

IN THE SUPREME COURT OF OHIO

CRAIG D. GRIFFITH, : CASE NO. 09-0203
APPELLEE, : ON APPEAL FROM THE
vs. : FRANKLIN COUNTY
CITY OF MIAMISBURG, et al., : (TENTH DISTRICT) COURT
APPELLANTS. : OF APPEALS

APPELLEE CRAIG D. GRIFFITH'S MEMORANDUM IN RESPONSE TO
APPELLANT CITY OF MIAMISBURG'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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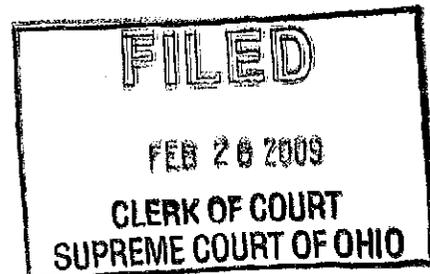


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STATEMENT OF APPELLEE'S POSITION AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, WHETHER LEAVE TO APPEAL IN A FELONY CASE SHOULD BE GRANTED, OR WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST (S.C.T. PRAC. R. III, Sec. 2(B)(1))

This case involves neither a substantial constitutional question nor a felony. Additionally, and contrary to Appellant City of Miamisburg's ("Miamisburg's") assertions, this case is not of public or great general interest. Therefore, this Court should decline to exercise discretionary jurisdiction in this case.

This case involves a workers' compensation claim appealed into the Franklin County Common Pleas Court pursuant to R.C. 4123.512¹. The sole issue in the case is whether Appellee Craig D. Griffith ("Griffith") is entitled to participate in the workers' compensation fund for an injury which occurred on May 8, 2006, which turns upon whether Griffith's injury occurred in the course of and arose out of his employment with the City of Miamisburg pursuant to R.C. 4123.01(C). No issue of public or great public interest was implicated in the decision of the Tenth District Court of Appeals which allowed Griffith the right to participate, and no significant guidance would be given by this Court to litigants and inferior courts in any decision resulting from this Court's review of the Tenth District's decision.

Appellant Miamisburg's concerns that the Tenth District Court of Appeals' decision will confuse the state of previously settled law are unfounded. Generally, cases determining whether an injury occurs in the course of and arises out of employment for workers' compensation purposes are not cases of public or great general interest, because workers' compensation cases involving the right to participate in the workers' compensation system are highly fact-specific. This case is highly unique in its facts, and it is unlikely that the set of facts existing in this case

¹ The Notice of Appeal was originally filed into the Montgomery County Court of Common Pleas, which transferred the case to the Franklin County Court of Common Pleas pursuant to the venue provisions of R.C. 4123.512.

will be repeated in the future; therefore, there is little precedential value in a decision from this Court which determines whether the facts of this case satisfy the elements of compensability.

This Court has previously spoken as to the uniqueness of workers' compensation cases:

"[W]orkers' compensation cases are, to a large extent, very fact specific. As such, no one test or analysis can be said to apply to each and every factual possibility. Nor can only one factor be considered controlling. Rather, a flexible and analytically sound approach to these cases is preferable. Otherwise, the application of hard and fast rules can lead to unsound and unfair results." *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 280, 551 N.E.2d 1271. See also, *Rosado v. Cuyahoga Metro Housing Auth., Inc.*, Cuyahoga App.No.87922, 2007-Ohio-1164, ¶22 (citing *Fisher*); *Richardson v. Conrad*, Franklin App.No. 03AP-913, 2004-Ohio-1340.

Contrary to Appellant Miamisburg's assertion, this case does not involve issues which are "germane to almost every Ohio workers' compensation case." While it is true that this case does involve the issue of whether particular facts and circumstances fit within the confines of "in the course of" and "arising out of" and it is also true that all workers' compensation claims must meet this requirement, this fact alone does not make this case germane to many other workers' compensation cases for the simple reason that the unique set of facts is not likely to occur again in the future.

