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*2009 Ill. App. LEXIS 981, **

ELMHURST PARK DISTRICT, Plaintiff-Appellant, v. ILLINOIS **WORKERS' COMPENSATION** COMMISSION and SEAN T. **MURPHY**, Defendants-Appellees.

No. 1-08-2289WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, **WORKERS' COMPENSATION** COMMISSION DIVISION

2009 Ill. App. LEXIS 981

October 6, 2009, Filed

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. No. 07-MR-947. Honorable Alexander P. White, Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that confirmed appellee Commission's decision that found appellee employee's claim for **workers' compensation** benefits was compensable under the **Workers' Compensation** Act, 820 ILCS 305/1 et seq. Respondent employer appealed.

OVERVIEW: The employee worked as a fitness supervisor for the employer, a park district that was operating a fitness facility. A coworker asked the employee to participate in a wallyball game. Although the employee did not want to do so, he agreed after the coworker informed him that other participants were paying customers and without him, they would not have enough people for the game to go forward. About 15 minutes after the game started, he injured his right leg and was transported to the hospital to undergo surgery for a fracture. Thereafter, he sought **workers compensation** benefits. An arbitrator heard evidence and determined that the injury arose out of and in the course of his employment with the employer. The Commission affirmed and the trial court confirmed the Commission's decision. The appellate court found that 820 ILCS 305/11 (2002)'s "voluntary **recreational** programs" exception did not apply to bar the employee's claim because recreation was inherent in his job as a fitness supervisor, and the evidence showed that he did not participate in the game for his own diversion or exercise, but did so in order to accommodate the paying customers of his employer.

OUTCOME: The appellate court affirmed the trial court's judgment.

CORE TERMS: claimant's, wallyball, arbitrator, sport, recreational, supervisor, customer, participating, fitness, recreational activity, incidental, recreation, league, tennis, racquet, job description, compensable, tournament, athletic, played, right leg, voluntary-recreational, recovering, accidental, dictionary, confirmed, diversion, playing, patrons, team

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Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

HN1 An injury is compensable under the **Workers' Compensation** Act only if the claimant proves by a preponderance of the evidence that it arose out of and in the course of his or her employment. An injury is said to "arise out of" one's employment if its origin is in some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury. An injury is in the course of employment when it occurs within the period of employment at a place where the employee can reasonably be expected to be in the performance of his or her duties and while he or she is performing these duties or a task incidental thereto. More Like This Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Recreational Activities

HN2 See 820 ILCS 305/11 (2002).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN3 The interpretation of a statute is a question of law subject to de novo review. In interpreting a statute, a reviewing court's primary goal is to ascertain and give effect to the intent of the legislature. The best indication of legislative intent is the plain and ordinary language of the statute itself. Moreover, because the provisions of a statutory enactment are to be viewed as a whole, a court may also consider the principle purpose of the statute in ascertaining the legislative intent. More Like This Headnote

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Compensability > Course of Employment > Recreational Activities

HN4 Although 820 ILCS 305/11 (2002) provides several general examples of activities which may be considered "**recreational,**" the **Workers' Compensation** Act does not expressly define the term. Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meanings. In determining the ordinary meaning of a statutory term, it is appropriate to consult a dictionary. The term "**recreational**" is derived from the word "recreation." The word "recreation" in turn is defined as the act of recreating or the state of being recreated, refreshment of the strength and spirits after toil, or diversion or play. More Like This Headnote

COUNSEL: For Appellant: Nyhan, Bambrick, Kinzie & Lowry, Chicago, IL.

For Appellee: Cronin, Peters & Cook, Chicago, IL.

JUDGES: Honorable John T. McCullough, P. J., concurs. Honorable Thomas E. Hoffman, J., concurs. Honorable Donald C. Hudson, J., Honorable William E. Holdridge, J., concurs and Honorable James K. Donovan, J., concurs. JUSTICE HUDSON delivered the opinion of the court.

