Careful hearing methods key to Oregon Appeals Court ruling in *Greenblatt*

By Jerry Keene, Guest Writer ■ September 19, 2017

The Oregon Court of Appeals-issued decision August 30, 2017, in the case of *Greenblatt vs. Symantec Corporation*,[1] affirmed the Board's Order on Review that claimant waived or failed to preserve several key arguments that, if considered, might easily have persuaded the court to rule the other way. The court also determined that the way the case was tried at the hearing resulted in an evidentiary record that supported the Board's findings of fact.

In *Greenblatt*, claimant sustained a knee injury while jumping to hit a basketball backboard on the employer's premises immediately at the close of a work break during which he had been playing a game with coworkers. Claimant contended the jump itself was related to work because he was celebrating "a good day" insofar as his work performance was going well. The ALJ held that the injury arose out of and in the course of employment. The Board reversed, ruling that it was excluded by ORS 656.005(7)(b)(B), which prohibits benefits for injuries sustained during or resulting from the worker's engagement in "recreational or social activities primarily for the worker's personal pleasure." The court of appeals upheld this ruling.

Greenblatt was an extremely close case that could have gone either way, especially since the court of appeals issued a decision that was damaging to defense arguments in *Pohrman v. US Bank.*[2]

Three particular issues were key to preserving the court's denial. The first issue was whether playing basketball during a sanctioned break on employer premises actually constituted a "recreational activity." While this seems obvious, the court of appeals in *Pohrman* ruled that the statute only applied to certain "organized" social or recreational activities, and not to informal activities the worker engaged in incidental to a paid work break. Fortunately, the court determined that claimant waived any argument that playing basketball did not constitute a qualifying "recreational activity" because he failed to preserve it in his brief to the Workers' Compensation Board.

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The second issue was whether the injury occurred "during" or "as a result of" engaging in such a recreational activity. Claimant emphasized that the game was over and he was on his way back to work. The employer contended that claimant's arguments were not persuasive because even if the activity was over, the injury still occurred as a *result* of engaging in the activity because

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Oregon Court of Appeals decides *Greenblatt* (continued)

he was still on the court and jumping to hit a piece of equipment used in the activity. Once again, the court agreed with the employer's argument.

The third issue was whether the activity was "primarily" for the worker's personal pleasure as opposed to being for the employer's benefit. Claimant argued that the employer provided the equipment and the basketball court, which meant that the activity was a work-related activity. The employer argued that while it provided the location and the equipment, this was not enough to automatically render the "activity" of playing basketball on it one that was primarily for the employer's benefit. The court agreed with the employer, stating as follows:

> Employer concedes that, necessarily, providing break facilities served employer's work-related interests, but contends that determining the primary motivation for the activity itself is a separate inquiry. We agree. The record includes sparse evidence of the way in which claimant's recreational activity might have served employer's work-related interests.

In a footnote, the court continued, "As noted, claimant contends that his jump was in part motivated by his happiness with work. That fact does not make the activity itself work related."

The attorneys at Reinisch Wilson Weier PC are available to discuss these or any other claim issues. ■

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[1] *Greenblatt v. Symantec Corporation*, 287 Or App 506 (2017)

[2] *U.S. Bank v. Pohrman*, 272 Or App 31 (2015)

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