

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-007

**VALERY CHARLES,
Claimant-Petitioner,**

v.

**APPLE HOSPITALITY, LLC and TRAVELERS INSURANCE Co.,
Employer/Insurer-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2013 JUL 24 PM 12 43

Appeal from a December 13, 2012 Compensation Order By
Administrative Law Judge Gerald D. Roberson
AHD No. 12-394, OWC No. 688990

David M. Snyder, Esquire for the Petitioner
Amy L. Epstein, Esquire for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In November 2011, Mr. Valery Charles worked for Apple Hospitality, LLC (“Apple Hospitality”) as a line cook in the Lincoln Restaurant. On November 19, 2011, while Mr. Charles was participating in a flag football game with his co-workers, he injured his left knee.

During his recovery, Mr. Charles was unable to work, and he filed a claim for wage loss benefits and medical benefits. Following a formal hearing, an administrative law judge (“ALJ”) denied Mr. Charles’ claim because his injury did not arise out of and in the course of his employment.

On appeal, Mr. Charles concludes he is entitled to temporary total disability benefits because he sustained an accidental injury that arose out of and in the course of employment. He does not dispute the ALJ’s ruling that he sustained an accidental injury; he argues that the positional risk test applies to bring the flag football game within the scope of his employment. Mr. Charles also argues Apple Hospitality brought the flag football game within the orbit of employment and

derived substantial direct benefit from the game. For these reasons, Mr. Charles asserts he has sustained a compensable injury that entitles him to temporary total disability benefits and medical benefits, and he requests the Compensation Review Board (“CRB”) reverse the December 13, 2012 Compensation Order.

In opposition, Apple Hospitality contends Mr. Charles failed to satisfy the elements necessary to prove the flag football game qualifies as an event within the scope of his employment because the event “was in no way part of the services offered by [Apple Hospitality.]”¹ Thus, because the Compensation Order is supported by substantial evidence and in accordance with the law, Apple Hospitality requests the CRB affirm it.

ISSUES ON APPEAL

1. Does the positional risk test bring Mr. Charles’ injury with the scope of his employment?
2. Was the flag football game that resulted in Mr. Charles’ injury a social event within the scope of his employment?
3. Is Mr. Charles entitled to workers’ compensation benefits for his injury?
4. Is the December 13, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS²

The focus of this appeal is not the Capital Food Fight or the Taste of D.C; the focus of this appeal is a flag football game that took place on November 19, 2011. Importantly, the positional risk test only applies to neutral risks; when the positional risk test applies, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of employment placed the claimant in the position where he was injured.³ Thus, as explained below, because the conditions and obligations of Mr. Charles’ employment did not place him in the position where he was injured, there is no error in the ALJ’s ruling that the positional risk test does not render Mr. Charles’ injury compensable; however, because Mr.

¹ Memorandum of Points and Authorities in Support of Opposition to Claimant’s Application for Review, p. 7.

² The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code §32-1501 to 32-1545. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

³ *Grayson v. DOES*, 516 A.2d 909, 911 (D.C. 1986) quoting Larson’s *The Law of Workmen’s Compensation* §6.50 (1984).

Charles was injured during a flag football game, further analysis is required regarding the compensability of a social event.

An activity is related to employment if it carries out the employer's purposes or advances its interests directly or indirectly, and in cases where an employee is injured at a social or recreational activity, there are special rules to determine whether the injury arose out of and in the course of the employment. Recreational or social activities are within the course of the employment when:

- (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
- (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
- (3) The employer derives 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.^[4]

Importantly, although some jurisdictions require proof of every prong in order to establish an employment connection, the rule in the District of Columbia is that there are three independent links by which recreation can be tied to employment. Thus, if one prong is proven, the absence of the others is not fatal.⁵

Both parties concede that Mr. Charles sustained an accidental injury and that the first prong has not been satisfied.⁶

