COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022175-07**

Kathleen Buduo	Employee
National Grange Mutual Insurance Co.	Employer
Vigilant Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Hernández.

APPEARANCES
William R. Reitzell, Jr., Esq., for the employee
Shawn F. Mullen, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision denying and dismissing her claim for medical benefits, and allowing the insurer to recoup medical benefits paid under a § 10A conference order issued by a different administrative judge. The employee sought medical benefits for treatment of a broken tooth she sustained while sitting at a supervisor's desk at work, eating employer-provided ice cream with toppings. The hearing judge concluded the employee's injury was not compensable because it lacked a "sufficient connection with [the employment] to warrant the award of compensation," and because it resulted from her "purely voluntary participation" in a "recreational activity," within the meaning of § 1(7A).[1] We reverse.

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[1] General Laws c. 152, § 1(7A), provides, in pertinent part:

> "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 employee is a claims representative for the employer. (Dec. 3.) The judge made the following findings of fact regarding the incident:

> On June 19, 2007, [the employee] attended an ice cream social event that was held at the Employer's premises. The event was organized and subsidize [sic] by the Employer and billed as Appreciation Day for the company's employees. The lay testimony event [sic] indicated that the event was purely voluntary and no attendance was taken. The lay testimony revealed that the company managers scooped and served ice cream to the employees. The lay testimony revealed that the employees served their own ice cream toppings. [The employer's witnesses] credibly testified that there were no negative consequences if an employee elected not to attend the ice cream social.
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> The Employee testified that after receiving her complimentary ice cream, she returned to her manager's cubicle and began to eat her ice cream. The Employee testified that as she bit into her ice cream topping, she felt a tooth break in her mouth. The Employee reported the incident to her supervisor.

(Dec. 3.) From these subsidiary findings, the judge made the following general findings and rulings of law:

> I find that the Employee's decision to obtain and enjoy an ice cream dish covered with her favorite toppings was a purely voluntary activity. I find that the Employee's act to sit at her manager's cubicle and enjoy a bowl of ice cream two days before the official start of summer, was both a refreshing and recreational activity. I find that the Employer did not coerce, encourage, require, or pressure the Employee to participate in the ice cream social event.
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> I further find that the Employer's involvement with the ice cream social event in which the Employee voluntarily participated does not have a sufficient connection with her employment to warrant the award of compensation. I find that any benefit to the Employer was inferential and insignificant. This is not a case in which the Employer was concerned with its "public relations and maintenance of the corporate image." See L. Locke, Workmen's Compensation Section 246, at 295 (1981). This Court finds that the great weight of authority points to the denial of benefits in this case and suggests that the Employer offer soft serve ice cream at its next ice cream social event.

(Dec. 5-6, 7.) Under the heading, "Liability," the judge further concluded:

> "Purely voluntary participation" is non-compensable when injury occurs during the recreational activity and the employer has done nothing more than pay for the costs of that activity. At the opposite end of the spectrum, the cases have stated that actual, express employer compulsion to participate in a recreational activity with resultant injury might itself be determinative of compensability in some situations. See Moore's Case, 330 Mass. at 4-5; Kemp's Case, 386 Mass. at 733. The vast gray area in between is left to the trier of fact and "requires an analysis of the facts of each case," ibid., and an "evaluation of the significance of each factor found to be present in relation to the enterprise as a whole." Moore's Case, 330 Mass. at 5. I find that the Employee's decision to obtain and enjoy a bowl of ice cream at work was a purely voluntary activity. I find that the Employer did not coerce, encourage, require or pressure the Employee to participate in the ice cream social event. I find that the Employer's involvement with the ice cream social event in which the Employee voluntarily participated does not have a sufficient connection with her employment to warrant the award of compensation. I find that any benefit to the Employer was inferential and insignificant.

(Dec. 6-7.)

The employee argues reversal is required because the judge erred in: 1) conducting his analysis under Moore's Case, 330 Mass. 1, 4-5 (1953), by basing his analysis on conclusions unsupported by the evidence, and concluding the event did not have a sufficient connection to the employment to warrant the award of compensation; and, 2) denying the claim because the employee was not engaged in a "recreational activity" contemplated by § 1(7A). We agree.

The Supreme Judicial Court recently described the analysis that must be conducted in this case:

> In determining whether the employee is entitled to benefits, we examine first whether the employee suffered "a personal injury arising out of and in the course of [her] employment." G.L. c. 152, §26. If the first question is answered affirmatively, we evaluate whether the employee's injury is excluded from compensation as purely voluntary participation in recreational activity. See G.L. c. 152, § 1(7A).

Sikorski's Case, 455 Mass. 477, 480 (2009). Accordingly, "[d]espite the amendment [of § 1(7A)], the test set forth in Moore's Case remains authoritative

for the purpose of determining whether an injury arises out of and in the course of the employment," under § 26. Id. at 481. "What is required in each case is an evaluation of the significance of each factor found to be present in relation to the enterprise as a whole." Moore's Case, supra at 5.

