SAFE AT HOME...BUT OUT AT THE INDUSTRIAL ACCIDENT BOARD RECREATIONAL INJURIES - PROOF AND DEFENSES

ALAN S. PIERCE

PIERCE, PIERCE & NAPOLITANO | SALEM, MA

On May 28, 1971, John Kemp, after rounding third base, collided with the catcher of the opposing team and broke his collar bone at home plate while playing for the Westinghouse Company softball team in an industrial league competing against other such company teams. At the time of his accident, he was wearing a softball jersey with the name "Westinghouse" and a hat with a "W", both paid for by his employer and despite his pain, felt he had upheld the glory of his company team. The schedule for the games was posted in the employee breakroom. The employer was presumably deriving both good will and increased employee morale, but other than that the games were off premises, off hours, purely voluntary and the question arose whether Kemp was entitled to workers' compensation benefits.

As a newly minted workers' compensation lawyer in Massachusetts, I took this case to the Department of Industrial Accidents (then known as the Industrial Accident Board) and obtained an award of compensation for his several months of lost time and medical expense. The matter was affirmed by a three member Reviewing Board, affirmed by a Judge in Suffolk Superior Court and by a three-member Appeals Court. The Massachusetts Supreme Judicial Court granted further appellate review at the request of the self-insured Westinghouse Electric Supply Company.

In a decision issued on July 13, 1982 (yes, 11 years after the injury), the Supreme Judicial Court concluded "Westinghouse's involvement with the operation of the softball team in which Kemp played just does not have a sufficient connection with his employment to warrant the award of compensation. The case for employer benefit and employer involvement is not made on the record. Any benefit to Westinghouse was, at best, inferential and insignificant. Westinghouse's involvement was incidental and the award affirmed by the Superior Court was vacated. *Kemp's Case*, 386 Mass. 730 (1982).

A bitter disappointment for me, personally, in my first case that made it to the Supreme Judicial Court, but not unexpected when the court granted further appellate review. At the time of Kemp's injury and the decision of the SJC, Massachusetts had no statutory provisions covering recreational injuries. Shortly thereafter, in 1985, the Massachusetts legislature amended G.L. c. 152, Section 1(7A) to state as follows:

> "Personal injury" shall not include any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to, athletic events, parties, and picnics, even though the employer pays some or all of the cost thereof."

This statutory provision is not unlike many similar provisions in a significant amount of workers' compensation jurisdictions. However, the experience in Massachusetts before and after *Kemp's Case* is an interesting beginning to an analysis of the compensability of injuries occurring in the setting of company teams, parties or other types of so-called "recreational" activities.

The state of the law in Massachusetts before the decision in *Kemp's Case* is worth looking at. *Moore's Case*, 331 Mass. 1 (1953) involved an injury sustained at an office Christmas party and the Supreme Judicial Court noted that the certain factors for determining whether the employment in the recreation are related with sufficient closeness to warrant an award are "the customary nature of the activity, the employer's encouragement or substitution of the activity, the extent to which the employer managed or directed the recreational enterprise, the presence of substantial pressure or actual compulsion on the employee to participate, and the fact that the employer expects or receives a benefit from the employee's participation in the activity such as by way of improved employer-employee relationships or through advertising the employer's business."

The Court noted that there could be other relevant factors such as the time and place of the recreational activity. The Court in Kemp referred to cases in other jurisdictions such as *Lindsay v. Public Serv Co.*, 146 Colo. 579 (1961) in which no compensation for an injury sustained by a member of a softball team for which the employer

provided equipment and uniforms carrying the company symbol; *Jackson v. Cowden Mfg. Company*, 578 S.W. 2nd 259 where no compensation was awarded for injuries sustained in an industrial league basketball game, where the employer paid the annual entry fee and certified that each player was an employee, and the employer had formally purchased uniforms, and in the year of the injury had reimbursed member's for uniforms purchased by them); in *Wilson v. General Motors Corp.*, 298 NY 468 (1949) (4-3 decision) in which compensation was denied as a matter of law where the employee was injured in a softball game while playing, after hours and off premises, on a team for which the employer provided equipment and allowed conferences related to the contests on company team, on the company's premises.

