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SCHALLER, J. dissenting. The pivotal issue in this case is whether the plaintiff, Edward Anderton III, has met his burden of establishing that the injury he suffered while participating in an athletic event was compensable despite the statutory exclusion to the definition of ''personal injury'' contained in General Statutes § 31-275 (16) (B) (i). That statutory subdivision excludes from the definition of ''personal injury'' any ''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 . . . .'' The majority concludes that the workers' compensation review board (board) ''ignored evidence that supported the [workers' compensation] commissioner's finding and improperly substituted its judgment for that of the commissioner.'' I respectfully disagree and conclude that the board appropriately applied § 31-275 (16) (B) (i) to the facts found by the commissioner, something which both the commissioner and the majority fail to do. Because I conclude that the board correctly determined that the plaintiff failed to produce sufficient evidence to establish that he sustained a compensable ''personal injury,'' I would affirm the decision of the board.

It is well established that a plaintiff who asserts that he or she is entitled to workers' compensation benefits bears the burden of proving that his or her injury is compensable. *Brown* v. *Dept. of Correction*, 89 Conn. App. 47, 51, 871 A.2d 1094, cert. denied, 274 Conn. 914, A.2d (2005). In this case, the plaintiff sought compensation for an injury that occurred during a basketball game. As such, he bore the burden of establishing that his participation in the game was *not voluntary* and that the major purpose of the game was *not social or recreational*. I agree with the board that the plaintiff failed to meet that burden. Accordingly, the statutory exclusion to the definition of ''personal injury'' contained in § 31-275 (16) (B) (i) bars the plaintiff's claim.

The broad definition of ''personal injury'' provided in § 31-275 (16) (A) is modified by § 31-275 (16) (B), which expressly states that '' '[p]ersonal injury' or 'injury' shall not be construed to include'' certain types of injuries. In addition to the exclusion provided in clause (i) discussed previously, clause (ii) excludes ''[a] mental or emotional impairment, unless such impairment arises from a physical injury or occupational disease . . . .''[1] Clause (iii) excludes ''[a] mental or emotional impairment which results from a personnel action, including, but not limited to, a transfer, promotion, demotion or termination . . . .''[2]

The language of § 31-275 (16) (B) was added to the Workers' Compensation Act; General Statutes § 31-275 et seq.; in 1993 when the legislature enacted Public Acts 1993, No. 93-228. Prior to the addition of the exclusion contained in § 31-275 (16) (B) (i), ''unless the injured worker was required to attend recreational or social activities as part of the job, it was necessary to determine to what extent the activity was for the benefit of, or in the interest of, the employer. Previously, as a general rule, if it was determined that the activity was required of the injured worker, was regularly engaged in on the employer's premises, was within the period of employment and was with the employer's approval or acquiescence, then the injury occurring under those conditions was found to be compensable.

''[Section] 31-275 (16) (B) (i) . . . now disallow[s] injuries received through *voluntary* participation in activities that are mostly social or recreational. The disallowance includes injuries received at athletic events, parties, and picnics, even if the employer pays part or all of the cost of the activity.'' (Emphasis in original.) A. Sevarino, Connecticut Workers' Compensation After Reforms (3d Ed. 2005) § 4.23, pp. 649–50. In other words, when an injury results from ''voluntary participation'' in a ''social or recreational'' activity, it should be disallowed pursuant to § 31-275 (16) (B) (i), regardless of whether the employer received a benefit.

The commissioner's decision made no reference whatsoever to the statute. Instead, he framed his conclusion in terms of whether the plaintiff's injury ''arose out of and in the course of employment.'' On the basis of the finding that the plaintiff ''felt he had to agree to play with his employers and that if he refused, [his supervisor] and his employers would not look favorably upon him as an employee,'' the commissioner concluded that ''playing basketball with his employers that day was part of his employment.'' The commissioner made no findings or conclusions on the issue of whether the plaintiff's injury resulted ''from his voluntary participation in any activity the major purpose of which is social or recreational . . . .'' General Statutes § 31-275 (16) (B) (i).

