COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 053648-97**
Employee	Richard Grigg
Employer	International Equipment Co.
Insurer	Travelers Ins. Co., c/o Constitution State Service Co.

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Richard C. Hyman, Esq., for the employee
John F. Keefe, Esq., for the insurer

Smith, J. The insurer appeals from a decision on an original liability claim, which awarded compensation for an injury sustained while playing basketball at a company picnic. Genereal Laws c.152, § 1(7A), as amended in 1985, excludes injuries resulting from "purely voluntary participation" in recreational activities from the category of "personal injuries" that are compensated under the Workers' Compensation Act. See Bengtson's Case, 34 Mass. App. Ct. 239, 243-244 (1993). Because the judge applied the wrong legal standards to the case, we reverse the decision and recommit the case.

Richard Grigg joined a game of two on two basketball at the employer's annual Employee Appreciation Day. While chasing a rebound, he fell, fracturing his patella. As a result of the injury, he was totally incapacitated from the date of the accident, August 29, 1997, until January 4, 1998. He took one week of vacation and then received benefits under his short-term disability policy. Insurance paid for all of his medical treatment except for co-payments. He has returned to work for the employer without restriction.

Grigg sought workers' compensation benefits, arguing that the injury occurred while on the job during normal business hours. The insurer denied the claim, asserting that, under § 1(7A), the injury was not compensable because it occurred while Grigg was engaged in a purely voluntary recreational activity.

The injury occurred during a company-sponsored cookout with games. The judge found that no employee was required to attend. The event was held during ordinary working hours on the employer's premises. If a worker declined to attend, he could either remain at his workstation or use vacation time if he wanted to leave the work site. The event, called Employee Appreciation Day, was popular and everyone attended it. The employer served food in a large tent erected on the side lot adjacent to its building. Employees played basketball, volleyball and horseshoes. "No one had to play any games, but many employees did." (Dec. 6 Bean 318.)

The judge concluded as a matter of law that the employee's participation in the activity which caused his injury was not "purely voluntary" because of the choices given to employees, "one very attractive one, and two choices so unattractive as to be absurd to contemplate." (Dec. 6 Bean 319.) The judge reasoned that § 1(7A) did not apply here because the event took place during regular business hours on the property of the employer, at the employer's expense and encouragement. He construed § 1(7A) to apply only to off-premises events held outside of working hours. (Dec. 6 Bean 320.) The judge awarded the claimed benefits, and the insurer has appealed.

Section 1(7A) renders noncompensable, "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." G.L. c. 152, § 1(7A), as amended by St. 1985, c. 572, § 11. This provision was enacted to limit liability for injuries occurring during organized recreational activities, such as company picnics and games, in

which employees are engaged in nonwork activities. Gateley's Case, 415 Mass. 397, 400 (1993).

The insurer contends that the judge erred as a matter of law in requiring that the recreational event occur off-premises and outside of regular working hours for § 1(7A) to apply. We agree. "Injuries sustained as a result of an employee's voluntary participation in a recreational activity, whether or not on the employer's premises, normally do not qualify for workers' compensation." Mulford v. Mangano, 35 Mass. App. Ct. 800, 802 (1994). Section 1(7A) does not limit the time or place of the recreational activity to which it applies. Gateley's Case, supra.

Next, the insurer challenges the judge's conclusion that the recreational activity was not "purely voluntary." The word "purely" connotes unmixed or unqualified. Bengtson's Case, supra at 244. Voluntary means "unimpelled by another's influence or the free choice of the person." Gateley's Case, supra. " Webster's defines 'voluntary' variously as 'by an act of choice,' 'not constrained, impelled, or influenced by another,' 'acting or done of one's own free will,' and adds that the word 'implies freedom from any compulsion that could constrain one's choice.' Webster's Third New International Dictionary 2564 (1961)." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 122 (1991). The employee's participation in Employee Appreciation Day was voluntary because he had an alternative course to follow that was not coercive or punitive. No penalty attached to an employee's choice to remain in the building and continue working.