OPINION BY: Donald C. Hudson

OPINION

JUSTICE HUDSON delivered the opinion of the court:

Claimant, Sean T. **Murphy,** worked at a fitness facility operated by respondent, Elmhurst Park District. On January 3, 2002, claimant injured his right leg while playing in a wallyball [1] game on respondent's premises during his work shift. Claimant sought benefits for his injury pursuant to the **Workers' Compensation** Act (Act) (820 ILCS 305/1 *et seq.* (West 2002)). Respondent asserted that claimant's injury was not compensable by virtue of section 11 of the Act (820 ILCS 305/11 (West 2002)), which precludes an employee from recovering for accidental injuries incurred while participating in "voluntary **recreational** programs" unless the employee was ordered or assigned by the employer to participate in the activity. The arbitrator awarded claimant benefits, finding that his injury arose **[*2]** out of and in the course of his employment with respondent. The arbitrator found that section 11 did not apply because claimant's participation in the wallyball game did not constitute a "voluntary **recreational** activity" as contemplated by section 11. The Illinois **Workers' Compensation** Commission (Commission) affirmed the decision of the arbitrator, and the circuit court of Cook County confirmed. On appeal, respondent contends that, despite the Commission's conclusion to the contrary, claimant was not entitled to benefits because his participation in the wallyball game was "voluntary," the wallyball game constituted a "**recreational**" activity, and respondent did not order or assign claimant to participate in the activity. See 820 ILCS 305/11 (West 2002). We find respondent's position unpersuasive and therefore affirm.

FOOTNOTES

1 Wallyball is a team sport similar to volleyball, but which is played within the confines of a racquetball court. See American Wallyball Association, *http://www.wallyball.com* (last visited September 22, 2009).

Claimant was hired by respondent as a fitness supervisor late in 2001. Claimant testified that in this capacity one of his duties was to promote and implement the **[*3]** classes and programs that respondent offered its patrons. Claimant explained that promoting respondent's programs involved "help[ing] out with any of the programs or classes along with helping the members and customers." A copy of claimant's written job description was placed into evidence.

Regarding the events of January 3, 2002, claimant testified that he was scheduled to work from noon until 8:30 p.m. At approximately 7:30 p.m. that day, Denise McElroy, a coworker, approached claimant and asked him to participate in a wallyball game. McElroy was not claimant's supervisor, and she was off duty on the evening of January 3. Claimant testified that the game in question was part of respondent's wallyball league and that the participants were paying customers. Although claimant was a regular member of the wallyball league, he declined McElroy's invitation because he did not feel well and he had other work to do. According to claimant, however, McElroy persisted. She told him that without his assistance the game could not go forward "because they didn't have enough people to participate." At that point, claimant ceded to McElroy's "cajoling" and decided to "oblige" and "help[] out." At **[*4]** about 7:45 p.m., 15 minutes after the game commenced, claimant jumped up to block a shot. When he came down, he injured his right leg. Claimant was transported by ambulance to Elmhurst Memorial Hospital, where he underwent surgery to repair a fracture. With the aid of crutches, claimant was able to return to his position as fitness supervisor on February 24, 2002.

Claimant testified that he was not aware of any policy prohibiting park district employees from participating in league play while on duty and that he was not reprimanded by respondent for his participation in the wallyball game. In fact, claimant stated that he had played wallyball during working hours on at least three occasions prior to January 3, 2002. Claimant explained that on those occasions he would begin a game prior to the end of his shift and finish the game after the end of his shift. Claimant acknowledged that no one told him that it was mandatory for him to participate in the wallyball game on the evening in question. Nevertheless, he stated that he "felt that [it] was part of [his] job" which was "to promote *** different classes and programs."

Claimant's supervisor, Pamela Stoike, testified that in January 2002 **[*5]** she was employed by respondent as the manager of fitness

and racquet sports at the facility where claimant worked. Stoike testified that the wallyball program is administered as part of the racquet sports department. Stoike explained that the fitness department and the racquet sports department are separate, that each department has its own" sub supervisor," and that claimant had no duties with respect to the racquet sports department. Stoike further testified that wallyball was not within claimant's responsibilities and that she, as claimant's supervisor, never ordered or directed claimant to play or participate in any wallyball league. Stoike added that McElroy did not have any supervisory duties over claimant and that claimant did not have any responsibilities regarding the formation of wallyball teams or the promotion of the sport. In fact, Stoike testified that although respondent encouraged its employees to participate in sports leagues on their own time, it had a policy prohibiting employees from playing while they were on duty.

