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EDWARD ANDERTON III *v.* WASTEAWAY SERVICES, LLC, ET AL.
(AC 23431)

Lavery, C. J., and Schaller and Peters, Js.

Argued March 31—officially released September 13, 2005

(Appeal from the workers' compensation review board.)

Kevin M. Blake, with whom, on the brief, was *Rebekah L. Sprano*, for the appellant (plaintiff).

Opinion

LAVERY, C. J. The plaintiff, Edward Anderton III, appeals from the decision of the workers' compensation review board (board) reversing the determination by the workers' compensation commissioner (commissioner) that the plaintiff's injury was compensable. On appeal, the plaintiff maintains that the board improperly determined that he was not injured in the course of his employment and was not entitled to workers' compensation benefits when he sustained an injury while participating in a basketball game during working hours at the request of his employers. We agree and reverse the decision of the board.

The following facts were found by the commissioner. The plaintiff began working for the defendant WasteAway Services, LLC,[1] in August, 1999, cleaning up after

baseball games and concerts held at the Bluefish Stadium in Bridgeport. He generally reported for work between 7 and 8 a.m. on the day after an event. Richard Farrell and Kevin Lynch, the owners of WasteAway Services, LLC, and the plaintiff's employers, asked the plaintiff if he would play basketball on September 3, 1999. The game would pit him and Charles Dobson, his supervisor and future brother-in-law, against the two employers and would be played on a court located in an apartment complex across the street from the stadium. The plaintiff was told that he and Dobson would be treated to lunch if they were victorious. Although he and Dobson recently had been at odds because of an unpaid debt owed by the latter to the former, they agreed to play. The plaintiff testified that he believed that he had to participate and that if he refused, his employers and Dobson would look on him unfavorably as an employee. Within fifteen minutes of the start of the game, the plaintiff sustained an injury to his left Achilles tendon.

During a hearing before the commissioner, evidence was presented that the injury totally disabled the plaintiff from work from September 3 to November 18, 1999, and, according to Peter Boone, a physician, left the plaintiff with a 7 percent permanent partial disability of the left ankle. The commissioner found that the injury arose out of and in the course of the plaintiff's employment and ordered the defendant to pay the plaintiff total disability benefits and permanent partial disability benefits for 8.75 weeks. Both parties filed petitions for review. The board reversed the commissioner's finding of compensability.[2] The plaintiff has appealed from that decision.[3]

The plaintiff argues that the board disregarded the evidence supporting the commissioner's award and improperly concluded that he did not suffer a personal injury pursuant to General Statutes § 31-275 (16) (B) (i)[4] because he was participating voluntarily in a social or recreational event. Specifically, the board concluded that there was insufficient evidence for a reasonable person to believe that there would be adverse employment related consequences if the plaintiff declined the invitation to play basketball. We agree with the plaintiff that the board ignored evidence that supported the commissioner's finding and improperly substituted its judgment for that of the commissioner.

"It is an axiom of [workers'] compensation law that awards are determined by a two-part test. The [plaintiff] has the burden of proving that the injury claimed arose out of the employment and *occurred in the course of* the employment. There must be a conjunction of [these] two requirements . . . to permit compensation. . . . The former requirement relates to the origin and cause of the accident, while the latter requirement relates to the time, place and [circumstance] of the accident. . . .

The party seeking the award must satisfy both parts of the test. . . .

"In order to establish that [the] injury occurred in the course of employment, the [plaintiff] has the burden of proving that the accident giving rise to the injury took place (a) within the period of the employment; (b) at a place [the employee] may reasonably [have been]; and (c) while [the employee was] reasonably fulfilling the duties of the employment *or doing something incidental to it*. . . . Furthermore, [t]he determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brown* v. *Dept. of Correction*, 89 Conn. App. 47, 51–52, 871 A.2d 1094, cert. denied, 274 Conn. 914, A.2d (2005).

"A party aggrieved by a commissioner's decision to grant or deny an award may appeal to the board pursuant to [General Statutes § 31-301] . . . . [T]he [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [The board] is obliged to hear the appeal on the record and not retry the facts. . . . [T]he power and duty of determining the facts rests on the commissioner, the trier of facts. . . . The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"To the extent that we have articulated a standard for reviewing a determination by a commissioner that an injury arose out of the employment, we have treated this issue as factual in nature and, therefore, have accorded the commissioner's conclusion the same deference as that given to similar conclusions of a trial judge or jury on the issue of proximate cause. A finding of a fact of this character [whether the injury arose out of the employment] is the finding of a primary fact." (Citation omitted; internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220, 226, 853 A.2d 597, cert. granted on other grounds, 271 Conn. 925, 859 A.2d 579 (2004). "Put another way, the board is precluded from substituting its judgment for that of the commissioner with respect to factual determinations." *Brown* v. *Dept. of Correction*, supra, 89 Conn. App. 53; see also Regs., Conn. State Agencies § 31-301-8.

