U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY SALAZAR and DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, Denver, Colo.

Docket No. 96-373; Submitted on the Record;
Issued May 22, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty.

On July 6, 1995 appellant, then a 38-year-old laboratory worker, filed a claim, alleging that he sustained an umbilical hernia on June 28, 1995 while lifting furniture in Building 41 of the Federal Center in Denver, Colorado. A witness, George G. Herrera, stated that appellant was lifting some furniture when he said he sustained an injury. Appellant stopped work that day and returned to work on July 5, 1995.

In support of his claim, appellant submitted medical reports dated June 28 and 29, 1995 in which Dr. Patrick N. Williams, a Board-certified internist, advised that appellant had a one-year history of umbilical hernia and sustained mid-abdominal discomfort on June 28, 1995 while lifting furniture and heavy boxes at work. Surgery was recommended. Dr. Williams also provided an undated attending physician's report in which he advised that the preexisting hernia was aggravated by employment activity. He stated that appellant would be able to work light duty with a 20 pound lifting restriction until the recommended surgery was performed. Reports dated July 12 and August 17 from a "Dr. Gerding"[1] contained the same history of injury and indicated that surgery would be scheduled.

In a July 6, 1995 statement, Mr. Herrera advised that, although he did not request help from appellant, on June 28, 1995 appellant helped him move furniture at the Federal Center. R.J. Noltensmeyer provided a statement dated July 6, 1995, indicating that appellant did not have supervisory permission to help Mr. Herrera move furniture. Willard D. Lanier, support services supervisor, provided a statement attached to appellant's claim form, stating that appellant was performing material handling duties, which he periodically performed, but that on June 28, 1995 he did not have supervisory permission to leave his normal duty station. Mr. Lanier agreed with

[1] The doctor is not identified further.

the facts surrounding the injury and stated that witnesses were not aware of the injury at the time it was supposed to have occurred. In reports dated August 9, 14 and 16, 1995, coworkers remembered seeing appellant and Mr. Herrera in Building 25 between 9:00 and 10:00 for a brief period but did not remember the date. Barbara Porter reported that she and appellant helped Mr. Herrera move furniture from Building 41 on June 28, 1995.

A memorandum of conference dated September 7, 1995 between an Office of Workers' Compensation Programs claims examiner and appellant indicated that appellant had discovered the hernia approximately two and one-half weeks prior to the date of injury. Appellant stated that he sought medical treatment and his physician did not place him on light duty but cautioned him to use a safety belt when lifting. He related that at 7:15 a.m. on June 28, 1995, Mr. Herrera asked him if he wanted to help move furniture. He therefore checked out the truck, went to Building 25 and then was told by Mr. Herrera to go to Building 41 where he helped move furniture. Appellant related that his stomach started hurting as he moved the last desk. He did not wear a safety belt. Appellant disagreed with Mr. Herrera's statement, insisting that Mr. Herrera asked him to help. He stated that his supervisor was not in the office and since Mr. Herrera told him to help, he assumed that it was all right -- that he had helped move furniture many times -- and "figured" Mr. Herrera was in charge.

In a September 18, 1995 letter, the employing establishment responded to the memorandum of conference, stating that appellant had not informed his supervisor that he had been diagnosed with a hernia that required the use of a safety belt when lifting; that it was "common knowledge" that the truck used to transport furniture or equipment was not available until after 9:00 a.m.; that appellant made an unauthorized personal stop in the government vehicle while en route to the Federal Center; that at the alleged time of injury, neither witness was aware that appellant had hurt himself; that Mr. Herrera stood by his statement; that at all times in the past when appellant helped Mr. Herrera, supervisory approval had been given; and that appellant was aware of who was in charge and did not seek supervisory approval.

By decision dated September 26, 1995, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty. In the attached memorandum, the Office indicated that appellant did not have supervisory approval to check out the truck or help move furniture and that he did not disclose that he made a personal stop in the government vehicle. The Office concluded that at the time of injury appellant was not engaged in an activity that was a function of his employment.

The Board finds that appellant has established that the injury for which he claims compensation was sustained in the performance of duty.

The Federal Employees' Compensation Act[2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8102(a).

the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[4] "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[5] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show that substantial employer benefit is derived or an employment requirement gave rise to the injury.[6]

Whether a particular case is or is not within the scope of the Act depends upon the general test of whether the particular risk may be said to be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed.[7] The Board has held that a deviation from an employment trip for personal reasons takes an employee out of the course of employment for the period of the deviation.[8] In this case, appellant may have made a personal stop on the morning of June 28, 1995. The record indicates, however, that, while he was not at his normal duty station, at approximately 9:00 a.m. on that date, he had returned to an employing establishment remote site where he had worked in the past and was assisting Mr. Herrera move furniture, which he did periodically in the course of his employment. Furthermore, the fact that he did not have the express permission of his supervisor to assist Mr. Herrera is not dispositive in this case. Appellant was not expressly prohibited from assisting Mr. Herrera,[9] and an act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered is within the course of employment.[10] The injury, therefore, occurred at a time when appellant was engaged in the master's business, at a place where he was reasonably expected to be in connection with his employment, and while fulfilling the duties of his employment.[11]

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[4] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *Timothy K. Burns*, 44 ECAB 713 (1992).

[6] *Charles Crawford*, 40 ECAB 474 (1989).

[7] *Bernard D. Blum*, *supra* note 4.

[8] *See Louis J. Barbara*, 18 ECAB 47 (1966).

[9] *See e.g.*, A. Larson, *The Law of Workmen's Compensation* §§ 27.14, 31.14 (1996).

[10] *Id.* at § 27.00.

[11] *See Thomas E. Keplinger*, 46 ECAB 699 (1995); *Timothy K. Burns*, *supra* note 5.

Thus, while the reports of Dr. Williams lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish by the weight of reliable, substantial and probative evidence that his condition was due to or aggravated by the June 28, 1995 employment incident, the fact that these reports contain deficiencies preventing appellant from discharging his burden does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished.[12] Under such circumstances, the reports are sufficient to require further development of the record, especially given the absence of any opposing medical evidence.[13] For these reasons the Board will set aside the Office's September 26, 1995 decision and remand the case for such further development as may be necessary to properly determine whether the June 28, 1995 incident caused an injury, after which the Office will issue an appropriate decision.

The decision of the Office of Workers" Compensation Programs dated September 26, 1995 is hereby set aside and the case is remanded for further proceedings consistent with this opinion.[14]

Dated, Washington, D.C.
May 22, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See Delores C. Ellyet*, 41 ECAB 992 (1990).

[13] *John J. Carlone*, 41 ECAB 354 (1989).

[14] The Board notes that appellant submitted evidence subsequent to the September 26, 1995 Office decision and also to the Board with the present appeal. The Board, however, cannot consider this evidence, as the Board's review of the case is limited to the evidence of record which was before the Board at the time of its final decision. 20 C.F.R. § 501.2(c).