

TERRY E. SHEERER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BATH IRON WORKS)	DATE ISSUED: <u>May 1, 2001</u>
CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Brunswick, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (99-LHC-1631) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who worked for employer as a painter, sustained a ruptured left patellar tendon on September 5, 1997, while playing ping-pong during his lunch break at employer's pipe shop. On September 4, 1997, claimant was assigned to work an 8 hour shift from 10:30 p.m. to 7:00 a.m., with a 30 minute lunch break between 3:00 a.m. and 3:30 a.m. Upon his arrival that night, claimant worked as a painter in the pilot house of a vessel at the main

shipyard. At about 3 a.m., claimant walked about 50 yards from the vessel to the building that housed employer's pipe shop where he proceeded to have his lunch. Once there, he and three co-workers set up a portable ping-pong table and began to play a doubles match. During the match, claimant slipped and fell to the ground. He received immediate treatment from Dr. Van Arden, an orthopedic surgeon, who diagnosed a ruptured patellar tendon of the left knee, immediately performed corrective surgery, and prescribed physical therapy. Dr. Van Arden returned claimant to light duty work with restrictions, and employer provided appropriate work to claimant as of October 30, 1997.

Claimant sought benefits under the Act for the period between September 5, 1997, through October 30, 1997. Employer disputed the claim, asserting that claimant's injury did not occur in the course and scope of his employment but rather during so-called "horseplay" or recreational activities while claimant was on his lunch break. In his decision, the administrative law judge determined that claimant's injury arose out of and in the course of his employment with employer as it occurred on company property while claimant was still "on-the-clock" engaging in an activity, *i.e.*, ping-pong, impliedly authorized by employer by way of its purchase of the equipment and placement of the equipment in the "break room." He therefore concluded that employer is liable for temporary total disability benefits from September 5, 1997, through October 30, 1997,¹ as well as for medical benefits related to the work injury.

On appeal, employer challenges the administrative law judge's determination that claimant's injury is compensable under the Act. Claimant responds, urging affirmance. Employer argues that contrary to the administrative law judge's determination, claimant's injury did not arise in the course of his employment. Employer maintains that, pursuant to the factors discussed by the Board in *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992), claimant's injury is not compensable as it occurred while claimant was engaged in a voluntary recreational activity during a break period for which he was not paid. Employer also avers that the administrative law judge erred in stating that an "on-site" break serves employer's interests, and that the administrative law judge erred in relying on the fact that claimant's injury is not compensable under the Maine Workers' Compensation Act.

Section 2(2) of the Act, 33 U.S.C. §902(2), requires that claimant's injury arise out of

¹The administrative law judge found that during the period in question, claimant could not perform his usual employment as a painter and employer did not submit any evidence as to the availability of suitable alternate employment.

and in the course of employment, and the Section 20(a) presumption, 33 U.S.C. §920(a), provides that in the absence of substantial evidence to the contrary, the claim comes within the provisions of the Act. For an injury to have occurred within the course of employment, the injury must be shown to have occurred within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); 2 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW §20.00 (2000). Generally, an activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. However, the Larson treatise states that

under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.

2 LARSON §20.00. The Act does not expressly say that the employee must at the time of injury have been benefitting the employer; it merely says that the injury must have arisen in the course of employment. If it can be shown that the particular activity, beneficial or not, was a part of the employment, either because of its general nature, *e.g.*, activities falling within the personal comfort doctrine, or because of the particular customs and practices at the individual worksite, *e.g.*, certain recreational and social activities, the statute is satisfied. *See id.* at §§20.01, 20.02. This is, in essence, the general test applied by the Board in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), wherein the Board held that the claimant, who was injured during a work break while helping to start a co-worker's car which was parked on employer's premises, was in the course of employment under this general test when injured,²

