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**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 057416-98**

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| Carol Labadie (deceased) | Employee |
| Charles Labadie | Claimant |
| Raytheon Company | Employer |
| Raytheon Company | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Maze-Rothstein, McCarthy and Carroll)

**APPEARANCES**
Walter J. Korzeniowski, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer at hearing and on brief
Richard W. Jensen, Esq., for the self-insurer on brief

**MAZE-ROTHSTEIN, J.** The decision now on appeal denied the claimant G. L. c. 152, §§ 31 and 33[1] benefits because his deceased spouse had not sustained a compensable injury arising out of and in the course of her employment with Raytheon. We affirm that decision. See G. L. c. 152, § 11A.

Carol Labadie was a sixty-one year old married employee of Raytheon at the time of the incident. On August 20, 1998 at approximately 6:00 a.m., prior to the start of her 7:00 a.m. shift, Mrs. Labadie was participating in an informational picket with fellow union members. The demonstration did not occur on the employer's premises. During

[1] General Laws c. 152, § 31, reads, in pertinent part:

> If death results from the injury, the insurer shall pay the following dependents of the employee, including his or her children by a former spouse, wholly dependent upon his or her earnings for support at the time of his or her injury, or at the time of his or her death, compensation as follows. . . .

the demonstration, she was struck by an automobile and severely injured. On August 28, 1998, she succumbed to her injuries, and was survived by her spouse, Charles Labadie. (Dec. 3.)

Charles Labadie, the claimant, filed for § 31[2] spousal benefits and § 33 benefits for funeral expenses. The self-insurer resisted the claims. After a § 10A conference, an order issued denying the claim. Mr. Labadie then appealed to a hearing de novo. (Dec. 1.)

At hearing, the parties stipulated to the following facts:

1. The decedent, Carol Labadie, was 61 years old when she was struck by a motor vehicle on August 20, 1998.

2. She expired six [sic] days later as a result of injuries emanating from the motor vehicle accident.

3. As of August 20, 1998, Mrs. Labadie had been continually married for 43 years to the claimant, Charles Labadie.

4. As of August 20, 1998, Carol Labadie was a 43-year employee of Raytheon and was a member of a compulsory union.

5. On August 20, 1998, she was engaged in a union-directed informational picket. The picket was not being conducted on Raytheon premises nor was the employee participating in the picket during work hours.

6. The motor vehicle accident occurred at approximately 6:00 a.m.

7. The employee's scheduled shift was from 7:00 a.m. to 3:30 p.m. on the date of the

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> To the widow or widower, so long as he or she remains unmarried, a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee . . . .

Section 33 reads:

> In all cases, the insurer shall pay the reasonable expenses of burial, not exceeding four thousand dollars.

[2] On September 8, 2001, Mr. Labadie remarried. This is the last date for which spousal benefits are requested. (Dec. 3.)

accident.

8. As a result of injuries caused by the August 20, 1998 incident, the decedent incurred medical expenses. The decedent's estate incurred funeral expenses in the amount of $7,800.00.

9. The following benefits were paid to the claimant after the death of the employee: life insurance benefits, accidental death benefits, pension benefits, and medical coverage was continued.

10. The picket was not authorized by Raytheon. Raytheon employees participating in the picket were not paid by Raytheon for time spent picketing and approximately thirty Raytheon employees participated voluntarily in the picket.

(Dec. 2; Tr. 8-10.)

The sole issue in dispute at hearing was whether an injury that occurred during union activities, away from the employer's premises and outside of normal working hours, is compensable as arising out of and in the course of employment. (Dec. 2; Tr. 11-13.) See G. L. c. 152, § 26. Expert testimony from a professor of industrial relations at Michigan State University's School of Labor and Industrial Relations, was offered on behalf of the claimant.[3] (Dec. 1, 4.) The judge found this expert testimony unpersuasive as the professor admitted "he had no actual knowledge of Raytheon and its labor/management history." (Dec. 5.) Based on the parties' stipulations, and the claimant's failure to offer any evidence that the employee was "compelled" either by the union or by her employer to attend and participate in the picket activity, the administrative judge concluded that the motor vehicle accident which claimed Mrs. Labadie's life did not arise out of and in the course of her employment. (Dec. 6-7.) We have the case on appeal by the claimant.

[3] The self-insurer's motion to strike the expert professor's testimony was denied. (Dec. 5.)

