U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA M. ADAMS and DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, Washington, DC

Docket No. 98-757; Submitted on the Record;
Issued October 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury in the performance of duty on March 13, 1997.

On March 20, 1997 appellant, then a 47-year-old claims examiner, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she injured her head, back and buttocks as a result of a fall sustained in the performance of duty on March 13, 1997. Appellant explained that she injured herself while attending an employment sponsored luncheon. Specifically, appellant indicated that while attempting to flush a toilet in a public restroom, her foot became entangled between the upright toilet seat and the flush handle. In an effort to dislodge her foot, appellant lost her balance and struck her head on the adjacent wall and subsequently fell to the floor, striking her back. Appellant's supervisor, Nancy Ligon, had accompanied her to the restroom and, therefore, witnessed the incident.[1] On March 14, 1997, Dr. Carl S. Friedman, a Board-certified internist, examined appellant and diagnosed a head contusion as well as lumbosacral sprain. As a result of her injuries, appellant ceased work on March 14, 1997, and returned to work on March 20, 1997. 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 March 13, 1997 incident.

By letter dated May 14, 1997, the Office of Workers' Compensation Programs advised appellant that based on a preliminary review of the record, the incident of March 13, 1997 did not occur while she was in the performance of duty. The Office explained that the farewell luncheon was an off-premises social event, which appellant was not required to attend. The

[1] In a March 27, 1997 statement, Nancy Ligon explained, *inter alia*, that on March 13, 1997, she and several other coworkers accompanied appellant to a public restaurant to attend a farewell luncheon for a departing colleague. The restaurant was not located on the employing establishment premises. Shortly after arriving at the restaurant, appellant and Ms. Ligon proceeded to the restroom where the incident occurred at approximately 11:40 a.m.

Office noted that while the employing establishment may have encouraged appellant's participation in this social activity, it derived no special benefit from appellant's attendance at the March 13, 1997 luncheon. Appellant was provided 30 days with in which to submit additional information.

In a June 11, 1997 response, appellant contended that her injury arose in the course of employment because she was in a pay status at the time,[2] and her supervisor was in control of the unit during the entire luncheon excursion, which lasted approximately three hours. Appellant also noted that she and her supervisor discussed a particular case en route to the restaurant. Additionally, appellant stated that her attendance was implicitly required by her supervisor. She explained that, had she declined to participate in the luncheon, her supervisor would have most likely assigned her additional duties as a punitive measure.[3]

On August 28, 1997 the Office conducted a telephone conference with appellant's supervisor to address some of the issues raised in appellant's June 11, 1997 response. During the conference, Ms. Ligon provided information regarding the number of employees assigned to her particular unit and the number of employees who attended the March 13, 1997 luncheon. She also verified the fact that the employees who attended the luncheon were not required to take leave. Additionally, Ms. Ligon indicated that no announcement was made regarding likely additional assignments for employees who did not attend the luncheon. She specifically denied that such additional assignments were a past practice in the unit. Ms. Ligon explained that she personally made arrangements for telephone and direct contact coverage to be provided by another unit supervisor during the March 13, 1997 luncheon. Finally, Ms. Ligon acknowledged that, as she and appellant were departing for the restaurant, they had a brief conversation regarding a case appellant was assigned. Ms. Ligon explained that while appellant wanted to continue the discussion, she ended the conversation and advised appellant that they would talk further when they returned to the office.

Appellant reviewed the conference report and in a response dated September 16, 1997, argued that contrary to Ms. Ligon's statement, it was a past practice in her unit to have the remaining unit members provide telephone and direct contact coverage during office luncheons. Additionally, appellant submitted statements from two colleagues in support of her position. She also provided further details about her work-related conversation with Ms. Ligon that occurred en route to the restaurant. Appellant verified the fact that Ms. Ligon stated they would resume the conversation later when they returned to the office.

In supplemental statements dated September 29 and October 7, 1997, Ms. Ligon explained, among other things, that the alleged past practice of assigning coverage to remaining employees did not occur during her tenure as a supervisor. She further indicated that the two

[2] Although appellant was required to pay for her own lunch, she was not required to utilize any leave to attend the farewell luncheon, which extended approximately two and a half hours beyond appellant's normal lunch break.

[3] Based on an alleged past practice within her unit, appellant assumed that she might be required to provide telephone and direct contact coverage for her absent coworkers in the event she did not attend the March 13, 1997 luncheon.

employees who had not attended the March 13, 1997 luncheon did not receive any additional duties as a result of their absence.

