STATE OF MICHIGAN

COURT OF APPEALS

DANIEL ROSS,

Plaintiff-Appellant,

v

J.E.M. CARPENTRY & BUILDING, INC. and ACCIDENT FUND OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
March 10, 1998

No. 208483
WCAC
LC No. 90-266

ON REMAND

Before: M. J. Kelly, P.J., and McDonald and Griffin, JJ.

PER CURIAM.

Pursuant to the Supreme Court's order of remand, *Ross v JEM Carpentry & Building, Inc*, 456 Mich 890 (1997), for reconsideration in light of *Goff v Bil-Mar Foods, Inc (Dudley v Morrison Industrial Equipment Co) (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), we revisit the issue whether the Worker's Compensation Appellate Commission erred when it reversed the decision of the magistrate and denied plaintiff's petition for benefits on grounds that his injuries did not arise out of and in the course of his employment.

As we previously noted in our unpublished opinion of May 5, 1995 (Docket No. 175555), the magistrate ruled for plaintiff based on a finding that personal hygiene at the end of a work shift was part of plaintiff's normal routine as a carpenter. The WCAC reversed, noting that the only evidence on this point was plaintiff's own testimony, which in context asserted only that the cleaning up of plaintiff's work station, putting away tools and securing projects in progress, rather than bathing, was within the scope of plaintiff's employment. Finding the WCAC's factual determination that bathing was outside the scope of plaintiff's employment, and thus that plaintiff's injury and resultant disability from jumping in the lake to bathe was not compensable as an injury "arising out of and in the course of employment," MCL 418.301(1); MSA 17.237(301)(1), was supported by the requisite scintilla of evidence, Const 1963, art 6, §28; MCL 418.861; MSA 17.237(861), we concluded that benefits were properly denied, as the injury was the product of recreational activity. MCL 418.301(3); MSA 17.237(301)(3); *Clark v Chrysler Corp*, 276 Mich 24; 267 NW 589 (1936); *Luteran v Ford Motor Co*, 313 Mich 487; 21 NW2d 825 (1946).

In *Goff, supra*, the Supreme Court clarified its prior decision in *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992) with respect to the standard of appellate review of a factual ruling by the WCAC. A WCAC finding overruling a magistrate is accorded the constitutionally-requisite deference when supported by any competent evidence in the record if it in turn reflects deference for the magistrate's initial determination and is limited to a review of the magistrate's action for competent, material, and substantial evidence on the whole record. *Goff, supra* at 516-517.

Having reconsidered the WCAC ruling in the present case in light of this refined appellate review standard, we again affirm. The magistrate's finding that post-work shift personal hygiene was within the scope of plaintiff's employment so that his injuries arose out of and in the course of that employment was not based on any competent evidence at all, but a misunderstanding or misconstruction of the actual evidence on point. The WCAC, in rejecting that finding by the magistrate, properly determined, after respectful examination of the entire record, that the magistrate's decision was not supported by competent, material, and substantial evidence on the whole record. *Goff, supra* at 526-528.

Accordingly, our review is therefore limited to determining whether the findings of the WCAC are supported by any competent evidence on the whole record. We conclude that those findings are so supported, *York v Wayne Co Sheriff's Dep't*, 219 Mich App 370; 556 NW2d 882 (1996) (*approved Goff, supra* at 528, n 16), *on remand*, 22_ Mich App ___; ___ NW2d ___ (Docket No. 208484, issued 1/23/98); *Van Deusen v Tri-County Distributing, Inc*, 22_ Mich App ___; ___ NW2d ___ (Docket No. 184511, issued 1/27/98).

Ordinarily, having reached this conclusion we would again perceive no need to address the issue of whether plaintiff's chosen manner of bathing might in any event preclude an award of benefits. However, the Supreme Court's order of remand mandates that we "consider the applicability of the 'overnight exclusion' doctrine discussed by the magistrate and the Workers' Compensation Appellate Commission."

Initially, we note that we assume the Supreme Court intended us to focus on the "overnight *excursion*" doctrine, which was discussed in the opinions of the magistrate and the WCAC. We further assume the word "exclusion" in the Court's order is a typographical error.

The WCAC and magistrate disagreed on the contours of the "overnight excursion" doctrine. However, both appear to recognize that, where an employee is forced to remain at or near the job site overnight by the circumstances of some task that itself is within the course and scope of employment, such as plaintiff's visit to Harsen's Island to perform carpentry work, the hazards of such a sojourn may remain part of the employer's risk under the WDCA. We agree with that formulation of the doctrine, which is merely a corollary to the "special purpose" *LeVasseur v Allen Electric Co*, 338 Mich 121; 61 NW2d 93 (1953) and "dual purpose" *Burchett v Delton-Kellogg Schools*, 378 Mich 231; 144 NW2d 337 (1966) doctrines. When an employee must, in conjunction with the employer's business, spend a night away from home, the incidental activities of eating and sleeping while at the remote location are generally within the course and scope of employment. Accordingly, injuries incurred in connection with such necessary but

ancillary activities are compensable. *Concrete Cutting & Breaking v Auto Owners Ins Co*, 224 Mich App 221; 568 NW2d 387 (1997), citing 2 Larson, *Workers' Compensation Law* § 25.00, p. 5-275. However, MCL 418.301(3); MSA 17.237(301)(3) limits the employer's liability and precludes benefits if the major purpose of the activity in which the employee is engaged at the time of the injury is social or recreational. *Nock v M & G Convoy*, 204 Mich App 116, 120-121; 514 NW2d 200 (1994). Here, the WCAC found that plaintiff was engaged in a predominantly social or recreational activity when he was injured because there were indoor plumbing facilities available for bathing. The WCAC's finding is supported by competent evidence on the record. Accordingly, plaintiff's injuries are not compensable. *Id.*

If the activity in which plaintiff was engaged at the time of his injury did not have a dominant recreational aspect, we would be required to address the conflict between the magistrate and the WCAC over whether the inherent or obvious dangerousness or unreasonableness of plaintiff's decision to dive into the lake would otherwise disqualify him from eligibility for benefits. In light of our decision, we need not address this issue. However, we note that Professor Larson advocates a test under which the injury would be compensable, given the magistrate's finding of fact that jumping in the lake (assuming *arguendo* this includes diving) was the usual means by which employees of defendant spending the night on Harsen's Island bathed. 2 Larson, *supra*, § 21.84(d). Also worth remarking is that Larson's proposed test appears on its face substantially more generous than Michigan jurisprudence would otherwise justify; the Michigan Supreme Court has allowed as how the increase in risk of injury may be material to a determination of compensability. *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 454, 457 (quoting 1 *Larson, supra*, §19.29); 320 NW2d 858 (1982). Where, as here, the activity is merely incidental to the employment, Larson acknowledges that many jurisdictions deny benefits if the chosen method is unusual or unreasonable. 2 *Larson, supra*., §§ 21.80, 30.21. Given that Michigan workers' compensation jurisprudence already disqualifies from the scope of compensability injuries attributable to egregious misconduct, *Crilly v Ballou*, 353 Mich 303; 91 NW2d 493 (1958), this narrower formulation of the rule for imposing liability seems more consonant with the legislative intent underlying the WDCA. These, however, are questions for another day.

Affirmed.

/s/ Michael J. Kelly
/s/ Gary R. McDonald
/s/ Richard Allen Griffin