Rambeau, Berry

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

Recreational activities

Worker who injured his knee while playing on company football team was not injured in the course of employment where the employer paid for only the team's league entry fee, games were played off work hours and off work premises, the company name did not appear on jerseys, and no business was solicited through the team's participation in the league. ***….In re Berry Rambeau*, BIIA Dec., 89 1604 (1990)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-25386-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BERRY RAMBEAU	**)**	**DOCKET NO. 89 1604**
	)	
CLAIM NO. K-632059	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Berry Rambeau, by
Walthew, Warner, Costello, Thompson & Eagan, P.S., per
Edward Boyer and Celia Seiglar, Legal Assistant

Employer, Continental Credit Services, Inc., by
Howard George, Vice President and
Pete Roswell, Owner

Department of Labor and Industries, by
Office of the Attorney General, per
Christine Tilton, Assistant

This is an appeal filed by the claimant on May 17, 1989 from an order of the Department of Labor and Industries dated March 6, 1989 and communicated to the claimant on March 20, 1989, which adhered to the provisions of a Department order dated October 19, 1987 which rejected the claim because at the time of the injury the claimant was not in the course of employment. **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 May 4, 1990 in which the order of the Department dated March 6, 1989 was reversed and remanded to the Department to accept the injury as having occurred during the course of his employment.

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.

Mr. Berry Rambeau was employed by Continental Credit Services, Inc. from October, 1985 until January, 1988. He joined a company football team in 1986 when he was approached by Mike Edwards, a company vice- president, and asked to play. On August 23, 1987, while playing in a game, Mr. Rambeau injured his right knee. The issue presented in this appeal is whether that injury was an industrial injury within the meaning of RCW 51.08.100 and RCW 51.08.013.

The basic question is whether Mr. Rambeau was injured "in the course of his employment" with Continental Credit as defined by RCW 51.08.013. The Industrial Appeals Judge found that he

was, citing Professor Larson's treatise as authority for her decision. 1A A. Larson, The Law of Workmen's Compensation,] 22.00 and] 22.22. Further review of Larson, § 22.24, in particular, leads us to a different conclusion.

The company football team was organized by Michael Edwards, a company vice-president. He and some friends organized a flag football league which Continental's team joined. Continental paid the entry fee of $100.00, but provided no equipment nor money for equipment for team players.

The games were held on weekends and both games and practices were held off the company premises. Players occasionally left work early for practice, which was held once per week during the season. In 1986 the team wore jerseys with the name Continental, but in 1987, the year Mr. Rambeau was injured, the jerseys did not bear the name of the company.

These facts are undisputed. There was some testimony that people were pressured into playing and that those who did not play were treated differently. There was also testimony that employees were promoted and demoted based on their participation with the team. This testimony came from Mike Spoor, who was fired by the company, the claimant, and Robert Polus, who admitted he had personal problems with Mike Edwards.

Even considering the evidence produced by these employees, as well as Curtis Phillips, another employee, we do not believe Mr. Rambeau was injured during the course of his employment. The Proposed Decision and Order correctly quotes the basic test set forth in Larson for determining whether a recreational activity is within the course of employment. Section 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.

These three factors are fleshed out in § 22.24, which sets forth four criteria. These four criteria are (1) time and place (§ 22.24(b)); (2) degree of employer initiative (§ 22.24(c)); (3) financial support and equipment furnished (§ 22.24(d); and, (4) employer benefit (§ 22.24(e) and 22.32).

In this case the football games were played on Sundays, off company premises. 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 some evidence that Mike Edwards, a company vice-president, was the chief organizer of the team. Mr. Edwards was also an organizer of the league and this was probably a major factor in Mr. Edwards' enthusiasm in promoting the team. There is no evidence that the owner and president of Continental had any involvement with the team or that the company officially endorsed the team. Those cases cited by Professor Larson 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.

Continental Credit paid league dues of $100.00 for the first year. The players paid for all equipment, including jerseys, shoes, footballs and flags. "Although facts of this kind are helpful in building a cumulative case of employer involvement, standing alone they are ordinarily not enough to meet the burden of proof." Larson,] 22.24(d), at 5-160. Professor Larson cites cases in other jurisdictions where tangible employer contributions such as $1,000.00 for equipment, $500.00 as a subsidy, league dues, and equipment have not been enough to satisfy this requirement. Larson, § 22.24(d), at 5-160-5-161.

