

# When working out doesn't work out

## *Employer liability for workers' fitness-related injuries*

By Andrew Ebejer and Carissa Tanzola

**To promote healthy living and encourage physical fitness, many employers provide on-site fitness facilities, contribute to private gym membership fees or sponsor recreational sport leagues.**

But could an employer be liable if a worker is injured while participating in these fitness initiatives? The answer is yes.

Regardless of whether the activity takes place on or off an employer's premises, an employer can be exposed to several types of liability, including workers' compensation surcharges, disability insurance claims, civil actions and occupational health and safety orders or penalties.

### **Workplace safety and insurance**

In Ontario, for example, an injured worker may be compensated on a "no fault" basis (regardless of who is at fault) if the injury occurs "in the course of employment." In return for this automatic compensation, the worker is precluded from suing the employer in civil courts and collecting short- or long-term disability benefits.

If the province's Workplace Safety and Insurance Board (WSIB) finds a fitness-related injury to be compensable, the related costs will be applied against the employer's WSIB experience rating and could result in a costly surcharge.

In determining whether an injury occurred in the course of employment, the WSIB considers the place, time and nature of the activity. Generally, an injury will be considered to have occurred in the course of employment if the injury occurs:

- at the workplace or at a place where a worker might reasonably be expected to engage in work-related activities
- during work hours or a reasonable period before or after work
- while performing a work-related duty or an activity reasonably related to employment.

The WSIB will consider the customs and practices of the employer (such as whether the employer has supported or sanctioned the activity in the past), as well as:

- the extent to which the employer controls or supervises the activity
- whether the worker is compensated for participating
- the extent to which the employer benefits from the activity (such as improvements to team morale or decreases in absenteeism)
- whether the activity occurred in response to the employer's instructions or encouragement.

The following two decisions of Ontario's Workplace Safety and Insurance Appeals Tribunal (WSIAT) help illustrate how these factors are applied.

In Decision No. 999/94 in 1994, the employer established a fitness centre at its workplace, at "great financial expense," and promoted an exercise program. Participation was strictly voluntary and classes were conducted after working hours with little employer supervision.

While exercising at the centre during non-working hours, an assembly line worker slipped and fractured her wrist. The WSIB determined the injury occurred in the course of employment and awarded her benefits.

At appeal and before the WSIAT, the worker alleged she joined the program after receiving a disciplinary letter for excessive absenteeism. She sought to improve her physical condition and reduce her absences. The WSIAT accepted her argument, finding that participation had become a "condition of her continued employment." The tribunal was also persuaded by the fact the activity was pursued under the employer's advice, on the employer's premises, using the employer's equipment and it was promoted through the employer's corporate policies.

In Decision No. 1052/09 in 2009, a worker suffered a shoulder injury after falling during a soccer game with a group of co-workers in the employer's parking lot. Loss of earnings were initially denied by the WSIB's appeals service division so the worker appealed. Although the injury occurred on the employer's premises within a "reasonable period after work," the denial of loss of earnings was upheld on the basis the game was "(not) a regular or even an occasional practice" and not sanctioned by the employer.

### **Disability insurance and civil actions**

As noted above, where WSIA benefits are not applicable — either because benefits were denied or the worker opted out of coverage (an option available in some circumstances) — a worker may have further options of applying for disability insurance benefits and launching a civil action against the employer.

If a civil action is commenced, the worker will be required to prove the employer was negligent.

### **Health and safety**

Ontario's Occupational Health and Safety Act (OHSA) requires an employer to take every reasonable precaution to ensure the protection of its workers. This includes ensuring equipment

is well-maintained and workers are properly instructed on how to use the equipment and what to do in the event of an accident.

Failure to protect workers can result in orders, significant fines and, in rare cases, imprisonment.

To determine whether a fitness-related activity creates liability under the OHSA, the following questions are considered:

- Does the activity take place at the "workplace"?
- Does the activity take place during working hours?
- Are workers expected and not simply encouraged to participate?
- Are workers paid to participate?
- Is the activity under the employer's care and control (directly or indirectly)?

If the answer to some or all of these questions is yes, fitness-related activities may create liability.

### **Tips for employers**

For some employers, the benefits of a healthy workforce outweigh the risks of a fitness-related injury. To minimize liability, consider the following best practices:

- Develop a health and fitness policy specifying that use of facilities or participation in work-related sporting endeavours is voluntary and for the exclusive benefit and pleasure of workers. Require workers to sign off on the policy.
- Consistent with the notion of "voluntariness," a worker should not be compensated (directly or indirectly) for participation in any fitness endeavour associated with the employer.
- Where worker participation is not voluntary — either because of the bona fide requirements of the job or because the worker is "encouraged" by the employer — consider providing a customized fitness plan incorporating professional instruction and supervision. If a worker chooses not to follow the plan and is injured while pursuing an unauthorized fitness regime, an adjudicator is more likely to find the injury resulted from a personal pursuit outside of the course of employment.

Prior to any fitness-related activity, an employer should ensure it has appropriate liability insurance in place.

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