U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN ROSENBAUM and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, N.Y.

Docket No. 97-1685; Submitted on the Record;
Issued April 6, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant's injury on September 6, 1996 was sustained in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

On September 6, 1996 appellant, then a 32-year-old pharmacist, filed a claim alleging that she was injured in an automobile accident which took place while she was moving her car from one parking location to another. Appellant explained her car was parked in a lot at Fort Hamilton, which was made available for the use of Veterans Administration employees through special arrangement. She stated that on the day of the accident, she was assigned to a 10:30 a.m. to 7:00 p.m. shift, and that because the parking lot gate closed at 7:00 p.m., it was necessary for her to move her vehicle to another parking location prior to that time. She further explained that on the day of the accident, she had pulled her vehicle out of the parking lot and onto the public roadway and was waiting at a red light when her vehicle was struck from behind. Appellant reported that the route she took was the only possible route connecting the parking locations, and required the use of the public roads. Finally, appellant stated that at the time of the accident she was carrying out parking procedures arranged by the Director of the Medical Center in collaboration with Fort Hamilton, and that her actions were therefore imposed by her employment.

In support of her claim, appellant submitted a copy of an electronic memorandum from Mr. Michael A. Sabo, Medical Center Director, outlining the procedures for the use of the Fort Hamilton parking spaces.

In response to a request by the Office for additional information, the employing establishment submitted a statement indicating that at the time of the accident, appellant was moving her private vehicle from a parking lot at Fort Hamilton to the Veteran Administration Medical Center, an approximate distance of less than a mile, and that appellant was not being reimbursed for travel expenses.

In a decision dated January 13, 1997, the Office rejected appellant's claim finding that her injury did not occur while in the performance of duty.[1] The Office noted that the motor vehicle accident did not occur in the performance of duty because at the time of the accident, appellant had left her work site, was on a public road and was not doing anything incidental to her employment duties as a pharmacist.

By letter dated February 25, 1997 and received February 27, 1997, appellant requested a hearing before an Office hearing representative. Appellant stated that she did not receive a copy of the January 13, 1997 decision in the mail, but instead was notified of the decision for the first time February 24, 1997 by the employing establishment payroll department.

In a decision dated April 7, 1997, the Office denied appellant's request for an oral hearing on the grounds that her request was untimely and that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

By letter dated April 14, 1997, appellant requested reconsideration of the Office's January 13, 1997 decision. In support of her request, appellant submitted a signed copy of the previously submitted electronic memorandum from Mr. Sabo, which included on its reverse side, a map of the route between the various parking locations available to employees.

In a decision dated May 29, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the application for review was not sufficient to warrant review of its prior decision.

The Board finds that appellant's injury on September 6, 1996 was not sustained 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 his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. 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 phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated the following: "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 his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[2]

[1] The Office mistakenly referred to appellant's injury as having occurred on July 6, 1996, rather than on September 6, 1996.

[2] *Christine Lawrence*, 36 ECAB 422 (1985).

The Board has stated as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[3] Exceptions to this general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[4] or which are in the nature of necessary personal comfort or ministration.[5] The fact that no deduction is made from the employee's salary for the time he or she engages in the questioned activity does not, by itself, establish that activity as being incidental to the employment.[6]

In the instant case, appellant had fixed hours and place of work, in the sense that she was not an off-premises worker such as a letter carrier or delivery person, and she sustained injury on September 6, 1996 at approximately 6:00 p.m. when her automobile was struck from behind by another vehicle while she was in the process of moving her vehicle from one parking location to another. The injury did not occur on the actual employment premises, but instead occurred on a public roadway between the two parking locations. In view of the foregoing, the general going and coming rule will apply unless it is established that one of the exceptions to the general rule applies to the circumstances of this case.

In *Estelle M. Kasprzak*,[7] the Board enumerated four recognized exceptions to the general going and coming rule which it characterized as the "off-premises" exceptions. The Board stated that these exceptions are related to situations: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[8]

In the present case, appellant contends that her injuries are covered by the fourth exception cited, for the reason that her employer knew of the necessity that employees move their vehicles from the Fort Hamilton lot prior to the gates closing at 7:00 p.m., and that in doing so she was following parking procedures imposed by the employing establishment on all its employees. The Board finds, however, that the practice engaged in at the employing establishment constitutes an arrangement among those staff employees who drove their private vehicles to work and was made for the personal convenience of those employees who utilized the

[3] *Alvina B. Piller (Robert D. Piller)*, 7 ECAB 444 (1955); *Anne R. Rebeck*, 32 ECAB 315 (1980).

[4] *Lillie J. Wiley*, 6 ECAB 500 (1954); *Mary Chiapperini*, 7 ECAB 959 (1955).

[5] For *e.g.*, accidents occurring while an employee is on the way to the lavatory, *Abraham Katz*, 6 ECAB 218 (1953); or the drinking of coffee and similar beverages, or the eating of a snack, *Helen L. Gunderson*, 7 ECAB 288 (1955) and *Harris Cohen*, 8 ECAB 457 (1955).

[6] *Julianne Harrison*, 8 ECAB 440 (1955).

[7] 27 ECAB 339 (1976).

[8] *See Cardillo v. Liberty Insurance Co.*, 330 U.S.C. 469, 479.

