Polmanteer, Vince

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

Aggressor doctrine

Horseplay

Lunch period (RCW 51.32.015; RCW 51.36.040)

A worker injured as a result of friendly horseplay initiated by his supervisor during their lunch period at a lumber mill was entitled to industrial insurance benefits because the activity did not constitute an unreasonable deviation from the course of employment. *In re Vince Polmanteer*, BIIA Dec., 88 0362 (1989) [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: VINCE O. POLMANTEER)	DOCKET NO. 88 0362
)	
CL AIM NO T-156376	,	DECISION AND ORDER

APPEARANCES:

Claimant, Vince O. Polmanteer, by Neff, Phillabaum & Harlow, per Stephen D. Phillabaum

Self-Insured Employer, Vaagen Brothers Lumber, Inc., by Lukins & Annis, per Edger L. Annan

This is an appeal filed by the claimant, Vince O. Polmanteer, on January 25, 1988 from an order of the Department of Labor and Industries dated January 14, 1988 which adhered to the provisions of a Department order dated December 1, 1987, which rejected this claim for the reason that the claimant was not in the course of his employment at the time of the injury. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order entered September 21, 1988 in which the order of the Department dated January 14, 1988 was reversed and the claim remanded to the Department of Labor and Industries with directions to allow the claim, provide the claimant with benefits as allowed by law, and for such further action as indicated.

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

The issue before us is whether the claimant, Vince Polmanteer, was within the course of his employment with Vaagen Brothers Lumber, Inc., at the time of his injury on September 20, 1987. The evidence presented by both parties is adequately set forth in the Proposed Decision and Order. To briefly summarize, Mr. Polmanteer, who worked clean-up at the lumber mill, was verbally teased by crew members throughout the workshift about his late night activities. At the lunch break, while in the company designated break room, the verbal banter continued. Terry Hall, the crew supervisor, and Mr. Polmanteer exchanged joking comments. Mr. Hall removed his hard hat and struck Mr. Polmanteer on top of his hard hat which he was wearing. This prompted the two men to engage in a

friendly scuffle which ended when Mr. Hall fell upon Mr. Polmanteer, severely fracturing his right leg. While we agree with the conclusion reached by our Industrial Appeals Judge, we have granted review to clarify the reasoning which supports our finding that Mr. Polmanteer is entitled to industrial insurance coverage.

The Industrial Insurance Act provides benefits to:

each worker receiving an injury, . . . during the course of his or her employment and also during his or her lunch period as established by the employer while on the jobsite.

RCW 51.32.015. RCW 51.36.040. While there may be some confusion created by the statutory language and by prior Decisions and Orders issued by this agency, we believe the legislature intended to cover normal lunch time activities and also to provide the same coverage for injuries occurring during the lunch period on the employer's premises as for those occurring during the work period. In re Alfred Morrill, Dec'd., BIIA Dec., 29,704 (1970). Contra, In re Herman Arnott, BIIA Dec., 24,755 (1965). Thus, we must determine whether Mr. Polmanteer was engaged in normal lunchtime activities or was in the course of his employment when the injury occurred.

According to RCW 51.08.013:

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

As indicated by the language of the statute, it is not necessary in order to find coverage under the Act to find that the worker was doing the work on which his compensation is based at the time of the injury. In fact, in <u>Tilly v. Department of Labor and Industries</u>, 52 Wn.2d 148, 324 P. 2d. 432 (1958), this state's Supreme Court found the worker to be in the course of his employment when he left his work station to go to the men's lavatory and on the way engaged in horseplay with a co-worker which culminated in a face-washing incident. Unfortunately, the incident triggered a cerebral hemorrhage which led to Mr. Tilly's death. The court stated:

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 <u>unreasonably deviated</u> from such purpose en route to such an extent that the deviation could be said to constitute an abandonment (however temporary) of his employment.

Tilly, at 153. (Emphasis added).

In defining the parameters of what constitutes an "unreasonable deviation" from the course of employment, we see a distinction between cases involving injuries resulting from friendly horseplay and those injuries which result from assaults. The "aggressor doctrine" which generally applies in assault cases, results in denial of compensation if the individual claiming benefits was the aggressor in the altercation. See In re Stanley Murebu, BIIA Dec., 37,335 (1972). However, horseplay usually does not take the form of an assault. It usually involves no animosity between the participants and the conduct is generally friendly or jovial in nature. The difficulty in applying the "aggressor doctrine" in horseplay cases and even sometimes in assault cases is that it is sometimes almost impossible to determine who really started the incident which resulted in the ultimate injury. See, In re Peter Earl Patterson, BIIA Dec., 53,306 (1980).

