NOTES

WORKMEN'S COMPENSATION FOR INJURIES ARISING OUT OF RECREATIONAL ACTIVITY

Today the value of organized recreational programs for employees is being recognized in an ever-increasing number of American businesses.[1] Management-sponsored activities, moreover, have been supplemented in many instances by various forms of social and athletic amusement developed by the workers themselves. It is the purpose of this note to exmine the various claims which injured workers have raised seeking compensation for injuries received while engaged in some sort of recreational activity which reasonably could be associated with their employment.

Workmen's compensation statutes now have been enacted in every one of the United States.[2] They are designed to assure prompt and adequate benefit payments to employees who are injured as the result of an accident which is attributable to their employment.[3] These payments are made without considering the question of fault or blame under the theory that the cost of such injuries should be borne as a legitimate expense of production.[4] There is, however, one important requirement imposed by the statutes—that is that the injury must have arisen "out of and in the course of" the worker's employment.[5] An interpretation of this phrase which is customarily applied by the courts was given in a leading Massachusetts case:

> . . . an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.[6]

The courts in increasing numbers have been called on to apply such provision to the claims of workers who have been injured

1. MAZE, OFFICE MANAGEMENT 165 (1947).
2. U. S. DEPT. OF LABOR, BULL. No. 78 (1946).
3. *Ibid.*
4. *Ibid.*
5. MO. REV. STAT. § 3691 (1939).
6. McNicol's Case, 215 Mass. 497, 498, 102 N.E. 697, 697 (1913).

in some sort of recreational activity connected with their work. It has been the task of the injured workman to show that even though he was engaged in such an activity at the time of his injury, there was a close enough relationship between that activity and his usual work that he should be considered to have been acting within the scope of his employment.

In those cases where a worker has been required by his employer to participate in the recreational activity in which he was injured, there has been a unanimous willingness to allow recovery. Thus, where a fireman was required to exercise while off duty,[7] where a saleman was instructed to attend a dinner and demonstration,[8] and where an employee was required to supervise the practice games of a company-sponsored baseball team,[9] the employee was allowed to recover workmen's compensation benefits for injuries resulting from the compulsory conduct. In each case the court seemed to have little difficulty in concluding that an act performed at the direct command of the worker's superior was an act arising out of and in the course of his employment.

Where a worker has been encouraged, though not required, by his employer to enter into a specific form of recreation, or where he voluntarily enters into the activity under no form of compulsion whatsoever, the courts customarily grant or deny recovery for injuries so received on the basis of other factors. It is submitted that by far the most important factor for the injured workman to consider at this point is the possibility of persuading the court that even though the participation was optional, the employer received some direct business gain from the activity in which the injury occurred. In considering this factor the courts generally choose not to include within such "benefits" the mere fostering of good will or the raising of morale in the employees. The latter results of employer-sponsored activity are generally considered "too tenuous and

7. Salt Lake City v. Industrial Commission *et al.*, 104 Utah 436, 140 P.2d 644 (1943).

8. Sinclair v. Wallach Laundry, 252 App. Div. 715, 298 N.Y. Supp. 686 (3d Dep't 1937); *accord*, Stakonis v. United Advertising Co. *et al.*, 110 Conn. 384, 148 Atl. 334 (1930); Miller v. Keystone Appliances, Inc. *et al.*, 133 Pa. 354, 2 A.2d 508 (1938).

9. Huber v. Eagle Stationery Corp., 254 App. Div. 788, 4 N.Y.S.2d 272 (1938).

ephemeral" in and by themselves to place an employee within the scope of his employment.[10] But, given a more substantial showing that the employer's interests were being furthered financially by the employee at the time of his injury, the courts have consistently granted recovery even though the injury occurred while in the process of play or recreation.

The "benefit" factor is exemplified in three recent cases where companies sponsored and equipped baseball teams which customarily played in public and before spectators, with the team members wearing uniforms bearing the name of their employer. The courts allowed workmen's compensation benefits to injured players. These decisions were based, largely at least, on the ground that the employees were serving their employer by advertising his name at the time of their injuries.[11] Similarly, where a salesman was killed on a fishing trip which had been financed by his employer as a reward in a competitive sales campaign, recovery was allowed, and the decision of the court was based on the fact that the entire scheme was of obvious benefit to the employer in that it provided incentive for increased sales.[12] In another case, the New York Stock Exchange was shown to have encouraged its employees to engage in competitive sports and to enter teams which the exchange had sponsored for that purpose. The games were played against similar teams in and around New York City, and the schedule was arranged by the employer *who kept the receipts and paid any deficits arising from the venture.* The Appellate Division in awarding the benefits of workmen's compensation to a page who was injured while playing on a team so sponsored said:

> We are not required to decide whether the employer was actuated by a belief that the venture was wise because of

10. It seems that it would be a safe presumption to conclude that every activity backed by an employer to the extent of financial expenditures must be, to some extent, beneficial to the sponsor. As stated in a New York decision: "The officials of a corporation may not extend largess from stockholders' money." Holst v. New York Stock Exchange, 252 App. Div. 233, 234, 299 N.Y. Supp. 255, 256 (1st Dep't 1937).

