BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35471

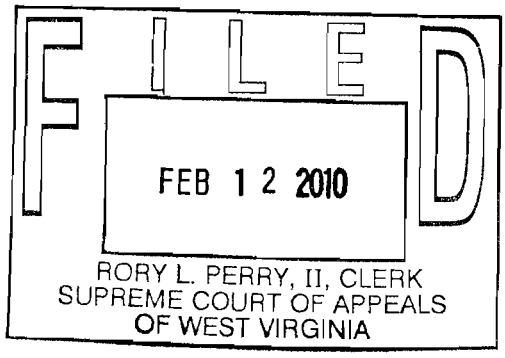
DONNA MCKNEELY,

Appellant,

v.

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Appellee.



BRIEF IN SUPPORT OF APPEAL

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W.Va. Code § 15-2-29

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29 CFR 785.27-29

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62 C.J.S., Municipal Corporations, § 588d

82 *Am Jur 2d Workers' Compensation*, §§ 270, 272, 280

Larson, Treatise on Workers' Compensation at § 22.22

I. INTRODUCTION

This is an appeal of the July 31, 2009 Opinion and Final Order of the Kanawha County Circuit Court which ruled that a West Virginia Trooper was not entitled to disability for a "duty related injury" when she fell at the police academy as a result of the negligence of the janitor, also an employee of the State Police. This ruling is clearly wrong and an abuse of discretion.

In order to establish a "duty related injury," a West Virginia State Police employee need only establish that she is partially disabled by 1) injury resulting from any occupational risk or hazard inherent in or peculiar to the services required of members of the Department and 2) incurred pursuant to or while the member was engaged in the performance of his or her duties as a member of the Department.

Trooper McNeely was an 8-year employee and was instructed to attend career progression training and testing at the West Virginia State Police Academy. While attending classes and testing, she fell as a result of wax left on the floor without warnings. In other words, she fell at work while taking specific classes put on by her employer. **The overwhelming analogous authority in this country has ruled such an occurrence is a duty related injury.**

Importantly, West Virginia's State police officers are not covered by West Virginia's Workers' Compensation or Social Security. The only compensation they are entitled to when hurt is the State Police's own statutory programs. Officers need the protections afforded by their sole remedy when they are disabled from working. **The Circuit Court's analysis of the disability fund for state troopers should not be**

accepted because, essentially, it means that the West Virginia Death, Disability and Retirement Fund would be one of the most exclusionary state compensatory schemes in the country for injured workers. The position below is not supported by the law or the intent of the legislation.

II. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

Appellant has appealed the decision of the Kanawha County Circuit Court, dated July 31, 2009, which incorrectly affirmed the decision of the West Virginia Consolidated Public Retirement Board (hereinafter sometimes referred to as the "Board"), dated May 23, 2007, denying her request as a disability annuitant from the West Virginia Death, Disability and Retirement Fund (State Police "Plan A," hereinafter sometimes referred to as "DDR"), to correct and change her disability status from a non-duty related status to a duty-related partial disability status.

III. STATEMENT OF FACTS

Appellant was an active member of the West Virginia State Police for eight years, two months and fourteen days before she was forced to leave her employment with a disability pension as a result of an injury she incurred on June 28, 1999, which rendered her unable to perform all of the duties of a West Virginia State Trooper. Although she applied for duty-related partial disability benefits, she was erroneously instead awarded non-duty-related disability benefits by the Board on January 24, 2001.

The injury that led to the appellant's disability occurred on June 28, 1999, when she slipped and fell at the State Police Academy where she was taking an examination for promotion to the rank of Sergeant. While walking to the restroom during a recess,

she fell as a result of a custodial employee leaving wax or some other slippery substance on the floor. The fall was witnessed by several State Troopers. (Administrative Record, Tab 10, Testimony of Appellant at pp. 34-36).

The appellant has testified both during her hearing before Hearing Examiner Jack DeBolt and in an affidavit that her attendance at the examination for promotion was pursuant to "Orders" and that her attendance was mandatory. (Administrative Record, Tab 10, Testimony of Appellant at pp. 31-33, 42-45, and Tab 1, Affidavit of Appellant attached to her Reply to Memorandum in Support of Request for Change in Retirement Status.) Specifically, appellant, who was on paid maternity leave at the time of her injury, having had a C-Section three weeks prior, called her supervisor to ask if she could attend the class at a later date, but was told that was not possible.

As important factual background information, it is important to note that W.Va. Code § 15-2-5 provides in relevant part:

> (a) the superintendent **shall establish** within the West Virginia state police a system to provide for: **The promotion of members** to the supervisory ranks of sergeant, first sergeant, second lieutenant and first lieutenant; . . .
>
> (c) The superintendent **shall provide to each member a written manual** governing any system established under the provisions of this section and **specific procedures shall be identified for the evaluation and testing of members for promotion** or reclassification and the subsequent placement of any members on a promotional eligibility or reclassification recommendation list.
>
> * * *

(Emphases added).

