

Gandee, Lloyd

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

"Arising out of employment" test distinguished

An off jobsite assault on a worker, possibly motivated by the fact he had crossed a striking employees' picket line, did not qualify as an industrial injury because the worker was not in the course of employment at the time. An "arising out of employment" test cannot be substituted for the "in the course of employment" test.*In re Lloyd Gandee*, **BIIA Dec., 66,434 (1984)** [Editor's Note: *See* RCW 51.08.180(1); RCW 51.08.013.]

Going and coming rule

A worker assaulted on a public street while traveling to work was not in the course of employment even though the incident may have been in retaliation for his having crossed a striking employees' picket line.*In re Lloyd Gandee*, **BIIA Dec., 66,434 (1984)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: LLOYD GANDEE**)
2)
3 **CLAIM NO. J-266821**)
4)
 DOCKET NO. 66,434
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, Lloyd Gandee, by
8 The Cameron Law Offices, per
9 Timothy S. McCredie

10
11 Employer, Isaacson Company, by
12 Art Filon, Vice President of Planning Operations

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 John Wasberg and Dorothy Bullitt, Assistants

17
18 This is an appeal filed by claimant Lloyd Gandee on December 6, 1983, from an order of the
19 Department of Labor and Industries dated October 17, 1983. The order rejected the claimant's claim
20 for industrial insurance benefits on the grounds that at the time of the injury Mr. Gandee was not in the
21 course of his employment. The Department order is **AFFIRMED**.

22
23
24 **PROCEDURAL STATUS AND EVIDENTIARY RULINGS**

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
27 Proposed Decision and Order issued on June 21, 1984 in which the order of the Department dated
28 October 17, 1983 was reversed and the claim remanded to the Department with instruction to allow
29 the claim as an industrial injury occurring on May 13, 1983.

30
31
32 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
33 prejudicial error was committed. Said rulings are hereby affirmed.

34
35
36 **ISSUE**

37 The sole issue presented for resolution in this matter is whether Lloyd Gandee was "Acting in
38 the course of employment," as that phrase is defined in RCW 51.08.013, at the time of his injury on
39 May 13, 1983.

40
41
42 **DECISION**

43 The Proposed Decision and Order reaches the conclusion that because the unusual
44 employee-employer relationship between Mr. Gandee and Isaacson Steel Company exposed Gandee
45 to particular hazards not shared by the working public in general, and because "but for" his
46
47

1 employment at Isaacson Steel Mr. Gandee would not have been injured, claimant Gandee was acting
2 in the course of his employment at the crucial point in time. We disagree.
3

4 Considering the evidence in this matter, we find the following facts established. Lloyd Gandee
5 was among those persons hired by Isaacson Steel to replace striking ~~boilermakers~~ union members.
6 Mr. Gandee repeatedly crossed picket lines in order to work. He drove his own car to and from work,
7 and received no remuneration from the employer for this expense. On more than one occasion Mr.
8 gandee was subjected to violence and threats from the striking workers as he crossed picket lines. On
9 May 13, 1983, when the claimant was on a public street on his way to work one mile from the
10 employer's "job site" (see RCW 51.32.015 and RCW 51.36.040), two individuals tossed acid into the
11 claimant's face from their vehicle which had pulled alongside the claimant's. These individuals denied
12 any involvement in this incident and have not been charged with criminal activity. The incident
13 produced "an immediate or prompt result" which required medical treatment, and it occasioned lost
14 work time.
15

16 From the foregoing, it can be seen that if the subject incident occurred while the claimant was
17 "acting in the course of employment," it will qualify as an industrial injury, and entitle Mr. Gandee to the
18 industrial insurance benefits he seeks. However, as a matter of law, it cannot be concluded that he
19 was "acting in the course of employment" at the time he was assaulted.
20

