

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT WILLIAMS and DEPARTMENT OF THE ARMY, DEPARTMENT
OF PUBLIC WORKS & HOUSING, WEST POINT MILITARY ACADEMY,
West Point, N.Y.

*Docket No. 96-2376; Submitted on the Record;
Issued March 9, 1999*

DECISION and ORDER

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

The issue is whether appellant's May 3, 1995 injury occurred while in the performance of duty.

On May 22, 1995 appellant, then a 26-year-old engineering project manager, filed a traumatic injury claim, alleging that on May 3, 1995 at 12:00 p.m. he was hit in the nose with a softball resulting in a contusion to the nose. A witness corroborated appellant's statement. On the reverse side of the form, appellant's supervisor indicated that appellant was not in the performance of duty at the time of the injury.

By letters dated November 3, 1995, the Office of Workers' Compensation Programs requested detailed factual and medical information from appellant. By another letter also dated November 3, 1995 the Office requested detailed factual information from the employing establishment.

On November 13, 1995 a conference was held between a senior claims examiner and a human resource specialist with the employing establishment to determine whether appellant's injury occurred in the performance of duty. On November 16, 1995 a copy of a memorandum of conference was sent to the human resource specialist and appellant for review and/or comment.

On December 22, 1995, after receiving no response to the memorandum of conference, the Office issued a decision denying appellant's claim on the grounds that the evidence of record failed to establish that the claimed injury occurred in the performance of duty.

By letter dated November 21, 1995 and received by the Office on December 22, 1995, appellant stated that "The accident happened around 11:45 hours which is considered regular working hours. The baseball field where the accident happened is behind building 667B, this is where I work, so it is on my employer's premises."

By undated letter forwarded by the employing establishment on February 6, 1996, appellant requested reconsideration of the December 22, 1995 decision. Submitted in support of the request, was a letter to all employees regarding the employing establishment softball team looking for players; a January 24, 1996 memorandum from Colonel Michael F. Colacicco stating that 12:00 noon is considered appellant's lunch period, that the baseball field located across from the Gillis Field House is owned and maintained by West Point Academy and is solely used by academy cadets, military, and civilian personnel; that the softball league is sponsored by the community recreation division of the military academy and is open solely to military and civilian personnel assigned to the academy; and that participation is encouraged.

After finding that its December 22, 1995 decision was factually inaccurate in that it stated that the softball games were played after work hours, whereas appellant had stated the injury occurred at noon, during his lunch period, the Office determined that further development of the evidence was required. On April 15, 1996 a conference was held between a senior claims examiner and a West Point civilian personnel office representative. On April 18, 1996 a copy of the memorandum of conference was sent to the civilian personnel representative and appellant. By telephone on April 26, 1996, the representative stated that she had no objections or addenda to the memorandum.

By decision dated May 7, 1996, the Office found the evidence of record insufficient to warrant modification of the prior decision.

The Board finds that this case is not in posture for decision on whether appellant's May 3, 1995 injury occurred while in the performance of duty.

The general criteria for performance of duty as it relates to recreational and social activities is set forth in Larson as follows:

“Recreational or social activities are within the course of employment when: (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.”¹

¹ Larson, *The Law of Workers' Compensation* § 22.00.

Larson specifically addresses the issue of athletic teams, stating that the pertinent performance of duty test involves the following criteria:

“On or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit.”²

In the instant case, the evidence of record establishes that playing softball was not required by the employing establishment, and that the employing establishment did not derive substantial direct benefit from the activity beyond improved morale. However, the Office also found that appellant’s injury on May 3, 1995 did not occur on the premises during a lunch or recreational period as a regular incident of employment.

The Office found that appellant did not establish that he was engaged in an activity during an approved lunch period. Appellant originally stated that the incident occurred at 12:00 p.m. and later stated that it occurred at 11:45 a.m. and subsequently stated that his lunch period was from 11:45 a.m. to 12:30 p.m. and that the actual incident occurred at 12:00 p.m.. The employing establishment stated that the official lunch periods ran between 12:00 p.m. to 2:00 p.m. The Board finds that the Office did not sufficiently develop the evidence to determine specifically when appellant’s approved lunch period began and ended and whether appellant was on his lunch period at the time of the incident.

The Office stated that the location of the incident was a field that is a 15-minute walk from appellant’s workplace. Appellant has consistently stated that the field where the actual softball games are played is 15 minutes away from his workplace, but that the field where practice games are played every day and where he was injured on May 3, 1995 during lunch time is located behind the building where he works. The Board finds that the Office failed to sufficiently develop the evidence to determine whether or not the field where the incident occurred was a part of the employing establishment’s premises.

The Office also found that the activity was not a “regular incident of employment” because the incident happened on May 3, 1995 and the softball season covered May through August 1995. However, if the season started in May just because the incident occurred in early May does not remove it from a “regular incident of the employment,” as it may not have been the first practice game played.

The record in the instant case is not sufficiently developed for a decision to be made on the issue of performance of duty.

On remand the Office should determine the “mix” in the fact situation in the case at hand of whether the activity occurred on the premises during a lunch period as a regular incident of employment, within the meaning of the above-mentioned discussions from Larson.³ After such further development as is necessary, the Office should issue a *de novo* decision.

² Larson, section 22.24

³ *Eileen Anita Byrnes*, 35 ECAB 843. (The Board found that the case was not sufficiently developed for a

The decisions of the Office of Workers' Compensation Programs dated May 7, 1996 and December 22, 1995 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
March 9, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

decision to be made on the issue of performance of duty.)