Based on the foregoing evidence, the arbitrator concluded that claimant's injury arose out of and in the course of his employment with respondent. The **[*6]** arbitrator found that section 11 of the Act (820 ILCS 305/11 (West 2002)) did not apply because claimant was not participating in a "**recreational**" activity, but rather was performing duties incidental to his employment. The arbitrator explained that claimant was injured during an activity that "was part of the respondent's business, and therefore part of the [claimant's] overall job duties." The arbitrator stated that without claimant's participation, the wallyball game would not have been played and respondent's customers would not have been accommodated. Moreover, the arbitrator noted that claimant felt "compelled" to participate based on his written job description, which provided that claimant's responsibilities included "[p]romot[ing] *** programs to patrons, members, guests and staff," "[d]evelop[ing] and maintain[ing] positive customer service," and" [b]e[ing] available for flexible work schedules." The arbitrator added that the fact that an employee's work duties involve an activity that is "**recreational**" to the employer's customers does not make the activity "**recreational**" to the employee involved in it. The arbitrator concluded that since claimant's participation in the wallyball **[*7]** game "clearly benefited the respondent's business of operating a health facility and the [claimant] reasonably believed the activity was part of his work duties," claimant was not engaged in a "voluntary **recreational**" activity. The arbitrator awarded claimant 7-2/7 weeks of temporary total disability benefits (see 820 ILCS 305/8(b) (West 2002)) and 50 weeks of permanent partial disability benefits, representing 25% loss of use of the right leg (see 820 ILCS 305/8(e) (West 2002)). As noted above, the Commission affirmed and adopted the decision of the arbitrator and the circuit court of Cook County confirmed. This appeal followed.

HN1 An injury is compensable under the Act only if the claimant proves by a preponderance of the evidence that it arose out of and in the course of his or her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). An injury is said to "arise out of" one's employment if its origin is in some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Comm'n*, 58 Ill. 2d 226, 230, 317 N.E.2d 515 (1974). An injury is "in the course of' employment **[*8]** when it occurs within the period of employment at a place where the employee can reasonably be expected to be in the performance of his or her duties and while he or she is performing these duties or a task incidental thereto. *All Steel, Inc. v. Industrial Comm'n*, 221 Ill. App. 3d 501, 503, 582 N.E.2d 240, 164 Ill. Dec. 32 (1991).

On appeal, respondent does not expressly dispute that claimant has established the foregoing elements. Rather, respondent asserts that claimant is precluded from recovering benefits by virtue of the voluntary-**recreational** activity exclusion set forth in section 11 of the Act (820 ILCS 305/11 (West 2002)). That section provides in relevant part:

> HN2 "Accidental injuries incurred while participating in voluntary **recreational** programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program." 820 ILCS 305/11 (West 2002).

The parties do not suggest that claimant's participation in the wallyball game was not "voluntary." Instead, they focus **[*9]** on whether the nature of the activity in which claimant was engaged at the time of his injury was "**recreational**." According to respondent, the plain and unambiguous language of section 11 was meant to apply in instances such as this where an employee is injured while engaged in an activity such as wallyball which is an "athletic event." Claimant counters that section 11 was not intended to bar compensation where, as here, the injury occurs within the period of employment and while the employee is participating in an activity that is "incidental" to the performance of his or her duties.

