U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY C. GRAHAM and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Okla.

Docket No. 96-2053; Submitted on the Record;
Issued October 13, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim on the grounds that she removed herself from coverage under the Federal Employees' Compensation Act due to statutory willful misconduct.

On February 14, 1995 appellant, then a 59-year-old secretary, filed a claim alleging that she injured her back, right leg and right shoulder on February 2, 1995 when she fell over a drawer on the floor which she alleged had been placed there by another employee. The employing establishment controverted the claim, asserting that appellant's injury was due to her willful misconduct. In a decision dated May 31, 1995, the Office denied appellant's claim on the grounds that appellant had removed herself from coverage under the Act when she disobeyed a direct order from her superior. The Office found that appellant's actions were willful misconduct inasmuch as they were deliberate and intentional. The Office further found that appellant's comments about the incident made it clear that she was cognizant of the potential consequences of her actions. The Office concluded that appellant's injuries did not occur within the performance of duty. In a decision dated May 29, 1996 and finalized on May 30, 1996, an Office hearing representative affirmed the May 31, 1995 decision of the Office on the grounds that appellant had removed herself from the scope of employment by her deliberate and intentional disobedience.

The Board has carefully reviewed the entire case record on appeal and finds that the Office improperly determined that appellant was not covered by the Act due to statutory willful misconduct.

In providing for a compensation program for federal employees, Congress 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 an employee/employer relation.[1] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment." "In the course of employment" deals with the work setting, the locale, and the time of injury whereas "arising out of employment" encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury.[2] In addressing the issue, the Board stated:

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

In the present case, appellant has contended that she was within the performance of duty when her injury occurred. However, the employing establishment has invoked and the Office has adopted the invocation of the affirmative defense of willful misconduct in the adjudication of appellant's claim for compensation.

Section 8102(a) of the Act provides in pertinent part, as follows:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the injury or death is—
>
> (1) caused by willful misconduct of the employee…."[4]

In determining whether the statutory defense of willful misconduct can be properly applied to the present case, the Board reviewed Larson's treatise on workers' compensation law, section 32 which provides the following guideline:

> "The statutory 'willful misconduct' defense, whatever its actual general definition might be, has in practical application been largely limited to the deliberate and intentional violation of known regulations designed to preserve the employee from serious bodily harm."[5]

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[1] *Christine Lawrence*, 36 ECAB 422, 423-24 (1985). *See Minnie M. Heubner*, 2 ECAB 20 (1948).

[2] *Denis F. Rafferty*, 16 ECAB 413 (1965).

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

[4] 5 U.S.C. § 8102(a)(1).

[5] A. Larson, *The Law of Workers' Compensation* § 32.00 (1989).

The treatise further provides that as a condition precedent to application of the statutory defense, "the employee must understand the seriousness of the consequences attending violation of the safety rule since otherwise his conduct can only be described as heedless rather than deliberate."[6]

In this case, appellant was given a written suspense order to remove her name and writing from the office furniture. This directive was given during the period of time that outside contractors were building cubicles for the employing establishment, including an area that was to be appellant's new office. Appellant stated that she interpreted this written suspense order as a directive to remove all of her papers from the furniture in question. However, there is no indication that this was the intent of her supervisor, Richard T. Montgomery who reported in his statement that appellant had been involved in past incidents in which she wrote directly on office furniture and had to remove the writing with a scrub pad. According to his statements, Craig Hampton, the Acting Branch Chief, received a complaint from the contract workers that appellant's removal of furniture from the office in which they were putting up cubicles and return of that furniture was interfering with their work. Mr. Hampton indicated that he observed appellant's actions at approximately 4:00 p.m. and advised her that she should stop moving items to and from her office. He reported that appellant refused to obey this directive and that a little later a thump was heard from her area when she fell over one of the boxes she had moved into her space against his instructions. Mr. Hampton also indicated that he had held a meeting at approximately 1:00 p.m. with the entire secretarial staff to request that they stay out of the way of the contractors while they were building the cubicles. Mr. Hampton indicated that his exchange was overheard by Benny Stroope, the Acting Chief of the Management and Technical Support Branch, who was overseeing the construction of the cubicles. In a statement from Mr. Stroope, he corroborated that appellant was directed not to drag any more furniture into her office by Mr. Hampton, that appellant had said she did not care who Mr. Hampton was, and that she immediately dragged another file into her office.

While it is clear that appellant did disobey a direct order from Mr. Hampton, there is no evidence that this directive was phrased as a direction for appellant to avoid bodily harm, *e.g*, in the form of a safety rule. Rather, Mr. Hampton instructed appellant to avoid the area in which the cubicles were being constructed as her actions were impeding completion of the work and not because it was a safety hazard. Appellant did not "intentionally violate" a "known regulation" designed to save her from "serious bodily harm" since there was no such directive or known regulation in the instant case. Consequently, the employing establishment and Office improperly invoked the affirmative defense of statutory "willful misconduct," and the decision of the Office rejecting appellant's claim on this ground must be reversed.

[6] *Id*. at § 32.20.

The decision of the Office of Workers' Compensation Programs dated May 29, 1996 and finalized May 30, 1996 is hereby reversed and remanded for further development of the claim.

Dated, Washington, D.C.
October 13, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member