mr. E say anything to Mr. D about the worker using the motorcycle. Mr. D indicated he was the sales manager; protocol would have dictated that he or Mr. E discipline the sales staff if the use of the motorcycle was inappropriate, that is, if Mr. E had not wanted either the motorcycle broken in or had not wanted the worker to ride it. Mr. E had numerous opportunities to stop the worker directly or indirectly through Mr. D.

- [77] Mr. D indicated that breaking in a motorcycle such as the one operated by the worker entailed running the motorcycle for about 1,000 kilometres and constantly varying the throttle speed. If the motorcycle was to go out on demonstration purposes to the event, it would have been standard operating procedure to put on the first 1,000 kilometres and then perform a first service before putting it in the hands of potential customers. That way the motorcycle would perform better and last longer; potential customers could operate the motorcycle harder without doing damage to it.
- The worker's first written statement
- [78] The worker declared that on August 11, 2007 he was instructed by Mr. E and Mr. C to use the motorcycle and break it in for an upcoming event. In order for the motorcycle to be ready for the event, it needed to have 1,000 kilometres put on it. Mr. C had the motorcycle the night before the worker had it. On "Saturday" he left directly from work on the motorcycle. On Sunday, August 12, 2007, he met with three customers and Mr. I and went on a ride. He took many pictures that day to show to Mr. E what he was intending to do for many of his customers in the future to sell more motorcycles.
- [79] The worker indicated he went into work on Tuesday, August 14, 2007 where he met with Mr. E and showed him pictures of the previous weekend ride. Mr. E was upbeat and excited, and in no way tried to reprimand him. Mr. E did not express any negative comments, and in fact he told the worker that he had performed a good job. Mr. E asked if the worker would burn him a copy of the pictures, which he did.
- [80] The worker indicated that on August 14, 2007 he was to meet Mr. I on Marine Drive in Vancouver to put on the last remaining kilometres and scope out new trails for future clients. He waited for Mr. I, who did not show up. The worker continued to his home, where Mr. I was waiting. The worker then recounted the circumstances of the accident. He did not remember telling the ambulance attendant that he had consumed two beers and smoked a joint. He had no idea where that statement would have come from; no drugs or alcohol were consumed that day.
- [81] The worker indicated that three weeks prior to his accident he had been suspended from riding for two weeks owing to his abuse of a scooter. The suspension ended one week before his accident.
- [82] The employer's representative provided a May 29, 2008 submission which was accompanied by typed statements from Mr. E and Mr. F. The submission was also accompanied by typed statements from Ms. B. (a secretary/accessories assistant), Ms. E (the human resources manager for the dealership), Mr. J (a service technician/service centre manager at the dealership), and Mr. K, a salesman/sales manager (who succeeded Mr. D).

- Mr. E's written statement

- [83] In his statement Mr. E reiterated that the motorcycle was to be a personal motorcycle for Mr. F, and it had been negotiated as part of Mr. F's compensation package. He had discussed with Mr. F the benefit of his taking this motorcycle to the upcoming event to show to potential customers. Mr. E agreed to Mr. F's request that, if it was to be part of his compensation package, the motorcycle would not be generally ridden by others, and it would be under his direct control. When he advised Mr. D that Mr. F would be provided with the motorcycle as his personal demonstrator vehicle, it was Mr. E's impression that Mr. D was unhappy with this decision as it would remove a potential sales commission from the sales team.
- [84] Mr. E declared that he informed Mr. D of his view that having Mr. F ride the motorcycle to the event would provide the dealership with good exposure. They discussed whether it was necessary to put some kilometres on the motorcycle. Mr. E telephoned Mr. F and asked him if he wanted someone to break in the motorcycle before he commenced employment. Mr. F was emphatic that he wanted to break in the motorcycle himself, to ensure it was done properly. Mr. F was confident he would be able to put enough kilometres on the motorcycle so that the first service could be completed prior to the event which was to take place the following weekend. Mr. E advised Mr. D that Mr. F wanted to break in his own motorcycle, and that no one else should ride it.
- [85] Mr. E understood that the motorcycle was still in the dealership showroom on the afternoon of August 11, 2007 when he left work to attend an out-of-town event. Upon his return at about 3:00 p.m. on August 14, 2007, Mr. F expressed his displeasure with the fact the worker had taken his motorcycle out on the previous weekend. Mr. F felt that his motorcycle had been driven very roughly and had not been broken in correctly. Mr. E asked Mr. D what was going on, and Mr. D advised Mr. E that he had not given anyone permission to ride the motorcycle.
- [86] Mr. E indicated that, as he was a new owner, he would take some time to consider his options prior to dealing with the situation. As he was going upstairs to his office, the worker came up to him and handed him a compact disc containing pictures and videos and stated that he had a great time. Mr. E felt too frustrated to speak at that point, and simply took the compact disc and put it in his drawer. He did not look at it until long after he had heard that the worker had been in an accident. He had no idea why the worker gave the compact disc to him.
- [87] Mr. E went downstairs to the sales floor just before 6:00 p.m. on August 14, 2007 to tell the worker not take the motorcycle out again. He found that the worker had already left work on the motorcycle. He approached Mr. D and inquired what was going on; Mr. D again told Mr. E he had not given permission to anyone to ride the motorcycle.

