U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID M. MULLINS and DEPARTMENT OF THE AIR FORCE, AIR FORCE ACADEMY, Colorado Springs, Colo.

Docket No. 95-2907; Submitted on the Record;
Issued February 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 29, 1993 as alleged.

On June 14, 1994 appellant, then a 35-year-old electronic measurement equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 1993 at 9:30 a.m. he injured his right knee when he exited his car at the cadet gym and slipped on the ice. On the reverse of the form, Don Perry, appellant's supervisor, indicated that appellant's regular work shift was from 6:30 a.m. until 3:00 p.m., that appellant's injury occurred on December 29, 1993 and that appellant did not stop work. Mr. Perry stated that appellant "went unauthorized to play basketball at cadet gym at 0930. He should have been at work." Appellant's claim was accompanied by a June 14, 1994 narrative statement describing the December 29, 1993 incident, subsequent medical treatment and his current condition. Appellant explained the delay in filing his Form CA-1 stating that he believed that he was not required to complete any additional forms after he had submitted an authorization for examination and/or treatment (Form CA-16).

In a letter dated June 16, 1994, the employing establishment controverted appellant's claim stating that appellant was not in the performance of duty at the time of the alleged injury because he was absent without official leave at the time of the alleged injury, that appellant took a Form CA-16 from the work site without supervisory permission and that appellant did not report the alleged injury until June 1994. The employing establishment's letter was accompanied by Forms CA-16 dated December 30, 1993 and May 10, 1994 which were unsigned by the employing establishment. The former Form CA-16 was signed by Dr. Quay C. Snyder, Jr., a Board-certified family practitioner and an employing establishment physician, and indicated that appellant slipped on the ice while going to the gym to play basketball and that appellant sustained a right knee strain. Dr. Snyder further indicated that there was doubt as to a causal relationship between appellant's condition and employment, and that appellant's injury was not sustained while in the line of duty. The latter Form CA-16 was signed by Dr. Ronald P. Mandrell, an employing establishment physician, and revealed that appellant was going to the

gym to play basketball, that appellant had a anterior cruciate ligament tear of the right knee, and that there was doubt as to a causal relationship between appellant's condition and employment.

The Office of Workers' Compensation Programs received Mr. Perry's June 28, 1994 letter reprimanding appellant for unauthorized absence, *i.e.*, absence without official leave (AWOL), on December 29, 1993 for one and one-half hours and on June 15, 1994 for two hours.[1] Regarding the December 29, 1993 incident, Mr. Perry stated that on that date appellant left his work area at 9:30 a.m. to go to the cadet gym without supervisory approval, that no scales were scheduled for calibration between December 26, 1993 and January 1, 1994 and that the gym was not an area that appellant normally worked in. Mr. Perry noted that contrary to appellant's statement that he went to the gym to observe the repair of a scale by his coworkers, Jeff Logsdon and Jon Trudeau, these men submitted statements stating that the only reason they went to the gym was to play basketball. Mr. Perry concluded that "[t]here was no official work-related reason for [appellant] to be at the cadet gym on 29 December 1993" and that appellant failed to request annual or sick leave for the time he spent at the gym.

On July 15, 1994 the Office conducted a telephone conference with appellant regarding the issue whether he sustained an injury in the performance of duty and his grievance filed against the employing establishment concerning the June 28, 1994 letter of reprimand. The Office prepared a memorandum of the telephone conference. Appellant described the December 29, 1993 incident and stated that someone from the cadet gym called his office and requested that someone take a look at the physician's scale in the gym. Appellant further stated that he overheard two coworkers, Mr. Lodgson and Mr. Trudeau discuss this request. Appellant then stated that when he emerged from the back of the office some time later, he looked at the log book and noticed that Mr. Lodgson and Mr. Trudeau had signed out to go to the gym. Appellant stated that he went to the gym to watch them repair the scale. Appellant explained that he slipped when he was getting out of his car at the gym parking lot because a water main had broken and the water had frozen. Appellant acknowledged that there was no scheduled work during this period and responded that the telephone call was a nonscheduled request which only happened occasionally. Appellant also stated that although Mr. Lodgson's and Mr. Trudeau's statements provided that they went to the gym to play basketball, he thought they went to fix the scale at the gym when he noticed that they had signed out. Appellant further stated that Mr. Perry was not at work, but that he told Max Stafford, an acting employing establishment supervisor, about his injury on the date of injury.

