U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EILEEN R. GIBBONS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA

Docket No. 99-2517; Submitted on the Record;
Issued January 10, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant met her burden of proof in establishing that she sustained an injury in the performance of duty on May 8, 1998.

On May 8, 1998 appellant, then a 49-year-old program analyst, filed a claim for traumatic injury, Form CA-1, alleging on that same date she was injured in the performance of duty when she slipped on wet pavement in the employing establishment parking lot injuring her right hip and right hand. The injury occurred at 9:25 a.m. Appellant's regular duty hours were 6:00 a.m. to 2:30 p.m.

Appellant submitted various chiropractic notes from Dr. Richard Liberati from May 11 to June 2, 1998. Dr. Liberati indicated in his note dated May 15, 1998 that appellant previously sustained injuries to the neck and low back in an automobile accident on August 8, 1997; however, he believed these injuries to be resolved at the time of this incident. Dr. Liberati diagnosed appellant with a lumbar strain and cervical/trapezius strain.

The employing establishment submitted documentation including a diagram of the accident; a report of the incident dated May 14 1998 from Lynn Whalen; a statement from Bonita Kelly dated May 14, 1998; a telephonic conference call with appellant on May 14, 1998 as well as a witness statement from the guard on duty dated May 15, 1998. The report prepared by Ms. Whalen noted that appellant reported she experienced a flat tire on her way to work. Appellant stated that, while on a break at work, she went to check the tire to determine the appropriate size for replacement and fell in the parking lot. Appellant, thereafter went to the nurse's office and took three hours of sick leave. The statement from Ms. Kelly indicated that she escorted appellant to the nurse's office after appellant fell in the parking lot. Ms. Kelly indicated that appellant told her she had a flat tire that morning and fell in the parking lot on her way to inspect the tire size. The telephonic conference with appellant and the claims examiner documented appellant's version of the incident. The guard's statement dated May 15, 1998 noted that, after hearing noise from employees who were outside smoking, he witnessed appellant getting up from her knees on May 8, 1998 at approximately 9:15 a.m. Appellant

indicated that she had slipped and fallen. Appellant indicated to the guard that she did not want to fill out an incident report.

By letter dated July 24, 1998, the Office of Workers' Compensation Programs advised appellant that the initial evidence of file was insufficient to establish her claim and requested that appellant submit additional evidence in support of her claim.

In a statement received August 11, 1998 appellant stated that her injury occurred two hours after she reported to work.

By decision dated August 28, 1998, the Office denied the employee's claim, finding that she was not in the performance of duty at the time her injury occurred.

By letter dated September 11, 1998, appellant requested an oral hearing before a hearing representative and submitted a narrative statement as well as duplicative chiropractic notes from Drs. Raymond P. Rogowski and Liberati. Appellant indicated that she experienced a flat tire on her way to work and as a result reported to duty two hours late. She indicated that on her break she walked to her car in the parking lot to determine the appropriate size for the replacement tire and slipped and fell while trying to step over a water puddle.

The hearing was held on April 1, 1999 before a hearing representative, and appellant's supervisor was in attendance. Appellant indicated that she was in an automobile accident in December 1997 and was receiving chiropractic care relating to the automobile accident from December 1997 through the time of this incident in May 1998. Appellant noted that she was not changing a tire when the incident occurred but fell while walking to her automobile to observe the tire size. The supervisor testified that the injury occurred on an employing establishment parking lot and that the parking lot was the property of the employing establishment and was not leased.

By decision dated July 8, 1999, the hearing representative affirmed the August 28, 1998 decision, finding that appellant was not in the performance of duty at the time of her injury.

The Board finds that appellant has established that an injury occurred on May 8, 1998 in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of any employee/employer relation.[1] The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[3]

[1] *Minnie N. Heubner (Robert A. Heubner)*, 2 ECAB 20, 24 (1948); *Christine Lawrence*, 36 ECAB 422-24 (1985).