- [88] Mr. E declared that was completely illogical for the worker to believe he was authorized to take the motorcycle out that evening to further break it in. As Mr. F had started his employment on August 14, 2007, it should have been obvious to the worker that Mr. F would have wanted to ride the motorcycle himself prior to the event scheduled for the upcoming weekend. Mr. E never asked the worker to break in the motorcycle or any other new motorcycle. Mr. E had recently banned the worker from riding company motorcycles for three weeks. Due to the worker's unsafe and abusive practices on the scooter, he would never request that the worker break in a brand new motorcycle worth approximately \$11,000, let alone one that Mr. F had explicitly requested to break in himself. It was inconceivable that Mr. F would have authorized that, as he also witnessed the worker's operation of the scooter.
- [89] Mr. E declared that breaking in a motorcycle correctly is extremely important to its long-term mechanical health. A motorcycle should be gently ridden during a break-in period. That method of breaking it in was inconsistent with intense off-road riding, such as that performed by the worker. He reiterated that he was not aware of anyone riding the motorcycle until he returned to work on the afternoon of August 14, 2007.
- [90] Mr. E addressed other statements filed by the worker's representative. In particular, he contested Mr. D's assertion that he had numerous opportunities to stop the worker from riding the motorcycle. Further, he told Mr. D long before August 9, 2007 that Mr. F was joining the dealership as the new service manager and that the motorcycle was to be his personal demonstrator motorcycle. He refuted the assertion that everyone knew the worker was riding the motorcycle on the weekend. He did not see the worker arrive for work on August 11, 2007.
- Mr. F's written statement
- [91] In his statement Mr. F indicated that during the week of August 9, 2007 he met with Mr. E to confirm the details of his forthcoming employment as a service manager. Part of the agreement was that he would have the benefit of a company-owned motorcycle for his own use. It seemed beneficial to the two of them for Mr. F to have the motorcycle for his own use and at the same time get it out there for people to see in action. There was an upcoming event which he was already scheduled to attend.
- [92] Prior to the end of that week, Mr. E called Mr. F to ascertain whether he needed the motorcycle to have a few miles put on it prior to his starting work on August 14, 2007. Mr. F declined the offer, in favour of putting miles on himself. Mr. F arrived during the late morning of August 11, 2007. He was welcomed by salesmen who explained it was best for them to put some miles on the motorcycle over the weekend, so that it was "run in" by the following weekend for him to take to the event. Mr. F was a bit surprised, bearing in mind his previous conversation with Mr. E. As the "new guy" who was unfamiliar with how things worked, he kept his confusion to himself. He was actually

quite annoyed and somewhat insulted that someone of his known experience would need someone else to break in his motorcycle. He kept that to himself, pending Mr. E's return.

[93] On the morning of August 14, 2007 Mr. F was busy sorting out his new employment. He was surprised and annoyed that pictures of his motorcycle were being shown around by various members of the staff after it had been operated over the weekend. He ascertained that the worker and his friends had been out in the back country with various motorcycles. He wondered what state his motorcycle was going to be in by the time he got it. He felt he was in no position to comment or express his dismay at what he saw in the pictures and decided not to say anything until Mr. E returned. On his return, Mr. E was very clearly upset that the motorcycle had been used. Mr. F believed that Mr. E addressed this matter with Mr. D and with the worker. Unfortunately, the worker had already left.

[94] The worker's representative provided a June 17, 2008 submission which was accompanied by additional typed statements from the worker and his father.

- The worker's second written statement

[95] The worker commented that, while Mr. F claimed he was upset about the worker breaking in the motorcycle, at no time did Mr. F physically or verbally tell him not to do what he had been requested to do. Mr. F's position as a manager gave him authority to forbid the worker from doing what he had been told by others to do.

[96] The worker asserted that Mr. E knew he was riding a motorcycle. At no time did Mr. E indicate verbally or through body language that he was displeased that the worker had the motorcycle to break it in. On the day of the accident, he and Mr. E sat at Mr. E's desk at which he showed Mr. E the pictures and video contained on the compact disc. Mr. E never indicated he did not want the worker riding the motorcycle.

The review officer's decision

[97] In her July 2, 2008 decision the review officer summarized the history of the claim. She determined that the preponderance of evidence established that the worker was injured during a recreational motorcycle ride, an activity undertaken outside of his employment and for his own benefit. She noted submissions with respect to item #16.00 of the RSCM II regarding unauthorized activities. She indicated she could not conclude with certainty that the worker was "unauthorized" to use the motorcycle in question. She considered that policy provided that the issue of authorization was not determinative. She declared she did not find it necessary to make a finding as to whether the worker was authorized to use the motorcycle. Instead, she relied on the factors identified in items #14.00 and #20.20 of the RSCM II.

