IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 00764
September Term, 2001

MONTGOMERY COUNTY, MARYLAND,

Appellant

v.

GEORGE R. SMITH,

Appellee

On Appeal from the Circuit Court for Montgomery County, Maryland
(Hon. Martha G. Kavanaugh, Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

George R. Smith submitted a claim for workers' compensation benefits after injuring himself playing basketball on County property after completing his shift as a correctional officer at the Montgomery County Detention Center. The Workers' Compensation Commission (Commission) determined that Mr. Smith had sustained a compensable accidental injury. (E. 22) The County filed an appeal to the Circuit Court for Montgomery County. (E. 1-2)

Mr. Smith filed a motion for summary judgment. (E. 5-38) The County filed a cross-motion for summary judgment, asserting that no dispute of a material fact existed and that Mr. Smith had not sustained an occupational injury as a matter of law. (E. 41-57) The Circuit Court granted Mr. Smith's motion and sustained the Commission's finding. (E. 84) The County timely appealed to this Court.

QUESTION PRESENTED

Can an off-duty injury unrelated to his job be considered a compensable accidental injury arising out of and in the course of Mr. Smith's employment?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to the County's brief.

STATEMENT OF THE FACTS

George Smith is a correctional officer at the Montgomery County Detention Center. (E. 29, ¶1) The Detention Center maintains a gymnasium, primarily for use by the inmates. Correctional officers, however, are permitted to use the facility after working hours when no inmates are present. (E. 56, ¶ 4) Officers are not permitted to use the gymnasium while on duty, which includes during lunch hours and breaks. (E. 56, ¶ 6) On February 3, 2000, after completing his shift for the day, Mr. Smith played basketball in the Detention Center's gymnasium and injured both knees. (E. 29, ¶ 2) Mr. Smith filed a claim with the Workers' Compensation Commission alleging he sustained an accidental injury. (E. 20)

ARGUMENT

Mr. Smith did not establish that his injury, suffered while playing basketball on County property, is an accidental injury arising out of and in the course of his employment.

It is undisputed that Mr. Smith sustained an injury while on County property. But that fact alone does not make his injury compensable under the workers' compensation laws.

To be entitled to workers' compensation, Mr. Smith's injury must have arisen "out of and in the course of employment." Md. Code Ann., Lab. & Empl. § 9-101(b)(1). "The words 'out of' and 'in the course of' employment as used in the [Workers'] Compensation Act are not synonymous, and both must be satisfied by the claimant to bring the case within the operation of the Act." *Pariser Bakery v. Koontz*, 239 Md. 586, 590, 212 A.2d 324, 326 (1965). The phrase "out of" refers "to the cause or origin of the accident, while the phrase 'in the course of' refers to the time, place and circumstances under which it occurs." *Coates v. J.M. Bucheimer Company*, 242 Md. 198, 201, 218 A.2d 191, 193 (1966). Because the evidence in the record does not establish that the injury arose out of and in the course of employment, the Circuit Court erred in sustaining the Commission's decision.

Mr. Smith's injury did not arise out of his employment.

An injury "arises out of" employment when it "results from some obligation, condition or incident of the employment, under the circumstances of the particular case." *Department of Correction v. Harris*, 232 Md. 180, 184, 192 A.2d 479, 481 (1963). Simply stated, an injury "arises out of" the employment when the employee is injured performing normal job duties incidental to the employment. There must

be a causal connection between the job duties and the resulting injury. *Blake Construction Company v. Wells*, 245 Md. 282, 288, 225 A.2d 857, 862 (1967). Here, Mr. Smith was not performing any function incidental to his employment as a correctional officer while engaging in a recreational game of basketball, and was clearly not on duty at the time of the accident. His injury did not, therefore, arise out of his employment within the meaning of the Act.

