

FINAL AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-044902

Employee: James Jackson  
Employer: PepsiAmericas  
Insurer: Old Republic Insurance Company  
Date of Accident: May 16, 2003  
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 29, 2006. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued August 29, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: James Jackson

Injury No. 03-044902

Dependents:

Employer: PepsiAmericas

Additional Party:

Insurer: Old Republic Insurance Company

Hearing Date: May 31, 2006; finally submitted June 23, 2006

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and  
Industrial Relations of Missouri  
Jefferson City, Missouri

Checked by: KD/Isn

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 16, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee suffered a right knee injury arising out of and in the course of employment
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right knee
14. Nature and extent of any permanent disability: 20% permanent partial disability to the right lower extremity at the level of the knee
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? See Award
18. Employee's average weekly wages: \$835.42
19. Weekly compensation rate: \$556.97/\$340.12
20. Method wages computation: by agreement of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: See Award

32 weeks of permanent partial disability from Employer at \$340.12 per week ..... \$10,883.84

UNDETERMINED; SEE AWARD AS TO MEDICAL EXPENSE

TOTAL:

22. Future requirements awarded: N/A

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 17.5% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ronald S. Motil

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Jackson

Injury No: 03-044902

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents:

Employer: PepsiAmericas

Additional Party

Insurer: Old Republic Insurance Company

Checked by: KD/lsn

The claimant, Mr. James Jackson, and the employer and its insurer, PepsiAmericas and Old Republic Insurance Company, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issue and evidence to be presented in this claim for compensation. At issue is the liability of the employer for an injury suffered by the claimant while involved in a recreational activity. The employer argues that it is not liable for disputed medical expense or for disability referable to a right knee injury, under the theory that the injury did not arise out of and in the course of employment.

The claimant appeared at hearing and testified on his own behalf. The employer and insurer submitted the

deposition testimony of Mr. David Like and of Mr. John Woodhead.

## EXHIBITS

The following exhibits are in evidence:

### Claimant's Exhibits

- A. Copy of e-mail directions
- B. Roster of teams/participants
- C. Medical records of Dr. McMullin
- D. Medical billings paid to Dr. McMullin

### ***Employer and Insurer's Exhibits***

- 1. Deposition of David Like, taken on 5/25/06
- 2. Deposition of John Woodhead, taken on 5/25/06

## FINDINGS OF FACT AND RULINGS OF LAW

On 5/16/03 the claimant, Mr. James Jackson, suffered a right knee injury, and subsequently had a surgery performed by Dr. McMullin on 5/22/03 to repair a complex bucket handle tear of the medial meniscus. Mr. Jackson suffered the injury while at Wacky Warriors, a paintball facility in Wentzville, Missouri, chosen by the employer, PepsiAmericas, to be the location of a mandatory meeting for its employees. The facility was dedicated for the exclusive use of PepsiAmericas, and a pavilion located in the midst of the various paintball fields of play was the locus of the business meeting.

On the date of injury Mr. Jackson was employed by PepsiAmericas as an account sales manager. His duties required him to call on grocery stores and mass merchandisers in his sales territory, writing up orders for sales of soda to be delivered the next day. Mr. Jackson described the meeting on 5/16/03 as a kick off for the summer, to lay out the summer objectives, and to introduce summer sales programs and promotions offered by Pepsi.

The employer provided claimant with an e-mail as to directions to the off site meeting (Claimant's Exhibit A) and a roster of paintball teams was provided to the claimant in his mailbox (Claimant's Exhibit B). Claimant acknowledges that he was on Team Aquafina, and cannot identify any rhyme or reason as to the make up of the team rosters, other than that each of the team captains held a supervisory position in the company.

Mr. Jackson recalled that at the close of the meeting, the list of teams was made available to the participants over the power point presentation equipment used for the business meeting, and after the lunch provided on site, the participants then went to a barn to pick up the necessary paintball equipment. Mr. Jackson recalls that while participating in the paintball activity, and while running from one obstacle to another, he stepped in a hole or rut and twisted his right knee.

The employer paid for both the use of the paintball facility and the use of the equipment. Claimant, a salaried employee, was paid both salary and mileage for his attendance at the meeting. Mr. Jackson did not volunteer to be placed on a paintball team, but rather was assigned to a team by his employer. Mr. Jackson further acknowledged that the employer, whether it be by memo or through one of the supervisors, never advised him that participation in the paintball was mandatory, and further agreed that the employer offered no particular incentive or reward as an inducement to participate in paintball. The claimant testified that he supposed the purpose of the paintball was to foster "teambuilding" and to have fun. Claimant noted that his immediate supervisor, Rob Beggs, participated on one of the teams, as did other supervisors. The claimant further acknowledged that not all of the participants at the business meeting also participated in the paintball activity. Mr. Jackson further agreed that all of the paintball participants were employees of PepsiAmericas, and that none of the participants were clients of the employer.