- [98] The review officer acknowledged the support provided by co-workers and friends to the worker; however, she gave little weight to those statements. Similarly, she gave little weight to statements provided by the employer's representative in support of the employer's position. She preferred the evidence provided by the worker and Mr. E during the initial telephone conversations with the case manager, along with the clarification of facts set out in the field investigator's report. The telephone conversations and the field investigator's investigation were conducted closer in time to the motorcycle accident. The telephone log entries and the field investigator's report were more likely to contain an accurate reflection of events in question than the subsequent statements attached to the submissions of the two representatives.
- [99] The review officer cited subsection 5(1) of the Act and items #14.00, #20.00, #20.20, and #97.00 of the RSCM II. In the course of her review of item #14.00 she commented it was not disputed that the worker's accident occurred while he was riding a motorcycle owned by the employer. The injury did not occur on the employer's premises and did not occur during his regular work hours. The accident occurred at a considerable distance from the dealership, and there was no evidence that the worker received compensation for riding a motorcycle after his regular working hours. He was not being supervised by the employer at the time of the accident and was riding with Mr. I, a friend who worked at a competing dealership.
- [100] She considered that, apart from the worker's belief, the evidence did not establish it was a job requirement for salespersons at the worker's dealership to scout off-road trails. The worker may have previously taken customers on an off-road ride, which the worker felt was related to his employment and which activity he believed was condoned by his employer. While having customers present tended to provide stronger evidence of an employment relationship, there were no customers in attendance on the day in question. She was unable to conclude that the worker's injury occurred in the process of doing something for the benefit of the employer.
- [101] She reiterated that it was not necessary to determine whether the worker had authority to ride the motorcycle in question. There was no evidence that the worker received specific instructions from the employer to take the motorcycle in question to the particular off-road location. She accepted the evidence of Mr. E that when he attempted to speak to the worker on August 14, 2007 the worker had left for the day with a motorcycle. She also relied on the worker's own evidence when speaking to the case manager that he had been given no direction as to where to ride the motorcycle or how to ride it.

[102] The review officer provided the following analysis in support of her conclusion that the worker's activities were personal decisions not captured by the language of section 5 of the Act:

Having considered the factors set out in policy item #14.00, I find that the worker's activities on August 14, 2007 were undertaken outside of his employment and for his own benefit. The worker and his friend decided to ride their motorcycles after work in an off-road area in another town a considerable distance from the employer's premises. They chose when to stop for food and breaks and for how long to ride. It was their own decision to complete their ride at dusk, after which the accident occurred. There is no evidence that the employer had control over any of the worker's decisions on the night in question, including with whom he chose to ride, the location (town), the particular off-road routes, how the motorcycle was to be driven (off-road or on-road), the length of the ride, or even the motorcycle the worker chose to ride.

I find that those decisions were personal decisions made by the worker and his friend in the course of a recreational activity. To find otherwise, in my opinion, would be stretching the meaning of "arising out of and in the course of the employment" beyond that which was intended by section 5 of the *Act* and policy item #14.00.

[103] The review officer indicated that she did not consider that the language of item #20.20 of the RSCM II favoured coverage. In particular, she noted that policy indicates coverage is not provided if a worker is injured while engaged in personal activities unrelated to the instruction of "pupils." She observed that the worker did not have any customers with him on the August 14, 2007 ride. She provided the following further analysis in support of her conclusion that item #20.20 did not favour coverage:

Also, as discussed above, there is no evidence that a clear direction was provided by the employer for the worker to engage in an off-road ride that evening to scout trails. There is conflicting evidence as to whether the worker had been instructed to put mileage on that motorcycle. Even if I were to accept the worker's position that he had implied authority to put mileage on the motorcycle to "break it in", I find that implied authority is insufficient to establish a clear direction. The recreational activity occurred outside of the worker's regular working hours and there is no evidence that his salary was expected to cover such an activity or that he would receive other compensation. The worker was not supervised. His activity did not involve any public relations for the benefit of the employer. Further, the policy provides that coverage is normally not extended to recreational activities occurring off the employer's premises.

WCAT proceedings

- [104] As part of these proceedings, the panel initially assigned to this appeal obtained the audiotapes of interviews performed by the field investigator and a compact disc of photographs and video depicting the worker's operation of the motorcycle. The panel also obtained a copy of materials gathered by the Royal Canadian Mounted Police. It held a January 8, 2009 teleconference and later distributed transcripts of the interviews conducted by the field investigator.
- [105] Owing to medical reasons, the initial presiding member of the panel was replaced.
- [106] The employer's representative provided an extract from a service manual and a picture of the motorcycle. He also provided a further statement from Mr. J.
- [107] The panel heard extensive testimony from many witnesses. The relevance of that evidence will be dealt with further in this decision.

Reasons and Findings

- [108] While the above recitation of the evidence does not purport to be exhaustive, even a casual reader of that recitation will realize there are many disparities and incongruities in the evidence. Numerous questions associated with that recitation include the following:
- When did Mr. C first ride the motorcycle? Was it as early as July 31, 2007 or as late as August 9, 2007?
 - Yet, if Mr. E's trip actually commenced August 11, 2007 (as per Mr. E's advice to the case manager) or Sunday, August 12, 2007 (as per his advice to the field investigator) could any instruction given by Mr. E to Mr. C have occurred on August 9 or 10, 2007 rather than much earlier?
 - If the motorcycle was ridden as early as late July or early August 2007, why would Mr. D's statement submitted to the Review Division indicate it only had 20 kilometres on it as of August 9, 2007?
 - When did the worker first ride the motorcycle? Was it as early as August 2, 2007 or as late as August 11, 2007?
 - What were the circumstances under which the worker learned of the instruction that the motorcycle was to be ridden? Did he learn the same day as Mr. C learned? Did Mr. C offer the worker the initial opportunity to ride the motorcycle or had Mr. C already ridden the motorcycle before the worker learned of the instruction?