The final factor is benefit to the employer. In this case there is very little, if any, evidence showing any benefit flowing to Continental from the flag football team. There is no evidence that any business was solicited through the league or that this was a goal of the company. Though the team jerseys did carry the company name in 1986, the next year the company name was eliminated from the jersey. Even if the company was able to advertise through its employees' participation in the league, this is not enough to bring Mr. Rambeau's injury within the course of his employment, even when combined with evidence of an employer subsidy. Larson, § 22.24(e), at 5-161-5-162.

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 a 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 NY 468 (NY Ct.App.1949).

Applying Larson's criteria to the facts of this case, we conclude that Mr. Rambeau was not in the course of his employment when he injured his knee during a football game, played outside work hours and off work premises.

FINDINGS OF FACT

1. On October 12, 1987, the Department of Labor and Industries received a report of accident alleging an injury to Berry Rambeau on August 23, 1987, during the course of his employment with Continental Credit. On October 19, 1987, the Department issued an order rejecting the claim for the sole reason that at the time of the injury the claimant was not in the course of his employment. On October 28, 1987, a notice of appeal was filed on behalf of the claimant. On November 10, 1987, the Board issued an order granting the appeal, assigning it Docket No. 87 3604, and directing that proceedings be held on the issues raised in the appeal. On January 26, 1988, the Board issued an order on agreement of parties remanding the claim to the Department of Labor and Industries for further investigation and such other action as may be indicated or required by law.

   On March 6, 1989, the Department issued an order adhering to the provisions of a prior Department order dated October 19, 1987. On May 18, 1989, the Board received a notice of appeal filed on behalf of the claimant. On June 14, 1989, the Board issued an order granting the appeal subject to proof of timeliness and assigning it Docket No. 89 1604.

2. The March 6, 1989 order was received by the claimant or communicated to the claimant no sooner than March 20, 1989.

3. In 1986, Mike Edwards, a vice-president for Continental Credit Services, Inc., the claimant's employer, organized a flag football league with some friends. Mr. Edwards organized a team of Continental employees to participate in the league.

4. Continental paid a $100.00 entry fee for the team in 1986. The players were responsible for the purchase of all equipment, including jerseys, shoes, footballs and flags.

5. League games were held on Sundays off the company premises. Players were occasionally allowed to leave work early for the once per week practices. Team meetings were occasionally held on company premises.

6. In 1986 the name "Continental" appeared on the team jerseys. In 1987 the company name did not appear on the jerseys.

7. The company president and owner did not take any part in the organization of the team or any of the team's activities. No business was solicited through the team's participation in the league.

8. On August 23, 1987, Berry Rambeau injured his right knee while playing flag football for the Continental employees' team.

CONCLUSIONS OF LAW

1. The claimant filed an appeal within 60 days of the communication of the order, as required by RCW 51.52.050 and .060.

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

3. On August 23, 1987, Berry Rambeau was not acting within the course of his employment within the meaning of RCW 51.08.013 while playing flag football. The knee injury which he sustained while playing flag football was not an industrial injury.

4. The Department order dated March 6, 1989 which adhered to the provisions of a Department order dated October 19, 1987 which rejected the claim because the injury was not in the course of employment is correct and is affirmed.

It is so ORDERED.

Dated this 11th day of December, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member

DISSENT

I disagree with the decision of the majority in this appeal. My main concern is the evidence of employer compulsion to participate on the football team. As pointed out in the Proposed Decision and Order, employees, including Mr. Rambeau, were pressed into playing on the team.

There is sufficient evidence in the record to persuade me that failure of Mr. Rambeau and his coworkers to play on the team would have an effect on their jobs. Employees who testified at the

request of Mr. Rambeau sincerely believed their advancement in Continental Credit Services depended on their active and willing participation as team members.

Mike Spoor testified about general peer pressure from management and supervisors. He told of constant individual pressure to play. Curtis Phillips stated that he joined the team due to pressure to play from management. Robert Polus's testimony was consistent with that of other employees, as was Mr. Rambeau's.

I believe the Proposed Decision and Order should be adopted as it is supported by the record and is a correct statement of the law as it applies to the facts of this appeal.

Dated this 11th day of December, 1990.

_____

FRANK E. FENNERTY, JR. Member