

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 14

WCC No. 2006-1641

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CURTIS M. MICHALAK

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

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***APPEALED TO SUPREME COURT 03/22/07***

***AFFIRMED BY SUPREME COURT 01/03/08***

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner attended a company picnic hosted by his employer at the employer's lake home and was injured while riding a wave runner on the water. Respondent denied liability.

**Held:** Section 39-71-118, MCA, which defines "employee" does not preclude Petitioner from receiving benefits because he was acting within the course and scope of his employment at the time of his injury even though he was engaged in a recreational activity.

**Topics:**

**Employment: Course and Scope: Generally.** Where a company picnic occurred at the home of the company president, the company inquired about the employees' attendance by placing a notice of the picnic with the employee's pay stubs, posting a written notice, circulating a sign-up sheet, and by asking for a headcount, the activity was undertaken at the employer's request and thus the first factor of the "course and scope" test is satisfied.

**Employment: Course and Scope: Generally.** Where Petitioner felt compelled to attend the company picnic because his supervisor requested he oversee the wave runners at the picnic, vendors were invited to attend the

picnic, and the company president addressed the employees, the employer either directly or indirectly compelled the employee's attendance at the activity and thus the second factor of the "course and scope" test is satisfied.

**Employment: Course and Scope: Generally.** Where the company picnic was hosted by the company president, a company secretary organized the picnic, shopped for supplies and assisted with the dinner, the company paid for the supplies and rented the wave runners, the company representatives believed the company took a deduction for the expenses it incurred for the picnic and used its property at the picnic, the employer controlled or participated in the activity and thus the third factor of the "course and scope" test is satisfied.

**Employment: Course and Scope: Generally.** Where the company invited its employees and vendors to the company picnic, used the picnic as a forum for its officers to address the employees, and the company president agreed the picnic was good for the company and promoted good relations, the company and its employees mutually benefitted from the activities and thus the fourth factor of the "course and scope" test is satisfied.

**Employment: Course and Scope: Recreational Activities.** The Court concludes that an employee injured while riding a wave runner at a company picnic was acting in the course and scope of his employment where the employee attended the picnic at the request of his employer, was directly or indirectly compelled to attend, the employer controlled or participated in the picnic, and both the employer and employee mutually benefitted from the picnic.

¶ 1 The trial in this matter was held on September 28, 2006, in Missoula, Montana. Petitioner Curtis M. Michalak was present and represented by Sydney E. McKenna. Respondent Liberty Northwest Insurance Corporation was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 19 and 21 through 29 were admitted without objection. Exhibit 20 was withdrawn.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, John Felton, Denise Sand, Shawn Skinner, Steve Talley, Lynn Kurtz, Tim Yoder, Alfred Dion, and Kirt Weishaar were taken and submitted to the Court. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 4a Is Liberty liable for the claim?<sup>1</sup>

#### FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds his testimony at trial credible.

¶ 6 On July 23, 2005, Petitioner attended a company picnic at the lakeside home of John Felton (Felton), president and owner of Felco Industries, Ltd. (Felco).<sup>2</sup>

¶ 7 Felco rented wave runners for the use and enjoyment of picnic attendees. While Petitioner was riding a wave runner, he was seriously injured.<sup>3</sup>

¶ 8 Petitioner's injuries included closed fractures of the L2, L3, and L4 vertebrae that required surgical fusion.<sup>4</sup>

¶ 9 At the time of the accident, Respondent provided workers' compensation insurance to Felco, which sponsored the picnic and employed Petitioner.<sup>5</sup>

¶ 10 Petitioner reported his injuries to his employer who then completed an Accident Reporting Form. Petitioner filed a formal First Report of Injury on January 12, 2006.<sup>6</sup>

¶ 11 Respondent denied liability for the claim and has not paid any of Petitioner's medical expenses or other benefits.<sup>7</sup>

¶ 12 Petitioner was not paid to travel to and from the company picnic, was not reimbursed for his time at the picnic, and was not reimbursed for his transportation expenses.<sup>8</sup>

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Michalak Dep. 23:19 - 24:3.

