

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONA SCHORR and U.S. POSTAL SERVICE, POST OFFICE,
New York, N.Y.

*Docket No. 95-2175; Submitted on the Record;
Issued March 10, 1998*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof to establish that she sustained an injury while in the performance of duty on November 16, 1993.

On November 16, 1993 appellant, then a 46-year-old personnel clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right shin, knee, forearm, shoulder and wrist when she tripped on the floor while exiting an elevator. Appellant stopped work on November 17, 1993. On the reverse of the form, appellant's supervisor, Lorraine Castellano, indicated that appellant's regular work schedule was 8:30 a.m. until 5:30 p.m. Monday through Friday. Ms. Castellano further indicated that appellant was not injured in the performance of duty because she was going to the credit union to make a deposit. Appellant's claim was accompanied by a November 16, 1993 job offer for a limited-duty assignment from the employing establishment and an authorization for medical attention dated November 16, 1993, indicating that appellant was not fit for duty, that appellant should be assigned limited duty from November 17 through 19, 1993 with no prolonged walking or standing, and that appellant had a contusion of the right upper arm, superficial abrasion of the right forearm, and a contusion and swelling of the right leg.

By letter dated December 8, 1993, the Office of Workers' Compensation Programs advised appellant that the evidence submitted was insufficient to establish her claim and requested that appellant submit medical evidence supportive of her claim. By letter of the same date, the Office also requested that appellant provide a detailed description of how the injury occurred, the names and addresses of witnesses or those who had immediate knowledge of the injury, the immediate effects of the injury and what she did immediately thereafter, any prior similar disability or symptoms, whether she had filed a previous workers' compensation claim, and whether she had permission from her supervisor to go to the credit union.

On December 14, 1993 appellant responded to the Office's requests. Appellant provided a description of the injury, the names and addresses of Robert Cappiello and Robert F. Casey,

witnesses to the injury, a description of the immediate effects of the injury, and the dates that she previously filed a claim for workers' compensation benefits. Appellant stated that "[d]ue to the absence of my immediate supervisor Barbara Ashe, Labor Relations Specialist and also my Manager, Mr. Sturman who was not in his office, I informed my coworker Renee Murray that I was stepping off for a few minutes to go to the credit union." Appellant submitted Mr. Cappiello's December 15, 1993 witness statement revealing that on November 16, 1993 at approximately 10:30 a.m. he saw that the elevator door was opened and that appellant exited the elevator while it was still coming up. Mr. Cappiello stated that appellant's foot was caught on the floor, and that she stumbled and fell hitting her right shoulder and right knee. Mr. Cappiello further stated that he and Mr. Casey told appellant not to move because she fell very hard and they could see that she was hurt. Appellant also submitted Mr. Casey's undated witness statement indicating that on the morning of November 16, 1993 at approximately 10:30 a.m. he was walking by the elevator when the door opened and he noticed that the elevator did not come to a full stop at the floor. Mr. Casey stated that it was about four inches below the floor. Mr. Casey further stated that appellant was walking out of the elevator when she tripped over the edge of the floor and hit the wall with her right shoulder and side banging her knee on the floor.

By letter dated December 20, 1993, the Office advised the employing establishment to provide whether appellant had permission to go to the credit union and whether the credit union was on government property.

In response, the employing establishment submitted Ms. Castellano's November 16, 1993 internal memorandum controverting appellant's claim because appellant's injury occurred while performing an unauthorized personal activity and appellant neither requested nor was granted permission to visit the credit union. The employing establishment further submitted medical records regarding appellant's injuries and a report concerning the condition of the elevator that appellant exited when she injured herself.

Further, in a December 21, 1995 response, the employing establishment again controverted appellant's claim stating that appellant was en route to the credit union without prior authorization from Ms. Castellano, and thus, she was not in the performance of duty at the time of the alleged injury. Additionally, the employing establishment submitted internal notes regarding appellant's injury, Ms. Castellano's November 16, 1993 internal memorandum, medical records regarding appellant's injuries, accident reports, appellant's Form CA-1, and appellant's acceptance of the offered limited-duty assignment.

By decision dated December 27, 1993, the Office 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 appellant's injury was not sustained while in the performance of duty because she went to the credit union without the permission of a supervisor. The Office further found that appellant admitted that she did not have permission to go to the credit union and concluded that "one cannot do what one wants just because their immediate supervisor is absent."

The Office received medical records regarding the treatment of appellant's injuries. The employing establishment submitted Ms. Castellano's January 3, 1994 internal memorandum

revealing that although the credit union was on government property, appellant neither requested permission nor was she granted permission to visit the credit union during business hours.

Appellant submitted a February 11, 1994 internal memorandum from Ms. Murray indicating that she and appellant were in the office alone on November 16, 1993. Ms. Murray stated that Ms. Ashe was not at work that day and that Anthony Collica had stepped out of the office. Ms. Murray stated that appellant told her that she was going to the credit union and that she would be right back. Ms. Murray further stated that she did not learn that appellant had fallen while exiting the elevator until appellant returned from the credit union. Ms. Murray also stated that when Mr. Collica sat at the computer, she told him about appellant's fall. Additionally, Ms. Murray stated that "when no supervision is temporarily present, the clerks inform one another of their whereabouts." Appellant also submitted Mr. Cappiello's December 15, 1993 witness statement, Mr. Casey's undated witness statement and her response to the Office's December 8, 1993 letter. Further, appellant submitted Ms. Castellano's November 16, 1993 letter and January 3, 1994 internal memorandum, medical records regarding her injuries, and employment records concerning her pay and use of sick leave.

