STATE OF VERMONT

DEPARTMENT OF LABOR AND INDUSTRY

JOHN NUTBROWN	)	State File No. D-21491
	)	
v.	)	Christopher McVeigh, Temporary Hearing Officer
	)	
ROADWAY EXPRESS	)	
	)	Barbara G. Ripley, Commissioner
	)	
	)	Opinion No. 2-93WC

This matter has been submitted on stipulated facts and the parties' written memoranda of law.

APPEARANCES:

Stanley B. Brinkman, Esq. for the Claimant
Keith Kasper, Esq., for the Defendant

ISSUES:

Whether claimant's injury arose out of and in the course of his employment as defined by the Workers' Compensation Act; and

Whether the amateur sports exclusion, 21 V.S.A. §601(14)(A), applies to bar the claim for benefits.

CLAIMS:

1. Temporary total disability benefits.

2. Medical benefits.

3. Attorney's fees.

FINDINGS:

The parties have stipulated to the following matters:

1. Roadway Express was Mr. Nutbrown's employer within the meaning of the Workers' Compensation Act on May 8, 1991.

2. John Nutbrown was an employee of Roadway Express within the meaning of the Workers' Compensation Act on May 8, 1991.

3. Protective Insurance Company was the workers' compensation insurance carrier for Roadway Express on May 8, 1991.

4. On May 8, 1991, John Nutbrown injured his ankle while playing basketball.

5. Mr. Nutbrown was not paid for the time he was playing basketball nor is he a professional athlete.

6. Mr. Nutbrown was required to attend a new employee orientation program on May 8 and May 9, 1991, in Andover, Massachusetts by his employer, Roadway Express.

7. This program in Andover, Massachusetts was too far from Mr. Nutbrown's residence for him to travel to and from it on a daily basis; therefore, Mr. Nutbrown was required to stay overnight in Hanover and was reimbursed for his overnight stay.

8. Following completion of the first day's schedule and the buffet dinner for program participants, the participants, including Mr. Nutbrown, were informed by their employer that they were on their own time and they could do whatever they wanted until the following day.

9. Following the dinner, Mr. Nutbrown decided to play basketball with the other participants in the program.

10. Mr. Nutbrown injured his ankle during this game of basketball.

11. Other Roadway Express employees participated in activities other than the basketball game.

12. Also, other employees did not feel obligated or compelled to participate in any activities.

13. Following the injury, Mr. Nutbrown was temporary totally disabled from work from May 10, 1991, until his return to work on August 26, 1991. Mr. Nutbrown's average weekly wage for the 12 weeks preceding his injury was $628.01, which equates to a compensation rate of $418.25 per week.

14. Mr. Nutbrown's primary treating physician was Dr. Driesback, who performed surgery on Mr. Nutbrown. All medical treatment was reasonably related to his injury and all medical bills are reasonable in amount, and the medical bills of $4,053.04 relate to the claimant's May 8, 1991, injury.

15. The parties also stipulate that all medical records relating to Mr. Nutbrown's ankle injury are admissible, and that the claimant's deposition taken April 29, 1992, is admissible, as is the Department of Labor and Industry's file.

Based on the record presented, including the claimant's deposition, I make these additional findings of fact:

16. At the completion of the first day's seminar activity, the claimant sat down to a buffet dinner with six or seven other Roadway employees, including Mr. Robert Rinker.

17. Mr. Rinker was Roadway's district sales manager for Massachusetts, New Hampshire, Vermont, Maine, and part of Canada, and had been Roadway's St. Johnsbury's terminal manager prior to claimant's employment with Roadway.

18. After dinner Mr. Rinker generally asked the employees at the table, including the claimant, if they were interested in shooting baskets with the basketball Mr. Rinker had in his automobile.

19. Mr. Rinker posed his question to the group as a whole and did not ask the claimant individually or singly. Mr. Rinker did not demand that the claimant or the others play basketball, nor did he use his position or authority at Roadway Express to compel the claimant to play basketball.

20. Several employees at the table, including the claimant, thought shooting baskets was a good idea and quickly agreed to play.

21. The claimant also thought playing basketball would enable him to unwind as well as to get to know Mr. Rinker better.

22. The claimant had mixed motives in playing basketball ranged from his desire to unwind after his attendance at the seminar to personally getting to know Mr. Rinker ("I figured that would be the way to get on the inside track with him.") as well as to dispel previous negative impression he had formed about Mr. Rinker.

23. Although Mr. Rinker was the sales manager of the claimant's district, I find that the claimant was not compelled, either directly or indirectly, to play basketball with Mr. Rinker and the other Roadway employees. The claimant's decision to play rested completely on his own volition and involved little or no concern for adverse employment consequences had he decided not to play.

