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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001750-WC

AMERICAN GREETINGS CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-91658

SHEILA BUNCH; HONORABLE
JOSEPH W. JUSTICE, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

* * * * * * * * *

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,[1] SENIOR JUDGE.

LAMBERT, JUDGE: American Greetings Corporation appeals a September 4, 2009, decision of the Workers' Compensation Board which reversed an ALJ

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

decision determining Sheila Bunch's eligibility for workers' compensation benefits. The Board determined that Bunch was within the course and scope of her employment when she was injured at an annual charity event held during her unpaid lunch break at her place of employment. Agreeing with the Board that the undisputed facts of this case warranted a reversal of the ALJ's determination, we affirm.

The pertinent facts of this case are not in dispute. In October 2007, Bunch injured her knee while she was attending a United Way fundraising event held in her employer's cafeteria during her unpaid lunch hour. She was on a team with five other employees participating in a relay race. Six teams of employees competed in the race. Lanes for the race were marked with streamers on the floor. Bunch injured her knee when she slipped on one of these streamers.

Bunch's employer, American Greetings, sponsored the fundraising campaign. The campaign was conducted each October and had occurred annually for the past fifteen years. Over the span of approximately four weeks, American Greetings personnel conducted several events for employees. These events included speakers, a lip syncing performance, and bake sales.

In past years, lanes for the relay race were marked with tape. However, in October 2007, the employees planning the event were asked not to use tape anymore because it stuck to the floor and left a mark. It was unclear whether someone in management made this request or whether it was the cleaning crew that stripped and waxed the floors.

During the fundraising campaign, employees were encouraged by American Greetings personnel to participate in the events and to donate money to the charity. There was an option for employees to have charitable donations deducted directly from their paychecks. Participation by employees was completely voluntary. Some of the charity events were held and planned during work hours, but others were not. All money collected by American Greetings employees was donated to the charity. After raising nearly $60,000 from employees, American Greetings finished the 2007 campaign by making a final contribution to the charity of $15,000.

When Bunch filed a claim for workers' compensation benefits, American Greetings disputed the claim as not being compensable under the Act. American Greetings argued that participation in the charity event during Bunch's unpaid lunch break was outside the course and scope of her employment. The ALJ agreed with American Greetings and dismissed Bunch's claim. On appeal the Board reversed, holding that Bunch was entitled to benefits under the standard for recreational activities first set forth in *Jackson v. Cowden Mfg. Co.*, 578 S.W.2d 259, 261-62 (Ky. App. 1978).

American Greetings now appeals the Board's decision to this Court. After careful review of the controlling precedent, we agree with the Board that Bunch is entitled to benefits pursuant to the modified standard first set forth in *Jackson*.

American Greetings first questions the proper standard of review to apply to this case. It contends that the ALJ's determination is entitled to deference and should not be overruled unless it is determined to be "clearly erroneous." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). A decision is "clearly erroneous" only if it is unreasonable in light of the evidence presented. *Id.*

We agree that the "clearly erroneous" standard set forth above is the proper standard to apply to this case. *See Smart v. Georgetown Community Hospital*, 170 S.W.3d 370, 372 (Ky. 2005) (applying the standard). However, we disagree that the ALJ's determination of reasonableness is entitled to deference in the absence of any factual disputes. When facts are undisputed, a determination of work-relatedness is a question of law, and questions of law are reviewed *de novo*. *Jackson*, 578 S.W.2d at 265-66 (citing *N. H. Stone Co. v. Harris*, 531 S.W.2d 513, 515 (Ky. 1975)). Thus, we will apply the following standard of review in our consideration of the Board's opinion: whether it was unreasonable, as a matter of law, for the ALJ to determine that Bunch's injury was not work-related.

American Greetings argues in its brief that it was not unreasonable, as a matter of law, for the ALJ to make this determination. After careful review, we disagree. We hold that it was unreasonable, and thus, "clearly erroneous" as a matter of law, for the ALJ to determine that Bunch's injury was not work-related. *See id.* at 261 ("'Work-related' and 'arising out of and in the course of employment' are synonymous terms.").