On behalf of Kemp, I cited *Jewel Tea Company v. Industrial Commission*, 6 Ill. 2nd 304 (1955), which held that compensation should have been awarded to an employee injured playing softball in a company league, where the company provided equipment and t-shirts carrying the company's name, awarded trophies, and provided an annual dinner, or otherwise encouraged the league in a variety of ways; *LeBar v. Ewald Bros.* Diary, 217 Minn. 16 (1944), where compensation was upheld where the employer furnished equipment and shirts with its name on them, paid a league entry fee, and provided a year-end banquet, and admitted it had entered the league to obtain good-will from the publicity given its business, as well as other cases.

Subsequent to the decision in *Kemp's Case*, and the addition of the aforementioned statutory language concerning recreational activities, there have been several cases, both in Massachusetts and around the country, that point out the scope of the difficulties in bringing or defending these claims.

In Massachusetts, there were two notable appellate decisions in recent years (*Hammond's Case* and *Sikorski's Case*) to be discussed later involving the interpretation of the "purely voluntary recreational activity" language now included in our statute.

When it can be shown that an employee's injury arose out of and took place in the course of his employment, he or she will receive compensation in accordance with the amount by statute. Athletic, recreational and social activities may be considered within the course of employment (1) when they occur on premises during a meal or recreation period as a regular incident of employment; or (2) the employer by requiring participation either expressly or impliedly brings the activity within the scope of employment; or (3) where the employer derives substantial benefit from the activity, usually beyond the intangible value of morale or goodwill. Many states have attempted to limit by state the compensability of injuries occurring under these circumstances. For example, Section 11 of the Illinois Workers' Compensation Act, 820 ILCS 305 states: "accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics, do not arise of and in the course of employment even though the employer pays some or all of the costs thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

Under the New Jersey Workers' Compensation Statute, NJSA, Section 34: 15-7, New Jersey enacted a limitation in 1979 limiting coverage for recreational activities.

The Act removes from the scope of compensability injuries or death resulting from recreational activities "unless such activities are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale."

See *Sarzillo v. Turner Constr. Co.*, 101 N.J. 114 (1985).

However, where an employer compels an employee to participate in an activity that ordinarily would be considered recreational or social in nature, the employer thereby renders that activity a work-related task as a matter of law. See *Lozano v. Frank De Luca Construction*, 178 N.J. 513 (2004). See also Sarzillo, supra (declining to award benefits to employee in part because employer had not compelled participation in injury-inducing recreational activity); *Dowson v. Borough of Lodi*, 200 N.J. Super. 116 (App.Div.1985) (affirming judge of compensation's denial of benefits based in part on absence of evidence that employer compelled employee to participate in softball game); and *Cotton v. Worthington Corp.*, 192 N.J. Super. 467 (App. Div.), cert. denied, 96 N.J. 301 (1984) (declining to categorize softball games as regular incident of employment when "employer's contribution to, participation in, and encouragement of the activity did not rise to a level suggesting any compulsion on employees").

The New York Worker's Compensation Law, WCL, Section 10, as amended by S. 6848 and A. 8106, June 21, 1983, now provides: "There is no liability where the injury was sustained in or caused by voluntary participation in an off duty athletic activity not constituting part of the employee's work-related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.

According to the Missouri Workers' Compensation Act, 287.120 (7):

> 7. Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:
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> (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
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> (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
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> (3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

Similar provisions appear in many other state jurisdictions so it's of utmost importance to check your state's statute.

In *Kozac v. Industrial Commission*, 219 Ill. App. 3rd 629 (1st Dis. 1991), an employee suffered a fatal heart attack playing in a tennis round robin tournament which was being held in order to select a tennis team to represent his employer in a national invitational championship named "Holiday Inn 1983 Corporate Invitational Tournament." The winners would receive a vacation and the Holiday Inn Hotel Corporation would make a donation into charity in the name of the winning corporation.