¶ 13 Felco is located in Missoula, Montana. It fabricates or manufactures attachments for heavy equipment. Petitioner was hired as a welder for Felco.<sup>9</sup>

¶ 14 The company picnic is a tradition and has occurred annually each summer since 1980 at the lake house of Felton.<sup>10</sup> Steve Talley (Talley), a supervisor for Felco testified, “The tradition with the company picnic is every year at John’s lake house we had a party with horseshoes and Waverunners and boating. . . . And we get together and have food and have a good time with our families.”<sup>11</sup>

¶ 15 The company picnic was held on July 23, 2005. Denise Sand (Sand), a secretary at Felco, stated that in 2005, just as she had in the past, she helped organize the company picnic, shopped for supplies, purchased supplies with a Felco credit card, set up the company picnic, and assisted with the dinner. Sand said that she placed notice of the picnic in the employee pay stubs and asked for a head count.<sup>12</sup>

¶ 16 Sand also testified regarding notice of the company picnic:

I usually just make out a few copies and put it out in the plant, and it’s mainly for Tim that runs the . . . horseshoe contest, just so he can have an idea of how many are going to play. And I like to know how many kids so I have enough hot dogs, kid food, pop, water, ice cream for the kids.<sup>13</sup>

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<sup>9</sup> Trial Test.; Talley Dep. 5:23 - 6:2, 6:15-6:24.

<sup>10</sup> Felton Dep. 5:24 - 6:7; Talley Dep. 7:22 - 8:9.

<sup>11</sup> Talley Dep. 7:24 - 8:5.

<sup>12</sup> Sand Dep. 8:12 - 12:22; Ex. 19; Ex. 22.

<sup>13</sup> Sand Dep. 8:19 - 9:2.

The notice Sand posted at work read:

**2005 SUMMER PICNIC**  
**SATURDAY, JULY 23, 2005**

Requesting a head count (food prep) for the picnic that is in the very near future; likely 2 WEEKS!!!! Please mark down how many will participate in horseshoes and attending the picnic (FRIENDS, FAMILY AND VENDORS)!!!! Return to Deni ASAP!

HORSESHOES   ADULTS   KIDS<sup>14</sup>

¶ 17 Petitioner felt compelled to attend the picnic.<sup>15</sup> At trial Petitioner testified that although he was not required to attend the picnic, he nonetheless felt compelled to attend because he did not want to dishonor Felton and the company and because an initial head count had been taken.<sup>16</sup>

¶ 18 Felco paid for the picnic. Sand stated that Felco paid for the supplies. She also testified:

**Q. Did you use a credit card to purchase picnic supplies at Costco?**

A. Yes.

**Q. Do you have authority to sign the card?**

A. Yes.

**Q. In whose name is the card?**

A. John Felton. It's Felco Industries.<sup>17</sup>

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<sup>14</sup> Ex. 19.

<sup>15</sup> Trial Test.

<sup>16</sup> *Id.*

<sup>17</sup> Sand Dep. 11:16-23.

¶ 19 Both Felton and Sand believed Felco took a deduction for the expenses it incurred for the picnic.<sup>18</sup>

¶ 20 In addition to its employees, Felco invited vendors to the picnic.<sup>19</sup>

¶ 21 The company picnic mutually benefitted Felco and Felco's employees.<sup>20</sup> On this point, Shawn Skinner (Skinner) testified:

**Q. I think that it's been pretty much stipulated and agreed that the company picnic would be a mutual benefit for the company and the employees. Would you agree with that?**

A. I'd say yes.<sup>21</sup>

¶ 22 Felton's testimony corroborated Skinner's assessment. On the subject of his company benefitting from the company picnic, he testified:

**Q. Do you believe that the company picnic has been good for your company?**

A. I think yes. I think anything like that is. Somebody that doesn't have anything like that is missing the boat.

**Q. It promotes - -**

A. Good relations. . . .<sup>22</sup>

¶ 23 During the picnic, Felco hosts an annual horseshoe competition and honors the winner by placing his or her name on a plaque displayed at the Felco headquarters.<sup>23</sup>

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<sup>18</sup> Sand Dep. 13:3-5; Felton Dep. 7:11-14.

