

## FORCED FUN EVENTS AND WORKERS' COMPENSATION

*[Ref. The Course and Scope of Employment  
in Workers' Compensation, Para. 2.10]*

### INTRODUCTION

To be compensable under state workers' compensation statutes, an injury to an employee must arise out of and in the course of employment. When an employee is injured on the employment premises while engaged in employment activities, the compensability test is usually met. Determining the compensability of injuries that occur while the employee is engaged in recreational activities is more complicated. This is especially true when the activities occur while the employee is attending what some writers call "forced fun events" or "game days."

Many companies sponsor, encourage, or permit recreational and social events for employees. Injuries arising from an employee's participation in such events may be so closely related to the employment that the injured worker is entitled to workers' compensation benefits. *Larson's Workers' Compensation Law*, Vol. 2, § 22.01, lists three criteria that should allow recovery of workers' compensation benefits. According to *Larson's*, if any of the following criteria are met, compensation should be awarded.

Recreational or social activities are within the course of employment when:

- (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
- (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
- (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

While each state has its own workers' compensation statute and some statutes include language specific to recreational activities, most states use *Larson's* test.

## EMPLOYER EXPRESSLY OR IMPLIEDLY REQUIRES PARTICIPATION

When recreational or social activities are required employment functions, the employee's attendance is in the course of employment. For a large number of sales employees whose job responsibilities include entertaining customers, social events are part of the job. For these employees, injuries that occur during social functions are routinely treated as compensable in most states. Problems arise, however, when recreational or social activities are not an integral part of the employee's job yet, to some degree, the employer still requires or, at least, encourages participation. These cases typically involve employee injuries that occur at company sponsored functions such as a picnic or holiday party. Often the key to compensability is the degree to which attendance is expressly or impliedly required – forced fun.

In *Danny Douglas v. Ad Astra Information Systems*, 213 P3d 764 (Kan. App. 2009), Douglas worked as a computer analyst for Ad Astra Information Systems (Astra). His job was to answer questions from customers and solve problems concerning Astra's software products. Douglas was injured while racing a go-cart at a game day event hosted by Astra during regular work hours. Douglas filed for compensation, but Astra argued that the Kansas Workers' Compensation Act excludes injuries incurred during recreational or social events.

The owners of Astra invited their employees to the game day as a way of thanking them for their extra work at a recent conference. The game day was planned for a Friday afternoon during regular work hours at a nearby amusement park where employees could eat, play games, and drive go-carts. Employees were given the choice of either going to the event or remaining at work that afternoon. Astra arranged for a private dining room, reserved the go-cart race track exclusively for its employees, and paid for the food and amusement fees. While the food was being served, Astra's owner divided the employees into teams for competitive events, thanked the employees for their extra work, and discussed the release of a new company product.

Douglas and other employees testified that they believed the outing was a "team building" activity. Douglas also said that he considered the owner's opening remarks a "pep talk" about the release of a new software product. Although employees could have chosen to stay at the office rather than attend the outing, Douglas and others said they felt pressured to attend. Douglas said that he normally would not race a go-cart, but he wanted to be viewed as a team player. He said that the teams were encouraged to go as fast as they could because there would be prizes for the fastest teams. He also said that the go-cart racing "was meant to boost morale and boost sales to kind of energize the company."

The Kansas Workers' Compensation Act, K.S.A. 2008 Supp. 44-508(f), contains a specific exclusion for injuries occurring during recreational activities. It states: "The words arising out of and in the course of employment as used in the workers' compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer."

The Court of Appeals of Kansas reviewed this provision and said: "Under K.S.A. 2008 Supp. 44-508(f), an employee is barred from recovery ... for injuries ... while engaged in recreational or social events when two circumstances are both met. First, ... the employee was under no duty to attend the recreational or social event. Second, ... the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer."

It was easy for the court to decide that the second condition was met. Driving a go-cart was not

part of the claimant's normal job duties. The open question was whether the first condition was met. Was the employee under a duty to attend the event? Astra argued that Douglas' attendance at the event was not mandatory, but the court pointed out that there is a distinction between mandatory and "under no duty," the phrase from the statute. It was clear from the evidence that attendance was not mandatory, but there was ample evidence that employees felt that they had a duty to attend. There had been testimony from Douglas and others that they felt pressured to attend. The event was scheduled during the company's regular working hours, as opposed to being scheduled in the evening or on a weekend. And, although employees had the choice between going to the event and remaining at work, the court said it was "not surprising" that only two or three employees in the entire company chose not to attend. Perhaps most telling was Douglas' testimony that even after his accident, he did not feel he was free to leave before 5 p.m. Also, while the event was recreational and social in nature, it did include some business components. The court concluded that there was sufficient evidence in the record to find that Douglas was under "some duty" to attend the event.

Finally, Astra argued that the workers' compensation board focused too much on *Larson's* criteria and not enough on the state's statutory language specific to recreational activities. The court disagreed, pointing out that while the state statute used the terms "recreational" and "social," it didn't define them. Resorting to *Larson's*, which devotes an entire chapter to the subject, not only made sense to the court, but was supported by prior appellate court decisions that used *Larson's* as a guide. Because the court found that employees were under some duty to attend, it held that the first element was not met and that the claim was compensable.