- Why would someone who had been suspended from riding vehicles owing to abuse of a scooter be instructed to break in an \$11,000 motorcycle?
- When did Mr. E learn of the worker's riding of the motorcycle? Was it as late as August 12, 2007, as early as August 11, 2007 or even as early as July 31, 2007?
- If the worker had not been instructed to ride the motorcycle, why would he take a brand new motorcycle and risk punishment?
- If the worker had not been instructed to ride the motorcycle, why would he give Mr. E a compact disc containing pictures documenting his use of the motorcycle?
- On August 14, 2007 was Mr. E shown photographs which depicted the worker riding the motorcycle or did he not see the actual photographs until sometime quite later?
- Was Mr. D ever told that the motorcycle was not to be used by anyone other than Mr. F?
- If Mr. D had been given such instruction by Mr. E regarding the use of the motorcycle, why would he not accost the worker immediately upon the worker's arrival at work on August 11, 2007 and instruct him not to operate the motorcycle any further?
- On August 14, 2007 did Mr. E speak to Mr. D about the worker's use of the motorcycle?
- Upon his return to the dealership on August 14, 2007, and upon learning of the worker's use of the motorcycle, did Mr. E have any opportunity to speak to the worker about the matter?
- Why would Mr. E and Mr. F, when apprised of the worker's use of the motorcycle, not immediately instruct the worker to stop riding it, especially if either or both of them was frustrated, surprised, annoyed, or worried about the worker's operation of motorcycles generally or the fate of this particular motorcycle as ridden off-road by the worker? Is Mr. E's waiting so long before he sought out the worker to speak to him consistent with his asserted reaction to the news of the worker's use of the motorcycle?

[109] While the above matters are of interest, it is not critical that we address all of the disparities and inconsistencies. Seeking to resolve all of them would distract us from focusing on the critical issues in this appeal. A fundamental issue is whether the worker had been instructed to break in the motorcycle.

- [110] We had the benefit of hearing the testimony of the worker, Mr. C, Mr. D, Mr. E, and Mr. F. Ms. E and Mr. K also testified; though they had little evidence that was relevant to the matter before us, save for Mr. K's evidence as to the nature of negotiations between Mr. E and Mr. F. He was physically present when some discussions were conducted.
- [111] At the outset of the oral hearing the panel encouraged the parties to ensure that the witnesses provided direct evidence. The panel was asked to make a number of procedural rulings as to the relevance, admissibility, and weight to be attached to certain evidence.
- [112] In assessing the documentary evidence and the testimony, we have kept in mind the comments of the court in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at page 357 regarding the assessment of interested witnesses:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

- [113] The above observations of our Court of Appeal expressly acknowledge that credibility cannot be gauged solely by whether a particular witness's personal demeanour had a "conviction of truth." Observing a witness giving evidence can certainly support impressions about credibility, but the real test is whether the evidence of the witness is in harmony with the preponderance of probabilities, which a "practical and informed person" would recognize as reasonable in that place and in those circumstances.
- [114] In cases such as the one in front of us not all facts may be directly established by the evidence. We consider it is open to us to draw inferences from the facts established. In that regard, we are aware of the key distinction between inference and speculation. We note the following comments from Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152 (H.L.):

...Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if

they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture

- [115] We had the benefit of hearing the worker testify during examination in chief. He is a poor historian, even with a calendar at hand.
- [116] The worker's evidence was not at all consistent as to when he first rode the motorcycle. At the outset of his testimony, he was clear that he first rode it on Wednesday, August 8, 2007, one day after a discussion with Mr. E and Mr. C. He indicated Mr. C had already ridden the motorcycle, and that was after the discussion with Mr. E and Mr. C at which the worker was present. The worker rode it back to work on August 9, 2007 and did not ride it again until August 11, 2007.
- [117] Yet, later in his testimony his evidence was to the effect he would have ridden the motorcycle on August 5, 2007. He indicated that he reviewed the photographs with Mr. E on August 11, 2007, and the photographs would have been taken on August 5, 2007.
- [118] The worker was not consistent in his evidence to us as to when he would have reviewed the photographs with Mr. E. At one point, he testified that Mr. E returned from an out-of-town trip on August 11, 2007, and it was at that point that the worker gave the compact disc to Mr. E. The worker was asked about his understanding as to when Mr. E went on his trip, and the worker then indicated that Mr. E returned on August 14, 2007, and that it was that day (rather than August 11, 2007) the photographs were reviewed. Even with that later day in mind, he testified that the photographs were taken on August 5, 2007. Two confirmations by him that the photographs had been taken on August 5, 2007 suggest that August 8, 2007 could not have been the first day he operated the motorcycle.
- [119] The worker testified that the dates were "foggy."
- [120] The worker fared poorly in cross-examination. His attention was drawn to his statement to the field investigator that the first day he rode the motorcycle was a Tuesday. He confirmed that was the day of the accident. When he was asked if the first time he rode the motorcycle was Tuesday, August 14, 2007, he responded "no" and advised that the first time he would have ridden the motorcycle was Tuesday, August 7, 2007. He then said August 8, 2007 was the first day because Mr. C had taken the motorcycle home on August 7, 2007.
- [121] The worker testified that the meeting with Mr. E and Mr. C occurred on August 7, 2007. He indicated he was really foggy on the dates. He was referred to his first written

statement to the Review Division which referred to August 11, 2007 as the date when he was instructed to ride the motorcycle. He was asked as to the date that he first rode the motorcycle, and he indicated that it was the Tuesday.

