

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

APR 01 2009

Date of Injury: 06/25/2008
Employee: RALPH C. DEJULIIS

RALPH C DEJULIIS
3201 SOUTH 145TH EAST AVENUE APT 2D
TULSA, OK 74134

Dear Mr. DEJULIIS:

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 01/14/2009. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Dallas District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 16 DAL
LONDON, KY 40742-8300

Sincerely,



Christina Stark
Hearing Representative

SOCIAL SECURITY ADMINISTRATION
SSA-REGION VI
HUMAN RESOURCES OFFICE-DALLAS
1301 YOUNG STREET, SUITE 550
DALLAS, TX 75202

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of Ralph Dejuliis, Claimant; Employed by the Social Security Administration in Tulsa, Oklahoma. Case No. 162145109. Hearing held on January 14, 2009 in Oklahoma City, Oklahoma.

The issue for determination is whether the claimant sustained an injury as alleged.

The claimant, born February 21, 1953, is employed as a Claims Representative for the Social Security Administration in Tulsa, Oklahoma. On June 28, 2008, he filed timely notice of a traumatic injury sustained on June 25, 2008 when he was testifying as a witness in arbitration at a union office. He was anxious and stressed, clenching his jaw, and grinding his teeth. While being questioned, he chipped his tooth.

The agency disputed the claim on the basis that it felt he was performing internal union business at the hearing.

On July 18, 2008, the Office requested additional factual and medical evidence from the claimant.

The claimant responded and stated he was stressed because he had to be the witness and be questioned by someone who had never done an arbitration hearing or grievance before. Also, this was the first arbitration he performed as the Local President. He stated that the same tooth was injured in high school with a basketball. A filler was used to replace the missing part of the tooth. It fell off in college at a movie theater while eating sticky candy. The filler came off again while eating lunch in 1983. The filler came out again in 1998 when he did a belly flop in a pool.

On August 18, 2008, the Office received an undated report from dentist, Dr. Raj Patel. He reported the prior injuries to the tooth and that the resin came off periodically. He stated that

the claimant came in, unscheduled, on June 25, 2008. The resin came off again, and he told Dr. Patel that he was testifying that morning and was grinding his teeth. Dr. Patel stated that "Grinding his teeth certainly could have resulted in the resin coming off. I have no reason to believe otherwise." He reapplied the resin.

On August 21, 2008, the Office denied the claim for the reason that the evidence failed to establish that he sustained an injury as alleged. The Office discussed that he had not identified any work factors.

After the decision, the claimant stated that he is prohibited from obtaining official time for internal union business. He testified as a witness and was in duty status. He submitted an email approval for official time to attend the hearing.

Witness Mary Roberts stated that the claimant was nervous and fidgety. She recalled the claimant telling the management representative that the questioning was good, and he was so nervous that he was grinding his teeth and chipped a tooth. The arbitrator advised the claimant to file an OWCP claim. The claimant showed Ms. Roberts a milky piece of something on his fingertip that came from the back of his tooth. She asked him to smile and it revealed that the lower corner of his left front tooth was thinner than the rest of his teeth.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. Accordingly, an oral hearing was scheduled and held on January 14, 2009 in Oklahoma City, Oklahoma. The claimant was represented at the hearing by his union representative, Mary Roberts.

The claimant has worked for the agency since May 1978 and began in the Tulsa office in April 1998. He testified that on the date of injury, he was in a paid status by the agency. The union only reimburses him for travel, postage, out of pocket expenses, etc., but the agency pays his salary when he is on official union time.

The claimant testified regarding the injury. He was serving as a witness and representative. He was the union's only witness and the union's only representative. Management did not tell the union in advance who the witnesses were going to be so he could not prepare. Management had not responded to the grievance and did not inform the library that the union was authorized to go into the meeting room. Management did not

bring copies of the contract after they told the union they would bring in joint exhibits. The claimant had to go back to the office to print the contract while the arbitrator waited. The claimant testified that the whole situation was unusual.

