U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY V. TUCKER and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Columbus, OH

Docket No. 00-1409; Oral Argument Held June 6, 2001; Issued September 7, 2001

Appearances: *H. Macy Favor, Jr., Esq.*, for appellant; *Julia Mankata, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant sustained an injury in the performance of duty on December 17, 1998.

On January 27, 1999 appellant, then a 42-year-old accounting technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained a contusion to the buttock and sciatic nerve when she was kicked by James Gilley a fellow employee, at a club where employees from the employing establishment had gathered for a holiday party. As a result of her injuries, appellant ceased work on December 21, 1998 and returned to work on April 3, 1999. The employing establishment controverted appellant's claim on the basis that she was off-premises and not acting in an official capacity at the time of the December 17, 1998 incident.

On December 21, 1998 Dr. Andrew C. Smith, a Board-certified internist, examined appellant and diagnosed a coccyx contusion, subluxation and damage to the sciatic nerve. Appellant submitted several additional reports from Dr. Smith from January 19 to March 3, 1999 documenting appellant's ongoing treatment and physical therapy for her buttock and sciatic nerve injuries.

On February 23, 1999 the Office of Workers' Compensation Programs conducted a telephone conference with appellant's supervisor to clarify the discrepancies as to how the injury occurred and to develop the issue of whether the injury occurred in the performance of duty. Roger Moyer, appellant's supervisor, indicated that the claimed injury took place at the annual Christmas party, which was held off premises. He verified the fact that the employees who attended the luncheon were not required to take leave, rather they were afforded "absorbed time," which was unofficial administrative leave. Additionally, Mr. Moyer noted that participation in the Christmas party was voluntary, the employing establishment did not sponsor

the event and all participants paid for their own lunch. He further indicated that administrative action had been taken against Mr. Gilley for his conduct. In a separate telephone conference, the Office spoke to appellant who indicated that she was provided with two hours of administrative leave to attend the Christmas party and believed the injury to have arisen in the performance of duty. Appellant indicated that the employing establishment sent a memorandum, which forbade alcohol consumption at the party. She also indicated that attendance at the event was voluntary. Appellant noted that she was assisting a coworker in opening a gift when the incident occurred. She indicated that following the injury, she took oral analgesics for pain and sought treatment from her physician on December 21, 1998. Appellant noted her sciatic nerve was irritated five to six years prior when she received an injection.

Appellant reviewed the conference report and in a response dated March 11, 1999, noted that she was able to stay at the Christmas party after the incident occurred because she was taking oral analgesics for the pain. Additionally, she submitted two letters of correspondence dated October 27 and November 24, 1998, written by the Director of the employing establishment, encouraging participation in the event to the greatest extent possible. He indicated that the purpose of the provision of leave time was to foster morale and camaraderie among employees.

By decision dated March 16, 1999, the Office denied the claim on the basis that appellant was not in the performance of duty at the time of the December 17, 1998 incident. The Office explained that appellant failed to demonstrate that her claimed injury arose out of or was sustained in the course of employment and therefore was not considered to have occurred in the performance of duty.

In a letter dated April 15, 1999, appellant, through her representative, requested a hearing before an Office hearing representative. The hearing was held on November 16, 1999. Appellant testified as to the events, which transpired on December 17, 1998. She testified that the party was planned by appellant's supervisor and fellow employees during work hours, who determined where and when the party would take place. Appellant further testified that attendance at the event was not mandatory and employees who chose to participate paid for their own lunch. She indicated that the employing establishment resolved the dispute among employees concerning the use of alcohol and tobacco at the party, determining that no alcohol or tobacco would be used during the two-hour period of absorbed time allotted to employees who chose to participate in the event.

In a decision dated March 1, 2000, the hearing representative affirmed the decision of the Office dated March 16, 1999 on the grounds that the injury sustained on December 17, 1998 did not occur in the performance of duty.

The Board finds that appellant has not established that she sustained an injury in the performance of duty on December 17, 1998.

Section 8102(a) of the Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury "sustained

while in the performance of his duty."[1] This phrase is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws; namely, "arising out of and in the course of employment."[2] Whereas "arising out of the employment" addresses the causal connection between the employment and the injury, "arising in the course of employment" pertains to work connection as to time, place and activity.[3]

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states:

"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 direct benefit 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."[4]

These are three independent links by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.[5] Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty. The evidence in the instant case, fails to satisfy any of the above-noted criteria.

On appeal appellant alleges: (1) the annual luncheon was a regular incident of employment and therefore was within the orbit of appellant's employment; (2) the employing establishment impliedly required appellant to participate in the luncheon; and (3) the employing establishment derived substantial direct benefit from the luncheon beyond the intangible value of the improvement in employee health and morale.

The claimed injury is not covered under the first criterion for recreational and social activities as the injury did not occur on the employment premises but instead occurred in a public restaurant, located off the employing establishment premises. Appellant alleged the annual luncheon was a regular incident of employment as it was a regularly scheduled annual event and

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[1] 5 U.S.C. § 8102(a).

[2] *See Bernard E. Blum*, 1 ECAB 1, 2 (1947).

[3] *See Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[4] 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

[5] *Archie L. Ransey*, 40 ECAB 1251 (1989); *Clifford G. Smith*, 32 ECAB 1702 (1981); *Stephen H. Greenleigh*, 23 ECAB 53 (1971); *see* Larson, *supra* note 4 at §§ 22.10, 22.30.

the employing establishment maintained sufficient control over the luncheon to make it within the orbit of appellant's employment. She specifically noted that management exercised its control by issuing a memorandum prohibiting the attendees to smoke or drink while attending the luncheon.