To determine whether the exclusion set forth in section 11 precludes claimant from recovering benefits, we must determine what the legislature intended by the use of the word "**recreational**." HN3 The interpretation of a statute is a question of law subject to *de novo* review. *City of Chicago v. **Workers' Compensation** Comm'n*, 387 Ill. App. 3d 276, 278, 899 N.E.2d 1247, 326 Ill. Dec. 596 (2008). In interpreting a statute, our primary goal is to ascertain and give effect to the intent of the legislature. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 253, 899 N.E.2d 365, 326 Ill. Dec. 148 (2008). The best indication of legislative intent is the plain **[*10]** and ordinary language of the statute itself. *Piasa Motor Fuels v. Industrial Comm'n*, 368 Ill. App. 3d 1197, 1203, 858 N.E.2d 946, 306 Ill. Dec. 888 (1996). Moreover, because the provisions of a statutory enactment are to be viewed as a whole, a court may also consider the principle purpose of the statute in ascertaining the legislative intent. See *In re Detention of Lieberman*, 201 Ill. 2d 300, 308, 776 N.E.2d 218, 267 Ill. Dec. 81 (2002).

HN4 Although section 11 provides several general examples of activities which may be considered "**recreational**," the Act does not expressly define the term. See *Cary Fire Protection District v. Industrial Comm'n*, 211 Ill. App. 3d 20, 25, 569 N.E.2d 1338, 155 Ill. Dec. 727 (1991). Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meanings. *General Motors Corp., Fischer Body Division v. Industrial Comm'n*, 62 Ill. 2d 106, 112 (1975). In determining the ordinary meaning of a statutory term, it is appropriate to consult a dictionary. *People v. Perry*, 224 Ill. 2d 312, 330, 864 N.E.2d 196, 309 Ill. Dec. 330 (2007). The term "**recreational**" is derived from the word "recreation." Webster's Third New International Dictionary 1899 (2002). The word "recreation" in turn is defined as "the act of recreating **[*11]** or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY." Webster's Third New International Dictionary 1899 (2002).

Given the foregoing definition, we can certainly envision circumstances under which participation in a game of wallyball would constitute a "**recreational**" activity and therefore fall within the voluntary-**recreational** activity exclusion set forth in section 11 of the Act. However, we do not believe that the facts of this case present such a situation. Similar to a professional athlete, "recreation" is inherent in claimant's position as a fitness supervisor. See 2 A. Larson & L. Larson, **Worker's Compensation** Law § 22.04[1][b], at 22-12 through 22-16 (2007) ("The clearest possible example of 'recreation' which is the essence of the job itself is that of professional sports"). As such, we find it appropriate to consider why claimant agreed to play wallyball on the date he was injured. The evidence adduced at the arbitration hearing established that claimant initially declined McElroy's invitation to participate in the

wallyball game because he was not feeling well and he had other work to do. However, McElroy persisted in her request **[*12]** and told claimant that absent his participation, the game would be cancelled because there would not be enough participants. Thereafter, claimant decided to "help[] out" because he "felt that [it] was part of [his] job" which was "to promote *** different classes and programs." Based on this evidence, we conclude that claimant did not participate in the wallyball game for his own "diversion" or to "refresh" or "strengthen" his spirits after toil. Rather, claimant participated in the game to accommodate respondent's customers. As such, we find that claimant was not engaged in a "**recreational**" activity as contemplated by section 11 of the Act at the time of his injury.

Our finding is further buttressed by the Commission's determination that claimant's participation in the wallyball game was incidental to his employment. Respondent asserts that claimant's duties centered on the fitness department and his 'supervisor testified that none of his duties involved racquet sports, the department which encompasses the wallyball program. However, according to claimant's written job description, his responsibilities included "[p]romot[ing] *Elmhurst Park District* programs." (Emphasis added.) This **[*13]** clearly does not limit claimant to promoting only fitness-department programs. Similarly, claimant was required to "[d] evelop and maintain positive customer service with *internal and external* customers." (Emphasis added.) Again, this responsibility does not restrict claimant from attending to customers outside of the fitness department. Indeed, as we noted previously, claimant testified that he felt that participating in the wallyball game was part of his job because one of the requirements of his position was to help out with any programs or classes respondent offered its patrons. Claimant's belief was reasonable in light of his written job description. Therefore, the evidence supports the Commission's finding that claimant's participation in the wallyball game was incidental to his employment.

