COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 021785-04

Karen Sikorski	Employee
City of Peabody	Employer
City of Peabody	Self Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

APPEARANCES

Richard H. Schwartz, Esq., for the employee at hearing
Alan S. Pierce, Esq., for the employee on appeal
Daniel B. Kulak, Esq., for the self-insurer at hearing and on brief
Brian P. Barrett, Esq., for the self-insurer at oral argument

HORAN, J. Karen Sikorski, a high school math teacher for the employer, appeals from the denial of her claim for § 30 medical benefits. She required medical treatment, including two surgeries, for a shoulder injury suffered in a skiing mishap while chaperoning a high school ski club trip.[1] We reverse the decision and award the benefits claimed.

The material facts of this case are not in dispute.[2] The Peabody High School ski club is a longstanding Peabody School Committee sanctioned "non-sports" club. (Tr. 11-12.)[3] The club conducts fundraisers and sponsors trips to ski areas for its members. Teacher-chaperones are

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[1] The self-insurer "does not question the reasonableness or necessity of the employee's treatment, only its liability to pay for such treatment." (Dec. 563.)

[2] In fact, the self-insurer proposed to the judge that the matter be disposed of via its motion for summary judgment. Had the parties stipulated to the material facts, the judge could have issued a decision without taking further testimony. Because that was not done, the judge properly denied the motion and presided over the § 11 hearing.

[3] All transcript references are to the testimony taken at the April 24, 2006 hearing.

required for all ski trips. (Tr. 38.) If an insufficient number of teachers volunteer to chaperone a trip, it is cancelled.

(Tr. 38, 54, 74.) No teacher is required to chaperone at any school sponsored activity, although the teachers are encouraged to do so, and it is generally understood to be part of a teacher's employment obligation to support these activities. (Tr. 14-15, 36, 43-44, 68.) According to the school principal, teachers chaperoning ski trips are expected to be on the slopes to monitor student behavior, and to ensure compliance with all applicable rules. (Tr. 36.) The ski club advisor testified that ski chaperones have walkie-talkies to maintain contact with each other, and to respond to injuries. (Tr. 54, 58, 80.) Chaperones do not get a stipend, but the ski club does pay their expenses. (Tr. 62.) On January 24, 2004, during a ski club trip, the employee was seriously injured while chaperoning student skiers on the slopes. (Dec. 561-563, 568.)

The self-insurer denied liability for the employee's injury, citing the second sentence of G. L. c. 152, § 1(7A), which provides:

> "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.

The judge found the employee was providing a necessary service to the school by volunteering to go on the ski trip as a chaperone, which service was "closely related to her primary job as a high school teacher." (Dec. 567.) He nevertheless denied the claim by turning his attention to § 1(7A)'s use of the phrase "purely voluntary participation." On that subject, the judge found:

> There was no compulsion involved in the employee's acceptance of her position as a ski club chaperone. She chaperoned because she loved to ski. She chose to chaperone events that interested her - ski trips, dances and proms. Others coached various sports or provided guidance to after school clubs. She understood, as most everyone would, that without teacher chaperones, no after school activities could take place. Without these after school activities, the high school curriculum would suffer. And, she knew that all teachers were expected to volunteer their time for some after school projects, but that tenured teachers who did not volunteer did not suffer adverse consequences. The holding in Hammond['s Case, 62 Mass. App. Ct. 684 (2004)], requires "an objective element of compulsion on the part of the employer in order for the employee's participation in such activity to fall outside of the exclusion set out in G. L. c. 152, section 1(7A)." There is no

> objective element of compulsion in this case. The nearest example to be found is the subtle coercion of peer pressure among teachers and administrators to maintain a series of after school programs. That does not appear to be what the Hammond court had in mind.

(Dec. 567-568.) The judge therefore concluded the employee's injury was not compensable. (Dec. 568.)

The employee does not challenge the judge's finding that her decision to volunteer as a chaperone was "purely voluntary." Instead, the employee argues the judge misapplied § 1(7A), and that Hammond 's Case, 63 Mass. App. Ct. 684 (2004), relied upon by the judge, is distinguishable.

The self-insurer maintains that because the employee's participation in a recreational activity (skiing) was on a "purely voluntary" basis, the judge correctly concluded that the employee did not suffer a "personal injury" as defined by § 1(7A). The self-insurer also argues the judge correctly applied Hammond, supra.

We agree the employee volunteered to chaperone; chaperoning is work, not a recreational activity. We also agree Hammond is distinguishable, and that the judge misapplied the statute.

