

1986

# Kelly Arlin Black v. McDonald's of Layton, and or State Insurance Fund : Brief of Petitioner

Utah Supreme Court

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860296

IN THE SUPREME COURT OF THE STATE OF UTAH

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KELLY ARLIN BLACK,

:

Plaintiff,

:

vs.

:

MCDONALD'S OF LAYTON, and/or  
STATE INSURANCE FUND,

:

Case No. 860296

:

# 6

Defendants.

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BRIEF OF PETITIONER

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PETITION FOR REVIEW OF THE FINAL  
ORDER OF THE INDUSTRIAL COMMISSION  
FOR THE PURPOSE OF DETERMINING THE LAWFULNESS  
OF THE ORDERS OF THE COMMISSION

-----

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FILED

IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.	:	
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Plaintiff,	:	
vs.	:	
MCDONALD'S OF LAYTON, and/or	:	Case No. 860296
STATE INSURANCE FUND,	:	
Defendants.	:	

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BRIEF OF PETITIONER

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The central issue presented on appeal is whether the plaintiff, and incidentally his three fellow employees, were, contrary to the ALJ's ruling, in the course and scope of their employment with McDonald's of Layton when they were driving to a softball game against McDonald's of North Ogden and were struck and injured by another vehicle while traveling to that game. The incidental issues inherent in the major issue are two in number, namely:

1. Are the facts of the present case distinguishable from the facts decided by the Supreme Court in Auerbach Company v. Industrial Commission, 113 Utah 347, 195 P.2d 245 (1948), thereby warranting a different result, or

2. Should the Auerbach case, decided 38 years ago, be overruled because it no longer stands for the appropriate rule of law.

STATEMENT OF FACTS

On June 13, 1985, Mr. Black was injured in an automobile accident when the car he was driving was hit by a truck. The accident occurred at the intersection of 4th Street and Wall Avenue, Ogden, Utah (T43). On the day in question, Mr. Black was employed by McDonald's of Layton as a crew trainer (T19). With Mr. Black at the time of the accident were four other McDonald's of Layton employees who were also going to play in the softball game between McDonald's of Layton and McDonald's of North Ogden. The game was to be played at McDonald's of North Ogden's home softball park located at 4th Street and Wall Avenue in Ogden (T44). The fellow employees of Mr. Black who were riding with him to the McDonald's game were Robert VanDyke, Vicki Thorne, Richard Hatch and Sherrie Debbrecht (T39). All of the occupants of the vehicle were injured, including Mr. Black, and Vicki Thorne and Sherrie Debbrecht were very seriously injured, with Miss Debbrecht suffering a severely shattered pelvis, bladder and spleen injury, left eye injury, and some muscle paralysis (T91), and Miss Thorne suffered a fractured pelvis, a ruptured bladder, and a fractured back, some cuts resulting in scars on her arm and face, and loss of memory of events preceding the accident (T369).

The softball league the employees were engaged in at the time of the accident was organized by the various McDonald's Restaurants in the Weber, Davis, Salt Lake, Tooele, and Utah County areas. There was a set of "McDonald's of Utah Softball

Rules" prepared and distributed to the various teams, (T283) and Rule 1 and 14 required a certain number of female employees to be on each team at each game, and mandated that all players "must" be employed at that McDonald's for whom he or she plays or the game would be forfeited (T250, 258, 283).

John Parisi, the operations consultant for McDonald's, who is the person within the McDonald's organization who organized the softball league in the first instance, testified that it was the policy of McDonald's to allow and encourage its employees to have activities, even though the activities may not be organized by corporate people within McDonald's. McDonald's does, however, publish and distribute to its employees a crew employee handout which states the policy that McDonald's employees will be given the opportunity to participate in activities like baseball, volleyball, and bowling, and that those extra curricular activities should be encouraged so that employees can have fun and to provide them an opportunity to have a good time and get to know the fellow employees better. It encourages employees who are interested in such activities to contact their management team (T236-239). He also testified that it is his opinion that the softball league, in which the injured occupants of the Black car were participating in, instills fun and competitive type pride outside the McDonald's store, and that such incentive geared activity makes the employee feel a part of a team inside the McDonald's organization (T266-268).



The McDonald's League softball games were played from June to August under a schedule which called for games each Tuesday and Thursday morning (T22, 108, and 302). At the beginning of the season, each participating store contributed either \$25.00 or \$35.00 to the McDonald's League for the purchase of score books, softballs, and trophies. The fee as to McDonald's of Layton was paid by the employer, and not the employees (T119 and 294). Trophies were given to the winning teams of each division and the runner up team. The money remaining after the purchase of score books, softballs, and trophies was scheduled to be divided 75% to the championship team and 25% to the runner up team. That money would be paid to the employer, and not the individual employee players (T33).

