IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 16

WCC No. 2015-3587

CHARITY STEPHENS

Petitioner

vs.

MONTANA ASSOCIATION OF COUNTIES

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 11/15/16
ORDER (DISMISSED APPEAL PURSUANT TO STIPULATION) – 03/16/17

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner, an EMT with an ambulance service, suffered an injury while running an obstacle course at a health fair. Although her employer did not pay Petitioner to attend, Petitioner contended that her employer required or requested her attendance and that her supervisor directed her to compete on the obstacle course. Respondent argues that Petitioner was participating in a recreational or social activity not within the course of her employment at the time of her accident and injury.

Held: Petitioner's employer did not require her to attend the health fair. Although Petitioner's employer asked her to assume duties for the activity so that her presence was not wholly voluntary, her employer did not "request" her presence at the activity, as that term is defined in § 39-71-407(2)(b), MCA, because her injury did not occur in the performance of the duties her employer asked her to assume. Although Petitioner contended that her supervisor directed her to participate in the obstacle course on which she was injured, this Court did not find that portion of her testimony credible. Since Petitioner's accident did not occur within the course of the duties her employer asked her to assume, her injury did not occur within the course of her employment under § 39-71-407(2)(b), MCA.

¶ 1 The trial in this matter was held on October 14, 2015, in Billings. Petitioner Charity Stephens was present and represented by Thomas A. Mackay. William Dean Blackaby represented Respondent Montana Association of Counties (MACo).

¶ 2 Exhibits: This Court admitted Exhibits 1 through 13 without objection. This Court overruled MACo's relevancy objection and admitted Exhibit 14.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Charity Stephens, Daniele O'Banion, Mark Solberg, Karen Elliott, Dustin Will, and Megan Will. Stephens, O'Banion, Megan Will, Tyrel Mraz, and Liz Krzan were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:

> Issue One: Was Stephens injured in the course of her employment under § 39-71-407(2)(b), MCA?
>
> Issue Two: Was MACo's denial of Stephens' claim unreasonable, entitling Stephens to her attorney fees, a penalty, and costs?

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Stephens worked as an Advanced Emergency Medical Technician for Big Horn County Ambulance (BHCA) in Hardin. Her job duties included assisting a paramedic on emergency calls. Stephens was an "intermittent" employee, which meant that she was not automatically scheduled for work shifts, but had the opportunity to request unfilled shifts on BHCA's schedule.

¶ 7 Daniele O'Banion is BHCA's ambulance director. O'Banion makes all of BHCA's scheduling decisions, and was the only person who assigned Stephens shifts at BHCA. O'Banion uses intermittent employees to fill shifts not covered by BHCA's full-time employees. When creating each schedule, O'Banion schedules BHCA's full-time employees and then announces schedule openings to the intermittent employees. O'Banion fills each opening with any intermittent employee who requests it, so long as that employee has the appropriate level of training and is not scheduled for overtime.

¶ 8 In 2013, three full-time BHCA paramedics — Tyrel Mraz, Megan Will, and Megan's husband Dustin Will — created an event to celebrate EMS Week in Big Horn County. Mraz, a former BHCA employee with no apparent interest in the outcome of this case, offered wholly credible testimony. At Mraz's request, O'Banion asked the county commissioners to issue a declaration for EMS Week. Mraz, Megan, and Dustin also organized an event to inform area residents about available resources. The group decided to call the event a "block party" rather than a "health fair" because it sounded

more appealing. O'Banion authorized the use of the BHCA ambulances and other BHCA equipment for the block party.

¶ 9 For the 2013 block party, Mraz invited other local organizations to participate. He signed a letter he sent to the organizations that expressed interest in participating as "Tyrel Mraz, Paramedic, Special Event Coordinator, Big Horn County Ambulance." Mraz also created a promotional flyer, calling the event the "Big Horn County EMS Block Party and Health Fair." Mraz used the BHCA station address as contact information on the materials, and he printed the letter and flyers at the BHCA station with O'Banion's knowledge. O'Banion proofread the materials before Mraz distributed them, and did not object to referring to the "block party" as being put on by BHCA. BHCA paid for the postage to mail the letter to the other entities.

¶ 10 Mraz asked the BHCA medical director to promote the event at a BHCA meeting and to request that BHCA employees attend in uniform. The 2013 event occurred on May 19, 2013. Mraz left BHCA later that year.

