Bemis, Kimberly

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

Training programs

Where a participant in an employer-sponsored training program appears to be acting under an implied contract of employment, which includes provisions for termination for absences or limitation from access to future employment with the employer, the participant is within the course of employment if she sustains an injury during the program. **….*In re Kimberly Bemis*, BIIA Dec., 90 5522 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-12714-8.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KIMBERLY J. BEMIS	**)**	**DOCKET NO. 90 5522**
	)	
CLAIM NO. T-446053	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kimberly J. Bemis, by
Cohen & Keith-Miller, per
Verlaine Keith-Miller

Self-insured Employer, Alaska Airlines, by
Roberts, Reinisch, MacKenzie, Healey & Wilson, per
Michael H. Weier

This is an appeal filed by the claimant, Kimberly J. Bemis, on October 12, 1990 from an order of the Department of Labor and Industries dated August 30, 1990 which affirmed a Department order dated July 9, 1990 which rejected the claim because there was no proof of a specific injury at a definite time and place in the course of employment, because the claimant's condition was not the result of an industrial injury as defined by the laws of the state of Washington, and because no licensed physician's report or medical proof had been filed as required by law. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 claimant to a Proposed Decision and Order issued on October 22, 1991 in which the order of the Department dated August 30, 1990 was affirmed.

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

As a preliminary matter, the claimant alleges that because the self-insured employer did not appeal from the Department order of August 30, 1990, it could not properly raise a defense of lack of employment relationship when the claimant appealed. RCW 51.52.060 provides that "any worker, beneficiary, employer or other person 'aggrieved' by an order, decision or award of the department must, before he appeals to the courts, file with the board and director, by mail or personally, within sixty days...". The self-insured employer was not aggrieved by the August 30, 1990 order. One of the reasons that the Department gave for rejecting the claim was that there was "no proof of a specific injury at a definite time and place in the course of employment." (Emphasis added.) As the appealing

party, the claimant had the burden of proving all material elements of her claim, including the existence of an employment relationship. The industrial appeals judge properly permitted the self-insured employer to raise the defense at the hearing.

The Department order of August 30, 1990 included failure to file a medical report as required by law as one of the bases for rejecting the claim. The parties agreed at hearing that a report had, in fact, been filed. That issue is, therefore, not before us on review.

DECISION

The issues on appeal are whether claimant Kimberly J. Bemis was an employee of Alaska Airlines for industrial insurance purposes on April 27, 1990, and whether she suffered an industrial injury on that date in the course of that employment. We find for the claimant on both issues.

In the spring of 1990, Ms. Bemis applied for admission to an Alaska Airlines flight attendant training program and employment with Alaska Airlines in that capacity. After she applied, Alaska Airlines conducted a background check on Ms. Bemis. The airline also required that she pass a physical examination performed by a physician of its choice before entering training.

The training program consisted of 5 weeks of curriculum designed to meet the requirements established by the Federal Aviation Administration in 14 CFR Ch.1, Sec. 121.400 et seq., and to familiarize trainees with specific Alaska Airlines policies and procedures. The first week of training introduced trainees to Alaska Airlines Company policies; the last week included Alaska Airlines catering and food service requirements. The remaining training and testing familiarized the participants with the characteristics, operation, and safety features of particular aircraft operated by Alaska Airlines.

Absence from any portion of the training disqualified a trainee from completing the course. Course attendance was mandatory both for novices, like Ms. Bemis, and for flight attendants with experience at other airlines, although the curriculum apparently varied slightly for experienced flight attendants.

Classes were conducted on premises owned by Alaska Airlines and taught and administered by Alaska Airlines employees. Flight and simulation training was conducted in aircraft owned by Alaska Airlines. Participants who successfully completed the program were guaranteed employment with Alaska Airlines. Ms. Beemis was eventually dismissed or released from the program because she did not meet Alaska Airlines subjective criteria although she had passed the objective portions of the instruction.

Alaska Airlines bore the cost of the training. In addition each participant received $8.00 per diem from Alaska Airlines during the period of the course. This was a flat rate, daily allowance paid to all participants. Ostensibly it was to pay for lunches or food although receipts were apparently not required by Alaska Airlines.

Ms. Bemis began her course of flight attendant training on April 16, 1990. On April 27, 1990, the course included an airplane emergency evacuation drill in which the students deployed and used an inflatable escape slide. An actual Alaska Airlines aircraft was utilized for this drill. The students were to learn the proper way to exit from an aircraft under emergency conditions. For the purposes of training, the concrete hangar floor/runway at the bottom of the slide was covered with foam mattresses. Two instructors were stationed at the base of the slide to catch trainees as they slid down.