McDonald's of Layton employees and prospective employees were informed of the softball league, and the participation of that store's team in the league during pre-employment interviews, where Mr. Black was asked if he played softball, and when he responded that he did, was told that was good because the store needed softball players to come out and play on the store team (T75-76). The store manager also told new employees about the games, and encouraged their participation in the softball program during the new employee orientation meeting (T153-154), and they further notified the employees and encouraged their participation by posting a schedule and a sign up sheet on the employee bulletin board, (T25, 31, 83, 116, 306, 353, and 393).

Employees who were playing on the company softball team where scheduled at work for times other than the time set for the softball game (T29). The employer purchased shirts or jerseys with numbers for the members of th softball team (T32-33). The employer furnished the score book and the softballs for home games, and the employees furnished their own mits, and bats (T31, and 310). The employees were not payed by their employer during the time they were playing the games (T26, and 289).

#### SUMMARY OF ARGUMENT

The applicant, and his co-employees, were engaged in an employer-sponsored social affair, which under the Workman's Compensation Statute is sufficient to bring them under the coverage of the Act.

#### ARGUMENT

Most of the Courts throughout the United States, in the past several years, have moved toward the recognition that an employer-sponsored social affair which promotes the employer's purpose is sufficient work related activity to bring a person within the coverage of the Workman's Compensation Act when they are injured while engaged in such an employer-sponsored social affair, or traveling to or from such an affair. While this Court has not ruled on a case directly in point, it appears to have been following the trend holding that participation in employer-sponsored social affairs brings a person within the coverage of the Workman's Compensation Act.

While it is true that 38 years ago in the case of Auerbach Company v. Industrial Commission, 113 Utah 347, 195 P.2d 245 (1948), this Court found, under the peculiar fact situation of that case, that Miss Wardle, who was playing on the Utah Shamrock's Basketball Team that received some support from the Auerbach store, but not all of its support, nor were all of its team members employees of Auerbach, that while traveling from a basketball game with a non-team member, and being involved in an automobile accident in so doing, that the provisions of Title 42-1-1 et seq of the 1943 Utah Code did not apply. In the intervening 38 years, the concept of Workman's Compensation Law has substantially changed, and other Utah cases have seemed to retreat from some of the rationale of that decision.

In Stroud v. Industrial Commission, 2 Utah 2d 270, 272 P.2d 187 (1954) an off duty police officer on his day off, arranged with two other police officers to check out to them, in his capacity as a police officer, a special police car. While transferring cases of beverage to an automobile for transportation to the Police Benefit party, his firearm discharged killing him. This Court held that the accident both "arose out of" and "was in the course of" his employment even though he was off duty, and was not directly engaged in the activity for which he was hired as a police officer for Salt Lake City.

This Court more recently, in Martinson v. W-M Insurance Agency, Inc., (Utah) 606 P.2d 256 (1980), dealt with a situation

where Mr. Martinson was returning to Salt Lake City from Park City, where he had allegedly talked about increasing some insurance limits on one of his insurance clients. It appeared, however, that his primary purpose in going to Park City was to socialize with the director of the Kimball Art Center, and he was returning to Salt Lake City about 24 hours after he allegedly transacted his business. He also had a blood alcohol content of .18 at the time of the accident, which seemed to have some influence on the Court's decision as to whether he had been about his business. In any event, this Court, in that case, set out some criteria with which to evaluate whether one is in the course of his employment or not. In doing so, this Court stated:

"\*\*\*One of the tests sometimes applied is whether such a trip is one which someone else would have had to make for the employer at some time if the claimant had not. Another such test, which is sometimes helpful is whether the paramount or predominant motivation and purpose of the trip or other activity is to serve the employer's interest, and the social aspect, or other diversion for one's own interest, is merely adjunctive thereto. In that instance, the person should be deemed to be in the course of his employment.

"Conversely, if the predominant motivation and purpose of the activity is in serving the social aspect, or other personal diversion of the employee, even though there may be some transaction of business or performance of duty merely incidental to and adjunctive thereto, the person should not be deemed to be in the course of his employment; and where there is uncertainty as to the just-stated proposition, that should be resolved by the commission as the trier of the facts."