Mr. Jackson further testified that he supposed the paintball to be a part of the agenda for that day; that he never considered not playing; and that he was never specifically advised as to whether participation in paintball was to be voluntary or mandatory on his part.

Mr. David Like testified on behalf of the employer by his deposition taken on 5/25/06. Mr. Like was sales

operations manager for the employer on 5/16/03, and participated in paintball as a member of Team Dew. Mr. Like recalls that he had no involvement in the planning of the meeting, the choosing of the paintball facility as the site, nor was he aware how the team rosters had been set. Mr. Like was not told that playing paintball was mandatory, and is unaware of any suggestion to any employee that such activity was mandatory. Mr. Like recalled that Lee Jeffries, an employee listed as being on Team Aquafina, did not participate in the paintball, but does not know why he chose not to play. Mr. Like recalls that prior to the commencement of paintball, an announcement was made that "If" you were going to play paintball, you needed to find your team and head over to the shed. The witness recalls that no other activities, other than paintball, had been scheduled, and that employees not playing paintball were free to leave. Mr. Like further recalls that the seven people listed on the roster below the list for Team Pepsi were certain female employees who did not play paintball.

Mr. John Woodhead also testified on behalf of the employer by his deposition taken on 5/25/06. On 5/16/03 Mr. Woodhead was the regional manager in St. Louis for PepsiAmericas, and his immediate boss was Rich Frey the vice president /general manager. Mr. Woodhead had a recollection of the nature and purpose of the meeting on 5/16/03 that was consistent with the recall of Mr. Jackson. The meeting was not just the usual monthly meeting of the St. Louis office to discuss sales and marketing, but was a meeting to bring in management from entry-level and up for the sales departments in Rich Frey's division, including St. Louis, Springfield, Jerseyville, Farmington, and Columbia. The decision to have a business review meeting, and to include a fun event as a part of the program agenda, was made at an upper management meeting, and Mr. Woodhead believes that the roster of teams was chosen and prepared by Christina Lohman, the assistant to Rich Frey. Mr. Woodhead recalls that he and the other upper management team captains were a competitive bunch, and that the choice of team rosters was left to Ms. Lohman to ensure that the teams were chosen fairly. Mr. Woodhead testified that the idea of the paintball activity was to have fun, and does not recall being advised, or advising anyone, that participation in paintball was mandatory, or that there would be some sort of sanction for failing to play. Mr. Woodhead recalled that it was Mr. Frey who announced the agenda at the meeting on 5/16/03, and who announced that at the meeting the employees were to have fun and play some paintball.

### **INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**

The provisions of Section 287.120.7 RSMo applicable to an injury occurring on 5/16/03 provide as follows:

Where the employee's participation in a voluntary recreational activity or program is the proximate cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

- (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
- (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
- (3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

As was pointed out by the court, the term "voluntary recreational activity" is not defined by statute, nor does the statute provide examples of activities contemplated by its forfeiture provisions. Graham v. La-Z-Boy Chair Company, 117 S.W.3d 182, 185 (Mo. App. S.D. 2003). In Graham, the court concluded that the activity involved is not to be deemed "recreational" for purpose of the statute, and the forfeiture not to be in effect, if the involved activity engaged in by the employee results in a mutual benefit to the employee and to the employer, citing the "mutual benefit doctrine" as articulated in Brenneisen v. Leach's Standard Serv. Station, 806 S.W.2d 443, 448 (Mo. App. E.D. 1991). The interplay between Section 287.120.7 and the mutual benefit doctrine was further discussed in Custer v. Hartford Insurance Company, 174 S.W.3d 602, 615-616 (Mo. App. W.D. 2005), where the court cites to Graham and states, "More specifically, where an employee's participation in golf tournaments benefits his employer's business in some way, the golf tournament cannot be considered to be purely recreational so as to trigger the provisions of Section 287.120.7."