As will be further discussed in Appellee's response to each of Appellant's Propositions of Law, the Tenth District Court of Appeals cited numerous cases which supported its conclusion that Appellee's injury occurred in the course of and arose out of his employment with Appellant Miamisburg. The Tenth District's decision is based upon sound analytical principals mandated previously by this Court and an extensive body of case law from other appellate districts. The straight-forward application of well-established legal principles to the facts by the Tenth District does not confuse or otherwise conflict with prior precedent.

APPELLEE'S SUPPLEMENTAL STATEMENT OF THE FACTS

Appellant City of Miamisburg dedicates just two paragraphs to its recitation of the facts of this case.² In doing so, Appellant fails to state critical facts that were analyzed by the Tenth District in reaching its decision which would be helpful to this Court in deciding whether to accept jurisdiction. Appellee includes these facts, as articulated by the Tenth District.

Appellee was injured at a two-week motor vehicle accident investigation training course at the Ohio Highway Patrol Training Academy in Columbus. Appellant Miamisburg approved Appellee's attendance at the course. Appellant Miamisburg provided a car for his travel to and from the Academy. Appellant Miamisburg paid Appellee his regular pay during his stay at the Academy. Appellant Miamisburg strongly suggested that Appellee stay at the Academy for the entire two-week period. *Griffith v. City of Miamisburg*, Franklin App.No. 08AP-557, 2008-Ohio-6611, ¶2. Appellant fails to disclose that the testimony of Officer Timothy Hunsaker revealed that remaining at the Academy is encouraged by Appellant Miamisburg because it provides trainees with better resources to complete the activities after regular classes end. *Id.* Appellant also omits that Appellee was further encouraged to stay at the Academy by virtue of the fact that Appellant refused to reimburse Appellee for the costs of lodging and meals anywhere except for the Academy. *Id.*

Appellant fails to articulate important facts leading up to the injury. Appellee finished dinner, then he returned to his room. *Id.* at 3. After reading for the next day's classes, Appellee walked down to the Academy's workout facilities (which included a gymnasium containing three basketball courts, a track, rooms with fitness equipment and free weights, and a swimming pool.) *Id.* Appellee began a workout consisting of lifting weights for forty-five minutes, and then

² The facts were not disputed by the parties in this case. When the facts in a workers' compensation case are not in dispute, a court correctly decides the case on summary judgment. *Young v. State Hwy. Dept. of Admin. Servs.*, Summit App.No. 23688, 2007-Ohio-7021, ¶10.

entered a basketball game with other trainees. Id. During the basketball game, Appellee stepped on the jacket of a discarded laser cartridge, twisted his right knee, and suffered a ruptured right knee patellar tendon. Id. The discarded taser jacket resulted from laser training that was conducted in the gymnasium during the day's classes. Id., at fn. 1.

Importantly, Appellant also omits that Appellee was under an obligation to maintain a level of physical fitness that allows him to effectively carry out his police duties. Id. ¶32, at fn. 2. Simply put, Appellee was engaged in an activity at his place of employment which was required by the Appellant City of Miamisburg.

**APPELLEE GRIFFITH'S ARGUMENTS IN SUPPORT OF HIS POSITION
REGARDING APPELLANT CITY OF MIAMISBURG'S PROPOSITIONS OF LAW
(S.CT. PRAC. R. III, Sec. 2(B)(2))**

Appellant City of Miamisburg's Proposition of Law No. 1

Appellee's response to Appellant City of Miamisburg's Proposition of Law that "Under the traveling employee doctrine, a claimant's participation in a pick-up basketball game after the conclusion of a day's scheduled activities is a purely personal errand, outside the course of his employment."

Appellant City of Miamisburg's Proposition of Law Number 1 confuses well-settled law in Ohio, as it lacks sufficient detail to allow it to be reconciled with already existing law. Furthermore, this suggested bright-line rule conflicts with this Court's mandate that all cases must be reviewed individually for the "time, place, and circumstances of the injury" to determine whether it occurs "in the course of" employment. *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 1998-Ohio-455, 689 N.E.2d 917. Appellant asks this Court to review the Tenth District's decision despite Appellant's misstatement of the decision simply as one determining that playing a "pick-up" game of basketball occurs in the course of employment.