In the past several years, there seems to have developed a trend throughout the country to treat a person engaged in a company-sponsored recreational activity, or who is attending a company-sponsored social, to be in the course and scope of their employment when injured. The general statement of the rule is found in 82 Am Jur 2d pp. 66-68, under Sections 283 and 284, entitled Recreation or Amusement, and Employer-Sponsored Social Affairs; Parties, Picnics, Outings, Etc. Those two Sections state as follows, to wit:

"Section 283. Recreational activity, in the absence of a statute expressly excluding it, may be so bound up with employment as to create risks incidental thereto so that a resulting injury will be deemed compensable. According to many authorities, injuries sustained by an employee while attending or participating in recreational activities of employees may be regarded as arising out of and in the course of the employment, so as to be compensable, where such activities are promoted, sponsored, or encouraged by the employer. The rule of compensability has been applied particularly where the injury occurred on the premises of the employer, or during an intermission or temporary suspension of work, or where the employee's attendance or participation in the activity in question was in pursuance of the orders, rules, or requirements of the employer.

"Many particular cases, however, have held that such activities did not have a sufficient relationship to the employment to bring the injury within the coverage of the statute. An employee on a business trip who engages in personal recreation beyond that necessary to the normal ministration to the needs of an employee on a business trip is not covered by Workman's Compensation for injury or death resulting from such recreation.

"The general rule is said to be that an employee while on vacation is not within the protection of the Workman's Compensation Law."

And in,

"Section 284. It is generally recognized that under appropriate circumstances an injury or death sustained by an employee while attending or traveling to or from an employer-sponsored social affair may arise out of and in the course of employment, so as to be compensable under the Workman's Compensation Statute. Primary elements to be considered in determining the compensability of an injury received by an employee while attending or traveling to or from an employer-sponsored social affair are whether the employee was compelled, either directly or indirectly, to attend the affair, whether the employer derived some benefit from his sponsorship of the function, the extent to which the employer-sponsored, controlled, or participated in the activity, and whether the social affair was a benefit or consideration of the employer to which the employee was entitled. The Courts have implied these elements to cases involving injuries sustained by employees while attending or participating in a variety of employer-sponsored social activities, including picnics and outings, parties, dances, and the like, trips and excursions, and activities of a combined business and social nature, the determination of whether the injury arose out of and in the course of employment making it compensable depending upon the particular facts and circumstances of each case. In those instances where the injury occurred while the employee was traveling to or from such an employer-sponsored social function, the compensability of the injury, has also been decided on the basis of the extent to which the particular social affair was employment-related."

Many Courts have recognized that employers can put substantial indirect pressure on employees requiring them to attend or participate in employer-sponsored social activities. In the instant case, we have the employer in both a pre-employment interview and in the employee orientation interview making strong overtures that participation in the softball program would be looked upon favorably. Such indirect and compelling pressure exerted by the employer upon employees to attend the employer-sponsored social affair was expressly discussed in the following cases

as a factor pointing to the compensability of an injury sustained by the employee while attending such function. See Lawrence v. Industrial Commission of Arizona, (1955) 78 Ariz. 401, 281 P.2d 113, where the Court holding that an employee's injury sustained while returning from an employer-sponsored function arose out of and in the course of his employment, rejecting the argument that the technique of employer direction defines the course of employment. The degree of pressure which the employer must be shown to have exerted in order to define that he directed an employee in a given action must not be a requirement which ignores the realities of business, the Court said. The superior position of the employer permits compulsion to be exerted indirectly, the Court observed that it would be unrealistic to fail to recognize that the forces of a suggestion or encouragement may equal that of an expressed order. See also Stakonis v. United Advertising Company, (1930) 110 Conn. 384, 148 A 334; Lybrand, Ross Brothers and Montgomery v. Industrial Commission, (1967) 36 Ill. 2d 410 223 NE 2d 150; Dependents of Staten v. Ewing Gas Company, (1971) (Miss.) 243 So. 2d 561; Kelly v. Hackensack Water Company, (1950) 10 NJ Super 528, 77 A 2d 463; and Clevenger v. Liberty Mutual Insurance Company, (1965, Tex. Civ. App.) 396 SW 2d 174.