An injury also "arises out of" employment when there exists a "causal connection between the conditions under which the work is required to be performed and the resulting injury." *Mulready v. University Research Corporation*, 360 Md. 51, 55, 756 A.2d 575, 577 (2000) (quoting *Weston-Dodson Company v. Carl*, 156 Md. 535, 538, 144 A. 708, 709 (1929)). In *Mulready*, an employee injured herself when she fell in a bathtub in her hotel room while attending a business conference. In finding that the employee had sustained a compensable injury under the Act, the Court of Appeals stated that since a "traveling employee's eating and bathing are reasonably incidental to the travel required by the employer, injuries resulting from these activities are compensable." 360 Md. at 66, 756 A.2d at 583. But unlike the restrictions imposed on the traveling employee in *Mulready*, who could not return home at the end of normal

business hours and had no choice but to stay in a hotel, the County neither required Mr. Smith to remain at the Detention Center, nor prevented him from going home. Mr. Smith had finished his shift, was off-duty, free to leave the employer's premises, and injured himself while freely and voluntarily engaging in an activity not incidental to his employment. There was no causal connection to support a finding that the injury "arose out of" Mr. Smith's employment.

An employee may also recover under the workers' compensation law if injured on the employer's property while performing a personal activity similar to that which he normally performs for the employer. In *Austin v. Thrifty Diversified, Inc.*, 76 Md. App. 150, 543 A.2d 889 (1988), a welder was electrocuted while using company equipment on company premises for a personal project after hours with the employer's permission. This Court found that the worker's injury arose out of his employment because the activity causing the death was the same as that which he encountered in his employment. *Id*. at 159, 543 A.2d at 894. In other words, "the instrumentality of the death, the place where it happened, and the activity giving rise to it were the same as those encountered in his employment." *Id*.

The trial court in this case relied on the fact that Mr. Smith played basketball after hours with the consent and knowledge of the County. (E. 84) Applying the factors set out in *Austin,* however, consent and knowledge standing by themselves are not sufficient. The activity must be the same as that encountered by Mr. Smith in his employment. There is no dispute that Mr. Smith does not use basketballs while performing his job as a correctional officer, and that playing basketball is not the same type of "hazard" that he is exposed to while performing his job functions. Under *Austin*, therefore, Mr. Smith's injury did not arise out of his employment. The Circuit Court erred in ruling otherwise.

Mr. Smith's injury did not occur "in the course of" his employment.

This Court in *Austin* considered the nature of the activity in determining whether an injury occurred in the course of employment:

> Whether the injury occurred in the "course of employment" involves an analysis of whether the activity out of which the injury arose had a purpose related to the employment . . . Thus, "an injury arises 'in the course of employment' when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incident thereto."

76 Md. App. at 157, 543 A.2d at 898 (quoting *Watson v. Grimm,* 200 Md. 461, 466, 90 A.2d 180, 183 (1952)). If Mr. Smith's injury had occurred while he was securing a prisoner or performing a cell-check, the injury clearly would have arisen in the course of his employment. But in addition to the fact that Mr. Smith was off-duty at the time of his injury, his job does not include playing basketball. Therefore, Mr. Smith's employment as a correctional officer did not expose him to the risk of injury while playing basketball. Rather, Mr. Smith's conscious decision to play basketball as a recreational activity on his own time exposed him to this risk. This activity would have exposed Mr. Smith to the same danger of injury regardless of whether the game was played on the County's premises or in a health club gymnasium a mile away.

There are three factors that this Court must consider in determining whether a recreational activity is within the course of employment: (1) Did the activity "occur on the premises during a lunch or recreation period as a regular incident of the employment;" (2) Did the employer bring the activity within the orbit of the employment by expressly or impliedly requiring participation; or (3) Did the employer derive "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." *Sica v. Retail Credit Company*, 245 Md. 606, 613, 227 A.2d 33, 37 (1967). The Court of Appeals has cautioned, however, that the presence or absence of any *one* factor is not determinative of this issue, but that each case must examine these factors and weigh the significance of them in relation to the whole. *Id.* at 614-15, 227 A.2d at 37-38. Examining those factors, the Court held in *Sica* that an employee injured while swimming at an annual company picnic sustained an injury arising out of and in the course of his employment. In *Sica*, the company made attendance at the annual picnic an express term of employment, encouraged and authorized the formation of a picnic committee and its activities, paid the expenses, advertised the picnic, and urged its employees to attend. Had the Circuit Court in this case properly examined and weighed the *Sica* factors, it would not have upheld the Commission.

