Carstens, Philip, Jr.

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

Personal comfort doctrine

INJURY (RCW 51.08.100)

Normal bodily movement

An attorney, who broke loose a dental crown when he bit into a piece of candy taken from a dish located on the reception desk of his employer, sustained an industrial injury. The issue in such a case was not whether the eating activity was in response to a requirement of the job, but rather, whether the eating activity was permissible and reasonably incidental to the duties of the job. *Overruling In re Carol Rivkin*, BIIA Dec., 85 1694 (1986). ***….In re Philip Carstens, Jr.*, BIIA Dec., 89 0723 (1990)** [special concurrence]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PHILIP J. CARSTENS, JR.	**)**	**DOCKET NO. 89 0723**
	)	
CLAIM NO. K 965553	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Philip J. Carstens, Jr.,
Pro Se

Employer, Lukins & Annis, P.S., by
None

Department of Labor and Industries, by
The Attorney General, per
Jacquelyn R. Findley, Assistant, and Gary W. McGuire, Paralegal

This is an appeal filed by the claimant, Philip J. Carstens, on March 9, 1989 from an order of the Department of Labor and Industries dated January 13, 1989. The order adhered to the provisions of an order dated December 20, 1988 which rejected the claim for the reason that the claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws. **REVERSED AND REMANDED**.

ISSUES

1) Whether the claimant, Philip J. Carstens, sustained an "injury,"within the meaning of RCW 51.08.100, when he bit into a piece of candy taken from a dish located on the reception desk of his employer, and broke loose a dental crown. If so,

2) Whether the "injury" occurred "in the course of employment" with his employer.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision in response to a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on December 21, 1989 in which the order of the Department dated January 13, 1989 was affirmed.

The facts in this case are not in dispute, having been stipulated to by the parties. The stipulated facts are as follows:

> On October 31, 1988 claimant selected a piece of candy from a dish located at the reception desk at Lukins & Annis, P.S., Suite 1600 Washington Trust Financial Center, Spokane, Washington 99204. The candy was either furnished by Lukins & Annis, P.S., or by the receptionist

> employed by Lukins & Annis, P.S., with full knowledge of management of Lukins & Annis, P.S. On October 31, 1988 claimant was employed as an attorney with Lukins & Annis, P.S. While chewing the candy selected from the bowl at the receptionist's desk claimant felt the crown on one of his teeth give way. He immediately called James Quigley, D.D.S. If called to testify, Dr. Quigley would testify that he examined the claimant on October 31, 1988. Dr. Quigley would further testify that the results and findings of his examination of the previously capped tooth (specifically, tooth number 18) was, on a more probable than not basis, an injury consistent with biting on a piece of candy, as described by the claimant. It is a normal and customary practice of Lukins & Annis and the employees of Lukins & Annis, with the full knowledge of Lukins & Annis, to provide food, including candy, to its staff and fellow staff members, on all major holidays, including Halloween, Christmas, Valentine's Day, etc.

11/17/89 Tr. at 3-4.

As noted by our industrial appeals judge, the facts of this case are in all material respects identical to those presented in In re Carol Rivkin, BIIA Dec., 85 1694 (1986). In Rivkin an employee of a law firm broke a tooth while chewing popcorn supplied by her employer as a job amenity. Relying on Flynn v. Dep't of Labor & Indus., 188 Wash. 346 (1936) and Longview Fibre v. Weimer, 95 Wn.2d 583 (1981), two members of the Board as then constituted held that a physical condition which results solely from the performance of a normal bodily function does not qualify as an "injury" under the Act, unless such normal bodily function or movement was made in response to a requirement of the job. Since the claimant was a law firm employee -- and not a food or popcorn tester -- the Board at that time concluded that eating popcorn was not a requirement of her job. The Board therefore upheld the Department's rejection of her claim for the reason that she had not sustained an "injury" compensable under the Industrial Insurance Act.

We have taken this opportunity to reconsider the rule announced in Rivkin. On further review of both Weimer and Flynn we do not believe those cases support the result in Rivkin. Further, we are unable to satisfactorily reconcile Rivkin with our holding in In re Donald V. Cawley, Dec'd., BIIA Dec., 41,864 (1974). In Cawley we allowed the claim of a worker who had choked on a piece of steak during a business lunch and died of asphyxiation.

