

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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| LESLIE D. FLOWER |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 189,684 |
| CITY OF JUNCTION CITY |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| KANSAS EASTERN REGION INSURANCE TRUST |) | |
| Insurance Carrier |) | |

ORDER

Claimant requested review of the February 5, 1997, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral arguments on July 15, 1997.

APPEARANCES

Claimant appeared by attorney, Steven Hornbaker of Junction City, Kansas. Respondent and its insurance carrier appeared by attorney, Bart E. Eisfelder of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

1. Did claimant's April 19, 1994, injury arise out of and in the course of his employment?
2. What is the proper construction of K.S.A. 44-508(f)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, a firefighter for the city of Junction City, was injured on April 19, 1994, while playing volleyball. The gymnasium where the accident occurred is in the same building as the fire department and is owned by the city. The injury occurred while claimant was on a 24-hour duty shift.

Claimant argues the injury arose out of and in the course of his employment since playing volleyball was a part of scheduled, daily physical fitness activities. The daily schedule for the Junction City Fire Department did include an entry at 1300 hours for "physical fitness." Claimant's injury occurred during the scheduled physical fitness period, and of the ten firefighters on duty that day, five were playing volleyball.

In addition, claimant testified that he had been discussing a personnel problem with the acting captain relating to one of the firefighter's attitude at work and decided to play volleyball as an opportunity to talk with the firefighter. However, claimant was injured before he had the opportunity to talk with the fellow firefighter.

By ordinance, the city of Junction City adopted the National Fire Protection Association, (NFPA), standards regarding Fire Department Occupational Safety and Health Programs. One such standard, NFPA 1500, states a fire department shall require the structured participation of all its members in physical fitness programs. The city's Fire Chief Lawrence E. Bruzda testified that although the NFPA 1500 standard and the daily schedule allow time for physical fitness, such activities were not required of firefighters and NFPA 1500 was not enforced. Chief Bruzda further pointed to a memorandum from the city personnel director stating injuries which occurred while the employee was engaged in certain listed recreational and social events were not covered under the Workers Compensation Act.

The Special Administrative Law Judge denied compensation, finding claimant's injury was "in the course of" his employment but did not "arise out of" his employment. Consequently, claimant has asked the Appeals Board to reverse the Special Administrative Law Judge's decision and award compensation for his injury.

Respondent argues K.S.A. 44-508(f) bars recovery in this case. That statute states, in pertinent part:

"The words, 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to

include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer."

Neither claimant nor respondent cite to the Appeals Board a Kansas appellate court case on point with the issue raised by this claim. Likewise, the Appeals Board's research has failed to uncover any Kansas precedent. Other jurisdictions, however, have decided cases with factual scenarios similar to that at hand.

For instance, in Connery v. Liberty Northwest Insurance Corporation, 929 P.2d 222 (Mont.1996), the Court was asked to determine whether claimant's accident that occurred during a "warm-up run" prior to her giving a ski lesson was compensable. The claimant was employed as a certified ski instructor for respondent and suffered a fracture to her left leg while warming up prior to the time she was scheduled to give a ski lesson. Claimant argued the warm-up allowed ski instructors to become familiar with the weather and ski conditions and to mentally prepare themselves before giving ski lessons. Additionally, claimant noted her employer encouraged the ski instructors to take "warm-up runs" prior to giving ski lessons and that her "warm-up run" was in fact a prescribed duty of her employment.

Respondent, on the other hand, argued claimant's injury was barred by MCA sec. 39-71-188, which stated an "employee" or "worker," as referred to in the statute, did not include a person "participating in recreational activity and who at the time is relieved of and is not performing prescribed duties"

In reviewing MCA sec. 39-71-188, the Montana Supreme Court agreed with the Workers Compensation Court that the above statute required a two-part analysis. The first prong of this analysis focussed on whether the activity leading to the accident was a recreational activity. If the first prong was answered in the affirmative, then the second prong required a determination of whether at the time of the injury the individual was performing duties associated with his/her employment.

In applying this analysis, the Workers Compensation Court concluded that the claimant was engaged in a recreational activity at the time of her accident as conceded to by claimant. However, when the Court applied a traditional course and scope of employment analysis to the second prong, the Court determined that the "warm-up run" was within the course of her employment and was a prescribed duty. The Court further noted that the "warm-up run" was recommended by claimant's employer; that it was reasonable to assume both claimant and the employer benefited from the warm-up by limbering muscles and joints and familiarizing the instructors with ski conditions; and that it directly or indirectly contributed to claimant's duty of giving ski lessons. The Workers Compensation Court found claimant's injury was not barred by MCA sec. 39-71-188; the Supreme Court of Montana affirmed.

Connery is strikingly similar to our case at hand. In both instances the claimants were engaged in physical activities designed to enhance their abilities to perform prescribed duties. The employers in both cases knew the activities were being performed and did not forbid but actually encouraged them. Additionally, Montana, like Kansas, has a workers compensation statute which precludes benefits to those employees engaged in recreational activities outside of their prescribed duties.