Civil Courts which have dealt with the question of whether or not an injury sustained by an employee while attending an employer-sponsored social affair arose out and in the course of the employment, within the terms of a Workman's Compensation

Statute, have recognized that the determination of compensability of such an injury may be affected by the presence or absence of benefits derived by the employer from the social function. In several cases, the benefits accruing to the employer as a result of the employer-sponsored social affair were expressly discussed as a factor pointing to the compensability of an injury sustained by an employee while attending the affair. The New York Court of Appeals in Hill v. McFarland-Johnson, Engineers (1966) 25 App. Div. 2d 899, 269 NYS 2d 217, held that an injury suffered by an employee in an automobile accident which occurred when he was returning from the outing arose out of and in the course of employment, concluding that the picnic had for its purpose the improvement of employee relations and a building of morale, for which the employer reasonably might expect to derive some tangible benefit. That case was very similar to the present case in that Mr. Parisi, McDonald's corporate representative, testified that the primary purpose of the establishment of the softball league was to build the morale of the employees and help them work better within the company by participating in social activities through the softball league organized by McDonald's. To the same effect are a number of cases, namely, Lybrand, Ross Brothers and Montgomery v. Industrial Commission, Supra; Noble v. Zimmerman, 237 Ind. 556, 146 NE 2d 828; Linderman v. Cowmi Furs, 234 Iowa 708, 13 NW 2d 677; Kelly v. Hackensack Water Company, Supra; Riccirdi v. Damar Products Company, 45 NJ 55, 211 A 2d 347; Gore v. New York Air



Brake Company, 33 App. Div. 2d 851, 305 NYS 2d 814; and Kohlmayer v. Keller, 24 Ohio St 2d 10, 263 NE 2d 231.

In several of the foregoing cases, the Courts have also recognized that some degree of employer-sponsorship and control of the social affair is a factor pointing to the compensability of an injury sustained by an employee in connection with the affair. The employer's sponsorship, arrangement for a facility, furnishing of supplies, and the like is looked at as a factor in determining whether injury while associated with the activity is compensable.

The cases have uniformly held that if the social function is employer-sponsored, and an injury at it would be compensable, an injury while traveling to or from it would be equally compensable. See all the foregoing cited cases.

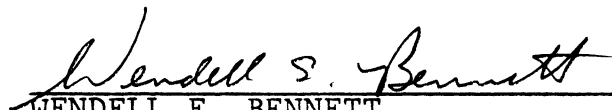
Where we have the McDonald's parent organization sponsoring a Wasatch Front Softball League to which McDonald's of Layton sent an employee, appointed him as coach, furnished jerseys for participation of the team in the sport, required that only McDonald employees could participate in the sport, and routinely scheduled their employees, who were participating, work schedule around the softball game schedules, it appears quite clear that there was sufficient direction, control, and not too subtle encouragement of employees to participate in the softball program, which had as its primary purpose the building of morale outside the work place so as to increase the morale inside the work place. Under those circumstances, it is respectfully submitted that the participation

in the softball program, with the accident occurring as the team members, all employees of McDonald's were attempting to find their way into the softball park where the game was to be played, is work related, and should be compensable under Utah Workman's Compensation Law.

#### CONCLUSION

The findings of fact and conclusions of law entered by Timothy C. Allen, Administrative Law Judge and sustained by the Industrial Commission as a whole by their entry of a denial of motion for review should be reversed, and the Industrial Commission should be ordered to find that Mr. Black sustained a compensable industrial accident on June 13, 1985, while in the course and scope of his employment with the defendant McDonald's of Layton.

Respectfully submitted,

  
\_\_\_\_\_  
WENDELL E. BENNETT  
Attorney for Plaintiff

DELIVERY CERTIFICATE

I do hereby certify that I delivered four copies of the foregoing on the 15th day of September, 1986 to James R. Black and Laurie A. Haynie, 261 East 300 South, Suite 300, Salt Lake City, Utah 84111.

Wendell E. Bennett

## A D D E N D U M

FX

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000922

KELLY ARLIN BLACK,

Applicant,

vs.

McDONALD's OF LAYTON and/or  
STATE INSURANCE FUND,

Defendants.

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FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

\* \* \* \* \*

HEARING: Hearing Room 332, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on April 4,, 1986, at 8:30 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The Applicant was represented by Wendell Bennett, Attorney at Law.

The Defendants were represented by James R. Black and Laurie Haynie, Attorney's at Law.

At the time and place set for the evidentiary hearing, counsel for the parties notified the Administrative Law Judge that there would be no need for an evidentiary hearing, since the issues involved were legal, and the parties had heretofore deposed all of the necessary witnesses. Therefore, instead of a hearing, oral argument was had from counsel on the Motion to Dismiss filed by the Defendants. Having had the opportunity to hear the argument, and having reviewed the depositions of the witnesses, and being fully advised in the premises, the Administrative Law Judge is prepared to enter the following:

FINDINGS OF FACT:

The Applicant herein, Kelly Arlin Black, was employed by McDonald's of Layton as a crew trainer, which is not a management position.

