U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUY D. SHIPLEY and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Tacoma, Wash.

Docket No. 97-66; Submitted on the Record;
Issued August 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that he sustained an injury while in the performance of duty on December 2, 1995.

On December 9, 1995 appellant, then a field representative, filed a traumatic injury claim (Form CA-1) alleging that at 3:00 p.m. on December 2, 1995, he fractured his right leg when he stubbed his toe and fell while shooting a basketball in an attempt to establish a better rapport with a witness respondent who was shooting basketballs with his sons. Appellant indicated that the injury occurred in the driveway of the witness' home where he conducted a survey with the witness because the witness was reluctant to quit shooting the basketballs to participate in the survey. Appellant stopped work on December 2, 1995 and returned to work on December 14, 1995. On the reverse of the form, Nancy R. Mitchell, appellant's supervisor, stated that appellant "was in a location where official business was being conducted." Ms. Mitchell stated that a supervisor was never contacted by appellant, and that the activity took place after the interview was completed, but before appellant left the premises. Appellant's regular work schedule varied.

Appellant's claim was accompanied by medical evidence regarding the treatment of his leg and correspondence with the employing establishment. Appellant's claim was also accompanied by a January 9, 1996 memorandum from Annette Weed, appellant's coworker, revealing that appellant telephoned her on December 4, 1995 to obtain the employing establishment's toll free number and the telephone number of another coemployee, Audrey Cramer. Ms. Weed stated that appellant informed her that he was in the hospital and explained that 'I went to a home for a first month interview, the man was playing with his boys outside (shooting baskets) and said he would answer my questions if he could do it while playing. I established a good rapport with him, made small talk, asked the necessary questions and got what was needed from him, then asked if I could see if I could get the ball in the basket.' Ms. Weed stated that appellant told her that they gave him the ball. Ms. Weed indicated that appellant stated that after throwing the ball, he turned and fell on a small wood dowel which he

always carried and had several keys attached to it. Ms. Weed described the dowel and how long appellant had carried it, noted appellant's leg surgery and explained that she assumed appellant's work load.

Appellant's claim was accompanied by the employing establishment's February 1, 1996 letter controverting the claim on the grounds that by engaging in the basketball activity, appellant had removed himself from within the performance of duty when the injury occurred and that appellant had reported to Ms. Mitchell that the injury occurred after the survey information was collected and not during the interview. The employing establishment stated that "[i]t is not the policy of the [employing establishment] for employees who are conducting surveys to engage in sporting or other physical activities not directly related to the collection of surveys." The employing establishment further stated that if appellant was unable to collect the information at the time that the respondent was playing basketball, then appellant should have scheduled a later appointment. The employing establishment also stated that appellant indicated that he had no difficulty collecting the survey information and that appellant sustained an injury after conducting the survey. The employing establishment concluded that "[t]here was no official reason for [appellant] to participate in the ball playing once the information had been collected."

By decision dated February 15, 1996, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty. In an accompanying memorandum, the Office found that shooting baskets was not a requirement of appellant's employment. The Office also found that appellant's contention that he engaged in this activity to improve and to ensure continued rapport with the interviewee did not bring appellant's injury within the performance of duty. The Office further found that upon engaging in the basket shooting activity, appellant deviated from his assignment and was engaged in a personal activity unrelated to his work.

In a March 13, 1996 statement, appellant disagreed with the Office's findings. Appellant's statement was accompanied by a February 17, 1996 narrative statement indicating that his injury occurred following the question and answer portion of the survey, but before the interview was over. Appellant stated that the respondent was reluctant to participate in the survey and that he needed to develop a rapport with him to conduct the survey with him and to obtain approval to contact his wife. Appellant further stated that since the respondent was not informed of the ongoing scope of the survey and confidentiality or importance of the information, they discussed this following the question and answer part of the interview, therefore, he was not engaged in a personal activity. Appellant then stated that at that point, one of the respondent's sons gave him the ball and he asked the respondent for permission to shoot the basketball to establish a rapport with him. Appellant explained that he only took one shot and that following the shot, he tripped on a seam in the driveway or possibly caught the soft crepe sole of one shoe by the other. In addition, appellant noted his subsequent medical treatment. Appellant's statement was also accompanied by medical evidence. Appellant's statement was further accompanied by a March 7, 1996 witness statement from Michael Rodgers, revealing that appellant completed the survey in his driveway while his sons played basketball. Mr. Rodgers stated that at the conclusion of the interview, appellant asked his youngest son if he could take one shot with the basketball. Mr.