The board, in contrast, properly applied the statutory exclusion to the definition of ''personal injury'' that is contained in § 31-275 (16) (B) (i) and sought to ''determine whether there [was] sufficient evidence in the record to support a finding that the plaintiff's participation in the basketball game . . . was not voluntary, and/or that the major purpose of the game was not recreational or social.'' I find no reason to conclude that the board did ''ignore the evidence'' or ''substitute its judgment'' for that of the commissioner. Rather, the board gave appropriate deference to the commissioner's findings and properly construed the evidence in favor of the plaintiff. The board's actions were appro-

priate in light of its well established responsibility to review decisions made by compensation commissioners. See General Statutes § 31-280b.

"The commissioner is the sole trier of fact and [t]he conclusions drawn by [the commissioner] 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. . . . The review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is any evidence in the record to support the commissioner's finding and award. . . . [T]he board is precluded from substituting its judgment for that of the commissioner with respect to factual determinations." (Citations omitted; internal quotation marks omitted.) *Brown* v. *Dept. of Correction*, supra, 89 Conn. App. 53.

The board searched the record before the commissioner for evidence that supported the commissioner's conclusion. In searching the record, the board located evidence that supported the commissioner's findings and evidence that the commissioner failed to include in his findings, namely, that one of the plaintiff's employers acknowledged that the idea of a basketball game was inspired in part by an intent to boost company morale and foster employee loyalty, and the fact that the plaintiff's teammate was not only a coworker and his future brother-in-law, but the plaintiff's supervisor as well. The board found no evidence in the record on the issue of whether the game was not voluntary other than the employers' *request* that the plaintiff participate in the game. The board considered all the evidence and concluded that it was not sufficient because the principal *connecting link* between the game and the plaintiff's employment was the plaintiff's subjective *feeling* that he had to play.

The board established a standard or rule, which the majority considers "too strict," namely, that the plaintiff must produce *some* evidence beyond his own *subjective feeling*. As the board stated: "What is missing . . . is any concrete act or statement *by the employer* that would have led a reasonable person to think that there would be negative employment related consequences if the [plaintiff declined his employers' proposal to participate in the game]. In order for an employer to be held liable for an injury that arises out of an activity that is normally understood to be recreational or social, the employer must do more than propose the recreational event with an awareness that it might benefit employee morale. The employer must somehow acknowledge its own subjective intent or understanding that participation in said event is connected with one's employment duties in some way. This does not neces-

sarily require a specific statement by the employer, but the employer must have created in some manner an atmosphere whereby it was known by employees that the employer would prefer their participation in that recreational or social event, and that they would be viewed more favorably as a result. It is not enough that a claimant's subjective perception of a situation leads him to conclude that it is necessary for him to participate in such an activity. . . . There must be a direct tie-in between one's employment duties or status and one's attendance at the activity. Without this element of additional proof, a claimant cannot be said to have met his burden of establishing an exception to § 31-275 (16) (B) (i). As no such proof was offered here, we hold that the statutory exclusion to the definition of 'personal injury' for voluntary participation in social and recreational events must apply to the instant case.'' (Citation omitted.)

In my view, the board used an appropriate standard and gave appropriate deference to the commissioner's findings. Although the ''conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts''; *Brown* v. *Dept. of Correction*, supra, 89 Conn. App. 53; in this case, the board acted properly in applying § 31-275 (16) (B) (i) after the commissioner had failed to do so, in concluding that there were insufficient facts in the record to support a finding that the plaintiff's participation in the basketball game was not voluntary and in determining that the major purpose of the game was not recreational or social. The board properly concluded that, in view of all the evidence produced, the social and recreational exclusion contained in § 31-275 (16) (B) (i) applied to bar compensability.

The majority, like the commissioner, does not address whether the plaintiff met the burden of establishing that his participation in the basketball game was *not voluntary* and that the major purpose of the game was *not social or recreational*. Instead, the majority's analysis focuses on whether the accident giving rise to the plaintiff's 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*.'' (Emphasis in original; internal quotation marks omitted.) Id., 52.

