Dial, Janise

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Parking area exclusion (RCW 51.08.013)

Personal comfort doctrine

When injured in the parking lot while engaged in an activity to which the personal comfort doctrine applies (smoking), the worker remained in the course of employment and the parking lot exception did not require that the claim be denied. ***….In re Janise Dial*, BIIA Dec., 01 17217 (2003)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JANISE A. DIAL	)	**DOCKET NO. 01 17217**
	)	
CLAIM NO. X-783307	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Janise A. Dial, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab

Employer, R. F. Taplett Fruit Co.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
David W. Coe, Assistant

The claimant, Janise A. Dial, filed an appeal with the Department of Labor and Industries on August 30, 2001, from an order of the Department of Labor and Industries dated June 29, 2001. The Department forwarded the appeal to this Board on September 21, 2001. In the June 29, 2001 order, the Department affirmed the provisions of an order dated February 12, 2001, which rejected Ms. Dial's application for industrial insurance benefits on the grounds the injury, for which she sought coverage, occurred in her employer's parking lot, and that RCW 51.08.013 excluded the alleged injury from coverage. **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on September 9, 2002, in which the Board reversed the June 29, 2001 order and directed the Department to allow the claim. Our industrial appeals judge determined this claim should be allowed under the personal comfort doctrine. The Department rejected the claim, based on the provisions of RCW 51.08.013. That statute excludes certain claims, resulting from injuries in employee parking lots, that occur when a worker is coming to or going from work. We agree with the decision of our industrial appeals judge to allow the claim. We have granted review to explain why the statutory bar to certain claims stemming from parking lot injuries does not apply to the facts of this case.

On January 8, 2001, Ms. Dial slipped during a morning rest break. She was walking to her car so she could smoke a cigarette. As a result of her fall, she suffered a low back strain. Her employer, R. F. Taplett Fruit Co. (Taplett), neither encouraged nor supported smoking, but limited the locations where employees could smoke on its property. By smoking in her car, Ms. Dial was not furthering any Taplett business interest. She was merely trying to keep warm on a cold winter day. Taplett allowed workers to smoke during rest breaks in their cars in its parking lot.

In these circumstances, we conclude that the application of the personal comfort doctrine determines that Ms. Dial was in the course of her employment when she fell. The personal comfort doctrine includes, within the definition of "course of employment," activities that are incidental, minor deviations from work duties. This doctrine allows coverage for an injury that takes place while an employee is ministering to personal comfort needs, such as eating or drinking. Under this doctrine, an employee who is injured while attending to a basic need is within the course of his or her employment and is, therefore, eligible for industrial insurance benefits. *In re Phillip Carstens, Jr.*, BIIA Dec., 89 0723 (1990); *In re Ken Bezley*, Dckt. Nos. 95 5865 & 95 6356 (January 27, 1997).

The general rule concerning the personal comfort doctrine, as stated by Professor Larson, is as follows:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

2 A. and L. Larson, *Larson's Workers' Compensation Law* § 21 (2002).

We noted in *Carstens* that under the personal comfort doctrine, activities such as eating, obtaining a drink, smoking, or going to the bathroom are frequently considered to have occurred in the course of employment. *Carstens*, at 13. Practically all jurisdictions that have addressed smoking hold that smoking does not constitute a departure from employment. *Larson's* § 21.04. We believe a person should be considered to be within the personal comfort doctrine when smoking a cigarette if the activity is reasonably incidental to his or her job duties.

We conclude that when Ms. Dial went outside to smoke a cigarette during a paid break, she did not leave the course of her employment because she engaged in a personal comfort that was reasonably incidental to her employment. The employer would not allow her to smoke within its facility. During her break, in order to smoke, she went outside as required and then to her car to

keep warm. Nothing in that activity suggests that her departure from her job duties was so great that it evidenced intent to abandon the job. Her activities were within the reasonable time and space limits of her employment. She remained in the course of her employment when she slipped and fell in the parking lot. We wish to be clear, however, that although we find Ms. Dial's injury covered in the circumstances of this case, we do not believe that personal comfort activities a worker engages in during paid break periods, whether on or off the jobsite, **necessarily** requires a finding that the activity is within the course of employment.

The Department, in its Petition for Review, contends that the personal comfort doctrine cannot be used to overcome the statutory bar to coverage contained in RCW 51.08.013, which generally prohibits some claims for injuries stemming from parking lot accidents. Pursuant to the statute, a worker is considered to be in the course of employment when coming to or going from work on the jobsite. A worker is not considered in the course of employment if injured in the parking lot when going to or coming from work because the parking lot is excluded from the definition of the jobsite. RCW 51.08.013(1). The rule should not be applied here, however, because a worker is neither coming to nor going from work if they are within the time and space constraints of the personal comfort doctrine; the course of employment has not been interrupted.

The Department relies on *Bergsma v. Department of Labor & Indus.,* 33 Wn. App. 609 (1983) to support rejection of the claim. That decision covers the issue of an injury during a lunch break; it does not control application of the personal comfort doctrine. Lunch breaks are not the same as personal comfort breaks and are treated differently in statute and case law. The foremost distinction is that, unlike the worker ministering to a personal comfort, a worker is generally not considered to be in the course of employment when on a lunch break. *Tipsword v. Department of Labor & Indus.,* 52 Wn.2d 79 (1958). If not otherwise in the course of employment, a worker may be covered for an injury occurring during a lunch break only because of the statutory provision that covers workers while they are on a lunch break on the employer's jobsite. RCW 51.32.015.