Ms. Bemis deployed the slide and was the first trainee to descend. As instructed, she crossed her arms over her chest, jumped from the plane onto the slide and slid to the bottom. Her recollection is that the instructors failed to catch her and she landed very hard on her tailbone. She experienced immediate pain, which continued through the balance of her participation in the training program. She was unable to consult a doctor until she left the training program, because absence from any of the classes would have resulted in her dismissal from the course.

John Mace and Jim Alford, the Alaska Airlines instructors who were stationed to catch Ms. Bemis as she descended the slide, recall catching her. They do not remember Ms. Beemis having any physical problems after completing the slide exercise. We do not agree with our industrial appeals judge that these gentlemen did not have specific reason to remember Ms. Bemis out of a class of forty students. Throughout the course, Ms. Bemis displayed a variety of physical ailments which required her to use heating pads and ice packs. This behavior would have attracted the attention of the average person, let alone persons who were evaluating her physical fitness to work as a flight attendant. However, the fact that the instructors remember her does not mean that she was not actually injured during the evacuation exercise. We do not find that their testimony is persuasive on this point.

Ms. Bemis presented the corroborating testimony of a fellow trainee who recalled her complaining of pain on the day of the exercise. Further, her attending chiropractor diagnosed acute lumbosacral sprain/strain with aberrant, abnormal joint motion in her lumbar spine, lumbar subluxations and anterior displacement of the coccyx. He related these diagnoses to the incident

described by Ms. Bemis. Alaska Airlines presented no contradictory medical testimony. Ms. Bemis denied that her back complaints pre-existed the alleged injury. She had previously passed the Alaska Airlines physical examination for acceptance into the training program, which tends to corroborate her history on that point. The claimant clearly prevails on the issue of whether she suffered an injury during the slide evacuation exercise on April 27, 1990.

We turn now to the more difficult question of whether Ms. Bemis' injury occurred while she was in the course of employment with Alaska Airlines. Our industrial appeals judge relied on the provisions of RCW 51.12.130[1] to conclude that there was no employment relationship. Mindful of the rule that statutes must be construed in their entirety and not piecemeal, see, e.g., Donovick V. Seattle-First Nat. Bank, 111 Wn.2d 413, 757 P.2d 1378 (1988), we conclude that RCW 51.12.130 does not apply in this case.

The self-insured employer proposed, and our industrial appeals judge agreed, that the language of RCW 51.12.130, entitled "Registered apprentices and trainees", operates to exclude all "unregistered" apprentices and trainees from coverage under Title 51 RCW. In fact, the actual impact of the statute is extremely limited. The statute applies only to those registered apprentices and trainees who are "participating in supplemental and related instruction classes conducted by a school district, a community college, a vocational school, or a local joint apprenticeship committee" and who do not receive wages during the time that they are attending the described supplemental instruction

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[1]RCW 51.12.130 provides, in pertinent part:

> (1) All persons registered as apprentices or trainees with the state apprenticeship council and participating in supplemental and related instruction classes conducted by a school district, a community college, a vocational school, or a local joint apprenticeship committee shall be considered as workers of the state apprenticeship council and subject to the provisions of Title 51 RCW, for the time spent in actual attendance at such supplemental and related instruction classes
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> …
>
> (3) Only those apprentices or trainees who are registered with the state apprenticeship council prior to their injury or death and who incur such injury or death while participating in supplemental and related instruction classes shall be entitled to benefits under the provisions of Title 51 RCW.
>
> (4) The filing of claims for benefits under the authority of this section shall be the exclusive remedy of apprentices and trainees and their beneficiaries for injuries or death compensable under the provisions of Title 51 RCW against the state, its political subdivisions, the school district, community college or vocational school and their members, officers or employees or any employer regardless of negligence.
>
> (5) This section shall not apply to any apprentice or trainee who has earned wages for the time spent in participating in supplemental and related instruction classes.
>
> (Emphasis added.)

classes. The effect of the statute is that registered trainees and apprentices are "considered as workers of the state apprenticeship council and subject to the provisions of Title 51 RCW, for the time spent in actual attendance at such supplemental and related instruction classes."

RCW 51.12.130 does not create a blanket exclusion from coverage for workers who are trainees or apprentices but who are not registered with the state apprenticeship council. For example, a carpenter's apprentice on a construction site, who receives an hourly wage while actually framing buildings under the control and direction of the employer, is entitled to benefits if injured during that activity, regardless of whether he or she is registered with the apprenticeship council.

What RCW 51.12.130 does for registered apprentices and trainees is create a right to benefits under circumstances where the right would not ordinarily exist: during training conducted by a third party on premises not controlled by the employer! In order to equitably assess the costs of that coverage, the statute itself further creates a special employment relationship between the identified class of workers and the state apprenticeship council. Section (3) of the statute clarifies that the relationship between the worker and the apprenticeship council exists, and coverage under this provision applies, only while the worker is attending the specified supplemental instruction classes.