¶ 11 In 2014, Dustin and Megan decided to organize another event during EMS Week. Karen Elliott, a full-time BHCA paramedic, stated that Megan and Dustin "spearhead[ed]" the group, and Elliott and another BHCA employee helped organize the event.

¶ 12 Neither Big Horn County nor BHCA provided any funding for the 2014 event. Dustin and Megan personally funded the event, including a $750 rental fee for an inflatable obstacle course. Unlike Mraz in 2013, Megan created and printed flyers for the 2014 event at her home.

¶ 13 Other than the ambulance crew on duty that day, BHCA did not require its employees to attend the event. However, the event organizers and O'Banion counted on some BHCA employees volunteering to work at the block party because O'Banion had agreed to the use of some BHCA resources, including an EKG machine, at the event. Megan created a volunteer sign-up sheet and posted it on a bulletin board at BHCA. The sign-up sheet was labeled "EMS Week 2014" and said, in part, "Our EMS Fair will be on Sunday May 18th," followed by numbered lines where BHCA employees could sign up to help with the event. Megan, Dustin, and O'Banion frequently reminded the BHCA employees to sign up to volunteer and O'Banion encouraged employee participation in the event.

¶ 14 Stephens learned about the 2014 EMS Week Block Party several months before the event. Stephens knew that BHCA employees would run BHCA booths at the event and she believed that O'Banion expected her to volunteer. The sign-up sheet reinforced Stephens' impression that the block party was a BHCA event because the sheet said

"Our EMS Fair . . ." and it was posted on the bulletin board at the BHCA station where job-related sign-up sheets, such as for training classes, are posted.

¶ 15 On May 9, 2014, O'Banion sent an e-mail from the account he used for communications about the BHCA employee schedule. Megan had written the message and asked O'Banion to forward it to seek additional volunteers for the event. The e-mail said:

> I was asked to forward this to all:
>
> Greetings All (Present, Past and Future Employees)
>
> As most of you are aware, EMS week is next week. We are having our Annual Block Party on May 18th from 10 to 4 at the Hardin High School Commons Area. We have had a great response from the vendors that will be attending. We have several family activities planned. We opted out of the dunk tank this year and decided to do a 75 foot long inflatable obstacle course instead. A little friendly competition amongst the employees should prove to be FUN, your participation would be greatly appreciated! We will be having a bounce house, concessions, balloon animals, blood drive and much more. Please feel free to bring your family and friends. Many of the activities are free and we encourage you to please spread the word.
>
> Thanks to those of you who have already volunteered your time and help. There are several of you who signed up on the list at the station…..I still need your help! There are multiple activities that will need to be manned by our employees. Please be at the Commons area at 0900 so we can make sure that all of the activities are covered.
>
> We will be setting up in the Commons Area on the 17th. If anyone would like to help, please text Dustin or myself.
>
> It would be nice if everyone would wear Class A uniforms, it never hurts to make a good impression. It is a good opportunity for us to make a showing in the community.
>
> Employee Appreciation BBQ
>
> There will be a BBQ for employees and their families following the Block Party at 6 p.m. at the Will Residence. Bring a side dish, dessert or drinks. Burgers and hot dogs will be provided. Class A uniforms are NOT required.
> . . .

. . . .

We hope to see you all there.

Megan

¶ 16 When Stephens received the e-mail, she believed that when the message stated "We are having our Annual Block Party," "We" and "our" referred to BHCA. Since the message stated that participation in the obstacle course competition would be "greatly appreciated," she understood this was a request that she participate in the obstacle course competition. Since the message said, "multiple activities that will need to be manned by our employees," she believed that BHCA employees were expected to attend and work at the event. The e-mail also led Stephens to believe she was required to wear her BHCA uniform at the block party.

¶ 17 On May 12, 2014, Dustin posted a message on his Facebook page:

> Hey everyone I am posting to remind everyone our Big Horn County EMS Health Fair is this Sunday at the Hardin High School Commons. It is from 10 – 4. Make sure I [sic] you are near to stop in and see us.

The next day, Dustin posted the following message on Facebook:

> Good morning all. By the end of the week you will know that our EMS Health Fair is going to be this Sunday at the Hardin High School Commons. There is going to be fun for all ages. Help Flight will be landing around 11 am for an exciting tour or the Helicopter and meet and greet with the Crew. Rumor has it Tom Matthews will be the flight medic for the day. Stop by and say hello to one of our former critical care medics. Oh did I mention there is going to be a bounce house and much more.