Section 1(7A) was inserted into chapter 152 by the legislature in the aftermath of the court's decision in Kemp's Case, 386 Mass. 730 (1982), which addressed the issue of the compensability of an employee's injury suffered in a company sponsored softball game. In Kemp, the Supreme Judicial Court reversed the award of benefits to the employee, concluding that the employer's "incidental support of the softball team and any incidental benefit to it from that activity, as a matter of law [did] not warrant a finding that Kemp's injury arose out of and in the course of his employment." Id. at 734. Citing the "governing principles now stated in this opinion" applicable to the compensability of recreational injury claims, including those found in Moore's Case, 330 Mass. 1 (1953), the court remanded the case to the Industrial Accident Board "for further action in light of this opinion," adding that it was within the board's discretion to take further evidence. Kemp, supra at 736-737.

The first appellate case post Kemp to address the effect and meaning of § 1(7A) in the recreational injury context was Bengston's Case, 34 Mass App. Ct. 239 (1992). Mr. Bengston, like Mr. Kemp, injured himself playing softball for his company team. Because the administrative judge had awarded benefits to Bengston by relying on his subjective perception of employer coercion, and because an objective assessment of the record did not support a finding

that the employee's participation was anything but "purely voluntary," the court ruled his injury was not compensable. Id. at 246-247. There was no issue before the court that Bengston was a participant in anything other than a recreational activity; he was playing softball, not working, when he was injured. The employee in Gateley's Case, 415 Mass. 397 (1993), was similarly situated. Mr. Gateley injured himself at work in a game of catch with a nerf football. The employee did not contest that he was injured while engaging in a recreational activity, but instead argued that the statute barred recovery only when the injury was sustained during a formally organized recreational activity. The court rejected this argument in affirming the denial of benefits. Id. at 400.

In Hammond's Case, supra, the court reversed an award of benefits to an employee who had been injured while skiing on a business trip with a friend. The employee in Hammond was employed as an events coordinator. At her employer's request, she had organized a ski trip for the employees of her employer's client. The employee received advance permission to bring a friend along.[4] The employee's job, among other things, required her to accompany the client's employees to the mountain, and to make sure they had everything necessary to ski. She was not required to ski with the clients, but felt she had been encouraged to do so. After discharging her work-related duties at the mountain, the employee skied with her friend. The employee stopped skiing to eat lunch, and resumed skiing thereafter. That afternoon, while skiing with her friend, the employee injured her right leg. The administrative judge awarded benefits reasoning that " '[the employee] was . . . authorized to attend and enjoy the events involved along with the clients" and that "[a]lthough she was never specifically directed to attend any of the events . . . she reasonably felt encouraged to ski. . . .' " Id. at 686. The judge also found " 'the employee was not actively guiding the tour group down the mountain, nor was she directly performing the specific functions of her work while skiing.' " Id.

Here, the judge's reliance on Hammond is misplaced. The employee in Hammond was not required to ski in order to perform her duties. Id. at 687 and n.4. Ms. Sikorski was indisputably in the course of her employment as a chaperone when she was injured. (Dec. 563.) As the judge found:

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[4] The administrative judge found the employer paid for the employee's equipment and lift ticket, and absorbed the cost of the employee's friend's lift ticket into the trip's cost. Hammond, supra at 685-686.

> The teacher chaperones are expected to assist [the ski club advisor] in supervising the students . . . *while on the ski slope,* and while in the ski lodge and hotel. Their responsibilities do not end when they arrive at the mountain. *They are expected to ski the mountain and maintain a presence on the mountain throughout the day*.

(Dec. 564; emphasis added.) There is no disputing that, at the time of her injury, the employee was on the slopes performing her assigned function to "maintain a presence" as a teacher chaperone. "Participation by this employee . . . even if voluntary, was a work activity as borne out by the record." Simmons v. St. Elizabeth's Hosp., 4 Mass. Workers' Comp. Rep. 132, 133 (1990). The fact that she enjoyed the sport, and that she volunteered to chaperone, does not invalidate her claim. The "recreational" aspect of chaperoning - skiing - was only incidental to her employment responsibility. See Nason, Koziol and Wall, Workers' Compensation, 29 M.P.S. (2003) § 11.16, p. 370.