The court in Custer, at p. 615, further ruminated over the case law as it applies to injuries sustained while attending or traveling to or from employer sponsored social or recreational functions, and stated as follows:

The cases reveal that no general rule has been developed which can be

applied to all situations for the determination of the circumstances under which the injury may be considered to have arisen out of and in the course of employment, with the result that the determination is made by the consideration of various relevant factors, accorded varying degrees of weight, applied to the particular facts and circumstances of each case. In as much as injuries sustained by an employee in connection with an employer-sponsored event usually occur while the employee is not performing the duties for which he was employed, the inquiry is whether the social affair is sufficiently related to the employment to justify the conclusion that the injury arose out of and in the course of employment. Whether an employee injured while attending *or traveling to or from* an employer-sponsored social affair was compelled, directly or indirectly to attend, 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 employment to which the employee was entitled, have been recognized as the primary elements to be considered in determining the compensability of the injury. Ludwinski, 873 S.W.2d at 892 (quoting Riggen v. Paris Printing Co., 559 S.W.2d 625, 629 (Mo.App. W.D. 1977))

The recreational activity involved in this matter, a paintball competition, was so integral to the agenda of the employer that a roster of teams was created and disseminated to the employees prior to the business meeting, and the business meeting itself was held at a paintball facility secured by the employer for the exclusive use of the employer during the business meeting and recreational activity that followed. When asked whether the meeting was different from the typical monthly meeting, John Woodhead responded as follows:

What the meeting was, my boss, Rich Frey, who is the vice president/general manager, he wanted to have his whole division in for a meeting and afternoon of fun to kick off the summer and do all the, you know, rah-rah stuff and have a good time, as well as kind of do a business review as to what happened and what's upcoming. (Employer and Insurer's Exhibit No.2, at page 7).

The employer had an interest in the competitive balance of the respective teams captained by upper management, and left it to Ms. Lohman to draw up the rosters accordingly. The employer also had an interest in promoting participation, which was not mandatory, but which was clearly expected of the employees, as suggested by the comments of Mr. Woodhead in the following from his deposition:

Q: When you got to the meeting, were there any announcements made with regard to the agenda or what was going to happen that day?

A: Yes.

Q: Do you recall what was said?

A: I believe the agenda was put up on the screen. We had, like, an area where we all sat and then a big screen where we did the presentation. And it was all outside, so it was- you know, we had like this overhang that we were in.

And Rich, my boss, put up on the agenda, "Here's what we're going to do. We're going to go through what happened and what's going to happen"—you know, each of us captains took a piece of the meeting—"and then at the end, we're going to go out and have some fun and play some paintball." And that's what the agenda said.

It seems to this fact finder that the purpose of both the business agenda and the paintball was to allow upper management and lower management to recognize common goals in anticipation of working together in a competitive environment to reach those common goals. The business portion of the meeting and the paintball portion of the meeting blended in seamlessly together through the efforts of the company to organize the meeting at the paintball facility and to provide a ready list of captains and team rosters. The following is the test articulated by the Missouri Supreme Court as to the nature of the benefit required to invoke the mutual benefit doctrine:

Each case turns on its own facts under the mutual benefits doctrine. The test is not whether any conceivable benefit to the employer can be articulated no matter how strained, but whether the act that resulted in the injury is of some substantive benefit to the employer. That is not to say the benefit needs to be tangible or great. Bybee v. Ozark Airlines, 706 S.W.2d 570, 572 (Mo.App.1986). But the benefit cannot be so remote that it deprives the mutual benefit doctrine of meaning. Blades v. Commercial Transport, Inc., 30 S.W.3d 827, 831 (Mo banc 2000)

The employee and the employer are found to have received a mutual benefit from the paintball activity that led to the meniscus injury suffered by Mr. Jackson on 5/16/03. The claimant is found to have sustained an injury by accident arising out of and in the course of his employment.

### **PERMANENT PARTIAL DISABILITY**

The parties stipulated at hearing that the injury suffered by Mr. Jackson on 5/16/03 resulted in a permanent partial disability equivalent to 20% of the right knee. The parties further stipulated to \$340.12, the maximum rate allowed for by law for weekly compensation given an injury on 5/16/03. The total due for permanent partial disability is for 32 weeks, or a total of \$10,883.84.

### **PAST MEDICAL EXPENSE**

The parties stipulated that the claimant paid \$738.64 out of pocket for medical treatment necessary to cure and relieve of the effects of his right knee injury. The records of Dr. McMullin, Claimant's Exhibit D, documents the total medical expense necessary to cure and relieve, in the amount of \$12,011.24. The employer is to reimburse the claimant for the \$738.64 that was paid out of pocket, and is liable for the balance, in the amount of \$11,272.60, payable by the employer and insurer to the extent that the group health insurance carrier should seek reimbursement.

This award is subject to a lien in favor of Ronald S. Motil, Attorney at Law, in the amount of 17.5% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: August 29, 2006

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST  
PATRICIA "PAT" SECREST  
Director  
Division of Workers' Compensation