Appellant submitted the following documents: medical records regarding the treatment of his left and right knee,[2] a statement prepared by the Office regarding appellant's view of the claim, his grievance regarding the employing establishment's June 28, 1994 letter of reprimand, a memorandum of the July 15, 1994 telephone conference, a work incident log, a map of the employing establishment's premises and its guidelines regarding the use of leave signed by him on July 7, 1994, his July 21, 1994 response to the Office's memorandum of the telephone conference, an August 4, 1994 internal memorandum announcing practice for a baseball game

[1] Regarding the June 15, 1994 incident, Mr. Perry stated that appellant changed his leave slip from two and one-half hours of annual leave which was approved by a supervisor to reflect four hours of annual leave which was not approved by a supervisor.

[2] On December 29, 1993 appellant was wearing a brace on his left knee. Appellant injured his left knee while skiing on November 21, 1993.

and his August 10, 1994 letter alleging that the practices for an upcoming baseball game were scheduled during work hours.

By decision dated August 29, 1994, the Office found that appellant had failed to establish that he sustained an injury while in the performance of duty.

In a letter dated September 6, 1994, appellant requested an oral hearing before an Office representative.

The Office received the medical notes of Dr. David S. Matthews, a Board-certified orthopedic surgeon, regarding the treatment of appellant's right knee condition during the period June 28 through August 30, 1994. The Office also received Dr. Matthew's June 28, 1994 medical report revealing a history of the employment incident, his findings on physical examination, that abnormalities existed in the posterior horns of both menisci and that there was complete disruption of the anterior cruciate ligament based on a review of objective test results, and appellant's medical treatment.

The employing establishment submitted Mr. Perry's August 29, 1994 response to the Office's memorandum of the July 15, 1994 telephone conference with appellant. Mr. Perry stated that there was no telephone call made regarding the repair of any equipment in the gym during the week of December 28, 1993 based on the questioning of all personnel in the laboratory including, Mr. Logsdon and Mr. Trudeau. Mr. Perry further stated that "[a]ccording to Jeff and Jon, [appellant] could not have noted that they had signed out for the gym because [appellant] was already at the gym when they arrived and that they did not go over do to any work" thus, Mr. Perry stated there was no way that appellant could have watched any repair work. Mr. Perry also stated that:

> "There was no scheduled or unscheduled work being accomplished on site at any location outside of the laboratory. All work and work requests must be processed on the PMEL Automated Management System (PAMS) computer. No work is allowed unless a work order is generated and time spent on the work is documented. Records on all maintenance accomplished by PMEL technicians over the last five years are maintained in the PAMS computer. Again, there were no on site work orders documented that week by [appellant] or any other technician assigned to the laboratory."

Mr. Perry further stated that:

> "[Appellant] is trying to make it sound as if he goes on-site to work on a regular basis. The week before [appellant's] injury, Ken Ostasiewski, (a technician who works in the same area as [appellant]) asked him if he would like to go on-site to calibrate some oscilloscopes in the Electrical Engineering Department which is just down the hall from the laboratory. Even though this was still a slow time in the laboratory, [appellant] replied that he did not want to go. The first time he went on-site to assist with calibrations was in June 1994 and that was only because two of the technicians that normally do that work were on leave."

