COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030060-96**

Jayson Kulisich	Employee
Greater Lowell Family YMCA	Employer
Eastern Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson & Smith)

APPEARANCES
James C. Dragon, Esq., for the employee
Mark A. Sullivan, Esq., for the insurer

MCCARTHY, J. Jayson Kulisich was employed as a lifeguard at a summer day camp run by the Greater Lowell Family YMCA. At the time of the hearing he was a nineteen year old college student. (Dec. 553.)

On July 24, 1996, Mr. Kulisich ruptured a lumbar disc while at work. Confronted with conflicting versions of how the injury occurred, the administrative judge made the following findings:

> Beginning in June, 1996, the employee worked [sic] the Y at their summer day camp, Camp Massapoag, as a lifeguard. He was given a booklet entitled the Camp Massapoag Waterfront Manual. This book contains the waterfront rules and the responsibilities of the lifeguards. On page 6 there is a list of eight rules to be followed at the beach. Rule 3 is "No horseplay."
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> On July 24, 1996 the employee was at his post on the beach. Several camp counsellors and lifeguards engaged in horseplay, throwing one another into the water. This was not an uncommon occurrence during the really hot days of summer. Among those who participated were Mark Lynch, Michael Gordon, Jason Cyr, and the employee. The employee saw that Cyr was sitting on a fence away from the water and was not wet. The employee approached Cyr with the intent to throw him into the water. Cyr held tightly to the fence. The employee pulled at Cyr, finally dislodging him. The two fell backwards toward the beach. The employee tripped over the

> exposed root of a tree and landed hard on his back. Cyr fell on top of him. Counsellors Eric Hoar and Jennifer Mungovan, both of whom testified at the hearing, witnessed the accident.
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> The employee's calf began to burn when he fell. He went down to the water to relieve the sensation. Soon he lost feeling in his foot. He laid on the dock for five minutes, but the pain worsened. He was helped to the nurse's office by two lifeguards. His father was called, and soon arrived to drive his son to the hospital. He was admitted to the hospital and spent a week inpatient. He had ruptured a lumbar disc . . . .

(Dec. 553-554.) These findings are supported by competent record evidence.

Presently, Kulisich performs home therapy exercises for his back. He attends classes and does volunteer work at a church, cleaning and ministering to people. (Dec. 556-557.)

The employee brought a claim for § 34 total temporary total incapacity benefits which the insurer resisted. Following a § 10A conference, the insurer was ordered to pay the claimed benefits from August 17, 1996 to date and continuing. The insurer appealed to a full evidentiary hearing. Testimony was given by Kulisich as well as three individuals employed by the YMCA at the time of the accident. The parties waived a § 11A impartial medical examination. The report of Dr. Bruce Cook was put in evidence by Mr. Kulisich and the insurer presented the report of Dr. Lawrence Luppi. (Dec. 552, 553, 557.)

In his decision, the administrative judge found the employee's injury on July 24, 1996 arose out of and in the course of his employment. He found further that Kulisich was rendered totally temporarily incapacitated from the day of his injury to January 17, 1997 and temporarily partially incapacitated thereafter until January 1, 1998. (Dec. 561-562.)

On appeal, the insurer raises three issues. First, it argues that the judge failed to specifically address § 26 which was put in issue at the hearing. General Laws c. 152, § 26 states in pertinent part that "if an employee . . . receives a personal injury arising out of and in the course of his employment . . . he shall be paid compensation by the insurer

or self-insurer." In other words, in order for an injury to be compensable, the injury must not only "arise out of" but also be "in the course of" employment. Laroque's Case, 31 Mass. App. Ct. 657 (1991). "Arising out of" refers to the causal origin, while "in the course of" refers mainly to the time, place, and circumstances of the injury in relation to the employment. Id. at 658-659. Furthermore, in order to be considered to be in the course of employment, an employee must be performing an action which benefits the employer in some way. Corraro's Case, 380 Mass. 357 (1980). We recommit the case to the hearing judge for reasons that follow.

Section 11B of the Act requires that the decision of the administrative judge "set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." Here, the judge stated that the issue presented was "[w]hether the employee engaged in serious and willful misconduct on the job within the meaning of § 27 which lead [sic] to his disabling injury." (Dec. 551.) The judge went on to discuss relevant case law as applied to the facts of this case and ultimately determined that "[T]he employee was engaging in willful misconduct at the time he was injured. However, he was not engaged in serious misconduct within the meaning of § 27. Therefore, the disqualification of § 27 does not apply to this case." (Dec. 559-561.) It is a deft legal analysis of an issue not raised in defense of the claim. On its issues sheet, entered into evidence as Exhibit 2, the insurer lists § 26 as an issue. (Dec. 552, Exhibit 2.) The judge's decision does not acknowledge or discuss § 26.