Benefits were denied on the basis that the participation in the tennis tournament was voluntary. It was argued, however, that the program was not a recreational activity, but rather a promotional activity that inured to the benefit of the employer. The court in Illinois nevertheless held that this event fell under Section 11 of the Workers' Compensation Statute because it was "an athletic event" and therefore, the death was not compensable. However, see *Chicago Transit Authority v. Industrial Commission*, 238 Ill. App. 3rd 224 (1st Dist. 1992) in which the claimant was a varsity basketball player in college and was approached by an employee of his future employer and recruited to be a bus driver. He was hired, and the evidence revealed that the number of hours he worked each week depended on the employer's team schedule, which the employee was paid for days he did not drive the bus and was, instead, playing basketball and that the employer actively organized and ran the league.

Since the injured employee was recruited and subsequently hired because of this basketball skills, it was held that the activity in which he was injured was "ordered or assigned" and therefore the injury was compensable. A different result occurred in *Pickett v. Industrial Commission*, 252 Ill. App. (1st Dist. 1993), where the employee, a correctional officer played for a basketball team sponsored by the Sheriff's department. The evidence revealed that the employee was never asked to play on the team, was never told he had to play on the team, and while there was a finding, there was certain evidence of control on the part of the employer and some intangible benefit by sponsoring the team. The court distinguished the case from the Chicago Transit Authority case in finding that Pickett was not expressly recruited to play basketball not ordered or assigned to do so.

LARSON'S TREATIE:

Absent statutory provisions to the contrary.

According to Professor Arthur Larson's treatise, Larson's Workman's Compensation Desk Edition, Section 22:

Recreational or social activities are within the course of employment when:

> 1. They occur on the premises during a lunch or recreational period as a regular incident of employment; or
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> 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
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> 3. 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.

Larson suggests that the principles at stake in these cases are closely analogous to those which have been enumerated in connection with lunchtime injuries, going and coming injuries, and personal comfort cases, as well as the basic principles drawn from these other areas of the Workers' Compensation Law.

Larson also states: "It has been repeatedly and consistently observed that in borderline course of employment situations, such as going and coming, or having lunch, the presence of the activity on the premises is of great importance. Consistency is maintained by applying the same distinction to recreation

cases: recreational injuries during the noon hour on the premises have been held to be compensable in the majority of cases. This result has been reached in lunch hour on the premises cases, where the claimant was a softball player, touch football player, a ping pong player, a 17-year old girl riding a hand truck, or a spectator at a basketball game, baseball game or a boy swimming in the employer's pool." However, as he succinctly puts it: "put negatively, this means that the course of employment does not embrace every spontaneous or unprecedented frolic that might be undertaken on the premises. It should not be necessary to show acknowledge or acquiesce by the employer. The controlling test is whether the activity has in fact become an incident of the employment; if it has been persisted in long enough to do so, the employer's ignorance of its existence does not destroy the fact of its existence." *Nichols v. Workman's Compensation Appeals Board*, 75 Cal. Rptr. 226 (1969).

It would seem from an analysis of cases, both in Massachusetts and around the country, whether there is statutory language concerning voluntary participation or not, the relevant factors of employer involvement would be:

- Employer's Direction and Management of Activity
- Employer's Subsidization of Activity
- Employer's Encouragement Causing Employee to Feel Obligated to Attend
- Use of Event to Promote Business
- Conduct of Business in Connection with the Activity
- Benefit Derived by the Employer from Activity in Question
- Use of Occasion to Promote Business
- Use of Occasion to Prove Skills of Employee
- Deduction of Financial outlay for Activity as Business Expense for Income Tax Preparation
- Enhancement of Employer/ Employee Relationship

