Roe, Thomas

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Goodwill

A worker injured while attempting to lift his employer's business associate during a beer break had removed himself from the course of employment**.** His participation in the beer break was not designed to foster goodwill between his employer and the business associate. **….*In re Thomas Roe*, BIIA Dec., 43,694 (1974)**

Horseplay

A worker injured while attempting to lift his employer's business associate during a beer break was not in the course of employment**. ….*In re Thomas Roe*, BIIA Dec., 43,694 (1974)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: THOMAS G. ROE	**)**	**DOCKET NO. 43,694**
	)	
CLAIM NO. G531817	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Thomas G. Roe, by
John E. Calbom

Employer, Tyee Electric Company, by
Robert Bumgardner, Owner

Department of Labor and Industries, by
The Attorney General, per
John Aaby, Assistant

This is an appeal filed by the claimant on February 6, 1974, from an order of the Department of Labor and Industries dated February 1, 1974, which rejected the claim for the reason that at the time of the injury the claimant was not in the course of his employment. **SUSTAINED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on September 4, 1974, in which the order of the Department dated February 1, 1974 was sustained.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The claimant sustained a fracture of the left tibia on December 21, 1973, while employed as a working foreman for the Tyee Electric Company of Moses Lake. Tyee Electric held the subcontract for electrical work on an A & W Drive-In under construction in Moses Lake by Andrew Thayer, the general contractor for the job.

On the date mentioned, the claimant and a fellow-employee whom he supervised on the job were nearing the end of the work-day, when they were approached by Mr. Thayer and invited to share in a "beer break" to celebrate the festive season, it being a Friday with Christmas Day the following Tuesday, and no work scheduled for the following Monday. The men gathered for a few beers and a "bull session", and at that point the claimant described what occurred as follows:

> "Well, we got to discussing who could lift what and that sort of thing. The general contractor's foreman said that he could lift me with his

> hands and I told him it wasn't logical that he could lift a man of my weight for him being his weight; so he tried, and he couldn't. So the general contractor said, 'okay, go ahead and show him Tom that you can lift him.' I don't know why I even attempted, but I didn't really feel that I could lift him but I thought I'd give it a try and I lifted him up and as I was putting him back down I stepped off of an unfinished curb, about a 4 inch step, and I kind of stepped off of it and I fell straight down; I dropped straight down and turned my leg as I fell and the two of us landed on it and it broke."

As soon as the men realized what had happened, an ambulance was called and the claimant was removed to a hospital.

On December 21, 1973, the claimant and his helper had followed his company's usual procedure. The normal workday was from 8 a.m. to 4:30 p.m. with a half-hour off for lunch, with the usual practice that of loading the necessary tools and electrical equipment at the company shop at about 8 a.m., leaving for the job, and wrapping the day's work up in time to return to the shop at 4:30 to 4:45 p.m., at which point the men punched out for the day. The time of returning to the shop each evening varied from day to day, depending on the manner in which the work had progressed on the job, the distance of the job from the shop, and on occasion the men might return to the shop late enough that they received some overtime pay. The claimant states that, at the time of the beer break, the tools and equipment had not been picked up for the day, and on that particular day they were making use of a van and a pickup truck.

Mr. Robert Bumgardner, manager and major stockholder of Tyee Electric, states that about five o'clock on December 21, 1973 he became somewhat concerned over the fact that the crew had not returned from the A & W job, and that as soon as he was free he drove to the job and found an emergency vehicle present preparing to remove the claimant to the hospital. Mr. Bumgardner recalls that he saw no tools lying around, and presumably the van and the truck had been loaded by the time he arrived on the scene. Mr. Roe, the claimant, recalls that the general contractor approached them and suggested a beer break at about 4:25 p.m., and that he believes that he fell about 4:30 or 5 p.m. During the period of time he said he had consumed at least one stubby of beer.

The hearing examiner, in his Proposed Decision and Order, sustained the rejection of the claim for the reason that the claimant was not in the course of his employment when he suffered his injury, citing RCW 51.08.013 to the effect that:

> "'Acting in the course of employment' means the workman acting at his employer's direction or in the furtherance of his employer's business . . ."

The examiner pointed out that an argument could be made for the theory that the claimant's participation in the beer break was furthering the business of his employer, presumably because of the good will that would be created by the camaraderie of the beer break, but the examiner was not prepared to accept the idea that the "horseplay" of attempting to lift the general contractor's foreman was done either at the direction or in the furtherance of the business of the Tyee Electric Company.