- [122] We observe that that last answer would seem to be an indication that the worker first rode the motorcycle on August 7, 2007.
- [123] The worker was then referred back to his interview with the field investigator, and he confirmed that he first rode the motorcycle the week of August 5, 2007. He was asked why he mentioned August 11, 2007 in his first statement to the Review Division. He was not sure why. He declared that he made a mistake.
- [124] We observe that the absence of an adequate explanation of the reference to August 11, 2007 in his written statement to the Review Division is especially noteworthy. One might expect that a person would carefully reflect on the accuracy of a written statement before signing it and submitting it to a decision-maker.
- [125] The worker was asked about the photographs shown to Mr. E mentioned in the statement to the field investigator. He did not have a date, but he indicated that he sat down with Mr. E and mentioned the day as being Tuesday, Saturday, Sunday, or Tuesday. He then settled on Tuesday, August 14, 2007.
- [126] Mr. C was more consistent as to when the worker first operated the motorcycle. Mr. C confirmed that he rode it in the first week of August 2007; he was aware that he mentioned July 31, 2007 in his interview with the field investigator. He testified that the worker then rode the motorcycle.
- [127] Certainly the testimony of the worker and Mr. C as to when the motorcycle was first operated by either or both of them does not appear to be easily harmonized with that of Mr. D and Mr. E. Mr. D did not consider that the motorcycle had been ridden prior to August 9, 2007, and Mr. E did not consider that it had been ridden prior to August 11, 2007.
- [128] Other than Mr. D's illness from August 9 to 11, 2007, both Mr. D and Mr. E would have been present at the dealership and both of them would have had an interest in the stock of the dealership. Neither of them checked the odometer of the motorcycle or inspected the motorcycle.
- [129] Mr. D was quite clear that he would have known had the motorcycle been ridden to and from the dealership for a week. He thought the motorcycle looked brand new as of August 9, 2007.
- [130] The worker thought that as of August 7 and 8, 2007 Mr. D would have known about the motorcycle being operated. Mr. C addressed Mr. D's belief that the motorcycle was in

pristine condition as of August 9, 2007 and commented that, in the absence of looking closely, one could not tell that a motorcycle had 100 kilometres on it. He considered Mr. E would have seen the motorcycle coming and going, whereas Mr. E was clear that the motorcycle had not moved from its position on the showroom floor prior to August 11, 2007. Mr. C stated that the motorcycle was placed in the showroom every day and was available for sale.

- [131] In considering this matter, we are aware that in the interview with the field investigator, Mr. C said that Mr. E told him to break in the motorcycle shortly before his out-of-town trip and that Mr. D was away that day for some reason. He said he rode it for one day and then the worker rode it and took it that weekend. This was the first statement that the field investigator took. There was no statement from Mr. D until quite a while later when he provided a written statement to the Review Division. If one shifts the dates given by Mr. C forward by one week, Mr. C's advice to the field investigator is consistent with Mr. D's statement that no one had ridden the motorcycle when he left on August 9, 2007 and that when Mr. D returned from his illness on August 11, 2007 the worker drove into the dealership on the motorcycle. This sequence of events likely puts the first day Mr. C rode the motorcycle at August 9 or 10, 2007, with the worker riding it the following day. This statement is also closer in time to the incident, as opposed to the oral hearing evidence. Also, the worker testified that they informed Mr. D they were breaking in the motorcycle when he came back from being off sick a couple of days. We are aware that this sequence might not be consistent with declarations by the worker to the field investigator that he had ridden the motorcycle for at least a week before his accident or evidence that Mr. C's riding commenced on a Tuesday.
- [132] It may be that the motorcycle was not operated prior to August 9, 2007 or even August 11, 2007. However, even the commencement of operation of the motorcycle as late as either of those days, while potentially inconsistent with the evidence of the worker and Mr. C as to the commencement of operation, would not change the outcome of this appeal.
- [133] The above discussion concerns when the motorcycle was first operated. The more critical issue is whether the worker was instructed to operate it. Both Mr. C and the worker were emphatic that Mr. E issued such instructions. Mr. E denied having instructed anyone to operate the motorcycle.
- [134] Mr. D was emphatic that permission could only have come from Mr. E or himself, and he was clear that he had not given permission. The worker and Mr. C would not have taken the motorcycle unless he or Mr. E had given permission. Mr. D was not present at any discussion at which Mr. E directed the worker and Mr. C to operate the motorcycle. As well, he did not have a discussion with Mr. E in which Mr. E advised that he had instructed the worker and Mr. C to operate the motorcycle. Mr. D denied having been told on August 14, 2007 that the motorcycle was for Mr. F's exclusive use.