In a 1959 New Jersey case, before their 1979 statutory amendment, a game is played on premises during lunch or recreation, a claim may be found to be compensable. *Tito v. Tessler & Weiss, Inc.*, 147 A. 2nd 783 (1959), see also *Mack Trucks, Inc. v. Miller*, 326A 2nd 186 (1974), was a Maryland case where the employee ruptured a kidney while playing touch football on his employer's premises during a coffee break. While the touch football game had not been expressly authorized, evidence revealed it was considered to be permitted based upon the company's acquiescence over a three-month period these games had taken place. In addition, the evidence revealed the company's safety director was present on more than one occasion and never interfered or objected to the games. The employer's actual knowledge and acquiescence established the recreational activity as a "incident of employment." If a game is played outside the normal work hours, but played on premises, this also may result in compensability. The Court stated: In 1966 the Court of Appeals first determined that when an employer encouraged, authorized and underwrote the costs of recreational activities the work-related criterion was met. *Sica v. Retail Credit Co.*, 245 Md. 606. The employee there was injured at a company picnic when he dove off a piling into shallow water and broke his neck. Recognizing that each case must be decided on its particular circumstances, the Court gave great weight to the "substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale common to all kinds of recreation and social life." Sica, supra, at 618.

In *Tedesco v. General Electric Co.*, 114 N.E.2nd 33 (1953), a New York case in 1953, the employee was injured while playing in a softball league whose games were played off hours but on premises of the employer, compensation was affirmed.

EMPLOYER COMPULSION - VOLUNTARY v. PURELY VOLUNTARY?

Careful attention should be given to the plain meaning of the statutory language in the relevant jurisdiction. 'Purely voluntary recreational activity' are four words that need to be parsed. The 'activity' is generally the least controversial word in this limitation, and there have been cases arising out of what is considered not only voluntary but "purely" voluntary. Obvious employer compulsion that can be shown on the record would be relatively easy, more difficult are cases those that might involve subtle compulsion or a subjective view compulsion by the injured employee.

Anecdotally, there was an episode from the 1980's TV series LA Law in which a subplot involved the law firm's informal basketball league competing against other law firms. The subject law firm of McKenzie, Brackman, Chaney & Kuzak, hired a summer intern who was around 6'8" tall, not a very distinguished law student, but somebody with a strong basketball background, and immediately "drafted" him to play in their basketball league. Had this summer intern been injured, the McKenzie law firm could have difficulty showing that its intern's participation was purely "voluntary". In a real case, *GGS Machine Company v. Industrial Commission*, 670 P.2nd 816 (1983), an award of compensation was upheld where the injured employee testified that he was "strongly encouraged" by his employer to play in a basketball game. Note, also, *The Chicago Transit Authority* case and the Pickett case (supra).

Where a state of mind is a relevant fact, the declarations made by that person are admissible as circumstantial evidence of the witness's state of mind rather than there is evidence of the facts asserts. 29 Am. Jur. 2d, Evidence, Sections 497, 650. The case of *Ezzy v. Workers' Comp. Appeals Bd.*, 194 Cal. Rprt. 90 (1983), involved a female law clerk injured while playing in a softball game while playing on an employer sponsored team. There was a requirement in the softball league that the teams be comprised of men and women with at least four women per team. There was a shortage of women on her employer's law firm's team. The court, in awarding compensation, noted that there was more pressure on women to participate. Another important consideration was the fact that one of the law firm's partners was the coach of the team. This fact made the law clerk more vulnerable to pressure to participate.

A claim based on pressure or compulsion to attend can also be approached by evidence that the employer recorded or recognized attendance. In the case of *Grant*, 671 P.2nd 455 (1983), the court, in awarding compensation benefits, relied, in part, on evidence that the employer noted the names of employees or did and did not attend its annual Christmas parties, and compiled statistics as to average attendance. This evidence helped support the claim that the employee felt compelled to attend the party.

What is or is not a "recreational" activity should also be explored.

WHAT DOES "RECREATIONAL" MEAN?