21 In Washington, in order to receive industrial injury benefits an employee must be "within the
22 course of" employment, although the injury need not "arise out of" the employment. Boeing Company
23 v. Department of Labor and Industries, 22 Wn.2d 423 (1945). With certain exceptions, an employee is
24 not covered during those portions of his journey to and from work which occur off the jobsite." Some
25 examples of the aforementioned exceptions appear in Hamilton v. Department of Labor and
26 Industries, 77 Wn. 2d 355 (1969), Westinghouse Electric Corporation v. Department of Labor and
27 Industries, 25 Wn. App. 103 (1980), affirmed 94 Wn.2d 875 (1980), and Aloha Lumber Company v.
28 Department of Labor and Industries, 77 Wn.2d 763 (1970). None of the exceptions are applicable to
29 the facts before us. We find that because Mr. Gandee was injured (a) while going to and from work,
30 (b) not on his employer's "jobsite," and (3) not otherwise furthering the interests of his or her
31 employer's business, he was not "acting in the course of employment," and is not entitled to industrial
32 insurance benefits.
33

34 Lest it go unspoken, we observe that the thrust of the Proposed Decision and Order is to
35 substitute the "arising out of employment" test for Washington's "within the course of employment"
36
37
38
39
40
41
42
43
44
45
46
47

1 test. That is to say, it is possible that this injury arose out of work-connected matters. However, it is
2 very clear that, according to Washington statutory and case law, Mr. Gandee was not yet "in the
3 course of" employment when he was assaulted. Washington law, as it has developed to this point, will
4 not support this extension of industrial insurance benefits, and any change in the status quo is solely
5 and properly the province of the legislature.
6
7

8 **FINDINGS OF FACT**

- 9
- 10 1. On May 27, 1983, the Department of Labor and Industries received an
11 application for benefits from Lloyd Gandee alleging he had sustained an
12 injury during the course of his employment on May 13, 1983. On June 23,
13 1983, the Department issued an order rejecting the claim. A protest and
14 request for reconsideration of the Department's reject order was filed on
15 behalf of the claimant on July 28, 1983, and August 9, 1983, the
16 Department issued an order holding its June 23, 1983 order in abeyance.
17 Subsequently, on October 17, 1983, the Department issued a second
18 order rejecting this claim. A notice of appeal from the October 17, 1983
19 reject order was filed on behalf of the claimant on December 6, 1983. By
20 order dated December 29, 1983, the Board of Industrial Insurance
21 Appeals granted the appeal, assigned it Docket No. 66,434 and directed
22 that proceedings be held on the issues raised in the notice of appeal.
23
 - 24 2. On or about April 22, 1983, Lloyd Gandee was hired by Isaacson Steel
25 Company as a replacement employee for a striking worker while the
26 employer was being struck by the International Brotherhood of
27 Boilermakers, Local No. 104.
 - 28 3. In order to perform his duties as a replacement employee at Isaacson
29 Steel Company, Lloyd Gandee crossed picket lines manned by striking
30 members of the Boilermakers' union while he was going to and coming
31 from work.
 - 32 4. On more than one occasion while Mr. Gandee was going to and from his
33 work as a replacement employee at Isaacson Steel Company during the
34 strike by the Boilermakers' union, he was followed and subjected to
35 threats by persons picketing the employer.
36
 - 37 5. On May 13, 1983, while traveling to work on a public street and not on
38 premises occupied, used or contracted for by the employer for the
39 business or work process in which the employer was then engaged, Lloyd
40 Gandee was injured when acid was thrown in his face by individuals in a
41 vehicle which had pulled alongside his vehicle.
42

43 **CONCLUSIONS OF LAW**

44 Based upon the foregoing Findings of Fact, this Board hereby concludes as follows:

- 45 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
46 and the subject matter of this appeal.
47

- 1
2
3
4
5
6
7
8
2. At the time of his injury on May 13, 1983, Lloyd Gandee was not acting in the course of employment within the meaning and intent of the Washington Workers' Compensation Act.
 3. The order of the Department of Labor and Industries dated October 17, 1983, which rejected this claim on the grounds the claimant was not acting in the course of his employment at the time of his injury, is correct, and should be affirmed.

9 It is so ORDERED.

10 Dated this 5th day of November, 1984.

11
12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13
14 /s/ _____
15 MICHAEL L. HALL Chairman

16
17 /s/ _____
18 FRANK E. FENNERTY, JR. Member

19
20 /s/ _____
21 PHILLIP T. BORK Member

22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47