Adoption of the self-insurer's position would permit the § 1(7A) exclusion to be applied as a bar to compensation in a variety of circumstances unintended by the legislature. A physical education teacher or a ski instructor, for example, would be deprived of workers' compensation coverage for injuries arising from job related duties fairly characterized as recreational. Chaperoning is not a recreational activity. We do not believe the legislature intended the second sentence of § 1(7A) to deny compensation to employees who volunteer for work-related assignments with a recreational aspect. Had the employee been injured while participating, on a "purely voluntary" basis, in an employer-sponsored ski trip for the teaching staff, without more, the result would be different. We are mindful that at the time of their injuries, the employees in Bengston, Gateley and Hammond were engaged in recreational activities bearing no relationship to their work responsibilities. See also McManus's Case, 289 Mass. 65, 66 (1935) (caddy's injury suffered while playing golf on employer's course on day off not compensable).

We reverse the decision as contrary to law on the facts as found.[5] We award the medical benefits claimed, and award employee's counsel a fee of $4,925.03 pursuant to G. L. c. 152, § 13A(5).

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[5] The dissent's view of the evidence, shared by neither party nor the administrative judge, is, respectfully, beside the point. On appeal, the self-insurer concedes the work connection to the chaperoning activities on the slope. It takes no exception to the judge's findings. (Dec. 564; Self-ins. br. 3.) The only argument advanced on appeal is that because the employee volunteered as a teacher-chaperone for the ski club, and because her duties involved skiing, a recreational activity, she did not suffer a "personal injury" as contemplated by § 1(7A).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **September 26, 2008**

COSTIGAN, J., dissenting. Citing to page 563 of the administrative judge's decision, the majority writes that the employee "was indisputably in the course of her employment as a chaperone when she was injured." (See page 5, supra.) I take issue with that statement on two grounds. First, the judge made no such finding, either on the cited page or anywhere else in his decision. The judge found only that, "Karen Sikorski was in the performance of her duties when she was injured." (Dec. 566.) The very next sentence refers to "[h]er duties as a chaperone," a position which, as the judge properly found, the employee held as a volunteer. Here lies the second point on which I disagree with the majority. Notwithstanding the majority's declaration of indisputability, the employee was not injured in the course of her employment as a chaperone because she was not employed as a chaperone, but rather as a high school math teacher. (Dec. 563.) The record evidence is devoid of any suggestion that the employee's contract of hire contemplated, or was contingent on, her volunteering to chaperone any non-curriculum related activities such as the ski trip at issue here, which took place off school property (indeed, in another state) and on a weekend.

The employee testified about her personal sense of obligation to participate in after-school activities, such as chaperoning at dances or on ski club trips, (Tr. 89-90), "[b]ecause if we don't chaperone, then these events will not happen." (Tr. 93.)[6] She testified that such participation was

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[6] When asked why she decided to become involved as a chaperone, the employee testified:

> Well, I'm a skier. I started skiing myself in high school. And I went with a church. And that was my opportunity to ski. And I loved skiing. And Mark ran a very good program. And I knew Mark. And, actually, I knew his -- the department head of electronics very well. And they asked me to go. And I thought that would be great. It's a great opportunity for the kids. And I just wanted to be part of it.

expected of all teachers by the principal, and it was part of her own expectations as a teacher. (Tr. 96.) Indeed, the school principal at the time confirmed he encouraged teachers to participate. (Tr. 14-15.) It is well-established, however, that an employee's *subjective* perception of whether his employer *requires* his participation in a recreational activity is not the standard. See Bengston's Case, supra ("The nature of an employee's participation in a recreational activity under G. L. c. 152, § 1(7A), must be weighed by an objective standard.") Tested against an objective standard, the employee's testimony, as well as that of the school principal and the ski club advisor, establish that her participation as a chaperone at dances and on ski club trips was "purely voluntary," and that there was no "objective element of compulsion on the part of the employer" that would place the employee's participation in the ski trip, and in skiing itself, "outside of the exclusion set out in G. L. c. 152, § 1(7A)." Hammond's Case, supra at 686.

Then-principal Patuleia conceded there was no written requirement that a teacher serve as a chaperone for extra-curricular activities. (Tr. 36.) He testified that the funding for ski club activities came from fundraisers and from fees the students were charged to participate in ski trips, with no contribution from the city or the school department. It was from such funding that the chaperones were reimbursed for some of their expenses. (Tr. 40-42.) He acknowledged that "[n]o one can force a teacher to be a chaperone," and that a person who chaperones is a "pure volunteer." (Tr. 43.)[7] [7] Mark Metropolis, the ski club advisor, agreed there was no requirement

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(Tr. 90.)

[7] **Q.:** Now, if a person does not involve themselves [sic] as a chaperone, you don't put that as a negative in their evaluations?