¶ 18 Dustin and Megan thought of the idea to have the obstacle course competition for BHCA employees which Megan publicized in the e-mail. They offered a $50 Olive Garden gift card, donated by O'Banion, to the BHCA employee who completed the course with the fastest time. O'Banion purchased the gift card with his own funds and donated it to the event. Several individuals and organizations had donated gift cards and it was coincidental that Dustin and Megan chose O'Banion's donation for the obstacle course winner. At the block party, anyone could run the obstacle course for a fee, but BHCA employees ran the course for free. The fact that BHCA employees were invited, and in fact encouraged, to run the obstacle course for free while the public paid a fee to run the course further supported Stephens' impression that BHCA put on the event.

¶ 19 On the morning of May 18, 2014, Stephens texted Megan and asked if she was required to wear her Class A uniform. Megan responded that the uniform was required.

¶ 20 Stephens drove from Red Lodge, arriving at the block party at approximately 10:00 or 10:30 a.m. The event was already in progress. Stephens approached Megan and asked what she should do. Megan directed Stephens to blow up balloons, and later directed Stephens to work at the food booth. Stephens worked at the food booth for several hours.

¶ 21 Approximately 40 organizations participated in the block party. O'Banion had the BHCA ambulance and crew attend the event while on duty, coming and going as they responded to emergency calls throughout the day. O'Banion and full-time paramedic Mark Solberg were part of that ambulance crew, and both received their usual wages that day. BHCA's participation in the event also included performing an "extrication demonstration" in which Solberg and two other BHCA employees demonstrated how they extricate people from vehicles after accidents, and 12-lead EKG testing. These BHCA contributions, authorized by O'Banion, required the participation of BHCA employees.

¶ 22 Although most of the BHCA employees who had put their names on the sign-up sheet attended, Megan noted that at least three did not. Although she expected the employees who signed up to volunteer to honor their commitment, Megan did not tell O'Banion which employees failed to attend. Dustin testified that the only consequence to BHCA employees who did not volunteer was that Megan and he were disappointed in them.

¶ 23 At approximately 3:50 p.m., Stephens and Elliott ran the obstacle course together. Near the end of the course, Stephens struck her head against Elliott's back and suffered an injury. The emergency department at Big Horn Hospital Association evaluated Stephens afterward. Stephens exhibited neurologic symptoms and she was transported to a larger facility for further evaluation.

¶ 24 On May 21, 2014, Stephens filled out a First Report of Injury or Occupational Disease (FROI) in which she described the accident as follows:

> We were challenged by our boss to compete on an inflatable obstacle course & the person w/ the best time wo[u]ld receive a gift card. I was racing another employee up a ladder & she went over the top first & down the slide on the other side. I lost my footing and came down the slide head first &

slammed my head into the small of her back. My neck made a snapping sound & then 2 more until the rest of my body stopped and I . . . .[1]

Resolution of Main Factual Disputes

¶ 25 The parties have two main factual disputes; the first is whether the block party was a BHCA event. Relying on the testimony of Dustin, Megan, and O'Banion, MACo argues that the block party was put on by the organizers, without BHCA's imprimatur. However, Dustin's and Megan's attempt to distance BHCA from the event was unconvincing. Although the 2014 block party occurred largely through Megan's efforts and leadership, the event was advertised as the "Big Horn County EMS Block Party and Health Fair" in 2013, and no evidence suggested that this changed for the 2014 event. Megan and Dustin publicized the 2014 event as a BHCA event. While Megan testified that her use of the phrase "our employees" in her e-mail message was "being misconstrued," and Dustin testified that when he referred to the event as "our Big Horn County EMS Health Fair" and to Tom Matthews as "our former critical care medic[]," he did not intend to imply that Big Horn County was involved in the block party in an official capacity, these claims defy common sense. Megan and Dustin had no employees, and no one reading their messages could be expected to infer that the block party was not a BHCA event.

