U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA R. ALCALA and DEPARTMENT OF DEFENSE, COMBINED ARMS & TACTIC DEPARTMENT, Fort Bliss, TX

Docket No. 98-1697; Submitted on the Record;
Issued February 17, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether appellant's June 26, 1997 injury occurred in the performance of duty.

On July 9, 1997 appellant, then a 47-year-old instructional systems specialist, filed a claim alleging that on June 26, 1997 at approximately 9:53 a.m. she was involved in a car accident while on her way to pick up a birthday cake to celebrate a coworker's birthday that day. The accident occurred off the base facility. Appellant was treated for lacerations and a fractured lateral malleoulus of the left ankle for which she later underwent surgery.

By letters dated July 29, 1997, the Office of Workers' Compensation Programs requested appellant to submit additional 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.

The Office received medical evidence from appellant and a response to circumstances surrounding the injury. In a July 15, 1997 statement, appellant stated that it was customary for her section to have a small ceremony with cake and ice cream for an employee's birthday. Appellant asserted that the head of each section usually collects money from their section in which to buy a cake, ice cream and sometimes drinks. If the head of the section cannot buy the items needed for a birthday ceremony, someone within the section is usually assigned to make all the arrangements. Appellant stated that her immediate supervisor, Joseph Wicker, was on temporary duty and that his replacement, Scott Stevens, had been in and out of the office as he was scheduled for a weapon systems course. Appellant stated that, as the senior GS-11 civilian, she had been designated next in command.

In a July 28, 1997 statement, Mr. Stevens stated that on June 26, 1997 he was the acting branch chief. He related that appellant approached him at approximately 9:00 a.m., stated that it was a coworkers' birthday and that she was going to get the birthday cake. The birthday get

together would be at 1:00 p.m. at the employing establishment. Mr. Stevens stated that he was new to the office and that after appellant explained that a birthday get together was customary for all personnel, he made a contribution for the cake. Appellant also related that she would not get the cake from an on post bakery because she knew of an off post bakery, which was better and cheaper. Mr. Stevens stated that, while in a branch chief's meeting, he was informed that appellant had been in an accident. He stated that at no time was he aware that appellant had left the building as appellant did not tell him when she was going to get the cake or ask whether she could go.

In an August 22, 1997 memorandum, Mr. Stevens stated that appellant was not authorized by him to leave off post to get the cake and that, when his employees go on breaks, it was not customary for them to leave off post.

By decision dated August 28, 1997, the Office rejected appellant's claim on the basis that appellant had not established an injury in the performance of duty.

By letter dated September 12, 1997, appellant requested a review of the written record before an Office hearing representative. She alleged that the June 26, 1997 injury occurred in the performance of duty because employee birthday celebrations were a standard practice along with other leadership initiatives to promote employee morale. Moreover, appellant asserted that, based on past and present practices regarding birthday celebrations during duty hours, supervisors and subordinates alike, purchased a birthday cakes for employees. She asserted that the acting supervisor donated money for the cake and at no time did he state that she was to purchase the cake off the clock or at any time other than during duty hours. Appellant stated that she had always been asked to purchase the birthday cake and that she has never been told that this was not allowed during duty hours during the past four years she worked at the employing establishment. Written statements from present and prior coworkers were submitted to support her allegation that birthday celebrations took place during duty hours and that such contributed to worker productivity and morale.

In an undated letter, Mr. Wicker stated that, although appellant may not have had direct permission from the person in charge at the time, he believed that appellant's decision was in the best interest of the branch and his people were encouraged to make such decisions. He stated that he believed that appellant's actions were in the "line of duty" as they benefited the morale, welfare and recreation of employees.

The employing establishment responded to appellant's request for review of the written record. In a January 5, 1998 statement, Anthony F. Bush stated that he was the "second line" supervisor of appellant. He stated that appellant was never given permission to leave her work site, to purchase a birthday cake by either himself or her immediate supervisor, Mr. Stevens. He stated that celebrating birthdays during normal duty hours was customary, not standard operating procedures. He stated that, at the time of the accident, he was unaware that appellant had left her work site to purchase the cake.

In a January 6, 1998 letter, Mr. Stevens reiterated that permission to leave was neither requested nor granted. He further stated that appellant did not at any time tell him when (therefore requiring his permission) she would depart to get the cake. He stated that, if she

would have requested leave at the time of their conversation, he would have told her to do it during her lunch period and if need be to take an additional 30 minutes for the purpose of acquiring the cake.

In a decision dated and finalized March 17, 1998, the Office hearing representative affirmed the prior decision and found that appellant was no longer in the performance of her duties when she left the employing establishment in her personal vehicle to purchase a birthday cake.

The Board finds that appellant's injury on June 26, 1997 was not sustained in the performance of duty.

Congress in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in worker's compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated the following: "In the compensation field, to occur in the course of employment, in general, an injury must occur (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[1]

The Board has stated as a general rule that off premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[2] Exceptions to this general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[3] or which are in the nature of necessary personal comfort or ministration.[4] The fact that no deduction is made from the employee's salary for the time he or she engages in the questioned activity does not, by itself, constitute that activity as being incidental to the employment.[5]

[1] *Christine Lawrence*, 36 ECAB 422 (1985).