The Moore criteria and analysis provide a tool for determining whether "injuries sustained outside the formal scope of the employee's duties," as well as those "sustained during organized recreational activities," are related to the employment "with sufficient closeness to warrant an award." Moore's Case, supra at 4. The Court enumerated the criteria as follow:

> (1) The customary nature of the activity. (2) The employer's encouragement or subsidization of the activity. (3) The extent to which the employer managed or directed the recreational enterprise. (4) The presence of substantial pressure or actual compulsion upon the employee to attend and participate. (5) The fact that the employer expects or receives a benefit from the employees' participation in the activity, whether by way of improved employer-employee relationships, through greater efficiency in the performance of the employees' duties, by utilizing the recreation as partial compensation or additional reward for their work, or for advertising the employer's business, or as an actual adjunct of his business.

Id. at 4-5. The Court further observed that its "enumeration [was not] meant to be exclusive of other factors which might appear in a given case," leaving room for consideration of additional factors as they present themselves. Id. at 5.

Here, three witnesses testified at the hearing: the employee, the employer's human resources consultant, Ms. Joan Greenwood, and the employee's direct manager, Ms. Aileen Jansson. In addition to the facts found by the judge, supra, we summarize the undisputed evidence.

June 19, 2007 was a regularly scheduled work-day. (Tr. 8, 9.) On that day, an event was scheduled known as "Appreciation Day" or "A Day." (Tr. 9, 19). "A Day" consisted of employer sponsored "ice cream events" held in the employer's lunchroom, where employees were served ice cream with toppings. (Tr. 9, 10-11, 21, 24.) Ms. Greenwood explained the employer coordinated the

event, alerted human resources of "when 'A Day' celebrations happen," and agreed this was a customary event, being the second one of its kind held in the one and a half years that she had been employed with the company. (Tr. 19, 21.) Managers notified employees of the time they could attend the event, based on a schedule set by the company. (Tr. 9, 22, 24, 25, 30.) The company devised the schedule in order to ensure there was coverage for work and that not everyone was in the lunchroom at the same time. (Tr. 24-25, 30.) The company encouraged employees to attend the event. (Tr. 15, 16-17, 21, 30.) The employee described the event as a "gratuity type thing," a sentiment echoed by Ms. Greenwood, who agreed the event was a way in which the company rewards employees, a morale builder, and that the event was a benefit "to the company and the employees," as "an appreciation day; thank you for your hard work and efforts." (Tr. 9, 22, 25-26.)

An evaluation of all the evidence, in relation to the enterprise as a whole, reveals a strong connection between the activity and the employment requiring as a matter of law, an award pursuant to § 26. First, employee "Appreciation Day" was a regularly scheduled and "customary" event. Moore's Case, supra at 4-5. Second, the event was subsidized by the employer, who provided the ice cream and toppings, and served it to the employees in its lunchroom. In addition, the employer "encouraged" employee participation.[2] Id. Third, the employer "managed or directed" the provision of ice cream, not only by setting and maintaining discrete scheduled time periods for different groups of employees to go in shifts for their ice cream, but also by having management serve the employees. Id. Fourth, the employer benefited from the employees' participation in "Appreciation Day," not only through improved employee morale, but also by

[2] There is no record support for the judge's conclusion that the employer did not "encourage" the employees to attend the event. To the contrary, the employee and both of the insurer's witnesses, Ms. Greenwood and Ms. Jansson, testified employees were "encourage[d]" to attend the event. Tr. 15, 16-17, 21, 30.

utilizing the event as an "additional reward for [the employees'] work." Id. Although the employee was not compelled to attend the event, the facts satisfy four out of five of the Moore factors.[3] Id.

Significantly, the entire event took place on the employer's premises, for a discrete period of time within the confines of a regular work day. We view this "time and place" factor as being not only pertinent to the analysis, but one of the additional factors whose relevance was referenced, but not enumerated, in Moore. Id. Under the circumstances, the "time and place" factor further strengthens and, viewed with the other factors, establishes the connection between the event and the employee's work.

An injury "arises out of" employment if it can be attributed to the "nature, conditions, obligations or incidents of the employment; in other words, [to] the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). "The question is whether the employment brought [the employee] in contact with the risk that in fact caused [her injury]." Souza's Case, 316 Mass. 332, 334 (1944). Moreover, "the employee, in order to be entitled to compensation, need not necessarily be engaged in the actual performance of work at the moment of injury. It is enough if he is upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment." Id. at 335.