The claimant argues that where the employee was participating in a union-sponsored activity concerning employment issues in a company where union membership is mandatory, the injury therefore arose out of and in the course of her employment, when looked at in its broadest sense. The self-insurer responds by stating that the employee's act of picketing was not in furtherance of the employee's duties for Raytheon, was not in the course of her employment and thus, was not compensable under the Act. "From Raytheon's perspective, the informational picket was not a benefit and was likely a detriment to subsequent contract negotiations." (Stipulation 11, Dec. 2.) At the outset, we note that the parties correctly recognized that this case is governed by the "mutual benefit" concept. See generally, A. Larson, Workers' Compensation § 27.03 [3][b]-[c], at 27-34 - 27-36 (2003).

The claimant relies heavily on the holding in Handren v. Suffolk County Sheriff Dep't., 14 Mass. Workers' Comp. Rep. 318 (2000). In Handren, we held that an emotional injury that occurred during a normal work shift on the employer's premises while participating in a compulsory union activity was compensable as incidental to the employee's employment, regardless of whether it was a benefit to the employer. Id. at 321. Here, unlike Handren and as argued by the self-insurer, the incident did not occur during the employee's work shift, or on the employer's premises. Handren, supra. While off-premises, off-the-clock union activity *can* be properly characterized as being a benefit to the employer, the analysis is exceedingly fact-specific and must be carefully determined on a case-by-case basis. Taken together, case law from other jurisdictions outlines a discernible boundary of compensability in the area of union activity. See Larson, supra.

In Mikkelsen v. N.L. Industries, 72 N.J. 209 (1977), the court addressed whether an employee's injury during his attendance at a union meeting, held after normal working hours, and off the employer's premises, was compensable as being to the employer's benefit. The court ruled in the affirmative. However, the court reasoned as follows: the meeting was called specially for the purpose of ratification of a collective bargaining contract offered by the employer, and the membership met to vote on that contract as the

sole matter of business. Applying the "mutual benefit" analysis, after a thorough recounting of courts' use of that doctrine in various settings, the court examined the union activity at issue:

> In cases involving unilateral union activities conferring, if any, only a remote or indirect benefit upon the employing enterprise, compensation has uniformly been denied. *Thus compensation was denied where the injuries were sustained during picketing or strike activities.* See Fantasia v. Hess Oil & Chemical Corp., 110 N.J. Super. 360 (Cty. Ct. 1970), aff'd o.b. 113 N.J. Super. 229 (App. Div). (other case citation omitted). Cf. Larson, supra, Law of Workers' Compensation, § 27. 33. Similarly, in Pacific Indemnity Co. v. Industrial Acc. Com'n, 27 Cal. App. 499, 81 P. 2d 572, 575 (Dist. Ct. App. 1938), recovery for an injury sustained during the course of an on-premises union meeting was denied, the court stressing that the meeting was held behind closed doors, and that its purpose was not communicated to the employer, so that "[f]or aught that appears the meeting may have been held for the purpose of declaring a sit-down strike, demanding an increase in wages, or demanding shorter hours of employment." See also Tegels v. Kaiser-Frazer Corp. 329 Mich. 84, 44 N.W. 2d 880 (Sup Ct. 1950).
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> On the other hand, where the injury occurred while the employee was engaged in union-related activity which directly accrued to the employer's benefit, compensation has generally been permitted. In Gerard v. American Can Co., 32 N.J. Super. 310 (App. Div. 1954), a union steward was injured by a co-employee during an attempt to resolve a grievance based on purported violations of a pre-existing bargaining agreement. Finding the injury compensable, the court stressed that a bargaining contract signed by the employer provided for such grievance settlement activity with free time and pay therefor, and the contract had the express purpose of promoting harmonious labor-management relations, so that when the steward was investigating a complaint he was furthering the contractual interests of the employer as well as the union. . . .
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> In light of the foregoing cases and the general principles heretofore noted, we are convinced that, *on the specific facts of this case*, a finding that respondent's attendance at the union meeting simultaneously benefited both himself and his employer to an extent justifying compensability was warranted. *While it might be asserted that theoretically all union activities promote the intangible values of enhanced employee morale and therefore, derivatively, the long-range welfare of employers as well* [a la expert's testimony in the present case], *it is obvious that a line of demarcation must be drawn.* Such cases as the Fantasia decision, supra, make it clear that beyond that line the union activity is completely *unilateral and*

> *antagonistic to the employer, and thus not an employment-connected milieu for compensation purposes. The line can be drawn only on a case-by-case basis.*
>
> The purpose of the union meeting in this case was solely to pass on a proffered collective bargaining agreement. As the cases previously cited recognize, the consummation of such a contract and the carrying out of its terms play a significant role in preventing industrial strife and unrest, and in promoting the uninterrupted operation of an enterprise. Where, in fact, the union is a recognized bargaining unit, the collective agreement may be viewed as a necessary element of the employer's business. . . . On today's industrial scene, the successful consummation of the periodic labor negotiations is accounted a substantial employer benefit. The bilateral character of the particular union activity here involved is highlighted by the fact that the meeting was specifically held to respond to the employer's offer of the contract.