Fort Hamilton lot. There is no question that the employing establishment staff were authorized to utilize several specific parking locations at Fort Hamilton; however, while the memorandum instructing employees as to the proper parking procedures notes that the parking facilities close at 7:00 p.m., the memorandum does not include any procedures to be followed by employees whose shifts extend beyond the closing of any lot located on the base. In addition, contrary to appellant's arguments, the memorandum issued by the medical director merely outlined procedures to be followed by "staff desiring to park on Fort Hamilton" and did not impose any requirement that staff utilize these spaces. Finally, there were no employment factors involved in appellant's absence from the employment premises at the time her injury occurred. Although the injury may have occurred during her tour of duty, the act of leaving the employing premises in order to move her car from one parking location to another was a matter of personal convenience, not a work-related incident of employment.[9]

Closely allied to the "off-premises" exceptions is the "proximity" rule recognized by the Supreme Court of the United States in *Cudahy Packing Co. v. Parramore*.[10] In *William L. McKenney,*[11] the Board defined the proximity rule by stating that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment. In *Cudahy Packing Company,* a deciding factor noted by the Court in establishing the requisite nexus between the conditions giving rise to the injury and the employment was that the road on which the injury occurred was the only means of access to the employing establishment.

In the present case, while the road upon which appellant was traveling was the only route connecting the Fort Hamilton parking area in which she was parked with the location to which she was moving her car, the facts establish that appellant was not required to park at the Fort Hamilton location, and there has been no showing that the employing establishment owned, controlled, or had managerial responsibility over that area where appellant parked her car or that the parking spaces were used exclusively or principally by staff employees of the employing

[9] *See Wesley T. Miller,* 38 ECAB 106 (1986).

[10] 263 U.S.C. 423.

[11] 31 ECAB 861 (1980).

establishment for the convenience of the employer.[12] Instead, the evidence reveals that Fort Hamilton provided five separate parking areas for use by Medical Center employees, that these employees could park in the spaces provided at their option for their own convenience, but that they remained guests of Fort Hamilton. The case record does not establish that the parking spaces used by appellant were so connected with the employing establishment as to be considered part of the premises of the employing establishment. Appellant's injuries arose as a result of her car being struck by another vehicle while on a public street and is an example of a hazard common to all travelers on public streets.

Finally, the Board finds that appellant's injuries are not covered by the personal ministration doctrine. The Board has found that the drinking of coffee and similar beverages, or the eating of a snack, during recognized breaks during daily work hours is now so generally accepted in the industrial life of our nation as to constitute a work-related activity falling into a general class of activity closely related to personal ministrations so that engaging is such activity does not take an employee out of the course of his or her employment.[13] In the present case, the Board finds that the activity in which appellant was engaged at the time of injury is in the nature of a personal convenience and not an activity which can be considered closely related to personal ministration. The nature of the activity in which appellant was engaged consisted of driving her car on a public street while in the process of moving her car from a parking location that had been provided for her convenience and for the convenience of the other employees, and which she was not required to use. This arrangement, while not prohibited by the employing establishment, is readily distinguishable from such activities as have been accepted by the Board as necessary personal comfort or ministration.

For the reasons set forth above, the Board finds that appellant has not established that the act of leaving the employing establishment's premises to move her car from one parking location to another was a work-related incident and, therefore, that the injury she sustained on September 6, 1996 was not in the performance of duty.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act, concerning entitlement to a hearing before an Office representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[14]

[12] The Board has pointed out that factors which determine whether a parking lot used by employees may be considered part of the employer's premises include factors such as whether the lot or a portion of it is used principally or exclusively by employees of the employing establishment; whether parking spaces were assigned by the employing establishment; whether the parking area was checked to see that no unauthorized cars were parked in the lot; whether the public was permitted to use the lot; and whether other parking was available to employees; *see Grace McElroy*, Docket No. 86-1481 (issued August 22, 1985) and cases cited therein.

[13] *See also Nancy E. Barron*, 36 ECAB 428 (1985).

[14] 5 U.S.C. § 8124(b)(1).

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[15]

In this case, the Office issued its decision denying appellant's claim on January 13, 1997. Appellant's letter requesting a hearing was postmarked February 25, 1997 which was beyond 30 days from the date that the January 13, 1997 decision was issued.[16] Because appellant did not request a hearing within 30 days of the Office's January 13, 1997 decision, she was not entitled to a hearing under section 8124 as a matter of right.[17]

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[18] In this case, the Office advised appellant that it considered this request in relation to the issue involved and the hearing was denied on the basis that the claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[19] There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

[15] *Henry Moreno*, 39 ECAB 475 (1988).

[16] Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; see 20 C.F.R. § 10.131(a).

[17] Regarding appellant's contention that she did not receive the January 13, 1997 decision in a timely manner, under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual, and copies of these letters show appellant's correct address; *see Clara T. Norga*, 46 ECAB 473 (1995).

[18] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

[19] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated April 7 and January 13, 1997 are hereby affirmed.[20]

Dated, Washington, D.C.
April 6, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[20] With respect to the decision issued by the Office on May 29, 1997, denying appellant's April 15, 1997 request for reconsideration, the Board notes that appellant's notice of appeal, postmarked April 15, 1997, was received by the Board on April 21, 1997. As the Board and the Office may not simultaneously have jurisdiction over the same issue in the same case, the Office did not have the authority to issue the May 29, 1997 decision and it is null and void. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings* 41 ECAB 880 (1990).