The first factor requires that the injury occur on the employer's premises during the employee's normal business hours, which includes time allotted for lunch and/or break periods. Playing basketball while off-duty fails to meet this test. While Mr. Smith's injury occurred on the County's premises, it did not occur during a lunch or recreation period. In fact, the County forbids correctional

officers from using the gymnasium during lunch or break periods. (E. 56, ¶ 6) Further, Mr. Smith did not dispute that he played basketball after he was off-duty, or that he understood the County's policy against playing basketball while on duty.

The second factor discussed in *Sica*, that the employer expressly or impliedly required participation in the activity, also is not present. Although Mr. Smith asserted that he played basketball to maintain the high level of physical fitness required of a correctional officer (E. 29, ¶ 3), he pointed to nothing that required him to do so. The County neither promotes nor discourages correctional officers' participation in physical fitness activities. (E. 56, ¶ 9) And while correctional officers undergo initial and periodic physical examinations, the County does not subject them to mandatory physical fitness tests or evaluate officers' physical ability after the initial hiring. (E. 56, ¶ 8) Mr. Smith pointed out that supervisors periodically played basketball in the gymnasium, but failed to provide any evidence that supervisors expressly or impliedly required participation by subordinates, or were themselves required to participate. The employees initiated playing basketball as a purely recreational activity for their own pleasure and enjoyment and not because of any

requirement incidental to their employment. Additionally, no one at the Detention Center monitored or supervised the activities of correctional officers in the gymnasium, further evidence that such participation was not required. (E. 56, ¶ 5)

The third factor under *Sica* requires a showing that the employer derives a **substantial** 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." 245 Md. at 613, 227 A.2d at 37 (emphasis added). Without any supporting evidence in the record, the circuit court found that the County benefitted by having extra correctional officers nearby. But Mr. Smith presented no facts that the County benefitted from having the officers nearby. He provided no evidence that he or any correctional officer had ever been called to duty while playing basketball at the Detention Center. Mr. Smith merely made bald allegations in his reply memorandum that correctional officers are on call twenty-four hours a day and *could* have been called to duty. But he submitted no affidavit testimony, departmental directive, or other evidence to support these allegations. Further, *Sica* requires that the benefit be **substantial** not merely incidental. Mr. Smith asserted that the County benefitted

by having more fit employees. But this benefit is common to any recreational activity in which employees may engage and is not "substantial." *Compare Turner v. State, Office of Public Defender*, 61 Md. App. 393, 405, 486 A.2d 804, 810 (1985) (no evidence that employer received any benefit from off-duty softball game other than that which is ordinarily incidental to recreational activities).

Mr. Smith also asserted that he was training to meet the fitness standards to become a member of the Detention Center's Emergency Response Team. But, again, he presented nothing more than bald statements to support this assertion. Mr. Smith presented no evidence that he was training to meet these standards, relying solely on a memorandum informing officers of a test for the team scheduled **one year** before his accident. (E. 66) Further, the test focused on push-ups, sit-ups and a one and a half mile run not the same activities occurring in a basketball game.

Moreover, participation on the Emergency Response Team is voluntary. The County does not require that its correctional officers participate in any type of physical fitness regime, nor engage in any type of physical fitness tests after becoming employed. And because there are no specific physical fitness requirements for correctional

officers, there are no benefits inuring to the County beyond those normally incident to recreational activities.