As a West Virginia State Police Officer, apparently pursuant to the above statutory provisions, the appellant received a copy of the "Career Progression System" Procedures Manual, including a cover letter signed by the Superintendent of the West Virginia State Police. Said letter stated, in relevant part:

> The effectiveness of a law enforcement agency is determined by the quality, integrity and capabilities of the men and women who make up the agency. The recruitment, selection and training programs of the West Virginia State Police have been very successful in assuring that our members possess these qualifications. **The goal of the West Virginia State Police Career Progression System is to encourage these highly trained and qualified officers to fulfill their law enforcement careers with the West Virginia State Police by providing for upward mobility through enhanced opportunities for professional growth, by recognizing the individual career needs of every Trooper and by rewarding continued service with predictable salary enhancements.**
>
> This manual provides the detailed procedures available to a member of this Department who wishes to take any of several career paths. The drafting of these procedures was the final step in a process that has taken the **idea** of a fair and predictable promotional system to the **reality** of a comprehensive career progression program, **addressing the needs of the West Virginia State Police. The benefits of this program are as great for the individual Trooper as they are for the organization.**
>
> * * *
>
> The Career Progression System has resulted from a cooperative effort. Through a continuation of this united spirit, **the organization's effectiveness will increase; the people within the organization will realize a professional, personal and financial growth; and the citizens of West Virginia will reap the public safety benefits of a professional, dedicated and motivated State Police force.**

(Underlined emphasis in original; other emphases added).

Subsection 1.34 of the Career Progression System Rules states, "[a]ll members determined by the Selection and Review Board to be in compliance with the

preliminary eligibility requirements for promotion ... ***will*** advance to the competitive promotional process." (Emphasis added).

Subsection 1.37 of the Career Progression System Rules states, "[e]very eligible member ***will be scheduled*** for a specific testing appointment. Should a member fail to appear as scheduled, he will be eliminated from the competitive process...." (Emphasis added).

Subsection 0.18 of the Career Progression System Rules states, "[t]he PSO shall establish and maintain individual Career Progression System records for every Division member participating within one or more subsystems. Such records shall include copies of all correspondence generated by the PSO and directed to individuals as well as all Career Progression System related correspondence concerning an individual's reclassification or promotion eligibility. General correspondence generated by the PSO and directed at a group of Division members will be maintained in a general correspondence file. Additionally, the PSO shall assume responsibility for maintaining all material related to the selection, appointment and convening of all Career Progression System Boards."

At the time of the appellant's claim, the employer took the self-serving position that the officer's attendance was voluntary and not compensable. To the personal knowledge of the appellant, such promotional cycle was the *first and last time* the Department took the position that such time was not compensable. (Administrative Record, Tab 10, Testimony of Appellant at pp. 33-34).

After receiving the Special Order directing her to appear on June 28, 1999, at the State Policy Academy for the Sergeant's exam,[1] because the appellant was on maternity leave and had just given birth to a baby girl approximately three weeks earlier than the scheduled exam date, she contacted her superior, Major Bedwell, to ascertain whether the Special Order could be withdrawn as to her and she could be instead ordered to attend an examination at a later date and time. However, she was instructed that such an arrangement was not possible and that she had to attend the scheduled exam in order to be eligible for promotion. Accordingly, she obeyed her orders, as she understood them, and attended the exam. (Administrative Record, Tab 10, Testimony of Appellant at pp. 32-33).

Upon falling, the appellant immediately notified the academy staff officer, and the nurse on duty at the academy. The appellant also notified her ob-gyn. (Administrative Record, Tab 10, Testimony of Appellant at pp. 35-36).

On August 24, 1999 appellant returned to duty as a trooper, but due to severe back pain was seen and treated by her physician and her back problems worsened. Between October 1999 and her retirement on January 24, 2001, appellant was periodically on and off duty, including temporary alternative duty, as a result of her injury. (Administrative Record, Tab 10, Testimony of Appellant at pp. 36-42).

Having no other choice in light of her injuries and the Department's unwillingness to provide permanent accommodations for her, the appellant was forced

[1] Appellant intended to produce a copy of the Special Order as evidence. However, she had not kept her copy and the Department failed to produce a copy during her grievance despite her request that it be produced.

to seek a duty-related partial disability pension. The Department opposed her request for a duty-related disability pension alleging that she was not injured while on-duty insofar as her decision to take the exam was "voluntary" and she was not compensated for her time or expenses during such exam. (Administrative Record, Tab 10, Testimony of Appellant at pp. 36-42). This position by the Department is not supported by any West Virginia or other authority.

At the time the appellant was seeking disability retirement benefits in 2000, Gyanesh Agrawal, M.D., one of her physicians, opined that the appellant's injury, illness or disease resulted from an occupational risk or hazard inherent in and peculiar to the services required of a State Trooper. However, a physician selected by the Board, Paul K. Forberg, M.D., opined that while the appellant's disability was incurred while she was engaged in the performance of her duties with the Division of Public Safety, her injury, illness or disease did not result from an occupational risk or hazard inherent in and peculiar to the services required of a State Trooper. (See Administrative Record, Tab 19).

