

DECISION ON APPEAL

The National Hockey League Players' Association (the "NHLPA" or the "Union"), on behalf of Boston Player Shawn Thornton, has appealed from a December 14, 2013 supplementary discipline decision suspending Mr. Thornton for fifteen (15) games. This shall constitute my determination of Mr. Thornton's appeal. For the reasons described herein, I find that the decision suspending Mr. Thornton for fifteen (15) games was supported by clear and convincing evidence.

SUMMARY OF FACTS

In the first period of the December 7, 2013 Regular Season game between the Boston Bruins and the Pittsburgh Penguins (Game # 438), Brooks Orpik (a defenseman with Pittsburgh) delivered a legal body check to Boston forward Loui Eriksson. The check resulted in Eriksson sustaining a concussion and he did not return to play for the remainder of the game.

Later in the first period, Mr. Thornton confronted Mr. Orpik and tried to engage him in a fight. Mr. Orpik declined and skated away and Mr. Thornton was assessed a two minute penalty for roughing.

Again in the first period, a scrum developed in the Pittsburgh zone when both Messrs. Thornton and Orpik were on the ice. While play was stopped, and well after the whistle had been blown, Mr. Thornton skated from an area around the Boston blue line all the way to the Pittsburgh zone to join the scrum. Mr. Thornton deliberately skated around Pittsburgh forward Pascal Dupuis (who was on the perimeter of the scrum) and approached Mr. Orpik from behind. Placing his right arm on Mr. Orpik's left shoulder, Mr. Thornton drove his right leg behind Mr. Orpik's legs and pulled him backwards, causing the latter to fall to the ice. Mr. Thornton then kneeled down over the fallen Mr. Orpik and delivered two punches to Mr. Orpik's face as he lay face-up and defenseless on the ice. Mr. Thornton was quickly pulled off Mr. Orpik by the linesmen and was escorted to the Boston bench area and then to the Boston dressing room. Mr. Thornton was assessed a match penalty and suspension for the balance of that

game. After a lengthy delay, Mr. Orpik was removed from the ice on a stretcher and transported by ambulance to the local hospital, where he was diagnosed with a concussion. As of the date of the appeal hearing, Mr. Orpik had not returned to play and had missed six (6) games (plus the remainder of the December 7 game against Boston).¹

PROCEDURAL HISTORY

On December 13, Brendan Shanahan (Senior Vice President of Player Safety) held an in-person supplementary discipline hearing in New York.² On December 14, Mr. Shanahan announced that Mr. Thornton was suspended for fifteen (15) games for his conduct in the December 7 game that resulted in a match penalty. The Union raised no objections – procedural or otherwise – with the conduct of the disciplinary hearing itself, during which all parties, including Mr. Thornton, were provided a full and fair opportunity to be heard.

By letter to me dated December 16, 2013, the NHLPA gave notice of the Player’s “appeal of the League’s decision to suspend him for fifteen Games, as set out in the League’s notice to the Player on December 14, 2013.” The NHLPA’s letter did not set out the basis for the appeal.

STANDARD OF REVIEW

Section 18.12 of the NHL/NHLPA Collective Bargaining Agreement (the “CBA”) provides for the right to appeal to the Commissioner any decision regarding Supplementary Discipline for On-Ice Conduct. The CBA directs, in connection with any such appeal, that I determine whether the “decision was supported by clear and convincing evidence.”

¹ As of the date of this Decision, Mr. Orpik has still not returned to Pittsburgh’s lineup and has missed an additional two (2) Regular Season games, although barring any setback in his recovery, Club officials expect him to return to the lineup in the relatively near future.

² Mr. Shanahan has served in the role of the NHL’s Senior Vice President of Player Safety since June 2010. Prior to joining the National Hockey League in 2009, Mr. Shanahan played 1,524 games in the League as a Player over a 21-year NHL career. Mr. Shanahan is a 2013 inductee into the Hockey Hall of Fame.

THE DECEMBER 20 HEARING

As set forth in CBA Section 18.12, where, as here, the underlying disciplinary decision results in a suspension of six (6) or more games, and such decision is appealed, I am required to hold an in-person hearing. I held such a hearing on December 20 at the offices of Proskauer Rose LLP. In attendance at the hearing on behalf of Mr. Thornton were Mr. Thornton himself, his agent, Anton Thun, NHLPA representatives Roman Stoykewych, David Sinclair and Maria Dennis, and Boston General Manager Peter Chiarelli. Shawn Thornton, as well as Messrs. Thun and Chiarelli, all were called by the Union to testify at the hearing. Also at the hearing were members of the League office staff, including Bill Daly, David Zimmerman, Julie Grand and Brendan Shanahan, who was called to testify, and Joseph Baumgarten from Proskauer Rose.