Furthermore, we reject the suggestion that claimant's injury is not compensable because respondent had a policy prohibiting employees from playing league sports while they were on duty. Claimant's supervisor testified to such a policy. However, if the policy existed, the evidence presented at the arbitration hearing suggested that it was not enforced. See *County of Cook v. Industrial Comm'n*, 177 Ill. App. 3d 264, 272, 532 N.E.2d 280, 126 Ill. Dec. 595 (1988) **[*14]** ("[A]n employee may be entitled to compensation even though he may have violated a rule of his employer, especially where that rule was unenforced"). Claimant testified that he was not aware of any such policy and, in fact, that he had played wallyball during working hours on at least three occasions during his short tenure with respondent prior to the date of his injury. Moreover, claimant stated that he was not reprimanded by respondent for his participation in the wallyball game on January 3, 2002. For all these reasons, we affirm the Commission's finding that the voluntary-**recreational** activity exclusion did not render claimant's injury noncompensable.

Citing to *Kozak v. Industrial Comm'n*, 219 Ill. App. 3d 629, 579 N.E.2d 921, 162 Ill. Dec. 107 (1991), respondent vigorously asserts that wallyball is clearly an "athletic event" and therefore claimant's injury is not compensable. In *Kozak*, the employee suffered a fatal heart attack while participating in a tennis round-robin tournament conducted for the purpose of selecting a tennis team to represent the employer in a national invitational championship. *Kozak*, 219 Ill. App. 3d at 630. The petitioners, the decedent's widow and son, thereafter sought benefits under the **[*15]** Act. In upholding the Commission's decision to deny compensation, we stated that" section 11 applies if an employee is injured while participating in a voluntary activity regardless of the purpose of the activity." *Kozak*, 219 Ill. App. 3d at 632. Further, we cited two reasons for declining the petitioners' request to define "**recreational** activities" beyond the description contained in section 11 of the Act:

> "In the first instance, it is absolutely clear in the case before us that participation in a round-robin elimination tennis tournament is an 'athletic event' within the meaning of the Act. Second, any additional explication of the possible types of conduct which may be within or without the Act would be, at best, *dicta*, and, at worst, an impermissible advisory opinion in which this court may not engage." *Kozak*, 219 Ill. App. 3d at 633-34.

While our decision in this case may, at first blush, seem antithetical to *Kozak*, a closer examination reveals that the two cases are distinguishable.

As noted above, "recreation" is inherent in claimant's job. Therefore, almost any activity in which claimant takes part could be considered "**recreational**." For this reason, it is necessary to consider **[*16]** the purpose of claimant's participation in the wallyball game. In *Kozak*, there was no evidence that "recreation" was inherent in the employee's position. Therefore, under our analysis in this case, the result in *Kozak* would be the same. The evidence in *Kozak* indicates that the sole reason for the employee's participation in the tennis tournament was for his own "diversion." As part of the tennis competition, the employee in *Kozak* was flown to Texas and the employer paid all of the travel expenses. *Kozak*, 219 Ill. App. 3d at 631. Further, had the employee won the tournament, he would have received a trophy and an all-expense paid vacation. *Kozak*, 219 Ill. App. 3d at 630. Accordingly, we find respondent's reliance on *Kozak* misplaced.

In sum, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission.

Affirmed.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and DONOVAN, JJ., concur.

*2007 Ill. Wrk. Comp. LEXIS 344, *; 7 IWCC 0376*

SEAN MURPHY, PETITIONER, v. **ELMHURST PARK** DISTRICT, RESPONDENT.