In addition to her sworn testimony before Hearing Officer DeBolt, set forth above, appellant also submitted a sworn statement, "Affidavit of Donna McKneely," proclaiming the following:

> I was employed and served as a member of the West Virginia State Police beginning in 1992 until October 2000.
>
> At all times during my service, I never disobeyed a direct order given to me by my superior officer(s) or by Special Order(s).

> I was assigned to the Academy for testing on June 28, 1999 by a Special Order. This Special Order compelled me to attend testing at the West Virginia State Academy for purposes of taking a written examination for promotion in rank.
>
> During this time period, I was on paid maternity leave, receiving pay and benefits from the West Virginia State Police.

(Administrative Record, Tab 1, Affidavit of Appellant attached to her Reply to Memorandum in Support of Request for Change in Retirement Status.)

Despite appellant's evidence and argument, Hearing Officer DeBolt recommended that the Board deny appellant's request to correct and change her disability status from a non-duty related status to a duty-related partial disability status. The Board adopted Hearing Officer DeBolt's recommendation and entered an Order to such effect. The Circuit Court affirmed, essentially mimicking the decision of the Board. By Order dated January 28, 2010, this Honorable Court granted a Petition for Appeal of the matter.

Appellant submits that the decision of the Circuit Court is clearly wrong, both factually and legally, because the appellant was engaged in the performance of her duties and pursuant to her duties as a member of the Department in attending an examination at the State Police Academy.

IV. ASSIGNMENTS OF ERROR

A. **THE CIRCUIT COURT'S FINDING THAT THE APPELLANT'S INJURY WAS NOT "DUTY RELATED" AND INCURRED PURSUANT TO HER DUTIES AS A MEMBER OF THE DEPARTMENT IS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE OF RECORD AND CONSTITUTES AN ABUSE OF DISCRETION.**

B. **THE CIRCUIT COURT'S CONCLUSION OF LAW THAT THE APPELLANT IS NOT ENTITLED TO A DUTY-RELATED DISABILITY PENSION IS A CLEAR ERROR OF LAW.**

V. DISCUSSION OF LAW AND POINTS AND AUTHORITIES

West Virginia Code § 29A-5-4(g) provides:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A. The Appellant's Injury Was Duty Related.

As noted above, appellant submits that the finding of the Board that the appellant's injury was not "duty related" when she was performing activities pursuant

to her duties when she suffered her injury is clearly wrong in view of the reliable, probative, and substantial evidence of record and constitutes an abuse of discretion. Furthermore, the Board's conclusion of law that the appellant is not entitled to a duty-related disability pension is a clear error of law. The appellant's injury was duty related and incurred pursuant to the performance of her duties. Her injury incurred while acting in furtherance of or to the benefit, direct or indirect, of the employer's interests or affairs and the activity was encouraged or requested in a manner and under circumstances that made it an express or implied requirement of employment. The decisions below too narrowly construed the applicable statute, misinterpreted said statute, and interpreted it inconsistent with its remedial intent. Furthermore, the appellant asserts that this Honorable Court should consider this issue for the purpose of explaining and clarifying it for injured officers and the West Virginia Consolidated Public Retirement Board.

W.Va. Code § 15-2-29 provides:

> (a) Any member of the Department who had not yet entered retirement status on the basis of age and service and who becomes partially disabled by injury, illness or disease **resulting from any occupational risk or hazard inherent in or peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of his or her duties as a member of the Department** shall, if, in the opinion of the Retirement Board, he or she is by reason of that cause probably permanently unable to perform adequately the duties required of him or her as a member of the Department, but is able to engage in any other gainful employment in a field other than law enforcement, be retired from active service by the Retirement Board.

(Emphases added).

It is beyond dispute that statutes providing for disability awards or pensions are remedial in nature and are to be liberally construed so as to effectuate their purpose, absent clear legislative statement otherwise. **Specifically, the liberality rule has been applied to pensions for members of the police force. In Spencer v. Yerace, 155 W.Va. 54, 60, 180 S.E.2d 868, 871 (1971) this Court held that "Pension provisions applicable to members of the police force will be liberally construed and ambiguities resolved in favor of those to be benefited."** (quoting 62 C.J.S., Municipal Corporations, § 588d). Accord Sturm v. Seamonds, 122 W.Va. 338, 9 S.E.2d 227, 228 (1940) ("we are impressed that this is a benign and salutary provision for placation and repose, intended by the legislature to have a curative and stabilizing effect, and therefore, there should be some degree of liberality in its interpretation and application"). In McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 777-78, 461 S.E.2d 516, 523-24 (1995) the Court applied the rule of liberality to CCPA cases: "'Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.'" (citations omitted).' In Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 64, 479 S.E.2d 561, 574 (1996) this Court applied the rule of liberality to the ADA and the West Virginia Human Rights Act: "In applying our statutes, we remain mindful that, as a remedial law, it should be liberally construed to advance those beneficent purposes."