The hearing began at approximately 9:30 a.m. and concluded at approximately 2:00 p.m. All parties were given a full and fair opportunity to be heard and there were no objections raised at the hearing. The transcript of the hearing was received at the League office on December 23.

THE PLAYING RULES AT ISSUE

Playing Rule 28 authorizes the Commissioner (or his designee, here, Brendan Shanahan) to assess fines and/or suspensions for any violation of the League's Playing Rules committed during the course of a game, whether or not such offense has been penalized by the Referee. Here, Mr. Thornton was suspended based on a determination that he had violated Playing Rule 46.15, which provides:

46.15 Match Penalty – A match penalty shall be assessed to a player who punches an unsuspecting opponent and causes an injury.

The consequences of a match penalty are set out in Rule 21.1, which provides as follows:

21.1 Match Penalty – A match penalty involves the suspension of a player for the balance of the game and the offender shall be ordered to the dressing room immediately. A match penalty shall be imposed on any player who deliberately attempts to injure or who deliberately injures an opponent in any manner.

THE NHLPA'S CONTENTIONS

At the outset of the hearing before me, the NHLPA stated that the appeal solely concerns the quantum of discipline and that there is no dispute that the Player committed a “quite serious” violation of the Playing Rules that is deserving of a disciplinary penalty. (Tr. 5) Both the Union and the Player acknowledge that Mr. Thornton’s actions were “harmful” and “wrong” and that they resulted in a “significant” injury to Mr. Orpik. (Tr. 5, 112)

When initially asked how long a suspension the incident warranted, the NHLPA said that it was not then prepared to respond, other than to say that it should be less than fifteen (15) games. (Tr. 14-15) Later in the hearing, the Union suggested that a suspension in the range of ten to twelve (10-12) games would be appropriate – as opposed to the fifteen (15) game penalty imposed by Mr. Shanahan. (Tr. 52) The Union advanced three principal arguments in support of its position:

1. Prior to December 7, Mr. Thornton had played in more than 500 NHL games without ever receiving Supplementary Discipline for On-Ice Conduct. Mr. Thornton’s status as a first-time offender distinguishes him from other players recently subject to lengthy suspensions (*e.g.*, Patrick Kaleta and Raffi Torres) and is a mitigating circumstance. (Tr. 5-6)
2. Mr. Shanahan erred in concluding that Mr. Thornton’s actions were premeditated and that they were not part of a “hockey play.” (Tr. 6-7)
3. Other Players who engaged in comparable conduct were given shorter suspensions, and, therefore, Mr. Thornton’s punishment was excessive. (Tr. 9-10)

ANALYSIS

In this case there is no dispute that Mr. Thornton engaged in the conduct described at pages 1-2 above, and no dispute that his conduct was in violation of Rule 46.15 and warranted a match penalty.

Moreover, the NHLPA does not dispute that a lengthy suspension was warranted. The only question raised by this appeal is the appropriate length of the penalty, which the Union contends should be reduced from fifteen (15) games to somewhere in the range of ten-twelve (10-12) games. I find that there is clear and convincing evidence to support Mr. Shanahan's conclusion that a suspension of fifteen (15) games is appropriate.

As always in a case of this nature, the framework for my inquiry involves a review of the factors set forth in Section 18.2 of the CBA for determining the appropriate level of Supplementary Discipline for On-Ice Conduct.

Section 18.2(a) directs that I consider:

[t]he type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.

Here, the evidence is compelling, and not disputed, that the Player's conduct violated League Playing Rules. This certainly includes Rule 46.15 (the rule cited in Mr. Shanahan's decision), but also Rule 52.1, which outlaws slew-footing.³ Just as importantly, and whether or not it was "pre-meditated" and an act of retribution (which, as I explain below, I have concluded that it was), there is no question that the conduct was, improper, intentional and involved the use of excessive and unnecessary force.

In the first period of what was described at the hearing (by Mr. Thornton and Mr. Chiarelli) as a "nasty" and "emotional" game (Tr. 20, 57), a scrum developed at the other end of the ice from where Mr. Thornton was positioned when play was halted (the blue line area of Boston's defensive zone).

