Morgan, Ricky

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

Deviation

Where recreational activities were pursued during earlier ammonia spills at an employer's workplace, the employees reasonably believed that there was nothing wrong with recreational activities to kill time while awaiting instructions from the employer. A worker who injured his left knee when it buckled after he jumped to block a pass was in the course of his employment at the time of the injury since the injury occurred on company time and all were being paid to wait in the parking lot. For that reason, the Board concluded that the worker did not deviate from his employment when he played football during the work stoppage. **….*In re Ricky Morgan,* BIIA Dec., 94 1042 (1995)**

Parking area exclusion (RCW 51.08.013)

When ammonia spilled at the employer's bottling plant, the employer evacuated the workers and they were directed to await further instructions in the front parking lot. The employees pursued various activities--standing, sitting and talking, hitting tennis balls, reading or listening to music, eating lunches, and some played touch football. A worker who injured his left knee when it buckled after he jumped to block a pass was in the course of his employment at the time of the injury since the injury occurred on company time and all were being paid to wait in the parking lot. **….*In re Ricky Morgan,* BIIA Dec., 94 1042 (1995)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: RICKY D. MORGAN	**DOCKET NO. 94 1042**
CLAIM NO. N-296212	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ricky D. Morgan, by
Stephen J. Henderson

Employer, Columbia Beverage Co., by
Owens Davies Mackie, per
Cynthia D. Turner

Department of Labor and Industries, by
The Attorney General, per
Martha P. Lantz, Assistant

This is an appeal filed on behalf of the claimant, Ricky D. Morgan, on February 16, 1994, from an order of the Department of Labor and Industries dated January 24, 1994, which rejected the claim because: there is no proof of a specific injury at a definite time and place in the course of employment; the claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws; the claimant was not under the industrial insurance laws at the time of the injury; at the time of the injury the claimant was not in the course of employment; and, the claimant's condition is not an occupational disease as contemplated by RCW 51.08.140. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 claimant to a Proposed Decision and Order issued on December 30, 1994, in which the order of the Department dated January 24, 1994, was

affirmed.

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.

DECISION

The sole issue presented by this appeal is whether the claimant, Ricky D. Morgan, was within the course of his employment with Columbia Beverage Co., when he injured his left knee on September 13, 1993. Our industrial appeals judge determined that the claimant was not within the course of his employment when he sustained the injury. We granted review because we disagree with this determination.

On September 13, 1993, there was an ammonia spill at Columbia Beverage Co., which caused the employer to evacuate the workers from the plant. The employer directed the employees to go to the parking lot in front of the building and await further instructions. At that time, the employer was trying to determine if the workers would be able to return to work or if they should be sent home.

While they were waiting for a decision from the employer, the employees engaged in various activities. Some were standing, or sitting and talking, some were hitting tennis balls back and forth, some were reading or listening to music, some were eating their lunches, and some, including the claimant, were playing touch football. Even though there is no indication in the record that it was a particularly rough game, the claimant injured his left knee when it buckled after he jumped to block a pass.

The Industrial Insurance Act provides for benefits to:

> each worker receiving an injury, . . . , during the course of his or her employment and also during his or her lunch period as established by the employer while on the jobsite. The jobsite shall consist of the premises as are occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged: PROVIDED, That if a worker by reason of his or her employment leaves such jobsite under the direction, control or request of the employer and if such worker is injured during his or her lunch period while so away from the jobsite, the worker shall receive the benefits as provided herein . . ..

RCW 51.32.015. RCW 51.36.040. The Act also defines when a worker is "in the course of employment." Under RCW 51.08.013:

> 'Acting in the course of employment' means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based . . ..

As the Board stated in Charles R. Johnson, Dckt. No. 90 5879 (March 10, 1992), the "determination of whether a worker is in the course of employment is an analysis of the time, place, and circumstances under which the injury occurred." Johnson, at 3. Under the facts of this case, it is clear that the claimant was within the course of employment at the time of the injury. There is no dispute that the injury occurred on company time and that the claimant was being paid to wait in the parking lot. The game started while the

employees were awaiting instructions and continued into the lunch break called by the employer. Further, it appears to us that the parking lot was the jobsite when the claimant was injured. The employer directed the employees to go to the parking lot and wait for further instructions. The employees were not free to leave the area or the premises.

The real focus of our inquiry, therefore, is on the circumstances under which the injury occurred. We are asked to determine if the claimant's participation in a football game took him out of the employment context. The test, as enunciated by the Washington State Supreme Court, the Board, and Professor Larson, is whether the claimant unreasonably deviated from his employment to such an extent that the deviation constituted an abandonment, however temporary, of his employment. Tilly v. Department of Labor & Indus., 52 Wn.2d 148 (1958); Vince O. Polmanteer, BIIA Dec., 88 0362 (1989); Charles R. Johnson, Dckt. No. 90 5879 (March 10, 1992); 1 A. Larson, The Law of Workmen's Compensation, § 23.65.

