U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENT W. DAVIS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Ogden, UT

Docket No. 00-248; Submitted on the Record;
Issued April 20, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty.

On June 23, 1997 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that, on June 21, 1997, while playing softball during a voluntary fun day sponsored by the employing establishment and the employee's union, he slipped on wet grass and fell breaking his tibula in three places in his right leg, tearing all the ligaments and tendons in his right foot resulting in surgery. The employing establishment controverted the claim by contending that appellant was not in the performance of duty when injured.[1]

In a decision dated July 18, 1997, the Office of Workers' Compensation Programs denied appellant's claim for compensation, as he did not establish that his injury occurred in the performance of duty.

By certified letter sent on August 15, 1997, appellant requested a hearing.

In a decision dated March 5, 1998, the hearing representative found that the case was not in posture for hearing. The hearing representative remanded the case and directed the Office to undertake further development of the evidence.

[1] The employing establishment noted that appellant signed a waiver of liability. The waiver of liability contained the player's signature and the following statement at the bottom of the page: "By signing the above, each player agrees that they will not hold NTEU or the Internal Revenue Service responsible for any accidents or injuries they may incur during this activity." At the hearing, appellant testified that he signed this document in a hurry before the game. The Board notes that any waiver of an employee's rights under the Federal Employees' Compensation Act is not valid. 20 C.F.R. § 10.15.

After further development, on June 18, 1998, the Office again denied the claim for compensation, finding that appellant had still not established that the injury occurred in the performance of duty.

Appellant requested a hearing and this hearing was held on March 29, 1999. In a decision dated June 4, 1999, the hearing representative affirmed the Office's decision, as she found that appellant had failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty.

The Board has duly reviewed the record and finds that appellant's injury of June 21, 1997 was not sustained in the performance of duty.

The Act[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of an in the course of employment." "Arising out of the employment" tests the causal relationship between the employment and the injury; "arising in the course of employment" tests work connection as to time, place and activity. For the purposes of determining entitlement to compensation benefits under the Act, "arising in the course of employment, "*i.e.*, performance of duty, must be established before "arising out of the employment," *i.e.*, causal relationship can be addressed.[4]

In determining when an injury arises in the performance of duty, Larson's treatise on workers' compensation law states that recreational or social activities are within the course of employment when:

> "(1) They occur on the premises during a lunch or recreational period as a regular incident of the employment; or
>
> "(2) The employer, by expressly or impliedly requiring participation or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(3) The employer derives substantial benefits from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[5]

These are three independent links by which recreation can be tied to the employment and, if one is found, the absence of the others is not fatal.[6] Accordingly, when an employee is injured

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8102(a).

[4] *Arthur J. Berte*, 48 ECAB 296, 298 (1997); *see also Robert J. Eglinton*, 40 ECAB 195 (1988).

[5] 1A. Larson, *The Law of Workers' Compensation* § 22.00 (1993).

[6] *Arthur J. Berte, supra* note 4; *Archie L. Ransey*, 40 ECAB 1251 (1989).

in a recreational activity, he or she must meet one of these three tests to establish performance of duty.

In the instant case, appellant's injury occurred during a softball game that was part of "fun day", which was cosponsored by appellant's union and the employing establishment. Other activities were also held on fun day, including activities for the children of the workers.

With respect to the first test, premises and timing, the record establishes that the alleged injury did not occur on employment premises during a lunch or recreational period as a regular incident of employment. The incident occurred on a Saturday, when appellant was not working. The Board also notes that the game was played on a field about ½ mile from the employing establishment. The Board is not persuaded by appellant's argument that the fact that the softball field was at a Department of Defense site with gated admission at which the employing establishment had several offices brings this field within the "premises" test.

With regard to the second test, required participation, the employment establishment stated that all employees who participated in the activity were volunteers who chose to play of their own free will without pressure from the employing establishment to participate. When the degree of employee involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to consider a further series of tests.[7] These tests include whether the employing establishment sponsored the event, whether the attendance was voluntary and whether the employing establishment financed the event.[8]

In the instant case, as to the question of whether the employing establishment sponsored or financed the event, the record indicates that the employing establishment provided no funds, equipment or wage compensation in support of the team or league. The employing establishment did provide some publicity through its official newsletter and did allow flyers to be distributed throughout the center. The employing establishment also provided a first aid kit and telephone numbers for emergency medical treatment. However, the direct financial support for the game came from outside the employing establishment. In order to pay for the trophies and softballs, the union collected either $10.00 from each team or $1.00 from each player. The employees provided their own bats and gloves. Other funds were obtained through union sponsored fundraisers and these funds paid for the coke wagon and out-houses. The only involvement of the employing establishment in the fundraisers was to allow them to be conducted on the premises of the employing establishment during work hours. None of the participants were paid for their time at fun day. The employing establishment cannot be said, therefore, to have encouraged participation through financial support.[9] Furthermore, the *de minimis* involvement of the employing establishment in fun day through letting the event be publicized in their official newsletters and over the teleprompter or allowing people to meet or buy and sell tickets during work hours, would be insufficient to bring their activities to a level

[7] *Mary A. Minter*, 52 ECAB ____ (Docket No. 99-2044, issued October 30, 2000), *see also* Larson, *supra* note 5 at §§ 22.23-22.24.

[8] *Id.*

[9] *Harold L. Dunlap*, 45 ECAB 817, 820-821 (1994).

which would suggest sponsorship of the event. With regard to the question of voluntary attendance, no evidence suggests that participation in the recreational activity was a part of appellant's job.[10] The mere fact that several of the other employees encouraged appellant to attend, including one who happened to be the husband of the head of the employing establishment, did not imply that appellant was forced to attend the game. Consequently, the evidence of record does not establish that the employer required participation in the recreational activity bringing it within the orbit of the employment.[11]

With respect to the third test, benefits derived by the employer, the employing establishment stated that the benefit derived were improved physical fitness and increased morale. No evidence of record suggests that the recreational activity in this case was in any way related to the employing establishment's business. Consequently, the evidence of record does not establish that the employer derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreating and social life.[12]

Accordingly, considering all the evidence of record, the Board finds that appellant failed to establish that the incident occurred during the performance of duty.

[10] *Arthur J. Berte*, *supra* note 4.

[11] The Board disagrees with appellant's assertion that the cases of *Michael A. Vestuto*, 47 ECAB 632 (1996) and *Stephen H. Greenleigh*, 23 ECAB 53 (1971), require a different result. In both of these cases, appellant was injured on the premises of the employing establishment after work. In *Vestuto*, appellant was injured in a volleyball game held on the premises of the picnic grounds for the employing establishment. In *Greenleigh*, appellant was injured in a softball game played on the premises of the employing establishment after work hours. In the case at hand, appellant was not on the premises of the employing establishment when he was injured, but rather was on a softball field about ½ mile from the employing establishment's premises; *see supra* at 4. Accordingly, the cases of *Vestuto* and *Greenleigh* are not persuasive when applied to the facts at hand.

[12] *Harold L. Dunlap*, *supra* note 9, *see also* Larson, *supra* note 5 at §§ 22.30 at 166. The issue of employer benefit takes on greater meaning in the private sector, where opportunities abound for promotion, enhanced business contacts, increased sales and the like.

The decision of the Office of Workers' Compensation Programs dated June 4, 1999 is affirmed.

Dated, Washington, DC
April 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member