Lister, Martin, Thompson & Secia's

WORKERS' COMPENSATION COMMENTARY

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JUST MESSIN' AROUND...

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Those of our clients who have been reading our newsletter over some time have probably noted that from time to time we like to cover some esoteric areas of the workers' compensation law with which most of our clients do not come in contact very frequently. Since, however, in this field, such issues will arise from time to time, we feel it is worthwhile to cover them occasionally so that when a client sees a case containing some of these issues, they will at least have a brief overview of the area and some acquaintance with the principles involved.

This month the focus is on the issue of "horseplay" in the workplace.

Horseplay is not officially defined within the Labor Code but Webster's New World Dictionary defines it as "rough, boisterous fun." It is also referred to as "skylarking, joking, playing or frolicking" or... as I have titled this article... "just messin' around."

In the first place, it must be noted that in order for a behavior to be characterized as "horseplay" (as opposed to an "assault"), that horseplay does not involve an intent to injury another and is not perceived to arise out of anger toward another.

When an injury arises out of such behavior in the workplace, there is generally no question that the injury has arisen in the course of the employment the question becomes, however, whether it <u>arises out of</u> the employment. As you know, both elements must be present to make disability from an injury compensable.

Since, where "horseplay" has been established, the activity is not considered to arise out of the employment, injury caused to individuals in such activity is, generally speaking, considered non-industrial. Years ago, even individuals who were injured by the activity but had not been participating in it were denied benefits under that same theory.

Since sometime around the second World War, however, the courts decided that employees can be expected, from time to time, to engage in conduct that is not specifically what the employer dictated and that individuals who are injured by the activity but were not participants should not be denied benefits for injuries sustained when they had nothing to do with precipitating those injuries.

Well, that would be a pretty simple rule if there weren't any exceptions but this being a workers' compensation principle it is, of course, neither simple nor free of exceptions. There are three major exceptions to the general rule.

The first exception has to do with an employer participating in or knowing that this activity is going on and doing nothing about it. The second exception has to do with participants engaged in such conduct while living in employer owned or controlled housing or a "bunkhouse". Liability still attaches to the employer if the activity is closely connected with the person's presence in the bunkhouse, the activity is known by the employer and either permitted or ignored and the presence in the bunkhouse is closely connected with the employment.

Finally, if the activity is not viewed strictly as "horseplay" but is, perhaps, just some oddball activity associated with the "personal comfort and convenience doctrine."

The first exception to the doctrine of non-compensability is certainly easy to understand. *If an employer is participating in the horseplay or is aware that it is going on in the course of employment, then, if an injury is sustained either by the participants or bystanders, it is compensable just because it is a permitted activity at the work site.*

It is essential for compensability, however, to establish that the employer actually knew that the activity was going on.

The Court of Appeal decided one of the most famous cases involving this subject in 1981. Mr. Leffler was working in Iran for an American corporation and lived in an apartment house with his wife in that country. He and his wife threw a party in their apartment on the third floor of the building.

(Continued from page 1)

During the party, Mr. Leffler entered into a wager with a supervisor that he would dive from the third floor balcony of the apartment building into the swimming pool. The following day he did so. After strolling around the apartment house boasting to his neighbors about this accomplishment, Mr. Leffler then went back to his apartment where, while complaining about pains in the back and chest, he collapsed and died. Apparently he had ruptured an aorta in performing the dive.

The Court first talked about the bunk-house rule indicating that this individual would have been covered for "reasonable" activity around the apartment house but that this behavior was not reasonable and constituted "horseplay."

The question then was whether this particular activity was one condoned by the employer in some fashion leading to an inquiry as to whether or not this was an activity engaged in on multiple occasions by various individuals. The Court found that it was an isolated incident and a "daredevil stunt" which was done on only one occasion.

The WCAB evaluated the effect of the bet made with the supervisor. They determined that since the bet was only for $20 that there was not really a monetary incentive and there didn't appear to be any pressure from the employer for him to jump. It was clear that when the bet was made the supervisor was not acting in any official capacity but only as an individual and that diving into the pool would not raise his esteem in the eyes of the his employer. (One would expect quite the opposite to happen in fact! ...although, we are talking about engineers...)

The applicant hammered away at the court, arguing that this was a violation of the Workers' Compensation principle that indemnity is provided on a no-fault basis. The court, however, made the point that the injury must first arise out of and occur in the course of the employment before any further issues are determined.