As Professor Larson suggests, the standard by which we judge an employee's conduct during lull periods is, or should be, different to some degree than in cases in which the employee drops active duties. The rationale for such a distinction is twofold:

> first, if there were no duties to be performed, there were none to be abandoned; and second, it is common knowledge, embodied in more than one old saw, that idleness breeds mischief, so that if idleness is a fixture of employment, its handmaiden is mischief also.

Vol. 5, The Law of Workmen's Compensation, § 23.65, 219.

In this case, the football game started spontaneously and innocently. As Garland Warren testified, he had a football in his truck which he and a few other employees "started tossing" around while they were waiting in the parking lot. After a while, they decided to play a "little game, you know, we're playing on asphalt, so we're trying to be, you know, as smart about it as we could." 9/27/94 Tr. at 26 and 27. Roen Lindseth described the game as a "noncontact pass only game." 9/27/94 Tr. at 45. The claimant characterized the football game as a "recreational activity while we were just standing there killing time." 10/17/94 Tr. at 11.

It is also important to note that this was not the first time an ammonia spill at the plant caused a temporary work stoppage and plant evacuation. A few months earlier, a similar spill occurred and the employees engaged in various activities to pass the time which included playing catch with a "Nerf" football, playing catch with a frisbee, and hitting rocks with sticks. At that time, the employer did not intervene to stop these activities, except to direct employees to stop hitting rocks with sticks, and the employer did not take disciplinary action against any employees for engaging in these activities. As a result, the participants in the football game reasonably believed that there was nothing wrong with a friendly game of football after the second ammonia spill.

Obviously, we are not suggesting that an employee is free to engage in any activity he may choose during a lull period and still remain within the coverage of the industrial insurance laws. Conduct which is outrageous, inherently dangerous, or unreasonable under the

circumstances would result in a denial of coverage. This case is distinguishable from previous Board decisions denying coverage for injuries.

The Board's decision in Alfred Morrill, Dec'd, BIIA Dec., 29,704 (1970), involved a worker who left the employment premises to collect honey from a tree in the woods during his lunch break and was stung by a bee. Benefits were denied on the basis that the injury resulted from the wholly independent act of the employee, for his own benefit or gain, and the employee's act had no connection with his employer's work.

In Thomas G. Roe, BIIA Dec., 43,694 (1974), the Board denied benefits to a claimant who was injured during a beer break that occurred near the end of normal working hours. The Board determined that the claimant's participation in the beer break was a sufficient deviation to constitute an abandonment of his employment since he was not instructed to participate in such breaks and the breaks were not designed to foster goodwill or the employer's best interest.

This case is also distinguishable from cases in which the injury occurred while a worker was playing on an employee softball team or a company football team. In such cases, the Board denied coverage in part because the games were played off work hours, off work premises, and the players were not being paid for their time. Christopher Phillips, BIIA Dec., 90 1386 (1991); Berry Rambeau, BIIA Dec., 89 1604 (1990).

In this case, the claimant was doing something which had some connection with his employer's work. He was engaged in a friendly game

with his coworkers while passing the time, awaiting further instructions from his employer. He did not have any other duties to perform or abandon. As Professor Larson points out:

> workmen whose jobs call for vigorous physical activity cannot be expected, during idle periods, to sit with folded hands in an attitude of contemplation. They must do something, and the most natural thing in the world to do is to joke, scuffle, spar, and play with the equipment and apparatus of the plant.

Vol. 5, The Law of Workmen's Compensation, § 23.65, 220.

This case is similar to a recent Board decision, in Charles R. Johnson, Dckt. No. 90 5879 (March 10, 1992). In that case, the Board found that the employer acquiesced in the activities of a worker who cut off some fingers while working on a table saw at home. Mr. Johnson was on administrative leave at the time and his employer's only directives to him were to be available at home, during work hours, and not to perform the employer's work unless specifically assigned to do so. These cases are similar in that neither employer told the employee to do anything other than to wait. In both cases, the employees were injured while they waited.

Certainly, the employer has an interest in how its employees pass the time during a paid lull period. The employer's interest is to have the employees pass the time in an orderly, relatively safe, and pleasant manner. Since the employer was paying the employees and did not allow them to leave the area or the premises, the employer also had the right and duty to exercise supervisory control over their activities.

The employer contends that the employees were told by Mr. Armstrong, night shift supervisor, to stop playing the football game. As Mr. Armstrong testified, he was concerned that someone might get hurt. Even so, he admitted that he could not confirm that the participants heard his directive to stop playing the game. Dean Swanson, lead man, and Liana White, machine operator, corroborated Mr. Armstrong's claim that he directed the participants to stop playing the game before the injury occurred.

All of the participants denied that they were told to stop playing the game. They admitted, however, that Mr. Armstrong told them not to kick the football because they might damage a car. David McRae, a coworker who did not play football, testified that he was sitting 20 feet away during the game and did not hear Mr. Armstrong tell the participants to quit playing football.