²In *Boyd*, the Board stated that, arguably, the administrative law judge should have applied the test at Section 27.15 (1996) of the Larson treatise, but that the claimant's injury would have been in the course of his employment under this test also. The Larson treatise states that aid to a co-worker on an entirely personal matter is outside the course of employment unless the deviation is insubstantial. 2 LARSON §27.01[5] (2000). In *Boyd*, the Board held that the deviation from work "was at most minimal." *Boyd*, 30 BRBS at 221.

as the administrative law judge rationally found that the assistance claimant rendered to his co-worker was for professional reasons, *i.e.*, a cooperative workplace, rather than for personal reasons. The Board rejected employer's contention that the "recreational or social activity test" was applicable as the claimant was not participating in either a recreational or a social activity at the time of his injury.

In *Vitola*, 26 BRBS 88, the Board addressed the issue of whether a claimant's injury, which occurred while he was involved in a recreational activity associated with his work, was in the course of employment and thus compensable under the Act. The claimant was injured while playing softball in an after-hours game between the employer's senior civilian management and its military personnel on the military base where employer had some of its operations. *Id.* The Board observed that pursuant to Section 22 of the Larson treatise, recreational or social activities are within the course of employment when one of the following conditions is present:

- 1) they occur on the premises during a lunch or recreation period as a regular incident of employment; *or*
- 2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment.

Vitola, 26 BRBS at 90-91. Subsequent to the issuance of *Vitola*, the Larson treatise added a third basis for coverage:

the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

2 LARSON, §22.01 (2000).

In *Vitola*, the Board held that the first two conditions did not apply as the softball game was after normal working hours and participation was voluntary. The Board thus looked to other factors that have generally been relevant in determining whether an injury during a voluntary social or recreational activity arose in the course of employment, *see* 26 BRBS at 91-96, and held that the claimant's injury did not arise in the course of employment. The instant case, however, is distinguishable from *Vitola*, as the first condition enumerated by the Larson treatise is applicable: claimant herein was injured on employer's premises during a lunch or recreation period. Thus, the treatise and the test stated in *Vitola* support the administrative law judge's finding here that claimant was injured in the course of his employment.

Neither the Board nor the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, has specifically addressed the issue of whether an employee's injury sustained during recreational activity on employer's premises while on his lunch break is

compensable under the Act. Generally, injuries occurring on the premises during a regular lunch hour arise in the course of employment, even though the lunch break is technically outside the regular hours of employment because the worker receives no pay for that time and is not under the control of the employer. 2 LARSON, §21.02[1][a] (2000). “[R]ecreational injuries during the noon hour on employer’s premises have been held compensable in the majority of cases.” *Id.* at §22.03[1] (2000). If the activity the claimant was engaged in at the time of injury has achieved some standing as a custom or practice either in the industry generally or in the particular work place, it becomes a regular incident condition of the employer. The employer’s knowledge and acquiescence is one kind of evidence of an existence of a custom or practice as part of the employment, but it is not the only evidence, nor is it necessarily the strongest in cases of conflicting evidence. *Id.* Employer’s knowledge and acquiescence, however, is pertinent to the disposition of the instant case where there is considerable evidence regarding employer’s knowledge of the recreational activity in question.

As noted by the Larson treatise, a finding that an injury occurred in the course of employment has been reached in lunch-hour on-the-premises cases where the claimant was a softball player, a football player, a spectator at a basketball game, a spectator at a baseball game, a basketball player, a handball player, a volleyball player, a frisbee player, a jogger, an employee swimming in the employer’s pool, and most analogously, a ping-pong player.³ *See In re Balamotis*, 141 N.H. 456, 685 A.2d 919 (N.H. 1996) [volleyball]; *Vaccaro v. Sperry Rand Corp.*, 83 A.D. 2d 678, 442

