U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN N. ELLIOT and DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, San Francisco, CA

Docket No. 01-363; Submitted on the Record;
Issued July 12, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's injury as arising in the performance of duty.

On March 2, 1998 appellant, then a 49-year-old auditor, filed a claim alleging multiple traumatic injuries when he was struck by an automobile on February 9, 1998 while crossing at an intersection in Sacramento, California.[1] He was off the premises of the employing establishment walking with several coworkers to get coffee at a bagel shop located approximately one block from his office.[2] On May 2, 1998 the Office accepted appellant's claim.[3] Appellant returned to work part time for four hours a day as of June 1, 1998 and to full-time duty as of July 14, 1998.

In a May 21, 1999 telephone conference with Shelton Jensen, senior auditor at the employing establishment, an Office senior claims examiner noted that when the Office was contacted regarding the third-party recovery, it was noticed that the claim had been adjudicated without development of the off-premises issue. The employing establishment was contacted to provide additional factual evidence regarding the case, advising that there was a coffee shop located on the employing establishment's premises since April 1997; there was no prohibition on employees going outside of the building for coffee breaks; that appellant was injured while on his way to a bagel shop located close to the employing establishment; and that he was paid for time taken for his break. On November 19, 1999 the Office claims examiner sent a copy of the conference memorandum to Mr. Jensen who, on November 30, 1999, stated that he concurred that all responses were accurate.

[1] Appellant sustained multiple fractures of the left eye socket, left collarbone, three ribs on the left, right thumb and left leg.

[2] Appellant's work schedule was Sunday through Thursday from 6:30 a.m. to 3:00 p.m. The injury occurred at approximately 9:00 a.m. on Monday, February 9, 1998.

[3] Appellant obtained a third-party recovery in the amount of $100,000.00. The Office disbursed $87,449.64 in medical benefits.

In a December 2, 1999 decision, the Office rescinded the acceptance of appellant's claim on the basis that he was not in the performance of duty when injured on February 9, 1998. The Office reviewed the Board's holding in *Helen L. Gunderson*,[4] noted that coffee was made available on the employing establishment's premises and that appellant seeking coffee at the bagel shop was a matter of personal preference which removed him from the performance of duty when injured.

On December 13, 1999 appellant requested an oral hearing before an Office hearing representative. A hearing was held on April 26, 2000 at which appellant appeared and testified. Appellant contended that his injury arose in the performance of duty as he was on an authorized coffee break and that his employers knew that employees went off premises to get coffee.

In an August 10, 2000 decision, the Office hearing representative affirmed the December 2, 1999 decision. The hearing representative noted that acceptance of the claim was based upon a mistake of fact.

The Board finds that the Office properly rescinded acceptance of appellant's claim on the basis that it did not arise while in the performance of duty.

The Board has long held that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in the manner provided by the compensation statute. It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office decides it erroneously accepted the claim. To support rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.[5]

The Board finds that the Office considered a new legal argument to justify the rescission of its acceptance of appellant's claim for injury on February 9, 1998. The general rule is that an "off-premises" injury sustained by an employee while going to and from his place of employment is, subject to some exceptions, not compensable.[6] The basis for rescission in this case is a mistake of law, *i.e.*, by leaving the employing establishment's premises to get coffee at a local restaurant appellant was no longer in the performance of duty at the time of injury. This finding by the Office is well settled by Board case law.

In *Helen L. Gunderson*,[7] the Board noted that the drinking of coffee or similar beverages, or the eating of a snack during recognized breaks during daily work hours is generally accepted as a work-related activity falling into that general class of activities closely related to personal ministrations so that engaging in such activity does not take an employee out of the course of employment.[8] The facts in *Gunderson*, however, that brought the case within the off-premises

[4] 7 ECAB 288 (1954), *petition for recon. denied*, 7 ECAB 707 (1955).

[5] *Roberto Rodriguez*, 50 ECAB 124 (1998); *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *John W. Pope*, 33 ECAB 810 (1982); *Thomas J. Caserta*, 27 ECAB 224 (1976); *Vernon Booth*, 9 ECAB 278 (1957); *Adrian M. Kallander*, 8 ECAB 654 (1956); *Evelyn J. Gray*, 6 ECAB 88 (1953); *Fred Foster*, 1 ECAB 21 (1947).