[2] *See* 5 U.S.C. § 8102(a).

[3] *James E. Chadden, Sr.*, 40 ECAB 312, 314 (1988).

"In the course of employment" deals with the work setting, the locale and time of injury.[4] In addressing this issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in her master's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto."[5]

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury in order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[6]

As to an employee having fixed hours and a fixed place of work, an injury occurring on the premises of the employing establishment, while the employee is going to and from work before or after working hours or at lunch time is compensable.[7] The Board has also held that the course of employment for employees having fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts and what constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the activity.[8]

In the present case, appellant fell on the employing establishment premises while walking to her personal vehicle located on the employing establishment parking lot. Appellant's

[4] *Denis F. Rafferty,* 16 ECAB 413-14 (1965).

[5] *Carmen B. Gutierrez,* 7 ECAB 58-59 (1954).

[6] *See Eugene G. Chin,* 39 ECAB 598, 602 (1988).

[7] *Emma Varnerin,* 14 ECAB 253-54 (1963); *Michael K. Gallagher,* 48 ECAB 610 (1997).

[8] *Narbik A. Karamian,* 40 ECAB 617-18 (1989).

supervisor confirmed that the employing establishment controlled and owned the parking lot.[9] At the time of her fall, appellant was on an authorized break, going to inspect the size of her tire so as to replace it after experiencing a flat on the way to work that morning. The evidence establishes that appellant was at a place she would be expected to be in connection with her employment, walking to her personal vehicle while on employing establishment property and thus the incident occurred at a place where appellant was reasonably expected to be as a result of her employment.[10]

Further, appellant was engaged in an activity which may be characterized as reasonably incidental to the conditions of her employment. Although appellant's activity of inspecting the size of her tire from her personal vehicle was not required by the employing establishment, the Board finds that it can be characterized as an activity reasonably incidental to her employment. Appellant's action of walking to her personal vehicle, while on an authorized break, was connected to the work she was employed to perform because it is reasonable that appellant might leave the building on her break, to walk to her vehicle parked on employing establishment property.[11] The record also indicated other employees apparently took smoking breaks in the same area where appellant fell and there is no evidence that employees were prohibited from this area during breaks. Therefore, appellant was engaged in an action incidental to the duties of her employment. Appellant has met her burden of proof to establish that she was in the performance of duty on May 8, 1998 at the time of the incident. The case is remanded to the Office for further development of the medical evidence to determine what, if any injury, was caused by the May 8, 1998 incident.

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Performance of Duty, *Industrial Premises*, Chapter 2.804(4)(f) (August 1992). This section provides, regarding parking facilities, that:

> "The industrial premises include the parking facilities owned, controlled, or managed by the employer. An employee is in the performance of duty when injured while on such parking facilities unless engaged in an activity sufficient for removal from the scope of employment. In such cases the official superior should be requested to state whether the parking facilities are owned, controlled, or managed by the employer, and whether the injury did in fact occur in the parking area. The CE [claims examiner] may approve the case when the official superior's response is affirmative and consistent with the other evidence."

[10] *See Carmen B. Gutierrez*, 7 ECAB 58-59 (1954); *see also* A. Larson, *The Law of Workmen's Compensation*, section 15.42(b) (once a parking lot has achieved the status of being a portion of the premises, coverage attaches to any injury that would be compensable on the main premises).

[11] *See Conrad Debski*, 44 ECAB 381 (1993) (it is well-established that work-connected activity goes beyond the direct services performed for the employer and includes at least some ministration to the personal comfort and human wants of the employee); *see also Clark D. Fisher*, 34 ECAB 1633 (1983) (injury within the performance of duty occurred when the claimant stepped off a curb in front of a building where he worked while walking his daughter to her car).

The decisions of the Office of Workers' Compensation Programs dated July 8, 1999 and August 28, 1998 are hereby reversed and the case remanded for further action consistent with this decision.

Dated, Washington, DC
January 10, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member