He testified that another union local president testified on management's behalf. The claimant felt he was stabbed in the back. He was caught off guard having to prepare questions for this witness.

The claimant testified that the actual grievance involved an employee who transferred into the Bartlesville, Oklahoma office. Per the contract, the union should be there for orientation purposes. The union was not told about this. Also, because management did not advise them of this, the union dues were not transferred. The claimant filed the grievance and management did not address the grievance; hence, they went to arbitration.

The claimant testified that management went out of its way to make this a difficult experience. As a result, he was grinding his teeth during the meeting and ground the resin off his front tooth. The claimant testified that prior to this, the union and management did not always disagree but they got along. In 2000, the agency ended all partnership agreements and "it's been horrible ever since."¹

Ms. Roberts testified on the claimant's behalf. She stated that the atmosphere at the meeting was stressful. She stated that when the claimant chipped the tooth, he turned to her and asked her if she saw anything. She stated that the arbitrator made a comment about workers' compensation. She also stated that when he chipped the tooth, he said something like "you were really good at questioning me. I was so nervous that I chipped my tooth. I may have to take sick leave to go to the dentist and have him take a look at it."²

The claimant testified that he chipped the resin off the tooth when management cross examined him.

The claimant was asked about the agency's statement that he was performing official internal union business during the hearing. The claimant testified that they would never go to arbitration over internal union business which is classified as union elections and organizing. The claimant testified that he was granted official time to attend the grievance hearing.

¹Transcript, page 19, line 17.

²Transcript, page 42, lines 15 - 18.

The claimant testified that the arbitrator ruled that management violated several articles but denied the grievance. The claimant filed an appeal which is pending.

During the hearing, the claimant submitted several exhibits regarding the grievance and articles from the National Agreement.

A copy of the transcript was sent to the employing agency for review and comment. The agency did not offer any comments on the transcript.

The record was held open for thirty days to allow for the submission of additional evidence. No further evidence was submitted for consideration.

Based upon hearing testimony, together with the written evidence of record, I find that the decision of the District Office dated August 21, 2008 should be reversed.

Generally, "fact of injury" consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure that is alleged to have occurred. The second component is whether the employment incident or exposure caused a person injury and generally can be established only by medical evidence.³

In the present case, the Office found that the claimant did not establish fact of injury. I find that the claimant has established that he sustained an injury as alleged. He chipped his tooth while he was testifying during an arbitration hearing in his capacity as a union representative. He testified, in detail, regarding how the injury occurred. He also had Ms. Roberts testify on his behalf since she was at the hearing. Therefore, the claimant has established a factual basis for his claim.

In addition, I find that the claimant has established a medical basis for his claim. Immediately after the hearing, he went to the dentist, Dr. Raj Patel, who examined him in an unscheduled visit because the claimant chipped the resin off one of his front teeth while grinding his teeth during testimony. Therefore, I find that the claimant has presented a medical basis for his claim.

³Elaine Pendleton, 40 ECAB 1143 (1989).

I also find that the claimant was in the performance of duty at the time the incident occurred.

The general rule is that union activities are personal, that attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment. The Office has adopted the mutual benefit approach to employees performing such representational functions. Its procedures provide that employees performing representational functions entitling them to official time are in the performance of duty and entitled to all benefits of the FECA if injured in the performance of these functions. The Office's procedures specify, however, that activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not included.⁴

Involvement in union activities does not necessarily preclude compensability of an injury. The Board has recognized an exception to the general rule in that employees performing representational functions which entitle them to official time are in the performance of duty and entitled to all benefits of the FECA if injured in the performance of those functions. The rationale underlying this exception is that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer. The Office's procedures recognize this exception and provide that representational functions include authorized activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.⁵

The Office's procedures define "official time" as time granted to an employee by an agency to perform representational functions when the employee would otherwise have been in duty status, without charge to leave or loss of pay. This may include scheduled overtime or a period of irregular unscheduled overtime, if an event arises which requires the representative to act in a representative capacity.⁶

With regard to union activities in general, the Board has adhered to the principle that union activities are personal in

⁴Ray C. Van Tassell, Jr., 44 ECAB (Docket No. 91-679, issued December 24, 1992).