Nevertheless, the judge decided that the employee's choice to participate in the event was not purely voluntary. (6 Bean 320.) In reaching this conclusion, the judge considered the employee's fear that refusal to participate might affect his relationships with co-workers and management. Id. To the extent that the judge weighed the employee's subjective perceptions, he erred. "The nature of an employee's participation in a recreational activity . . . must be weighed under an objective standard." Bengtson's Case, supra.

Because the decision is based upon erroneous legal principles, we reverse it and recommit the case to the administrative judge for a new decision consistent with this opinion, as to whether the employee's participation in the recreational event was "purely" voluntary.

So ordered.

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Suzanne E.K. Smith
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

MCCARTHY J., dissenting Following its annual custom, on August 7, 1997, the employer staged an Employee Appreciation Day. It was a "cookout with games" -- basketball, volleyball and horseshoes, among others. (Dec. 318.) To the extent that the event was "not purely voluntary," within the meaning of § 1(7A), so too was the basketball game played as part of the event. (Dec. 320-321.) Gateley's Case, 415 Mass. 397 (1993), is distinguishable on this count. "We conclude . . . that the term 'voluntary' in the statute pertains to the employee's participation in the activity [of playing the game in which he was injured] and not the reason he remained on the premises." Id. at 400. Gately was waiting for his paycheck to arrive, an activity which had nothing to do with his playing nerf football. Id. Grigg's participation in the basketball game, on the other hand, was part and parcel of the employer's Employee Appreciation Day.

Thus, the judge appropriately assessed the evidence with an eye toward the nature of the "cookout with games." The judge's analysis is appropriate, as he touched on the criteria relevant to the § 1(7A) recreational activity provision, which are enumerated in Bengtson's Case, 34 Mass. App. Ct. 239 (1993):

> "(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 employee's participation in the activity . . .by way of improved employer-employee relationships . . . ."[1]

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[1] Bengtson stresses the fact-intensive nature of the analysis:

> "Apart from the existence of employer compulsion, which often might warrant or even require a finding in favor of the employee, the presence or absence of any one of the other factors listed would not necessarily determine the issue. Nor, indeed, is the foregoing enumeration meant to be exclusive of other factors which might appear in a given case. 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. Upon such an evaluation must the decision as to the closeness of the connection between the employment and the recreation ultimately rest."

Bengtson, supra at 246-247, quoting Moore's Case, 330 Mass. at 4-5.

Id. at 246, quoting Moore's Case, 330 Mass. 1, 4-5 (1953).

The judge found that the employer staged the Employee Appreciation Day every year (Dec. 318.) He also found that the event improved employee morale, and thereby benefited the employer, as well as its employees. (Dec. 320.) The judge determined that the event was popular, and that everyone did attend it, even though they were not *required* to do so. (Dec. 318.) The judge found that the alternatives to attending were choices that were clearly unattractive in comparison to the event. "The employee could attend, eat the food offered, play and/or watch the games that were organized, and socialize with co-workers; or take vacation time so as to leave the workplace, or remain alone, at one's work station. It is easy to see that all employees eagerly participated in this enjoyable event." (Dec. 319.) The judge also found that the basketball game was an integral part of the event, and that the employer provided the means to play basketball and encouraged employees to play. (Dec. 320-321.) These findings sufficiently answer to the employee's benefit *all* of the Bengtson/Moore factors, with the exception of "substantial pressure or actual compulsion . . . to attend or participate." With four out of five of the relevant factors in the legal analysis supporting the judge's award of benefits, I cannot agree with the majority that reversal and recommital are warranted.[2] Cf. Bengtson, supra at 247 (judge awarded benefits solely on the subjective and conclusory basis that employee's participation was not "purely voluntary," "rather than weighing all of the relevant criteria").

I would affirm the judge's well-reasoned decision awarding benefits for this injury in the course of "not purely voluntary" recreational activity.

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[2] I agree with the majority that the judge's finding regarding the relative importance of the event taking place on the employer's premises are erroneous. (Dec. 320.) However, the error is harmless when put in the context of all the proper findings weighing the other relevant factors.

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William A. McCarthy
Administrative Law Judge

Filed: August 17, 2000