

CHAD OLSON, Employee/Appellant, v. SHORT STOP ELEC. and MERIDIAN INS. CO.,
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 7, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF - HORSEPLAY. The enactment of Minn. Stat. § 176.001 did not overrule prior case law holding that certain workplace horseplay injuries are covered under the Workers' Compensation Act. The horseplay which had caused the injury was customary in the workplace and the employer had acquiesced in it, so that it was, in essence, a risk of the employment as it was in fact conducted, thus the employee's injury was not excluded from coverage under the Act.

Reversed.

Determined by: Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Paul V. Rieke

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's conclusion that the employee's injury did not arise out of and in the course of the employment. We reverse.

BACKGROUND

The employee, Chad Olson, was born in 1974. He was hired by the employer, Short Stop Electric, as an apprentice electrician in March 1995. The employee worked under a journeyman electrician, Neil Larsen, who acted as his supervisor. When on a job site, the employee was "on the clock" from the time of arrival at the employer's shop to proceed to a job site until the time work finished for the day at the site, except that the employees took a thirty minute unpaid lunch break at some time during the work day, the time being in the discretion of Mr. Larsen. Customarily, the employees did not leave the job site for lunch, as this would have entailed using paid time to put away tools and supplies before lunch and to unpack them again after returning. Instead, Mr. Larsen would assign one of the apprentices to go and purchase food ordered by the members of the work crew. The work crew would have lunch when this employee arrived back with the food. (T. 11-12, 19-20, 23-24; Exh. B at 9-11.)

The employee testified that on numerous occasions at various job sites the

employee, his supervisor, and fellow employees had engaged in “recreational activities” that were not a part of their job duties. These “recreational activities” frequently included dares or wagers among the members of the work crew to attempt some risky physical feat. The employee testified that he had previously lost a bet with his supervisor for five lunches in about April 1998 that the supervisor could not jump down six or seven feet to a truss and hang there without falling the remaining nine feet to the ground. He also stated that he, his supervisor and his fellow apprentices held contests about once a week on job sites to see who could jump the longest distance after taking a running start from inside the house under construction. The employee recalled that on two or three occasions he and supervisor Neil Larsen had engaged in competitions involving swinging from truss to truss fifteen feet in the air for lunches as prizes. He testified that Bruce Bennett, a co-owner of the employer, had taught the workers a game using steel pipe as a blow gun to shoot wire nuts at each other, that Mr. Bennett had played this game with the employees and that the employees played this game almost daily. The employee also testified that when jumping contests were discussed in the presence of Mr. Bennett, “he laughed about it, asked who won, what we got for it.” (T. 15-18, 39-40; Finding 8.)

The compensation judge found that “the employee’s supervisor knew of and participated in the customary and frequent horseplay activities” and that “there was never a direct, unequivocal, expressed timely enforced prohibition by the employer to the employee not to engage in horseplay activities.” (Finding 9.)

On August 7, 1998, the employee was working for the employer at a job site at a residence in Ramsey, Minnesota. Some time around the noon hour, Mr. Larsen sent one of the apprentices, Steve Eller, to purchase food at a McDonald’s restaurant. The employee and Mr. Larsen had been working on the second floor of the house. A patio door on that floor opened above an eight-foot drop to the ground. At some point before Mr. Eller had returned with the food, the supervisor, Mr. Larsen, and Todd Campbell, another apprentice working for the employer at the site, dared the employee to jump to the ground from the patio door. The employee first refused to do so in return for a can of pop offered to him as an inducement for taking the dare. According to Mr. Larsen’s testimony, Todd Campbell then raised the bet to two lunches, but the employee again declined, at which point Mr. Larsen went downstairs to tie off some wires in an electrical panel. The employee testified that Mr. Larsen raised the bet to four lunches, two from him and two from Todd Campbell. In either event, the employee took the bet and jumped to the ground, but landed in such a manner as to sustain a broken heel. (T. 12-14, 19; 24-28, 36-37, Exh. B at 9-14.)

On March 4, 1999, a hearing was held before a compensation judge of the Office of Administrative Hearings on the sole issue of whether the employee’s injury was one which arose out of and in the course of the employment. The employee appeals from the judge’s denial of compensation.

STANDARD OF REVIEW

This case presents only questions of law. “[A] decision which rests upon the

application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The employee appeals from the compensation judge's determination that the employee's injury did not arise out of and in the course of his employment. The compensation judge apparently concluded that his findings of fact would have supported a legal determination of compensability if certain prior cases were taken as precedential.¹ However, he further seems to have concluded that those cases had reached their holdings as a result of the application of a remedial and broadly liberal construction of the Workers' Compensation Act, and thus were no longer of precedential value after 1981 pursuant to Minn. Stat. §176.001 (1981).² The

¹ In his memorandum, the compensation judge states that he denied compensation for the employee's injury "despite" his findings on "factors which have been previously considered by Courts in rendering decisions wherein the employee's injury was determined to be compensable under the Workers Compensation Act." (Mem. at 4.)