³ Rule 52.1 defines slew-footing as "the act of a player using his leg or foot to knock or kick an opponent's feet from under him, or pushes an opponent's upper body backward with an arm or elbow, and at the same time with a forward motion of his leg, knocks or kicks the opponent's feet from under him, causing him to fall violently to the ice." Given the inherent danger of such conduct, Rule 52.2 provides that a Player who is guilty of slew-footing shall be assessed a match penalty. Rule 52.3 reinforces the fact that slew-footing is a basis for imposing Supplementary Discipline for On-Ice Conduct under Rule 28.

Alerted to the scrum by teammates on the bench, Mr. Thornton approached the scrum and skated around Mr. Dupuis in order to get to Mr. Orpik from behind. Mr. Thornton used his right arm and his right foot to pull Mr. Orpik's skates out from under him, causing him to fall backward onto the ice. Once Mr. Orpik was down, Mr. Thornton delivered two punches to Mr. Orpik's face, as the latter's head lay close to or on the ice, before he was pulled off the pile by the on-ice officials. Having been grabbed by his collar from behind, Mr. Orpik never had a chance to fairly confront his opponent, much less an opportunity to defend himself. Mr. Thornton's actions were clearly intentional – they were not accidental – and nobody could suggest otherwise.

Applying the standards set forth in Section 18.2(a), therefore, there is no question that the conduct at issue provides the basis for a lengthy suspension.

Next, Section 18.2(b) directs that I consider whether there was “[i]njury to the opposing Player(s) involved in the incident.” Here, there was a significant injury – a fact openly and appropriately acknowledged by the Players' Association twice during the appeal hearing. (Tr. 10, 112) As indicated above, Mr. Orpik was concussed as a result of Mr. Thornton's actions, had to leave the Boston game in the first period on a stretcher and has missed six (6) subsequent games as of the date of the hearing (and eight (8) games as of the date of this Decision). While it appears from the medical reports that Mr. Orpik has been recovering, as of the date of the appeal hearing, there was still no definitive date for his return to play. His lengthy absence from play, combined with the uncertainty as to his future condition and status, also supports the determination that a lengthy suspension was warranted pursuant to Section 18.2(b).

Next, Section 18.2(c) directs that I consider “[t]he status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new

violation." (Emphasis in original.) Of the four specific factors set out in Section 18.2, this is the only one that can be argued to mitigate the severity of Mr. Thornton's offense. He does not have any prior record of Supplementary Discipline for On-Ice Conduct over his eleven (11) season NHL career. His record for clean play prior to December 7 is excellent and makes it clear that one can play a hard-working, physical brand of hockey while still playing safely and within the rules. Mr. Shanahan specifically acknowledged Mr. Thornton's good reputation and clean record, and testified that he fully factored it into his determination to issue a fifteen (15) game suspension. (Tr. 88) Certainly, Mr. Thornton's record does not constitute the aggravating factor that Section 18.2(c) contemplates.

Next, Section 18.2(d) directs that I consider: "[t]he situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game." Here, it is notable that Mr. Thornton's attack on Mr. Orpik occurred well after the whistle had blown. As Mr. Shanahan indicated in the video explanation of his suspension decision, Mr. Thornton's conduct cannot in any way be considered a "hockey play." Mr. Thornton himself was distant from the scrum and cannot claim that his conduct was motivated by any sense that he himself felt endangered or that he had any reason to believe that a teammate was endangered. To the contrary, after taking three (3) rapid strides towards the scrum, Mr. Thornton actually slowed down and glided the rest of the way down the ice, surveying the scene in order to decide what to do. After crossing the red line and before reaching the Pittsburgh blue line,⁴ he identified the Pittsburgh players (including Mr. Orpik) who were in or around the scrum. (Tr. 38-39) He then bypassed Mr. Dupuis as he approached the scrum in order to get at Mr. Orpik.

While I am prepared to accept Mr. Thornton's testimony that at the time the whistle blew he had no specific intention of targeting Mr. Orpik (and may not have even realized he was on the ice), I believe it is very apparent from the video that given the scrum and his recognition of Mr. Orpik's

⁴ Mr. Thornton testified that he was able to identify the players in the scrum "in between the red and the blue line." (Tr. 38-39)

presence on the ice, Mr. Thornton recognized an opportunity to exact the retribution that was denied him when Mr. Orpik earlier had declined his invitation to fight. He casually skated up behind Mr. Orpik and took him down under circumstances in which the latter “never had a chance” to defend himself. Interestingly (and disturbingly), Mr. Thornton testified at the hearing that he knew exactly what he was doing and that he was in complete control of his emotions. (Tr. 41) In these circumstances, I find that Section 18.2(d) also favors a lengthy suspension.