B. The Appellant's Injury Resulted From A Risk Peculiar To Her Employment As An Officer.

In the present case, applying such rule of liberality to the first prong of the analysis in §15-2-29(a), how can it not be found that the appellant was injured resulting

from an occupational risk or hazard inherent in or peculiar to the services required of members of the Department? Who else could have been injured at the State Police Academy while taking a sergeant's exam, other than a member of the Department, such as the appellant, who was authorized and directed to be there in furtherance of her duties? Stated otherwise, if we use a but-for analysis, would the appellant have suffered her injury if she were not acting pursuant to her status as a State Trooper? The first prong of the analysis states a risk "inherent in" or "particular to" service. Certainly, going to the police academy to take training and testing is particular to service required by police officers. The general public does not take tests and classes for sergeant of the West Virginia State Police. [2]

C. The Appellant Was Injured Pursuant To Or While Performing Her Duties As A Police Officer.

With regard to the second prong of the analysis, the language of §15-2-29(a) shows that the appellant was injured pursuant to her duties as a police officer. The sole purpose for her training and testing for sergeant was for her employment with the State Police and no one else. Her testing was not transferable to even other types of police forces. The second prong of the analysis states: "**incurred pursuant to *or* while the member was engaged in the performance of his or her duties . . .**" The "or" is critical because it says that a service related disability can occur not only "while" on duty, but also incurred "pursuant to" the performance of her duties. The Board and Circuit Court

[2] The Board and the Circuit Court at least impliedly admitted that this prong of the analysis was met by not determining it necessary to discuss the first prong of the analysis. Regardless, the criteria is clearly met.

took the position that the injury was not duty related because the appellant was, essentially, volunteering her services at the time. Even if true, the analysis is not complete and does not foreclose an award of benefits. If the Legislature had intended only to compensate an injury incurred "while" on traditional duty, it would not have used the "or pursuant to" language. The Circuit Court was clearly wrong and committed an error of law because it too narrowly defines duty related disability. **As discussed below, if this Court adopted the Circuit Court's analysis, essentially the DDR would be one of the most exclusionary state compensatory schemes in the country for injured workers.**

The terms in §15-2-29(a) have not been clarified or defined in any detail by this Court. Therefore, the Court must look to law that is similar in purpose and intent. While West Virginia State Troopers are not governed by the West Virginia Workers' Compensation Act, certainly their disability statute and its purpose is analogous to such law and we may look to such law in this state and others for guidance and persuasion, particularly in absence of law specifically applicable to DDR cases. In fact, in syllabus point 2 of Beckley v. Kirk, 193 W.Va. 258, 455 S.E.2d 817, a case discussing the Workers' Compensation Act and the Death, Disability and Retirement Fund and finding that state troopers were not entitled to benefits under the Workers' Compensation Act because of the DDR coverage, held: " **'Statutes in pari materia, must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.' "(citations omitted.)**

To begin with, the rationale for the Court's decision in Beckley derived in great part from their determination that the benefits under the DDR Fund are superior to the Workers' Compensation Fund and that the DDR is "far superior" in any "overall sense." It is noteworthy that, if appellant's case were filed under the well-developed case law applicable to West Virginia Workers' Compensation claims, even without the rule of liberality, it would have undoubtedly been held compensable. For the same injury to be held not duty related would be inconsistent with the Court's interpretation of the DDR in Beckley. Does a State Trooper, who risks his or her life every day for the citizens of this State, deserve any less beneficent treatment than any other worker in this State?

Furthermore, the lessons of this Court's decisions in Workers' Compensation claims of what is a work-related injury are instructive here. In Dodson v. Workers' Compensation Div., 210 W.Va. 636, 558 S.E.2d 635 (2001), the West Virginia Supreme Court of Appeals noted:

> The level of proof a claimant must produce to prove a claim compensable is evidence, however slight, that would **lead a reasonable person to conclude that the claimant was injured while performing his duties in the course of his employment or duties incidental to that employment**. . . . However, while "[a] claimant in a workmen's compensation case must bear the burden of proving his claim [ ] in doing so **it is not necessary to prove to the exclusion of all else the causal connection between the injury and the employment**." . . .

Dodson, 558 S.E.2d at 644 (internal citations omitted; emphases added).

In the long standing case of Archbald v. Ott, 77 W.Va. 448, 87 S.E. 791 (1916), discussing employment and injuries, the Court held that if there is an incidental or

causal connection between employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote. The Archibald court held that acts by a servant unto himself, such as quenching thirst and numerous others, performance of which are reasonably necessary to health and comfort, are incidents of his employment and acts of service therein and any injury sustained in the performance of such acts are compensable.

In the case of Emmel v. State Comp. Dir. , 150 W.Va. 277, 145 S.E.2d 29 (W. Va. 1965) the Court determined that recreational or social activities are within the course of employment **when the employer derives substantial direct benefit from the activity beyond employee health and morale or improved employee employer relationship.**[3]

The cases discussing what is a "work-related" injury provide guidance on what is a "duty-related" injury. The phrase "pursuant to" is analogous to cases that hold that activities in the furtherance of the employer's benefit and interest are compensable.

A review of the cases in this and other states defining what is a work related injury support the appellant's position. As a general proposition, an injury occurs "in the course of" employment when it takes place within the period of employment, at a place where the employee may reasonably be in the performance of his duties or when engaged in doing something incidental thereto or when the employee is engaged in the

[3] See also Turner v. State Comp. Comm., 147 W.Va. 106, 126 S.E2d 40 (W.Va. 1962), where the Court held that an altercation with a co-worker was as a result of his employment, and Williams v. State Comp. Comm., 114 W.Va. 37, 170 S.E. 775 (1933), in which the Court held that an injury sustained at the dinner hour on an employer's premises was compensable because the employee was there with the direct or implied knowledge and consent of the employer and while the employee was at a place he had a right to be.

furtherance of the employer's business. Emmel v. S.C.Dir., 145 S.E.2d 29, 32 (W.Va. 1965).

Many factors have been considered in determining whether an injury is work related. The primary factor is whether the injury occurred while the employee was engaged in or about the furtherance of the employer's affairs or business. Jenrett v. Smith, 315 S.E.2d 583, syl. pt. 1 (W.Va. 1983). An activity is in furtherance of the employer's business if the employer's interests are being directly or **indirectly** advanced. See 82 *Am Jur 2d Workers' Compensation*, § 270 and Ski World, Inc. v. Fife, 489 N.E.2d 72 (Ind. App. 1 Dist. 1986)[4]

The interests of the West Virginia State Police were being directly advanced by appellant's testing for the rank of Sergeant. The employer had a material interest in the furtherance of the training, experience, enhancement of performance and professional development of its officers and stated so in its manual. Likewise, there is no question that the officer's taking of the examination for sergeant provides progression in knowledge, enhances her performance and inures substantial, direct benefit to her employer.

The appellant's activities at the time of the injury were in furtherance of State Police interests, and her employer benefited, directly and indirectly, from the

[4] In Fife, the court noted that there is a distinction between those cases where the recreation which caused the injury, either directly or indirectly, was sponsored by the employer as a matter of business and those sponsored because of purely altruistic motives. As in Emmel, the Indiana court held the former are compensable. Id. at 76. In Ritchey v. Commander Mills, Inc., 521 P.2d 805, 807 (Okl. 1974), citing Archibald v. W.C.C., 87 S.E. 791 (W.Va. 1916), the Supreme Court of Oklahoma held that a lunchtime injury on the employer's premises was compensable even though the employee was not being paid. The Court reasoned, *inter alia*, that the employee's lunch could indirectly benefit the employer.

appellant's actions. Therefore, the appellant was acting "pursuant to" her duties of employment at the time of her injury and her disability is service related.

In addition, the attendance at the testing was the result of an express order. The appellant explained that she understood that the testing was an express requirement of her duties. She testified that she received a special order to attend the testing and, in fact, tried to get out of it but was told that was not possible. Why would she call to ask permission not to go if it were not ordered? Why would a woman, who is just three weeks post a cesarean section and in the middle of her maternity leave with her newborn, sit for a day to undergo examination and testing if she did not reasonably believe that she were required to do it?

The Department's attempt to construe the time used by Troopers to take examinations under its own Career Progression System as being voluntary and not compensable[5] certainly is not dispositive of the issue—no more than an employer's attempt to characterize a worker as an independent contractor rather than an employee should decide the question in other types of cases. Rather, agencies and courts must look beyond such self-serving characterizations or classifications to the real "heart" of the matter.

At the very least, the appellant's education and testing were inherent in and implied in the performance of her duties. The appellant has presented substantial

[5] As noted in appellant's prior memoranda at the administrative level, the fact that a worker was not being compensated at the time of the injury should also not control the issue. See Dodson, 558 S.E.2d at 644-45 ("entitling the applicant to workers' compensation coverage for any injury sustained in the course of the physical agility test notwithstanding the absence of remuneration paid to the employee for participation in the test").

evidence showing that she and other officers were directed, expressly and impliedly, to pursue the training, skills development and testing to move up in the ranks of the employer's system. This was a practice that the employer set up, knew of, acquiesced to and participated in.

The Circuit Court opined that the appellant "volunteered" to undertake the progression through the ranks and take the testing. The conclusion that this was "volunteer" or "recreational" work is clearly unreasonable. It is especially unreasonable in light of direct testimony from the appellant that she did not volunteer and that she felt she had to attend the testing as part of her employment. It is in no way a liberal interpretation of the evidence. Moreover, the Circuit Court opinion misses the point. The written policies, notifications and statutes citied herein show that the department wanted all of the officers to progress through the ranks. The employer sent regular information and notices and scheduled the tests and advised its employees of the times for the tests. This was most certainly an implied, if not express, requirement of employment. However, even if the appellant did strictly volunteer, which she did not, it has been recognized that small, non-deviant charitable activities promote the employer's interest in public image and public relations and are, therefore, compensable. Big "2" Engine Rebuilders v. Freeman, 379 So.2d 888, 891 (Miss. 1980).

Another important factor in determining work related injury and compensability is whether the employee's activity was directed or encouraged by the employer, or whether the employer knew of the activity and acquiesced to the same. Professor Larson, in his Treatise on Workers' Compensation at § 22.22, explains:

> **. . . the compulsion need not take the form of a direct order if the employee is made to understand that he is to take part in the affair.**

In Linderman v. Cownie Furs, 13 N.W.2d 677, 679 (Iowa. 1944), the Iowa Supreme Court discussed what is meant by "required":

> The argument that the salesman was not compelled to accept the invitation to go on (a fishing trip sponsored by the employer) and, therefore, was not in a place where he was 'required' to be within the meaning of the act is not persuasive. We must look to the purpose and nature of the trip to determine whether the salesman was 'required' to go. **'Required', as used in the statute, does not mean only an act in response to a command. It is sufficient if the act is in response to the company's bidding or in any manner dictated by the course of employment to further the employer's business.**[6]

Thus, in other jurisdictions addressing work related injuries with varied statutes and varied coverage, the principles are the same. If the employee is performing duties as a result of an express or implied requirement or performing duties that directly or indirectly benefit the employer, his injury is duty related. Here, both exist.

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[6] Similarly, in Lawrence v. Industrial Commission of Arizona, 281 P.2d 113, 115 (Ariz. 1955), the Workers' Compensation Commissioner erroneously asserted that because the claimant was not compelled to attend an employer-sponsored luncheon, his actions were voluntary and for a personal purpose. The Arizona Supreme Court disagreed:

> **The degree of pressure which the employer must be shown to exert in order to find that he directed an employee in a given action must not be a requirement which ignores the realities of business. The superior position of the employer permits compulsion to be exerted indirectly. While a suggestion or encouragement may be substituted for the command it would be unrealistic to fail to recognize that the force of such substitutes may equal that of an expressed order.** The employer's position of advantage requires that this be acknowledged if responsibility is to be commensurate with directive authority.

(Emphasis added.)

So even if her employer did not expressly order that she attend the testing, which they did, appellant's request should be approved because the circumstances were such that her doing the testing was an implied requirement.

The employer argued that the injury occurred while the appellant was on paid maternity leave. However, since the appellant's work on the date of her injury furthered her employer's interests and was expressly or impliedly required by her employer, it is immaterial that her injuries occurred outside of the typical work setting or typical work hours. Because of the above-discussed parameters, it is not necessary that an injury should have occurred during regular working hours or even on premises within the control of the employer to be regarded as having arisen out of and in the course of employment. 82 *Am. Jur.* 2d, *Workers' Compensation*, §272, 280. An injury resulting from authorized or *encouraged* after-hours work, on or off the premises of the employer, for the benefit of the employer, is an injury in the course of employment. Brown v. Jim Brown's Service Station, 262 S.E.2d 700 (N.C. App. 1980) and Nemeth v. Michigan Building Components, 213 N.W.2d 144 (Mich. 1973).[7]

The Board also argued in this case that since the appellant was not being paid by the employer for the time she spent testing, the injury was not service related. In determining whether injuries arise in the course of employment, however, it is not a

[7] This same rationale illustrates why it is not necessary for an injury to occur at the typical work setting to be held compensable. In Brown, 262 S.E.2d 700, 702, the claimant was electrocuted at his home after work hours while installing an employer-purchased CB radio in his own truck at the request of his employer. The radio was given to the employee so the employer would be better able to get in touch with the employee. The North Carolina Supreme Court held the claim compensable stating that "time and place" do not necessarily mean regular hours of employment and on the premises of the employer. If the employee is doing work at the direction and for the benefit of the employer, then it is a part of the employment and satisfies the time and place conditions. Id.

critical factor that wages be paid to the employee. Ricciardi v. Damar Products Co., 211 A.2d 347, 349 (N.J. 1965). (See also Lawrence, 281 P.2d at 115, rejecting the argument that if an employee pays the expense of some activity or is not reimbursed by the employer for the same, the activity is not in the course of the employment.)[8]

In summary, a reading of the authoritative treatises and case law in this and other jurisdictions shows that the primary emphasis in deciding duty related disability in a compensatory scheme to benefit injured workers is whether the activity was done, at least in part, in furtherance of the employer's interests and whether the employee's participation in the activity was directed by the employer or requested and encouraged by the employer in such a fashion as to amount to an implied requirement. If these criteria are satisfied, it is immaterial whether the injury occurred on or off the employer's premises, during or after work hours or while the employee was paid. Canoy v. S.C.C., 170 S.E. 184 (W.Va. 1933) and Carper v. W.C.C., 1 S.E.2d 165 (W.Va. 1939).

In briefs below, the Board contended that its position is consistent with the U. S. Department of Labor's interpretation of federal statutes and regulations, including the Department of Labor's discussion of a case which respondent asserts "is directly applicable to the issue at hand." Respondent's Brief to Circuit Court at p. 9 (citing

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[8] The Board cannot argue that the "social activity" cases are not analogous to the case at bar since the Board asserted below that the appellant acted voluntarily for her own benefit and not because she was compelled. Therefore, the rationale of the social activity cases is applicable to the appellant's injuries. The fact that the activities performed by the appellant were directly related to and in furtherance of her job as an officer simply illustrates that the circumstances in this case showing duty related injury are even more compelling than in the social activity cases.

Attachment #2 (Selected FLSA Regulations). However a careful and complete reading of the requirements listed in the Department of Labor's interpretation actually supports the appellant's assertions in this case and is inconsistent with the Circuit Court's decision.

More specifically, the Board referred to a Letter Ruling of March 19, 1993, which provides in pertinent part:

> This is in reply to you inquiry concerning whether time spent by a police officer during off-duty hours attending an interview for a potential career development reassignment is compensable under the Fair Labor Standards Act (FLSA).
>
> As you were previously advised, attendance at lectures, meetings, training programs and similar activities are compensable under the FLSA **if all four of the conditions described in 29 CFR 785.27 are met**. Under the facts described in your letter of February 26, 1993, clearly (a) and (d) are met. Further, the program is voluntary in nature and there is nothing in your submission which indicates that the officer's failure to participate would adversely affect his present working conditions or the continuance of his employment by the City. Thus, we conclude that condition (b) is met. See 29 CFR 785.28. **Since the purpose of the program is career development in another skill (i.e., traffic control and motorcycle training) rather than to enhance the officer's performance in his present job, we conclude that the condition (c) is also met**. See the last sentence of 29 CFR 785.29. Consequently, we conclude that the time spent in attending the career development interview by the officer during off-duty hours is noncompensable under the FLSA.

Attachment #2 to Respondent's Brief (at p. 191) (bold emphases added).

29 C.F.R. § 758.27 provides:

> Attendance at lectures, meetings, training programs and similar activities **need not be counted as working time <u>if the following four criteria are met</u>**:
>
> (a) Attendance is outside of the employee's regular working hours;
> (b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

Attachment #2 to Respondent's Brief (at p. 875) (emphases added).

In the present case, as to subsection (a), while appellant by coincidence happened to be on paid maternity leave at the time of the exam and her injury, such attendance was not outside of an employee's normal or regular working hours. As to subsection (b), appellant testified at her hearing that she did not believe that her attendance was, in fact, voluntary and instead believed that it was mandatory and that her position would be adversely affected if she did not attend. (Administrative Record, Tab 10, Testimony of Appellant at pp. 31-33, 42-45, and Tab 1, Affidavit of Appellant attached to her Reply to Memorandum in Support of Request for Change in Retirement Status.) Importantly, 29 C.F.R. § 758.28 provides, in pertinent part, that attendance "**is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance**." (Emphasis added.) As to subsection (c), appellant asserts that the West Virginia Statutes cited in the above section and the information she received, including the Career Progression Procedures Manual and the accompanying letter from the Superintendent, supports that the promotion exam was considered to be directly related to her job. Lastly, as to subsection (d), appellant asserts that her participation in such exam was considered to be productive work in light of the West Virginia Statutes

cited in the above section and the information she received, including the Career Progression Procedures Manual and the accompanying letter from the Superintendent.

Accordingly, for the above reasons, appellant asserts that all four of the criteria listed above are clearly not met in this case (in fact, not even one of them is met here), and that the purportedly analogous letter ruling from the U. S. Department of Labor and the related statements of law support the appellant's interpretation of the statute here.

The case law and scholarly treatises, including those relied upon by the Board, state that the claimant does not have to be directly or expressly ordered by the employer and that the injury does not have to occur on the employer's premises or during usual work hours to be duty related. What must be present is an employee acting in furtherance of or to the benefit, direct or indirect, of the employer's interests or affairs or that the activity be encouraged or requested in a manner and under circumstances that make it an implied requirement of employment.

In applying the law and analysis to a review of the documents quoted above in the Statement of Facts, including the Statute directing the creation of a Career Progression System for the State Police, the Superintendent's Letter accompanying the Manual provided to Troopers, and the Career Progression System Rules, more than aptly demonstrate that such system of career progression was created not only for the benefits of individual troopers but for the benefit of the West Virginia State Police, as employer, and the citizens of this State. Furthermore, they show that the activity was

encouraged or requested in a manner and under circumstances that made it an express or implied requirement of employment. As such, they bear repeating here.

