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Workmen's Compensation - Injuries for Which Compensation May Be Had - Acts of a Recreational Character Sponsored by Employer

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principal case cited several New York cases [28] in defense, relying upon the interpretation given the term "accident" in New York.

At the present time approximately one-third of the states allow recovery under the common law only if the accident does not come under one of the categories provided for in the Workmens Compensation Act [29] since the Act is compulsory as to the specifically enunciated injuries.

The statutes of North Dakota require every employer engaged in a hazardous enterprise to be covered by the Workmens Compensation Act [30] and no employer so covered is liable in tort for any injuries suffered by his employees. This pertains to those employers engaged in non-hazardous work also if they comply with the provisions of the Act.[31] While there are no cases directly in point with the principal case in this state it seems likely that the North Dakota court would follow Missouri in circumventing any limitations placed on the term "accident." In a 1941 case [32] the Supreme Court of North Dakota stated that the term "immediately" as used in a liability policy did not mean "instantaneously." However, the court refused to further define the term at that time.

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WORKMEN'S COMPENSATION — INJURIES FOR WHICH COMPENSATION MAY BE HAD — ACTS OF A RECREATIONAL CHARACTER SPONSORED BY EMPLOYER. — Claimant, a member of the General Electric Athletic Association, a membership corporation open only to employees of the General Electric Company, sustained a fracture of the left ankle during a game held on company property. *Held,* claimant was entitled to an award of Workmen's Compensation since the injury arose out of and in the course of his employment. *Tedesco v. General Electric Co.,* 305 N.Y. 544, 114 N.E.2d 33 (1953).

The dismissal of the claim by the Appellate Division was based mainly on the precedent of *Matter of Wilson v. General Motors Corp.*[1] An examination of the facts of that case makes it obvious that it has no sound application to the instant case. In the case of *Wilson v. General Motors* the employees of a plant had organized a softball league, conducting games after hours and off the premises for their own recreation and without any business advantages to the employer. Though the employer did permit conferences relating to

28. Jacobson v. Employers Assurance Corp., 259 N.Y. 559, 182 N.E. 180 (1932); Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925); Jefferys v. Charles H. Sager Co., 233 N.Y. 535, 135 N.E. 907 (1922).

29. 1 Larson, Workmens Compensation Law, §67.10 (1st Ed. 1952).

30. "Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund." N.D.Rev. Code, §65-0428 (1943).

31. "Any employer carrying on any employment not classed as hazardous under the definition of that term contained in section 65-0102 who complies with the provisions of this title and who shall pay into the fund the premiums provided for under this chapter shall not be liable to respond in damages at common law . . . for injuries to or the death of any employee . . . during the period covered by such premiums, if the injured employee has remained in the service of such employer with notice that the employer has paid into the fund the premiums provided for under the provisions of this title. The continuation in the service of such employer with such notice shall constitute a waiver by the employee of his rights of action as aforesaid." N.D.Rev. Code, §65-0429 (1943).

32. Jacobson v. Mutual Benefit Health & Accident Ass'n., 70 N.D. 566, 296 N.W. 545 (1941) (the statement, "The insurer shall be liable only for such accidental injuries as shall immediately . . . disable the insured." appeared in the policy).

1. 298 N.Y. 468, 48 N.E.2d 781 (1949).

games to be held on company property during working hours it was *held* that this injury was not compensable since the possible benefit that the employer received from the resulting *esprit de corps* was, to use the language of the court, "too tenuous and ephemeral".[2] It was further stated by the court in *Wilson v. General Motors,* "Personal activities of employees, unrelated to the employment, remote from the place of work and its risk, not compelled or controlled by the employer, yielding it neither advantage nor benefit, are not within the compass of the Workmen's Compensation Law."[3]

Possibly because of the comparatively recent advent of athletic associations among employees there are as yet no definite and settled principles by which to solve this type of case.

In "horse-play" cases courts are prone to allow recovery when the act causing the injury has become so customary as to be incidental to the employment and the employer knew or should have known about the practice of his employees but took no steps to stop it.[4] In these cases the courts have also shown great reluctance to compensate an employee whose "practical" jokes have resulted in his own injury.[5]

The cardinal point of many Workmen's Compensation cases is whether the injury arose out of, and in the course of, employment.[6]

"Out of employment" and "in the course of employment" are by no means synonymous terms. The phrase "out of" refers to origin or cause.[7] "In the course of" is indicative of time, place and circumstances.[8] Consequently it is not every injury that is compensable under Workmen's Compensation merely because the claimant sustained it during the time of his employment. For an injury to arise out of and in the course of employment the accident complained of must result from a risk peculiar to the occupation with a casual connection between employment and injury.[9]

