BRIAN DOYLE, Employee, v. KRAFT FOODS, INC. and LUMBERMEN'S MUT./KEMPER INS. CO., Employer-Insurer/Appellant, and CHOICE PLUS, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 19, 1998

No. *[redacted to remove social security number]*

HEADNOTES

ARISING OUT OF - TRAVELING EMPLOYEE. Where the employer requires the employee to attend an out-of-town sales conference at a resort in northern Minnesota and the employee is injured while voluntarily engaged in a volleyball game, the injury arose out of his employment since the employee was covered under the traveling employee doctrine and the volleyball game did not constitute a voluntary recreational program sponsored by the employer under Minn. Stat. § 176.021, subd. 9.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Johnson, J.
Compensation Judge: Cheryl LeClair-Sommer.

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal the compensation judge's determination that the employee's personal injury sustained on July 25, 1995 arose out and in the course and scope of his employment. At the time of his injury the employee was engaged in a pick-up volleyball game with co-employees at a mandatory regional sales meeting at Izaty's Resort. The employer and insurer contend that the compensation judge improperly ignored the provisions of Minn. Stat. § 176.021, subd. 9 (1994), which provide an exception to workers' compensation coverage when an employee was injured while participating in voluntary recreational programs sponsored by the employer.

BACKGROUND

The employee, Brian Doyle, was hired by the employer, Kraft Foods, on January 16, 1995, as a retail service representative. His responsibilities included visiting grocery stores to check on products and product displays. The employee was notified that he was required to attend a three-day regional sales conference to be held at Izaty's Resort on Mille Lacs Lake from July 25-27, 1995. The purpose for the conference included honoring employee achievement, discussing the company's business plan, future goals, setting sales quotas and obtaining information with respect to product lines. (T. 12-14.) The employee arrived at Izaty's

at approximately noon on July 25, 1995. After lunch, he attended a meeting at which managers introduced their product lines until 5:00 p.m. At the end of the meeting, the company's division manager, Mr. Williams, issued a challenge for a volleyball game pitting management employees against sales representatives before the 7:00 p.m. awards ceremony and dinner. The employee agreed with the characterization of the game as pick-up in nature, where the teams were not organized and the sides were determined by people milling around and ending up on one side or the other. (T. 15.) The employee voluntarily participated in the volleyball game, during which he twisted and sprained his ankle.

As a result of his injury, the employee was taken to Mille Lacs Hospital where x-rays were taken. The employee returned to the resort but did not participate in any of the other scheduled activities. The next day he returned to his home in the Twin Cities and commenced care for his ankle injury at the Park Nicollet Clinic. As a result of his injury, the employee was unable to work from July 26, 1995 through September 4, 1995, and from July 26, 1996 through August 11, 1996. In addition to conservative treatment, the employee underwent an arthroscopic surgical procedure on July 26, 1996.

Shortly after the employee's injury, on August 2, 1995, the employer and insurer filed a denial of liability, indicating that the employee's injuries did not arise out of and in the course of his employment pursuant to the terms of Minn. Stat. § 176.021, subd. 9. On June 27, 1996, the employee filed a claim petition seeking entitlement to temporary total disability and the payment of medical expenses. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on May 9, 1997. At that time, the sole issue was whether the employee's injury arose out of and in the course and scope of his employment. The compensation judge's Findings and Order, issued June 18, 1997, found that the employee's injury occurred while the employee was in the course and scope of his employment since he was a traveling employee who was covered from the time he left his home until the time he returned against injuries arising out of activities which were a natural incident of his work and which were contemplated or reasonably foreseeable by the employer under the circumstances. The compensation judge rejected the employer and insurer's argument that the exception to coverage found in Minn. Stat. § 176.021, subd. 9, excluded coverage under the workers' compensation laws.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. At 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. V. Lyon Food Prods., Inc., 304 Minn. 196, 201,

229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

DECISION

The facts surrounding the occurrence of the employee's injury are essentially undisputed. The employee was required, as a condition of his employment, to attend a three-day regional sales conference at a resort in northern Minnesota. The employer provided lodging and food and the employee was given access to the recreational facilities available at the resort. In addition, apparently a flyer was sent to the persons attending the meeting indicating that certain recreational activities, including a golf outing, a fishing tournament, basketball games and perhaps volleyball games would be occurring during the three-day stay. The employee testified that in response to the flyer he signed up for the golf outing. (T. 12-14.) The employee agrees that participation in the pick-up volleyball game was purely voluntary. He agreed that not all sales representatives participated, that sales representatives were not directed to participate, and that he had no evidence that those who chose not to participate were penalized in any way.

The issue presented to the compensation judge was whether the employee's injury arose out of and in the course of his employment. The phrase in the course of employment as found in Minn. Stat. § 176.011, subd. 16, and Minn. Stat. § 176.021, subd. 1, is a concept which refers to the time and place of injury and to the activity of the employee at the time of injury. The phrase arising out of as found in those statutes is a concept or element of a compensable claim which further limits compensation to injuries incurred as a result of employment risks. This element is concerned with causation. Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 136, 33 W.C.D. 625, 631 (Minn. 1981). To some extent there is an overlapping of these concepts. In addition, Minn. Stat. § 176.011, subd. 16, which defined personal injury indicates that the workers' compensation benefits extend only to personal injuries which occur while the employee is engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of service.

