U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. MINTER and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Cleveland, OH

Docket No. 99-2044; Submitted on the Record;
Issued October 30, 2000

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether appellant sustained an injury in the performance of duty on July 16, 1998.

On July 22, 1998 appellant, then a 47-year-old dental assistant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that at 5:45 p.m. on July 16, 1998, during a practice volleyball game for the YMCA Cleveland Corporate Challenge Team, another player stepped on the back of her right ankle and appellant sustained a rupture of the right achilles tendon. Appellant's regular work hours were from 8:00 a.m. to 4:30 p.m. She stopped work on July 20, 1998.

The employing establishment submitted a July 28, 1998 supplemental statement, which indicated that the activities in which the Employees' Association of the Veterans Administration participates are not to be represented, directly or impliedly, as official activities of the employing establishment. The employing establishment submitted a copy of the bylaws of the Cleveland VA Medical Center Employees' Association which indicated that the employees, not the employing establishment, control the Association. The employing establishment also noted that this was the second year the Employees' Association had participated in the athletic event and that these events are not sponsored by the Cleveland Veterans Administration Medical Center. The employing establishment noted that the employees association and not the employing establishment paid the entry fee to the YMCA. The employing establishment noted that the employees association also sponsored amusement park outings, dances, picnics and happy hours.

On August 13, 1998 a telephone conference call was held between the employing establishment and appellant. The employing establishment noted that the Veterans Administration Employees' Association paid a $700.00 entry fee to participate in the Cleveland Corporate Challenge and each participant paid $10.00 to be enrolled as a player. The employing establishment also indicated that e-mails and flyers were sent to employees regarding activities. The practice sessions were held in the employing establishment's gymnasium and the employing

establishment provided the equipment. The practice sessions were held after employment hours, and the actual Cleveland Corporate Challenge was to be held at another site.

By letter dated August 17, 1998, the Office of Workers' Compensation Programs requested additional information from appellant including factual and medical evidence in support of her claim. Among other things, appellant was specifically requested to describe in detail the circumstances surrounding her injury.

Appellant and the employing establishment submitted medical evidence, multiple copies of e-mails detailing the athletic event, as well as appellant's narrative statement. The medical evidence submitted included emergency room treatment notes dated July 19, 1998; a disability slip dated July 21, 1998, prepared by Dr. Robert Leb, a Board-certified orthopedic surgeon, progress notes from Dr. Leb, dated July 21 to September 1, 1998, an operative report dated July 22, 1998 and an attending physicians report dated August 7, 1998. The disability slip, prepared by him, indicated a diagnosis of right achilles tendon rupture. The operative report dated July 22, 1998 documented the repair of the right achilles tendon rupture. The copies of e-mails from the employees' association detailed the corporate challenge and invited employees to participate in this and other upcoming activities.

In appellant's narrative statement she indicated that the employing establishment solicited employees by e-mail to participate in the YMCA Cleveland Corporate Challenge. Appellant noted that the event was a fundraiser and that all monies would be donated to the YMCA. Appellant noted that she did not sign a release which absolved the employing establishment from liability should an employee be injured. Appellant further indicated that the practice sessions occurred after hours, on the premises of the employing establishment gym; however, the actual event would take place at another forum.

By decision dated September 23, 1998, the Office denied appellant's claim, stating that appellant did not establish that she sustained an injury in the performance of duty.

By letter dated September 29, 1998, appellant's attorney requested a hearing before an Office hearing representative. Appellant submitted additional evidence including medical evidence, official rules of the YMCA Cleveland Corporate Challenge and e-mails regarding the event.

On February 22, 1998 a hearing was held before an Office hearing representative. Appellant's attorney asserted that appellant's injury occurred in the performance of duty because: (1) of an implied order to participate in the volleyball team based on the e-mails sent by appellant's supervisor; (2) uniforms had the employing establishment's name associated with the event; and (3) appellant was permitted to leave work early with pay on two occasions, for about 15 minutes each, to participate in the volleyball practices.

In a letter dated March 19, 1999, the employing establishment responded to the claims raised at the hearing and noted that appellant was not required to participate in the athletic event, nor was appellant permitted to leave work early without the use of leave.

In a letter dated April 20, 1999, appellant's attorney responded to the employing establishment's letter of March 19, 1999 and indicated that appellant's supervisor requested her to participate in the event and appellant felt coerced into participating.

By decision dated April 30, 1999, the Office hearing representative affirmed the Office's September 23, 1998 decision on the grounds that appellant had not met her burden in establishing that her injury was sustained in the performance of duty.

