U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY D. O'NEAL and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, CALIFORNIA SERVICE CENTER, Laguna Niguel, CA

Docket Nos. 01-612 & 01-613; Submitted on the Record;
Issued July 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty on June 5, 1999; and (2) whether appellant sustained a consequential injury on August 22, 1999.

On June 7, 1999 appellant, then a 34-year-old adjudication officer, filed a traumatic injury claim alleging that on Saturday, June 5, 1999 at 7:40 p.m. she sustained a right ankle sprain in the performance of duty when she slipped on a rock and twisted her ankle while walking on the athletic track at the Federal Law Enforcement Training Center in Artesia, New Mexico. Appellant was attending a training course for adjudication officers.

In an undated report, Dr. Jeffrey A. Rey indicated that appellant was examined on June 16, 1999 and stated that she was attending a training course in New Mexico and was walking on an athletic track when she stepped on a rock and twisted her ankle.

In a report dated June 21, 1999, Dr. David M. Allen, an orthopedic surgeon, stated that appellant was walking on a track at the Federal Law Enforcement Training Center when she stepped on a rock and injured her right ankle. He diagnosed a right ankle sprain.

In a memorandum dated August 24, 1999, an employing establishment personnel management specialist stated that appellant was not required to participate in any physical exercise directly related to her training in New Mexico and the day of the incident, Saturday, June 5, 1999, was a scheduled day off duty. A May 5, 1999 informational memorandum concerning the training course stated that physical fitness equipment and athletic attire, except shoes, would be available to students at the training center.

On August 26, 1999 appellant filed a claim alleging that on August 22, 1999 she was at a pharmacy to pick up medication for her right ankle condition when she twisted her left ankle. She alleged that her left ankle condition was a consequential injury related to her right ankle sprain on June 5, 1999.

In a memorandum dated November 15, 1999, an employing establishment personnel management specialist stated that appellant was scheduled to attend training in New Mexico for two weeks of classroom training Monday through Friday with Saturday and Sunday as off duty time. She noted that appellant's claimed injury occurred on a Saturday.

By decision dated November 23, 1999, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the grounds that her right ankle sprain was not sustained in the performance of duty. The Office stated that at the time of the injury she was off duty and was not required to participate in any exercises while attending training. In a second decision dated November 23, 1999, the Office denied appellant's claim for a left ankle injury.

By letters dated December 7, 1999, appellant requested an oral hearing regarding her right and left ankle injury claims. The hearing was held on July 12, 2000. At the hearing appellant testified that she attended the training course in New Mexico from June 1 to 12, 1999 with 20 other employees who lived at the training facility. She testified that on the first day of the training course they were given training course uniforms consisting of slacks and shirts and also exercise clothing consisting of shorts, t-shirts and socks and were encouraged to use the track and weight room. Appellant testified that they were not required to exercise but were encouraged to exercise in preparation for a stress management class to be held later in the course. She stated that she and the other participants walked on the track after lunch and dinner daily. Appellant stated that she was walking on the track after dinner on Saturday, June 5, 1999 when she stepped on a rock and fell.

On July 21, 2000 appellant submitted additional information regarding her training in New Mexico. She submitted a document describing the subjects included in the training course she attended. This document stated that the "Journeylevel Center Adjudicator Course" was intended to provide guidance, reinforcement and updating of procedures for Immigration Service Center Adjudicators and included information on changes in immigration law, regulations, policy and procedures. A copy of a class schedule indicated that on June 9, 1999 the training topics included ethics and stress management. There was no description of the stress management class. Appellant asserted that the agency encouraged training participants to participate in physical exercise and the fact that stress management was a topic in the training program supported her contention.

In a letter dated August 15, 2000, an employing establishment assistant director stated that the students at the training course were not required to participate in any type of physical training but were encouraged to take advantage of the exercise facilities. He stated that participation in any form of physical exercise at the training center was completely voluntary. The assistant director stated that students were not issued physical exercise clothing for any scheduled training and that exercise clothing was issued only as a courtesy to students who had the option of using their own exercise clothes while voluntarily participating in exercise.

By decision dated and finalized October 4, 2000, the Office hearing representative affirmed the Office's November 23, 1999 decision. In a separate decision dated October 4, 2000 and finalized on October 5, 2000, the Office hearing representative denied appellant's claim for a left ankle injury.

The Board finds that appellant has not established an injury in the performance of duty.

With respect to recreational activities in general, the Board finds that the well-established indicia of coverage have not been met in this case. The Board has held that such activities arise in 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
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> "(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of the employee, brings the activity within the orbit of employment; or
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> "(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."[1]

In this case, none of the traditional indicia of coverage for recreational or social activities are present.

