United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 09-1445**
	)	**Issued: January 7, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 20, 2009 appellant filed a timely appeal from a May 4, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant was in the performance of duty at the time of her March 5, 2009 injury.

FACTUAL HISTORY

On March 20, 2009 appellant, a 44-year-old manual distribution clerk, filed a traumatic injury claim (Form CA-1) alleging she sustained an injury to her left middle finger on March 5, 2009 when she closed a car trunk on her finger while on a break retrieving a water bottle from a coworker's car parked in the employing establishment's parking lot.

Appellant submitted medical evidence supporting her claim, including a March 23, 2009 report (Form CA-17) in which Dr. Khaja Yezdani, Board-certified in family medicine, diagnosed

left third finger phalangeal joint sprain. She also submitted statements from coworkers who observed that her finger was swollen when she returned from her break.

By decision dated May 4, 2009, the Office denied the claim. Although it accepted that the incident occurred as alleged, it denied the claim because appellant had not established that her injury occurred in the performance of duty.[1] It specifically found she was not engaged in the performance of her employment duties or in the act of personal comfort at the time of injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for disability or death of an employee resulting from personal injury sustained while in the performance of 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 performance.[3] To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration. Course of employment relates to the elements of time, place and work activity: the injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[4]

As to employees having fixed hours and a fixed place of work, injuries occurring on the premises during working hours or at lunchtime are compensable.[5]

ANALYSIS

On appeal, appellant argues that her injury occurred in the performance of duty because it occurred in the employing establishment's parking lot, on premises, during an authorized work break. The Office did not deny appellant's claim because the incident did not occur on premises, rather it denied the claim on the grounds that appellant was not engaged in the employing

[1] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

[2] 5 U.S.C. § 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] *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

[5] *Emma Varnerin, M.D.*, 14 ECAB 253, 254 (1963); 1 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 13 (June 2006).

establishment's business, in the duties she was employed to perform, or in an act of personal comfort.[6]

The Board finds that appellant was engaged in an act of personal comfort at the time of the incident. It is well established that employees who, within the time and space limits of their employment, engage in acts which minister to their personal comfort do not leave the course of employment.[7] Activities encompassing personal acts for the employee's comfort, convenience and relaxation, eating meals 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 the employment and are in the course of employment.[8]

In *Helen L. Gunderson*,[9] and other cases, the Board found that obtaining and drinking coffee and similar beverages, or the eating of a snack, during recognized breaks during daily work hours is now so generally accepted in the industrial life of our nation as to constitute a work-related activity falling into a general class of activity closely related to personal ministrations so that engaging in such activity does not take an employee out of the course of his or her employment.[10]

Larson, in his treatise on workmen's compensation law, in discussing the personal comfort doctrine stated the following:

> "Some courts ... have refused to recognize as part of the employment not only personal comfort activities which are prohibited but also those which are so remote from customary or reasonable practice that they cannot be said to be incidents of the employment. In other words, the work 'incident' contains an element of the usual and reasonable, both as to the needs to be satisfied and as to the means used to satisfy them. If either is extraordinary, the action is no longer viewed as incidental.[11]
>
> "This rule is most likely to be followed when the abnormal means are chosen in spite of the fact that satisfactory normal facilities are available."[12]

Since the drinking of water can be considered incidental to one's employment, according to Larson the question is whether the method chosen to obtain drinking water was unusual or

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[6] *Jeremiah Bowles*, 38 ECAB 652 (1987); *Christine Lawrence*, 36 ECAB 422 (1985).

[7] Larson § 5.00.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(a)(2) (August 1992) (Industrial Premises).

[9] 7 ECAB 288 (1954).

[10] *JoAnn Curtis*, 38 ECAB 122 (1986).

[11] Larson § 21.81.

[12] *Id.*

unreasonable.[13] The Office's decision merely denied the claim concluding, without complete analysis, that because she was on a break and not performing her assigned duties that the activity appellant was engaged in was not incidental to her employment. The Board finds that appellant's actions were within the personal comfort doctrine and therefore were within the performance of duty. Moreover, the record contains no evidence or explanation why appellant's actions at the time of the incident while on the employing establishment premises were not reasonably incidental to the employment.

The case shall therefore be remanded to the Office to address the medical evidence and determine whether appellant sustained an injury as a result of this incident. After any additional development deemed necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that the March 5, 2009 incident occurred in the performance of duty and that further development of the medical evidence is necessary.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 7, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[13] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).