An assault can more easily be shown to be a deviation from a worker's course of employment. The conduct is usually intentional, personal, and less likely to be in furtherance of the employer's business. Horseplay, on the other hand, is often "the product of a moment of merriment". Tilly, at 150. The work environment includes, to a certain extent, the natural tendency of normal people to indulge in occasional foolery. The work environment involved in this case is a lumber mill. Mr. Polmanteer worked on the clean-up crew. At the time the injury occurred, the men were on their lunch break, in the company lunch room. While on break, Mr. Polmanteer had no duties to perform so he had no duties to abandon. As pointed out by Arthur Larson:

workmen whose jobs call for vigorous physical activity cannot be expected, during idle periods, to sit with folded hands in an attitude of contemplation. They must do something, and the most natural thing in the world to do is to joke, scuffle, spar, and play with the equipment and apparatus of the plant.

1 A. Larson, The Law of Workmen's Compensation § 23.65, at 5-136.

We are in no way implying that employees are free to engage in <u>any</u> activity they may choose during their lunch breaks, as long as it is in jest, and feel confident that the injuries they sustain will be covered. The Board's decision in <u>Morrill</u> involved a worker who attempted to collect honey from a tree during his lunch break in the woods and was stung by a bee. Industrial insurance benefits were

denied on the basis that the injury resulted from the wholly independent act of the employee, for his own benefit or gain, and the employee's act had no connection with his employer's work.

In re Thomas G. Roe, BIIA Dec., 43,694 (1974), involved a claimant injured lifting his employer's business associate while participating in a beer break near the end of normal working hours. Industrial insurance benefits were denied on the basis that the claimant's participation in the beer break was a deviation from and abandonment of his course of employment since he was not instructed to engage in such breaks and the breaks were in no way designed to foster goodwill, nor his employer's best interests.

The facts in this case are different. A friendly interaction between co-workers is an expected lunch time activity. There is no no dispute that the horseplay was entirely good-natured. We find it significant that the horseplay which resulted in the injury was the culmination of a verbal bantering which had occurred throughout the workshift before the break, and was participated in by the shift supervisor. In fact, we believe, as did our Industrial Appeals Judge, that Terry Hall, the shift supervisor, instigated the jostling which resulted in the injury by striking Mr. Polmanteer with his hard hat.

Our determination that the horseplay was not an unreasonable deviation from employment is supported by the testimony of other millwrights who were present. Timmy McDonnell testified "Well, we were just sitting around on break like usual, you know, giving each other lip and calling each other names." Tr. 7/8/88 at 61. Terry Hall, shift supervisor, testified that water fights occurred on the jobsite and if they took place outside or away from machinery he would "let it go; everybody likes to have a little fun once in a while." Tr. 7/8/88 at 34. On the other hand, millwright Timothy Barley testified that horseplay took place and, depending upon the situation, the worker usually got suspended or terminated. Tr. 7/8/88 at 84.

Obviously horseplay did occur at Vaagen Brothers Lumber because the company had set up procedures to handle incidents as they occurred. There is some conflict in the testimony as to whether or not the company's policy against horseplay was more strictly enforced following Mr. Polmanteer's injury. The plant manager, Hubert Sager, testified concerning three instances in which employees were terminated for assault or fighting prior to the time Mr. Polmanteer was injured. However, it does not appear that any termination resulted from incidents of horseplay, prior to this incident which resulted in Mr. Hall's termination.

Even in its Petition for Review, the employer points out that some types of horseplay may reasonably be expected on the jobsite. The petition referred to workers who occasionally spray each other with pressurized water or air hoses. The employer distinguishes this type of activity because pressurized water bottles or air hoses are used in the type of work performed by the employer. However, we find that the friendly jostling between co-workers during their lunch break, which occurred in this instance, while not condoned by the employer, did not constitute an unreasonable deviation from Mr. Polmanteer's course of employment so as to deny him coverage under the Industrial Insurance Act.

After consideration of the Proposed Decision and Order, the employer's Petition for Review filed thereto, the claimant's Response to Employer's Petition for Review, and a careful review of the entire record before us, we are persuaded that the Department order dated January 14, 1988 is incorrect and should be reversed and this matter remanded to the Department of Labor and Industries to allow this claim as an industrial injury occurring in the course of claimant's employment.