² Minn. Stat. §176.001 provides:

It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the

compensation judge concluded that the employee's injury was non-compensable in that "the employee's decision to engage in betting with his supervisor and co-employee that he could jump eight feet to the ground resulting in injury had no significant relationship with the performance of his job duties so as to impute liability to the employer under the Minnesota Workers' Compensation Act." (Mem. at 4.)

The question of liability for injuries sustained during workplace "horseplay" under the Minnesota Workers' Compensation Act is one which has been raised almost since the Act's inception. In State ex rel. H. S. Johnson Sash & Door Co., 140 Minn. 75, 167 N.W. 283 (Minn. 1918), the earliest Minnesota horseplay case of which we are aware, the Minnesota Supreme Court considered liability for an injury sustained when an employee of a woodworking factory was struck in the eye by a sash pin thrown by a fellow employee, an activity which the employees were accustomed to engage in as sport or mischief. Examining established precedent in other jurisdictions, our Supreme Court noted that "[t]he rule is well enough settled that where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results . . . the injury is not one arising out of the employment within the meaning of compensation acts." Notwithstanding this principle, however, the court found the injury compensable as an exception to this general rule because the horseplay which had caused the injury was customary in the workplace and the employer had acquiesced in it, so that it was, in essence, a risk of the employment as it was in fact conducted.

This exception to the general noncompensability of horseplay injuries continued to be recognized and applied by the Minnesota Supreme Court and the Industrial Commission over the next two or three decades. In a case involving the death of an employee resulting from the last of a series of horseplay interchanges between the employee and his foreman,³ the Supreme Court again reiterated that notwithstanding the general rule denying compensation for injuries sustained during horseplay, "compensation has been allowed in cases where the skylarking or horseplay was commonly carried on with knowledge or consent of the employer, or at least with the employer's acquiescence." Barden, et al v. Archer Daniels-Midland Co., 187 Minn. 600, 246 N.W. 254, 7 W.C.D. 295, 296-297 (Minn. 1933); see also Rydholm v. Forman, Ford & Co., 7 W.C.D. 288 (Minn. Indus. Comm. 1932) (eye injury from employees' habit of throwing small wads of waste felt or adhesive tape, which the management had not attempted to stop).

In 1937, significant statutory changes were made to the Workers' Compensation Act. For example, an employer's prior right to elect not to be bound by the Act was abolished. In addition, the coverage of the Act was significantly extended to include all injuries arising out of and in the course of the employment, without regard to negligence, excepting solely injury or death which was either self-inflicted or resulted from an employee's intoxication as the natural or

employee on the other hand.

³ The employee died from a ruptured colon after his foreman placed a high-pressure air hose against the employee's trousers in close proximity to the employee's rectum.

proximate cause. Prior law had limited liability to injuries for which the employer's negligence was the natural or proximate cause and had also permitted a defense of wilful negligence by the employee.⁴

In a 1960 case, Cunning v. City of Hopkins, 258 Minn. 306, 103 N.W.2d 876 (1960), the Minnesota Supreme Court first reconsidered the prior rule generally denying compensability for an injury resulting from horseplay in a case arising under the new statute. The injured employee, Bruce Cunning, was a college student employed by the Department of Parks and Recreation of the City of Hopkins. While riding to another work site in the back of a pickup truck, Cunning and another student employee, as a prank, flipped a raincoat over the cab of the truck so that it hung across the windshield, partially obstructing the driver's view. As the driver erratically negotiated a series of curves in the road, the employee was thrown from the truck, sustaining injury. The employer defended the claim on the basis of the general rule that injuries sustained during horseplay did not arise out of and in the course of the employment, and the Industrial Commission agreed. The Supreme Court reversed. Citing Pedro v. Martin Baking Co.,⁵ the Court concluded that the Workers' Compensation Act did not expressly exclude

⁴ Compare the relevant part of Mason's Minnesota Statutes §4261 (1933):

When personal injury or death is caused to any employe by accident arising out of and in the course of his employment, of which injury the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he, or in case of death, his personal representative, for the exclusive benefit of the surviving spouse and next of kin, shall receive compensation by way of damages therefor from his employer, provided the employe was himself not wilfully negligent at the time of receiving such injury . . . ,

with the relevant language of the new statute, Minn. Session Laws Ch. 64, Sec. 1 (1937):

. . . [E]very such employer . . . shall pay compensation in every case of personal injury or death of his employe, caused by accident arising out of and in the course of the employe's employment, without regard to the question of negligence, except injury or death which is intentionally self-inflicted or when the intoxication of such employe is the natural or proximate cause of the injury, and the burden of proof of such fact shall be upon the employer.

In 1953, the Act was further amended, and language similar to the foregoing, but deleting the concept "caused by accident" was incorporated into Minn. Stat. §176.021 (1953).

