Morrill, Alfred, Dec'd

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

Lunch period (RCW 51.32.015; RCW 51.36.040)

Coverage during a lunch period on the employer's premises is no greater than during the work period. A worker is not entitled to coverage if the injury results from a wholly independent act of the worker for his own benefit, if the worker's act has no connection with his work or meal, and if the worker's act places him in a more dangerous position than was required of him during the meal period. ***….In re Alfred Morrill, Dec'd,*** **BIIA Dec., 29,704 (1970)** [special concurrence]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALFRED MORRILL DEC'D	**)**	**DOCKET NO. 29,704**
	)	
CLAIM NO. F-558192	**)**	**DECISION AND ORDER**

APPEARANCES:

Widow-petitioner, Maida L. Morrill, by
Brodie, Fristoe & Taylor, per
Donald W. Taylor, and
Miller, Howell and Watson, per
Lembhard G. Howell

Employer, International Paper Company, by
McLean, Klingberg & Houston, per
Jerry Houston, and by
Lane, Powell, Moss & Miller, per
Wilbur J. Lawrence

Department of Labor and Industries, by
The Attorney General, per
Edward G. Gough, Robert G. Swenson, and Walter F. Robinson, Jr., Assistants

This is an appeal filed by the widow-petitioner on November 27, 1967, from an order of the Department of Labor and Industries dated October 4, 1967, which rejected her claim for a widow's pension. **SUSTAINED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Statements of Exceptions filed by the widow-petitioner, the employer, and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on September 14, 1970, in which the order of the Department dated October 4, 1967 was sustained.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal is whether the death of Alfred Morrill on May 29, 1967, was the result of an industrial injury, namely, a bee sting suffered on May 26, 1967, during the course of employment.

Our hearing examiner's order adequately set forth the medical aspects of the case, but did not discuss the course of employment aspects.

The employer and Department contend on this appeal and in the exceptions that the workman was stung by the bee during an independent act of his own which had no relation to the employer's business or interest. We will set forth hereinafter the basis of the employer's and Department's contention as concisely set forth in their exceptions to the Proposed Decision and Order. We find merit in their contention.

The facts surrounding the bee sting are simple and essentially un-contradicted. Mr. Morrill, the deceased workman, and two fellow workers, a Mr. Rye and Mr. Nelson Waddle, were working as a team in falling and bucking on May 26, 1967. Mr. Rye had discovered honey in a "bee" tree. After the three had eaten their lunch, Mr. Morrill was stung. (BR 65, 351, 352, 365) It is apparent from the evidence that it was necessary for these workmen to reach into the tree to get the honey. (BR 65, 368, 369) The taking of the honey was the independent idea of these three men. (BR 369) Thus, Morrill was not stung while working or while eating lunch or while resting. The sting resulted from Morrill's independently seeking honey for himself.

Under RCW 51.32.010, the widow's right to recover depends upon whether her deceased husband was injured while he was acting within the "course of his employment." So far as here material, "course of employment" is referred to in three sections of the Industrial Insurance Act. RCW 51.08.013 defines the term as

> ". . . acting at his employer's direction or in the furtherance of his employer's business . . . ."

RCW 51.32.015 provides that the benefits of the Act

> ". . . shall be provided to each workman receiving an injury . . . during the course of his employment and also during his lunch period as established by the employer while on the jobsite. . . ."

RCW 51.36.040 contains similar language.

RCW 51.32.015 and RCW 51.36.040 were enacted in 1961 as sections 1 and 2 of Chapter 107, Laws of 1961. Prior to their enactment, the Supreme Court had held, as a matter of law, that injuries occurring during the employee's lunch period were not compensable in cases where the employee was not paid during the lunch period and was not subject to his employer's direction and control. D'Amico v. Conjuista, 24 Wn. 2d 674 (1946); Mutti v. Boeing Aircraft Co., 25 Wn. 2d 871 (1946); Tipsword v. Department of Labor and Industries, 52 Wn. 2d 79 (1958). In Tipsword, the court commented that its construction of the Act was harsh, and that Judge Jeffers' dissent in

D'Amico v. Conquista was more in keeping with the Act's purposes. In Tipsword, supra, Judge Rosellini said, at pages 81-82:

> "It seems to us that the construction which this court, in D'Amico v. Conquista, supra, placed upon RCW 51.08.180 (designating that, in order to be eligible for the benefits of this act, a workman must be in the course of his employment), was much too narrow, and that an interpretation of the statute which extends its benefits to a workman, the nature of whose employment requires him to eat his lunch in the vicinity of his job and incur the hazards which exist there, would be more in accord with the spirit of the act. Judge Jeffers, dissenting in D'Amico v. Conquista, supra, ably set forth the arguments in favor of such an interpretation . . . ."

This was in effect an invitation by the Court for the Legislature to enact Judge Jeffers' dissent into law. This is exactly what the Legislature did in enacting RCW 51.32.015 and RCW 51.36.040 in 1961.

But Judge Jeffers pointed out in his dissent, not every injury occurring during the lunch period is compensable even in those jurisdictions where coverage is extended to lunch periods. As in cases of injuries occurring during regular work periods, an employee may remove himself from the Act's protection during the noon hour if the injury results from the wholly independent act of the employee for his own benefit or gain particularly where the employee's act has no connection with the employee's work or meal and places him in a more dangerous position than was required of him during the meal period. If this were not the case, the employee's coverage during the lunch period would be greater than during his normal work periods. We believe the Legislature by enacting RCW 51.32.015 intended to give the same coverage during the lunch hour as that applicable during the work period.