As guidance, the majority relies on language from cases that articulate the ''benefit test'' that has been applied to determine whether the employee was ''doing something incidental to'' his or her employment when he or she was injured. Under the test, when 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 . . . .'' *Smith* v. *Seamless Rubber Co.*,

111 Conn. 365, 368–69, 150 A. 110 (1930).

Although I agree that the benefit test is still applicable to activities not within the purview of § 31-275 (16) (B) (i), my view is that when an employee is injured while voluntarily participating in an activity, the major purpose of which is social or recreational, the statute bars compensation, regardless of whether the activity was incidental to the employment.[3] In other words, the threshold inquiry is whether there is a ''personal injury'' or ''injury'' as those terms are defined by § 31-275 (16) (B) (i). There is no need to resort to the ''benefit test'' to determine whether the injury occurred during an activity that was incidental to the employment when the activity is a voluntary social or recreational activity that is enumerated in § 31-275 (16) (B) (i).[4] Injuries occurring during these types of activities are excluded from the definition of ''personal injury'' and are therefore noncompensable under the Workers' Compensation Act.

The board appropriately applied the statutory exclusion that is contained in § 31-275 (16) (B) (i) to the definition of ''personal injury'' in § 31-275 (A) and properly concluded that there was insufficient evidence in the record to support a finding that the plaintiff's participation in the basketball game was not voluntary and that the major purpose of the game was not recreational or social.[5] Accordingly, I respectfully disagree with the reversal of the board's decision and would, instead, affirm the decision.

[1] In *Biasetti* v. *Stamford*, 250 Conn. 65, 735 A.2d 321 (1999), our Supreme Court held that the plaintiff's injury was not compensable because it failed to satisfy the requirement of General Statutes § 31-275 (16) (B) (ii) that a mental disorder be caused by a physical injury or occupational disease to be compensable.

[2] General Statutes § 31-275 (16) (A) provides that '' '[p]ersonal injury' or 'injury' includes, in addition to accidental injury which may be definitely located as to the time when and the place where the accident occurred, an injury to an employee which is causally connected with this employment and is the direct result of repetitive trauma or repetitive acts incident to such employment, and occupational disease.''

[3] In *Smith* v. *Seamless Rubber Co.*, supra, 111 Conn. 365, the defendant employer offered a voluntary vaccination program to employees and families. The plaintiff availed herself of the vaccination and, as a result, contracted an infection. Our Supreme Court affirmed the conclusion of the commissioner that the plaintiff's injury was not compensable because the plaintiff, in choosing to be vaccinated, was not fulfilling any duty of her employment or doing any act incidental to it. Although vaccination programs undoubtedly have worthwhile purposes, it cannot be said that the major purpose of a vaccination program is social or recreational. Accordingly, General Statutes § 31-275 (16) (B) (i) would not bar compensation of an injury that occurred from a vaccination and the benefit test would therefore be appropriate.

[4] See *Antignani* v. *Britt Airways, Inc.*, 58 Conn. App. 109, 117 n.8, 753 A.2d 366 (recognizing that with enactment of General Statutes § 31-275 [16] [B] [i], legislature amended Workers' Compensation Act to preclude injuries that result from voluntary participation in social or recreational activity, but stating that ''*excluding those activities enumerated* in § 31-275 [16] [B] [i], the benefit test can be applied'' [emphasis added]), cert. denied, 254 Conn. 911, 759 A.2d 504 (2000).

[5] See also *Sendra* v. *Board of Education*, No. 03961, CRB-06-99-01 (January 20, 2000) (injury suffered by teacher while riding mountain bike during school sponsored activity not compensable due to exclusionary language

of General Statutes § 31-275 [16] [B] [i]); cf. *O'Day* v. *New Britain General Hospital*, No. 03580, CRB-06-97-04 (June 5, 1998) (injury suffered while returning from birthday luncheon for coworker not barred by § 31-275 [16] [B] [i] because participation not voluntary in that supervisor required attendance at luncheon, employee's job evaluation included comments regarding participation in such activities and major purpose of luncheons not social or recreational in that they were planned during weekly meetings and consisted primarily of work-related discussions).