According to the Oxford English Dictionary, recreational is defined as "related to or

denoting activity done for enjoyment when one is not working", other definitions include "a means of refreshment or diversion or hobby" or according to Merriam-Webster, "refreshment of strength and spirits after work".

In my practice, I have encountered a couple of cases that I remember in which the workers' compensation insurer in defending a claim, in my view, improperly or misconstrued their statutory defense of "purely voluntary recreational activity".

In one case, I represented an employee of a manufacturing company, who is diabetic, had a largely sedentary job, and had to eat, drink or monitor his blood sugar levels on a fairly regular basis. In addition, he was instructed by his physician to try to do as much exercise as possible, something he could not control during his usual work day. Accordingly, on his 45-minute lunch break, he would have whatever necessary food or drink he would need and then he would power walk/jog in a wooded area, part of the employer's property. While so doing, he stepped in an indentation in the trail and severely injured his ankle. The insurer's primary defense was that he was engaged in a purely voluntary recreational activity.

While one, I suppose, could argue that power walking/jogging could be "recreational", our contention was that this did not fit into the definition of a recreational activity. This was an activity that could more properly be considered compensable under the Personal Comfort Doctrine (discussed in an earlier article for *Workers' First Watch*, October, 2019). The insurer's defense might have been more successful had he, for example, engaged in a race or competition with a co-worker during their luncheon break, but for somebody seeking to improve or control his health in order to perform his work activities in a healthy and safe manner, the activities of walking/jogging during his lunch break could hardly be considered "recreational".

Another case currently pending in our office involves a retired Marine, very physically fit, martial arts hobbyist, who is employed as a security guard for a company where he is often required to physically chase and, perhaps, apprehend others. His habit at the beginning of the work day, before he "clocks in", is to do calisthenics or other types of stretching/quasi-martial arts maneuvers and, in performing same one morning, on the employer's premises, before his shift actually began, he severely injured his knee. The insurer's primary defense is that he was engaged in a purely voluntary recreational activity. Once again, our claim is that, at best, the activity he was engaging in when injured, was at a location he otherwise would have been covered had he, for example, slipped and fell. We are analyzing this case under the arising out of and in the scope of employment basis and the Personal Comfort Doctrine, which encourages or recognizes the need for eating, drinking or doing other activities such as using a restroom, or seeking relief from work during the work day as being within this Doctrine. Accordingly, even though certain situations would call into question whether a certain activity was recreational or not, whether said activity was a "purely" recreational activity, one should be cognizant of the fact that the activity itself may not be considered to be "recreational" in the strict sense. Limbering up or preparing oneself for the rigors of the work day, even if it involves activities which in other settings could be considered recreational, does not mean that in all cases those activities are recreational. These cases illustrate the critical differences in analyzing the activity in question, and whether it was voluntary and/or recreational.

The more recent Massachusetts workers' compensation cases referred to above are worthy of discussion.

The first case is *Hammond's Case, 62 Mass. App. Ct.* 684 (2004). Linda Hammond was an employee of an events corporation which coordinates cultural, social and recreational events for client companies. One of the client companies had an annual employee appreciation program, and Linda Hammond

coordinated a weekend ski trip to Stowe, Vermont for the client's employees. As an event coordinator, she obtained and distributed ski lift tickets, coordinated matters with the hotel, provided snacks and movies for the bus ride and was available to respond to the needs of the client's employees at the ski area. She did not, however, accompany them to the mountain when they went skiing. Upon return from the trip, the President of her employer suggested that she "should at least go to the mountain and make sure that all went well for the client's employees while they were there".

Accordingly, at the next employee appreciation ski trip, Hammond brought a friend to accompany her. They did, indeed, accompany the client's employees on the mountain, including skiing. Had Linda Hammond been injured while so doing, she probably would have been covered for workers' compensation, although one could expect that the insurer might have raised the purely voluntary recreational activity defense, a defense likely countered by the directive of her employer to go to the mountain with the client's employees. However, in this case, after the employees had finished their skiing for the day, the employee and her friend decided to do one last run down the hill, at which time she suffered her injury.