Finally, I note that Section 18.2(e) also directs me to take into account “[s]uch other factors as may be appropriate in the circumstances.” Here, I find that Mr. Thornton’s unwillingness to acknowledge an obvious motivation (if not the only obvious motivation) for his conduct is an aggravating circumstance. At the hearing conducted by Mr. Shanahan, Mr. Thornton denied that he attempted to target Mr. Orpik, suggesting instead that he merely was looking for the “biggest” player in the scrum. (See Mr. Shanahan’s Testimony Tr. 84) That is not a credible explanation.⁵ Moreover, it is inconsistent with the testimony that Mr. Thornton provided at the December 20 hearing, where he acknowledged that he identified Mr. Orpik before he crossed the Pittsburgh blue line. (Tr. 38-39) Clearly by the time he had identified him, Mr. Thornton was targeting Mr. Orpik and the aggressiveness of his actions (during an otherwise uneventful scrum) has to be viewed in the light of events that had occurred earlier in the same period, namely the check that Mr. Orpik delivered to Mr. Eriksson and Mr. Orpik’s subsequent refusal to fight Mr. Thornton.⁶

⁵ The notion that Mr. Thornton skated around Pascal Dupuis (who is listed at 6’1” in the Pittsburgh roster) simply in order to get at a 6’2” player (Mr. Orpik’s height, as set forth in the roster), without regard for the identify of his victim, is not only inconsistent with the account he gave on December 20, it is simply not credible.

⁶ In this regard, I note Mr. Shanahan’s testimony (with which I concur) that “this was not a dangerous scrum. . . . [T]here were two or three [officials] over there. . . . And it was not an ugly, dangerous-looking scrum. They were having words. And so, again, I’ll take Shawn at his word. When he sees these situations he recognizes them and he understands them. And I think on his way over there he wouldn’t have been fooled or confused to think that now [a teammate] was in trouble.” (Tr. 85)

In these circumstances, I have no trouble concluding that a very lengthy suspension is warranted and that the decision to impose a fifteen (15) game suspension is supported by clear and convincing evidence. In fact, in light of all the circumstances relating to the underlying conduct, it is certainly possible to argue for a more severe punishment, but I am comfortable relying on Mr. Shanahan's judgment.

I have also considered the NHLPA's arguments in support of a ten-twelve (10-12) game suspension and I do not find those arguments persuasive.

First, the NHLPA is clearly correct that Mr. Thornton's record of no prior Supplementary Discipline is an important consideration and is not an aggravating factor in this case. Mr. Thornton has an excellent record for clean play and he is well-respected, as both Messrs. Chiarelli and Thun explained. But that is exactly why the suspension is only fifteen (15) games. Indeed, Mr. Shanahan's video explanation of the suspension decision specifically cited the fact that Mr. Thornton did not have a history of Supplementary Discipline as a factor in his decision. Mr. Shanahan reiterated that point in his testimony at the appeal hearing. (Tr. 88) Given the other factors present here (and discussed above), the suspension could have (and would have certainly) been considerably longer if Mr. Thornton had not had a clean record.

Second, I reject the NHLPA's argument that the suspension should be reduced to ten-twelve (10-12) games because Mr. Shanahan erred in finding Mr. Thornton's conduct to be premeditated and an act of retaliation. Even if I were to fully accept the NHLPA's contention as a factual matter (which I do not), the undisputed intentionality and highly dangerous nature of the conduct involved – and the extent of the resulting injury – would in and of themselves justify a fifteen (15) game suspension in my opinion.

Moreover, the objective evidence makes it clear to me that Mr. Thornton's conduct was premeditated and an act of retaliation, and I do not believe that any person with experience in the game could conclude otherwise. Mr. Thornton did not simply wade into the scrum looking for the "biggest" player; nor was he concerned with his own safety or that of a teammate. Rather, as discussed above, he conceded during the appeal hearing that he: identified Mr. Orpik before he crossed the Pittsburgh blue line; bypassed another Pittsburgh player in order to get to Mr. Orpik from behind; and methodically took him down and punched him while he was flat on the ice and unable to defend himself. By his own account, Mr. Thornton was in control of his emotions and fully aware that punching a defenseless player lying prone on the ice is highly dangerous. I find this type of conduct completely out of character for Mr. Thornton, and not something he would have done had it not been Mr. Orpik that was coincidentally involved in the scrum. (See Mr. Shanahan's Testimony Tr. 84-86) In these circumstances, there is (at the very least) clear and convincing evidence of premeditation. Once that fact is established, there is (even by the NHLPA's own reasoning) no reason to reduce the fifteen (15) game suspension to the ten to twelve (10-12) games suggested by the Union.