[6] *See Randi H. Goldin*, 47 ECAB 708 (1996); *Mary M. Martin*, 34 ECAB 525 (1983); *Byron A. Sharpe*, 26 ECAB 18 (1974).

[7] *Supra* note 4.

[8] *See Mary Keszler*, 38 ECAB 735, 742 (1987); *Nancy E. Barron*, 36 ECAB 428 (1985).

exception to the going and coming rule were not only that the employee was paid for the time she was off premises and that leaving the premises was in accordance with past practice and with the knowledge and consent of the employer, but as the Board noted there were no facilities available on the employing establishment's premises for obtaining coffee.

In *Harris Cohen*,[9] the employee sustained injury after leaving the employing establishment's premises to obtain coffee from a nearby restaurant. The Board noted that the evidence of record established that coffee machines were located in five places at the employing establishment and that notice was posted that employees were not permitted to leave the building during rest periods. The employee maintained that the coffee on premises was unpalatable and that he was not the only individual to leave the premises to obtain coffee elsewhere. The Board found that the injury did not arise within the performance of duty, distinguishing the facts of the case from *Gunderson*. Similarly, in *Joan R. Orem*,[10] the employee sustained injury when she fell to the sidewalk after leaving the premises while going to a nearby cafeteria for coffee. The Board, as in *Cohen*, recognized that coffee facilities were available in appellant's office building.[11] In both cases, the employees leaving their respective employing premises constituted a departure from the employment such that their injuries did not arise in the performance of duty.

The fact that appellant was on paid leave at the time of injury is not determinative of whether he was in the performance of duty. In *Julianne Harrison*,[12] the employee sustained injury while walking off premises to a bank to cash her salary check. The Board noted there were no facilities where she worked and that the employer granted its employees 15 minutes of paid leave to cash their checks. The Board found that the cashing of a salary check was not a work-related incident of the employment but, rather, constituted a matter of personal convenience for the employee. For this reason, the employee's injury was not sustained while in the performance of duty.

Nor does an employer's knowledge of an employee's custom to go off premises determine coverage under the Act. In *Linda A. Alcala*,[13] the employee sustained injury in an automobile accident while off premises to pick up a birthday cake to celebrate a coworker's birthday. The Board noted that the practice of celebrating birthdays engaged in at the employing establishment constituted an informal arrangement among the employees and management which was encouraged but was not a work-related incident of her employment. The Board also noted that the employing establishment did not pay for or provide transportation to pick up the cake such that it could be found to either have financed or sponsored the event. The employee's act of leaving the premises to get the cake was found a personal matter with no demonstration that the employing establishment required her to organize the birthday celebration. In *Mary Keszler*,[14] the employee sustained injury when struck by a car after leaving the premises to put money in a

[9] 8 ECAB 457 (1955).

[10] 19 ECAB 310 (1968)

[11] The Board also noted an employing establishment directive which prohibited leaving the premises during coffee breaks.

[12] 8 ECAB 440 (1955), *petition for recon. denied*, 8 ECAB 573 (1956).

[13] Docket No. 98-1697 (issued February 17, 2000).

[14] *Supra* note 8.

parking meter for herself and two other employees. Although appellant's supervisor and an Administrative Law Judge in charge of the office knew of and condoned the practice of staff employees "slugging" the parking meters, there were found to be no employment-related factors involved in the employee's absence from the premises at the time of injury. The employee was found to have left the premises as a matter of personal convenience as payment at the parking meter was a voluntary activity not required by her employment. For this reason, the custom of the employees in leaving the premises was not a practice incidental to their employment.

Based on these considerations, the Office properly reopened appellant's claim for further review and determined that his injury on February 9, 1998 did not arise while he was in the performance of duty. The record establishes that coffee was made available to appellant and other employees on the employing establishment's premises. Although the employer may have been generally aware of the custom of some employees leaving the office building to obtain coffee and did not prohibit coffee breaks outside the building, securing coffee off-premises was a matter of personal preference to appellant and not an activity incidental to his employment. As such, going off-premises on his coffee break constituted a sufficient departure from his employment so as to remove him from the performance of duty at the time of injury.

The August 10, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
July 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member