In a December 14, 1994 letter, appellant, through her counsel, before the Office, requested reconsideration of the Office's December 27, 1993 decision denying disability compensation benefits. Appellant contended that the credit union was in the James A. Farley Building, which was on the same premises as her place of employment, thus, the employing establishment contemplated its use by its employees and permitted such use by its employees. She further contended that it was established practice and policy of the employing establishment to routinely permit its employees to attend to personal affairs, such as, making personal telephone calls, retrieving or placing articles in personal lockers, using lavatories and handling personal personnel matters at various administrative offices, that arise in the course of their work schedules. Appellant explained that when an employee engaged in personal activities during the workday this was referred to as having "stepped off" from their regular duties. She further explained that to handle personal activities, an employee was expected to notify a supervisor of the desire to step off and the reason for the activity. Appellant stated that when no supervisor was available, it was a matter of accepted policy to notify a coworker about where you were going and the expected duration of the time away from the assignment area. She then stated that if the employee had not returned by the time the supervisor returned, the coworker would notify the supervisor of the employee's destination and the time that the employee left the work area. Appellant contended that she followed this procedure. Additionally, appellant contended that she was engaged in an authorized compensable activity because the employing establishment paid her for the time that she spent traveling to the credit union.

By decision dated February 16, 1995, the Office denied appellant's request for modification. In an accompanying memorandum dated February 13, 1995, the Office found that although appellant's visit to the credit union may have arisen out of her employment, it did not arise out of her assigned duties or out of the course of her employment. The Office also found that the mere fact that appellant was being paid by the employing establishment while en route to the credit union did not establish that she was injured in the performance of duty.

The Board finds that this case is not in posture for a decision inasmuch as further factual development is necessary.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.¹ Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."²

"In the course of employment' deals with the work setting, the locale, and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.³ In 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 she 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."⁴

It is a general rule of workers' compensation law that, as to employees having fixed hours and place of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after hours or at lunch time are compensable.⁵ If an employee is on the premises of the employing establishment, an injury will generally fall within the performance of duty.⁶ There is a strong presumption that an employee who is injured on the premises of the employing establishment during his or her hours of work is injured while in the performance of duty.

In the present case, there is no factual dispute that appellant's injury took place within the period of her employment. Appellant had a set tour of duty from 8:30 a.m. to 5:00 p.m. and the

¹ *George A. Fenske*, 11 ECAB 471 (1960).

² *Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

³ *Larry J. Thomas*, 44 ECAB 291 (1992).

⁴ See *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

⁵ *Annette Stonework*, 35 ECAB 306 (1983).

⁶ *James Gray, Jr.*, 45 ECAB 652 (1993).

record establishes that the incident giving rise to her injury on November 16, 1993 occurred at 10:30 a.m. There is also no factual dispute that appellant's injury occurred on the premises of the employing establishment. The issue presented, therefore, is whether appellant deviated from the course of her employment by engaging in an activity not incidental to her employment as a personnel clerk.

The evidence establishes that at the time of injury appellant was exiting an elevator on the fifth floor of the employing establishment's premises while on her way to the credit union to make a deposit. Clearly, appellant was not engaged in an activity contributing to the accomplishment of her assigned duties. But it is well established that work-connected activity goes beyond the direct services performed for the employer and includes at least some ministrations to the personal comfort and human wants of the employee.⁷ Activities encompassing personal acts for the employee's comfort, health, convenience, and relaxation; eating meals, lunches, and snacks on the premises, including established coffee breaks; and the employee's presence on the premises for a reasonable time before or after specific working hours, are reasonably incidental to employment and are, therefore, in the course of employment.⁸ Even if the activity cannot be said in any sense to advance the employer's interest, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.⁹

Although it may be said that appellant was engaged in a purely personal activity when she went to the credit union to make a deposit and that by doing so she in no sense advanced her employer's interest, the Board finds that this personal convenience, was reasonably incidental to her employment. However, the record does not establish whether appellant violated a prohibition against going to the credit union without first obtaining permission from a supervisor.

As Larson explains in his treatise on workers' compensation law:

“When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to *method* of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished

⁷ See, e.g., *Harris Cohen*, 8 ECAB 457 (1955) (accident occurred while an employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218 (1953) (accident occurred while an employee was on the way to the lavatory).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty, Industrial Premises*, Chapter 2.804.4a. (November 1986).

⁹ 1A A. Larson, *The Law of Workmen's Compensation* § 20.00.

from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.”¹⁰

In this case, the Office obtained information from the employing establishment indicating that appellant did not have permission to go to the credit union and, therefore, concluded that appellant did not sustain an injury while in the performance of duty. Appellant explained that she followed the “stepping off” policy when in the absence of a supervisor, she advised her coworker, Ms. Murray, that she was going to the credit union and how long she was going to be away from her assigned work area. Additionally, Ms. Murray’s February 11, 1994 internal memorandum corroborates appellant’s account of the existence of a “stepping off” policy and appellant’s adherence to such a policy prior to going to the credit union. However, the Board is unable to determine whether appellant acted in accordance with this policy inasmuch as the record does not contain any evidence from the employing establishment regarding the existence of such a policy and whether appellant followed the policy prior to going to the credit union. Rather, the record merely indicates that the employing establishment did not give appellant permission to go to the credit union.

Because there is insufficient evidence to determine whether a “stepping off” policy existed and whether appellant violated such a policy, the case must be remanded to the Office for further development. Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on whether appellant was in the performance of duty at the time of the injuries she sustained on November 16, 1993.

The February 16, 1995 decision of the Office of Workers’ Compensation Programs is hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
March 10, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

¹⁰ *Id.* § 31.00.

Willie T.C. Thomas
Alternate Member