Regarding the second prong, Mr. Charles asserts he

felt encouraged and obligated, in some sense, to participate in the game. He had even spoken to the Executive Chef, Dimitrio Zavala about it, and felt that Mr. Zavala had encouraged his participation in the event (HT at 79). Further, Ms. Kim, the owner-ordained Events Coordinator of the Employer, was present at the game and taking pictures which would later be used as part of the Employer's marketing efforts. All of the participants, save for one, were employees of The

⁴ Larson's *Workers' Compensation Law* §22.01; *Simmons v. Douglas Development, Corp.*, Dir. Dkt No. 03-23, OHA No. 02-378, OWC No. 575642 (June 4, 2003) ("In addition to the general rule of applicability of the presumption of compensability discussed above, in cases where an employee is injured at a social or recreational activity, there are special rules that are applied to determine whether the injury arose out of and in the course of the employment.")

⁵ *Simmons, supra.*

⁶ Memorandum of Points and Authorities in Support of Application for Review at unnumbered p. 8; Memorandum of Points and Authorities in Support of Opposition to Claimant's Application for Review, p. 6.

Lincoln, and many served in some type of management or supervisory role. Indeed, including Ms. Kim, there were thirteen participants (See CE 29-30). Of these the server supervisor participated, as did the Manager-on-Duty, another manager, and the Bar Manager (HT at 61-63). As such, including the Events Coordinator, at least five of the thirteen participants worked in some type of supervisory role with the Employer. This was not simply a staff-only event as indicated by Ms. Kim. Although none of the owners or board members participated, this was a game that was roundly attended by employees serving in various capacities with the Employer. As such, it was impliedly brought within the orbit of Mr. Charles' employment, and therefore satisfies the second criterion of the Larson test.^[7]

None of Mr. Charles' contentions compels a finding as a matter of law that Apple Hospitality expressly or impliedly required participation or made the activity part of the services of an employee. Instead, Mr. Charles merely disagrees with the ALJ's determination that

[r]egarding whether Employer expressly or impliedly required participation in the game, Claimant has failed to meet this element of the test as well. Claimant basically testified he learned of the football game through word of mouth, and everyone at the restaurant was participating. HT pp. 22-23. Claimant was unable to identify [sic] who organized the game, and stated it was hard to say who was in charge, but he was given a flag to wear when he arrived. HT pp. 25-26. Claimant's testimony does not offer any indication Employer required his participation in the game. Claimant testified he did not believe adverse action would be taken against him if he did not play in the game, and he had no fear of being fired. HT p. 75. Ms. Kim testified management and supervisors did not promote the game, and it was a social event. HT p. 85. Ms. Kim stated no one was told they were required to play in the game. HT p. 93. Mr. Wechsler also testified owners and managers did not participate in planning the football game, and no one was required to participate in the game. HT pp. 107-108.^[8]

Because the ALJ's conclusion that the second prong is not satisfied flows rationally from the findings of fact supported by substantial evidence, we cannot disturb the ruling on appeal.⁹

Regarding the third prong of the test, Ms. Charles asserts the testimony of Mr. Jay Wechsler and Ms. Jeanhee Kim satisfies the requirements:

Mr. Wechsler testified, in pertinent part, that he participates in discussions regarding advertising and marketing efforts of the Employer and, although he has no formal training or background in either advertising or marketing, gives his

⁷ Memorandum of Points and Authorities in Support of Application for Review at unnumbered p. 9.

⁸ *Charles v. Apple Hospitality, LLC*, AHD No. 12-394, OWC No. 688990 (December 13, 2012).