With respect to the second criterion, whether the employing establishment required appellant to participate in the luncheon or otherwise made the activity part of appellant's services as an employee, appellant argued that the employing establishment impliedly required appellant to participate in the luncheon. Appellant contends that the Director of the employing establishment sent out a memorandum encouraging them to attend the luncheon and if an employee chose not to attend the event he or she had to perform his or her regular duties or take personal leave. She indicated that the employing establishment, in an effort to encourage participation, gave attendees absorbed time or unofficial administrative leave for the period away from work up to two hours. Appellant noted that she believed she would be punished if she did not attend the party. She further indicated that she was evaluated annually and one of the rated elements involved teamwork and she believed attending this event was a part of being a team player.

In contrast, appellant's supervisor noted on the Form CA-1 that appellant was off-premises at the time of the incident and she was not engaged in an official duty capacity. Mr. Moyer further stated that the luncheon was not sponsored or controlled by the office or any unit at the employing establishment and that the employees attended on a voluntary basis. Further, the record does not demonstrate that the employing establishment either expressly or implicitly required appellant's participation in the December 17, 1998 luncheon.[6] In support of her position, appellant cited *Lawrence v. Industrial Com. Of Arizona*, 78 Ariz. 401, 281 P.2d 113 (1955)[7] in which the court indicated that the superior position of the employer permits compulsion to be exerted indirectly and that the force of suggestion or encouragement may equal an express order. There is no indication from the record that this occurred in the present case. The October 27, 1998 Memorandum from the Director of the employing establishment encouraged employees to participate in the event and there is no evidence to suggest that the employer compelled employees to participate or that there was force of suggestion, on the contrary, the record reveals that attending the party was purely voluntary. Appellant also cites to *Lybrand, Ross Bros. & Montgomery v. Industrial Com.*, 36 Ill.2d 410, 223 N.E.2d 150 (1967)[8] in which the court concluded that the employer exerted a compelling influence upon employees to attend a company outing by requiring those who did not attend to work at their regular duties. However, the employing establishment's Director clearly indicated that employees who chose not to attend the party would either work their normal tour of duty or request appropriate leave. There is no evidence of the employing establishment; compelling influence over the employee, rather a gratuitous option to take appropriate leave if the employee chose not to work his or her regular duties. Appellant further argued that the event occurred during work hours and

[6] *See Anna M. Adams*, 51 ECAB ____ (Docket No. 98-757, issued October 28, 1999).

[7] The Board notes that determinations made by other courts or agencies, pursuant to other statutory schemes are instructive; however, they are in no way binding on the Board. *See Stephen R. Lubin*, 43 ECAB 564 (1992); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

[8] *Id.*

participants were given absorbed time or unofficial administrative leave for the period away from work up to two hours. However, the Board has found that not being required to utilize leave to attend a luncheon at an off-premises restaurant does not, by itself, establish that the employing establishment either financed or sponsored the event.[9]

The Board notes that although the party was an annual event, it was not one which employees were compelled to attend. Participation in the social activity was neither part of appellant's job nor was it an activity for which she would be evaluated, it was a voluntary activity. Furthermore, the record does not support appellant's contentions that she would be punished should she have chosen not to attend the event; rather the record clearly indicated attendance was voluntary and those who chose not to attend would either complete their tour of duty or take leave. The record reveals that employees who chose to participate in the event were asked not to consume alcohol or use tobacco during the two hours of administrative leave granted to attend the affair; however, there is no evidence that sanctions were imposed or that the prohibition extended beyond the two hours of administrative leave. The fact that employees were asked not to consume alcohol or to use tobacco does not establish that the employer controlled the event.[10] Consequently, appellant has failed to demonstrate that the employing establishment either expressly or implicitly required her to attend the December 17, 1998 luncheon.

Appellant also argued that the employing establishment encouraged the attendance at the Christmas party. When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to conduct a further inquiry.[11] This inquiry focuses on the issues of whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment financed the event.[12] Inasmuch as appellant was not required to attend the December 17, 1998 luncheon, her participation was voluntary. Additionally, while appellant was not required to utilize leave in order to attend the approximate two-hour luncheon, other than this gratuitous act by the employing establishment, the record does not indicate that the employing establishment either financed or sponsored the event.[13] Furthermore, appellant specifically indicated that she paid for her own meal. Under the circumstances, the employing establishment cannot be said to have encouraged participation through sponsorship or financial support. Consequently, appellant has failed to demonstrate that the employing establishment required her to participate in the December 17, 1998 luncheon or otherwise made the activity part of her services as an employee.

[9] *See Anna M. Adams, supra* note 6.

[10] *Id*.

[11] Larson, *supra* note 4 at § 22.25.

[12] *Id*.

[13] The fact that no deduction is made from an employee's salary for the time he or she engages in a certain activity does not, by itself, constitute that activity as being incidental to employment; *see Julianne Harrison*, 8 ECAB 440 (1955), *petition for recon. denied*, 8 ECAB 573 (1956).

Appellant has also failed to demonstrate that the employing establishment derived substantial direct benefit from the December 17, 1998 luncheon beyond the intangible value of improvement in employee health and morale. The employing establishment specifically indicated in a memorandum dated October 27, 1998 that the intent of providing absorbed time for Christmas parties is to "foster morale and unity within each directorate." No evidence of record suggests that the social activity in this case was in any way related to the employing establishment's business.[14] Consequently, the evidence of record does not establish that the employing establishment 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 recreation and social life.[15]

Considering all the evidence of record, the Board finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on December 17, 1998.

The decision of the Office of Workers' Compensation Programs dated March 1, 2000 is hereby affirmed.

Dated, Washington, DC
September 7, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Anna M. Adams, supra* note 6.

[15] Larson, *supra* note 4 at § 22.30.