11. Fishman v. Lafayette Radio Corp. *et al.*, 275 App. Div. 876, 89 N.Y.S.2d 563 (3d Dep't, 1949); Ott v. Industrial Commission, 83 Ohio App.13, 82 N.E.2d 137 (1948); Le Bar v. Ewald Brothers Dairy *et al.*, 217 Minn. 16, 13 N.W.2d 729 (1944); *Contra:* Auerbach Co. *et al.* v. Industrial Commission *et al.*, 195 P.2d 245 (Utah, 1948).

12. Linderman *et al.* v. Cownie Furs *et al.*, 234 Iowa 708, 13 N.W.2d 677 (1944); Kelly v. Ochiltree Electric Co. *et al.*, 125 Pa. 161, 190 Atl. 167 (1937).

its advertising features or because of the improved health and morale of the employees. *The maintenance of the team was a matter of business, not of charity or benevolence.*[13] [italics added]

The foregoing cases have demonstrated how a clear financial benefit may accrue to an employer from the recreational activities he sponsors. These financial benefits, moreover, are entirely distinct from any co-existent benefits which might have arisen from the raising of his employees' morale or efficiency. The courts have allowed recovery to injured workers on the ground that where an employer receives a clear financial benefit from some activity of his employees, he is required to bear the cost of any injuries the workers receive while so engaged. Occasionally, the courts have presumed a financial benefit when, perhaps, the facts justify the presumption less clearly. For example, in a recent New Jersey case[14] recovery was allowed to an airplane mechanic's helper who was injured while taking a pleasure flight with the owner of a plane which he had just helped repair. The court pointed out that this and similar flights had been encouraged by the plaintiff's superior and that they were a distinct benefit to the latter in that his workers thereby became more familiar with the performance of the machines they were to repair by observing actual flight conditions. An analogous fact situation arose when a caddy was injured while playing a practice game on his employer's course. Here the court also granted recovery, stating that it was a fair inference that the caddies were encouraged to play and that such activity would tend to make them more efficient and thus better able to serve their employer.[15] In these cases the courts again relied heavily on the financial benefit to the plaintiff's employer arising out of the activity in which the employee was injured. The benefit, though it may not appear as clearly as in the preceding group of cases, still seems adequate to justify the decisions.

While the employee's presence on the premises of his employer is usually not a factor strongly influencing a finding that

13. Holst v. New York Stock Exchange, 252 App. Div. 233, 234, 299 N.Y. Supp. 255, 256 (1937).

14. Owens v. Bennett Air Service *et al.*, 133 N.J.L. 540 (Sup. Ct.), 45 A. 2d 320 (1946).

15. Puisinsky v. Transit Valley Country Club, 259 App. Div. 765, 18 N.Y.S.2d 316 (3d Dep't 1940).

he was within the scope of his employment, if this presence is coupled with the fact that the worker is on his lunch hour, many courts are inclined to find that he is then acting within the course of his employment. In other words, there is a substantial body of case law which finds a financial benefit to an employer from the mere presence of his employees on his premises during the workers' lunch hour. In about two-thirds of the cases involving injury to an employee while he was voluntarily engaged in some noon-time recreation, the injured employee has recovered workmen's compensation benefits. The leading case[16] allowed recovery to a seventeen-year-old girl who was injured while riding on an interdepartmental truck during her lunch hour. The activity was not connected in any way with her usual job and was purely a means of recreation. The court pointed out that because of the brevity of the time allotted for lunch it was to be expected that most of the employees would remain on the premises. Such presence, the court said, was in itself a benefit to the employer because it thereby became possible for the workers to be more punctual than if they had gone elsewhere. The decision also noted that the activity in which employee was injured had been engaged in by the plaintiff and her fellow employees for some time previous to the occurrence and that this fact was well known to her supervisors. The benefit in this case, when considered objectively, might seem more illusory than the benefits of the preceding cases, but the "lunch hour benefit" concept is still retained by a majority of the courts and must be considered as a factor weighing their decisions.

When a court fails to find any financial benefit whatsoever in the recreational activity of the employees other than the fostering of good will and morale in the workers themselves, recovery for injuries received in such activity is generally

16. Thomas v. Procter and Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372 (1919); *accord*, Conklin v. Kansas City Public Service Co., 226 Mo. App. 309, 41 S.W.2d 608 (1931); Geary v. Anaconda Copper Mining Co., 120 Mont. 485, 188 P.2d 185 (1947); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930); *cf.* Bowen v. Saratoga Springs Commission *et al.*, 267 App. Div. 928, 46 N.Y.S.2d 822 (3d Dep't 1944); Brown v. United Services for Air, Inc. *et al.*, 273 App. Div. 932, 78 N.Y.S.2d 37 (3d Dep't 1948). *Contra:* Luteran v. Ford Motor Co., 313 Mich. 487, 21 N.W.2d 825 (1946); Dunnaway *et ux.* v. Stone & Webster Engineering Corp. *et al.*, 227 Mo. App. 1211, 61 S.W.2d 398 (1933); Theberge v. Public Service Electric and Gas Co., 25 N.J. Misc. 149, 51 A.2d 248 (1947).