In our view the proper test in a case such as this is not whether the eating activity is "in response to a requirement of the job," but rather, whether the eating activity is permissible and incidental to the duties of the job. To the extent that it is, then it falls within the "personal comfort doctrine". Under that doctrine, a worker who engages in acts which minister to personal comfort (e.g.,

eating or drinking) is not considered to have left the course of employment. 1A A. Larson, The Law of Workmen's Compensation, § 21, p. 5-5; See, also RCW 51.32.015.

A. Did the claimant sustain an "injury" within the meaning of RCW 51.08.100?

We note that the Board in Rivkin and the Department in the instant case, rejected the claims for the reason that the events at issue did not constitute "injuries" within the meaning of our Industrial Insurance Act. An "injury" is defined as:

> . . . a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

RCW 51.08.100.

In the 1936 Flynn decision our Supreme Court was presented with the claim of a widow whose husband had died of a heart attack. The evidence showed that the worker had been chewing tobacco when he called out to a fellow worker, presumably concerning a matter related to his job. In calling out he swallowed some tobacco and started to choke and cough. The medical evidence suggested that the intake of breath caused him to swallow the tobacco and the strain of the coughing placed a burden on his heart which led to his demise. Interpreting a definition of "injury" essentially identical to that of RCW 51.08.100 the Court rejected the claim, stating:

> It seems apparent that the two phrases, "of a traumatic nature" and "occurring from without," both modifying, as they do, the word "happening," can only mean that there must be an external act or occurrence which caused the injury and that such act or occurrence must be "of a traumatic nature." The source as well as the nature or character of the "happening" are both determinative factors under the statutory definition.
>
> In this case, the source or cause of the physical impairment of the deceased workman did not occur outside his body or "from without." According to the admitted facts, he called, swallowed some tobacco, coughed, strangled, and from the coughing a fatal strain was placed upon his heart. The cause therefore originated within and not without the body. But, even if there was anything without the body in the origin of the cause, then that which was without was not "of a traumatic nature."
>
> If there was a quick intake of breath following the calling, then air only entered, and air entering through natural passages and in a natural way cannot be a "happening of a traumatic nature."
>
> There was then no "happening of a traumatic nature . . . occurring from without." Therefore, there was no "injury" within the contemplation of the statute.

188 Wash. at 348-349.

While the sudden intake of air resulting in a choking on tobacco may not constitute a "happening, of a traumatic nature ... occurring from without", we cannot extend Flynn to the facts of this case. First, the Supreme Court has held subsequent to Flynn that there need not be any showing of "external physical violence" in order for a worker to demonstrate a "happening" of a "traumatic nature". Peterson v. Dep't of Labor & Indus., 40 Wn.2d 635, 638 (1952).

Second, as a "heart case", it is difficult to ascribe any great precedential value to Flynn in evaluating the compensability of a non- heart injury case. Since the Supreme Court's decision in Windust v. Dep't of Labor & Indus., 52 Wn.2d 33 (1958) "heart cases" are subject to a special "unusual exertion" requirement. Such a requirement had been evidenced in the cases, off and on, for several years. See, e.g., Mork v. Dep't of Labor & Indus., 48 Wn.2d 74 (1955); Higgins v. Dep't of Labor & Indus., 27 Wn.2d 816 (1947). However, that requirement has not been extended beyond vascular problems which are attributable to an underlying progressive, long term disease. See, Longview Fibre Co. v. Weimer, supra; Boeing Co. v. Fine, 65 Wn.2d 169 (1964); Spino v. Dep't of Labor & Indus., 1 Wn.App. 730 (1969). This Board, as well, has refused to extend the "unusual exertion" or "intensity" requirement to cases other than those involving heart attacks or cerebrovascular accidents. See, e.g., In re Robert Hedblum, BIIA Dec., 88 2237 (1989) (mental conditions); In re Gary Sundberg, BIIA Dec., 62,107 (1983) (lung blebs). In light of the special rules applicable in our state for determining whether a heart attack is a result of a "happening" we are skeptical about placing much weight on the analysis used by the Court in Flynn to reject that claim.