As a result of the supreme court's interpretation of these statutory provisions, the general rule in Minnesota is that injuries that occur to employees while off the employer's premises do not arise out of and in the course of employment and are therefore not compensable. There are several exceptions to this general rule. The exception relied upon by the employee and the compensation judge in this case is referred to as the traveling employee doctrine. This principle was first articulated in Minnesota in the supreme court decision in Stansberry v. Monitor Stove Co., 183 N.W. 977, 1 W.C.D. 73 (Minn. 1921), and was most recently set forth in the decision of Voight in 1981. In the Voight decision, the supreme court stated that:

> The general rule is that an employee whose work entails travel away from the employer's premises is, in most circumstances, under continuous workers' coverage from the time he leaves home until

> he returns. Snyder v. General Paper Corp., 277 Minn. 376, 379, 152 N.W.2d 743, 746, 24 W.C.D. 255 (Minn. 1967); 1A Larson, The Law of Workmen's Compensation, Sec. 25 (1979).

Voight, 306 N.W.2d at 135, 33 W.C.D. at 630. So long as a worker is engaged in reasonable activity for his personal enjoyment or recreation when he is not otherwise actively engaged in his regular employment activities, he is protected if he is considered to be a traveling employee. Epp v. Midwestern Machinery, 296 Minn. 231, 108 N.W.2d 87, 26 W.C.D. 703 (Minn. 1973).

The theory underlying the traveling employee exception to the general rule requiring the injury to occur during working hours, on the employer's premises while engaged in the performance of his or her regular duties is that while an employee is traveling on behalf of his employer that the employee takes the employer's premises with him until he returns to his home.

The employer and insurer first argue that the employee was not a traveling employee while he was at the sales meeting, but was merely attending a business meeting. They argue that the employee's normal work activities were limited to short day trips in or near the Twin Cities metropolitan area. (ER/INS brief at pp. 11-12.) This argument misses the point. The employee was clearly a traveling employee because he was away from his home overnight to attend a business meeting. He, along with all other participants, were protected on a portal to portal basis, regardless of what their regular job duties entailed.

In the alternative, the employer and insurer argue that even if the employee was a traveling employee and his activity when injured was reasonable he should be denied benefits based on the specific exclusion contained in Minn. Stat. § 176.021, subd. 9, enacted in 1985. Minn. Stat. § 176.021, subd. 9, provides as follows:

> **Employer responsibility for wellness programs**. Injuries incurred while participating in voluntary recreational programs sponsored by the employer, including health promotion programs, athletic events, parties and picnics, do not arise out of and in the course of the employment even thought the employer pays some or all of the costs of the program. This exclusion does not apply in the event that the injured employee was ordered or assigned by the employer to participate in the program.

The employer and insurer contend that the employee's engaging in the recreational volleyball game satisfied the statutory requirement of participating in a voluntary recreational programs sponsored by the employer as it was an athletic event and that as a matter of law his injuries did not arise out of and in the course and scope of his employment and were not compensable. The employer and insurer argue that to the extent that these specific statutory provisions conflict with the general portal to portal protection provided under the traveling employee doctrine that the statute should govern. They argue that the compensation judge misapplied the rules of statutory construction as found in Minn. Stat. § 645.26, subds. 1 and 4. Specifically, they contend that

since Minn. Stat. § 176.021, subd. 9, was enacted in 1985, long after Minn. Stat. §§ 176.011, subd. 16, and 176.021, subd. 1, upon which the traveling employee doctrine was based, that as a later adopted statute it should be controlling over the earlier created statute and resultant doctrine. Minn. Stat. § 645.26, subd. 4 (1996). They also argue that any general provision of a statute which conflicts with a special provision in the same law should be considered subordinate to the special provision. Minn. Stat. § 645.26, subd. 1.[1] As a result, they contend that the specific statutory provisions of subdivision 9 govern over the general concepts embodied in the traveling employee doctrine.

Under the facts in this case, we do not believe there is a conflict between the provisions of Minn. Stat. § 176.021, subd. 9, and the traveling employee doctrine. We disagree with the employer and insurer contention that the employee was participating in activities which met the requirements of subdivision 9. As a matter of law, under the circumstances of this case, the employee's injury did not occur while he was participating in a voluntary recreational program. We do not believe that the pick-up volleyball game, which was a minor part of the fabric of the mandatory sales meeting held at the resort, is the sort of event intended to be covered by subdivision 9. First, the pick-up volleyball game was only an incidental activity which cannot be separated from the overall goals and purposes of the business meeting. The dominant purpose of the employee's presence at Izaty's was to participate in the sales meeting. As such the requirement for voluntary participation has not been satisfied because the employee was required to attend and participate in the entire sales meeting. Second, the informal nature of the event and the circumstances under which it arose do not provide it with sufficient status or formality to be considered to be a program as required by the statute. As a result, we find that the employee's entitlement to benefits is not precluded by the provisions of Minn. Stat. § 176.021, subd. 9. As set forth above, the employee is entitled to coverage under the traveling employee doctrine. The compensation judge's award of benefits is affirmed.

SEPARATE CONCURRING OPINION

DEBRA A. WILSON, Judge

I concur with the majority that Minn. Stat. § 176.021, subd. 9, does not bar the employee's claim. Had the legislature intended to create such an exception to the longstanding rule of portal-to-portal coverage for traveling employees, it would have said so more directly. It would make little sense to allow continued coverage for traveling employees who are injured while pursuing strictly personal recreational activities while at the same time denying such coverage for traveling employees who just happen to be injured while participating in events or activities sponsored by their employers. After all, which employee's injury is more directly connected to

[1] In order to resolve the dispute in this matter, it is not necessary for us to apply the rules of statutory construction as found in Minn. Stat. § 645.26, subds. 1 or 4. In fact, such an exercise may not be appropriate in that the traveling employee doctrine is one created by case law and does not involve a conflict between provisions of two statutes.

his or her employment? The legislature does not intend an absurd result. Minn. Stat. § 645.17 (1996). I agree that the compensation judge's decision should be affirmed.