The second issue raised by the insurer, namely, that the employee was not in the course of his employment at the time of the injury, is closely allied to the first. The insurer points to the finding that Kulisich was " 'willfully' engaged in forbidden activity" at the time of his injury and the forbidden activity, horseplay was the cause of his injury. (Insurer brief 5). We are directed by the insurer to Vaz's Case, 342 Mass. 495, 496 (1961), where the court said that "[i]f in fact the employee's injury was the result of his doing something he had been forbidden to do, he would not be entitled to compensation since his injury could not be found to have arisen out of his employment." (Vaz was not engaged in horseplay when injured.) The insurer then notes that injuries

arising from horseplay have been found to be compensable in the past. The insurer points out that an employee may recover if the injury arose from conduct that "although voluntary, was subordinate and incidental to and consistent with his main purpose" of employment. Mercier's Case, 350 Mass. 299, 301 (1966). "All that is required is that his activity be incidental to and not inconsistent with his employment." Bator's Case, 338 Mass. 104, 106 (1958); Mailloux's Case, 328 Mass. 592, 594 (1952). (Insurer brief 5, 6). The insurer contends that while the employee's conduct might be found to be incidental to his employment it was "definitely inconsistent with his employment." (Insurer brief 6).

On recommittal, the administrative judge must therefore grapple with whether or not Kulisich suffered an injury while in the course of his employment. One prominent writer illuminates the question as follows:

> The current tendency is to treat the question, when an instigator is involved, as a primarily course of employment rather than "arising-out-of-employment" problem; thus, minor acts of horseplay do not automatically constitute departures from employment but may here, as in other fields, be found insubstantial. So, whether initiation of horseplay is a deviation from course of employment depends on: (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

2A Larson Workers' Compensation Law § 23.01 (1999).

Third and finally, the insurer argues that Kulisich may not recover because the injury is the result of his voluntary participation in a recreational activity. General Laws c. 152, § 1(7)A, provides in pertinent part that " '[p]ersonal 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 costs thereof." There are no Massachusetts appellate cases which have included "horseplay" as a recreational activity. The American Heritage Dictionary, Second College Edition (1985) defines horseplay as rowdy, rough play. Recreation is defined by the same dictionary as refreshment of the mind or body after

work through some activity that amuses or stimulates. In the case at hand, the hearing judge in at least three different places in his decision found that the employee was engaged in horseplay. (Dec. 554, 555, 560). In its brief, the insurer characterizes the employee's conduct as "horseplay." While the demarcation between "horseplay" and "recreational activity" will not always be clear and bright, we are satisfied on the facts as found here that the § 1(7A) recreational activity exclusion does not apply in this case.

We recommit this case to the hearing judge for further findings as to whether the employee was injured in the course of his employment as that phrase from § 26 has been interpreted in the context of horseplay injuries.

So ordered.

William A. McCarthy Administrative Law Judge	Sara Holmes Wilson Administrative Law Judge

Smith, J. I concur in the reversal of the decision, but based upon the facts found by the judge, conclude that, as a matter of law, the claim must be denied. I therefore dissent from the recommittal of the case. Kulisich's injury arose out of an activity outside of the scope of his employment, which was purely recreational, and therefore is excluded from the definition of personal injury by G.L. c. 152, § 1(7A).

When he was hired as a lifeguard, Kulisich was given a camp manual containing waterfront rules and lifeguard responsibilities. "On page 6 there is a list of eight rules to be followed at the beach. Rule 3 is `No horseplay.' " (Dec. 5, Bean 554.) Kulisich was engaged in this prohibited activity, attempting to throw another employee into the water, when he fell and injured his back. Id. The fact that horseplay injuries may be compensable in other states, see Larson, supra, is irrelevant, as the outcome of this case is governed by a specific Massachusetts statute. That statutory provision also renders obsolete the cases, cited supra, decided prior to its enactment.

Section 1(7A) of the workers' compensation act precludes recovery for injuries arising out of a purely voluntary, recreational activity. G.L. c. 152, § 1(7A), as amended by St. 1985, c. 572, § 11, effective January 1, 1986. This provision was intended to restrict rather than expand the availability of workers' compensation benefits for recreational activities. Since the creation of this recreational activity exclusion, the appellate courts have issued two decisions[1] that delineate its boundaries, one of which is dispositive. In Gateley's Case, 415 Mass. 397 (1993), the Supreme Judicial Court concluded that the term "voluntary," as used in § 1(7A), refers to the employee's participation in the recreational activity and not to the reason the employee was on the employer's premises. Id. at 400. Thus, compensation was denied to an employee who was injured during a voluntary, pickup football game while he was compelled to be on the employer's premises awaiting his paycheck. Id. at 401.

Section 1(7A) does not pertain only to formally organized recreational activities. The statute does not limit the time or place of the activity. The statute pertains to "any recreational activity, including but not limited to" what may be deemed formally organized activities. G.L. c. 152, § 1(7A); Gateley's Case, supra.

Horseplay is rough or boisterous play. II Webster's Third New International Dictionary, 1093 (1981). Play is a recreational activity. Id., 1736. No rational distinction exists between the nature of the activity performed here and the act of tossing a football in Gateley. Both Gateley's and Kulisich's injuries resulted from purely voluntary, recreational activities unrelated to any duties of their employment. According to the Supreme Judicial Court, § 1(7A) makes injuries arising from such activities not compensable. Gateley's Case, supra.

The judge's decision is contrary to law and therefore cannot stand. G.L. c. 152, § 11C. I would reverse the award of benefits and enter an order denying the claim.

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[1] In Bengtson's Case, 34 Mass. App. Ct. 239 (1993), the court established that the purely voluntary aspect of the activity must be measured by an objective standard. There is no question here that the activities of the employee were purely voluntary.

Filed: **May 23, 2000**

Suzanne E.K. Smith
Administrative Law Judge