Third, I reject the contention that a reduced suspension is justified by reference to suspensions imposed on other Players for similar conduct. I think it is worthwhile to repeat what I have said in prior opinions. The CBA does not prescribe a formula and the process of assessing discipline for on-ice conduct is not an exact science, as evidenced by the Union's own difficulty in offering a precise alternative for discipline here. (Tr. 14-15) Any two incidents are almost certain to vary in a number of respects, making exact comparisons impossible. Moreover, standards and expectations have changed over the course of time, just as the Playing Rules, game tactics and Player training have evolved. As I noted in my recent opinion concerning Patrick Kaleta, the protection of Players' heads has been a matter of intense and increased attention over the course of several years. A Player who today blatantly flouts the rules in a manner that causes a head injury can and should expect to be severely disciplined.

The difficulty in identifying “comparables” in this case is actually highlighted by the NHLPA’s presentation, which involved references to various incidents that resulted in a wide range of responses from the League – from a low of no discipline to a high of twelve (12) games. “Comparables” whose discipline varied to such an extent can hardly be said to be truly comparable to one another or helpful to deciding the appropriate quantum of discipline here. Like Mr. Shanahan, I find that many of the “comparable” incidents identified by the NHLPA (prior to the hearing and then through the testimony of Mr. Chiarelli) are distinguishable from Mr. Thornton’s conduct because they lack one or more of the elements described above. Indeed, as the Union, Mr. Chiarelli and Mr. Shanahan explained during the appeal hearing, each of those incidents lacked one of the elements present here. Some of the incidents involved infractions arguably committed during or in connection with a hockey play; some involved conduct that did not involve premeditation or an ambush of a defenseless and unsuspecting Player; and others did not result in any serious injury causing the other Player to miss games. (Tr. 60-70; 105-109)

In many ways, unfortunately, Mr. Thornton’s conduct more closely resembles the more egregious incidents cited by Mr. Shanahan that resulted in: a twenty-one (21) game suspension to Dale Hunter (for his unprovoked run at Pierre Turgeon from behind after the play in 1993); a twelve (12) game suspension to Matt Johnson (for punching Jeff Beukeboom from behind during the play in 1998); and an eighteen (18) month suspension to Todd Bertuzzi⁷ (for punching and tackling Steve Moore from behind during the play in 2004). Each of those incidents involved an approach from behind against an unsuspecting and defenseless Player that was, if not premeditated, certainly intentional; that could not be considered to have involved a “hockey play”; and that resulted in serious injury to the victim of the

⁷ Mr. Bertuzzi was suspended indefinitely for the balance of the then-current 2003/04 season (thirteen (13) Regular Season games and seven (7) Playoff games), and was subject to a proceeding before me to seek formal reinstatement before being eligible to play in the NHL again. Given that he was ineligible to play in Europe during the 2004/05 season, I subsequently determined, in essence, to treat the work stoppage year as time served and to reinstate Mr. Bertuzzi prior to the 2005/06 Regular Season – a full eighteen (18) months after the date of his original suspension.

action involved. I note, moreover, that these incidents occurred between ten and twenty years ago. As I discussed above, standards and mores have evolved. Any Player engaging in this type of conduct today knows that he will be subject to the imposition of a very significant penalty for doing so.

I wish to make it clear (as Mr. Shanahan did at the hearing) that Mr. Thornton's conduct did not involve the same extreme level of aggression as was involved in the incidents cited above (Tr. 90-93); nor does he have any prior record of on-ice conduct warranting Supplementary Discipline. At the same time, Mr. Thornton's fifteen (15) game suspension is considerably less onerous than the suspensions faced by the Players involved in the incidents above (other than Matt Johnson). I have no doubt that a fifteen (15) game suspension fairly calibrates the penalty to the severity of the infraction in light of the factors that apply under Section 18.2 and the standards that apply in today's game. Simply put, this was a bad act with a bad result, and neither will be tolerated in our game. Again, I note that Mr. Thornton has a reputation for being a "good actor" and a model NHL citizen, but that does not eliminate the need for him to be punished appropriately for his bad act in this case.

CONCLUSION

The fifteen (15) game suspension of Shawn Thornton is supported by clear and convincing evidence and is therefore affirmed.

s/Gary B. Bettman
Gary B. Bettman

Dated: December 24, 2013