On June 13, 1985, the Applicant and four co-employees were on their way to a softball game at North Ogden Park, when the Applicant's car was struck on the driver's side by a truck, resulting in injuries to the Applicant and rather severe injuries to some of the car's occupants. The Applicant missed approximately 3 days of work as a result of the injury, and sustained some lacerations on his arm and elbow. Following his accident, the Applicant filed a claim for compensation alleging that at the time of his injury, he was in the course or scope of his employment with the Defendant, McDonald's of Layton. Thereafter, the Defendants filed a Motion to Dismiss the claim on the grounds that the Applicant was not in the course or scope of his employment at the time of his injury.

The employer in urging the Dismissal relies on Auerbach Company v. Industrial Commission, 195 P.2nd 245 (Utah 1945), wherein the Utah Supreme Court reversed the granting of benefits by the Commission to an employee of Auerbach's, who was injured in an automobile accident while on her way to play basketball for the Auerbach's Shamrocks. In that case, the team was part of the company's public relations and advertising campaign, and the Applicant had her expenses paid by her employer when she travelled with the team. She was not hired to play basketball or required to play basketball, nor was she paid to play basketball, rather she was only paid for her work as a cashier. The court in denying compensability indicated that "The issue is limited to a question of whether or not, as part of her employment as cashier, she was under the duty of playing basketball. We think not." Auerbachs at page 246. The court went on to indicate that one of the most important factors in its decision was that the employer did not have the right to require the Applicant to play basketball, nor did they have a right of control.

The Defendants also rely on the treatise of Professor Arthur Larson, Section 22.00 et seq. for further support of their Motion to Dismiss. Professor Larsen has indicated that there are four types of tests from the various jurisdictions that seem to govern the compensability of injuries sustained while engaged with company teams:

1. Whether the games take place on or off the premises and in or out of working hours,
2. Employer initiative,
3. Employer contribution of money or equipment, and
4. Quantities and types of employer benefit. Larson, Workman's Compensation Law, Section 22-24 (A), page 5-139.

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Larson goes on to indicate that:

[1] If the games are played both off the premises and after hours, the burden of proving work-connection falls heavily on the factors of employer initiative, financing, and benefit, and a showing of these points which might have sufficed in a case with some time or place work-connection may well prove to be inadequate. Id.

Before determining the legal issue, it is necessary to develop the facts further. The softball team which the Applicant was playing on had its origins in 1983, when some McDonald's employees of some of the McDonald corporate stores, as compared to owner-operated stores, inquired about the possibility of playing softball. The inquiry had been directed to a Mr. Parisi, who was an operations consultant for the corporate McDonald's outlets. Mr. Parisi had worked for McDonald's in California starting in 1969 and had played on various softball teams until he came to Salt Lake City in 1981, so he was familiar with how they were organized. Since he had been approached towards the end of the summer of 1983, he sent out a memo to the McDonald's stores on his own, for the purpose of seeing if there was any interest in a tournament. There was sufficient interest in the tournament, so the teams played in that format. Mr. Parisi testified that the Defendant, McDonald's, did not encourage him to set up the tournament, but rather it was done at his initiative after he had been approached by some of his employees.

In 1984, Mr Parisi was again approached about softball, and so he caused another memo to be circulated to the stores. The memo requested that the management people not be involved, since it was his intent that it be for the enjoyment of the employees only, and he did not want the employees to feel intimidated by having management personnel in positions of authority within the team structure. Mr. Parisi testified that the McDonald's Corporation is always looking for employee activities, but that the employees must organize the same. Mr. Parisi further testified that he was not encouraged by anyone at McDonald's to organize the league, but rather did so at the request of the employees.

In 1985, he sent out another memo, which again requested stores between Provo and Ogden to sign up if they were interested in participating in the softball league. The evidence indicates that not all of the stores participated. The memo also requested that those interested bring a \$25.00 or \$35.00 registration fee, which would be used for the purpose of purchasing scorebooks, softballs, and trophies for the end of the season. With respect to the Layton store, the memo from Mr. Parisi was received, and the manager of the store, having previously been approached by several employees concerning the possibility of whether there would be softball in 1985, determined that the employees would probably want to participate again.

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Accordingly, Mr. Cuning, the manager, inquired of Lawrence Shelton, a crew member, if he would be interested in coaching the team, since he had coached the Roy team the year before. Mr. Shelton agreed to take on the task, and testified that he felt no pressure to coach the team, but rather he wanted to do so. Mr. Shelton then arranged to post a sign-up sheet on the employee bulletin board, for those that might be interested. The employees then signed up, and Mr. Shelton then contacted them later concerning when the first game would be.