⁵ 58 N.W.2d 731, 21 W.C.D. 310, (1953). In Pedro, a case involving the death of the aggressor in a work-related altercation, the Court held that the only specific statutory defenses now applicable under the Workers' Compensation Act in the case of an accident arising out of and in

“horseplay” injuries from coverage and that an implicit exception could not be read into the statute, nor could a distinction be drawn between a participant injured in the horseplay and a non-participant injured as a result of the horseplay, as to do so would import a negligence standard, contrary to the express wording of the statute.

We reject the compensation judge’s apparent conclusion that Cunning was effectively overruled by the enactment of Minn. Stat. §176.001. While dictum in the Cunning case did mention the principle of liberal construction, we do not believe that the case turned on this point. The departure from prior law represented by the Cunning case was clearly a response to the specific statutory changes made by the legislature, which had eliminated an employee’s wilful negligence as a defense to compensability and eliminated any requirement of actual or implied-in-law negligence on the part of the employer. Even if Cunning had been decided under the former rule of liberal construction, such case law remains valid unless expressly overruled by the supreme court or altered by the legislature. See Foley v. Honeywell, Inc., 488 N.W.2d 268, 271-72 n.2 (Minn. 1992). In addition, we note that this court has applied and cited Cunning in various cases subsequent to the enactment of section 176.001, and our affirmance of the compensability of a horseplay-related injury has been summarily affirmed by the Minnesota Supreme Court.⁶

In their brief the employer and insurer argue that the denial of liability is justified pursuant to Elfelt v. Red Owl Stores, 296 N.W.2d 237, 26 W.C.D. 660 (Minn. 1973), and Qualy v. Metropolitan Transit Comm’n, 42 W.C.D. 1040 (W.C.C.A. 1990). In both these cases, liability was denied where the horseplay took place after the injured employee had already punched out from work and was no longer in a place where the employer’s service required him to be. We note in the instant case, that the compensation judge did not find that the employee was off the clock when he engaged in the wager with his supervisor and coworker and jumped down from the patio door. Rather, the judge found merely that the injury occurred “near the noon hour” while employees were “waiting for lunch.” (Finding 5.) In addition, the compensation judge specifically found that “[t]he relationship of the employee and employer were [sic] not suspended during the time that the lunches were being obtained by a co-employee. The circumstances regarding the lunch time for the employee created the fair implication that the employer expected or at least invited the employee to remain in the proximity of the work site” (Finding 9). The circumstances of this case are thus distinct from those presented in Elfelt and Qualy and we do not

the course of employment were intentional self-infliction and intoxication as a proximate cause. With respect to the former, the Court held that “the statutory language contemplates a deliberate intent on the part of the employee to cause injury or death to himself, not a failure on his part to realize the probable consequences to himself of his foolish acts.” 58 N.W.2d at 736, 21 W.C.D. at 317.

⁶ See, e.g., Johnson by Johnson v. El Mac Landscaping, 51 W.C.D. 75 (W.C.C.A. 1994), *summarily aff’d* July 27, 1994; Hansen v. Breadeaux Pisa, slip op. (W.C.C.A. Feb. 22, 1994); Sutherland v. Hanna Mining, slip op. (W.C.C.A. Jan 4, 1988).

find these cases applicable to the facts as determined by the compensation judge.

Finally, the employer and insurer relied on cases which deny compensability for injuries, whether or not occasioned by horseplay, which are the result of an employee's participation in an act clearly and expressly prohibited by the employer. Rather than discuss such cases in detail, we need only note that the compensation judge specifically found that "[t]here was never a direct, unequivocal, expressed timely enforced prohibition by the employer to the employee not to engage in horseplay activities nor to not engage in the specific jump that occurred on August 7, 1998," that "[t]he employee's supervisor was significantly influential in creating the circumstances that led to the employee's jump and eventual disablement on August 7, 1998," and that "[t]he injury to the employee was easily foreseeable to the employer if one considers that the employer's supervisor knew of and participated in the customary and frequent horseplay activities." (Finding 9.) These specific factual findings in this case are supported by substantial evidence and preclude a "prohibited act" defense.

We conclude that the compensation judge erred in denying compensation for the employee's horseplay injury. In our view, Cunning is still good law. Further, even if Cunning were overruled by the enactment of Minn. Stat. §176.001, we note that in the cases decided in Minnesota even prior to the period of "liberal construction" and, indeed, prior to the elimination of a defense of wilful negligence by the employee, compensation for horseplay injuries was awarded as an exception to the general exclusion from coverage where the horseplay which had caused the injury was customary in the workplace and the employer had acquiesced in it. Under the facts as determined in this case, we conclude that the employee's injury is compensable under even the strictest possible construction of the statutory and case law.

The compensation judge's conclusions of law in denial of compensation are reversed.