U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELLY D. DUNCAN and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AR

Docket No. 02-1260; Submitted on the Record;
Issued January 22, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding its acceptance of appellant's claim for a right wrist sprain and right wrist contusion.

Appellant, a data conversion operator, filed a traumatic injury claim alleging that she was injured at work when a coworker grabbed her wrist at 8:45 p.m. on February 27, 1997 in an altercation about union paperwork. The Office accepted the claim for a right wrist sprain and right wrist contusion, and paid compensation for loss of wage-earning capacity based on partial disability related to the accepted employment injury. In a decision dated October 11, 2000, the Office rescinded its acceptance of the right wrist sprain and contusion, finding that new evidence supported that appellant's wrist injury arose outside of appellant's duties as a data conversion operator. The Office thereafter terminated compensation and medical benefits as of October 11, 2000.

Prior to the termination decision, the employing establishment controverted acceptance of appellant's claim, contending that time records established that appellant was performing her keying duties rather than performing in her capacity as a union steward and "had not been on authorized union time" when the altercation began.

A report submitted to the Office indicated that on February 27, 1997 appellant began her shift at 1:00 p.m. (13:00) performing keying operations until 1:35 p.m. (13:59). At 1:35 p.m. appellant moved to a different operation and performed authorized steward work for over three hours, until she went to lunch at 4:56 p.m. (16:93). The report indicated that appellant returned from lunch to keying operations at 5:26 p.m. (17:43) and remained on that operation until she ended her tour at 9:40 p.m. (21.67).

A representative of the employing establishment stated in a letter dated August 25, 2000 that under no circumstances is any data conversion operator authorized to perform union steward duties without first obtaining permission from his or her immediate supervisor. The

representative argued that, upon obtaining permission, the steward is required to either clock on to union operation and then clock back onto the assigned operation and notify the supervisor when union activities are completed or the supervisor should authorize the absence through a PS Form 7020. The representative submitted a copy of the authorization form (Form 7020), which union stewards provide supervisors when requesting leave from the workroom in order to handle a grievance. The representative also provided supporting documentation, which indicated that, when requesting to be released, a union steward must provide his supervisor with the general nature of the grievance in order to be released. The employing establishment further submitted timekeeping regulations and the procedure for union stewards to perform union activities during the course of a duty day.

Following review of this evidence, the Office proposed to terminate appellant's compensation for wage loss related to the February 27, 1997 injury and provided appellant with 30 days to submit additional evidence or argument relative to the above-stated issue. Appellant's representative addressed the time records submitted. He indicated that appellant clocked in with her electronic badge reader at 13:00 (1:00 p.m.) on February 27, 1997 and keyed mail (operation #775-11), then appellant moved to union steward operations (#607-00) at 13:59 (1:35 p.m.) and that she later clocked out for lunch at 16:93 (4:56 p.m.). Appellant's counsel argued that the clock rings provided by the employing establishment which indicated that appellant clocked back into a keying operation (#775-11) at 17:43 (5:26 p.m.) were false. He noted that the time of 17:43 was manually inputted by someone other than appellant two days after the injury, on March 1, 1997 at 4:91, as noted by a social security number at the right of the clock ring that day which did not belong to appellant.

Appellant's counsel subsequently submitted a letter from Norma Dermenjian, manager of distribution operations at the employing establishment, who discussed her belief that at the time of the February 27, 1997 injury appellant was on authorized union steward duty. Ms. Dermenjian indicated that there had been an earlier incident between appellant and a male steward and that appellant, who had been upset, came to her office to discuss the situation. She further noted that appellant went to lunch from her office and that appellant then clocked out for lunch. After lunch, appellant returned to Ms. Dermenjian's office because she wanted to continue the discussion. Ms. Dermenjian stated that she and appellant both failed to monitor the time and missed appellant's clock in time, which had passed. She then indicated that she would have completed a PS Form 1260 for appellant or had one of the supervisors complete it for her and that the timekeeper could not enter clock rings without written documentation for the action. Ms. Dermenjian indicated that a PS Form 1260 or 1261 should be on file with a supervisor or manager's signature on it and that there should also be a PS Form 7020 on file, as a part of the investigation, which would indicate that appellant was on steward duty.

In a letter dated September 5, 2000, Allen Hammond, a supervisor of customer services with the employing establishment, stated that he was a group leader from February 27 through March 1, 1997 at the remote encoding center of the employing establishment. He noted that one of his duties as group leader was to correct errors, which occurred in the timekeeping system, by verifying in writing the type of time missing in order to authorize such changes. Mr. Hammond stated that on March 1, 1997 he entered an "in-lunch" keying operation on appellant's clock rings report for February 27, 1997, because appellant failed to clock in from lunch. He stated that, had there been a change in her operation from steward to keying, the report would have

shown the change. Mr. Hammond asserted that the only change made by him was to add the "in-lunch" keying operation per appellant's supervisor and written authorization.

In a decision dated October 11, 2000, the Office rescinded its acceptance of the right wrist sprain and contusion, finding that the altercation, was considered a noncompensable factor of employment, since appellant's wrist injury arose outside of appellant's duties as a data conversion operator. The Office thereafter terminated compensation and medical benefits as of October 11, 2000.

On October 31, 2000 appellant, through counsel, requested an oral hearing, which was held on August 6, 2001. During the hearing, appellant testified regarding the circumstances surrounding the February 27, 1997 altercation. Kristine Tackett, a time and control supervisor, Ms. Dermenjian, a former manager, and Greg Raglon, a clerk and local union president, also testified during the hearing.