⁵Marie Boylan, 45 ECAB (Docket No. 92-1968, issued January 14, 1994).

⁶Bernard Redmond, 45 ECAB (Docket No. 93-1258, issued January 7, 1994).

nature and are not considered to be within the course of employment. However, the Board has found that the involvement of union activities does not preclude the possibility that compensable factors of employment have been alleged. The Board has recognized an exception to the general rule in that employees performing representational functions which entitle them to official time are in the performance of duty and entitle them to all benefits of the FECA if injured in the performance of those functions. The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer. The Board determined that actions directly related to the performance of "representational functions" could, if substantiated by the record, constitute compensable factors since they arose out of covered representational duties.⁷

In the present case, the claimant was on official time attending an arbitration hearing involving the union and management. He was granted official time to attend the hearing. He testified that he was not performing internal business of the union as alleged by the employer. The claimant advised that union representatives are not granted official time to perform internal business of the union. He was not soliciting new members or collecting dues. He testified that the union would never go to arbitration over internal union business. The arbitration dealt with management's failure to follow Article 6 of the contract.

A physician's opinion supporting causal relationship between a claimant's disability and a specific employment incident or factors of employment is not dispositive on the issue of causal relationship simply because it is rendered by a physician. To be of probative value to an employee's claim, the physician must provide rationale for the opinion reached. Where no such rationale is present the medical opinion is of diminished probative value.⁸

Although causal relationship generally requires rationalized medical opinion, the Office's procedures provide for acceptance of a claim without a medical report when the following criteria are satisfied: (1) the condition reported is a minor one which can be identified on visual inspection by a lay person (e.g. burns, lacerations, insect stings, or animal bites); (2) the injury was witnessed or reported promptly, and no dispute exists

⁷Shelly D. Duncan, 54 ECAB (Docket No. 02-1260, issued January 22, 2003).

⁸Michael Stockert, 39 ECAB (1988).

as to the fact of injury; and (3) no time was lost from work due to disability.⁹

In the present case, the claimant chipped the resin from his tooth while testifying at an arbitration hearing. He was grinding his teeth during testimony. The incident was witnessed by Ms. Roberts who furnished testimony, and it is alleged that comments were made by others attending the hearing. After the hearing, the claimant went straight to his dentist, Dr. Patel. Dr. Patel furnished a report received on August 18, 2008. In his report, Dr. Patel stated that he first saw the claimant in 1978. He originally chipped his tooth in a basketball accident in high school and the resin had come off periodically over the years. Dr. Patel saw the claimant for regular dental exams every six months over the years.

Dr. Patel saw the claimant on May 2, 2008 for a routine check up. He found no problems with the resin on his front teeth. However, on June 25, 2008, the claimant made an unscheduled visit and reported that the resin came off his front tooth after grinding his teeth while testifying at an arbitration hearing. He reapplied the resin and stated that the claimant was not disabled. He opined that the grinding could have caused the resin to come off and the claimant sought treatment with him before going to lunch so as not to risk further damage to the tooth. He felt that the resin would last ten years or more if the claimant avoids activities such as grinding his teeth.


I find that the claimant has established his claim and that acceptance is warranted.

Upon return of the file, the Office should accept the claim for a chipped tooth with restoration of the resin and pay the appropriate entitled benefits.

⁹Melissa A. Carter, 45 ECAB (Docket No. 93-958, issued May 6, 1994).

Consistent with the above findings, the decision of the District Office dated August 21, 2008 is REVERSED and the case file is returned for further action as described above.

DATED: APR 01 2009
WASHINGTON, D.C.

A handwritten signature in cursive script, reading "Christina Stark", with a horizontal line extending to the right from the end of the signature.

CHRISTINA STARK
Hearing Representative
For
Director, Office of Workers'
Compensation Programs