Challenges to this disposition of the appeal have been made by both the claimant and the Department.

The Department believes that the basic result, rejection of the claim, is correct; however, it challenges the examiner's Finding No. 3 to the extent that that finding proposes that the claimant's injury occurred "during normal working hours."

It is the Department's contention that the injury may have occurred on the jobsite, but the day's work was over, and the claimant was injured during an after-hours beer party.

We have highlighted above the usual pattern followed during a normal workday by employees of Tyee Electric. That pattern was followed on December 21, 1973, and at the time the claimant was injured he was still within the time pattern that could be considered a normal working day for electricians with Tyee Electric. We accept the examiner's Finding No. 3, as we are convinced that the claimant was injured during normal working hours on December 21, 1973.

The claimant contests the Proposed Decision and Order, citing RCW 51.08.013 in its entirety, as follows:

> "'Acting in the course of employment' means the work-man acting at his employer's direction or in the furtherance of his employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the workman is engaged in the work process in areas controlled by his employer, except parking areas, and it is not necessary that at the time an injury as sustained by a workman he be doing the work on which his compensation is based or that the event be within the time limits on which industrial insurance or medical aid premiums or assessments are paid." (Emphasis supplied.)

It is the claimant's contention that the injury suffered on December 21, 1973, under the fact pattern of that date, comes within the gamut of RCW 51.08.013 and is controlled by the rules set forth by our Supreme Court in Tilly v. Department of Labor & Industries, 52 Wn.2d 148 (1958).

In Tilly v. Department, supra, an injury sustained during horseplay was determined to be allowable. In the instant case, the claimant contends that employees are entitled to take a break, and the claimant was under the impression that he was fostering good will between the general contractor and his employer, that morale of employees is important, that it is not unusual for employees to engage in horseplay, that if he had accidentally tripped over the concrete curb during his lunch or coffee break he would have been covered under the Industrial Insurance Act, thus, philosophically he asks, "Why does it make any difference that he tripped when he attempted to lift the general contractor's foreman?"

In the Tilly case, the claimant left the machine upon which he was working and walked toward the men's lavatory. He passed a machine operated by a female co-employee, who was holding a wet paper towel in her hands. The claimant made some remark to her, and she started to pursue him with the intention of washing his face with the paper towel, but he ran into the lavatory and escaped. Several minutes later he emerged to return to his work station, and the woman resumed the pursuit. The claimant ran toward the lavatory, was intercepted by another male co-employee, whereupon the woman co-employee washed the claimant's face with the paper towel. During this encounter, Tilly twisted and turned in an attempt to free himself, the incident being over in a matter of a few minutes. At the time, Tilly was breathless, but the event was entirely jocular, the product of a moment of merriment, and no animosity was shown. After the face-washing, Tilly walked toward the lavatory laughing and walked to the water fountain, where he slumped to the floor unconscious. He was hospitalized and died early the following morning, due to a cerebral hemorrhage. Our Supreme Court held that Tilly was in the course of his employment at the time the horseplay occurred, stating that:

> "The undisputed evidence shows that Tilly was working in the plant of his employer when he left his work station to go to the men's lavatory which was maintained by the employer for the convenience and comfort of his employees. Since there is no showing that Tilly's leaving his work station was for any purpose other than the proper use of the facilities provided by the employer, we must hold that he was in the course of his employment unless he unreasonably deviated from such purpose en route to such an extent that the deviation could be said to constitute an

> abandonment (however temporary) of his employment." (Emphasis supplied.)

We do not believe that the case before us is on all fours with the Tilly decision. The record fails to establish that the claimant's participation in the beer break was in any way designed to foster good will between the general contractor and Tyee Electric. The claimant was not instructed to engage in such breaks for the purpose of fostering his employer's best interests. Unlike the Tilly case, we view the beer break in this case as a deviation and abandonment of the claimant's course of employment. We do not feel that the beer break, under the facts of this case, can be held to fall within the gamut of RCW 51.08.013.

After consideration of the Proposed Decision and Order and the Petitions for Review filed thereto, and a careful review of the record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law. The hearing examiner's proposed findings, conclusions and order are hereby adopted as this Board's findings, conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 21st day of November, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
PHILLIP T. BORK Chairman

/s/ _____
R.M. GILMORE Member

/s/ _____
SAM KINVILLE Member