U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARYANN BATTISTA and DEPARTMENT OF DEFENSE, DECA NORTHEAST REGION, Columbus, Ohio

Docket No. 96-2501; Submitted on the Record;
Issued April 16, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on January 30, 1996, as alleged.

On January 30, 1996 appellant, then a 64-year-old accounting technician, alleged that she injured herself when she fell inside the secured area of the mini-commissary. She fell down a step and landed on both knees. The employing establishment indicated that appellant departed from her designated duty site without supervisory approval and entered an unauthorized office conducting personal business at the time of injury. Appellant sustained a nondisplaced fracture of the base of her left fifth metatarsal.

The evidence of record indicates that appellant was verbally advised on or about January 18, 1996 that she was not authorized to go in the secured area of the mini-commissary. Additional evidence indicates that appellant stated that she was dropping off her daughter for work and looking for cigarettes in the mini-commissary.

By decision dated April 9, 1996, the Office of Workers' Compensation Programs denied appellant's claim for failure to establish that she sustained an injury in the performance of duty, as alleged. Therefore, fact of injury was not established.

By letter dated May 6, 1996, appellant requested reconsideration. Within her letter, appellant stated that on January 30, 1996 at approximately 9:30 a.m. she indicated to a co-worker, Angela Wall, that she had to leave for a short period of time to go over to the mini-commissary. She noted:

> "Upon hearing my mention of this, I was asked by Theresa Taylor (computer room coordinator) to take some paperwork over to the store. I was also asked to deliver some signs to Frank Jenkins (store ID [identification] checker) and an updated ECCA List (bad check list). I also mentioned to my co-workers that I

was going to check to see if the mini-commissary carried a certain brand of cigarettes so that I could respond to a customer's phone request."

Submitted with the request for reconsideration were statements from three people, Edward LaBelle, Angela Wall and Theresa Taylor, confirming appellant's May 6, 1996 statement.

By letter dated June 10, 1996, the Office sent a letter to both appellant and the employing establishment asking for clarification. The employing establishment was asked if it was part of appellant's job to handle customers' telephone requests. By letter dated June 19, 1996, the zone manager responded:

"[T]he normal event which took place at the [m]ain[-][c]ommissary was the person answering the phone would give the customer the [m]ini[-][c]omm[issary] phone number (no method of transferring to another number). The customer would then call the [m]ini[-][c]omm[issary] to see if the product they wanted was carried.

"It was not necessary for an employee to walk over to the mini-commissary to see about the availability of a product. Furthermore, as stated by the [z]one [m]anager, to assist a customer inquiry, 'it would have been faster to have utilized the phone call method, as was the set standard.'"

Asked for further information about the mini-commissary being a "secured area," the zone manager responded that there was a sign on the secured area door, which stated: "Authoized Employees Only." Asked about how employees were advised of the "secured area," the zone manager answered:

"Because the [m]ini[-][c]omm[issary] was a temporary commissary (January 18 [through] February 29) and only a small number of personnel (6 [to] 9) were assigned to work there, an oral briefing was given to the employees, the first day of operation…. As new employees came in to relieve others they too were instructed as to the operational requirements and security of the [m]ini[-][c]omm[issary]. Both myself and Mr. Norman Jenkins, Deputy Commissary Officer, provided this information to these employees. Truck drivers and vendors were also briefed. As previously stated, I personally informed [appellant] of the secured area, prior to her fall."

The June 10, 1996 letter also requested that appellant comment on the report that on January 30, 1996 she was at the mini-commissary dropping off her daughter, Theresa, for work. No response was received from appellant.

By decision dated July 15, 1996, the Office reviewed appellant's claim on the merits and concluded that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that appellant was injured while in the performance of duty.

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.[1] The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[2] "Arising in the course of employment" relates to time, place and work activity: To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3] As to this phrase, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours, or at lunch time, are compensable.[4] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in incidental acts, and is based on the circumstances of the employee's activity.[5]

This alone is not sufficient to establish entitlement to compensation. The employee must establish the concurrent requirement of an injury "arising out of the employment." "Arising out of employment" requires that a factor of employment caused the injury.[6] It is incumbent upon appellant to establish that it arose out of her employment; that is, the accident must be shown to have resulted from some risk incidental to the employment. In other words, some contributing or causal employment factor must be established.

In the present case, appellant sustained an injury to her left fifth metatarsal when she fell in the area of the mini-commissary, which is on employing establishment property. In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[7] Appellant has presented credible evidence in the form of witness statements to show that at the

[1] 5 U.S.C. § 8102(a).

[2] 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).

[3] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

[4] *Narbik A. Karamian*, 40 ECAB 617 (1989).

[5] *Id.*

[6] *Dwight D. Henderson*, 46 ECAB 441 (1995).

[7] *Thomas E. Keplinger*, 46 ECAB 699, 706 (1995).

time of her injury she was engaged in activities which may be characterized as reasonably incidental to the conditions of her employment, *i.e.*, delivering signs, an updated bad check list and checking on a customer's phone request. Although the record does not reveal that the delivery of such items or personally checking on a customer's phone request was the usual or routine practice, the Board finds that this deviation was incidental to appellant's employment, rather than personal in nature, and did not take her out of the performance of her duties.

Moreover, the fact that appellant's injury occurred in a "secured area" where appellant was not authorized to go does not, in and of itself, establish that appellant deviated from the course of her federal employment. Although appellant was verbally advised by her supervisor that she was not authorized to go in the secured area of the mini-commissary, the Board has held that the mere act of disobedience of a rule or order does not necessarily place an employee outside the sphere of his employment so that he loses the benefits of the Act.[8] According to Larson, *The Law of Workers' Compensation*, the defense of willful misconduct has been used successfully in a narrow field of intentional violation of safety regulations.[9] There is no evidence of record that appellant's entry into the "secured area" of the mini-commissary violated a specific safety rule of the employing establishment. Thus, appellant's entry into a secured, authorized area where she was advised not to go does not constitute willful misconduct.

The Board finds that, under the circumstances of this case, appellant was engaged "in the course of her employment" at the time of her injury on January 30, 1996 and, therefore, appellant has met her burden of proof in establishing that she sustained an injury while in the performance of duty.

[8] *See Rudolph Faires*, 4 ECAB 649-50 (1952).

[9] *A.* Larson, *The Law of Workers' Compensation* § 32.10 (1994).

The decisions of the Office of Workers' Compensation Programs dated July 15 and April 9, 1996 are hereby reversed and the case remanded for payment of medical expenses.

Dated, Washington, D.C.
April 16, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member