[2] *Alvina B. Piller (Robert D. Piller)*, 7 ECAB 444 (1955); *Anne R. Rebeck*, 32 ECAB 315 (1980).

[3] *Lillie J. Wiley*, 6 ECAB 500 (1954); *Mary Chiapperini*, 7 ECAB 959 (1955).

[4] For *e.g.*, accidents occurring while an employee is on the way to the lavatory, *Abraham Katz*, 6 ECAB 218 (1953); or the drinking of coffee and similar beverages, or the eating of a snack, *Helen L. Gunderson*, 7 ECAB 288 (1955) and *Harris Cohen*, 8 ECAB 457 (1955).

[5] *See Julianne Harrison*, 8 ECAB 440 (1955), *petition for recon. denied*, 8 ECAB 573 (1956).

Appellant had fixed hours and place of work and she sustained injury on June 26, 1997 when her automobile was involved in an off premises accident with another vehicle while she was driving to an off-premises bakery to purchase a cake for a coworker's birthday. As the injury did not occur on the employment premises, the general going and coming rule will apply unless it is established that one of the exceptions to the general rule applies to the circumstances of this case.

The Board enumerated four recognized exceptions to the general going and coming rule which it characterized as the "off-premises" exceptions. The Board stated that these exceptions are related to situations (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[6]

None of the first three exceptions apply and appellant generally asserts that her injuries are covered by the fourth exception because her employer knew of the birthday celebration tradition within the department and, that in her going to purchase the birthday cake, she was following the past and present practices of the employing establishment. The Board finds, however, that the practice of celebrating birthdays engaged in at the employing establishment constitutes an informal arrangement among the employees and management which was encouraged but did not constitute something incidental to her employment. There is no question that the celebration of birthdays occurred and was encouraged at this particular employment establishment; however, the case record indicates that this was done informally and on a strictly voluntary basis among the employees. Appellant's immediate supervisor and her second line supervisor on the date in question both advised that appellant was not authorized to go off premises to pick up the cake and that this was not generally the type of thing that employees were allowed to do. While Mr. Wicker, a supervisor who was away on a temporary-duty assignment on June 26, 1997, advised that he would have considered appellant "in the line of duty," this does not comport with statements made by the persons who actually supervised appellant on the date in question and is insufficient to establish that getting a cake off premises was expressly or impliedly required by the employing establishment such that it could be considered incidental to her employment.[7]

Viewing appellant's claimed injury as an adjunct of a recreational or social activity also does not bring it within the performance of duty.

[6] *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[7] The Board notes that the "special errand" exception to the "going and coming rule" also does not apply as the employing establishment did not authorize, expressly or impliedly, that appellant go off premises to obtain a cake. *See Elmer L. Cooke*, 16 ECAB 163 (1964) (the essence of the exception is in the agreement to undertake a special task).

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[8] 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." [9]

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." [10]

While the birthday party was to occur on the employing establishment premises, appellant's claimed injury, as noted above, occurred off premises.

Regarding the second criterion, the employing establishment did not expressly or impliedly require appellant to go off premises to obtain a birthday cake. Appellant argued that, based on past and present practices, the employing establishment encouraged such birthday celebrations.

When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to conduct a further inquiry.[11] This inquiry focuses on the issues of whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment financed the event.[12] The employing establishment did not pay for the cake and did not provide transportation for appellant to pick up the cake. While it appears from witness statements that the organizers of such celebrations were not required to take leave when obtaining the items necessary for the birthday celebration, which takes place during duty hours,[13] the record does not indicate that the employing establishment either financed or sponsored the event. Appellant specifically indicated and the witness statements support that individual contributions, by both management and staff, were made by the branch for the purchase of the

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

[9] *Id*., at § 22.00.

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

[11] 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Anna M. Adams*, 51 ECAB ___ (Docket No. 98-757, October 28, 1999); *see also Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

[12] *Id.* at § 22.25.

[13] *See supra* note 5 and accompanying text.

cake. Appellant's supervisors did not expressly or impliedly require her to get the cake nor does the evidence indicate they were aware that she had left the premises until after her injury occurred. The act of leaving the premises to acquire the birthday cake was a voluntary personal decision, with no express or implied requirement by the employing establishment that she get the cake or attend the planned event. 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 organize such birthday celebration or otherwise made the activity part of her services as an employee.

Regarding the third criterion, the employing establishment has generally indicated that staff birthday parties served to boost morale and efficiency. Mr. Wicker indicated that he supported staff birthday parties as being in the best interest of the morale and welfare of the employing establishment. However, it has been held that morale and efficiency benefits are not alone enough to bring social and recreation events within the course of employment.[14] The circumstances of this case do not show that the employer derived 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.

Consequently, appellant has not established that the injury she sustained on June 26, 1997 was in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated and finalized March 17, 1998 is affirmed.

Dated, Washington, D.C.
February 17, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski

[14] *See Barbara Roy*, 42 ECAB 960, 966 (1991).

Alternate Member