- [135] Only Mr. E, Mr. C, and the worker have direct evidence as to whether Mr. E instructed Mr. C and the worker to operate the motorcycle. There is a significant issue of credibility raised on this point.
- [136] The employer's representative has focused his submissions on what he considers to be the lack of consistency in the evidence of the worker and Mr. C with respect to the date and month on which they first rode the motorcycle, the number of times they rode motorcycle prior to the accident, the number of kilometres they put on the motorcycle, and who was present when Mr. C was allegedly instructed by Mr. E to put some kilometres on the motorcycle. The employer's representative considers that the worker's testimony as to where he met Mr. I on the day of the accident differs from his previous statement and that provided to the field investigator by Mr. I.
- [137] We are certainly live to concerns with respect to consistency on several points and that there are concerns with the persuasiveness of the evidence. Certainly, the evidence falls far short of establishing proof beyond reasonable doubt that the worker had been instructed to operate the motorcycle. The standard of proof applicable to the case before us is the balance of probabilities, save for instances when evidence is evenly weighted. In such circumstances, the issue must be resolved in a manner that favours the worker.
- [138] We find that the evidence supports a conclusion that the worker was instructed by Mr. E to operate the motorcycle.
- [139] The critical pieces of evidence for us include the fact that both the worker and Mr. C made Mr. F aware on August 11, 2007 that miles would be put on the motorcycle. Such a statement by either or both of them to Mr. F would be strongly inconsistent with advice having previously been given to them that the motorcycle was exclusively for Mr. F's use and that he would be the only one to ride the motorcycle. (It would also be contrary to any understanding that a new motorcycle would not be taken without permission.) Such a statement to Mr. F would be consistent with them having been instructed to operate the motorcycle. If the worker and Mr. C had not had permission to ride the motorcycle, they would likely not have advised Mr. F, who could have taken exception to such advice and directed them not operate the motorcycle. (Further, Mr. D confirmed that on August 11, 2007 everyone in the building knew that the motorcycle was going to be broken in for the event on the upcoming weekend.)
- [140] We appreciate one can argue that such advice having been given to Mr. F on August 11, 2007 is consistent with the motorcycle not having been operated prior to that date. (The employer's representative's submission to WCAT raises this in an oblique fashion.) An announcement that miles were going to be put on the motorcycle on the weekend is not the same as an announcement that miles had already been put on and further miles would be put on during the weekend. However, that interpretation would not be consistent with the evidence of Mr. D. We accept his evidence that, as of

August 11, 2007, it was common knowledge at the dealership that the motorcycle was being broken in. Yet, even if August 11, 2007 was the first day that the motorcycle was being operated by either the worker or Mr. C, a declaration by either or both the worker and Mr. C to Mr. F is still inconsistent with them having been instructed that the motorcycle was for Mr. F's exclusive use.

[141] While we appreciate Mr. F's testimony that he was reluctant to take exception on August 11, 2007, we are struck by the fact he did not make any inquiries, even of a neutral nature, with the worker, Mr. C or Mr. D. It would have been a simple matter for him to have asked whether any instructions had been given with respect to his exclusive use of the motorcycle. One could make such an inquiry without making a scene.

[142] We consider it noteworthy that during his testimony Mr. F indicated he did not recall telling the worker on August 11, 2007 that he was supposed to own the motorcycle. He did not tell the worker that the worker should not be breaking in the motorcycle and that only he should be breaking in the motorcycle. Mr. F indicated he knew the worker or Mr. C was going to be riding the motorcycle. We confirmed with him that he did not recall telling Mr. E that no one else should break in the motorcycle. It was Mr. F's expectation that he would break in the motorcycle. Further, he did not recall Mr. E saying that no one else would be breaking in the motorcycle.

[143] It may be that Mr. F was under the impression that the motorcycle was for his exclusive use and that he did not wish to make a scene on August 11 or 14, 2007 when he learned of the worker's operation of the motorcycle contrary to his understanding. That Mr. F had such an impression might have been based on Mr. E's advice to him or his advice to Mr. E. Yet, that Mr. F may have had such an understanding is not especially determinative of whether the worker and Mr. C had, in fact, been instructed to operate the motorcycle.

[144] On August 14, 2007 employees at the dealership were shown photographs depicting the worker's operation of the motorcycle. Such showing of photographs is certainly consistent with the worker having been instructed to operate the motorcycle. Mr. F was aware of the photographs. He testified he saw the photographs on a computer screen with other people around. He did not ask the worker not to operate the motorcycle pending clarification of the circumstances with Mr. E.

[145] On August 14, 2007 the worker presented Mr. E with a compact disc containing photographs documenting his operation of the motorcycle. Such a presentation would be strongly inconsistent with the worker having been instructed that the motorcycle was exclusively for Mr. F's use; it would be consistent with the worker having been instructed to operate the motorcycle and with the worker being under the impression that Mr. E approved of the worker's use of the motorcycle.