The Massachusetts Appeals Court held that Linda Hammond was engaging at that time in a purely voluntary recreational activity, that the employer had done nothing more than pay for the cost of that activity, and that the employee must show an objective element of compilation on the part of the employer to offset the recreational activity defense.

Compare or contrast *Hammond's Case* to *Sikorski's Case*, 455 Mass. 477 (2009). This was one of my cases, and the last case I argued at the Massachusetts Supreme Judicial Court. My client, Karen Sikorski, was a mathematics teacher at Peabody, Massachusetts High School and volunteered to chaperone the Ski Club at one of their weekend ski trips. The Ski Club is officially sanctioned by the School Committee of Peabody. It has a faculty advisor, who receives a stipend from the City for serving as the Ski Club's advisor, and there is a requirement that there be one chaperone for every five (5) students. The teachers acting as chaperones are not paid for their services, but the Ski Club pays their expenses. The chaperones are expected to supervise the students while they ride on the bus and, this is important distinction, while they ski. The chaperones are provided with walkie talkies, and they were charged with enforcing all school rules during such a trip, including prohibitions against alcohol, drug use, rowdy misbehavior and, of course, skiing safely. Karen Sikorski was injured while skiing as a chaperone with five other students in her charge, and the City of Peabody which is self-insured, denied this case on the grounds that she was engaged in a "purely voluntary recreational activity".

Clearly, her decision to chaperone was "purely voluntary" but that it is not the important criterion. It is whether or not the activity in which she was engaged at the time of her injury was a "recreational activity".

The Massachusetts Supreme Judicial Court

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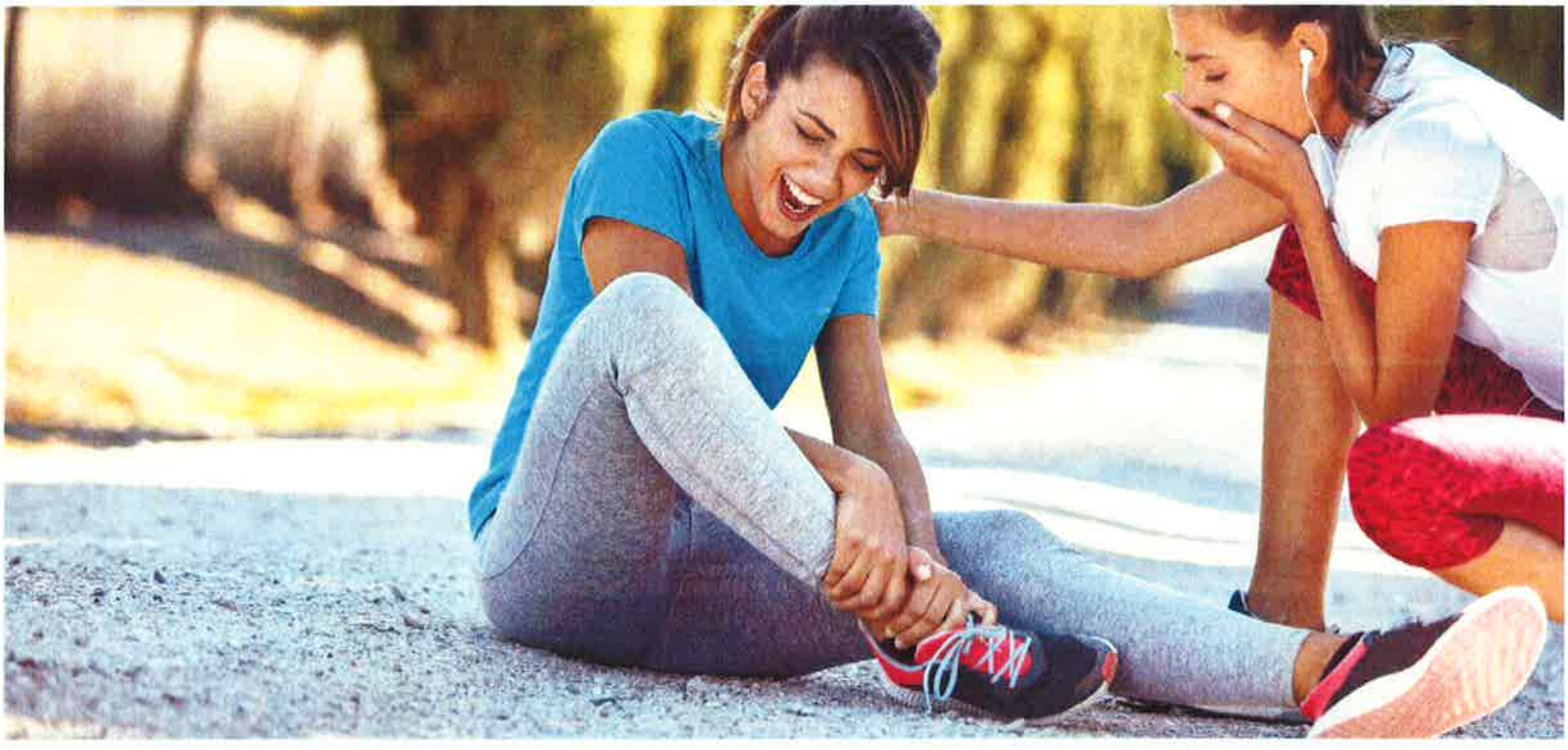