The Board finds that appellant's injury on July 16, 1998 was not sustained in the performance of duty.

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" 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 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.*, causal relation, can be addressed.

The general criteria for determining whether an individual is in the performance of duty as it relates to recreational and social activities is set forth in Larson[5] 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 employees health and morale that is common to all kinds of recreation and social life."[6]

[1] 5 U.S.C. § 8101 *et. seq.*

[2] *Id.* at § 8102(a).

[3] 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).

[4] *See Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985).

[5] Larson, *The Law of Workers' Compensation* § 22.00 (1997).

[6] *Id.* at § 22.00.

The Board has emphasized that these are distinct criteria noting that Larson characterized these as "three independent links … by which recreation can be tied to the employment and if one is found the absence of the others is not fatal."[7]

Although the volleyball practice sessions occurred on the employing establishment's premises and, therefore, appellant's claimed injury, as noted above, occurred on the premises, the practice sessions occurred after work and were not a regular incident of the employment.[8]

Regarding the second criterion, the employing establishment did not expressly or impliedly require appellant to participate in the athletic event. Appellant argued: (1) there was an implied order to participate in the volleyball team based on the e-mails sent to appellant's supervisor; (2) uniforms were provided by the employing establishment who received some benefit by having its name associated with the event; and (3) appellant was permitted to leave work early with pay on two occasions to participate in the volleyball practices. The e-mails from the Employees' Association indicated that employees were encouraged to participate in the event, but there is no indication they were required to participate in the volleyball tournament. Although the Employees' Association supplied t-shirts for the volleyball team and paid entry fees to the YMCA, the employing establishment received no substantial benefit from appellant's participation other than good will which was generated from the games' charitable intent. Appellant noted that she was permitted to leave work early to attend the practices. It is unclear from the record whether appellant was paid for this time; however, the supervisor indicated that there was no approved travel time for the practice sessions and that appellant was not paid for the period of time she was practicing.

When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to conduct further inquiry.[9] This inquiry focuses on the issues of whether the employing establishment sponsored the event and whether attendance was voluntary and whether the employing establishment financed the event.[10] The record indicates that the employing establishment did not grant administrative leave for the participants of the volleyball game practice sessions who voluntarily attended. The supervisor specifically indicated in his letter dated March 17, 1999 and e-mail dated July 16, 1998 that participants in the practice sessions had to use annual leave as no provision existed for approved travel time for the practices.[11] Additionally, the record does not indicate that the employing establishment either financed or sponsored the event. The evidence shows that the athletic event was financed through the Employees' Association. This record

[7] *See Stephen H. Greenleigh*, 23 ECAB 53 (1971).

[8] *See Archie L. Ransey*, 40 ECAB 1251 (1989) (injury in a recreational activity after work hours in an employing establishment gymnasium was insufficient in and of itself to bring the activity within the performance of duty).

[9] 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Anna M. Adams*, 51 ECAB __ (Docket No. 98-757, issued October 28, 1999); *see also Lindsay A.C. Moulton,* 39 ECAB 434 (1988).

[10] *Id.* at § 22.25.

[11] Even if there were evidence showing that appellant was allowed to leave work early on two occasions, for about 15 minutes each, this alone would not establish that the employing establishment sponsored or financed the event. *See Anna M. Adams, supra* note 9.

indicated that this association is controlled and funded by the employees not the employing establishment. There is no evidence that the employing establishment directed or financed specific association activities.[12] There is no express or implied requirement by the employing establishment that appellant participate in the athletic event. While it appears that one of appellant's supervisors was a member of the association and took a role in encouraging association members to participate in the corporate challenge, there is no credible evidence that the supervisor required or coerced participation. Under the circumstances, the employing establishment cannot be said to have encouraged participation through sponsorship or financial support. Consequently, appellant has failed to demonstrate that the employing establishment required her to participate in the activity or otherwise made the activity part of her services as an employee.

Regarding the third criterion, the employing establishment has generally indicated that the members of the Employees' Association engaged in morale boosting activities. The circumstances of this case do not show that the employer derived substantial direct benefit from the activity beyond the intangible value of the improvement in employees' health and morale that is common to all kinds of recreation and social life.

Consequently, appellant has not established that the injury sustained on July 16, 1998 was in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated April 30, 1999 is hereby affirmed.

Dated, Washington, DC
October 30, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[12] *See Carolyn A. Campeau*, 39 ECAB 386 (1988) (injury incurred while bowling on premises after regular work hours not compensable where employees voluntarily formed bowling league and where members of the league, not the employing establishment, provided financial support for the league and where the employing establishment did not provide operating rules for the league).