denied. This doctrine has received recent reemphasis by the New York Court of Appeals in the case of *Wilson v. General Motors Corporation.*[17] There recovery was denied to an employee who was injured while playing softball on one of fourteen teams organized into a league at his employer's plant. The games were played on the workers' own time and in a city park. The employer had supplied the teams with $1000 worth of equipment and had permitted league officials to confer on company time. The court, in a four to three decision, refused to award compensation on the ground that there was neither control by nor benefit to the employer from the teams' activity. The court said:

> . . . We look in vain for evidence of any business advantage or benefit accruing to the company from the employees' participation in the contests. Too tenuous and ephemeral is the possibility that such participation might perhaps indirectly benefit the employer by improving the workers' morale or health or by fostering employee good will.[18]

In an earlier Michigan case[19] where the defendant corporation maintained a gymnasium on its premises and encouraged its employees to make use of the facilities, the court denied recovery to a workman who was injured while playing in the gym after working hours. Two somewhat similar cases[20] arose where employees were injured while using railroad facilities which had been provided by their employer for their pleasure and convenience. Here the courts again denied recovery for the injured employees on the ground that the acts were purely voluntary and because of the fact that the workers were not engaged in the furtherance of their employer's business at the time of their injuries.

Generally, when a caddy is gratuitously permitted to use his employer's course in his spare time, the courts have not seen

17. 298 N.Y. 468, 84 N.E.2d 781 (1949).

18. *Id.* at p. 473, 84 N.E.2d at p. 784; *accord,* Industrial Commission of Colorado *et al.* v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938); Tom Joyce 7 Up Company v. Layman, 112 Ind. App. 369, 44 N.E.2d 998 (1942); Porowski v. American Can Co., 15 N.J. Misc. 316, 191 Atl. 296 (1937); Leventhal v. Wright Aeronautical Corp., 25 N.J. Misc. 154, 51 A.2d 237 (1946); Pate v. Plymouth Mfg. Co. *et al.*, 198 S.C. 159, 17 S.E.2d 146 (1941).

19. Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936).

20. Hama Hama Logging Co. v. Dept. of Labor and Industries, 157 Wash. 96, 288 Pac. 655 (1930); Graf v. Montecito County Water District, 26 P.2d 29 (Cal., 1933).

fit to acknowledge any financial benefit resulting to the employer. The courts, with the exception noted above,[21] have ruled that the only benefits are of the morale and goodwill variety which cannot in themselves place the employee within the scope of his employment.[22] Similarly, where a student employed as a camp counselor was injured while playing tennis on the camp courts at a time when he was not on duty but was subject to call, no compensation benefits were awarded.[23] Again, where an employer or association of employees sponsors a picnic for the workers and where attendance is not required either directly or indirectly, the courts generally deny recovery to an employee injured while at the affair or while traveling to or from it.[24]

The foregoing cases have been grouped in an attempt to show the amount of emphasis which has been given the financial benefit factor in the courts' decisions. This emphasis has generally received specific mention, but in some of the cases its actual weight may have been concealed in the discussion of other factors. Nevertheless, it seems that from a consideration of all the cases involving injury to an employee engaged in a voluntary recreational activity, the financial benefit to his employer becomes the only reliable criterion for predicting whether he will receive the compensation award for which he is bringing suit. Other factors which are generally given weight in suits of this type include the amount of financial backing given the activity by the employer, the place where the activity took place with regard to the employee's usual place of work, and the possibility of classifying the activity as one customarily engaged in by the employees. None of these factors appears to be controlling, but each may be taken into consideration when present.

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21. See note 15 *supra.*

22. Stevens v. Essex Falls Country Club, 136 N.J.L. 656, 57 A.2d 469 (1948); McManus' Case, 289 Mass. 65, 193 N.E. 732 (1935).

23. State Y.M.C.A. *et al.* v. Industrial Commission *et al.*, 235 Wis. 161, 292 N.W. 324 (1940).

24. Becker Asphaltum Roofing Co. v. Industrial Commission *et al.*, 333 Ill. 340, 164 N.E. 668 (1928); Stout v. Sterling Aluminum Products Co., 239 Mo. App. 418, 213 S.W.2d 244 (1948); Fick v. American Mut. Liability Ins. Co., 26 N.J. Misc. 244, 58 A.2d 854 (1948); Maeda v. Department of Labor and Industries, 192 Wash. 87, 72 P.2d 1035 (1937). *Contra:* Ackerson v. Jennings Co., 107 Conn. 393, 140 Atl. 760 (1928); Fagan v. Albany Evening Union Co. *et al.*, 261 App. Div. 861, 24 N.Y.S.2d 779 (1941).