24. The claimant has suffered no permanent partial impairment as a result of his injury.

CONCLUSIONS OF LAW

1. In a workers' compensation action, the claimant has the burden of establishing all facts essential to the rights asserted, including the character and extent of the injury and disability. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 151 (1962); Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950); McKane v. Capital Hill Quarry Co., 100 Vt. 545 (1926).

2. The claimant must establish by sufficient, competent evidence the character and extent of the injury as well as the causal connection between the injury, the medical treatment for the injury, and employment. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950).

3. An injury arises out of and in the course of the employment when it occurs in the course of it and is the proximate result of the employment. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961).

4. The claimant contends his injury arose out of and in the course of his employment because he attended an employer sponsored seminar designed to enhance employee efficiency, communication, and comradery. The claimant also argues that he was compelled to play basketball because of Mr. Rinker's inherent authority as a supervisor, and because fostering a sense of community was one of the seminar's goals.

5. While the claimant relies heavily upon Holmquist v. Mental Health Services, 139 Vt. 1 (1980) to argue that Vermont has adopted the company picnic rule, this argument stretches Holmquist beyond sustainable limits. The Vermont Supreme Court does not mention the company picnic rule in Holmquist, and the primary focus of Holmquist's facts pertain to the special nature of the social/business function discussed there. Holmquist more easily falls within the special errand category of cases for which employees are entitled to compensation for injuries suffered while traveling on a special errands for her or his employer. Since the Vermont Supreme Court has not adopted the company picnic rule, the claimant's injury is not compensable under it.

6. Professor Larson has devised, and some jurisdictions have adopted, a three-part test for determining whether an employee injured while engaged in a social/recreational activity is entitled to compensation, but even under this scheme the claimant fails to prove his entitlement to benefits. See 1A Larson's supra. at §22.00. First, this basketball game did not occur on Roadway Express' premises, nor was it a regular incident of the claimant's employment. Second, as found above, the claimant was not required to play basketball, nor did Mr. Rinker's proposal indirectly or directly force the claimant into playing. Finally, Roadway Express did not derive "substantial direct benefit" from the basketball game beyond possibly improving employee morale or interaction, benefits which do not meet the test of "substantial direct benefit" for

the purposes of Professor Larson's test. Therefore, the claimant's application for benefits cannot be sustained under this rationale either.

7. Although the claimant is not entitled to recover under the Holmquist or Larson test, a significant factor in the resolution of this claim is that the claimant was a traveling employee at the time of his injury. Under certain circumstances, an employee's injury while traveling for his or her employer arises out of and in the course of his or her employment. See 1A Larson's, supra 425.23.

8. While traveling for business or other employment related reasons, an employee is not required to remain immobilized in his or her room once activity directly related to his or her employment has ceased. See Robards v. N.Y. Division Electric Products, Inc., 307 N.Y.S. 2d 599, 600 (A.D. 3rd Dept. 1970).

9. A traveling employee may engage in reasonable activity, including recreation, incidental to his or her travel. If an injury occurs while engaged in that activity, the injury is compensable as arising out of an in the course of the employment. The significant issue is whether the activity is a reasonable one. In Gray v. Eastern Airlines, Inc., 475 So. 2d 1288, 1290 (Fla. App. 1 Dist. 1985) a flight attendant-claimant broke his nose while playing in a pickup basketball game during a two-day flight lay over. Eastern paid the claimant's lodging cost during this layover. Allowing the claim, the court relied upon the traveling employee rule and the personal comfort doctrine to conclude that "exercise at a nearby facility should be regarded as necessary for the same reasons underlying extension of the course of employment . . . [to] activities reasonably required for health and comfort." Other courts have also applied this rule and rationale. See Blakeway v. Lefebvre Corp., 393 So. 2d 928, 931-32 (La. App. 4th Cir. 1981)(claimant on two-weeks seminar in Iowa hurt while diving into motel pool; benefits awarded, court noted that with his swim "the plaintiff was not merely pursuing his own business or pleasure because he was entitled to some reasonable recreation as a part of his employer's business as having to remain in motel in Cedar Rapids, Iowa, for two

weeks during a training seminar."); Garver v. Eastern Airlines, Inc., 53 So. 2d 263, 267 (Fla. App. 1 Dist. 1989)(flight attendant injured in car accident during layover entitled to benefits, activity of driving to friend's house 20 miles from lodging was reasonable one); Davis v. Prudential Insurance Company, 316 N.Y.S. 2d 824, 826 (A.D. 3rd Dept. 1970)(claimant at four-day Montreal seminar hurt knee while dancing moderately at a dinner; benefits awarded, court stated "when employer sends employee away from home it has been held that the test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities, as such an employee may satisfy physical needs including relaxation and, if the activity is found to be reasonable, the risk inherent in such activity is an incident of his employment."); Cavalcante v. Lockheed Electronics Company, 204 A.2d 621 (N.J. Super. 1964)(same).