¶ 26 O'Banion's attempt to distance BHCA from the event was likewise unconvincing. At first, O'Banion claimed that he was unaware of the block party until one month beforehand, and he claimed that he did not recall seeing the sign-up sheet on the BHCA bulletin board. However, when confronted with evidence such as his knowledge of the 2013 event, the use of the BHCA name in connection with the event, and his authorization for the use of BHCA resources at the 2014 event, O'Banion was forced to admit knowledge of the event, his employees' involvement with organizing the event, and the use of the name "Big Horn County Ambulance" in connection with the event. Thus, this Court does not believe that he remained unaware of the sign-up sheet or of the event's very existence until a month beforehand.

¶ 27 O'Banion also maintained that he did nothing to encourage BHCA employees to attend the event because he did not care if they did so or not. However, his testimony was contradicted by other witnesses, and because of his demeanor and evasiveness at trial, this Court is convinced that he encouraged employees to attend. O'Banion also claimed that Megan was not a supervisor and had no authority to organize an event on behalf of BHCA. However, he allowed Megan and the other employees who planned and organized the block party to promote it as a BHCA event. Despite his knowledge that the

[1] Although Stephens' accident description appears to continue elsewhere — her sentence ends abruptly and she handwrote an arrow symbol pointing to the edge of the page — the parties introduced only the first page of the FROI into evidence.

event was being promoted as a BHCA event to the public and to BHCA's employees, O'Banion did nothing to dispel the notion that BHCA was putting on the event or to stop the organizers from promoting it as such. He also agreed to send the e-mail Megan had drafted, which was addressed to "Present, Past and Future Employees," and stated, *inter alia*, "There are multiple activities that will need to be manned by our employees." The e-mail also asked BHCA employees to wear their uniforms. O'Banion also allowed Megan to assign duties to the participating employees at the block party. Under these facts, O'Banion's claim that the event was not a BHCA event is, at best, revisionist history.

¶ 28 The sign-up sheet's presence on the BHCA bulletin board, the e-mail message and Facebook postings which referred to "our" event, "our" employees, the need for "our" employees to man the BHCA activities, and the request that BHCA employees wear their BHCA uniforms, led to Stephens' understandable belief that the block party was a BHCA event and she, as a BHCA employee, was expected to volunteer. Stephens credibly testified that she believed attending the 2014 EMS Block Party would make her look like a team player and could help her obtain more work shifts, while refusing to participate might hurt her opportunity to obtain work shifts at BHCA. This Court therefore finds that the block party was a BHCA event and that BHCA asked its employees to attend and volunteer.

¶ 29 The parties' second main factual dispute is whether O'Banion directed Stephens to run the obstacle course. At her deposition, Stephens testified that O'Banion approached her at the food booth around 3:15 p.m., informed her that she and Elliott were the only BHCA employees who had not participated in the obstacle course challenge, and directed them to participate. Stephens testified that Elliott and Megan were present when O'Banion made these statements. Stephens testified that O'Banion "did single us out. . . . [Elliott] and I were the last two left. And [O'Banion] said it's you and [Elliott]." On multiple occasions during her deposition, Stephens testified that the conversation occurred at approximately 3:15 or 3:20 p.m. Stephens explained that the event was ending at 4:00, and that "the turnout had slowed way down." She testified that she and Elliot ran the obstacle course shortly after O'Banion challenged them to run through it. It is undisputed that her injury occurred at approximately 3:50 p.m.

¶ 30 However, Stephens' claim that O'Banion directed her and Elliot to run the obstacle course is inconsistent with a Facebook post she made the day after her injury. On May 19, 2014, Stephens posted a message on Facebook which read in part:

> Yesterday we kicked off EMS week at Big Horn County Ambulance by having a family fun day open to the community. We had rented a 75 foot long inflatable obstacle course for children to enjoy but then there was a challenge made amongst the employees whoever could complete it and scored the best time got a $50 gift card to olive garden. ***[Elliott] and I***

> ***decide*[*d*] *to compete against each other*** and we ran through the obstacle course and at the very end you climb up the steep ladder and drop down the slide. [Elliott] had gotten to the bottom first and I came over and down that slide head first directly plowing into the small of her back with the top of my head.…[T]here was a loud crack and as my body came to a rest there were two more cracks and I passed out.[2]

¶ 31 Elliott refuted Stephens' testimony that O'Banion instructed them to complete the obstacle course. Elliott testified:

> [Stephens] and I were taking a turn at the food station . . . and there was a lull . . . . And she said, I bet we could go race each other now because it's pretty quiet. It was [Stephens] who challenged me to the race.