<sup>19</sup> Felton Dep. 7:21-8:1.

<sup>20</sup> Skinner Dep. 8:20-24; Felton Dep. 12:8-12.

<sup>21</sup> Skinner Dep. 8:20-24.

<sup>22</sup> Felton Dep. 12:8-12.

<sup>23</sup> Yoder Dep. 15:9-10; Weishaar Dep. 11:10-18; Felton Dep. 20:13-19.

¶ 24 Felco uses its property at the picnic. A grill made by Felco and stored at Felco was used at the picnic.<sup>24</sup>

¶ 25 Felco used the picnic as a forum for its president to address Felco employees and vendors. At the 2005 picnic, Felton addressed those in attendance and reported as to how the company was performing and thanked his employees for their support.<sup>25</sup>

¶ 26 Among the entertainment and recreation items provided by Felco at the picnic were rented wave runners.<sup>26</sup> Petitioner was assigned the duty of overseeing the wave runners. Felton had asked Talley, Petitioner's supervisor, to oversee the wave runners and Talley, in turn, delegated this responsibility to Petitioner because he knew he would have other responsibilities at the picnic.<sup>27</sup>

¶ 27 Talley testified that Felton took the safety of the wave runners seriously and watched them like a hawk.<sup>28</sup> Talley's responsibility for the wave runners included instructing users regarding safety procedures.<sup>29</sup>

¶ 28 Before his injury, Petitioner oversaw the wave runners. Talley observed Petitioner checking the wave runners, testifying: "I believe he might have been checking to see if the oils were okay and the fuel."<sup>30</sup> Talley also testified that Petitioner had been instructed by the person who had rented the wave runners as to the safe operation of them.<sup>31</sup>

¶ 29 Petitioner's testimony is consistent with Talley's. Approximately a week before the picnic, Talley asked Petitioner to assist with the supervision of the wave runners.<sup>32</sup> Specifically, Petitioner testified:

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<sup>24</sup> Talley Dep. 28:22 - 29:4

<sup>25</sup> Yoder Dep. 10:4-21.

<sup>26</sup> Sand Dep. 21:8-11.

<sup>27</sup> Talley Dep. 16:19 - 19:1; *see also* 36:13-19.

<sup>28</sup> *Id.* at 33:17 - 34:4.

<sup>29</sup> *Id.* at 17:8-12.

<sup>30</sup> *Id.* at 20:7-8.

<sup>31</sup> *Id.* at 40:4-14.

<sup>32</sup> Michalak Dep 25:4-8.

Steve Talley is my foreman. He requested that I help do this because the previous year there was several complaints, and the only way John [Felton] would rent them is if there was a safety supervisor and a person overseeing the wave runners.<sup>33</sup>

¶ 30 Petitioner further testified regarding the specific tasks Talley assigned to him as it pertained to the overseeing of the wave runners. Specifically, Petitioner testified that he was instructed to help pick up the wave runners, supervise, give safety instructions, monitor the fuel and oil levels, provide instructions on how to ride them, and enforce time limits on their operation.<sup>34</sup> At one point, during the performance of his duties, Petitioner elected to take a turn on one of the wave runners himself because one was available.<sup>35</sup>

¶ 31 While riding one of the wave runners, Petitioner sustained the injuries that are the subject of this action. Petitioner's recollection as to the specifics of how he was injured is vague because of his injuries.<sup>36</sup>

¶ 32 Tim Yoder (Yoder), Felton's nephew who was assisting with the supervision of the wave runners, testified that he saw Petitioner riding the wave runner into the shore and that he looked sore or hurt. Yoder further testified that he noticed blood on the wave runner as Petitioner was getting off of it.<sup>37</sup> Another employee also observed that Petitioner was in pain.<sup>38</sup>

¶ 33 Sand noticed Petitioner was lying on the couch in Felton's basement at the picnic and Petitioner said he had a headache.<sup>39</sup> Sand retrieved a pain reliever for Petitioner.<sup>40</sup>

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<sup>33</sup> *Id.* at 24:21-25.