The owner of the store purchased some jerseys or T-shirts, which were plain and did not contain any McDonald's logos whatsoever. The coach testified that the intent was that the T-shirts would be returned at the end of the season. The coach testified that the store did not provide any equipment, other than the 3 softballs which were purchased with the registration fee. The bats belonged to the coach, and each team member furnished his/her own glove. The games were played during off hours, in other words, no one was compensated for playing softball. If a game conflicted with a team member's regularly scheduled shift, then it was the responsibility of that individual to either arrange for someone to cover, or else they could not participate in that particular game. All of the witnesses, including the Applicant, testified that they received no special treatment with respect to scheduling, although it would appear from the record, that the person in charge of scheduling did attempt to schedule around the softball games, especially if requested by one of the team members. The coach testified that the Applicant and those team members in his car were night shift people, and as such, they did not have that scheduling problem. The coach further testified that they were not provided with any free food or drinks, or any other form of payment for their participation, nor did they receive any transportation expenses or any other expenses for their participation in the softball league. This league consisted wholly of McDonald's employees, and each team was required to have a minimum of 3 female members on the field at all times. The rules were ratified by the team coaches, and were enforced by the league commissioners, who were elected by the team coaches.

Applying the legal tests of Larson to the instant facts of this case, I find that the games did not occur on the employer's premises during a lunch or recreation period as a regular incident of the employment, but rather were played off the premises at a Clearfield City park during off hours. Therefore, as Larsen has indicated, ". . . The burden of proving work-connection falls heavily on the factors of employer initiative, financing and benefit,. . . ". From the evidence on the file, the Administrative Law Judge concludes that the preponderance of evidence clearly supports a finding that the softball league was initiated by the employees, and not McDonald's. Although Mr. Parisi did take it upon himself to organize the league, the Administrative Law Judge is satisfied that he did so of his own volition, and not at the behest or direction of McDonald's.



In making this finding, I am mindful that the employee handbook encourages the participation by employees in recreational and social activities, and that the McDonald's of Layton store had an Activities Chairman. However, this Activities Chairman was compensated by McDonald's for any planning time or other activity that she had to engage in on behalf of the social committee. The softball league was not a part of that activities program, but rather their activities consisted mostly of organizing employee get-togethers, Christmas parties, summer parties, and the like. The Activities Committee was also in charge of the employee incentive programs, such as the McBuck program for the fastest drive-thru team, the fastest counter help, etc.

The third test involves the amount of financial support furnished by an employer to a company team. Larson has indicated that the contribution of a \$1,000 to the team by the employer for the purchase of equipment, which equipment was stored on the premises, was still not sufficient to award compensation to the Applicant. In this case, the \$35.00 registration fee was, negligible, and the employees' expenses for transportation, were not covered by the company. Further, the employees were required to furnish their own equipment, and did so. Therefore, the Administrative Law Judge cannot find that the contribution of the employer in the form of the T-shirts and the registration fee was sufficient to satisfy that test. Larson concluded that "Although facts of this kind are helpful in building a cumulative case of employer involvement, standing alone they are ordinarily not enough to meet the burden of proof." Larson Section 22.24 (d). Finally, Larson requires that there must be some employer benefit from the team so as to confer compensability on the claim. In this respect, he writes:

Controversy is encountered also when the benefit asserted is the intangible value of increased worker efficiency and morale. Basically the problem with this argument is not that such benefits do not result, but they result from every game the employee plays whether connected with his work or not. \* \* \* It can be taken as the majority view that these morale and efficiency benefits are not alone enough to bring recreation within the course of employment.

Mr. Parisi testified that McDonald's encourages employee activities because, as indicated in the crew member manual (corporate): "This type of extracurricular activities is fun and provides you with an opportunity to have a good time and get to know your fellow-employees better." Mr. Cuning, the store manager, also testified that the purpose of the various activities is to keep the job fun and improve employee performance.

KELLY ARLIN BLACK  
ORDER  
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The jerseys did not contain the McDonald's logo, and the team was not part of any McDonald's publicity or advertising campaign. Further, the team results were not written up in any store newspaper or town newspaper. Therefore, the Administrative Law Judge concludes that the only benefit derived by the employer was that of improving morale and efficiency. Therefore, the Applicant has not satisfied the requirements enunciated by Professor Larson for compensability in this area.