The incident on June 5, 1999 did not occur during a lunch or recreational period as a regular incident of the employment. There is no evidence that appellant's walk on the training center athletic track on an off-duty day was expressly or impliedly required by the employer. Appellant also failed to demonstrate that the employing establishment derived substantial direct benefit from her voluntary exercise beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social activities.[2]

Appellant asserted that the employing establishment encouraged participants in the training course to exercise and, therefore, her injury was sustained in the performance of duty. When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to conduct further inquiry.[3] 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.[4] Inasmuch as appellant was not required to exercise while attending the training course, her participation was voluntary. Although the employing establishment provided participants at the training course with clothing which could be used for physical exercise, an employing establishment assistant director stated that employees could wear their own exercise clothes while voluntarily participating in exercise. Although the employing establishment provided exercise clothing in the event that one wished to exercise while at the training course, there is

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[1] *Lawrence J. Kolodzi*, 44 ECAB 818 (1993); *see also* 1 A Larson, *The Law of Workers' Compensation* § 22.01 (2000).

[2] Larson, *The Law of Workers' Compensation* § 22.05(3) (2000).

[3] Larson, *The Law of Workers' Compensation* § 22.04(3) (2000).

[4] *Id*.

insufficient evidence that the employing establishment financed or sponsored an exercise program. Under the circumstances of this case, 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 exercise during the training course or otherwise made the activity part of her services as an employee.

Regarding the fact that appellant was on temporary duty attending a training course in another state when the incident occurred, the general rule regarding coverage of employees on travel status or on temporary-duty assignments is set forth by Larson:

> "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, *except when a distinct departure on a personal errand is shown*. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."[5] (Emphasis added.)

The Board has similarly recognized that the Federal Employees' Compensation Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.[6] When the employee, however, deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[7]

Examples of noncompensable, personal deviations from normal incidents of employment while on travel can be found in prior Board decisions. In *Karl Kuykendall*, the employee was on temporary duty for training in Denver and sustained an injury, after his regularly scheduled duty hours, at a ski lift approximately 60 miles west of Denver.[8] The Board found that the employee's injury was not sustained while in the performance of duty as he had deviated from activities reasonably incidental to his temporary-duty assignment to engage in recreational activities. In *Lawrence J. Kolodzi*, the employee was injured at a health club approximately one mile from the motel where he was staying a few hours after his scheduled workday had ended.[9] The Board found that appellant was not engaged in activities reasonably incidental to his temporary-duty assignment but had deviated for purposes which were personal and recreational in nature. In *Evelyn S. Ibarra*, the traveling employee was injured while jogging during her

[5] Larson, *The Law of Workers' Compensation* § 25.01 (2000).

[6] *See Richard Michael Landry*, 39 ECAB 232, 236 (1987) and cases cited therein.

[7] *Id.*

[8] 31 ECAB 163 (1979).

[9] *Lawrence J. Kolodzi, supra* note 1.

lunch hour and the Board found that this was a personal recreational activity not reasonably related to her temporary-duty assignment.[10]

The principle illustrated in the above cases is equally applicable in the instant case. Appellant was on temporary-duty assignment in New Mexico and decided to walk on the athletic track on Saturday, June 5, 1999, an off-duty day. At the time of her injury, appellant was not engaged in an activity reasonably incidental to her temporary-duty assignment but had deviated for purposes which were personal and recreational in nature. The evidence of record does not establish that the employing establishment expressly or impliedly required walking on the track as part of the training course. Appellant alleged that the employing establishment encouraged participants in the training course to use the exercise facilities. However, this activity does not become reasonably incidental to the duties of the travel assignment merely because the training course participants may have been encouraged to use the exercise facilities during off-duty days or hours. Under the facts of this case, appellant engaged in a voluntary exercise activity on her off-duty day, an activity which was not directed by her employer nor arising out of the necessity of her employment.[11]

Accordingly, the Board finds no basis on which to bring appellant's activity at the time of injury within coverage of the Act, either as reasonably incidental to her travel assignment or as a covered recreational activity. Appellant is, therefore, found not to be in the performance of duty at the time of the claimed injury on June 5, 1999.

The Board further finds that appellant did not sustain a consequential injury to her left ankle in the performance of duty.

It is an accepted principle of workers' compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[12] The subsequent injury is compensable if it is the direct and natural consequence of a compensable primary injury.[13]

In this case, the primary injury on June 5, 1999 was not sustained in the performance of duty. As there is no compensable primary injury in this case, the August 22, 1999 injury cannot be a consequential injury and is not compensable.

The decisions dated October 4, 2000 and finalized on October 5, 2000 and dated October 4, 2000 of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC

[10] 45 ECAB 840 (1994).

[11] *See Hershel A. Rodgers*, 48 ECAB 637 (1997).

[12] Larson, *The Law of Workers' Compensation* § 10.00 (2000); *see also John R. Knox*, 42 ECAB 193 (1990).

[13] Larson, *The Law of Workers' Compensation* § 10.01 (2000); *see also Dana Bruce*, 44 ECAB 132 (1992).

July 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member