Finally, the instant case is distinguishable from Flynn. Mr. Carstens did not sustain a broken tooth by choking precipitated by the mere inhalation of air. Instead, he had taken candy from a dish on the receptionist's desk, placed it in his mouth, and, while chewing it, felt his crown give way. Although the traumatic injury occurred within his mouth, the "origin of the cause" of his injury was the candy itself. Flynn, 188 Wash. at 349. The candy originated "from without". Under these facts the claimant has established "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without."

We also do not believe that Weimer supports a rejection of this claim. In Weimer the Court was faced with the compensability of a worker's back condition. The evidence demonstrated that the worker had a previous history of back problems, but it also showed that his current condition was due

to bending over to pick up a metal strap at work. The holding of the case is that it is sufficient, for purposes of our Industrial Insurance Act, if a worker sustains an injury which aggravates a preexisting condition. The worker is entitled to compensation for the aggravation. The Court expressly overruled Boeing Co. v. Fine, supra, to the extent that case could be read to require that an injury must result from some movement involving an "unusual or awkward angle." Thus, the Court refused to extend a Windust unusual exertion requirement of any kind to injuries involving the back.

The Rivkin rule that the performance of a normal bodily function cannot constitute an injury "unless made in response to a requirement of the job" is based on language contained in both Fine and Weimer.[1]

In Fine the language surfaced as follows:

> In this state the statutory definition of "injury" is met when the bodily movements required by the job in the course of employment have produced a sudden and immediate back injury. Dayton v. Dep't of Labor & Indus., 45 Wn.(2d) 797, 278 P.(2d) 319 (1954). Indeed, in such cases the inquiry has usually been directed not to whether there has been an "injury," but to whether the bodily failure, if sudden and immediate, was proximately caused by an exertion required by or expended for the job. Dayton, supra. The requirements of a "traumatic" happening and one "occurring from without," are satisfied by the sudden strain, originating outside the body in answer to the demands of the job, which, when applied internally, proximately caused the bodily failure.

65 Wn.2d at 170-171 (Emphasis added).

We have reviewed Dayton v. Dep't of Labor & Indus., 45 Wn.2d 797 (1954) which was cited by the Fine Court, but we are unable to find any statement that a bodily movement must be "required by the job" or be "in answer to the demands of the job" before any disability resulting therefrom can be compensable. In Dayton the issue was whether the evidence was sufficient to support the worker's contention that he had hurt himself at work. He had claimed that he hurt his back while piling and sorting small boxes of rivets. A jury had held in his favor, but the superior court had granted a motion to dismiss based on the worker's failure to establish a causal relationship between his disability and his employment. There appeared to be some dispute as to whether the alleged injury involved some "sudden pain or strain". 45 Wn.2d at 799. The real issue, however, was whether his medical expert

[1]It should be noted that Fine also involved an unsuccessful attempt by the employer to extend a Windust "unusual exertion" requirement to injuries involving the back.

had testified in terms of a "probability" as opposed to a "possibility" of a causal relationship between the condition and the alleged injury. Although the expert did not use the magic legal words (i.e., he testified that his findings were "consistent" with the injury described) the Court held the expert's testimony was sufficient to support the jury's verdict. Nowhere in the decision is there any suggestion that the claimant was not performing his job duties at the time of the alleged injury, or that the alleged injury- producing activities were not "required by the job."

The Court in Weimer quoted Fine for the proposition which Fine had attributed to Dayton. 95 Wn.2d at 586. There was no further discussion of any legal requirement that a bodily movement causing an injury must be "in response to a requirement of the job." However, in a concluding paragraph the Court appears to have summarized its allowance of the claim as follows:

> A bodily movement (bending over) which was taken in response to a requirement of the job (lifting a metal strap) was a proximate cause of an internal bodily injury (disk condition).