As an initial matter, Appellant's over-specific Proposition of Law Number 1 forecloses the possibility that playing basketball at a jobsite after hours can ever be "consistent with the

employee's contract of hire and logically related to the employer's business," or "incidental to the employment." There is no benefit in this Court adopting such a bright-line test in the workplace, as there are most certainly situations in which an employee can be engaged in such activity that is compensable under *Ruckman*, *Kohlmayer*, and *Fisher*. The unique facts of the case at bar present one such situation.

Appellant's Proposition of Law No. 1 directly conflicts with this Court's decision in *Kohlmayer v. Keller* (1970), 24 Ohio St.2d 10, 263 N.E.2d 231, where this Court held that an employee injured in a recreational activity at a picnic held to generate goodwill among employees was an injury sustained "in the course of" employment, and *Columbia Gas of Ohio, Inc. v. Sommer* (1974), 44 Ohio App.2d 69, 335 N.E.2d 743, where an employee injured in a basketball league with other employees and sponsored by the employer was deemed to have occurred "in the course of" employment.

In *Kohlmayer* and *Sommer*, this Court and the Eleventh District, respectively, found that the injuries were sustained in activities permitted by the employer – not required. In the case at bar, Appellee was required to maintain a certain level of physical fitness. See *Griffith*, supra, at ¶32, fn. 2 ("It is undisputed that, as a condition of employment, Miamisburg police officers are required to maintain a level of fitness that will permit them to effectively carry out their duties.") This mandatory requirement presents a stronger link to the "in the course of" prong than the permissible activities previously found to satisfy the same prong in *Kohlmayer* and *Sommer*.

It is important to note that the General Assembly has mandated that the provisions of the Workers' Compensation Act, found between R.C. 4123.01 and R.C. 4123.94, must be "liberally construed in favor of employees and the dependents of deceased employees." R.C. 4123.95. Thus, to the extent there is ambiguity in the provisions of the Workers' Compensation Act, this

ambiguity must be liberally construed in favor of the injured worker. In *Fisher*, this Court held that this rule of statutory construction must be applied to interpretation of the terms "in the course of" and "arising out of" employment. The Tenth District's decision adequately considers the liberal construction requirement found in R.C. 4123.95.

The Tenth District found, and Appellant Miamisburg does not dispute, that Appellee Griffith was a "traveling employee" at the time of his injury. A "traveling employee" is one "whose work involves travel away from the employer's premises."³ Prior case law holds that "a traveling employee may be within the course of his employment continuously during the trip, except where a distinct departure on a personal errand or pursuit is shown."⁴ (Emphasis added.) Appellant Miamisburg simply argues that, under any circumstances, playing basketball at the end of the day is a "distinct departure on a personal errand" – a holding unsupported by previous case law and expressly rejected by the Tenth District in its well-developed analysis.

Appellant Miamisburg mischaracterizes the Tenth District's opinion in this case, suggesting that its decision found compensability solely because the injury occurred on a jobsite.⁵ As noted previously, Appellant fails to distinguish (or even cite) existing case law set forth by this Court which directly conflicts with Proposition of Law No. 1.⁶ This case law was, however, carefully considered by the Tenth District.

In reviewing what may be characterized as a "personal errand," the Tenth District recognized the broad rule set forth by this Court that "an injury is in the course of employment if

³ *Pascarella v. ABX Air, Inc.* (Aug. 10, 1998), Clinton App.No. CA98-01-002.

⁴ *Id.*

⁵ Appellant states: "The The Court of Appeals' first mistake is making a distinction between a traveling employee who is injured during a personal mission away from the jobsite, and a traveling employee who is injured while on the jobsite. In fact, the case law demonstrates that whether an employee is injured on or off premises is not the determining factor, it is just one factor the courts consider in reviewing whether an injury is compensable." In making this statement, Appellant demonstrates its lack of understanding of the Tenth District's decision, as the decision clearly reviews other factors beyond the location of the injury.

