Written by Melaney Moisan {SAIF communications coordinator} | Illustrations by Anna Magruder {Portland}

(h)Oops!

Is an injury received during a round of lunch-hour basketball compensable?

While playing basketball at work, a man falls and injures his leg. He files a workers' compensation claim, but it is denied. Another man, at a different workplace, is also injured while shooting hoops at work, but his claim is considered compensable. On the surface, these cases look similar, but the outcome is different.

As with many workers' compensation cases, the outcome is in the details. That's why it is so difficult to answer the question many employers are asking today: If I sponsor a fitness program at work and an employee is injured, will it be covered by workers' compensation? Our answer: It depends.

First case

An employer put up a hoop and provided the basketball, wanting to give employees the opportunity to play games on their breaks and lunch periods. His intent was to increase employee morale. On the day the employee was injured, he was playing during his unpaid lunch break. He enjoyed playing and frequently played on his breaks, both paid and unpaid. The supervisor often joined in the games, sometimes encouraging other employees to play, but just as another one of the players, not in his supervisory capacity. The injured worker was not required to play basketball as part of his job.

Second case

The man who was injured did not play basketball for his personal pleasure. As a field customer service representative, he had just returned to the workplace, intending to do paperwork and pick up assignments for the afternoon. He was in a hurry and did not plan to take a break. While on the way to the office, his supervisor asked him to shoot hoops on the basketball court. The worker declined, saying that he wanted to keep working. Again the supervisor asked him to play, so he agreed because it was his boss who was asking. He didn't enjoy playing basketball and felt he was terrible at it. Although the supervisor did not force him to play, he felt compelled because his boss was asking.

The decision

The Workers' Compensation Board found that the first injured worker was playing primarily for his own personal pleasure, and ORS 656.005 (7)(b)(B) excludes injuries incurred while engaging in recreational or social activities primarily for the worker's personal pleasure. The recreational activity was not closely related to the job, and the benefits to the employer—improved employee morale and energy—were merely incidental. For those reasons, the claim was noncompensable. Michael W. Hardenbrook, 44 Van Natta 529 (1992), affirmed without opinion, Hardenbrook v. Liberty Northwest Insurance Corp., 117 Or App 543 (1992).

However, the board found that the second employee did not play primarily for his personal pleasure. Instead the board found that he felt compelled to play and ORS 656.005 (7)(b)(B) did not apply. The board concluded that the injury was compensable. Karson Gard, 58 Van Natta 1121 (2006).

It all depends

As with any other workers' compensation claim, the outcome depends on the specific facts of each case. To minimize the chance for a claim, make it clear to employees that participation in a wellness program is optional and voluntary. Having employees sign a traditional liability waiver would not be effective, although having employees sign something that says they understand participation is completely voluntary and for their own enjoyment might be.

> **"As with many workers' compensation cases, the outcome is in the details."**

It is important to remember that this case law only addresses workers' compensation. Other issues of liability may come up as well, and you may wish to speak to an attorney before starting such a program at work. If you do not have an attorney, the Oregon State Bar provides a referral service to help you find someone. You can contact the lawyer referral service at 503.684.3763 or 800.452.7636. You can also visit their website at **orbar.org > Public > Lawyer Referral Service Info**. The Bureau of Labor and Industries also maintains a free information line to answer employment law questions. Contact them at 971.673.0824. CN