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2. Wilson v. General Motors Corp., 298 N.Y. 468, 473, 84 N.E.2d 781, 784 (1949).
3. *Ibid.*
4. Mascika v. Connecticut Tool & Engineering Co., 109 Conn. 473, 147 Atl. 11 (1929) (stick throwing by boys before working hours which employer knew about and failed to stop); Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372 (1919) (minor girl injured while riding truck during lunch time, a habit which employer knew of); Glenn v. Reynolds Spring Co., 225 Mich. 693, 196 N.W. 617 (1924) (customary joke of connecting electric wires to tools resulted in death of an employee); *accord,* Budrevie v. Wright Aeronautical Corp., 24 N.J. Misc. 24, 45 A.2d 453 (1946), *cert. denied,* 135 N.J.L. 46, 50 A.2d 147 (1946), *aff'd,* 136 N.J.L. 46, 55 A.2d 10 (1946) (recovery denied where employee was pushed from elevator in jest but there was no contention that such acts were customary).
5. Hughes v. Tapley, 206 Ark. 739, 177 S.W.2d 429 (1944) (attempt to scare fellow employee with powder charge); Givens v. Travelers Insurance Co., 71 Ga. App. 50, 30 S.E.2d 115 (1944); Horn v. Broadway Garage, 186 Okl. 535, 99 P.2d 150 (1940) (claimants attempt to shoot steel clip with rubber band backfired).
6. *E.g.,* Antoszkiewicz v. Industrial Commission, 382 Ill. 149, 47 N.E.2d 74 (1943) (circumstantial evidence indicated that janitor who fell down stairs was killed in the course of his employment); Figgins v. Industrial Commission, 379 Ill. 75, 39 N.E.2d 353 (1942) (recovery allowed where claimant was injured by agricultural machine while trying to dodge a gypsy fortune teller).
7. Irwin-Neisler & Co. v. Industrial Commission, 346 Ill. 89, 178 N.E. 358 (1931) (chemist injured in automobile accident while distributing samples during vacation); Borgeson v. Industrial Commission, 368 Ill. 188, 13 N.E.2d 164 (1938) (salesman entering building to make sale was killed by a stray bullet intended for another) (compensation denied).
8. Walker v. Hyde, 43 Idaho 625, 253 Pac. 1105 (1927) (lumberman killed by truck he intended to board when returning from lunch); Stark v. State Industrial Accident Commission, 103 Ore. 80, 204 Pac. 151 (1922).
9. Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868 (1934) (claimant shot by fellow employee outside of working hours); Borgeson v. Industrial Commission, 368 Ill. 188, 13 N.E.2d 164 (1938).

Although, as stated previously, there are no settled principles by which to solve the sporting and recreation controversies, a few guides have emerged from the cases that have thus far been considered by the courts. In general the courts will take cognizance of the following factors: One, the advertising benefit the employer gets from sponsorship of the activity.[10] Two, compulsion used by the employer to force the employee to participate in the activity.[11] Three, supervision of the activity by the employer.[12] Four, other benefits gained by the employer through employee participation in the activity.[13]

In the instant case the evidence pointed to a great deal of employer control over the association. The employer appointed one member of the board of directors and in one instance the association was inactive throughout a strike that affected the company by order of an officer of General Electric. There was no direct compulsion used to force employees to participate but the company encouraged such participation to the extent of using its own personnel facilities in handling applications for membership in the employee association. Further supervision might be assumed from the fact that the association was subsidized financially by General Electric.

There is a definite trend toward liberality of interpretation in Workmen's Compensation cases.[14] Courts have awarded compensation for injuries which might not, by lay standards, be considered compensable.[15] Taking the foregoing factors into consideration the decision of the Court of Appeals in the instant case appears to be in accord with other decisions to the point. The courts should look for more than secondary benefits to employer such as *esprit de corps*. To allow recovery in every athletic case on the ground that the activity engaged in benefits the employer by fostering good will among the employees would carry the law to questionable lengths and open the door to many far-fetched claims.

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10. Ott v. Industrial Commission, 83 Ohio App. 13, 82 N.E.2d 137 (1948) (claimant suffered heart attack while playing baseball. *But see*, Le Bar v. Ewald Brothers Dairy, 217 Minn. 16, 13 N.W.2d 729 (1944) (the court discussed the advertising factor but did not consider it essential to the case); Holst v. New York Stock Exchange, 252 App. Div. 233, 299 N.Y.S. 255 (1937) (court stated that it was not required to consider the advertising factor).

11. Hubber v. Eagle Stationary Corp., 254 App. Div. 788, 4 N.Y.S.2d 272 (1938) (claimant was instructed by employer to form and supervise baseball team); Salt Lake City v. Industrial Commission, 104 Utah 436, 140 P.2d 644 (1943) (fireman required to play handball to keep in shape); cf. Stakonis v. United Advertising Corp., 110 Conn. 384, 148 Atl. 334 (1930) (employees received regular wages only if they attended picnic).

12. Piusinski v. Transit Valley Country Club, 283 N.Y. 674, 28 N.E.2d 410, (1940) (caddy injured while engaged in practice game which caddies were encouraged to play under supervision of caddy-master); Hubber v. Eagle Stationary Corp., 254 App. Div. 788, 4 N.Y.S.2d 272 (1938); Holst v. New York Stock Exchange, 252 App. Div. 233, 299 N.Y.S. 255 (1937); Ott v. Industrial Commission, 83 Ohio App. 13, 82 N.E.2d 137 (1948). *But cf.* Auerbach Co. v. Industrial Commission, 113 Utah 347, 195 P.2d 245 (1948) (requiring supervision amounting to compulsion).

13. See note 12, *supra*.

14. Shockley v. King, 31 Del. 606, 117 Atl. 280 (1922) (part-time employees counted to bring total within statutory minimum); Cole v. Minnick, 123 Neb. 871, 244 N.W. 785 (1932) (issue was whether claimant was employee or independent contractor). *Contra*: O'Brien v. Wise & Upson Co., 108 Conn. 157, 143 Atl. 155 (1928) (compensation statute not to be construed in favor of either party).

15. Giracelli v. Franklin Cleaners and Dyers, 132 N.J.L. 590, 42 A.2d 3 (1945) (rape of salesgirl left alone in building); Lippman v. North Dakota Workmen's Compensation Bureau, 55 N.W.2d 453 (N.D. 1952) (waitress shot by customer of another waitress with no motive shown).