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# 60-Second Memo

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### Be Mindful of What Your Employees Do For Fun On-the-Clock: It Could Cost You

By Warren E. Buliox, Esq.

Ordinarily, when you think of a compensable injury for worker's compensation purposes, you think of an injury that occurs on the worksite while performing services growing out of or incidental to employment. What about injuries that occur while engaging in recreational or fitness activities, such as basketball or softball, "on the clock"? Are these injuries covered by worker's compensation laws?

An interesting series of cases on this question has some employers raising eyebrows and rethinking the way they approach what employees do both offsite and onsite during working hours or while on the clock. In one of the more recent cases, the Wisconsin Court of Appeals upheld an award of worker's compensation benefits for an employee who injured himself while playing basketball during working hours. See *City of Kenosha v. Labor & Industry Review Commission*, 2011 WI App 51, 797 N.W.2d 885 (Wis. Ct. App. 2011).

The facts in this case were relatively straightforward and undisputed. Captain Charles Leipzig, a firefighter for the City of Kenosha (the "City"), was playing basketball with fellow firefighters and members of the public in a public park next to the fire station. While playing, Leipzig reached for the ball and heard a "pop" in his right arm. The "pop" was a "distal biceps rupture," which resulted in months of treatment and missed work. At the time of the injury, Leipzig was on active duty working a twenty-four hour shift.

Following the injury, Leipzig filed an application for worker's compensation benefits seeking, among other items, payment for medical expenses. At the hearing that followed, the City's Fire Chief

testified that it was common for on-duty firefighters to play basketball during their shifts. Testifying further, he explained that playing basketball during working hours was not considered an abandonment of job responsibilities and that it is important for firefighters to be physically fit to handle the stress and demands of firefighting. Given this, Leipzig argued that the injury was related to and arose out of his employment as a firefighter.

The City, in response, argued that the injury did not arise out of any service or duty connected or incidental to his employment and, as such, was not compensable. After all, the City argued, Leipzig was a firefighter, not a basketball player. In support of its position, the City cited an exception/exclusion to the worker's compensation law in Wisconsin that provides that an employee who injures him/herself while engaged in voluntary and uncompensated activity designed to improve the physical well-being of the employee is *not* entitled to worker's compensation benefits because the employee is not engaged in activity growing out of or incidental to his/her employment. (For purposes of our discussion here, this exception/exclusion will be referred to as the "well-being activity exclusion.") A key point for the City was that Leipzig was *not* being paid to play basketball, but rather was being paid to be a firefighter.

In rejecting the City's arguments, the Court adopted the reasoning of the lower court, which noted:

[The City's] position demands a very unnatural reading of the [worker's compensation] statute, and would produce byzantine inquires and bizarre results. For example, under that analysis, Captain Leipzig would be covered by the Worker's Compensation Law if, during his 'idle time,' he burned himself in the firehouse kitchen whipping up a batch of frosted brownies, but not if he pulled a muscle while lifting weights provided in the firehouse in order to maintain the strength necessary to carry a full-grown man out of a burning building. He would be covered for choking on a Doritos chip while watching 'Desperate Housewives' on the firehouse television, but not for a sprained ankle sustained while jogging outside the station house in order to maintain his endurance.

In the Court's view, "the well-being activity exclusion [was] not applicable because Leipzig was being compensated by the City *to stand ready* at the fire station at the time of his injury." (Emphasis added.) Indeed, Leipzig was encouraged and ultimately paid to engage in fitness activities while on active duty in order to be ready to handle the stresses and demands of firefighting. As such, the injury he sustained playing basketball while on duty grew out of or was incidental to his employment as a firefighter and was compensable under the worker's compensation law.

So, what does this all mean for you? Last time you checked, you are not in the firefighting business and may not need your employees to be physically fit to handle the rigors of their positions. But do you send employees to golfing events to network? Does your company encourage (or allow) employees to engage in recreational or sporting activity on company time because it believes such activity lends itself to happier, more productive employees and/or builds

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camaraderie in the workplace? Is there a makeshift basketball hoop set up in the back of your facility, or does your company have softball or kickball leagues employees are encouraged to participate in? Are employees engaging in these activities during the workday (even if during a break) or while on the clock? If so, there is a chance (albeit small, perhaps, in some jurisdictions) that an injury resulting from such activity could be found to be work-related and compensable. Indeed, in one published case, an employee injured while playing softball was considered to have suffered a compensable injury because, in part, her employer encouraged sporting activity, and the injury occurred during a paid break in the workday. *See E.C. Styberg Engineering Company, Inc. v. Labor and Industry Review Commission*, 2005 WI App 20, 692 N.W.2d 322 (Wis. Ct. App. 2004).

If nothing else, the *City of Kenosha* case and others like it should serve as notice that what may initially appear to be a non-work related injury may be considered to be work-related for worker's compensation purposes. Given this, employers should take a close look at what they encourage (or allow) employees to do recreationally during working hours and whether employees are or have been compensated while engaging in such activity. If employees are encouraged or allowed to engage in recreational activities in furtherance of the interests of their employer, the activity should be closely monitored and regulated (to the extent possible) to reduce the chance of an injury that could later be interpreted as compensable under worker's compensation laws.

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