- [146] While we understand Mr. E's testimony to be that on August 14, 2007 he wanted to reflect before taking any steps after having become aware of the worker's operation of the motorcycle, we are struck by the fact that, by the time the worker handed him the compact disc, Mr. E asserts that he had already spoken to both Mr. F. and Mr. D. His interaction with the worker would have been the third interaction regarding the motorcycle in a very short space of time. It may be that he is as truly a calm and reflective manager as he would have us believe, and is not one to take precipitous action; however, it would not have been difficult for him to have simply told the worker not to operate the motorcycle any further.
- [147] Mr. E could have given such direction without having conducted any inquiry as to whether Mr. D had failed to instruct the worker that he was not to operate the motorcycle or whether Mr. D had erroneously instructed the worker that he was to operate the motorcycle. Instruction could have been provided by Mr. E to the worker, in the absence of any investigation.
- [148] Further, we find it noteworthy that Mr. E testified he made no attempt to contact the worker upon ascertaining that the worker had left work on August 14, 2007 on the motorcycle. Mr. E did not testify that the dealership had no contact information for its sales staff. The absence of any effort to contact the worker is consistent with the worker having been instructed to operate the motorcycle. The absence of any effort to contact the worker is inconsistent with the worker having, in fact, been instructed that the motorcycle was for Mr. F's exclusive use or even a belief by Mr. E that the worker had been so instructed. It is even inconsistent with Mr. E having a desire that the worker not operate the motorcycle. The motorcycle was valued at over \$10,000; the owner of the business who did not want his staff to operate a motorcycle of such a value would surely take steps to curtail such operation.
- [149] We are aware of suggestions made prior to the WCAT oral hearing and at the oral hearing that dissatisfaction with the change in ownership of the dealership in June 2007 drove the worker and Mr. C to act out and perform provocatively by operating a brand new motorcycle in the absence of permission or even in contravention of a direction that the motorcycle was for the exclusive use of a manager. Such acting out could be the product of young men who do not care if they are fired because they were planning on quitting and wish to have some fun before their employment ends via firing or resignation.
- [150] Yet, we consider that speculation is not enough to establish such a motive. Further, such speculation would not explain matters satisfactorily. One would still be left with the fact that between the time the worker and Mr. C spoke to Mr. F on August 11, 2007 and the worker left work on August 14, 2007 no one took steps to terminate the worker's operation of the motorcycle. That no steps were taken is consistent with the worker having been instructed to ride the motorcycle.

[151] We are aware that the worker had been suspended from riding for abusing a scooter. Mr. E confirmed that that suspension expired before the August 14, 2007 accident. One might question why a worker who had been suspended for abusing a scooter would be instructed to break in a motorcycle of some value. That suspension does cause us some concern; however, we note that the suspension only concerned the operation of motorcycles. The worker was not suspended from his employment. Thus, while a suspension sounds serious, we consider that we must be careful in attaching too much weight to the occurrence of such a suspension.

[152] Our finding that the worker was instructed to operate the motorcycle does not resolve the matter.

[153] The starting point in the next stage of our analysis is subsection 5(4) of the Act which provides as follows:

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.

[154] The critical words in that subsection are “where the injury is caused by accident.” Thus, there is a critical medical component to that subsection. Only where the evidence establishes that the injury is caused by accident does the presumption apply. The presumption does not assist, in any form, in establishing whether the injury was caused by accident. That point is made in *Appeal Division Decision #99-0149* (15 W.C.R. 291):

...It is important to remember that before the presumption may be applied, a causal relationship between the worker’s injuries and the accident must be established. In establishing this causal relationship, the presumption cannot be relied on. It can be of no assistance to the worker in that regard.

[155] “Accident” is defined in section 1 of the Act as follows: “...includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.”

[156] Item #14.10 of the RSCM II describes a limitation on subsection 5(4) of the Act associated with the meaning of the word “accident”:

Second, the presumption only operates when the injury results from an “accident”. This term is defined in section 1 to include a “. . . wilful and intentional act, not being the act of the worker . . .”, and a “. . . fortuitous

event occasioned by a physical or natural cause”. This is not an exclusive definition of the term, but the word has been interpreted in its normal meaning of a traumatic incident. It has not, for example, been extended to cover injuries resulting from a routine work action or a series of such actions lasting over a period of time. The broad interpretation given to the term “accident” for the purpose of section 4(1) of the *Government Employees Compensation Act* does not apply to section 5(4) of the *B.C. Act*. (1)

[157] We consider that the worker suffered an accident and that his injury was caused by that accident.

[158] The next step is to consider if the injury occurred in the course of employment or if it arose out of employment. If it did, the presumption in subsection 5(4) of the Act would be applicable, and the next step would be to consider if the presumption has been rebutted.

[159] The critical questions still remain. Did the injury occur in the course of employment or arise out of employment? To resolve those matters, it is necessary to consider items #14.00, #20.20 and #21.00 of the RSCM II. The final item concerns the interaction between employment functions and personal lives:

There is a dilemma that is always inherent in workers’ compensation. The difficulty, of course, is that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers’ compensation must be mapped. An incidental intrusion of personal activity into the process of work will not require a claim, otherwise valid, to be denied. ...Conversely, the intrusion of some aspect of work into the personal life of an employee at the moment an injury is suffered will not entitle the employee to compensation. For example, if someone slips in the living room at home and is injured, that person is not entitled to compensation simply on the ground that at the crucial moment the person was reading a book related to work. **In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.**

[emphasis added]

[160] The above policy does not contain explicit direction; however, it does remind decision-makers of the necessity of assessing employment features and personal features.

[161] An illustration of the overlap of employment features and personal features is found in item #20.20 of the RSCM II regarding recreational, exercise or sports activities which commences as follows:

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

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

[162] That item also lists a number of relevant factors to be considered and declares that all relevant factors must be considered, no single factor is determinative, and relevant factors not listed in policy may also be considered. It concludes with the following guidance:

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.

After a consideration of the factors listed in policy items #14.00 and #20.20, the evidence is weighed to determine whether the injury arose out of and in the course of employment. The standard of proof applied is based on a balance of probabilities and consideration is also given to section 99 of the *Act*.