10. Courts have not uniformly adopted and applied this rule, but some have denied benefits under circumstances similar to those presented here. For example, in State Farm Insurance Company v. Workers' Compensation Court, 609 P.2d 779, 781 (Okla. 1980) the court denied death benefits where the decedent was killed while trail riding with his motorcycle during free time at a seminar. The court focused upon the relationship of the activity to the conference stating that the death was "simply unrelated to the nature, conditions or incidents of the conference or the conference activities and did not 'arise out of' [the] employment." See also Grice v. National Cash Register Company, 156 S.E.2d 321, 323 (S.C. 1967)(decedent away at training seminar killed on return from picnic with other employees; death benefits denied, traveling employee rule rejected on these facts, no evidence showed death originated in risk created by being away from home); Edwards v. Industrial Commission, 385 P.2d 219, 220 (Ariz. 1963)(decedent drowned in a motel swimming pool while on business trip; death benefits denied because recreation activity deemed not incidental to the decedent's work); Sandy v. Stackhouse, Inc., 128 S.E.2d 218, 221, N.C. 1962)(decedent member of emergency crew repairing utility lines lodged away from home, killed while crossing street from store; benefits

denied since the decedent was off duty on personal errand.).

11. In jurisdictions applying the rule, the courts have focused upon the reasonableness of the activity and denied compensation when the activity was deemed unreasonable. For example, Hebrank v. Parsons, 212 A.2d 579 (N.J. Super. 1965) the court denied benefits where the claimant, lodged in a motel for his employer, went out on an extended driving and drinking journey before smashing into a tree. There, the claimant left the course of his employment and "became involved in a personal errand entirely disassociated from" his work. Id. at 587. See also Eastern Airlines v. Rigdon, 543 S.2d 822 (Fla. App. 1 Dist. 1989)(flight attendant on layover who engaged in downhill skiing at resort 58 miles from lodging not entitled to benefits as her activity was not a reasonable one, particularly given the danger of skiing); Dibble v. Industrial Commission, 161 N.W.2d 913, 918 (Wis. 1968) (traveling salesman's excessive drinking which caused the accident not reasonably necessary although cocktail or two would have been; death benefits denied).

12. Although jurisdictions take differing positions on this issue, I believe that the Vermont Supreme Court would follow the broader view and find that for traveling employees, injuries occurring during activities, even recreational ones, incidental to the travel, would be compensable as long as the activity is reasonable. Applying that standard here, I find that the claimant's injury is a compensable one. The claimant traveled and lodged away from home at his employer's request to attend a company seminar. The employer set no limitation on the claimant's activities and most likely expected the employees to engage in some recreation as demonstrated by the number of employees who brought their golf clubs to the seminar. Playing in a pickup basketball game at the motel where he was lodged was a reasonable activity incidental to the claimant's employment. Despite the defendant's argument concerning an employer's seemingly unlimited liability for recreational or social functions in any way related to the employer, the decision here turns on the traveling employee and personal comfort rules, factor not likely

to arise in most recreational or social functions involving employees.

13. Applying the traveling employee and personal comfort rules, the claimant's application is compensable under the Act in that his injury arose out of and in the course of his employment. The defendant, however, contends that even if the injury arose out of and in the course of the claimant's employment, the amateur sports exclusion bars any award of benefits.

14. 21 V.S.A. §601(14)(B) states that a worker or employee "means a person who has entered into the employment of, or works under contract of service of apprenticeship with, an employer, but shall not include . . . (B) a person engaged in amateur sports even if an employer contributes to the support of such sport." Relying upon this statutory exclusion, the defendant argues that since the claimant injured himself while playing a game of pickup basketball, an amateur sport, his claim is statutorily barred. The claimant, on the other hand, contends that the exclusion only applies to individuals who are not employees originally as in the context of a little league team sponsored by an employer, and does not apply to alter the employee's status of an individual who is already the employer's employee. In other words, the claimant argues that the exception doesn't apply to current employees but only applies to non-employees playing amateur sports in some way associated with the employer. The claimant relies upon legislative history to support his argument.