⁶ See Appellee's discussion of this Court's decision in *Kohlmayer*, *supra*, at pg. 5.

sustained in activity consistent with the employee's contract of hire and logically related to the employer's business or incidental to the employment." *Griffith*, supra, at ¶12 citing *Ruckman v. Cubby Drilling, Inc.*, supra, at 120, *Kohlmayer*, supra, at 12, and *Fisher*, supra, at 277. Here, Appellee's activity was consistent with his contract of hire, because it was activity directed at satisfying one of the conditions of his employment – maintaining a requisite level of physical fitness. In the disjunctive, the test was satisfied because Appellee's activity was incidental to employment, as he was engaged in a permissible activity located on the employment premises which he was encouraged to remain at for a two-week period. Appellee's activity does not constitute a "personal errand."

Appellant criticizes the Tenth District for citing to three cases which discuss the "traveling employee" provision of "in the course of," incorrectly claiming that these decisions do not apply the traveling employee doctrine. Appellant failed to set forth any case law (and in fact, no such case law exists) in its Memorandum in Support of Jurisdiction which deems an employee outside the course of his employment for engaging in a "personal errand" on the employment premises. In its analysis, the Tenth District examined numerous cases to analogize situations in which a worker was clearly on a personal errand and was excluded from coverage.

The Tenth District discussed *Elsass*⁷ as an example of a case which was not compensable, where the off-duty truck driver was injured in a taxi-cab riding towards a topless dancing establishment. *Griffith*, supra, at ¶16. Contrary to Appellant's assertions, the *Elsass* Court determined that the "in the course of" element was not met, in addition to the "arising out of" element.⁸ The Tenth District correctly noted that the *Elsass* Court did not discuss the

⁷ *Elsass v. Commercial Carriers, Inc.* (1992), 73 Ohio App.3d 112, 596 N.E.2d 599.

⁸ The *Elsass* Court stated that "In the case sub judice, under the foregoing authority, based on the totality of the facts and circumstances surrounding the accident, we find that appellant's injuries were not received "in the course of and arising out of" his employment with appellee." *Id.* at 114.

traveling employee doctrine; however, it is patently obvious that the *Elsass* Court's rationale is consistent with other cases which have explicitly applied the doctrine. Whether the Third District called it the "personal errand" doctrine or not, the claimant in *Elsass* was disqualified from coverage because he was engaged in a personal errand.

The Tenth District also correctly distinguished *Richardson*.⁹ In *Richardson*, the Tenth District concluded that an employee who was injured in an automobile accident occurring out-of-town did not suffer an injury "in the course of" employment. The employer did not pay for Richardson's meals, provide him with a car, or reimburse him for mileage in connection with the trip. Richardson was injured while returning to the motel from a personal dinner after work, off the employment premises, which clearly fits within the realm of a "personal errand."

Our case presents different facts from *Richardson*. Appellee was injured on the jobsite. Appellee was doing an activity that would have been anticipated by Appellant, as being physically fit is a requirement of being a police officer. Appellant paid for Appellee's lodging, meals, and provided him with a car to go to the Academy. The significant factual differences make *Richardson* inapposite to the case at bar.

Appellant's omission of all of the unique facts existing in the case at bar is fatal to Appellant's claimed error and analysis.¹⁰ The Tenth District in *Richardson* distinguished its case from another case, *Duncan*,¹¹ finding compensability even where the accident occurred off-premises. In distinguishing *Duncan*, the *Richardson* court stated:

"[W]e distinguish [*Duncan*] on the basis that the employee was in California and had no choice but to stay in a hotel for the convenience of the employer, and on the basis that he was compensated for all meals and provided the use of a rental car during his stay." *Richardson*, supra, at ¶15. (Emphasis added.)

⁹ *Richardson v. Conrad*, Franklin App.No. 03AP-913, 2004-Ohio-1340.

¹⁰ See *Appellee's Supplemental Statement of Facts*, supra, pg. 4-5.

¹¹ *Duncan v. Blow Pipe, Inc.* (1998), 130 Ohio App.3d 228, 719 N.E.2d 1029.

This case includes facts similar to *Duncan*, not *Richardson*. Appellee Griffith was in Columbus and had no choice but to stay at the Academy for the convenience of Appellant. Furthermore, Appellee's meals at the Academy were paid for by Appellant, and Appellee was provided a car to drive to the Academy by Appellant. The case at bar falls in line with *Duncan*, not *Richardson*, and there is no error in the Tenth District's analysis that the personal errand exception implicitly found in *Richardson* did not apply to Appellee's injury.