Additionally, Mr. Perry refuted appellant's statement that the employees' use of the employing establishment's recreational facilities was common practice. Mr. Perry's letter was

accompanied by his August 29, 1994 memorandum regarding appellant's August 10, 1994 letter. Mr. Perry stated that the picnic and baseball game is an annual event and that this event had not been discussed with management on the date of appellant's letter, that appellant was not at the gym to observe work and if so, appellant was there without supervisory permission, that baseball practice was not scheduled during work hours, but instead during the employees' lunch period, and that appellant was not being made a scapegoat because of his knee injury. Mr. Stafford's August 25, 1994 letter also accompanied Mr. Perry's letter. Mr. Stafford stated that he did not receive notification of appellant's injury until a few days after the injury from employees, that he assumed that appellant's injury was due to a skiing injury, and that he did nothing wrong to avoid being reprimanded like appellant. In addition, Mr. Perry's letter was accompanied by an August 29, 1994 memorandum of Miguel Verano, a lieutenant colonel, revealing that contrary to appellant's statement, two colonels did not make any comments about the personnel in appellant's work unit being in the hallways and Lieutenant Colonel Verano's August 12, 1994 decision denying appellant's grievance on the grounds that appellant improperly engaged in a basketball game at the gym during work hours and that appellant failed to request leave for such activity and to submit evidence corroborating his assertion that Airman Nartker requested that he check a faulty scale on the date of injury.

In an April 17, 1995 letter, the employing establishment responded to appellant's hearing testimony stating that no safety officer gave appellant a blank Form CA-16, that Mr. Stafford had no knowledge of the alleged injury, that Mr. Stafford denied receiving a Form CA-16 from appellant and that Mr. Stafford did not give appellant any instructions. The employing establishment also stated that contrary to appellant's statements, appellant had knowledge of the employing establishment's on-the-job injury procedures based on previous filings of Forms CA-1, that appellant did not tell Dr. Snyder that he was going to the gym to work or calibrate a scale, that appellant was not trained to work on the equipment at the cadet gym, that appellant's two coworkers denied discussing the repair of a scale, and that the Form CA-16 signed by Dr. Robert Gibbs did not indicate that appellant's right knee collapsed, rather it noted that appellant had stubbed his toe. The employing establishment's letter was accompanied by Mr. Stafford's August 25, 1994 memorandum, appellant's Form CA-1 for a right toe injury sustained on May 4, 1993, Dr. Synder's December 30, 1993 Form CA-16, the June 16, 1994 statements of Mr. Logsdon and Mr. Trudeau acknowledging their participation in a basketball game on December 29, 1993 and Lieutenant Colonel Verano's August 12, 1994 decision.

In an undated letter, appellant responded to the employing establishment's comments. Appellant stated that he received a Form CA-16 from a safety officer, that Mr. Stafford instructed him to go to the safety officer and placed his Form CA-16 in his file after he returned from the employing establishment's clinic on December 30, 1993, and that a previous claim form was completed by a supervisor, not by him, and that he improperly completed a claim form on another occasion. Appellant further stated that Mr. Stafford received his Form CA-16 because it was placed in his file which was located in a locked room that was accessible only to supervisors, that Mr. Perry and Mr. Stafford knew about his knee injury, that he described what happened on the date of injury to Dr. Synder, that he never stated that he was trained to work on equipment at the gym, but that he went to the gym to be trained and help with the repair, that his coworkers deliberately deceived everyone by signing in the log book that they were going on-site which indicated that they were going out to repair or calibrate equipment, and that he mistakenly omitted the cause of his May 4, 1994 toe injury which was his right knee condition.

Appellant's response was accompanied by his undated statement providing that despite the statements of Mr. Logsdon and Mr. Trudeau, he went to the gym to observe their work, the employing establishment's guide to disciplinary actions, the July 6, 1994 guidelines for the request of leave signed by him on July 7, 1994 and a February 27, 1995 memorandum from Mr. Stafford regarding the procedures for reporting an on-the-job injury. Appellant's response was also accompanied by his January 25, 1995 memorandum requesting to see the time sheets of his two coworkers who were placed in AWOL status, his February 17, 1995 memorandum requesting the status of his Form CA-1 for an injury sustained on May 4, 1994, his February 1, 1995 grievance regarding action taken by the employing establishment concerning the December 29, 1994 incident, and his February 17, 1995 grievance regarding the employing establishment's failure to file the proper paperwork with the Office.