This case is distinguishable from *Mack Trucks, Inc. v. Miller*, 23 Md. App. 271, 326 A.2d 186 (1974), *aff'd*, 275 Md. 192, 339 A.2d 71 (1975), where this Court ruled in favor of an employee injured while playing touch football during a coffee break on his employer's property, finding that his injury was compensable under the Act. In *Mack Trucks*, the company made available a grass plot for employees to play touch football. This Court relied on *Sica*, where the Court of Appeals noted that "[t]he modern institution of the 'coffee break' benefits the employer, in maintaining the employees' morale . . . [t]here can be little question but that an accident sustained during such an interval on the portion of the employer's premises set aside for that activity arises out of the employment." *Id*. at 612, 227 A.2d at 36. Thus, this Court was willing to find an injury compensable under the Act, even if the activities were outside of the typical work duties, as long as the injury occurred during the employee's normal working hours. In this case, since the County did not permit correctional officers to use the gymnasium and play basketball either while on duty or during any of their breaks, Mr. Smith's injury did not arise out of and in the course of employment

within the clear and unambiguous meaning of the Act and existing case law.

Courts in other jurisdictions have refused to find that injuries suffered while playing basketball off-duty arose out of the employment unless the activity was clearly a part of the employment. In *Mullins v. Westmoreland Coal Company*, 391 S.E.2d 609 (Va. App. 1990), the Court of Appeals of Virginia upheld the denial of workers' compensation benefits to an employee who broke his ankle while playing basketball on the employer's premises before work. The Court held that "an injury sustained as a result of a recreational activity arises out of employment only when the activity is an accepted and normal activity within the employment" and that playing "basketball was not an accepted and normal activity at the place of employment." *Id*. at 611. Similarly in *Ward v. Mid-South Home Service*, 769 S.W.2d 486 (Tenn. 1989), the Supreme Court of Tennessee found that an injury sustained by a home construction employee while playing basketball at a customer's home did not arise out of and was not incident to his regular employment.

The result is different, however, if the employer promotes the use of its facilities for basketball or other recreational activities. In *Baker v. Sentry Group*, 703 N.Y.S.2d 299 (N.Y. App. Div. 2000), the Court held that an

employee's off-duty injury, sustained while playing basketball on his employer's premises, arose out of and in the course of his employment where the employer provided a gymnasium, employed a coordinator who managed the facility and the employer's programs, distributed flyers that promoted use of the gym and offered incentives for using the gym.[1] None of those factors are present in this case since the County provided the gymnasium primarily for the use of inmates, did not employ anyone to manage the activities of correctional officers in the gym and did not promote the use of the gym through advertisements or incentives.

The trial court in this case improperly relied on the fact that the County permitted correctional officers to play basketball after hours and did not refer to any facts in the record to support its finding that the County derived a benefit from the officers' being nearby in the gymnasium because there were none. The trial court, therefore, erred in upholding the Commission's decision in favor of Mr. Smith, and this Court should reverse that ruling and order the entry of judgment in the County's favor as a matter of law.

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[1]N.Y. Workers' Comp. Law § 10(1) precludes workers' compensation benefits for voluntary athletic activities unless one of three conditions is met. One condition is when the employer sponsored the activity, which the Court found in this case.

CONCLUSION

Mr. Smith did not show any evidence that he sustained a compensable injury arising out of and in the course of his employment. Having failed to prove the statutory requirements for compensation, the trial court's decision should be reversed and judgment entered for the County as a matter of law.

Respectfully submitted,

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This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size in accordance with Md. Rule 8-504(a)(8).

APPENDIX

Excerpts from the Maryland Annotated Code (1999):

Lab. & Empl. § 9-101(b). Definitions.

* * *

(b) Accidental personal injury. - "Accidental personal injury" means:

(1) an accidental injury that arises out of and in the course of employment;

(2) an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee; or

(3) a disease or infection that naturally results from an accidental injury that arises out of and in the course of employment, including:

(i) an occupational disease; and

(ii) frostbite or sunstroke caused by a weather condition.

* * *

Lab. & Empl. § 9-501. Accidental personal injury.

(a) In general.- Except as otherwise provided, each employer of a covered employee shall provide compensation in accordance with this title to:

(1) the covered employee for an accidental personal injury sustained by the covered employee;

* * *