The Applicant, by and through counsel, has contended that the employer placed substantial indirect pressure on his employees to play softball. As support for this contention, he indicates that the employer in both a pre-employment interview and in the employment orientation interview made strong overtures that participation in the softball games would be looked upon favorably. The Administrative Law Judge has reviewed the depositions of the witnesses, and I conclude that that pressure while alleged, has not been proven. Rather, it would seem to the Administrative Law Judge that the employees were advised of the activities available to them, and it was left up to them whether or not they wanted to participate in the softball program. All of the witnesses, including the Applicant, testified clearly that the softball program was voluntary, and that there was no impression or feeling on their part that their participation was required to keep their jobs. In fact, Sherri Debbrecht, had not planned on playing any softball at all in the summer of 1985, but she played because her co-employees asked her to. The same can be said for Vicky Horne, who testified that she also had not planned on playing softball in 1985, but had indicated to the Applicant, who was a very good friend of hers, that in the event they were unable to get the 3 women necessary to avoid forfeiture, then she would play in that circumstance. With respect to the game to be played on June 13, 1985, she was approached by the Applicant, and asked if she would play. Since they were friends, and since she did not want the team to forfeit the game, she agreed to participate on June 13, 1985. The evidence in this respect, does not support the allegation that it was the employer who pressured either of these women into participating. Rather, they participated because they had been asked to do so by their fellow employees. The store manager attended approximately 4 games, if he was not scheduled to work, but did not attend otherwise. It would seem to the Administrative Law Judge that if the employer was truly exerting pressure in this regard, then he would have taken attendance, which was not taken, and he would have attended each game to ensure maximum participation, however, this did not occur.

The Applicant has also opined that the decisions in Stroud v. Industrial Commission, 272 P.2d, and Martinson v. W-M Insurance Agency, 606 P.2d, are indicative of the Utah Supreme Court's support of a "work related" test of course of employment, which does not require that the Applicant be on the premises to recover, or that he be on the time clock to recover compensation.

KELLY ARLIN BLACK  
ORDER  
PAGE SEVEN

However, it would seem to the Administrative Law Judge that the Stroud case is distinguishable, in that the Applicant therein had been directed to the police station for the purpose of checking out a police car to two other officers. The men were delayed, so the Applicant started transferring beverages to his automobile while waiting for their arrival. As he was doing so, his gun fell from his holster and discharged, killing the Applicant. Since the Applicant had been directed to the police station by his employer, he was clearly on a special errand for the employer at the time of his death, and as such, was entitled to recover Workers' Compensation benefits. The Applicant herein, was not directed by his employer to play softball, rather, the Applicant volunteered for that activity himself.

The Applicant's reliance on the Martinson case is also questionable, since Martinson requires that whether the person is in the course or scope of their employment depends on "whether such a trip is one which someone else would have had to make for the employer at some time if the claimant had not." 606 P.2d at 258. It cannot be said that the employer would have sent another employee in place of the Applicant, had the Applicant not been able to attend. Rather, the coach took it upon himself to call the players the night before each game to inquire as to whether or not they would be attending. If he was informed that an employee would not be able to attend, then he would attempt to find some other employee to attend, however management of the store did not recruit replacements or substitutes.

Martinson also asks "whether the paramount or predominant motivation and purpose of the trip or other activity is to serve the employer's interest, and the social aspects, or other diversion for one's own interest, is merely adjunctive thereto". Id. While it is true that the Defendant, McDonald's of Layton, may have derived some indirect benefit from the improved employee morale resulting from the softball games, this is not equivalent to a finding that the predominant purpose of those games was to serve the employer's interest. Rather, the predominant motivation and purpose of softball games was to serve the social aspect or entertainment diversion of the employees.

The remainder of the cases cited by the Applicant are inapplicable to the case at bar.

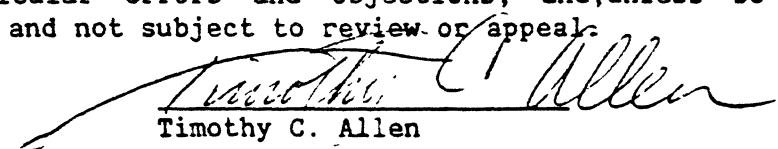
The Administrative Law Judge finds and concludes that the Applicant and the other occupants of his car did not sustain a compensable industrial accident during the course or scope of their employment with the Defendant, McDonald's of Layton. Rather, the Administrative Law Judge finds that the activity of the employees was initiated by the employees without the indirect or direct pressure of the employer to participate, and that the employer other than the benefit of improved employee morale and performance, derived no significant, substantial benefit from the softball league.

KELLY ARLIN BLACK  
ORDER  
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CONCLUSIONS OF LAW:

Kelly Arlin Black did not sustain a compensable industrial accident on June 13, 1985, while in the course or scope of his employment with the Defendant, McDonald's of Layton.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

  
Timothy C. Allen  
Administrative Law Judge

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah this  
17<sup>th</sup> day of April, 1986.