As set forth in *Jackson*, it is difficult "to determine when an employee's recreational activities fall within the course of his employment." *Id*. *Jackson* set forth a three-pronged test for determining when recreational or social activities are within the course of one's employment. *Id.* This test was modified slightly in *Smart* to include four prongs. 170 S.W.3d at 372. As modified, the test provides as follows:

> [A]n injury that occurs during recreational activity may be viewed as being work-related if:
>
> (1) It occurs on the premises, during a lunch or recreational period, as a regular incident of the employment; or
>
> (2) The employer brings the activity within the orbit of the employment by expressly or impliedly requiring participation or by making the activity part of the service of the employee; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible benefit of an improvement in employee health and morale that is common to all kinds of recreation and social life; or
>
> (4) The employer exerts sufficient control over the activity to bring it within the orbit of the employment.

Id. As the plain language above indicates, satisfaction of any one of these four prongs is sufficient to render an injury work-related.

Jackson directs us that when analyzing injuries occurring during a recreational activity, "the first inquiry must be whether the injury occurred on the employer's premises and during working hours." 578 S.W.2d at 262. "The

presence of either or both of these factors will frequently be a sufficient basis for finding that the recreational activity was work-related." *Id.*

In this case, both parties concede that the injury occurred on the employer's premises. Thus, one of the above factors was undoubtedly satisfied. It is debatable whether an unpaid lunch break is encompassed within the term "working hours." A review of the *Jackson* and *Smart* opinions suggests an affirmative answer to this query.

Of the cases cited by the *Jackson* Court where benefits were denied, all of them involved recreational activities that occurred "several hours after the day's work has ceased." *Id.* at 261 (quoting Larson, *Workmen's Compensation Law* § 22.00 (1978)). The injury in this case occurred in the middle of Bunch's work day during an unpaid lunch break when employees are more likely to remain on the employer's premises and continue to be encompassed within the scope of their employment.

The most convincing consideration is the fact that both the *Smart* and *Jackson* standards specifically include injuries sustained on the employer's premises "during a lunch or recreation period . . . ." *Id.*; *Smart*, 170 S.W.3d at 372. These lunch or recreation periods are not qualified in anyway, and there is no specific language or requirement mandating that lunch or recreation periods must be paid or compensated by the employer in order to satisfy the standard. After careful review of this controlling authority, we hold that an unpaid lunch break is included within the term "working hours."

Having recognized the presence of both of the above factors, *Jackson* directs us that the scale is undoubtedly weighted in Bunch's favor as to the question of whether her injury was work-related under the first prong of the *Jackson* and *Smart* standards. *See Jackson*, 578 S.W.2d at 262 (when both of initial *Jackson* factors are present, "the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection, and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might") (quoting Larson, *Workmen's Compensation Law* § 22.00 (1978)); *see also W.R. Grace & Co. v. Payne*, 501 S.W.2d 252, 253 (Ky. 1973) (weighing the above factors heavily).

Yet, one final factor must be satisfied before Bunch can be deemed to have met the first prong of the *Jackson* and *Smart* standards for engaging in recreational activities within the scope of one's employment. This factor is whether the recreational activity that caused Bunch's injury was "a regular incident of the employment[.]" *Jackson*, 578 S.W.2d at 262; *Smart*, 170 S.W.3d at 372. Employees who bring about their injuries through isolated instances of "horseplay" or other conduct that is clearly removed from the course and scope of one's employment are not entitled to workers' compensation benefits even though these injuries may occur on the employer's premises during working hours. *Jackson*, 578 S.W.2d at 262; *see also Kearns v. Brown*, 627 S.W.2d 589, 591 (Ky. App. 1982).

In this case, the undisputed facts indicate that the charity event that lead to Bunch's injury was held on a regular, albeit annual, basis. The facts further reveal that American Greetings sponsored this event and actively encouraged its employees to participate in and contribute to the campaign. American Greetings' sponsorship included the following: (1) directing its employees to plan events and then to solicit and collect donations during working hours; (2) holding events during both working and nonworking hours on the employment premises; (3) deducting contributions directly from employees' paychecks; (4) donating door prizes for events; and (5) making a $15,000 contribution to the charity.