95 Wn.2d at 589 (Emphasis added).

We are reluctant to rely on Weimer, Fine, or Dayton (as cited by Fine) as support for the proposition that any bodily movement producing an injury must be "in response to a requirement of the job" in order to be compensable. First, in none of those cases was there any dispute about whether the activity the worker was engaged in at the time of the alleged injury was "required by the job." The worker in Weimer was bending over to pick up a metal strap; the worker in Fine, a clerk- typist, was turning to answer the telephone; the worker in Dayton was piling and sorting boxes of rivets. It is true that in both Weimer and Dayton there was doubt, from a medical standpoint, as to whether the condition was caused by the particular employment activity -- in Weimer the worker had a preexisting back condition, and in Dayton the worker's physician was not specifically asked to testify in terms of medical probability. However, none of the cases suggest in any way that if the condition for which compensation was sought was proximately caused by the particular activity the claims should still be rejected for the reason that the activity was not "required by the job." Thus, language in the cases suggesting that an "injury" must result from a bodily movement taken "in response to a requirement of the job" is dicta.

Second, we are concerned that a "requirement of the job" rule, if applied literally, would essentially impose an "arising out of employment" requirement on the compensability of injuries. In Washington, unlike most states, an injury need only occur "in the course of employment." It need not

also "arise out of employment." See Tilly v. Dep't of Labor & Indus., 52 Wn.2d 148, 155 (1958); 1 A. Larson, The Law of Workmen's Compensation, § 6.10. Thus, we have allowed claims for injuries sustained in the course of employment even though they did not grow out of any special hazard attributable to the workplace and were, in fact, due to conditions personal to the worker. See, e.g., In re Marion Lindblom, Dec'd., BIIA Dec., 45,619 (1976) (idiopathic fall).[2]

It is true that in Cawley the worker choked on a piece of steak during a business lunch and it could therefore be said that his eating was a "requirement of the job." However, we do not think the work- relatedness of the activity has any bearing on whether an event constitutes an "injury" within the meaning of RCW 51.08.100. In Cawley the Board determined that choking on a piece of steak constituted an "injury" because it was a "sudden and tangible happening" which "occurred from without" and was clearly "traumatic." Before the "injury" could be compensable, however, it had to also be shown that it occurred "in the course of employment." It is only in the analysis of the "course of employment" issue, and not in the analysis of the definition of "injury," that the work-relatedness of the activity becomes relevant.

We are satisfied that Mr. Carstens sustained an "injury" within the meaning of RCW 51.08.100. The fact that the injury was due to his personal consumption of candy, and not in response to a requirement of his job, does not, in our view, make the loosening of his crown any less an "injury." Whether his injury is compensable under our Act, however, does depend upon whether the injury occurred "in the course of his employment."

B. Did the injury occur "in the course of employment?"

According to RCW 51.08.013:

> "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business . . . and it is not necessary that at the time an injury is sustained by a worker he or she be doing the work on which his or her compensation is based or that the event be within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

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[2]Because an injury need not "arise out of employment" we suspect that the result in Weimer would have been no different even if the claimant had hurt his back while bending over to tie his shoes or pick up some personal item off the floor instead of picking up a "metal strap." Our Supreme Court continues to recognize (at least in non-heart cases) that there is no "arising out of employment" requirement with respect to industrial injuries. See Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 480-481 (1987).

While there is no evidence that one of Mr. Carstens' job duties was to eat Halloween candy, that does not necessarily mean that by doing so he took himself out of the course of employment. For, as recognized by Professor Larson "... work-connected activity goes beyond the direct services performed for the employer and includes at least some ministration to the personal comfort and human wants of an employee." 1A A. Larson, The Law of Workmen's Compensation, § 20.10, p. 5-1. Thus, there has come to be known the "personal comfort doctrine" under which certain activities of employees, while not directly benefiting an employer, are nonetheless held to have occurred "in the course of employment."

The general rule concerning the personal comfort doctrine is stated by Professor Larson 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.

Larson, supra, § 21, p. 5-5.