According to Elliott, O'Banion was not present when Stephens challenged Elliott to race. After Stephens challenged Elliott, Elliott found Megan and another worker to relieve them of their duties at the food booth and Elliott and Stephens went to the obstacle course.

¶ 32 Megan also refuted Stephens' testimony. Megan recalled that Stephens decided to participate in the obstacle course challenge after Megan informed her that they were awarding a gift card to the BHCA employee with the fastest time.

¶ 33 O'Banion denied directing Stephens to run the obstacle course. He testified that he spoke with Stephens around 11:00 a.m. or noon when they exchanged pleasantries. However, he did not discuss any event activities with Stephens and he was not present at the time of her injury because he had left with the ambulance for an emergency call. According to the ambulance's log, O'Banion participated in the transport of a patient from 2:21 p.m. until 4:58 p.m.

¶ 34 This Court does not believe Stephens' testimony that O'Banion directed her to run the obstacle course. When confronted with the ambulance log during cross-examination at trial, Stephens conceded that she could not have spoken with O'Banion at 3:15 or 3:20 p.m. because the ambulance log proves that he was caring for a patient from 2:21 p.m. until 4:58 p.m. She then offered that she guessed at the time their alleged conversation occurred. Stephens contended that although she had stated on multiple occasions that the conversation with O'Banion took place between 3:15 and 3:20 p.m., she now believed the conversation must have happened earlier in the day.

¶ 35 However, the substance of the alleged conversation — specifically that she and Elliott were the only BHCA employees who had not yet participated in the obstacle course

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[2] Emphasis added.

challenge — would not have been true earlier in the day. In addition, none of the alleged witnesses to Stephens' conversation with O'Banion support Stephens' version of events, and Stephens' contemporaneous Facebook message, which correlates with Elliott's testimony, made no mention of O'Banion directing her to run the course. The Facebook message is more credible than Stephens' later claims that O'Banion directed her to complete the obstacle course. Although Stephens alleges that her Facebook message was inaccurate because she was hospitalized with a head injury when she wrote it, this allegation is undermined by the accuracy and detail of the rest of the message. Because this Court finds Stephens' testimony regarding her conversation with O'Banion incredible, it further finds that O'Banion did not direct Stephens to run the obstacle course.

CONCLUSIONS OF LAW

¶ 36 This case is governed by the 2013 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Stephens' accident.[3]

¶ 37 An injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[4]

Issue One: Was Stephens injured in the course of her employment under § 39-71-407(2)(b), MCA?

¶ 38 Section 39-71-407(2)(b), MCA, which the Legislature enacted in 2011, states:

> (2) An injury does not arise out of and in the course of employment when the employee is:
>
> (b) engaged in a social or recreational activity, regardless of whether the employer pays for any portion of the activity. The exclusion from coverage of this subsection (2)(b) does not apply to an employee who, at the time of injury, is on paid time while participating in a social or recreational activity or whose presence at the activity is required or requested by the employer. For the purposes of this subsection (2)(b), "requested" means the employer asked the employee to assume duties for the activity so that the employee's presence is not completely voluntary and optional and the injury occurred in the performance of those duties.

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[3] *Ford v. Sentry Cas. Co.,* 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[4] *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

¶ 39 Stephens argues she was in the course of her employment because BHCA required her presence at the block party. In the alternative, she argues that she was in the course and scope of her employment because BHCA requested her presence. MACo argues that BHCA neither required nor requested Stephens' presence, but if this Court determines that BHCA requested her presence, Stephens' injury did not occur in the performance of any duties BHCA asked her to assume. This Court agrees with MACo for two reasons.

¶ 40 First, this Court rejects Stephens' argument that she was in the course of her employment on the grounds that BHCA required her to attend the block party. Despite Stephens' claim that the May 9, 2014, e-mail mandated her presence, neither that e-mail, nor any of the other communications in evidence, contain an express directive to attend the event. The communications made it clear that BHCA's employees were only asked to volunteer at the event. Finding nothing to support Stephens' contention that BHCA required her presence, this Court concludes that Stephens was not required to attend the block party.