[163] While viewing the worker's operation of the motorcycle as a recreational activity has some appeal, we consider that the case before us is not simply one of an employer advising a worker that it was open to him to use a recreational vehicle if he so chose. This is a case in which a worker was instructed to break in a specific motorcycle. He was asked to perform an activity with the motorcycle. Thus, we do not consider he was engaged in a recreational activity at the time of his injury. We reject the review officer's finding to that effect.

[164] We have had recourse to item #14.00 of the RSCM II which declares as follows:

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

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.

[165] Item #14.00 declares that no single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. It then lists various indicators commonly used for guidance which include the following:

- (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.

[166] Item #14.00 declares that the list is by no means exhaustive. All of them can be considered in making a judgement, but no one of them can be used as an exclusive test.

[167] There would appear to be little dispute as to a conclusion that the evidence does not satisfy the terms of indicators (a), (e), (g), (h), and (j). We find that the injury occurred during the process of doing something for the benefit of the employer; the worker was breaking in a motorcycle for servicing. That breaking in was a course of action taken in response to instructions from the employer. The injury occurred in the course of using equipment or materials supplied by the employer: the motorcycle. Thus, indicators (b), (c), and (d) are satisfied. There is some question as to whether the terms of indicators (f) and (i) are satisfied. It does not appear that the worker's employer had previously asked him to break in a motorcycle outside of regular work hours. Thus, one could argue that the worker's operation of the motorcycle was not part of the normal course of production or his regular job duties. Yet, that a worker had not previously been asked to perform an activity would not mean that an injury sustained during that activity would be non-compensable.

[168] That the worker was injured while operating a motorcycle some distance from the dealership is of note, but it does not pose a significant barrier to the acceptance of his claim. We accept that any riding of motorcycles, other than used motorcycles borrowed to commute to and from work, would normally be done close to the dealership. However, the worker was instructed to put miles on the motorcycle. He could not do so by staying close to the dealership with the motorcycle. There is no suggestion he was instructed to put miles on the motorcycle during regular work hours; thus, he would

have to operate the motorcycle during other hours. In such circumstances, the location of where he was breaking in the motorcycle, and the fact that it was done in the evening, do not point away from compensability.

[169] We find that the evidence supports a conclusion that the worker's injury arose out of his employment. Owing to the terms of subsection 5(4) of the Act, it is presumed to have occurred in the course of his employment. The presumption is not rebutted.

[170] That there may be some dispute as to whether the worker was employing the correct method to break in the motorcycle is of interest. Both the worker and Mr. D did not consider that the worker's activities were inappropriate. Mr. F and Mr. E believed otherwise, as did Mr. J who did not testify but whose opinion was expressed in writing. While the worker's representative was under the impression that the panel excluded Mr. J's evidence from consideration, he is incorrect. The panel ruled that Mr. J's evidence could be the subject of submissions.

[171] In any event, even if the worker's method of operating the motorcycle as depicted in the photographs was not a recognized method of breaking in the motorcycle, he was not injured during the course of that usage. He was injured on a public highway on August 14, 2007. Further, even if he had been engaged in an inappropriate method of breaking in the motorcycle at the time of his injury, there would be little basis to find that the worker's injury did not arise out of and in the course of his employment. Such operation would not amount to any persuasive evidence supporting a conclusion that the worker had not been instructed to break in the motorcycle.

[172] We have also considered evidence as to the worker having consumed beer and smoked a joint. The ambulance report contains this information. The worker denies that he consumed beer and smoked a joint. Neither the worker nor Mr. I confirmed such use during their interviews by the field investigator, despite the field investigator's comments that Mr. I had done so. Notably, the medical records do not support a conclusion that the worker was intoxicated at the time of his injury, let alone that subsection 5(3) of the Act should be applied. There is insufficient evidence to find that his injury was solely due to wilful and serious misconduct. Even if it was due to such conduct, the worker's injury is serious and has resulted in permanent disablement.

[173] After having reviewed the matter, and for the reasons set out above, we allow the worker's appeal. The worker suffered an injury arising out of and in the course of his employment. While he was injured while operating a motorcycle some distance from the dealership, he was operating the motorcycle at the behest of his employer, pursuant to a plan that kilometres be put on the vehicle so that it could undergo servicing. The compensability of his injury is not contingent upon whether he had specific instructions as to where he was to break in the motorcycle or how he was to do so.

Conclusion

- [174] The worker's appeal is allowed. We vary the review officer's July 2, 2008 decision. We find that the worker's August 14, 2007 injury arose out of and in the course of his employment.
- [175] The worker has requested reimbursement in connection with his travel to the oral hearing. He travelled to the hearing from the United States rather than from his usual residence in Alberta. We order reimbursement of his expenses with respect to his travel within British Columbia after he crossed into the province *en route* to the oral hearing. He should submit the specifics of his request for reimbursement to the Board, which will review it in light of applicable policy and practice.
- [176] The panel has previously issued instructions to the Board with respect to any loss of wages sustained by Mr. C and Mr. D. The Board is directed to review with Mr. F whether he lost wages owing to his attendance at the oral hearing and to reimburse him according to applicable law and policy. The panel did not receive requests for reimbursement of any loss of wages by Ms. E or Mr. E. We make no order regarding any lost wages regarding them. Mr. K confirmed he was not employed at the time of the oral hearing.

Randy Lane
Vice Chair

Hélène Beauchesne
Vice Chair

Michael Redmond
Vice Chair

RL/jy