By decision dated October 9, 1997, the Office denied the claim on the basis that appellant was not in the performance of duty at the time of her March 13, 1997 fall. The Office explained that the incident was not sufficiently related to appellant's assigned duties or activities incidental to employment to be considered to have occurred in the performance of duty.

The Board finds that appellant has not established that she sustained an injury in the performance of duty on March 13, 1997.

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."[4] The quoted 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."[5] 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.[6] For purposes of determining entitlement to compensation under the Act, "arising in the course of employment," *i.e.*, performance of duty, must be established before "arising out of the employment," *i.e.*, causal relationship, can be addressed.

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."[7]

[4] 5 U.S.C. § 8102(a).

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

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

[7] 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

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.[8] 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 of record in the instant case, fails to satisfy any of the above-noted criteria.

First, it is undisputed that appellant was off-premises at the time of the March 13, 1997 incident. While the incident occurred during a lunch break, both appellant and her supervisor, who witnessed the incident, stated that the fall occurred in the restroom of a public restaurant, located off the employing establishment premises. Thus, appellant failed to satisfy the first criterion that the incident "occur[ed] on the premises during a lunch or recreational period as a regular incident of the employment."[9]

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 stated she "would never have attended the luncheon if it were not sponsored by the unit." As previously noted, appellant also stated that her supervisor implicitly required her attendance and that the employing establishment "certainly encouraged the attendance as incidental to employment." Lastly, appellant noted that she and her supervisor had discussed a particular case en route to the luncheon.

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. Ms. Ligon further stated that the luncheon was not sponsored by the office or the unit and that the employees attended on a voluntary basis. Additionally, she indicated that during her tenure as unit supervisor, it was not her practice to assign telephone and direct contact coverage responsibilities to those employees who declined to attend unit luncheons. Ms. Ligon further explained that on March 13, 1997 she personally arranged for a supervisor from another unit to provide contact coverage during the luncheon and that telephone messages were taken for absent employees. The two employees that did not attend the luncheon were expected to conduct business as usual and were not assigned any additional responsibilities. Finally, Ms. Ligon stated that while she and appellant had a brief conversation about a case while departing from the office, they did not discuss the matter during the luncheon.

The record does not demonstrate that the employing establishment either expressly or implicitly required appellant's participation in the March 13, 1997 luncheon. There is no indication from the record that appellant was specifically directed to attend the luncheon. With respect to any implied requirement of participation, while appellant may have assumed that she would be responsible for providing telephone and direct contact coverage for the unit had she opted not to attend the luncheon, appellant's supervisor indicated that she did not make any prior announcement to that effect and that it was not her practice to do so. Moreover, Ms. Ligon made

[8] *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 7 at §§ 22.10, 22.30.

[9] Larson, *supra* note 7.

other arrangements for coverage on the day in question that did not involve imposing additional responsibilities on the two employees who declined to attend the luncheon. Consequently, appellant has failed to demonstrate that the employing establishment either expressly or implicitly required her to attend the March 13, 1997 luncheon.

Appellant also argued that the employing establishment "certainly encouraged the attendance as incidental to employment." 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.[10] 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.[11] Inasmuch as appellant was not required to attend the March 13, 1997 luncheon, her participation was voluntary. Additionally, while appellant was not required to utilize leave in order to attend the approximate three-hour luncheon, other than this single gratuitous act by the employing establishment, the record does not indicate that the employing establishment either financed or sponsored the event.[12] 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 March 13, 1997 luncheon or otherwise made the activity part of her services as an employee.

Appellant has also failed to demonstrate that the employing establishment derived substantial direct benefit from the March 13, 1997 luncheon beyond the intangible value of improvement in employee health and morale. Although at the outset of their excursion appellant and her supervisor engaged in a brief discussion regarding a work-related matter, this discussion was merely incidental to the luncheon outing and does not constitute work activity. Furthermore, despite appellant's desire to continue the work-related discussion, her supervisor curtailed the discussion shortly after it began and well in advance of their arrival at the public restaurant where appellant's fall occurred. No evidence of record suggests that the social activity in this case, is in any way related to the employing establishment's business. 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.[13]

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 March 13, 1997.

[10] Larson, *supra* note 7 at § 22.25.

[11] *Id.*

[12] 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).

[13] Larson, *supra* note 7 at § 22.30.

The decision of the Office of Workers' Compensation Programs dated October 9, 1997 is, hereby, affirmed.

Dated, Washington, D.C.
October 28, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member