By decision dated June 9, 1995, the hearing representative affirmed the Office's August 29, 1994 decision. In a letter dated July 26, 1995, appellant requested reconsideration of the hearing representative's decision. Appellant's request was accompanied by a July 19, 1995 e-mail message from Ken Ostasiewski, appellant's coworker, revealing that at approximately 9:50 a.m. he went on-site to perform calibrations, that Mr. Logsdon and Mr. Trudeau had signed to calibrate equipment at the gym and that appellant was leaving to join them. Mr. Ostasiewski stated that appellant returned around lunchtime and that appellant badly injured his leg. Mr. Ostasiewski further stated that he could not recall which supervisor was present at that time and that appellant spent much of the afternoon receiving medical treatment from the employing establishment's clinic. Appellant's request was also accompanied by his requests to have his coworkers prepare statements concerning his grievances and disciplinary actions, and correspondence between himself and the employing establishment's regarding his injury.

By decision dated August 1, 1995, the Office denied appellant's request for reconsideration without reviewing the merits of the claim.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an injury while in the performance of duty on December 29, 1993 as alleged.

The Federal Employees' Compensation Act[3] 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 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."[5] "Arising out of the employment" tests the causal connection between the employment and the injury; "arising in the

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8102(a).

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

course of employment" tests work connection as to time, place and activity.[6] 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 to the employment or to the conditions under which the employment is performed."[7]

In this case, appellant alleged that at 9:30 a.m. on December 29, 1993 while exiting his car at the employing establishment's cadet gym to observe the repair of a physician's scale by two of his coworkers, Mr. Logsdon and Mr. Trudeau, he slipped on the ice that had formed as a result of a water main break in the parking lot and thus, injured his right knee. The record indicates that appellant's regular work shift was from 6:30 a.m. until 3:00 p.m. This places the time of injury well within appellant's workday. Thus, the incident occurred within the period of employment. Further, there is no dispute that the parking lot where appellant slipped on the ice was on the employing establishment's premises.

However, the evidence of record fails to establish that appellant was at a place where he may reasonably be expected to be in connection with the employment. In a July 15, 1994 telephone conference with the Office, appellant stated that on December 29, 1993, someone from the gym telephoned his office requesting that someone look at one of the physician's scales in the gym. Appellant also stated that he overheard Mr. Logsdon and Mr. Trudeau discussing this request and that after coming "out of the back," he noticed that Mr. Logsdon and Mr. Trudeau had signed out indicating that they had gone to the gym. Appellant stated that he went to the gym to observe Mr. Logsdon and Mr. Trudeau repair the scale. In an August 29, 1994 response to appellant's telephone conference, Mr. Perry, appellant's division chief, stated that there was no telephone call made regarding the repair of any equipment in the gym during the week of December 28, 1993 based on the questioning of all personnel in the laboratory including, Mr. Logsdon and Mr. Trudeau. Mr. Perry also stated that there was no scheduled or unscheduled work to be performed at any location outside of the laboratory. Further, Mr. Perry stated that appellant had previously refused to go on-site with Mr. Ostasiewski, appellant's coworker, to calibrate oscilloscopes in the electrical engineering department which was located down the hall from the laboratory and that appellant only went on-site to assist with calibrations in June 1994 because two technicians who normally perform the work were on leave.

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

[7] *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).

Additionally, the employing establishment reprimanded appellant by letter dated June 28, 1994 for, *inter alia*, AWOL on December 29, 1993 for one and one-half hours because he left his work area at 9:30 a.m. to go to the cadet gym without supervisory approval and there was no "official" work-related reason for appellant to be at the gym. In its August 12, 1994 decision, the employing establishment denied appellant's grievance claim regarding the June 28, 1994 reprimand letter finding, *inter alia*, that appellant improperly engaged in a basketball game at the gym during work hours, and that appellant failed to request leave for such activity and to submit evidence corroborating his assertion that Airman Nartker requested that he check a faulty scale on the date of injury.

Consequently, appellant has failed to establish that he sustained an injury while in the performance of duty on December 29, 1993.

The August 1 and June 9, 1995, and August 29, 1994 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member