Apparently they likened the conduct to playing "Russian roulette" and clearly indicated that a death from such activity would, as a general matter, be accepted as a non-compensable. (*Leffler v WCAB (1981) 46 CCC 1135*)

There are a wide variety of activities that fall into the category of "horseplay". Among some recent cases we see a decision involving an individual who received a wound from a knife wielded by a co-worker while the applicant was apparently doing karate kicks and "swings" at the knife wielding employee. In that case, the board ruled that the employer was not condoning the activity, that both of these individuals were engaged in "horseplay" and that the wound sustained by this individual was not compensable. *(Tovar v WCAB (1994) 59 CCC 1115)*

In another case, an employee was stabbed in the eye by a co-worker during the course of a "tic tac toe" game where they were utilizing utility knives. Although one worker had begun performing a job related task with his utility knife, he took up the encouragement of the other and they exchanged the utility knife placing Xs and Os on the job product. It was during that activity that the injured worker sustained the eye injury.

The applicant argued that this was just simple playfulness although the judge found it was "tinged with dangerousness." The applicant felt that the law should cover the injured employee under the circumstances claiming that this would be "the enlightened approach" citing a dissenting opinion in a Court of Appeal's decision. After pointing out that most of the cases on which the applicant relied were cases involving non-participants, they found that the injured individual in the tic tac toe case was engaged in an unauthorized activity not related to the employment nor with regard to the benefit to the employer. *(Michael Venegas v WCAB (SCIF) (1998) 63 CCC 269)*

Finally, just to show the breath of activity that might be found in these cases, we turn to the case of Jodi Yocum a burrito maker who worked for an establishment called "Juanita's Border Cafe." Yocum sustained an injury to her knee and filed an application for workers' compensation benefits. She found that the employer was uninsured but apparently this was an employer who decided to stand and fight. The employer did its best to cast doubt on the credibility of the applicant and alleged that this individual was engaged in horseplay at the time of the injury. Ultimately the applicant prevailed, but not before she left the legacy of a colorful description as to the manner in which the injury was allegedly sustained.

In the discussion of the case, the Court set forth the following:

"At the hearing Yocum testified she was dancing while cooking when her foot got caught between two floor mats. Her dancing was quite vigorous, involving leaps, turns, and playing an imaginary guitar..." She also testified she waved her arms in the air while dancing but was folding a burrito when she was injured. (Since both of her arms were in the air waving, the picture of her folding a burrito with one foot while leaping and dancing about is quite entertaining.)

The principle reason why the court seemed to agree with the WCAB that this did not constitute "horseplay" was that the employer did not effectively

(Continued on page 3)

(Continued from page 2)

rebut the applicant's testimony that she had observed the dancing activity and had not curtailed it. The fact that she had not was corroborated by another employee as well. (*Susan Blythe v WCAB (Yocum) (1997) 62 CCC 592)*

A review of the foregoing principles and the above-indicated cases provide an outline of the essential features of this subject. When dealing with cases involving "horseplay", ask the following basic questions:

1. Was the activity in which the employee was engaged clearly outside of reasonably anticipated job-related activity?

2. Was the injured individual a participant in the activity or an innocent bystander?

3. Was the employer aware of this activity at the time it was engaged in and impliedly condoned same?

The answers to those questions will greatly assist in evaluating the potential liability in these sorts of cases. Please ensure that if there is any question whatsoever, legal assistance is sought since, of course, liability must be denied within 90 days of the claim of injury.

Epilogue to last month's newsletter

You'll recall that in the last newsletter, we questioned the function of Labor Code §§6200-6208 and when Dennis Baker made an inquiry at the Rehabilitation Unit, he found that they were ignorant of the applicability of those sections in the present rehabilitation scheme. Since those sections purported to govern some of the rehabilitation responsibilities of our public sector clients, we thought that further inquiry was justified. We have recently been informed by representatives of the Rehabilitation Unit that, prompted by our inquiry and further study of Division 4.7 (which includes Labor Code §§6200-6208), a determination was reached that this entire division is no longer applicable and should be repealed because it pertains to pre-1975 dates of injury.

The repealing of Division 4.7 is not a top priority for the Rehabilitation Unit but it has been placed on their agenda to request that legislation be passed to repeal this division. If we could only persuade our legislature to repeal the many other sections of the Labor Code that focus on form over substance imposing inappropriate burdens on defendants, then we could really jump for joy.

Next Month:
Revisiting the treating doctor's presumption

HAPPY HOLIDAYS

FROM ALL OF US

AT

LISTER, MARTIN, THOMPSON & SECIA

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.