Appellant also states that the Tenth District erred when it found that "neither the fact that Griffith was on his free time nor that Griffith was engaged in recreational activity dispositive of whether he was in the course of his employment." Appellant criticizes the Tenth District for basing its decision, in part, upon cases which are not "traveling employee" cases.

As stated previously, the Tenth District was obligated to follow the standard for "in the course of" set forth by this Court -- "if sustained in activity consistent with the employee's contract of hire and logically related to the employer's business or incidental to the employment." *Griffith*, supra, ¶12, citing *Ruckman*. This Court has never confined an inferior court's analysis when discussing the "in the course of" beyond this standard, and the Tenth District was correct in reconciling its decision with other cases interpreting the "in the course of" element, regardless of whether those decisions were explicit cases involving a "personal errand." The Tenth District was correct in analyzing the case at bar's unique set of facts presented, given this Court's previous mandate to individually analyze each workers' compensation case separately for purposes of determining the "in the course of" and "arising out of" elements. See *Fisher*, supra.

Contrary to Appellant's argument, the Tenth District's decision does not confuse existing law. The decision is consistent with *Pascarella*.¹² In *Pascarella*, the Twelfth District concluded

¹² Appellant criticizes the Tenth District's characterization of the holding in *Pascarella*, and stated that the court "noted that neither a required layover period nor recreational activities during the wait for resumption of actual

that recreational activities undertaken by an employee on a lay-over were not outside the course of employment. "[A] 'layover period' required by the employer is not a breach in the employment relationship, which is also not breached by recreational activities during the wait for resumption of actual duties." *Pascarella*, supra, at *6. Here, the state of existing law will not be confused because, like *Pascarella*, Appellee was engaged in recreational activities during a layover period required by the employer. The Tenth District harmonized its decision with *Pascarella*.

Finally, the Tenth District correctly analyzed the "time, place, and circumstances" of injuries occurring on the premises of lodging provided by employers in concluding that the employer was deemed to have purchased the right for its employees to use all facilities on-premises, not just the room itself. "In addition, the Academy provided attendees with the use of its physical fitness facilities, a fact well-known to [Appellant], and injury from the use of the provided facilities can reasonably be expected." *Griffith*, supra, at ¶26. This is consistent with the decision in *Pascarella*, where the injured worker sustained an electric shock while venturing out onto the balcony. Because the Tenth District carefully reconciled its decision with the decision in *Pascarella*, Appellant's claims that the Tenth District's decision would confuse the state of the law is not well-founded.

In short, Appellant's Proposition of Law No. 1 does not adequately consider the unique facts of this case. Appellant is merely attempting to draw attention to the fact that Appellee was injured playing basketball, when there are other facts which must be considered as well.

Appellant misunderstands the reasoning of the Tenth District which found that, under the unique

duties constitutes a breach in a traveling employee's employment relationship." Memorandum in Support of Jurisdiction of Appellant City of Miamisburg, pg. 8. Appellant claims that the *Pascarella* Court "stated just the opposite and held that under the 'traveling employee' doctrine, *Pascarella* was in the course of his employment the entire time he was traveling except when he was on a personal errand." *Id.* This statement by Appellant demonstrates its lack of understanding of the Tenth District's decision, and significantly undercuts its argument that the Tenth District erred in reaching its conclusion in this case. In fact, the Tenth District's citation to the *Pascarella* case supports its conclusion that Appellee remained in the course of employment during his stay at the Academy.

facts of this case, Appellee's injury occurred "in the course of" employment. The Tenth District's decision contains solid analysis developed with a thorough review of the case law handed down by this Court and other appellate districts.

Appellant City of Miamisburg Proposition of Law No. 2

Appellee's Response to Appellant City of Miamisburg's Proposition of Law No. 2, which states that "The Court of Appeals should have affirmed the Trial Court's decision because the totality of the circumstances do not establish the requisite causal connection between Griffith's injury and his employment."¹³

It is axiomatic that an injury must "arise out of" employment as well as occur in the course of employment. *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 423 N.E.2d 96. An injury "arises out of" employment when "there is a causal connection between the injury and the employment." *Griffith, supra*, at ¶27.