We have long recognized that injuries sustained on the employer's premises during lunch, or other breaks in the work day, are compensable. Kubera's Case, 320 Mass. 419, 420-421 (1946)(observing that rest and relaxation can be found to be incidental to employment, injury found compensable where employee was struck by an automobile while gathering with other employees on steps of employer's building during ten minute unpaid morning work break); Holmes's

[3] The only factor not established was "actual compulsion upon the employee to attend and participate." Id. While the Court acknowledged the presence of "employer

Case, 267 Mass. 307, 308-309 (1929)(injury arose out of and in course of the employment where employee fell off a block of wood he was sitting on during lunch hour on the employer's premises); Seariac v. Donaher Sarasin, Inc., 11 Mass. Workers' Comp. Rep. 640, 643 (1997)(injury occurring on premises of work related seminar during smoking break incidental to employment). Where the employer provides employees with food during such a break, especially where the food is offered admittedly as a "reward," or as a form of compensation for the employees' work, an injury sustained as a result of the consumption of that food is an injury arising out of and in the course of the employment. DeStefano v. Alpha Lunch Company of Boston, 308 Mass. 38 (1941)(disability resulting from trichinosis contracted by eating sandwich provided by employer was compensable even though employee was under no compulsion to eat lunch provided by employer, and would not be paid value of lunch if she opted not to eat it). See Maguire's Case, 16 Mass. App. Ct. 337 (1983)(broken tooth sustained by employee eating employer provided lunch while attending a workshop was compensable).

The undisputed evidence is that "Appreciation Day" is not a one time event, but a carefully choreographed break period, constructed and conducted by the employer on the employer's premises, during the course of a regular work-day. As a practical matter, this event is no different in kind than an employer-operated snack wagon that visits a factory floor during a designated work-day break period. As such, it is an incident of the employment, and the employee's injury sustained as a result of eating the ice cream furnished by the employer during the break is an injury arising out of and in the course of the employment.

Having answered the first question in the affirmative, we turn to the question of whether the employee's injury is non-compensable under § 1(7A) because it was sustained as a result of her "purely voluntary participation in [a]

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compulsion, . . . often might warrant or even require a finding in favor of the employee," the absence of such a finding does not, by itself, make the injury non-compensable. Id.

recreational activity." The judge found the employee's "decision to obtain and enjoy a bowl of ice cream at work was a purely voluntary activity." (Dec. 7.) In addressing the question of whether this was a "recreational" injury, the judge concluded that "the employee's act [of] sit[ting] at her manager's cubicle and enjoy[ing] a bowl of ice cream two days before the official start of summer, was both a refreshing and recreational activity." (Dec. 5-6.) Just because the employee enjoyed eating the ice cream does not make eating a "recreational activity" under § 1(7A). Indeed, it would be incongruous to deny the employee compensation by labeling her act of eating employer-provided ice cream during work hours a "recreational activity," while allowing employees to recover for injuries sustained while on a smoking break. See Bradford's Case, 319 Mass. 621, 623 (1946)("It cannot be said as a matter of law that where an employee is injured on the premises of his employer while smoking or preparing to smoke he is precluded from recovering compensation.")

The employer provided its employees with ice cream and toppings during the course of a regularly scheduled work-day.[4] The employer's decision to label its provision of ice cream during a break period in a regularly scheduled work-day "Appreciation Day," does not transform the situation into a "recreational activity" as contemplated by § 1(7A). The employee's participation in this break period is no more a " '[recreational activity]' under § 1(7A) than having a cup of coffee and a doughnut at one's desk is a picnic or listening to the radio on the assembly line is a party." Gateley v. Construction Collaborative, 4 Mass. Workers' Comp. Rep. 260, 263 (1990)(Costigan, J. concurring in part and dissenting in part). Eating, like smoking or simply resting, is a reasonably foreseeable activity that employees engage in during break periods. While the recreational activity amendment to § 1(7A) was designed to limit the types of risks employers are required to bear under the Act, we do not view the exclusion as intending to effectuate a dramatic

[4] There was no evidence that the employee was unpaid during this break, or that she was free to leave the facility rather than participate.

change in our jurisprudence by transforming injuries sustained while engaging in such activities on the employer's premises during lunch and other break periods in the work-day as "recreational activity."

Accordingly, we reverse the decision and award the medical benefits claimed as a result of this compensable dental injury. Because reversal is required as a matter of law, the employee prevailed at hearing on the insurer's appeal from the § 10A conference order. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(5), in the amount of $5,233.64, which was the standard base hearing fee on the date of the decision, October 27, 2008.[5] Because the employee, and not the insurer, appealed the hearing decision, and the employee prevailed, an attorney's fee is due under § 13A(7).[6] Accordingly, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until said fee agreement is reviewed and approved by this board.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

[5] Circular Letter 327, issued October 3, 2008 and applicable on the date this decision was filed, increased the legal fee due an employee's attorney to $5,233.64. General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney's fees payable under § 13A(1)-(6) on October first of each year).

[6] General Laws, c. 152, § 13A(7), provides, in pertinent part:

> [s]ubject to the approval of the reviewing board, such fee shall be an amount agreed to by the employee and [her] attorney.

Mark D. Horan
Administrative Law Judge

Filed: