Unedited transcript of

What “Arising Out of” and What "In the Course of" Means in the Context of Workers’ Compensation

from **Injuries Arising Out of & in the Course of Employment**

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Speaker(s)

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>> Teri McHugh: Now, getting into what it means to be arising out of, that refers to the origin or the cause of the injury. The question is, is there a causal connection between the injury and the employment? In other words, can the employment be attributed to the nature, conditions, obligations, or incidents of the employment when the employment is looked at in any of those aspects? If the answer to those are yes, more than likely, the injury will be found to be compensable. And looking at arising out of, the employee doesn't necessarily have to be engaged in the actual performance of work at the moment of the injury. It's enough sometimes that the employee is just on the employer's premises occupying him or herself consistently with the contract of hire in some manner pertaining to or incidental to his employment. However, in order to establish a causal connection to your employment, you will need a medical opinion. And we'll get into that a little bit later getting into the defending and bringing successful claims. But you will need a medical opinion giving the causal relationship between the injury and your employment. So, in other words, you will need to have professional opine as to the causal connection. Examples, such as causal connections, if a fracture occurs at work, pretty straightforward, Jud will probably agree with me, not that anyone wants to see anyone hurt but if somebody walks through his door with a fracture that occurred at work, Jud's probably pretty happy because his burden is going to be pretty low on that one. That injury will probably more than likely be found to be compensable. If a heart attack occurs at work, however, there is a presumption that it is due to work. However, the insurer can rebut that presumption if it has evidence that the employee had a pre-

existing condition such as pre-existing heart problems, high blood pressure, things of that nature. Then we also have a situation under Section 1(7A). If an employee's injury combines with a pre-existing non-work-related injury, the employee will need an opinion that the work injury is the major cause of the injury. So there are many layers to not only a rising out of and the causal connection needed to that. In terms of the pre-existing, people may be wondering, well, what's that all about? Frequently, I find -- Jud, you can jump in here too, those often are spine-related or joint-related where there may be pre-existing arthritis that the employee presumably did or did not know about. And then the employee sustained some type of injury to that same body part and suddenly now there's an issue where they're unable to work, where they may have been able to work before. So the insurers will often raise at that point, no, this is due to a pre-existing injury. And once the insurer raises that, the employee then has the burden to prove that their injury is in fact the work incident or series of events is the major cause. In Massachusetts, we also allow for emotional injuries or psychological injuries. These can be stress injuries, depression, anxiety. However, if it's a psychological or emotional injury alone and there's no physical injury involved, it's a different standard. That standard is higher also under Section 1 of the act. And that one, it must be the predominant cause of the injury, the work event or series of work events. If it was, and this would be something where like if you have a PTSD claim from some type of accident and there's no physical injuries involved but purely the PTSD, you would have to show that the PTSD, post-traumatic stress disorder, arose is the predominant cause -- I'm sorry, that the work injury, the accident was the predominant cause of the PTSD versus if somebody sustains a back injury and they have significant pain from that back injury such that it leads them to be feeling depressed because they're unable to do anything, they're unable to work, that standard then for the depression that may arise from that is a but-for standard. So, but-for the work injury, this employee may not have sustained depression or a psychological injury.

>> Jud Pierce: Yeah. Just wanted to throw in the --

>> Teri McHugh: Please.

>> Jud Pierce: -- the burden that the doctor would have to say. Some people and a lot of times, this happens in depositions where you try to get the doctor to say, can your doctor say with a reasonable degree of medical certainty that the work injury caused the disability? Now, that's not really what you have to do. The same burden in civil cases is in workers comp cases, which is preponderance of the evidence. So, if the doctor can say, more likely than not, that the work caused the injury, that's enough to meet your burden of proof. Now, the doctor has to say, is your opinion within a reasonable degree of medical certainty? But not that he or she is 95% certain that the work caused the -- it's just more likely than not that the work injury caused the disability and the reasonable degree of medical certainty actually comes before all of that, the opinion is based on.

>> Teri McHugh: True. However, with the exception being the 1(7A) issue, if it combines with the pre-existing condition, then it's the major, not necessarily the more likely than not.

>> Jud Pierce: Correct. Yeah.

>> Teri McHugh: Of course, we won't get into that today but --

>> Jud Pierce: Yeah. But that was on that.

>> Teri McHugh: -- that can get a little messy sometimes, too, trying to get a doctor to opine us to -- verbally, whether it's major or not.

>> Jud Pierce: Right.

>> Teri McHugh: Another one, too, in discussing about that an injury can arise out of employment even if it's not necessarily on the employer's premises or during work, if an employee is receiving treatment for an injury that has been found to have be compensable, so arising out of and in the course and scope of employment and then sustains an injury during the course of that treatment, that injury is also then going to be deemed compensable. So if an employee is at physical therapy, say, and they're there for a shoulder injury and while they're doing shoulder treatment, they happen to step on a weight that might've just been on the floor and they

sprained their ankle. That injury is more likely going to be found to be in the course and scope of employment if you can show that the employee was receiving treatment at the time that injury occurred for a compensable injury. So there are many layers and nuances to the arising out of and portion of it and also in the course and scope but right now in terms of the arising out of. I'm getting into the in the course and scope since we've been discussing it, sorry. In the course and scope refers to the time, place, and circumstance in which the injury occurred. And again, if an employee walks into Jud's office and says that they were in the midst of doing their factory work when something fell and broke their arm during normal business hours in the course of their work, performing the specific job duties of their job, Jud's probably going to really like that. That injury is probably going to be found compensable. However, when we get into certain situations, as discussed earlier, will be when an employee is not working during the normal hours or maybe not performing specific job duties or on the employer's premises. Moore's case, which is the leading case on this, describes the criteria that courts apply when they're looking at to determine whether an injury arises out of or in the course of employment. The criteria for that are the customary nature of the activity. Was the employer encouraging or subsidizing the activity, the extent to which the employer managed or directed a recreational enterprise? Section 1(7A) or Section 1 also indicates that if an employee is voluntary participating in a recreational activity, that that's not deemed to be a injury in the course and scope of work. So we'll be getting into that a little bit more but that's where there's -- that's coming up for the recreational enterprise. Whether there's presence of substantial pressure or actual compulsion upon the employee to attend and participate. A lot of times, people may not be directly told by their employer but the circumstances of something may make them feel that they are, in fact, required or compelled to do something on behalf of the employer, which may not be in their specific duties, so if they can show that they felt compelled or required by the employer to do something, that may fall under Moore's Case as being arising out of and in the course and scope of employment. Another such thing is the fact the employer expects or receives a benefit from the employee's participation in the activity, whether by way of improved employer-employee relationship through greater efficiency and the performance of the employee's duties by utilizing a recreation as partial

compensation or a reward for their work or for advertising the employer's business or as an actual adjunct of his business. This last part is, a lot of people look at does it benefit the employer? So a lot of times it might be a situation where somebody's left their work hours and maybe they're a sales associate and they're no longer specifically within their work hours but they go out for a marketing event afterwards to hype up the company or to try to get new business. So they may not be specifically making cold calls at their desk, if that's what they typically do, but they're out meeting with a new representative and, yes, maybe they're having a meal, something that's not considered to be one of their job duties but they're having a meal with another person who they're trying to get as a new client. And therefore, the employer would be receiving a benefit from that if they, in fact, sustain a new client. So that's why these are all kind of the areas that you'd look at when you're trying to determine something that's not so straightforward as I was in my nine to five hours, I was at my desk, I was taking a phone call and my neck suddenly seized up. So these are things where it's -- you're not within those specific hours, you're not within your specific job duties. And this is areas where you look at to see, OK, maybe it's not within those specifics but does it fall into these categories to look at? And there are some such case law. One case -- I'm going to go a little bit out of order here. Talk about Sikorski's case first, which actually was a little side note here, argued by Jud's father, Alan Pierce. And Sikorski, she was actually a chaperone for, I believe it was Peabody High School. I don't know. I think --

>> Jud Pierce: Yup.

>> Teri McHugh: -- [inaudible] public. And so she was a teacher at Peabody High School and she volunteered to go on a ski trip as a chaperone. And while she was on the ski slopes, she decided to participate in skiing and while skiing, she sustained an injury. It was argued that she was in the course of her work and it was found initially not to be in the course of her work, I believe. And it was ultimately taken up to the review board, which is the Department of Industrial Accidents reviewing board, as well as to the appeals court. And it was ultimately found to be a recreational activity. Everyone agreed that skiing is a recreational activity, however, and she did voluntarily participate in it. But because she was a

teacher and by providing a necessary service to the school by volunteering to go on that trip as a chaperone and such service was closely related to her primary job as a high school teacher, her activity on the ski slope because she was at the time of skiing, monitoring and keeping track of the students and doing her work as a chaperone, it was found to have arisen and been in the course and scope of her employment. And she was, in fact, compensated both medically and for her lost wages for the injuries she sustained. They found that even though she enjoyed the sport, she volunteered, the recreational aspect of chaperoning was only incidental to her employment responsibility. So this is a case of, while the recreational and voluntary aspect under 1(7A) might typically find to be an exception, sometimes voluntary activities are, in fact, compensable if there is enough of a connection with their original job duties and linked to a causal connection to their employment, as this woman was still maintaining her presence as a teacher but just merely in the role as a chaperone. But the students all knew they were a teacher, knew she was, in fact, a chaperone and that she was there in her role as a teacher-chaperone to supervise them. So, in this case, this was, I think, one of the first and if not one of the first, it's definitely the one that still maintains that the courts look at when they're looking at voluntary and recreational activities as to whether it falls into that exception or not. It's often frequently cited. The other case is Buduo's case, which is -- gets also into the Moore's exceptions as well. This was a woman who was invited to participate in what was called Appreciation Day at her employer's place of business. And the Appreciation Day consisted of an ice cream social. No one was required to attend. No one was forced to. It was purely voluntary. And, by all means, it could also be considered maybe recreational as she was going to have ice cream. It was on the employer's premises and the managers of the company were actually the ones serving the ice cream but the employees were the ones who chose their toppings. So the employer scooped the ice cream provided to them. The employees were able to choose their toppings. And also, everyone said that no one felt that there'd be any negative consequences if they didn't go to the ice cream social. No one felt compelled to be there or that they'd be punished if they didn't go. So some of those aspects of the Moore's Case were there where they didn't feel compelled. However, she then sat down after getting her ice cream toppings and bit into one of the toppings and felt her tooth break. So this

was reported. Initially, the judge found that it wasn't -- he felt that it was a purely voluntary and a recreational activity and therefore didn't fall under 1 (7A) and found it to be an exception. This was then taken up to the review board and the review board felt that because the food was being offered as a reward for Appreciation Day and that this has long been found to be that an injury sustained as a result of consumption of food is arising out of the course of employment. When the food is then given as compensation, they felt that the ice cream would then fall under that and that the Appreciation Day was a break period given by the employer in order to, not compensate, but basically to help with morale and get the employees excited about their work. And although it was a recreational activity, as everyone indicated, they did not feel compelled. The reviewing board did find that it did arise out of and in the course and scope of employment. Additionally, that was also upheld at the appeals court as they found that eating employer-provided ice cream during a break period at regularly scheduled workday, the appreciation event was not recreational for the exception. While it was voluntary, they found that it wasn't a recreational activity because it was provided by the employer and in appreciation for the employees. So this is one where that seems to be a lot of the exceptions that they look at is, you look at the Moore's Case and just to go back to that for a minute that there's these five customary nature of the activity, employer's encouragement or subsidization, the extent to which the employer or manager directed the recreational enterprise, pressure or compulsion, and that the employer receives a benefit. And both of these two cases, both Sikorski's, as well as Buduo, when looking in the light of Moore's cases, you can see that while they both might've been voluntary, they weren't found to be recreational as there was enough of a tie to their work to find it to arise in and out of the course of.

>> Jud Pierce: Right.

>> Teri McHugh: And a lot of times, sometimes people look at them as when they're not compensable as are they forced fun exceptions. And that's ones would be where in these activities, they didn't feel compelled but where someone may come down and feel compelled to attend something. Those would be the forced fun that may not necessarily be voluntary, although recreational. The question is going to come down to,

does the employee feel free to excuse themselves from the activity or fear that they may be penalized if they don't participate? And again, does that activity benefit the employer? So these are all situations to look at in terms of the exceptions to arising out of and in the course of. When you're looking at do they arise out of and in the course of, the exception being, is it recreational or voluntary? Because that would be the exception where it doesn't, then there are these other layers where, although seemingly on their face, may be recreational and voluntary. But if you can look at them in the light of Moore's Case with those five points, you may be able to find, like they did in Buduo, as well as in Sikorski, that they're either not voluntary or recreational or recreational but not voluntary. But either way, they don't meet the exception and therefore, they arise in and out of the course and scope of employment. Another exception, as we touched on a little bit earlier, is the going and coming rule, which is another one that also has a bunch of fun layers. Before we get into that, though, and Jud's going to get into that a little bit more in-depth. Jud, do you have anything else regarding the exceptions with the voluntary and recreational? Did your dad ever give you some wisdom on Sikorski?

>> Jud Pierce: Little pearls of wisdom, yeah, have come all our way here at the firm. One of the things he likes to mention about that case is how fact-specific these cases are. And a case can really turn on a walkie-talkie. And the fact that Miss Sikorski had one of those walkie-talkies on her person when she was going down the ski slope made it not purely voluntary but rather just voluntary. So it was recreational and it was voluntary. But the law says it cannot be purely voluntary. So she was in charge of these kids. She had to report if there was an accident, for example. And so the fact that she had that and that came out in testimony was so crucial to the decision ultimately in the case.

>> Teri McHugh: Right. I forget whether -- I think it was the review board who noted that it would have been a different situation had it been a teacher event with only teachers that went out and chose to maybe go skiing on their own and do after-hours group teacher events. I think they know that that might be a different situation versus when this teacher was specifically there to assist with the students of the school for which she has been employed.

>> Jud Pierce: Absolutely, yeah.

>> Teri McHugh: And that is, I mean I think with everything with workers comp, everything's so fact-driven and fact-sensitive. And as we're all going to find out with the going and coming rule, depending on the facts of the case, it could go from being one thing to the next just purely by one small fact, as you said, turning on a walkie-talkie. So, Jud, if you wouldn't mind --

>> Jud Pierce: Yeah.

>> Teri McHugh: -- getting us started on the going and coming.