¶ 41 Second, under the definition of "requested" in § 39-71-407(2)(b), MCA, BHCA did not request Stephens' presence at the block party. Stephens met the first part of the definition of "requested" in § 39-71-407(2)(b), MCA, which is, "the employer asked the employee to assume duties for the activity so that the employee's presence is not completely voluntary and optional . . . ." As set forth in the findings above, BHCA, through O'Banion and the event's organizers, asked employees to volunteer at the block party. Stephens reasonably believed that her attendance, or refusal to attend, the block party could help or hurt her chances of obtaining work shifts and therefore her presence was not completely voluntary and optional. But Stephens' injury did not occur within the course of her employment because she has not met the second part of the definition of "requested" in § 39-71-407(2)(b), MCA, which is, "the injury occurred in the performance of those duties." At the block party, Megan asked Stephens to assume the duties of blowing up balloons and working at the food booth. However, Stephens' injury did not occur while blowing up balloons or working at the food booth; rather, her injury occurred while she voluntarily participated in the obstacle course, having voluntarily relinquished her duties at the food booth in order to do so. Thus, she was not within the course of her employment under the first sentence of § 39-71-407(2)(b), MCA, because she was engaged in a recreational activity at the time of her injury.

¶ 42 This Court is unpersuaded by Stephens' argument that BHCA asked her to assume a duty at the obstacle course in the May 9, 2014, e-mail where BHCA informed its employees of the family activities offered, including the obstacle course. Although the e-mail touted the obstacle course and stated, "A little friendly competition amongst the employees should prove to be FUN, [and] your participation would be greatly appreciated," this was not a request that Stephens assume a duty at the obstacle course.

Rather, the statement simply promoted one of the "family activities" to be offered at the event. Moreover, Stephens' duties did not include running the obstacle course because BHCA did not ask her to assume any duties related to the obstacle course, such as taking tickets or assisting participants. Likewise, this Court is not persuaded that Stephens' duties were, as she contended, "to attend the event in uniform and participate in the activities listed therein." As set forth in the statute, a compensable injury does not arise in the course of employment when the employee is engaged in a social or recreational activity unless the statutory exception is met. The applicable version of the statute does not focus on an employee's attendance at an activity; rather, it states that if an employee is injured while attending an event at an employer's request, mere attendance, without being required or "requested," is insufficient to render that injury compensable under the WCA.

¶ 43 Stephens also urges this Court to look beyond § 39-71-407(2)(b), MCA, and determine whether she would fall within the course of her employment under the factors set forth in *Courser v. Darby School Dist. No. 1*,[5] as utilized in both *Connery v. Liberty Northwest Ins. Corp.*[6] and *Michalak v. Liberty Northwest Ins. Corp.*[7] Stephens argues that if this Court were to apply the *Courser* factors — (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity[8] — it would conclude that she was within the course of her employment at the time of her injury.

¶ 44 In *Connery*, the Montana Supreme Court held that a ski instructor was within the course of her employment when she suffered an injury while taking a warm-up run prior to giving a ski lesson. Section 39-71-118(2)(a), MCA (1995), which was the law regarding recreational activities in effect at the time of Connery's injury, stated that the terms "employee" and "worker" did not include "a person who is: (a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties . . . ." The court held that a traditional course and scope of employment analysis under *Courser* was necessary because it needed a way to determine whether the warm-up run was part of Connery's "prescribed duties."[9] The court explained that the statute at issue did not define "prescribed duties," and that any attempt to define the term uniformly could not

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[5] 214 Mont. 13, 692 P.2d 417 (1984).

[6] 280 Mont. 115, 929 P.2d 222 (1996).

[7] 2008 MT 3, 341 Mont. 63, 175 P.3d 893.

[8] *Courser*, 214 Mont. at 16-17, 692 P.2d at 419.

[9] *Connery*, 280 Mont. at 119-120, 929 P.2d at 225.