<sup>34</sup> *Id.* at 25:9-18.

<sup>35</sup> *Id.* at 10:11 - 11:11.

<sup>36</sup> *Id.* at 28:19-22.

<sup>37</sup> Yoder Dep. 13:1-15.

<sup>38</sup> Weishaar Dep. 18:14-21.

<sup>39</sup> Sand Dep. 13:23 - 14:10.

<sup>40</sup> *Id.* at 14:19-23.

¶ 34 After the wave runner accident, Petitioner drove home and could not move the next day.<sup>41</sup> His neighbor, Lynn Kurtz (Kurtz), drove him to the hospital where he was diagnosed with a broken back that eventually required surgical fusion.<sup>42</sup>

### CONCLUSIONS OF LAW

¶ 35 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.<sup>43</sup>

¶ 36 This Court has jurisdiction over this matter pursuant to § 39-71-2905, MCA.

¶ 37 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>44</sup>

¶ 38 This Court uses the "course and scope" test to determine whether a worker's injury was sustained in the employment relationship.<sup>45</sup> In *Courser v. Darby School Dist. No. 1*, the Montana Supreme Court wrote:

Controlling factors repeatedly relied upon to determine a work-related injury include: (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity. The presence or absence of each factor, may or may not be determinative and the significance of each factor must be considered in the totality of all attendant circumstances.<sup>46</sup>

¶ 39 In 1993, the Legislature amended the definition of employee to preclude recreational activities from the employment relationship. Specifically, this section provided that the definition of "employee" does not include a person who is:

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<sup>41</sup> Michalak Dep. 30:14-19; 45:20 - 46:21.

<sup>42</sup> Kurtz Dep. 7:19 - 8:18.

<sup>43</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>44</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>45</sup> *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419.

<sup>46</sup> *Id.*, citing *Shannon v. St. Louis Bd. of Educ.*, 577 S.W.2d 949, 951-52 (1979).

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment . . . .<sup>47</sup>

¶ 40 In *Connery v. Liberty Northwest Ins. Corp.*, however, the Montana Supreme Court held that § 39-71-118(2)(a), MCA, does not preclude the use of the “course and scope” test articulated in *Courser*.<sup>48</sup> In fact, the Supreme Court specifically held that “prescribed duties” as used in § 39-71-118, MCA, can only be understood using the “course and scope” test.<sup>49</sup> Connery was a ski instructor at a ski resort.<sup>50</sup> One day, she reported to work at 8:45 a.m. and attended a ski instructor meeting at 9:15 a.m.<sup>51</sup> At approximately 9:45 a.m., her employer assigned Connery a private ski lesson that was to begin at 11:00 a.m.<sup>52</sup> In the mean time, Connery and another ski instructor, Roy, skied a few runs.<sup>53</sup> During one run Connery waited for Roy at the base of a ski lift.<sup>54</sup> Roy was unable to stop and collided with Connery.<sup>55</sup> Connery suffered a severe fracture of her leg.<sup>56</sup> The collision happened at approximately 10:35 a.m., twenty-five minutes before Connery’s private lesson.<sup>57</sup> Connery

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<sup>47</sup> § 39-71-118(2)(a), MCA (2005).

<sup>48</sup> *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 118-19, 929 P.2d 222, 225 (1996).

<sup>49</sup> *Id.* at 119, 929 P.2d at 225.

<sup>50</sup> *Id.* at 116, 929 P.2d at 223.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 117, 929 P.2d at 223.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 117, 929 P.2d 223-24.

filed a workers' compensation claim.<sup>58</sup> The employer's insurer denied Connery coverage.<sup>59</sup> The Workers' Compensation Court ruled in favor of Connery and the insurer appealed.<sup>60</sup>