15. Neither the Vermont Supreme Court nor the Commissioner of the Department of Labor and Industry have previously interpreted or applied Vermont's amateur sports exclusion. Since the Workers' Compensation Act has benevolent objectives and is remedial in nature, its provisions should be liberally construed and no injured employee should be excluded from receiving benefits unless clearly intended by law. Montgomery v. Brinver Corp., 142 Vt. 461, 463 (1983); Orvis v. Hutchins, 123 Vt. 18, 23 (1962). A liberal construction, however, does not mean the Act may be construed in an unreasonable or unwarranted manner. Rothfarb v. Camp

Awanee, Inc., 116 Vt. 172, 180 (1950). With these principles in minds I shall now examine the exclusion.

16. Only a handful of other states have legislatively promulgated recreational or social activity exclusions under their respective workers' compensation acts. See, 1 Larson's, supra, at §22.10. Some state statutes excluding these claims concern the definition of employee, see e.g., Colo. Rev. Stat. §8.41-106(b)(2), some concern the definition of personal injury, see e.g., Ann. L. of Mass. ch. 152 §1(7A), and others exclude the injury from arising out of and in the course of employment. See Smith Hurd Ill. Ann. Stat. ch. 48, ¶ 138.11; Nev. Rev. Stat. §616.110. Although these other statutes address the same general issue as Vermont's exclusion, their language and terms vary considerably; therefore, their text and case law are not overly helpful in applying the Vermont exclusion. One factor, however, appears to uniformly apply to all of the statutes examined; none absolutely excludes injuries suffered in a sporting or recreational event from compensability. See Cal. Labor Code §3600(H); Colo. Rev. Stat. §8-41-106(2); Smith Hurd Ill. Ann. Stat., ch. 48, ¶ 138.11; Ann. L. Mass., ch. 152 §1(7A); Nev. Rev. Stat. §616.11; N.J.S.A. §34:15-7; N.Y. Workers' Comp. Law §10.

17. The defendant cites several cases from other jurisdictions to bolster its argument that this claim is barred; these cases, however, are factually distinguishable. For example, Ward v. Mid-South Howe Services, 769 S.W.2d 486 (Tenn. 1989) concerned denial of benefits for a basketball injury incurred while playing during a lull in the work day at a customer's house. Further, Mullins v. Westmoreland Coal Company, 391 S.E.2d 609 (Va. App. 1990) concerned a basketball injury sustained during a game on the employer's premises and benefits were denied because the employer specifically prohibited such basketball games and they were not part of the normal or regular activities associated with the employment. Finally, in neither Ward nor Mullins was a statutory exclusion at issue.

18. Although the defendant also cites Wilson v. Scientific Software-Intercorp., 738 P.2d 400 (Colo. Ct. App. 1987),

which applies Colorado's statutory exclusion, that case is also distinguishable because the claimant there was not a traveling employee.

19. As noted, the Vermont exclusion concerns "a person engaged in amateur sports even if an employer contributes to the support of such sport." 21 V.S.A. §601(14)(B). The Vermont Legislature promulgated this exclusion in 1957. While the legislative history concerning its promulgation is scant, some exists. The pertinent legislative history, which the claimant provided, states that "[t]his bill [S.147] has to do with Little League Baseball teams supported by contributions, and various organizations, possible injuries incurred while playing."

20. Additional research into the legislative history revealed that the genesis of the exclusion appears to be a New York case in which a player on a little league team was injured and deemed an employee of the team's sponsor. The Legislative draftsman for the Vermont exclusion was former Vermont Supreme Court Justice Louis P. Peck. The thrust of the exclusion and its legislative history appears to be amateur sports associated with or sponsored by the employer, such as a company softball team, bowling team, or basketball team, or a community team sponsored by or associated with the employer. As indicated by the exclusion's "even if" language, the exclusion applies whether or not the employer contributes financial or other support to the team. As far as it goes, the exclusion is broad and absolute, providing no exceptions like those provided in other states' statutes. Given the exclusion's absolute nature and the Act's remedial purpose, the exclusion will not be extended beyond its intended goal.

21. Under the circumstances of this case, I find that the amateur sports exclusion does not apply. The claimant, while a traveling employee, engaged in reasonable recreational, and athletic, activity. This type of athletic activity falls beyond the exclusion's scope but within the scope of the claimant's employment as an incident to it.

For these reasons the claimant's application for benefits is granted. The claimant is awarded the following benefits:

1) temporary total disability benefits in the amount of $6,273.75.

2) medical benefits in the amount of $4,053.04; and,

3) attorney's fees in the amount of $1,155.00 (.3 hours as stricken from the claimant's request as it appears that his attorney inadvertently charged twice for an April 15, 1992, letter to Mr. Keitel).

DATED at Montpelier, Vermont this 7th day of June, 1993.

Barbara G. Ripley
Commissioner