Under an application of the personal comfort doctrine, injuries sustained during such activities as eating, obtaining a drink, smoking or going to the bathroom are frequently considered to have occurred in the course of employment. Larson, supra, §§ 21.20-21.53. Our courts have recognized the principle behind the doctrine. See, e.g., Tilly, supra; Young v. Dep't of Labor & Indus., 200 Wash. 138 (1939); Hill v. Dep't of Labor & Indus., 173 Wash. 575 (1933). We too have suggested that it is applicable under proper circumstances. In re Arie "Art" Vanderhoogt, BIIA Dec., 48,219 (1977) (doctrine held inapplicable).

In discussing the cases from various jurisdictions concerning "eating," Professor Larson discusses injuries which occur while eating between meals:

> The "eating" cases so far considered have dealt with more or less regular meals, of which it could be said that they were a virtual necessity to the well being and efficiency of the employee.
>
> But how about eating between meals, which is not only unnecessary, but according to some mothers reprehensible? In Vilter Manufacturing Company v. Jahncke, [192 Wis. 362, 212 N.W. 641, 57 ALR 627 (1927)] an engineer who was waiting to perform certain duties at a hospital was given some ice cream by the janitor, from which he contracted small pox and died. An award was sustained by the Supreme Court of Wisconsin on

> the theory that refreshment in the form of ice cream is no different from refreshment in the form of a drink of water. It is sufficient if the refreshment is permitted; it need not be indispensable.

Larson, supra, at § 21.24, p. 5-26.

In reference to a Louisiana case involving a worker injured by an exploding cola bottle, Professor Larson also addresses the distinction between drinking water furnished by the employer as an absolute necessity to quench thirst and drinking cola which employees have made available for their own pleasure and refreshment. He states:

> Once more the central issue is pointed up: must the personal comfort activity be a necessity or is it enough that it is an incident of the employment? The decision, affirming an award, is in line with the modern view that the refreshing activity need not be strictly necessary if it is reasonably incidental to the employment. What is reasonably incidental depends both on the practices permitted in the particular plant, which here included the maintenance of the box of cola with ice furnished by the employer, and in the customs of the employment environment generally.

Larson, supra, at § 21.30, pp. 5-26--5-27.

In the instant case the stipulated facts demonstrate that the candy responsible for Mr. Carstens' injury was either supplied by the employer or by a co-employee with the full knowledge of the employer. This is not, we might add, an uncommon business practice. The eating of holiday candy under such circumstances seems to us to be "reasonably incidental" to employment. There is no evidence that Mr. Carstens or the other employees were prohibited from consuming holiday treats while performing their other duties, nor can we see any reason to consider such conduct a deviation from the course of employment.

As Mr. Carstens pointed out in his oral argument, his claim would have clearly been compensable had he tripped while walking by the receptionist and broken his tooth falling into the receptionist's desk. We see no reason under our Act why the injury he sustained in eating candy from that desk should be any less compensable.

It is apparent from Rivkin that the Board at that time felt there must be some direct connection between the activity causing the injury and the worker's job duties. While generally such work connection will exist, we do not think it is an absolute requirement for compensability. In our state an injury need not arise out of employment or be the result of some special risk or hazard attributable to the performance of one's specific work duties. It is sufficient if the injury-producing activity, though

personal in nature, was so reasonably incidental to the job duties that it did not thereby remove the worker from the course of his or her employment. Therefore, we specifically overrule the Board's decision in Rivkin, reverse the order of the Department dated January 13, 1989, and remand this matter to the Department with direction to allow the claim.

FINDINGS OF FACT

1. On December 9, 1988, the Department of Labor and Industries received a report of accident alleging an industrial injury to the claimant occurring on October 31, 1988, while in the course of his employment with Lukins & Annis, P.S. On December 20, 1988, the Department issued an order rejecting the claim. This was protested by the claimant on January 5, 1989. On January 13, 1989, the Department issued an order adhering to the provisions of its December 20, 1988 order. On March 9, 1989, a notice of appeal was filed by the claimant. On March 17, 1989, the Board granted the appeal, assigning it Docket No. 89 0723, and directing that proceedings be held on the issues raised by the appeal.

2. On October 31, 1988, during his regular working hours, the claimant ate a piece of candy which was either supplied by his employer or by a co-employee with the full knowledge of his employer. It was the normal and customary practice of the claimant's co-employees and his employer to provide food, including candy, to the employer's staff during major holidays, including Halloween.