Appellant testified regarding the procedure of entering union status from her regular keying operation. She testified that, in order to move into union status, she generally made a request to a supervisor for union time and filled out a card, upon which the supervisor would mark the time she was leaving the workroom floor. Appellant testified that she would then clock out with her time badge using the code 607 into union status. She further testified that she was in union steward status for approximately seven hours on the day of the altercation and as far as she was concerned, she ended her duty on February 27, 1997 on union steward status. Ms. Dermenjian reiterated through testimony that appellant was in union status from the time she clocked in, for the duration of the day. She testified that appellant was on steward time the entire time she was in her office, during which time they discussed union issues and that appellant had not clocked back to her keying operation following lunch. Ms. Dermenjian testified that appellant forgot to clock back in because they were talking and that she called down and told someone to put appellant back on the clock.

By decision dated January 24, 2002, the Office hearing representative found that appellant did not sustain her wrist injury while in the performance of duty and affirmed the October 11, 2000 decision.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of the claimed right wrist conditions.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[1] Pursuant to the Office's regulations, "the A[ct] specifies that an award for or against payment of compensation may be reviewed at anytime on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded

[1] *Eli Jacobs*, 32 ECAB 1147 (1981).

or award compensation previously denied."[2] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statue.[3] It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[4] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.

In the present case, the Office rescinded its acceptance of appellant's right wrist conditions based on timekeeping records submitted regarding appellant's activities at work on February 27, 1997. The employing establishment takes the position that appellant was clocked in as performing her assigned keying duties at 8:45 p.m. when the altercation occurred and not clocked in a union steward status. Further the employing establishment contends that appellant did not have authorization to act as a union steward at the time of the altercation. Therefore, the employing establishment asserts that appellant was not in the performance of duty when the February 27, 1997 altercation occurred.

The Board notes that the February 27, 1997 electronic time record indicates that appellant reported to work at approximately 1:00 p.m. on the date in question and that at approximately 1:30 p.m. she clocked out to do union activities using code 607. Subsequently she went to the office of a supervisor, Ms. Dermenjian, who she frequently worked with on union matters. When the hour approached lunchtime, appellant failed to clock out for lunch and did not clock back into her keying position. At 8:45 p.m., when the altercation occurred, appellant was not performing her keying duties but discussing union paperwork. When she left for the evening, she was still on the union steward code 607; however, a supervisor later clocked appellant back in from lunch status into the keying position and not in as a union steward. Because appellant failed to clock back in from lunch as a union steward, and did not use her badge again until she clocked out at 9:40 p.m, the Office found that she was not on official union business at the time of the injury and rescinded acceptance of the claim. However, the testimony of appellant and Supervisor Dermenjian establishes that, once appellant clocked into the "steward" position, she was on official union business and remained in such status. Supervisor Dermenjian indicated that she directed that the proper paperwork be completed. She noted meeting with appellant on union matters prior to lunch and that they resumed meeting in her office following lunch. Ms. Dermenjian noted that she completed appropriate paperwork to reflect appellant's status.

In the case of *Marie Boylan*,[5] the employee, a union representative, alleged an emotional condition resulting from the hostile treatment she received from coworkers that were critical of her performance as a union representative. Similar to the present case, the Office found that the employee was not in the performance of duty because the events she discussed were related to her union activities and not to her assigned duties. With regard to union activities in general, the Board has adhered to the principle that union activities are personal in nature and are not

[2] 20 C.F.R. § 10.610 (1999).

[3] *Shelby J. Rycroft*, 44 ECAB 795 (1993); *Compare Lorna R. Strong*, 45 ECAB 470 (1994).

[4] *See Frank J. Mela, Jr*. 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

[5] 45 ECAB 338 (1994).

considered to be within the course of employment.[6] However, the Board has found that the involvement of union activities does not preclude the possibility that compensable factors of employment have been alleged. The Board has recognized an exception to the general rule in that employees performing representational functions which entitle them to official time are in the performance of duty and entitle them to all benefits of the Act if injured in the performance of those functions.[7] The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer.[8] Therefore, the Board determined that actions directly related to the performance of "representational functions" could, if substantiated by the record as occurring, constitute compensable factors since it arose out of covered representational duties.

In this case, the Board finds that the Office erred in rescinding the acceptance of appellant's claim for a right wrist sprain and right wrist contusion. The weight of the evidence established that appellant was performing representational functions as a union steward at the time of the altercation and her wrist injury sustained on February 27, 1997 is found to be in the course of her federal duties. The Office therefore did not meet its burden of proof to rescind its prior acceptance.

As such, the Board further finds that the Office was not justified in terminating appellant's compensation effective October 11, 2000.[9] The Office based its termination decision on the finding that appellant was not in the performance of duty at the time of her injury as she was not clocked in as a union steward on official union business at the time. The testimony in this case establishes that appellant was in fact on official union business at the time of the incident. Therefore, the Office improperly rescinded acceptance of appellant's wrist conditions as compensable and has failed to justify termination of compensation based on this contention.

[6] *Jimmy E. Norred*, 36 ECAB 726 (1985).

[7] *Larry D. Passalacqua*, 32 ECAB 1859, 1862 (1981).

[8] *See* A. Larson, *The Law of Workers' Compensation* § 27.33(c) (1990).

[9] Under the Act (5 U.S.C. §§ 8101-8193) once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits. *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986). The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment. (*Id.*)

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 24, 2002 is reversed.

Dated, Washington, DC
January 22, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member