³In recent years, there has been a trend in several states, including California, Colorado, Illinois, Maine, Massachusetts, Montana, Nevada, New Jersey, New York, and Oregon, to statutorily exclude from coverage those employees who are injured while voluntarily participating in any recreational activity. Mass. Ann. Laws ch 152 §1(7A); N.Y. Work. Comp. Law §10, as amended by S. 6848 and A. 8106, June 21 1983; Or. Rev. Stat. §656.005(7)(b)(B); N.J. Rev. Stat. §34:15-7, as amended eff. January 10, 1985; 820 Il. Comp. Stat. 305/11; Nev. Rev. Stat. §616A.265; Cal. Labor Code §3600(a)(9); Me. Rev. Stat. Ann. 39-A §102(11)(C); *see also Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. Ct. App. 1998); *Quinones v. P.C. Richard & Son*, 310 N.J. Super. 63, 707 A.2d 1372 (N.J. Super. Ct. App. Div. 1998); *Connery v. Liberty N.W. Ins. Corp.*, 929 P.2d 222 (Mont. 1996); 2 Arthur Larson & Lex K. Larson, LARSON’S WORKERS’ COMPENSATION LAW §22.02[1][c] (2000). In this regard, the outcomes in several of the above cited cases would in all likelihood be altered based on changes in the relevant workers’ compensation statutes in the respective jurisdictions. *See, e.g., Sarzillo v. Turner Constr. Co.*, 101 N.J. 114, 501 A.2d 135 (N.J. 1985)(New Jersey statute bars an award for claimant injured while playing Ka-nocka after lunch on employer’s premises, N.J. Rev. Stat. §34:15-7, as amended eff. January 10, 1985). This trend, however, is premised on the statutory language in these jurisdictions which explicitly excludes or limits coverage for employees engaged in voluntary recreational activities. *Id.* The Act contains no such limiting provision and therefore does not rule out, *per se*, injuries that have occurred during recreational activities. 33 U.S.C. §902(2).

N.Y.S. 2d 243 (N.Y. App. Div. 1981) [jogger]; *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 412 N.E. 2d 492 (Ill. 1980) [frisbee]; *McNamara v. Town of Hamden*, 176 Conn. 547, 398 A.2d 1161 (Conn.1979) [ping-pong]; *Fidelity & Guaranty Ins. Underwriters, Inc. v. Rochelle*, 587 S.W. 2d 493 (Tex. Civ. App. 1979) [ping-pong]; *Bender v. LILCO*, 71 A.D.2d 754, 419 N.Y.S.2d 238 (N.Y. App. Div. 1979) [football]; *Nichols v. Workmen's Compensation App. Board*, 269 Cal. App. 2d 598, 75 Cal. Rptr. 226 (Cal. Ct. App.1969) [softball]; *Geary v. Anaconda Copper Mining Co.*, 120 Mont. 485, 188 P.2d 185 (Mont.1947) [handball]; *Conklin v. Kansas City Pub. Serv. Co.*, 226 Mo. App. 309, 41 S.W.2d 608 (Mo. Ct. App.1931) [baseball spectator]; *Kingsport Silk Mills v. Cox*, 161 Tenn. 470, 33 S.W.2d 90 (Tenn. 1930) [basketball spectator]. In *McNamara*, 176 Conn. 547, 398 A.2d 1161, the court held that an injury sustained during a game of ping-pong on the employer's premises prior to the start of the work day was compensable. The Connecticut Supreme Court held that the activity was covered because it was on employer's premises, it was reasonably incidental to the employment, and it was both permitted and regulated by the employer. The court further noted that the absence of a benefit to employer was not fatal, particularly since it was not realistically possible to evaluate employer benefit in cases of this kind.⁴ The court stated that in order for the injury to occur in the course of the employment, it must take place (a) within the period of employment, (b) at a place where the employee may reasonably be, and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it. *Id.*, 176 Conn. at 556, 398 A.2d at 1166. In determining whether the activity is incidental to the employment, the court adopted the following rule: "If the activity is regularly engaged in on the employer's premises within the period of the employment, with the employer's approval or acquiescence, an injury occurring under those conditions shall be found to be compensable." *Id*; see 2 LARSON §22.03[1] (2000). Similarly, the Texas court in *Rochelle*, 587 S.W. 2d 493, held that playing ping-pong was within the course of employment since it occurred on the employer's premises during an employer-approved recreational period.