⁹ *Marriott, supra*.

input based on what he believes to be beneficial for the Employer (HT at 110). Mr. Wechsler testified that he would not recommend anything that was not beneficial for the Employer, and further testified that discussions had occurred regarding the development of a Facebook page for the Employer prior to its inception (HT at 110). The Employer and its ownership/board personnel had clearly determined that a Facebook page would be a worthwhile and effective marketing device, or else they would not have created one and would not continue to own and operate one to this day. As indicated by Mr. Charles in his testimony, the Employer's Facebook page was used solely for marketing events associated with The Lincoln and not for the posting of any personal material, even if it related to employees of the Employer. Furthermore, Ms. Kim indicated that only a very limited number of people had access and control over the content of the Employer's Facebook page, herself included, for the purpose of adding and deleting content. Ms. Kim, along with approximately five other employees of the Employer, had administration [*sic*] rights and privileges regarding this website (HT at 95-96). In essence, this means that she was able to control the content of the page, which she testified the Employer used for marketing purposes (HT at 97-98). She posted them on the Employer's Facebook page with the captions, "Team LINCOLN's 1st Football Game of the Season," but subsequently disingenuously deleted them when she felt they might pose a concern for the Employer following Mr. Charles' filing of his workers' compensation claim.

Based on the testimony of all three witnesses, it is clear that the Facebook page and any and all content posted therein, was used as a marketing device for the Employer. It is further obviated [*sic*] that the Employer would not use the Facebook page if it did not feel it would derive some type of benefit from there. Therefore, because the pictures were posted, alleging to be some type of Lincoln-sponsored team, on the Facebook page operated exclusively by the Employer, it is clear that the Employer intended to derive a benefit from their posting. As such, Mr. Charles has satisfied the third criterion of the Larson test and has established that his injury arose in the course of his employment with the Employer.^[10]

Again, contrary to Mr. Charles' assessment of the evidence he thinks favors his claim, the ALJ's conclusion that the third prong is not satisfied flows rationally from the findings of fact supported by substantial evidence:

Thirdly, Claimant has failed to establish Employer derived substantial direct benefit from the activity. Claimant testified the participants in the game did not wear t-shirts, hats or anything with a logo or insignia of Employer. HT pp. 63-64. Claimant stated the staff from Employer was not playing against another restaurant, and no printed advertisement was used to promote the game. HT p. 69. Additionally, Ms. Kim stated it was a public field, and Employer did not pay for the use of such field, and the flags were brought by one of the boys. HT p. 86. Mr. Wechsler also testified managers/owners did not arrange the place and time of

¹⁰ Memorandum of Points and Authorities in Support of Application for Review at unnumbered pp. 9-10.

game. HT p. 108. According to Mr. Wechsler, Employer did not provide equipment for the game, or t-shirts or insignia. Mr. Wechsler testified Employer did not promote the game before hand, and did not reap any benefits from employees playing in the football game. HT p. 109. While the parties agreed pictures taken at the football game were posted on a web page or Facebook page of Employer, the pictures were posted subsequent to the event, and there is no evidence Employer derived a substantial direct benefit from the football [game] or posting pictures of the football game on its web page. As such, Claimant has not satisfied any of the elements of Larson's test to establish his participation in a recreational event off the premises of Employer arose out of and in the course of his employment.^[11]

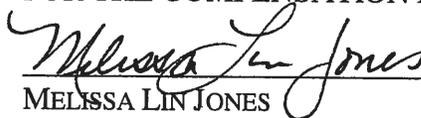
We cannot disturb this ruling on appeal in favor of a reweighing of the evidence.¹²

Having affirmed the ruling that Mr. Charles' accidental injury did not arise out of and in the course of a compensable social event, his remaining arguments that he is entitled to indemnity and medical benefits are moot.

CONCLUSION AND ORDER

Substantial evidence in the record supports the ALJ's rational conclusions that the November 19, 2012 flag football event was not within the scope of Mr. Charles' employment with Apple Hospitality and that Mr. Charles is not entitled to workers' compensation benefits for his injury. The December 13, 2012 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

July 24, 2013
DATE

¹¹ *Charles, supra*, at p. 8-9.

¹² *Marriott, supra*.