FINDINGS OF FACT

On November 4, 1987 an accident report was filed with the Department of Labor and Industries alleging an industrial injury occurred to the claimant on September 20, 1987 while in the course of his employment with the self-insured employer, Vaagen Brothers Lumber, Inc. On December 1, 1987 the Department issued an order rejecting the claim for the reason that at the time of the injury the claimant was not within the course of his employment.

On January 7, 1988 the claimant filed a protest and request for reconsideration from the Department order of December 1, 1987. On January 14, 1988 the Department issued an order adhering to the provisions of the Department's order of December 1, 1987.

On January 25, 1988 the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order of January 14, 1988. On February 18, 1988 the Board issued an order granting the appeal, assigning it Docket No. 88 0362 and ordering that proceedings be held on the issues raised.

- 2. On September 20, 1987 the claimant suffered an injury to his right leg while involved in friendly horseplay with his shift supervisor during the lunch period while on the jobsite. The friendly horseplay which resulted in the injury to the claimant's right leg was the culmination of activities which took place during the work shift and lunch period. Claimant, his co-workers and the shift supervisor participated in these activities.
- 3. As a result of the injury occurring on September 20, 1987, the claimant suffered a broken right leg which required medical treatment.

- 4. Some types of horseplay may reasonably be expected to occur on the jobsite in a milling operation.
- 5. The friendly horseplay activity in which the claimant participated on September 20, 1987 and which caused his injury was instigated by the claimant's co-workers and his shift supervisor.
- 6. The horseplay activity in which the claimant participated on September 20, 1987 and which resulted in his injury did not constitute an unreasonable deviation from nor an abandonment of his employment.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
- 2. The claimant suffered an industrial injury on September 20, 1987 while in the course of his employment with the self-insured employer within the meaning of RCW 51.32.015 and RCW 51.36.040.
- 3. The order of the Department of Labor and Industries dated January 14, 1988, which adhered to the provisions of an order dated December 1, 1987, which rejected the claim for the reason that the claimant was not in the course of his employment at the time of the injury, is incorrect and should be reversed and this claim remanded to the Department to allow the claim as an industrial injury occurring in the course of claimant's employment and to direct the self-insured employer to take such further action as is indicated by the law and the facts.

It is so ORDERED.

Dated this 8th day of May. 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/	
SARA T. HARMON	Chairperson
<u>/s/</u>	
FRANK F FENNERTY IR	Member

DISSENT

I agree with the statement of the Board majority that the legislative intent in enacting RCW 51.32.015 in 1961 was "to cover <u>normal</u> lunch time activities and also to provide the <u>same</u> coverage for injuries occurring during the lunch period on the employer's premises as for those occurring during the work period." (Emphasis supplied).

Also, I concur that the pivotal question here is whether the claimant's actions on the morning of September 20, 1987--particularly the physical horseplay that he engaged in during the break time in the lunch room which led directly to his injury--was such an <u>unreasonable deviation</u> from the course of employment and from such normal and expected lunch or break-time activity as to constitute an abandonment of employment.

The majority concludes that there was not such an unreasonable deviation here. I disagree. The wild antics which occurred did constitute an unreasonable deviation, in my view. The horseplay had no connection with the employee's work, and exceeded the normal or expectable lunch time activities, even in such a setting as a lumber mill.

The majority states that it is "in no way implying that employees are free to engage in any activity they may choose during their lunch breaks, so long as it is in jest, and feel confident that the injuries they sustain will be covered". Two significant decisions of this Board are cited in support of this statement, In re Alfred Morrill, Dec'd., BIIA Dec. 29,704 (1970), and In re Thomas G. Roe, BIIA Dec. 43,694 (1974), in both of which this Board held that the employee had deviated from and abandoned his course of employment. The facts of those cases are succinctly recited in the majority's decision.

But the majority says that the facts in this case are different -- just a friendly interaction or friendly jostling between co-workers. I do not view the matter in that way. "Friendly" activity or not, it appears that Mr. Polmanteer had unreasonably deviated from his employment at the time of his injury, just as much as had Mr. Morrill or Mr. Roe.

As further support for my view, I incorporate and adopt the well- reasoned arguments in employer's counsel's Petition for Review. I would affirm the Department's order of January 14, 1988, rejecting this claim because Mr. Polmanteer was not in the course of his employment at the time of his injury.

Dated this 8th day of May, 1989.

<u>/s/</u>
PHILLIP T. BORK Member