In the instant case, the administrative law judge found that employer paid for and provided the ping-pong table and equipment, and placed them in the break room. From these actions, the administrative law judge found that employer impliedly acquiesced in this activity during break periods. Moreover, the administrative law judge inferred, given the time when claimant took his lunch during the third-shift, 3 a.m., that employer expected and was aware that claimant would use the ping-pong table during breaks. The administrative law judge therefore determined that this

⁴The Larson treatise cites this case as an example that the absence of benefit to the employer is not in itself adequate to exclude recreation from coverage if other elements favoring coverage are sufficiently persuasive. In addition, it is not necessary under the test set out in Section 22 of the Larson treatise to establish employer benefit, as only one of the three conditions need be met. In *McNamara*, as in the instant case, claimant's injury occurred during a lunch or recreation period as a regular incident of employment. Thus, contrary to employer's contention, the fact that it may not have derived a benefit from claimant's activity is not dispositive in this case, and any error the administrative law judge may have committed in this regard is harmless error.

activity was a regular incident of claimant's employment, and thus concluded that claimant's injury sustained while playing ping-pong on employer's premises, during an approved break period, and using equipment supplied by employer, is compensable under the Act.

Substantial evidence supports the administrative law judge's factual findings. Claimant testified that the ping-pong tables were purchased and made available to the employees by employer's recreation committee, a joint effort between employer and the union which is chiefly run by management, that the ping-pong tables were stored and set-up on an as needed basis in employer's pipe room, and that employees from a number of different departments regularly used the tables during their breaks. Tr. at 23-26, 32-33. Claimant additionally stated that at the time of his injury, he was on a regularly scheduled break, and that he remained "on-the-clock," although he did not get paid for the time that he was on this break. *Id.* at 22, 33-35. Claimant also testified that since he worked the third shift and took his lunch break in the very early morning, he could not go anywhere off-premises for his breaks because nothing was open at that time. *Id.* at 22, 34. He stated that, furthermore, he knew of no one who would leave employer's premises while on breaks during the third-shift. *Id.* at 22. There is no evidence to dispute claimant's testimony in this case.⁵

⁵The record contains a Benefits Alert, wherein the union notified its members that: "The weather is warming up and we see more Local 5/6 members outside on your breaks playing basketball. As a reminder any lost time injury will not be covered by workers' comp. This is [an employer's] workers' comp department policy which is supported by Maine court decisions. This comes under the horse play rule which in short reads that any activity outside of normal work is not compensable." EX 16; *see also* fn.3, *supra*. Claimant acknowledged receipt of this document, as noted by the administrative law judge. However, given that the instant case arises under the Longshore Act and not Maine law, the administrative law judge properly accorded this document little weight.

We affirm the administrative law judge's conclusion that claimant's injury occurred in the course of his employment.⁶ Claimant's recreational activity in this case, playing ping-pong on employer's premises during his lunch break, occurred as a regular incident of his employment. The evidence credited by the administrative law judge establishes that employees regularly engaged in this activity on employer's premises within the period of employment, with employer's acquiescence. Employer provided the equipment and the site, which is sufficient to establish employer's knowledge and acquiescence in this activity if not its outright sanctioning. *McNamara*, 176 Conn. 547, 398 A.2d 1161; *see generally Vitola*, 26 BRBS at 91. The administrative law judge's finding that claimant's injury is compensable under the Act, therefore, is affirmed. *See 2 LARSON* §22.00.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁶Moreover, while employer correctly notes that the fact that claimant's injury is not subject to the jurisdiction of the workers' compensation statute in Maine is not a valid reason to find that claimant's injury is work-related under the Act, the administrative law judge's notation of this additional rationale for finding that a work-related injury occurred under the Act in this case does not rise to the level of reversible error as the administrative law judge's decision otherwise is supported by substantial evidence and comports with law.