Phillips, Christopher

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Recreational activities

A worker injured while playing on an employee softball team was not in the course of his employment, particularly where the employer provided no financial support to the team, exerted no control over the players who were not paid for their time and when the game did not occur on company premises during a lunch or recreation break.
….*In re Christopher Phillips*, BIIA Dec., 90 1386 (1991)

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHRISTOPHER J. PHILLIPS	**)**	**DOCKET NO. 90 1386**
	)	
CLAIM NO. M-147521	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Christopher J. Phillips, Pro Se with
John Phillips, his father

Employer, American Multi Cinema, Inc., by
Robert P. Holen, General Manager

Department of Labor and Industries, by
The Attorney General, per
Jody A. Gross and Kathryn I. Eims, Assistants and Sherry Silver, Paralegal

This is an appeal filed by the claimant on March 19, 1990 from an order of the Department of Labor and Industries dated March 12, 1990, which affirmed a Department order dated November 20, 1989 which rejected the claim for the reasons that the claimant was not under the industrial insurance laws at the time of the injury, and that he was not in the course of his employment at the time of the injury. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on January 2, 1991 in which the order of the Department dated March 12, 1990 was reversed and the claim remanded to the Department with direction to issue an order accepting the claim.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

However, we disagree with the conclusion of our industrial appeals judge.

Mr. Phillips, who is 19 years of age, was a concessionist at Sea- Tac North Cinema beginning February 1989. He worked part-time during the school year, and up to 45 hours a week during the summer vacation through November 1989. On June 28, 1989, during a softball game, he broke his arm. The testimony is somewhat in dispute, but essentially, the senior manager of the theater, Mr.

Tom Perry, asked the claimant if he wanted to play shortstop on a team composed mostly of employees of the theater. Mr. Phillips was originally scheduled to work the day of the game, but Mr. Perry rearranged his schedule. The game was held during non-work hours on a play field near the theater and Mr. Phillips was not paid for his time. Mr. Phillips said he felt compelled to play because he wanted to be promoted and did not want to upset his manager.

The team was not an organized team nor in a league. From the testimony in the record, the game resembled a "pickup" game. Mr. Phillips participated in one game. There were only four games during the entire season. Employees of the theater had been playing at the park since 1981 and there was some kind of longstanding rivalry between Sea-Tac North and Sea-Tac South theaters.

Our industrial appeals judge concluded that because Mr. Phillips was only 18 at the time of the injury, with limited experience in the labor market and a desire to do a good job and impress his supervisors, his manager's desire that he play on the team "took on the air of" a job requirement, and he was, therefore, acting in the course of his employment when the injury occurred.

The game did not occur on company premises during a lunch or recreation period. The employer did not expressly or impliedly require participation; the employer gave no financial support to the team; employees who played were not paid for their time; the employer did not exert any control over the players; and the employer did not derive any business benefit from the game other than the possible improvement of employee health and morale.

The basic test to determine whether a recreational activity is within the course of employment is found in Professor Larson's treatise on Workers' Compensation. § 22.00 provides:

> Recreational or social activities are within the course of employment when
>
> (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Professor Larson specifically states that:

> . . . if games are played both off the premises and after hours the burden of proving work connection falls heavily on the factors of employer initiative, financing and benefit, and a showing on these points which might have sufficed in a case with some time or place work connection may well prove to be inadequate.

Chilcote v. Blass, Riddick, Chilcote & Continental Ins. Co., 620 S.W.2d 953 (Ark.Ct.App.1981). Larson, § 22.24(b), at 5-159.

There is no evidence that the theater had any involvement with the team or that the theater officially endorsed the team. Our decision in In re Barry Rambeau, Dckt. No. 89 1604 (December 11, 1990), is on point. Those cases cited by Professor Larson as falling within this requirement involve situations where "a clear case is made of outright employer sponsorship so that it can be said that the activity is part of an employment recreational program. . . Larson, § 22.24(c), at 5-160. We do not find such evidence in this record."

We also noted in In re Barry Rambeau, supra, "there is very little, if any, evidence showing any benefit flowing to (the theater) from the (softball) team. There is no evidence that any business was solicited through the league or that this was a goal of the company." The very same thing may be said in the instant case.

Further, we quoted "balancing all four factors, Professor Larson suggests that:

> . . . mere encouragement, even with the tangible support of financial assistance, is not in itself enough to bring industrial league athletics within the course of employment. There must ordinarily be a time or place association with the employment, or employer initiative and sponsorship of the activity as part of the recreation program or some significant employer benefit before significant connection is found.

Larson, § 22.24(f), at 5-165, citing Wilson v. General Motors Corp., 84 N.E.2d 781, 298 N.N.Y. 468 (New York Court of Appeals, 1949). In re Barry Rambeau, supra, at 5.

The only issue left in this case is with respect to the implied requirement to participate. The record does not support the allegation that Mr. Phillips' chances for promotion would have been compromised had he declined to play. Participation was strictly voluntary, and the claimant's speculation about how his manager might take his declining to play does not establish a job requirement.

The youth and inexperience of the claimant do not transform an offer to make available a place on the team into a job requirement, nor does the supervisor's desire that Mr. Phillips play on the team rise to that dignity.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On October 27, 1989 the Department of Labor and Industries received an application for benefits from Christopher J. Phillips, alleging the occurrence of an industrial injury on June 28, 1989 while in the course of his employment with American Multi-Cinema, Inc. On November 20, 1989 the Department issued an order rejecting the claim on the grounds that the claimant was not under the industrial insurance laws at the time of the injury and the claimant was not in the course of his employment. On December 19, 1989 a protest and request for reconsideration was filed on behalf of the claimant. On December 27, 1989 the Department issued an order holding its November 20, 1989 order in abeyance. On March 12, 1990 the Department issued an order affirming its prior order of November 20, 1989. On March 19, 1990 the claimant filed a notice of appeal. On April 17, 1990 the Board granted the appeal, assigning it Docket No. 90 1386, and directing that further proceedings be held.

2. On June 28, 1989, while participating in a softball game, Christopher J. Phillips broke his arm, requiring medical treatment.

3. Christopher Phillips' supervisor was aware of the claimant's experience playing AAA high school baseball and made available to the claimant a position on the softball team when they played against a rival theater. Christopher Phillips' schedule was arranged by his supervisor so that he would be able to attend the game. Mr. Phillips believed that his employer would have been upset and that his chances for promotion would have been diminished if he had declined to participate in the softball game.

4. The softball game did not occur during lunch or a regular recreation period; the employer neither expressly nor impliedly required the claimant to participate in the game; and the employer derived no substantial benefit from the activity.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. Christopher Phillips was not acting in the course of his employment when he broke his arm on June 28, 1989 at a softball game in which he participated with the knowledge and consent of his supervisor.

3. The Department order of March 12, 1990, which affirmed a prior Department order dated November 20, 1989 which rejected the claim on

the grounds that the claimant was not under the industrial insurance laws at the time of the injury and that the claimant was not in the course of his employment, is correct and should be affirmed.

It is so ORDERED.

Dated this 5th day of August, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member