In *Tammy Frost v. Salter Path Fire & Rescue*, 639 SE2d 429 (N.C. 2007), Frost was injured while racing a go-cart at an amusement park during a fun day. Frost served as the volunteer emergency medical services captain for Salter Path Fire & Rescue (Salter Path). Frost's position as captain involved making sure the ambulances were stocked, cleaned, and ready for use, as well as ensuring that calls to the department were handled properly. Although Frost was a volunteer EMT, she and her employer were subject to the North Carolina Workers' Compensation Act and, for purposes of the act, there was an employer-employee relationship between plaintiff and defendant on the date of the injury.

Salter Path invited its members to participate in a "fun day" as a way of thanking them for their service to the community. Admission tickets to a local amusement park were purchased and given to department volunteers and their families. The costs of the event were not paid out of the department's operating budget, but were funded entirely by community donations and paid out of a special account. Frost testified that her role at the fun day was merely participatory, although she did plan to personally thank the volunteers. The testimony also showed that no awards were given at the event, nor were there any organized discussions concerning work or the department. Furthermore, the record indicated that many of the volunteers did not attend the event. The workers' compensation commission made a finding of fact that although volunteers were encouraged to attend if possible, participation in the fun day was voluntary.

Frost filed for compensation, but the claim was denied based on the Salter Path's assertion that the injury did not arise out of and in the course of the plaintiff's employment. The North Carolina Workers' Compensation Act, Section 97-2(6) of the North Carolina General Statutes, states: "Injury and personal injury shall mean only injury by accident arising out of and in the course of the employment."

With respect to the statute, the North Carolina Supreme Court said: "The injury must spring from the employment in order to be compensable under the Act. Risk of injury from a go-cart accident is not something a reasonable person would contemplate upon entering service as a volunteer EMT, as it is not a risk one would associate with the anticipated risks inherent in the job." Furthermore, the court said: "The Act's application to injuries occurring during recreational and social activities

related to employment is well established in the jurisprudence of North Carolina. Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment.”

The court concluded that the plaintiff attended the fun day of her own will and for her own personal benefit and pleasure and, as a result, the claim was not compensable.

In *Michalak v. Liberty Mutual Insurance Co.*, 175 P3d 893 (Mont. 2008), the owner of Felco Industries sponsored a company picnic at his lakeside home every year since 1980. At the 2005 picnic, an employee was injured while riding a wave runner. The nature of the invitation to the fun day event allowed the Montana Supreme Court to conclude that the claim was compensable.

Montana’s workers’ compensation statute, section 39-71-118 (2a), MCA (2005), specifically addresses recreational injuries and excludes recovery by a person who is “participating in recreational activity and who at the time is relieved of and is not performing prescribed duties ...” According to the court, though, if the person is performing prescribed duties, he is entitled to compensation. To determine whether the injury arose out of prescribed duties, the court used a “traditional” four factor course and scope test it had previously adopted in *Courser v. Darby*, 692 P2d 417 (Mont. 1984). The factors are:

- ◆ Was the activity undertaken at the employer’s request?

The *Michalak* court concluded that this factor was met because the owner had invited employees, family, and vendors for 25 years. He invited employees through notices in their pay envelopes and by posting notices around the factory.

- ◆ Did the employer directly or indirectly compel attendance at the activity?

The court ruled that the claimant was at a minimum indirectly compelled to attend. The claimant’s supervisor, Talley, had requested that Michalak help oversee the other employees’ use of the wave runners. The supervisor felt he could not handle the job alone and Michalak agreed because he knew the request came from Talley in his capacity as supervisor. Michalak felt he had to attend to fulfill this obligation and to respect his employer.

- ◆ Did the employer control or participate in the activity?

The owner testified that he picks the date for the picnic, provides everything for the picnic, and actually prohibits employees from bringing anything. The company takes a tax deduction for the picnic and hosts a horseshoe tournament at the event, with the winner’s name going on a plaque at the factory. This evidence was sufficient for the court to conclude that the employer controlled the activity.

- ◆ Did the employer and employee mutually benefit from the activity?

The company owner testified that the events were good for the company and that the picnic promoted good relations. Other members of the company hierarchy testified similarly: the picnics were good for the company and the employees. The court accordingly concluded that this factor had been met.

The court also explained why Liberty Mutual’s argument that Michalak did not meet the

*Courser* factors was unpersuasive. Liberty, the workers' compensation insurer, was focused on the activity of riding the wave runner. This was misplaced, the focus should be on the picnic itself. In *Courser* the claimant was injured while commuting to graduate school on a motorcycle. The court in that case focused on the graduate school attendance, not riding the motorcycle. Michalak's attendance at the picnic was the activity that allowed the court to rule his injury arose out of and the course of his employment.

In *Michalak* the court focused on the same factor used by the *Ad Astra* and *Salter Path* courts, that is, whether attendance was directly or indirectly compelled by the employer. Since the employee was compelled to attend, the claim was compensable.

## CONCLUSION

While some state workers' compensation statutes specifically refer to recreational and social activities and others do not, these court decisions suggest that absent dramatically different statutory language, claims arising out of fun days have a common element. They focus on whether attendance at the event in question was in some way required. Attendance may have been under a sense of duty, directly required, or indirectly required, but in every case, establishing whether attendance was required or voluntary is a major distinction for the courts. This is especially true in those states that use *Larson's* factors described earlier. Under *Larson's* approach, meeting any one of the three criteria is sufficient to conclude that the injury suffered at a fun day arose within the course of the employment. Recall that the second item on that list is: "The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment."

Depending on the state statute and court decisions, there may be other factors to consider, but in investigating this type of claim, you will at some point in the process need to consider the basis for the claimant's attendance. If you determine that attendance was impliedly or expressly required, the claim will likely be compensable.