The commissioner found that the plaintiff's "September 3, 1999 injury arose out of and in the course of his employment, as playing basketball with his employers that day was part of his employment." The commissioner also found that the basketball game was requested by the employers, it was played during working hours and the plaintiff believed that he had to agree to play with his employers and that if he refused, Dob-

son and his employers would not look favorably on him as an employee.

The board held that the plaintiff bore the burden of establishing a concrete act or statement made by the employer that would have led a reasonable person to believe that there would be negative employment related consequences if the plaintiff had declined the employer's proposal for a two on two basketball game; that the plaintiff's subjective perception of a situation could not be the controlling factor in the determination of whether an activity was to be deemed voluntary; and that there must be evidence of a direct tie-in between one's employment duties or status and one's attendance at the activity. We conclude that this test is too strict.

We are persuaded that *Smith* v. *Seamless Rubber Co.*, 111 Conn. 365, 150 A. 110 (1930), ''provides us with more relevant guidance. In that case, in affirming the denial of benefits, our Supreme Court stated: Where an employer merely permits an employee to perform a particular act, without direction or compulsion of any kind, the purpose and nature of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both, an injury arising out of it will usually be compensable; *on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable. . . .*

''More recently, in *Spatafore* v. *Yale University*, [239 Conn. 408, 421–22, 684 A.2d 1155 (1996)], our Supreme Court stated: Consequently, when an employee has sustained an injury while traveling to and from work, but there also existed some work related recreational or social aspects, as in traveling to a union sponsored picnic, the benefit test has been applied and we have held that that employee could fall within the [Workers' Compensation] [A]ct's coverage by demonstrating that the activity that took him outside the place and period of employment had been for the employer's benefit. . . . This independently convincing association with the employment is needed in order to overcome the initial presumption of disassociation with the employment established by the time and place factors. . . . It is clear, therefore, that absent some frequent activity, endorsed, approved or permitted by the employer, a [plaintiff] must demonstrate some benefit to his or her employer in order to satisfy the incident to employment requirement.'' (Emphasis in original; internal quotation marks omitted.) *Brown* v. *Dept. of Correction*, supra, 89 Conn. App. 56.

In the present case, the activity in question was a

basketball game occurring during working hours, thereby fulfilling the time requirement. The employers exercised some compulsion in that they invited the plaintiff and his supervisor to play and scheduled it during the plaintiff's work hours. It also was known that the employers were visiting the stadium because of the maintenance staff's poor performance. The plaintiff believed that if he refused to play, his employers and his supervisor would look on him unfavorably as an employee. Also, one of the employers acknowledged that the notion of playing basketball with employees was to benefit the company by boosting company morale and fostering employee loyalty.

Those facts support the commissioner's finding that the plaintiff's injury arose out of and in the course of his employment, as playing basketball with his employers that day was part of his employment. The commissioner was free to draw such a conclusion from those facts, and that finding must stand unless it resulted from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. This is not such a case. The board used too strict of a standard for determining whether the injury arose out of voluntary participation in a recreational or social activity and improperly substituted its judgment for that of the commissioner. Therefore, the decision of the board is reversed, and the commissioner's finding of compensability must be reinstated.

The decision of the workers' compensation review board is reversed and the case is remanded with direction to reinstate the commissioner's finding of compensability and for further proceedings to address the plaintiff's appeal regarding unpaid medical bills.

In this opinion PETERS, J., concurred.

[1] Harbor Yard Stadium and the second injury fund also were defendants at trial and are not involved in this appeal. In this opinion, we refer to WasteAway Services, LLC, as the defendant.

[2] The board did not address the plaintiff's appeal regarding unpaid medical bills.

[3] On July 23, 2002, the defendant filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code. The plaintiff was listed as a creditor in the bankruptcy case, but in accordance with 11 U.S.C. § 727 (a) (1), his debt was not discharged when the case was closed.

An argument has been raised by the second injury fund, which did not participate in the workers' compensation proceeding at the trial level, that this case is moot because the defendant is no longer in business and that should the plaintiff prevail, he would have no way to enforce a decision in his favor. We disagree. A finding of liability against a bankrupt corporate debtor can result in a debt chargeable against the entity if it ever resumes operations or against an alter ego corporation. See *N.L.R.B.* v. *Better Building Supply Corp.*, 837 F.2d 377, 379 (9th Cir. 1988); 9E Am. Jur. 2d, Bankruptcy § 3223 (2000).

[4] General Statutes § 31-275 (16) (B) provides in relevant part: " 'Personal injury' or 'injury' shall not be construed to include: (i) An injury to an employee which results from his voluntary participation in any activity the major purpose of which is social or recreational, including, but not limited to, athletic events, parties and picnics, whether or not the employer pays some or all of the cost of such activity . . . ."