3. As a direct and proximate result of eating the piece of candy the claimant broke loose a crown on tooth number 18, which required the claimant to seek and obtain dental treatment.

4. The eating of candy by the claimant was an activity reasonably incidental to his employment as an attorney with the law firm of Lukins & Annis, P.S.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. The loosened crown sustained by the claimant on October 31, 1988 while eating a piece of candy was the result of an "injury" within the meaning of RCW 51.08.100.

3. At the time the claimant ate the piece of candy on October 31, 1988 he was acting in the course of his employment with his employer, within the meaning of RCW 51.08.013, in that his eating activity was reasonably incidental to and not a deviation from his duties as an attorney.

4. The order of the Department of Labor and Industries dated January 13, 1989, which adhered to the provisions of an order dated December 20, 1988 which rejected the claim is reversed, and this matter is remanded to

the Department with direction to allow the claim and take such further action as indicated by the law and the facts.

It is so ORDERED.

Dated this 16th day of July, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

SPECIAL CONCURRING STATEMENT

I concur with the result reached by my colleagues in this case, and specifically concur with and adopt the Findings of Fact and Conclusions of Law.

I also feel, after much more reflection and consideration, that the "rule" in Rivkin put forth by the prior Board chairperson and myself, purporting to say, under the facts in that case, that the claimant had not sustained an "injury" within the meaning of RCW 51.08.100, was inappropriate. Under the facts in Rivkin, the claimant, by eating popcorn and breaking her tooth therefrom, did sustain "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without." But by saying that eating of the popcorn was not "a requirement of her job," we were effectively holding that by doing so she removed herself from the course of her employment, at least temporarily or momentarily. I am now persuaded, after lengthy reconsideration, that such conclusion was incorrect. It would be equally incorrect under the facts here.

It would be unreasonable to hold that Mr. Carstens, who was clearly within the time and space limits of his employment, abandoned and removed himself momentarily from that employment merely by eating a piece of holiday candy from the bowl on his employer's reception desk, which candy, with other food, was normally and customarily provided for all the staff during all holidays. I believe that the "personal comfort" doctrine is applicable here. As has been noted, our courts have recognized the principle behind the doctrine. So has this Board, in Vanderhoogt, supra, in which we recognized the application of the doctrine to a variety of employment situations, as set forth in Larson's treatise, (although we held that its application in that particular case would have been an "extension and distortion of the concept").

I am particularly persuaded by Professor Larson's comments on the "personal comfort" activity, wherein he states that:

> .... the modern view [is] that the refreshing activity need not be strictly necessary if it is reasonably incidental to the employment. What is reasonably incidental depends both on the practices permitted in the particular plant, which here included the maintenance of the box of cola with ice furnished by the employer, and in the customs of the employment environment generally. (Emphasis added)

What occurred in Mr. Carstens' case -- and in Ms. Rivkin's case, too -- is a common practice in many work-places, especially in office environments. In fact, the personal comfort activities -- the "amenities" -- are often, as a practical matter, inextricably intertwined with direct job duties.

I concur with my colleagues' legal conclusion that Mr. Carstens, at the time he ate the piece of candy on October 31, 1988, was still in the course of his employment in that this eating activity was reasonably incidental to, and not a deviation from, his employment duties.

As a final note, I wish to observe that I am not in complete accord with my colleagues' discussion of the Weimer and Fine Supreme Court cases, with regard to the importance, or lack thereof, of a normal bodily movement being "in response to a requirement of the job." That requirement, I feel, can be very significant in some cases, as it may relate to the "course of employment" issue, where the "personal comfort" doctrine is not involved. In particular, I refer to, and do not accept, the Board majority's "assumption" contained in footnote 2, page 10, that the result in Weimer would have been no different even if the claimant "had hurt his back while bending over to tie his shoes or pick up some personal item off the floor instead of picking up a metal strap." That is still an open question, in my view.

Dated this 16th day of July, 1990.

/s/_____
PHILLIP T. BORK Member