Mikkelsen, supra at 215-217 (emphasis added).

The opinion rendered in Fantasia, supra, is also informative. There the employee was killed by an automobile while picketing during a lock-out. Although the facts of the labor dispute make the case somewhat different, the approach is similar. Denying the claim, the court reasoned:

> Certainly the picketing involved here was not in the interest of the employer, and decedent was not discharging a duty of his employment. . . . The employer had no control over the employees' activities, nor did he pay them. . . .
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> . . . .
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> While the accident might have arisen out of the employment, it did not arise in the course of employment. The relationship of employer-employee did not exist.

Id. at 362-363.

In New Hampshire, the court addressed an easier case in which a compensable injury was found to have occurred while the employee was engaged in bargaining for the union during work hours, and being paid for so doing by the employer per the contract. The court reasoned:

> In this case, the defendant was negotiating solely on behalf of the union. Her purpose, in participating in the negotiating session, was to advance the union's position and obtain increased wages and benefits from the plaintiff. However, the negotiation of and the increased wages and the agreement on a labor contract are

> activities of mutual benefit to the employer and employee. . . . [Citing Mikkelsen, supra.] . . .
>
> Therefore, we hold that the activity of the defendant was of mutual benefit to herself and to the plaintiff, and thus arose in the course of employment. *In so holding, we address only the circumstances of this case.* We recognize that the benefit of union activity to an employer may, in some cases, be so tenuous that the activity will not be "in the course of employment." (Citations omitted). However, we need not draw that line in this case.

New England Telephone Co. v. Pauline Ames, 124 N.H. 661, 664-665 (1984)(Emphasis added).

Other cases to the same effect are Blades v. Commercial Transp. Inc., 30 S.W. 3d 827 (Mo. bdnc 2000)(testifying voluntarily at arbitration hearing on behalf of union – and adverse to employer – regarding dispute over additional compensation owed for specific job duties not benefit to employer); Repco Prods. Corp. v. Pennsylvania Workmen's Compensation Appeal Bd., 379 A.2d 1089, 32 Pa. Commw. 554 (1977)(In discussing shop steward's death at the hands' of a co-worker, the court wrote: "If it can be shown that the union activity which cause the injury is in furtherance of the business or affairs of the employer, there is no reason why that injury should not be compensable"); Scullin Steel Co. v. Whiteside, 682 S.W. 1 (Mo. App. 1984)(injuries to shop steward resulting from argument with co-workers over handling of grievance were work-related).

The foregoing line of cases helps to demarcate the divide between compensable and non-compensable injuries incurred during union activities, particularly those involving contract negotiations. In sum, the general rule is that union efforts including direct negotiations, or enforcement of agreements reached, are covered while unilateral posturing and positioning for leverage is not. The instant case is an example of the latter, not the former. Moreover, there was certainly no prejudicial error in the judge's determination that the expert's testimony was not persuasive. See Amon's Case, 315 Mass. 210, 214-215 (1943)(the judge is free to adopt all, some or none of the expert

testimony). The expert witness knew nothing about Raytheon or the particular facts in this case. In fact, the expert actually stated: "I cannot say for Raytheon that unions have been beneficial." (Dec. 5; Tr. 60.) Arguably, this was the main purpose of the expert testimony. While one might quibble with the exact wording utilized by the administrative judge in his findings, he was correct on the law, insofar as the application of the "mutual benefit" standard is overwhelmingly factually-based, and he was not persuaded that the expert's broad and general statements described a specific employer benefit resulting from the subject union's action to gain support.

Given the specific facts of this case, we cannot say as a matter of law that the judge erred in finding that the claimant failed to prove that the employee's injury arose out of and in the course of her employment with Raytheon Company. Accordingly, the decision of the administrative judge is affirmed.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: December 24, 2003