"because the recreational aspects of the employee's services as a Ski Club chaperone was subordinate to the work-related duties she performed; the exclusion does not bar her from receiving workers' compensation for her injury"

agreed that the employee was discharging her responsible as a chaperone, although voluntarily undertaken, and thereby this was an extension of her employment duties as a teacher, and not recreation. The City of Peabody, of course, relied on *Hammond's Case*, discussed above, but the Supreme Judicial Court recognized the important distinction between Linda Hammond's decision to ski with her friend as opposed to Karen Sikorski's activities of skiing along with and supervising the students. The court in Sikorski concluded "because the recreational aspects of the employee's services as a Ski Club chaperone was subordinate to the work-related duties she performed; the exclusion does not bar her from receiving workers' compensation for her injury".

Another interesting case in Massachusetts that summarily affirmed a decision of the Reviewing Board by the Appeals Court, is *Kathleen Buduo's Case*, 945 NE 2d 1004 (2011) involved the following state of facts:

Kathleen Buduo, on a regularly scheduled work day, attended an event known as "Appreciation Day" or "AD" a regularly scheduled event consisting of the employer sponsored "ice cream event" held in the employer's lunch room where employees were served ice cream with toppings. Managers notified the employees of the time of day they could attend the event based on a schedule set by the company in order to insure there was coverage for work and not everyone was in the lunch room at the same time, and encouraged employees to attend the event. There was testimony that this was a morale builder, and the event was a benefit to the company and the employees, an appreciation day and thank you for their hard work and efforts. On this particular occasion, the employee was eating ice cream furnished by the employer. She bit into her ice cream topping, and broke a tooth. A claim was brought for workers' compensation benefits and after a lengthy hearing largely centering around the issue of whether her participation was purely voluntary and a recreational activity, the Administrative Judge denied her claim. The Reviewing Board, however, relying in part on *Sikorski's Case*, noted "in determining whether the employee's entitled to benefits, we examined for whether the employee suffered 'personal injury arising out of and in the course of her employment'. If the first question is answered affirmatively, we evaluate whether the employee's injury is excluded from compensation as purely voluntary participation in a recreational activity." The Court then analyzed the criteria as set forth earlier in this article as noted in *Moore's Case*, and after evaluation of all of the evidence, found a strong connection between the activity and the injury requiring as a matter of law an award of compensation benefits. The Appreciation Day was a customary event, subsidized by the employer, who provided the ice cream and toppings, the

employer encouraged employee participation, the employer managed or directed the provision of ice cream, not only be setting and maintaining discreet scheduled times, but also by having management serve the employees, and that the employer benefitted from the employee's participation in Appreciation Day. Of equal significance is the fact that the event took place on the employee's premises during the regular work day. Time and place factors are especially relevant in any or recreational activity cases.