In *Bergsma*, the worker was not covered when on a lunch break because he left the jobsite. He was injured in the parking lot. The employer's parking lot was not considered part of the jobsite pursuant to the provisions of RCW 51.08.013. When injured, Mr. Bergsma was not otherwise in the course of employment, and coverage of the injury was denied. We note, however, that the parking lot exception to the jobsite is not a bar to coverage for all injuries occurring in a parking lot. It only limits coverage for injuries that would otherwise be allowed as part of the "coming and going" rule defined by RCW 51.08.013. *Bergsma*, at 615. Likewise, the parking lot exception does not limit

coverage for injuries sustained in parking lots that occur while the worker is in the course of employment. *Bolden v. Department of Transportation*, 95 Wn. App. 218 at 221 (1999); *In re Julie Trusley,* BIIA Dec., 93 3124 (1994*); In re Joseph Buchheit,* BIIA Dec., 88 2674 (1989).

Lunchtime travel from the jobsite is classified in the same category as travel before or after work, and is subject to the coming and going rule, with its exception. *Bergsma*, at 616. The worker who takes a lunch break away from the jobsite deviates from the course of employment; the worker merely attending to personal comfort within the time and space limits of their employment does not.

We conclude that Ms. Dial was in the course of her employment when injured because of application of the personal comfort doctrine to the facts of this case. The assertion that the personal comfort doctrine does not apply to accidents occurring in a parking lot is incorrect and would be an unwarranted extension of the parking lot exception to circumstances where a worker is neither coming to nor going from work. Once we determine that the personal comfort doctrine applies, we, by necessity, determine that the worker had not left the course of employment. It follows that the worker is neither coming to nor going from work. If a worker remains in the course of employment it is irrelevant where the injury occurred.

Based on consideration of the Petition for Review and the record in this appeal, we have determined that the Department's June 29, 2001 order rejecting the claim is incorrect and must be reversed and the matter remanded to the Department with direction to allow the claim.

FINDINGS OF FACT

1. On January 16, 2001, Janise A. Dial filed an application for benefits with the Department of Labor and Industries, alleging that she had been injured on January 8, 2001, during the course of her employment with the R.F. Taplett Fruit Co. (hereafter Taplett). On February 12, 2001, the Department rejected the claim for benefits, on the grounds that the injury for which she sought coverage occurred in Taplett's parking lot and that RCW 51.08.013 excluded her from obtaining industrial insurance benefits. Ms. Dial protested the order on April 9, 2001, but the Department affirmed the order on June 29, 2001. On August 30, 2001, Ms. Dial filed a protest of the June 29, 2001 order with the Department. On September 21, 2001, the Department forwarded her protest to the Board of Industrial Insurance Appeals as an appeal. On October 3, 2001, the Board issued an order granting the appeal, assigning it Docket No. 01 17217.

2. On January 8, 2001, Taplett employed Ms. Dial as a worker in the fruit packing business it operated near Wenatchee, Washington.

3. On and before January 8, 2001, Taplett disallowed employees from smoking tobacco in its work building. The company allowed employees to smoke during work breaks at areas that were located outside both the front and back entrances to the building. The building's roof eaves were the only cover over these areas.

4. During work breaks, Taplett customarily allowed employees to go to their cars in the employee parking lot in order to rest, smoke, eat, or drink. The employee parking lot was located immediately outside of the back door of Taplett's building.

5. On January 8, 2001, Taplett's employee parking lot was covered by snow and ice that had accumulated during the night. The outside temperature during the morning of January 8, 2001, was well below freezing. Ms. Dial felt she would have become uncomfortably cold if she stood outside for the length of time she needed to smoke a cigarette.

6. On January 8, 2001, during her morning break, Ms. Dial walked to her car in Taplett's employee parking lot for the sole purpose of smoking a cigarette. During her trip to the car, Ms. Dial slipped on the ice and snow that was in the parking lot. She hurt her low back as she moved suddenly to avoid falling.

7. On January 9, 2001, Ms. Dial sought medical treatment for her low back symptoms. She was diagnosed as having strained her back when she slipped in Taplett's parking lot.

8. On January 8, 2001, when Ms. Dial slipped in Taplett's parking lot, she was engaged in a personal comfort reasonably incidental to the course of her employment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal, which was filed within the time limitation allowed by RCW 51.52.060.

2. On January 8, 2001, Ms. Dial was in the course of her employment, within the meaning of RCW 51.08.013, when she slipped in the employer's parking lot and injured her low back.

3. On January 8, 2001, Ms. Dial suffered an industrial injury within the meaning of RCW 51.08.100.

4. The June 29, 2001 order of the Department of Labor and Industries is reversed. This matter is remanded to the Department with directions to allow the claim and take such further action as required by the law and the facts.

It is so **ORDERED.**

Dated this 26th day of March, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member