NO. 02 WC 012477

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF DUPAGE

2007 Ill. Wrk. Comp. LEXIS 344; 7 IWCC 0376

March 30, 2007

CORE TERMS: arbitrator, fracture, temporary total disability, recreational, supervisor, recreational activity, petitioner testified, present condition, ill-being, causally, carrier, played, tibia, pain, leg, amount of compensation, causal connection, returned to work, disputed issues, job description, emergency room, permanent loss, right leg, participating, disability, benefited, harmless, customer, assigned, fitness

JUDGES: David L. Gore; Paul W. Rink; Mario Basurto

OPINION:

[*1] DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 26, 2005 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

MAR 30 2007

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION [*2]

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Lammie,** arbitrator of the Commission, in the city of **Wheaton,** on **July 21, 2005.** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that the arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **January 3, 2002,** the respondent **Elmhurst Park District was** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did*** sustain injuries that arose **[*3]** out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned **$ 30,000.36;** the average weekly wage was **$ 576.93.**

. At the time of injury, the petitioner was **27** years of age, ***single*** with **0** children under 18.

. Necessary medical services ***have*** been provided by the respondent.

. To date, $ **2,033.10** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 384.62**/week for **7 & 2/7** weeks, from **1/4/02** through **2/23/02,** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ 346.16**/week for a further period of **50** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **permanent loss of use of the right leg to the extent of 25% thereof.**

. The respondent shall pay the petitioner compensation that has accrued from **1/3/02** through **7/21/05,** and **[*4]** shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of **$ 0** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay **$ 0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay **$ 0** in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay **$ 0** in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 3.71% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

September 14, 2005

Date

SEP 26 2005

Findings of Fact, and Conclusions of Law

In regard to issue C: "Did an accident occur that arose out of and in the course [*5] of the petitioner's employment by the respondent?", the Arbitrator makes the following findings:

On January 3, 2002, the petitioner sustained accidental injuries that arose out of and in the course of the petitioner's employment by the respondent. In support of that finding, the Arbitrator notes the following testimony and evidence.

The controlling issue is whether the petitioner sustained an accident that arose out of and in the course of his employment, or weather the petitioner was engaged in a voluntary recreational program, which would not be covered under the Workers' Compensation act, pursuant to Section 11. The relevant potion of that Section states:

Voluntary Recreation-Rehabilitation "Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

The petitioner testified that he was employed as a fitness supervisor in **[*6]** the respondent's fitness facility. On the date of accident, and during the petitioner's work hours, he was approached by another employee of the respondent, Denise McElroy, who asked the petitioner to participate in a recreational activity sponsored by the respondent at the respondent's facility. Although Ms. McElroy was not the petitioner's supervisor, she was a supervisor for the respondent. The petitioner initially declined, saying that he did not feel that well, and that he had some other work to do. But Ms. McElroy persisted. Apparently, one of the member's teams was a person short, and would be unable to play if a substitute was not found. The petitioner then relented and played, whereupon he was injured.

The petitioner's direct supervisor, Ms. Stoike, testified that the petitioner was not "ordered and assigned" to participate. The petitioner was not part of that department (racquet sports), and had no responsibilities in it. Therefore, it is argued, the petitioner's participation was purely voluntary. It was pointed out that the petitioner played on a team of his own when off duty. Ms. Stoike also testified that employees were not to engage in personal, recreational activities **[*7]** while working.

The petitioner testified that on the date in question, he was to work from noon to 8:30 pm. Ms Stoike testified he was off duty as of 8:00 pm. No documentation was offered by either party. But the agreement to play was at 7:30 pm, and the petitioner arrived at the emergency room by ambulance at 8:30 pm (PX1, last page), so it is a reasonable inference that the petitioner was on duty when the accident occurred.

The Arbitrator believes that the respondent is trying to draw the employment contract too narrowly. This was not a "voluntary recreational activity", and therefore, Section 11 does not apply. This activity was part of the respondent's business, and therefore part of the petitioner's overall job duties.

It is clear that the petitioner's participation in this activity benefited the respondent's business, as without his participation the scheduled game in the "Wally Ball League" would not be played, and the customers of the respondent would not be accommodated.

The petitioner testified that he felt "compelled" to participate based upon his written job description. The written job description included provisions to "promote ... programs to patrons, members, guests **[*8]** and staff' (par 12), to "develop and maintain positive customer service" (par 16), and even to "be available for flexible work schedules" (par 8). (PX 3).