A.: We had plenty that didn't.

Q.: Pardon me?

A.: We had plenty that did not.

Q.: And we've had clubs come and go; have we not?

. . .

A.: Yes. Some may be because of a lack of participation. It could be a faddish club that's hot right now for the next three or four years, and it just loses interest, or the advisor retires and moves away and no one picks it up. There are some clubs that have been in

that any teacher become a chaperone, (Tr. 73), and the employee acknowledged that fact. (Tr. 96.) [8]

I also disagree with the employee's argument, endorsed by the majority, that the Appeals Court's holding in Hammond's Case, supra, does not control the outcome here. The distinction the employee and the majority draw is that she was not simply skiing for recreational purposes, but rather was on the slopes to chaperone the student skiers -- a work activity, she contends. (Employee br. 6.) The employee maintains that, "[t]he only action that was voluntary was agreeing to be a chaperone." (Employee br. 7.) In my view, the employee cannot have it both ways -- she cannot be a volunteer and within the scope of her employment at the same time. It seems to me self-evident that one does not volunteer to do that which his or her employment requires be done.

It is beyond dispute that the employee, like Linda Hammond, was injured while she was skiing. Just as Ms. Hammond was not required by her employer to ski with her client's employees on a ski trip she had organized in her job as an event coordinator, chaperones were not required to ski

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existence for years because there's always someone that believes in that club that wants to do it. And others, again, are cyclical.

Q.: And the community of a high school continues on, does it not?. . .

A.: Of course.

(Tr. 45.)

[8] The majority suggests that neither the judge nor the self-insurer disputes the "work connection" between the employee's teaching position and her chaperoning activities on the slope. See footnote 5, supra. As I see it, it was understandable that in arranging for chaperones on the ski trips, the ski club advisor first drew upon the pool of his fellow teachers, but nothing in the evidence suggests that chaperoning extra-curricular events was intrinsic to the duties of those teachers. Such a tenuous connection, devoid of any element of employer compulsion, simply does not rise to the level of establishing the employee's injury arose out of and in the course of her employment, and neither the administrative judge nor the self-insurer agreed it did.

with the students, according to Michael Metropolis, the ski club advisor.[9] The employee herself acknowledged this:

> Well, we're, kind of, all on our own. You know, what I mean? You can't really help anybody when you're on skis. You know, what I mean? We ski together. Sometimes Mark has picture taking times where the kids will do tricks or whatever and show off. And he'll videotape and they'll run their boards across those things, whatever you call them. We'll get together for pictures.
>
> But sometimes we ski with the kids, and sometimes we don't see them. Like I said, like Mark said, sorry, we're in touch with walkie-talkies. He has a beeper. First Aid will usually give him a beeper being a chaperone with so many kids. So are we on top of each other skiing? No. That's impossible to do.

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[9] **Q.:** … What I'm saying is basically the degree of supervision that the chaperone gives is not a constant eyewitness supervision. It's a --

A.: That would be impossible.

Q.: They react, correct?. . .

Q.: In more times than not, they would react to being alerted that something happened to one of the kids is when the chaperone would then become involved; is that correct?

A.: If somebody would get hurt, First Aid would be called. And First Aid would try to contact us.

Q.: That's when the chaperone would appear on the scene or meet up with the --

A.: Unless if a chaperone was on the slope with the person or with the kid.

Q.: And on many occasions the chaperones would ski by themselves two or three at a time?

A.: Oh, yeah.

(Tr. 82.)

(Tr. 102-103.)

In my view, the administrative judge took something of a wrong turn when he found that the services the employee provided as a chaperone "were closely related to her primary job as a high school teacher for Peabody High School." (Dec. 567.) Her primary job as a teacher was to teach math -- an integral component of the academic curriculum. Just as participation in ski club activities was extra-curricular for the students, so it was for the volunteer chaperones. While such after-school programs are certainly a boon for the students whose parents can afford the fees, and the demise of such programs for lack of volunteer chaperones would be unfortunate, I disagree with the administrative judge that "without these after school activities , *the high school curriculum* would suffer." (Dec. 568; emphasis added.)

The employee was injured during an extra-curricular, recreational activity for which she volunteered, and which was neither required nor even contemplated by her contract of hire as a high school math teacher. Although I disagree with some of the judge's reasoning, I agree with his determination that the employee did not suffer a compensable personal injury under the pertinent provisions of § 1(7A). Accordingly, I respectfully dissent from the majority's reversal of the judge's decision.

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Patricia A. Costigan
Administrative Law Judge

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