On-premises injuries are deemed to satisfy the "arising out of" element. This Court previously stated in *Griffin v. Hydra-Matic* (1988), 39 Ohio St.3d 79, 82, 529 N.E.2d 436:

"[A]n injury sustained by an employee upon the premises of her employment is compensable pursuant to RC Chapter 4123 irrespective of the presence or absence of a special hazard thereon." *Id.* at 82."

Under *Griffin*, the fact that the injury occurred on the employment premises is dispositive of the "arising out of" portion of the compensability formula. Appellee's injury occurred upon the premises of his employer, because he was injured at his jobsite and he was strongly encouraged to remain on the jobsite premises after hours, and as such, "arises out of" employment.

In addition, an injury "arises out of" employment when considering the "totality of the circumstances." *Lord, supra*. When considering the "totality of the circumstances," the main inquiry relates to three factors: (1) the proximity of the scene of the accident to the place of

¹³ Appellant's Assignment of Error No. 2 does not appear to be in the format required by *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39, which requires an appellant to state its proposition of law in a format that the Court can adopt in the syllabus. Appellee will address Appellant's Assignment of Error No. 2 as if it pertains to the "arising out of" prong of compensability, however.

employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the employee's presence at the scene of the accident. *Lord* at 444. The three factors are not elements, and there is no requirement that all of the three factors in *Lord* be met. *Fisher*, supra, at 280. In *Durbin v. Ohio Bureau of Workers' Compensation* (1996), 112 Ohio App.3d 62, 677 N.E.2d 1234, the First District found that an injury "arose out of" employment despite the fact that none of the *Lord* factors applied. It is not required that Appellee demonstrates that each of these elements are satisfied in this case in order to establish the "arising out of" prong of compensability. Nonetheless, in the case at bar, the Tenth District found each of the three factors to weigh in favor of coverage.

First, the Tenth District analyzed the first "arising out of" prong, the "proximity of the scene of the accident to the place of employment." Despite Appellant's arguments to the contrary, the Tenth District correctly concluded that the distance to be considered was the place of last employment, not the eighty-mile distance between the Academy and the City of Miamisburg. See *Ruckman*, supra, at 120. ("Accordingly, although work at each drilling site had limited duration, it was a fixed work site within the meaning of the coming-and-going rule.")

In finding the place of employment in the case at bar to be the Academy, not Miamisburg, the Tenth District found support in *Elsass* and an Eleventh District decision, *Faber v. R.J. Frazier Co.* (1991), 72 Ohio App.3d 9, 593 N.E.2d 410, in which an employee was killed in an automobile accident on a private access road leading to a jobsite. The *Faber* Court found the jobsite to be the "place of employment" notwithstanding the fact that the jobsite was not under the ownership or control of the employer.

Appellant conceded that "although the Academy was not owned by Griffith's employer, City of Miamisburg, it would be considered 'on-premises' just as the CEI plant was considered

on-premises in *Faber*." *Griffith*, supra, at ¶30. In light of the foregoing case law and Appellant's concession, the Tenth District had adequate support for its conclusion that Appellee's injury occurred on the employment premises. This satisfies the test for "arising out of" contained in *Griffin* as well as the first *Lord* factor.

With regards to the second *Lord* factor, "the employer's degree of control over the scene of the accident," the Tenth District correctly concluded that this factor weighed in favor of coverage. Appellant exercised control over Appellee's presence at the Academy by authorizing his attendance, encouraging him to remain at the Academy throughout the course, including his free time, and refusing to allow Appellee for his costs at staying somewhere else including meals. *Griffith*, supra, at ¶31. Appellant Miamisburg also had the ability to exercise control over Appellee's activities, as evidenced by the fact that after Appellee's injury, Appellant Miamisburg instituted a policy which required its officer to sign a waiver for recreational purposes when staying out of town.¹⁴

Finally, the Tenth District correctly found that Appellee satisfied the third prong under *Lord* – that Appellant received a benefit from Appellee's presence at the scene of the accident. The Tenth District correctly noted that Appellant received a benefit from Appellee's presence at the Academy. Appellee stayed at the Academy at Appellant's direction, and Appellant received a benefit from his presence at the Academy in his free time, as well, through Appellee's acquiescence in Appellant's encouragement to stay on the premises. Appellant received a direct benefit from Appellee's participation in the recreational activity as Appellee was fulfilling a condition of his employment requiring him to maintain a level of fitness that will effectively allow him to carry out their duties as a police officer. Appellant also derived the benefit of forgone costs for alternative room and board. *Griffith*, supra, at ¶34.