The Reviewing Board found that the employee's act of enjoying a bowl ice cream was both a refreshing and recreational activity. The Reviewing Board stated just because the employee "enjoyed" eating ice cream, does not make eating ice cream a "recreational activity".

Without citing the Personal Comfort Doctrine specifically, the Reviewing Board noted that it would be "incongruous" to deny the employee compensation by labeling her act of eating employer provided ice cream during work hours "recreational activity" while allowing employees to recover for injuries sustained while on a smoking break, citing *Bradford's Case*, 319 Mass. 621 (1946), which was a Personal Comfort Doctrine case.

PRACTICE CHECKLIST:

Activity at Issue:

A. Description of Activity:
   1. Party
   2. Luncheon/dinner
   3. Athletic event
   4. Recreational activity

B. Time of Event:
   1. During work hours
   2. Off work hours

C. Place of Activity:
   1. On employer premises
   2. Off employer premises

D. Purpose of Activity:
   1. Purely business
   2. Purely social/athletic/recreational
   3. Part business/part social/athletic/recreational
   4. Limited to company employees
   5. Others able to attend

Employer Involvement:

A. Sponsorship:
   1. Notice of activity; oral or written
      a. memo/newsletter
      b. bulletin board
      c. mail/email
      d. employer activity committee

B. Subsidization:
   1. Paid exclusively by employer
   2. Charge to employee to attend/participate
   3. Event/activity on employer expense account and/or deducted as business expense for tax purposes
   4. Employee's costs/expenses reimbursed by employer as business expenses

C. Employer Goodwill:
   1. Sponsorship of event/team, league
   2. Sign/pamphlets/brochures/banners with company name
   3. Shirts/hats/uniforms
      a. Inter-company event/team league
      b. Part of trade or industry event/league
   4. Publicity
      a. Within company
      b. Within industry trade
      c. To general public

D. Employer Encouragement or Pressure:
   1. Direct encouragement
      a. Order or directive to attend
      b. Wage or salary withhold if not attending
      c. Requirement to use sick/vacation/personal time if not attending
      d. Requirement to work if not attending
   2. Indirect encouragement
      a. Attendance lists
      b. Peer pressure
      c. Communications from supervisor/management comment/expectations
      d. Employee's subjective feeling to attend or participate

CONCLUSION

Injuries occurring in a recreational or social setting are both challenging as well as interesting. The fact patterns are as unique as the number of cases that are brought. Complicating factors are the particular statutory provisions concerning voluntary participation in recreational or social activities or, in the absence of said statutory provisions, the applicable case law which seems to center around the nature and extent of the activity, and the benefit that would accrue to the employer balanced against the risk of injury.

ADDITIONAL RESEARCH REFERENCES RECRETIONAL, ATHLETIC OR SOCIAL ACTIVITIES

22 COA 2d, pp. 163-216, Cause of Action to Recover Workers' Compensation Benefits During Athletic, Recreational or Social Activities by Alan S. Pierce (excerpted with permission of Thompson West Publishing).

42 Am. Jur. 2d, Proof of Facts 481 Workers' Compensation: Injury occurring during social, recreational or athletic activity.

82 Am. Jur. 2d, Workmen's Compensation, Sections 283.

47 ALR 3d, 566 Injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment.

Marks, Compensability Under Workers' Compensation Laws of Employment Related Recreational Activities, 19 Forum 48 (Fall 1983).

82 Am. Jur. 2d, Workmen's Compensation, Sections 241-243, Meaning of "arising out of" and "in the course of" employment.

A. Larson, The Law of Workmen's Compensation, Sections 22.00 et. seq.