"account for all of the potential fact patterns that could arise."[10] The court then determined that the "activity" at issue was Connery's warm-up run, and that she was within the course of her employment under the *Courser* factors, primarily because Connery's employer recommended that its ski instructors take a warm-up run before giving a lesson.[11]

¶ 45 In *Michalak*, the Montana Supreme Court held that an employee who was injured while riding a wave runner at a company picnic was within the course and scope of his employment.[12] Michalak had attended the picnic at his supervisor's request in order to oversee the operation of the wave runners during the picnic, including providing safety instructions, monitoring the wave runners' fuel and oil levels, instructing attendees on how to ride, and enforcing time limits for riding.[13] Michalak suffered an injury while riding a wave runner, which this Court had found was "during the performance of his duties."[14] Relying upon *Connery*, the supreme court used the *Courser* factors to determine whether Michalak was "performing prescribed duties" under § 39-71-118(2)(a), MCA (2005). The court rejected the insurer's argument that the "activity" in which the employee was engaged at the time of the injury was the wave runner ride and held that the "activity" was the company picnic.[15] Applying the *Courser* factors, the court concluded that Michalak was within the course and scope of his employment while at the company picnic and, thus, his injury was compensable.

¶ 46 This Court, however, agrees with MACo that neither *Connery* nor *Michalak* support Stephens' case because the 2011 Legislature repealed the statute on which the supreme court relied in *Connery* and *Michalak* and replaced it with § 39-71-407(2)(b), MCA, which governs this case. "It has long been the law that, when the Legislature amends a statute, [Montana's courts] will presume that it meant to make some change in the existing law."[16] When the 2011 Legislature repealed § 39-71-118(2)(a), MCA, and replaced it with § 39-71-407(2)(b), MCA, it intended to narrow the law by limiting the time that an employee at social and recreational activities such as company picnics or health fairs is within the course of employment. Under the current statute, employees are not within the course of their employment the entire time they are at a social or recreational activity, even if the employer asked or encouraged them to attend the activity; rather, they are within the course of employment only when they are on "paid time," when the employer requires

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[10] *Id*.

[11] *Connery*, 280 Mont. at 121-22, 929 P.2d at 226.

[12] *Michalak*, ¶ 27.

[13] *Michalak*, ¶ 8.

[14] *Id*.

[15] *Michalak*, ¶ 18.

[16] *State ex rel. Mazurek v. Dist. Court of Twentieth Judicial Dist*., 2000 MT 266, ¶ 18, 302 Mont. 39, 22 P.3d 166 (citations omitted).

their attendance, or when they are performing the duties the employer asked them to assume. As set forth in *Michalak*, under § 39-71-118(2)(a), MCA (1993-2009), the courts utilized the *Courser* factors to determine whether an employee was within the course and scope of employment while attending the activity at issue — in *Michalak*, the company picnic.[17] However, under the current statute, the *Courser* test, which focuses on the "activity," is too broad. The inquiry under § 39-71-407(2)(b), MCA, is not whether an injury occurred during the *activity* — in Stephens' case, the block party — but whether the injury occurred within the context of the specific duties the employee was asked to assume at the activity.

¶ 47 Further, Stephens was not within the course of her employment under *Connery* and *Michalak* because those cases are factually distinguishable. Unlike Stephens, who suffered an injury after she voluntarily relinquished her duties at the food booth in order to run the obstacle course, Connery and Michalak suffered injuries while performing duties their respective employers had asked them to assume: in Connery's case, while taking a warm-up ski run prior to teaching a skiing lesson, as encouraged by her employer,[18] and in Michalak's case, while operating a wave runner his employer had asked him to oversee at the company picnic.[19] While *Michalak* can be broadly read as holding that Michalak was within the course of his employment the entire time he was at the company picnic, it is evident that the 2011 Legislature did not intend for the law to be that broad.

¶ 48 Since Stephens' injury did not occur while she was blowing up balloons or working at the food booth, it did not occur while she was performing duties BHCA asked her to assume. Therefore, she was not injured in the course of her employment within the meaning of § 39-71-407(2)(b), MCA.

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17 *Michalak*, ¶ 18.

18 *Connery*, 280 Mont. at 121-22, 929 P.2d at 226.

19 *Michalak*, ¶ 8.

Issue Two: Was MACo's denial of Stephens' claim unreasonable, entitling Stephens to her attorney fees, a penalty, and costs?

¶ 49 Since Stephens is not the prevailing party, she is not entitled to her attorney fees, a penalty, or costs.[20]

JUDGMENT

¶ 50 Stephens was not injured in the course of her employment under § 39-71-407(2)(b), MCA.

¶ 51 Stephens is not entitled to her attorney fees, a penalty, or costs.

¶ 52 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 2nd day of November, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

[20] §§ 39-71-611, -2907, MCA.

c: Thomas A. Mackay
William Dean Blackaby
Submitted: October 14, 2015