Rodgers also stated that appellant took a shot, lost his balance, and thus, injured himself. Mr. Rodgers further stated that appellant was not engaged in any sort of basketball game, rather appellant simply took one shot and fell. In another March 13, 1996 statement, appellant stated that Mr. Rodgers' statement established that he did not prompt him or put words into his letter, that he was not engaged in frivolous or personal activities and that he had established a satisfactory rapport with him for the benefit of the employing establishment. Appellant also stated that Mr. Rodgers' statement confirmed that the interview was not over because he had not interviewed Mr. Rodgers' wife.

On April 25, 1996 appellant requested reconsideration of the Office's decision accompanied by his March 13 and February 17, 1996 statements, and Mr. Rodgers' March 7, 1996 witness statement.

By decision dated June 3, 1996, the Office denied appellant's request for reconsideration on the grounds that appellant failed to submit new and relevant evidence or new legal arguments.

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury while in the performance of duty on December 2, 1995.

The Federal Employees' Compensation Act[1] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[2] The phrase "sustained while in the performance of duty" in the Act 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."[3] "Arising out of the employment" tests the causal connection between the employment and the injury; "arising in the course of employment" tests work connection as to time, place, and activity.[4] For the 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 relation, can be addressed.

In addressing this issue, the Board has stated that:

> "[i]n the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place, (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto, and (d) when it is the result of a risk involved in the employment or the risk is incidental

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8102(a).

[3] *Bernard E. Blum*, 1 ECAB 1 (1947).

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

to the employment or to the conditions under which the employment is performed."[5]

In this case, appellant has alleged that at 3:00 p.m. on December 2, 1995, he fractured his right leg when he stubbed his toe and fell while shooting a basketball with Mr. Rodgers and his sons. The record indicated that appellant's regular work schedule varied. There is no dispute that appellant's injury occured within his workday. Thus, the incident occurred within the period of employment. Further, the record reveals that appellant was at a place where he may reasonably be expected to be in connection with the employment as he was conducting a survey of Mr. Rodgers in his driveway.

However, the evidence of record fails to establish that appellant was reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto. Appellant alleged that he shot the basketball to establish a better rapport with Mr. Rodgers because Mr. Rodgers was reluctant to participate in the survey. Under the circumstances of this case, there was no requirement that appellant engage in the shooting of basketballs to establish a rapport with Mr. Rodgers. Rather, the employing establishment stated in its February 1, 1996 letter controverting appellant's claim that "[i]t is not the policy of the [employing establishment] for employees who are conducting surveys to engage in sporting or other physical activities not directly related to the collection of surveys." The employing establishment also stated that "[t]here was no official reason for [appellant] to participate in the ball playing once the information had been collected." The employing establishment further stated that since Mr. Rodgers was playing basketball, appellant should have rescheduled the appointment and that appellant indicated that he did not experience any difficulty in collecting the survey information. Contrary to appellant's statement that the interview was not over when he sustained the leg injury because he wished to interview Mr. Rodgers wife, the statements of Ms. Mitchell, Mr. Rodgers' and Ms. Weed, indicated that the interview was finished and that appellant shot the basketball subsequent to the interview. Further, appellant has failed to submit any evidence to corroborate his allegation that he wished to interview Mr. Rodgers' wife after interviewing Mr. Rodgers. The Board, therefore, finds that appellant engaged in the shooting of a basketball for personal reasons. Accordingly, the Board finds that appellant was not fulfilling the duties of his employment at the time of injury and was not in the performance of duty.

[5] *Allan B. Moses*, 42 ECAB 575 (1991); *Barry Himmelstein*, 42 ECAB 423 (1991); *Carmen B. Cutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

The June 3 and February 15, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member