ATTEST

  
Linda J. Strasburg  
Commission Secretary

WENDELL E. BENNETT  
Attorney for Applicant  
448 East 400 South, Suite 304  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7846

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IN THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000922

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KELLY ARLIN BLACK, 6-13-85 : MOTION FOR REVIEW

Applicant, :

vs. :

MCDONALD'S OF LAYTON and/or :  
STATE INSURANCE FUND, :

Defendants. :

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COMES NOW the Applicant above named, Kelly Arlin Black, by and through his attorney of record, and asks the Industrial Commission of Utah to review the opinion of Timothy C. Allen, Administrative Law Judge, which bears the date of April 17, 1986.

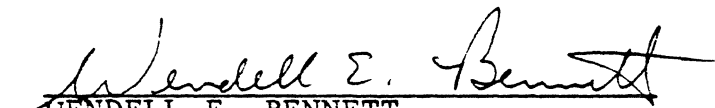
The Motion for Review is based upon an error of law contained in the Findings of Fact Conclusions of Law and Order which held that the injuries sustained by Kelly Arlin Black are not compensable industrial injuries in that the accident of June 13, 1985 were not injuries sustained in the course or scope of his employment with the defendant McDonald's of Layton.

Said legal conclusions on the part of the Administrative Law Judge are in error, and for the reasons stated by the

Applicant in the Memorandum in Opposition to the Defendant's Motion to Dismiss are not well founded in law.

WHEREFORE, the Applicant prays that the Industrial Commission review the Findings of Fact, Conclusions of Law, and Order of Administrative Law Judge Allen, and find that the Applicant Kelly Arlin Black was in the course and scope of his employment at the time of the accident on June 13, 1985, and that his injuries are, therefore, compensable.

DATED this 29<sup>th</sup> day of April, 1986.

  
WENDELL E. BENNETT  
Attorney for Applicant

DELIVERY CERTIFICATE

I do hereby certify that I delivered a copy of the foregoing to James R. Black and Laurie Haynie, attorneys for Defendants, 261 East 300 South, Suite 300, Salt Lake City, Utah, 84111, on this 29<sup>th</sup> day of April, 1986.



THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000922

KELLY ARLIN BLACK,

Applicant,

vs.

MCDONALD'S OF LAYTON and/or  
STATE INSURANCE FUND

Defendants.

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DENIAL OF

MOTION FOR REVIEW

On or about April 17, 1986, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were denied in the above entitled case.

On or about April 29, 1986, the Commission received a Motion for Review from the Applicant by and through his attorney.

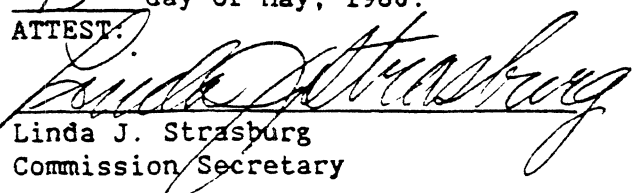
Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

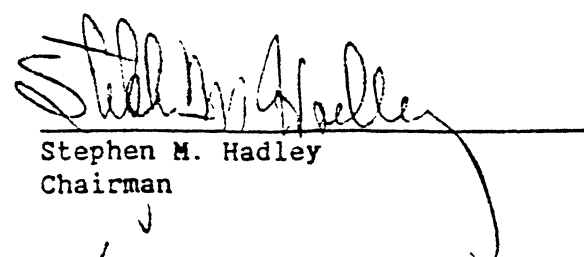
IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of April 17, 1986, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

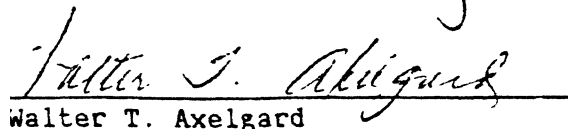
Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

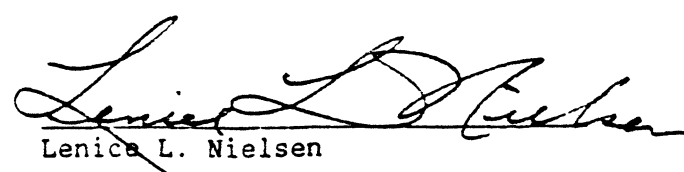
13<sup>th</sup> day of May, 1986.

ATTEST:

  
Linda J. Strasburg  
Commission Secretary

  
Stephen M. Hadley  
Chairman

  
Walter T. Axelgard  
Commissioner

  
Lenice L. Nielsen  
Commissioner