¹⁴ See Deposition of Timothy Hunsaker, pgs. 42 -44 and Exhibit 2 to Deposition of Timothy Hunsaker.

Appellant argues that the Tenth District erred when it "erroneously analyzed the arising out of" prong. Appellant's Memorandum in Support of Jurisdiction analyzes the decision in *Young*, supra. However, Appellant fails to disclose that the *Young* Court's analysis focused solely on whether an injury was incurred "in the course of" employment, not "arising out of" employment. *Id.* at ¶¶ 9-12.

The *Young* Court deemed the injury to be outside the course of employment. The facts of the case at bar and the facts of the *Young* case are dissimilar – in *Young*, the claimant was injured while playing basketball at the local YMCA on his regular day off, after completing a side job. *Id.* at ¶11. In the case at bar, Appellee was at the employment premises, a significant distinction from the *Young* case.¹⁵

The Tenth District addressed Appellant's concerns regarding application of *Young*. It recognized that a general physical fitness requirement, by itself, is insufficient to generate the causal connection required for compensability. The Tenth District properly distinguished the facts of the case from the facts of the case at bar. See *Griffith*, supra, at ¶33. It is undisputed that Appellant knew that the Academy had physical fitness equipment available for use, that Appellant could reasonably anticipate that Appellee would use such equipment, and therefore, an injury could be reasonably anticipated.

All of the *Lord* factors weigh in favor of coverage. In addition, Appellant conceded that the injury occurred on-premises. Appellee's injury "arose out of" employment with Appellant.

¹⁵ The Tenth District succinctly noted that, unlike *Young*, the case at bar involved a police officer staying at a location for two weeks at his employer's direction. "Appellee could not reasonably contemplate that Griffith, during the two-week training course, would neglect his personal needs or forfeit workers' compensation benefits from resultant injuries." *Griffith*, supra, at ¶34.

Conclusion

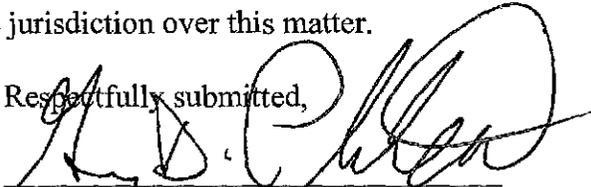
This case presents a workers' compensation claim with unique facts. Not surprisingly, there has not been a workers' compensation claim in the State of Ohio litigated to the appellate court level with these unique facts. Nor is it likely that there will be a similar case in the future.

The Tenth District correctly concluded that the "personal errand" exception did not apply to the facts of this case. All parties agreed that Appellee was a traveling employee, and the Tenth District correctly concluded that Appellee did not engage in a personal errand when he played basketball for fitness purposes at the time of his on-premises injury.

The Tenth District correctly concluded that the "arising out of" prong of compensability was satisfied with this on-premises injury. The *Lord* factors all weighed in favor of Appellee and coverage.

This Court should decline to exercise jurisdiction over this matter.

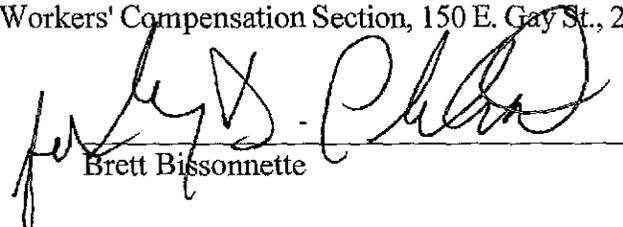
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Gary Becker, Dinsmore and Shohl, LLP, 1900 Chemed Center, 255 East Fifth Street, Cincinnati, OH 45202, and Stephen Plymale, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay St., 22nd Floor, Columbus, OH 43215-3130.



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