Another case with a similar fact scenario is AGS Mach Co. v. Industrial Com'n of Colorado, 670 P.2d 816 (Colo. App. 1983). The claimant in Mach was employed as a machinist and injured his ankle while playing basketball during a work break on the employer's premises. The employer argued that C.R.S. 8-41-106(2) precluded benefits. That statute states that the definition of "employee" excludes "any person employed by [an] . . . employer, while participating in recreational activity on his own initiative, who at such time is relieved of and is not performing any prescribed duties" In construing this statute, the Court affirmed the Commissioner's holding that claimant was not participating in a recreational activity on his own initiative. The Court also noted that the Commissioner's decision was supported by the fact the injury occurred on the employers' premises, during a regular work break and that the employer strongly encouraged basketball drills. Therefore, C.R.S. 8-41-106(2) was held not to apply to claimant's injury.

Similarly in Pepco, Inc. v. Ferguson, 734 P.2d 1321 (Okl. App. 1987), the court held the traditional rule excluding social/recreational activities from workers' compensation benefits was subject to exceptions where the recreation occurred on the employer's premises, where it was expressly or impliedly required or where the employer gained some benefit from it. As such, the court found the employee's death, resulting from injuries sustained while driving to a baseball game, arose out of and in the course of his employment since his employer would have benefited by his attending the baseball game.

In determining the proper construction of K.S.A. 44-508(f), it is useful not only to look at other jurisdictions' applications of similar statutory language but also to the traditional analysis to determine whether a recreational activity is within the course and scope of the employment. In Larson's Workers' Compensation Law, § 22, p. 5-87 (1997), Larson lists three factors to determine whether recreational and social activities are within the course of the employment. One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of the employment by making the activity part of the services of the employment. See Larson at § 22. A case on point is City of Oklahoma City v. Alvarado, 507 P.2d 535 (Okla. 1973), in which a firefighter was injured while playing volleyball during his work shift. The Court found this activity to be a regular incident and condition of the employment since volleyball was a recognized activity at the fire department, participated in by any employee so wishing and acquiesced in by supervisors. Similarly, in our case at hand, the fire department specifically scheduled time for its employees to engage in physical fitness, and of the ten firefighters on duty that day, five were playing volleyball during the physical fitness hour. In his deposition, Chief Bruzda stated that although physical fitness

was important it was not mandated. However, whether the Chief mandated his employees engage in physical fitness activities is not determinative of compensability. The Chief said he knew many of the firefighters played volleyball during the physical fitness hour and he did not forbid it nor did he consider it horseplay. Interestingly, if claimant's activity was horseplay, it would probably be compensable under these circumstances. See Neal v. Boeing Airplane Co., 161 Kan. 322, 167 P.2d 643 (1946); Thomas v. Manufacturing Co., 104 Kan. 432, 179 Pac. 372 (1919).

A second factor in determining whether a recreational injury is within the course of the employment is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. See Larson at § 22; McCarthy v. Quest Intern. Co., 667 A.2d 379, 285 N.J. Super. 469, *cert den.* 673 A.2d 277 (1995). In the case at hand, the Chief acknowledged that it was important for the firefighters to be physically fit; however, the Chief also noted that such physical fitness was not required of the firefighters except at their initial hiring. Regardless of whether the physical fitness was required by the fire department, allowing its employees to engage in physical fitness activities benefited the department by having firefighters better prepared to respond to emergency situations requiring both physical fitness and stamina.

The final factor in determining whether recreational activities are within the course of the employment is whether they occur on the employer's premises during lunch or a regularly scheduled recreation period. See Larson at § 22. According to Larson, "recreational injuries during the noon hour [or other regularly scheduled breaks] have been compensable in the majority of cases." Larson at § 22.11, p. 5-92. In our case, claimant was on duty and injured while playing volleyball on his employer's premises during a scheduled time for physical fitness.

Based upon the preceding points, the Appeals Board finds K.S.A. 44-508(f) does not bar workers compensation benefits in this case. Claimant's injury did not occur during a recreational or social event but during a regularly scheduled time for physical fitness. Even if claimant's action of playing volleyball during the scheduled time for physical fitness was recreational, the Appeals Board nevertheless finds K.S.A. 44-508(f) does not bar workers compensation benefits because claimant's injury occurred while he was performing tasks related to his normal job duties. Claimant's daily work schedule included an entry at 1300 hours for physical fitness. Claimant, as well as half of the other firefighters on duty that day, chose to participate in an activity, in this case volleyball, on their employer's premises to achieve this physical fitness. The Chief of the fire department knew this activity went on, did not consider it horseplay and realized the importance of having physically fit firefighters. Claimant concedes that neither he nor any other firefighter was required to participate in physical fitness activities during the hour scheduled for physical fitness. The firefighters could use this hour as free time as long as they did not leave the premises. Nevertheless, the Appeals Board finds by scheduling a specific time for physical fitness, the fire department impliedly required participation in physical fitness activities and furthermore benefited by having firefighters in the type of physical condition necessary to respond to emergency situations. The

Appeals Board therefore finds claimant's injury arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 5, 1997, Award by Special Administrative Law Judge William F. Morrissey, should be, and is hereby reversed, and this matter is remanded to the Administrative Law Judge for a determination of the remaining issues.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Steven Hornbaker, Junction City, Kansas
- Bart E. Eisfelder, Kansas City, Missouri
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director