The Arbitrator finds that Section 11 of the Workers' Compensation Act is not applicable since the activity clearly benefited the respondent's business of operating a health facility and the petitioner reasonably believed the activity was part of his work duties. The petitioner was not participating in a "recreational activity" but rather was performing duties incidental to his employment. The fact that an employee's work duties involve an activity that is "recreational" to the employer's customers or client does not make that activity "recreational" to the employee involved in it. Burtle -v- The Healthy Woman 02 WC 63940, 05 IWCC 0038

In regard to issue F: "Is the petitioner's present condition of ill-being causally related to the injury?", the Arbitrator makes the following findings:

The petitioner's present condition of ill-being is causally related to the injury. In support of that finding, the Arbitrator notes the following testimony and evidence.

While the respondent placed causal connection in dispute, it appears that **[*9]** is because of the dispute over "arising out of" and "in the course of". Clearly, as a result of his injury in the Wally Ball game, the petitioner sustained fractures of both right lower leg bones.

In regard to issue J: "Were the medical services that were provided to petitioner reasonable and necessary?", the Arbitrator makes the following findings:

The medical services that were provided to the petitioner were reasonable and necessary.

The Parties have stipulated that all of the petitioner's medical bills were submitted and paid by the respondent's group carrier. Pursuant to Section 8(j) the respondent is given credit for all payments made by their group carrier and will hold petitioner harmless from any and all claims or liabilities that may be made against him by reason of having received such payment.

In regard to issue K: "What amount of compensation is due for Temporary Total Disability?", the Arbitrator makes the following findings:

The parties have agreed that the duration of disability was from January 4, 2002 through February 23, 2002 inclusive, totaling 7 2/7 weeks. The petitioner returned to work for the respondent on February 24, 2002, using crutches. Based upon **[*10]** the finding that the petitioner did sustain an accident that arose out of and in the course of his employment the Arbitrator finds the petitioner entitled to $ 384.62 per week for 7 2/7 weeks, equal to $ 2,802.23. By stipulation, $ 2,033.10 of this amount has been paid. $ 769.13 remains due and owing.

In regard to issue L: "What is the nature and extent of the injury?", the Arbitrator makes the following findings:

The petitioner has sustained a 25% permanent loss of use of the right leg. That equates to 50 weeks of disability. At the petitioner's PPD rate of $ 346.16, that equals $ 17,308.00. In support of that finding, the Arbitrator notes the following testimony and evidence.

The petitioner was treated in the emergency room with a diagnosis of right tibia and fibula fracture. He was admitted and came under the care of Thomas Rodts M.D. who diagnosed a displaced, angulated mid shaft fracture of the right tibia and fibula. The fractures were also described by the radiologist as "comminuted". On January 3, 2002, Dr. Rodts performed a closed reduction under anesthesia and applied a long leg cast. Post hospitalization the petitioner remained under the care of Dr. Rodts, seeing him **[*11]** for periodic office visits and X-rays to monitor his healing.

The petitioner returned to work for the respondent on February 24, 2002, still using crutches. The petitioner last saw Dr. Rodts on October 2, 2002. The petitioner's complaints at that time were of a "twinge" of pain in the area of the tibia fracture site when trying to run fast or sprint. Dr. Rodts found the symptoms due to scar adhesions of the anterior tibial muscle lateral to the fracture site. He did not restrict the petitioner's activity, however.

The petitioner's present complaints are of pain in the leg with weather changes. The petitioner also complains of pain in the area of the fracture while running or jumping. He testified that he avoids participation in sports that require those activities. The Arbitrator finds the petitioner's complaints to be credible and supported by the medical evidence. The Arbitrator also notes the petitioner's young age (31 currently).

By Order of the Arbitrator:

The respondent shall pay to the petitioner the sum of $ 769.13 for TTD benefits, pursuant to finding "K" above. The respondent shall also pay to the petitioner the further sum of $ 17,308.00 in PPD benefits, pursuant to **[*12]** finding "L" above. Further, the respondent shall hold the petitioner harmless and indemnify him for any claim for reimbursement from the group insurance carrier, as noted under finding "J" above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

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