W.Va. Code § 15-2-5 provides in relevant part:

> (a) the superintendent **shall establish** within the West Virginia state police a system to provide for: **The promotion of members** to the supervisory ranks of sergeant, first sergeant, second lieutenant and first lieutenant; . . .
>
> (c) The superintendent **shall provide to each member a written manual** governing any system established under the provisions of this section and **specific procedures shall be identified for the evaluation and testing of members for promotion** or reclassification and the subsequent placement of any members on a promotional eligibility or reclassification recommendation list.

* * *

(Emphases added).

The cover letter signed by the Superintendent accompanying a copy of the "Career Progression System" Procedures Manual received by appellant, stated, in relevant part:

> The effectiveness of a law enforcement agency is determined by the quality, integrity and capabilities of the men and women who make up the agency. The recruitment, selection and training programs of the West Virginia State Police have been very successful in assuring that our members possess these qualifications. **The goal of the West Virginia State Police Career Progression System is to encourage these highly trained and qualified officers to fulfill their law enforcement careers with the West Virginia State Police by providing for upward mobility through enhanced opportunities for professional growth, by recognizing the individual career needs of every Trooper and by rewarding continued service with predictable salary enhancements.**
>
> This manual provides the detailed procedures available to a member of this Department who wishes to take any of several career paths. The drafting of these procedures was the final step in a process that has taken the <u>**idea**</u> of a fair and predictable promotional system to the <u>**reality**</u> of a comprehensive career progression program, ***addressing the***

> ***needs of the West Virginia State Police. The benefits of this program are as great for the individual Trooper as they are for the organization.***
>
> * * *
>
> The Career Progression System has resulted from a cooperative effort. Through a continuation of this united spirit, ***the organization's effectiveness will increase;*** **the people within the organization will realize a professional, personal and financial growth; and the citizens of West Virginia will reap the public safety benefits of a professional, dedicated and motivated State Police force.**

(Underlined emphasis in original; other emphases added).

While as to the applicable Rules: Subsection 1.37 of the Career Progression System Rules states, "[e]very eligible member ***will be scheduled*** for a specific testing appointment. Should a member fail to appear as scheduled, he will be eliminated from the competitive process...." (Emphasis added). Subsection 0.18 of the Career Progression System Rules states, "[t]he PSO shall establish and maintain individual Career Progression System records for every Division member participating within one or more subsystems. . . General correspondence generated by the PSO and *directed* at a group of Division members will be maintained in a general correspondence file.

The Circuit Court's order ignores the reality of the state police workplace, where officers, by virtue of policy statements provided to them, statutes, scheduling notices, statements made by superiors at meetings and elsewhere, are pressured to further their education and progression in the ranks of their employment. It is therefore an implied, if not express, performance pursuant to a person's duties as an officer. The West Virginia State Police is benefited by Troopers taking the exams for promotions and

taking such exams are consistent with and integrally related to the performance of a Trooper's duties as a member of the Department.

In addition, as a public policy matter this behavior should be, and by its express policy language is, encouraged by the State Police for their benefit and the benefit of the public.

Accordingly, for all of the above reasons, appellant submits that when all of the evidence is this case is fairly considered in conjunction with the rule of liberality, it is obvious that the Board's decision and final order is clearly wrong, both factually and legally.

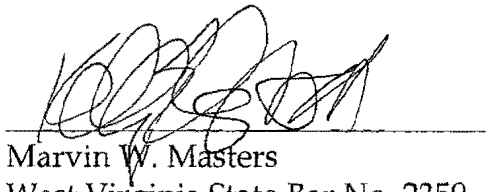
The officers of this state and the Board need instruction and clarification on what is service related disability. The current state of affairs leaves the officers at the mercy of the interpretation of the payor Board, who, by virtue of this decision and others, has created the narrowest definition of work related disability of any statutory scheme designed to compensate injured workers. This was not the intent of the legislation.

VI. REQUESTED RELIEF

For all of the foregoing reasons, Appellant respectfully requests that Your Honorable Court reverse the decision and final order of the Circuit Court and remand this matter with instructions for the Board to correct and change her disability status from a non-duty related status to a duty-related partial disability status. Appellant further requests all other relief deemed appropriate by the Court, including, but not limited to, attorney fees, costs and expenses, and interest.

DONNA MCKNEELY

By Counsel



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35471

DONNA MCKNEELY,

Appellant,

v.

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Appellee.

CERTIFICATE OF SERVICE

I, Kelly Elswick-Hall, counsel for Appellant, do hereby certify that a true and exact copy of the foregoing "Brief in Support of Appeal" was served upon:

J. Jeaneen Legato
West Virginia Consolidated Public Retirement Board
4101 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304
Counsel for Appellee

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 12th day of February, 2010.

Kelly Elswick-Hall
West Virginia State Bar No. 6578