¶ 41 On appeal, the insurer contended that the Workers' Compensation Court erred when it applied the "course and scope" test.<sup>61</sup> The Montana Supreme Court affirmed the Workers' Compensation Court and, in doing so, articulated a two-part analysis of § 39-71-118, MCA, which includes the "course and scope" test.<sup>62</sup> First, a court must determine whether the worker was participating in a recreational activity.<sup>63</sup> Second, a court must determine whether the worker was performing prescribed duties.<sup>64</sup> Regarding the second part, the Supreme Court applied the "course and scope" test.<sup>65</sup> The Supreme Court wrote: "[W]e hold that the "prescribed duties" prong of § 39-71-118(2)(a), MCA, can only be reasonably applied based on a traditional course and scope of employment analysis."<sup>66</sup> After applying the "course and scope" test, the Supreme Court found that Connery was injured in the course and scope of her employment.<sup>67</sup> Applying the same analysis, this Court reaches a similar conclusion.

### COURSE AND SCOPE ANALYSIS

*Was the activity undertaken at Felco's request?*

¶ 42 The company picnic is a tradition at Felco and has occurred annually in the summer since 1980 at the home of Felco's president. Sand, Felco's secretary, inquired about the employees' attendance at the picnic by placing a notice of the picnic with the employees' pay stubs, by posting a written notice, by circulating a sign-up sheet, and by asking for a

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<sup>58</sup> *Id.* at 117, 929 P.2d 224.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 118, 929 P.2d at 224.

<sup>61</sup> *Id.* at 119, 929 P.2d at 225.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 118, 929 P.2d at 224-25.

<sup>64</sup> *Id.* at 118-19, 929 P.2d 225.

<sup>65</sup> *Id.* at 119, 929 P.2d 225.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 122, 929 P.2d at 227.

head count. This Court, therefore, concludes that the activity was undertaken at Felco's request.

*Did Felco either directly or indirectly compel Petitioners' attendance at the picnic?*

¶ 43 Petitioner testified at trial that he felt compelled to attend the picnic because his supervisor, Talley, requested that Petitioner oversee the wave runners. Petitioner accepted the duty of overseeing the wave runners. He had knowledge of the wave runner rules he learned from the year before. Vendors were invited to the picnic and Felco's president addressed the employees at the picnic. Whether attendance was expressly mandatory, when an employee is specifically requested by a supervisor to attend an event for the purpose of performing duties such as overseeing an activity at the event, the Court must conclude that, at a minimum, Felco indirectly compelled Petitioner's attendance at the picnic.

*Did Felco control or participate in the activity?*

¶ 44 The company picnic was hosted by the president of Felco. A secretary of Felco organized the picnic, shopped for supplies, and assisted with the company dinner. Felco paid for the supplies, including the food, beverages, and entertainment. Felco rented the wave runners. Both Felton and Sand believed it claimed a deduction for the expenses it incurred for the picnic and no testimony contradicted this belief. Felco used its property at the picnic, e.g., the Felco grill. Through the use of employees, including the Petitioner, Felco regulated and oversaw the use of the wave runners. The Court concludes that Felco controlled and participated in the activities.

*Did Felco and its employees mutually benefit from the activities?*

¶ 45 Felco invited its employees and vendors to the picnic. Felco used the picnic as a forum for the officers to address the employees. Felco's president made a speech at the picnic. On this point, Skinner, Felco's general manager, agreed that the company picnic would be a mutual benefit for the company and the employees. Moreover, Felton agreed that the company picnic has been good for his company and promoted good relations. Accordingly, this Court concludes that Felco and its employees mutually benefitted from the activities.

¶ 46 Having met all four factors of the "course and scope" test set out in *Courser* to this Court's satisfaction, this Court concludes that although Petitioner was participating in a recreational activity (riding a wave runner at a company picnic), Petitioner had not been relieved of his prescribed duties as set forth in § 39-71-118, MCA, and therefore, he was acting within the course and scope of his employment.

JUDGMENT

¶ 47 Petitioner was acting within the course and scope of his employment when he was injured while riding a wave runner at the 2005 Felco company picnic.

¶ 48 Respondent is liable for Petitioner's workers' compensation claim.

¶ 49 This JUDGMENT is certified as final for purposes of appeal.

¶ 50 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 22<sup>nd</sup> day of March, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Sydney E. McKenna  
Larry W. Jones  
Submitted: September 28, 2006