Under the circumstances, we do not find the employer's contentions to be persuasive. If Mr. Armstrong had wanted to stop the game, he certainly could have intervened in an effective manner and stopped the game. More than likely, he did nothing more than tell them not to kick the football and, perhaps, express his concern to some of the bystanders that someone might get hurt. Further, we are not impressed by Mr. Armstrong's testimony regarding the verbal reprimands he issued after the incident. Many of the participants denied receiving a verbal reprimand at all. We also find it curious that only participants in the football game were reprimanded for engaging in horseplay.

The employer also contends that the injury occurred during the lunch period. The evidence does not clearly establish when the

supervisor called the lunch break or whether that information was effectively communicated to all the employees, however. It does appear that Mr. Armstrong called the lunch break some time after the football game started, but before the injury occurred. Since the activity which resulted in the injury was an extension or continuation of activity that commenced during work time, we do not believe that it matters whether a lunch break had been called a short time prior to the injury. See Polmanteer.

The employer is concerned enough about safety in the work place to have a rule/policy against horseplay. The employer did not invoke and enforce this rule during the work stoppages due to the ammonia spills, however, until someone actually got hurt. Obviously, the rule was designed to prevent/prohibit potentially dangerous "foolery" when employees are performing their jobs in the plant. We doubt anyone gave much pre-thought to what activities were acceptable during periods the employees were evacuated to the parking lot and simply told to wait for further instructions.

Under the totality of the circumstances, the claimant did not unreasonably deviate from his employment when he played football during the work stoppage. He was in the course of his employment, awaiting further instructions from his employer, when he injured his knee.

FINDINGS OF FACT

1. On September 17, 1993, the Department of Labor and Industries received an application for benefits alleging an industrial injury to the claimant on September 13, 1993, during the course of his employment with Columbia Beverage Company. On October 6, 1993, the Department issued an order rejecting the claim because there was no proof of a specific

injury at a definite time and place in the course of employment. Following a timely protest from the claimant, the Department issued an order on January 24, 1994, rejecting the claim because: there is no proof of a specific injury at a definite time and place in the course of employment; the claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws; the claimant was not under the industrial insurance laws at the time of injury; at the time of injury, the claimant was not in the course of employment; and the claimant's condition is not an occupational disease as contemplated by RCW 51.08.140. The claimant appealed this order to the Board of Industrial Insurance Appeals on February 16, 1994.

2. On September 13, 1993, there was an ammonia spill at Columbia Beverage Co., which occurred during work hours and caused the employer to evacuate the employees, including the claimant, from the plant. The employer directed the employees to go to the parking lot in front of the plant and await further instructions, while the employer was determining whether the workers would be able to return to work or should be sent home. The employer did not give employees specific instructions about what they should do or not do while they were waiting.

3. While they were waiting for further instructions from the employer, the employees engaged in various activities in the parking lot. Some were standing or sitting and talking, some were hitting tennis balls back and forth, some were reading or listening to music, some were eating their lunch, and some, including the claimant, were playing touch football.

4. The employees were not free to leave the parking lot area or the premises at the time the claimant's injury occurred.

5. On September 13, 1993, the claimant injured his left knee while involved in a friendly game of touch football while on the jobsite. A short time prior to the injury, but after the football game started, the employer called

a lunch break.

6. As a proximate result of the injury of September 13, 1993, the claimant sustained a medial meniscus tear of his left knee.

7. A few months prior to September 13, 1993, an ammonia spill occurred at the plant which caused a similar, temporary plant evacuation and work stoppage. During the lull period, employees engaged in various activities to pass the time which included playing catch with a "Nerf" football, playing catch with a frisbee, and hitting rocks with a stick. The night shift supervisor directed employees to stop hitting the rocks with sticks, but did not otherwise intervene to control the activities of the employees. The employer did not take any disciplinary action against any employees for their activities during the lull period.

8. It is reasonable to expect that friendly horseplay activity, such as the touch football game the claimant participated in on September 13, 1993, will occur during temporary work stoppages.

9. The employer did not direct the participants in the football game to stop playing the game before the injury occurred.

10. The touch football game the claimant participated in on September 13, 1993, did not constitute an unreasonable deviation from, nor abandonment of, his employment.

CONCLUSIONS OF LAW

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

2. The claimant sustained an industrial injury while working for Columbia Beverage Co., on September 13, 1993, within the meaning of RCW 51.08.013, RCW 51.08.100, RCW 51.32.015 and RCW 51.36.040.

3. The order of the Department of Labor and Industries dated January 24, 1994, which rejected the claim because: there is no proof

> of a specific injury at a definite time and place in the course of employment; the claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws; the claimant was not under the industrial insurance laws at the time of injury; at the time of injury the claimant was not in the course of employment; and the claimant's condition is not an occupational disease as contemplated by RCW 51.08.140, is incorrect, and is reversed. The claim is remanded to the Department with directions to issue an order allowing the claim as an industrial injury, and to take such other and further action as indicated by the law and the facts.

It is so **ORDERED**.

Dated this 20th day of April, 1995.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member