In determining whether the above facts compel a conclusion that the charity event at which Bunch was injured was a "regular incident" of her employment, we find guidance in *Hayes Freight Lines, Inc. v. Burns*, 290 S.W.2d 836 (Ky. 1956). In *Burns*, Kentucky's highest court considered whether a worker may recover benefits for an injury sustained during an instance of "horseplay" if that "horseplay" was "a regular incident of the employment as distinguished from an isolated act." *Id.* at 839. *Burns* defined the term "regular incident of the employment" as follows: "a series of similar incidents generally participated in, to the employer's knowledge, by employees, sufficient to regularize such conduct and stamp it as part and parcel of the employment." *Id.* (internal citation and quotation omitted). "The employer's knowledge of the practice, actual or constructive, is important." *Id.*

Upon careful review of the guidance set forth in *Burns*, we hold that the charity event at which Bunch injured her knee was a "regular incident" of her employment. In making this determination, it is significant that American Greetings not only had actual knowledge of the event resulting in Bunch's injury but also that it sponsored and hosted the activity. *Id.* (knowledge of or acquiescence in regular event is an important consideration)*; see also Payne*, 501 S.W.2d at 253. Such knowledge and active encouragement demonstrates the employer's consent to bringing the activity within the orbit of employment.

American Greetings counters that an event must be held more than once a year in order for it to be considered a "regular incident." We disagree. Annual events are not "isolated" acts. The charity campaign in this case was a month-long event held continually for fifteen years. It was generally participated in by employees and became a tradition which the employees came to anticipate and expect. When these facts are considered in their entirety, we hold that they are sufficient "to regularize such conduct and stamp it as part and parcel of the employment." *Burns*, 290 S.W.2d at 839 (internal quotation and citation omitted). Accordingly, Bunch met the first prong of the *Jackson* and *Smart* standards as a matter of law.

American Greetings argues in the alternative that simply meeting the first prong of the *Jackson* and *Smart* standards is not sufficient to support a finding of work-relatedness as a matter of law. It cites to the *Smart* case which directed

that "[n]o one factor should be given conclusive weight." 170 S.W.3d at 372-73. American Greetings misconstrues the language set forth in *Smart*.

We first note that the language set forth above referred only to circumstances "when an injury occurs off the operating premises and outside working hours . . . ." *Id.* at 372. That is clearly not the case here. In any event, the *Smart* Court does not alter the holding set forth in *Jackson* that only one of the prongs of the standard set forth therein need be satisfied in order to bring a recreational activity within the scope of one's employment.

Rather, the crux of the holding set forth in *Smart* is that the circumstances of each case "must be examined in their entirety to determine what facts connect the injury to the employment." *Id.*; *see also Hayes v. Gibson Hart Co.*, 789 S.W.2d 775, 777 (Ky. 1990). All of the pertinent circumstances of this case have been sufficiently analyzed and weighed. No one factor, such as the occurrence of the activity on the employer's premises or the voluntary nature of the employee's participation in the activity, was controlling to this outcome. Rather, all of the aggregate facts were considered and weighed in light of the controlling authority.

Upon careful consideration of the above, we agree with the Board's ultimate determination of the undisputed facts of this case. We therefore hold that Bunch's injury was, as a matter of law, within the scope of her employment under the first prong of the *Jackson* and *Smart* standards. In other words, Bunch's injury occurred "on the premises, during a lunch or recreational period, as a regular

incident of [her] employment[.]" *Jackson*, 578 S.W.2d at 261; *Smart*, 170 S.W.3d at 372. Having satisfied this prong as a matter of law, Bunch was entitled to workers' compensation benefits.

As American Greetings has presented no reversible error before this Court, we hereby affirm the Board's September 4, 2009, opinion.

ALL CONCUR.

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