In his dissent in D'Amico, Judge Jeffers quotes from Young v. Department of Labor and Industries, 200 Wash. 138 (1939). Thus, Judge Jeffers says (24 Wn. 2d at p. 689):

> "The opinion in the Young case continues:
>
> "'Consulting the cases from other jurisdictions, we find many instances in which employees have been injured during meal hours when they were not actually at work. The general rule in such cases is that the injury is compensable if the employee was, at the time, doing something incidental to the duties for which he was engaged, but is not compensable if the injury resulted from an independent act of the employee having no connection with his work or his meal.' (Italics mine.)

> "The opinion then quotes the following statement from 71 C.J. 739, Section 456:
>
> "'In accordance with the general rule that injuries to an employee while he is doing something not strictly within his obligatory duty but which is incidental thereto may be compensable, harm which befalls an employee may be compensable when it occurs to him during the lunch period or other meal period. However, harm sustained during a meal period may not be compensable as arising out of and in the course of employment when the harm results from an independent act of the employee having no connection with his work or his meal, or from the independent act of a third person, or when the harm is sustained by reason of the employee's placing himself in a more dangerous position than was required of him during the meal period, or where sufficient evidence that harm sustained during the meal period was an accident arising out of and in the course of the employment is lacking.' (Italics mine.)
>
> "The opinion continues:
>
> "'The theory of the cases is that a period of rest, refreshment or other temporary cessation from work, is not of itself sufficient to break the continuity of employment, but that the independent act of the employee , which has no relation to the employer's interest, serves to break the so-called nexus and to put the employee without the course of his employment.'" (Court's emphasis.)

Thus, even where the benefits of the Act are not denied during lunch periods, a workman removes himself from the Act's protection by voluntarily proceeding upon his own for his independent benefit.

This is what the employer and the Department contend occurred here. Mr. Morrill was on his own when he was stung. He went voluntarily to the "bee tree" to obtain honey for his own use and benefit. The act of obtaining and removing honey from the "bee tree" had nothing to do with Mr. Morrill's work for International Paper Company; the company received no benefit from the employee's act. In every respect, removing the honey was the employee's own independent act "having no connection with his work or meal." This independent act exposed Mr. Morrill to the danger of bee stings, and if, in fact, he was allergic to bee stings, as the widow-petitioner contends, he voluntarily placed himself "in a more dangerous position than was required of him during the meal period." Clearly, under the rationale of Judge Jeffers' dissent, the bee sting was not an "injury" in the "course of employment" covered by the Act.

The widow-petitioner's exceptions contend that her husband's death occurred when it did because of the bee sting and therefore she is entitled to the benefits of the Washington Workmen's Compensation Act, even though he had an arteriosclerotic heart condition. To prevail on this theory, Mr. Morrill would have had to be stung in the course of his employment.

After consideration of the Proposed Decision and Order and the Statements of Exceptions filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the medical evidence and is correct in sustaining the Department's rejection of the claim.

The hearing examiner's proposed findings, conclusions and order are hereby adopted as this Board's findings, conclusions and order and incorporated herein by this reference, and an additional finding is made as follows:

> 5. Mr. Morrill removed honey from the bee tree on May 26, 1967 for his own use, pleasure and benefit. He did not do so in furtherance of the interests of the International Paper Company nor for its benefit. In removing the honey, Mr. Morrill voluntarily and knowingly exposed himself to bee stings, thus voluntarily placing himself in a dangerous position having no relationship to his work or meal. At the time Mr. Morrill was stung by the bee, he was outside the scope of his employment.

It is so ORDERED.

Dated this 7th day of December, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
ROBERT C. WETHERHOLT Chairman

/s/_____
R. M. GILMORE Member

SPECIAL CONCURRING OPINION

I believe that the majority opinion is correct in finding that the hearing examiner's proposed findings and conclusions should be adopted as I do not think the weight of the evidence supports the widow-petitioner's theory that her husband's death was proximately caused by the bee sting which he sustained during his lunch hour while an employee of this employer.

However, I will have no part in any effort to limit the coverage extended to injured workmen under RCW 51.32.015. I cannot agree with what the majority has characterized as the legislative

intent in enacting RCW 51.32.015. I am unaware of any case law which supports this idea. I can find only one exception to the complete coverage of injured workmen during their lunch period (RCW 51.32.020), if such injury or death was the result of the workman's deliberate intention to produce such injury or death, or while engaged in the commission of a crime. There is no showing in this case that there is any applicability of this statute and I see no reasonable basis to impose limitations upon the right of injured workmen to receive benefits during their lunch hour which are not specifically established by statute. The argument that this deceased workman was outside the scope of his employment when stung is not material. The statute expressly provides for coverage under the Act to workmen who are injured during the course of their employment and also during their lunch period. It would seem to me that it was contemplated by the Legislature that a workman would not be in the course of his employment at such times, therefore the explicit coverage.

Therefore, I cannot join with the majority in the amendment to the proposed findings, conclusions and order of the hearing examiner by the inclusion of an additional Finding No. 5.

Dated this 7th day of December, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
R.H. POWELL Member