Just as RCW 51.04.010 abolishes any cause of action by an employee against an employer for work-related injuries, Section (4) of RCW 52.12.130 restricts covered apprentices and trainees from suing the entities who provide the supplemental instruction covered by the statute. Any broader interpretation of RCW 51.12.130 is absurd in light of the stated purpose of the Industrial Insurance Act to provide "sure and certain relief for workers, injured in their work...." RCW 51.04.010. Ms. Bemis was not a registered trainee or apprentice nor is she required to be under the facts of this case in order to establish her entitlement to benefits under Title 51 RCW. She was not attending "supplemental and related instruction" at one of the institutions specified in the statute. She was receiving initial, primary, job training from Alaska Airlines and its employees at an Alaska Airlines facility. Much was made in the record that this training was under the requirements "imposed" by the F.A.A. Presumably this was an effort to demonstrate that this flight attendant training was under the auspices of a "third party" as contemplated by RCW 51.12.130. This is clearly not the case as this training was completely under the sponsorship of Alaska Airlines and for its benefit. This was not a situation of the F.A.A. acting as a "vocational technical school" providing supplemental and related instruction classes.

The question remains whether she was an employee of Alaska Airlines during that initial training.

A settled principle of industrial insurance law in this state is that "while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act." Olympia Brewing Company v. Dep't of Labor & Indus., 34 Wn.2d 498, 505, 208 P.2d 1181 (1949). See, also, Clausen v. Dep't of Labor & Indus., 15 Wn.2d 62, 69, 129 P.2d 777 (1942); Berry v. Dep't of Labor & Indus., 45 Wn.App. 883, 729 P.2d 63 (1986). In this case, Ms. Bemis bears the burden of proving that she had a contract of employment with Alaska Airlines.

A contract of employment may be express or implied. Clausen v. Dep't of Labor and Indus. The Clausen court, at 69, identified criteria for evaluating the existence of an implied contract of employment.

> It is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee. Ordinarily, no single feature of the relation is determinative, but all must be considered together. Particularly, it is important to consider the following elements: the right to control and discharge, payment of wages, and the contractual relationship, whether express or implied. 1 Schneider, Workmen's Compensation Text (Perm. Ed.) 575, Sec. 220.

All of the elements identified in Clausen were present in the relationship between Ms. Bemis and Alaska Airlines.

The self-insured employer had a high degree of control over its trainees during the five week course. Attendance was mandatory for approximately 8 hours per day. Absence even for a medical condition was grounds for summary dismissal from the course. The training location and equipment belonged to Alaska Airlines. The trainers were Alaska Airlines employees.

As previously noted, Alaska Airlines interposes as a defense that the course content and format was mandated by the F.A.A. and that, therefore, such control as was exercised was exercised by the F.A.A. This argument fails, especially in the face of the actual language of 14 CFR Ch. 1, Sec. 121.405, which only requires that the airline (certificate holder) submit its training program for approval. The program will be approved so long as it meets the minimum subject matter and hours required by the F.A.A. The actual training provided by Alaska Airlines included numerous components of procedures peculiar to Alaska Airlines, specifically a full week devoted to Alaska Airlines policies as well as additional time devoted to other Alaska Airlines procedures including food service and catering. The 8 hour per day format was apparently selected by Alaska Airlines, as was the training location and

the trainers. The airplanes on which the participants trained were specific to the types of aircraft used by Alaska Airlines.

In sum, Alaska Airlines tailored the training program to suit its specific needs as well as any residual requirements the F.A.A. may have had.

Alaska Airlines retained the right to discharge trainees from the program and from access to future employment with Alaska Airlines. Ms. Bemis was, in fact, discharged from the program a few days before the classes ended because the Alaska Airlines employees who were training her did not think she was physically strong enough to meet Alaska's requirements. If the training experience was truly an arms-length, generic, transaction the airline could have let her complete the training and simply directed her to seek employment with another airline. In practice, however, completion of the training guarantees future employment with Alaska Airlines. Ms. Bemis was not only dismissed from the training program, she was discharged from permanent employment with Alaska Airlines.

Alaska Airlines alleges that an essential feature of an employment relationship is missing because Ms. Bemis received no wages during the training course. RCW 51.08.178 defines wages for the purpose of calculating benefits as including "the reasonable value of board, housing, fuel or other consideration of like nature received from the employer as part of the contract of hire." This Board has previously held that per diem paid for the cost of meals must be included as wages for the purpose of calculating time loss compensation benefits. In re: James A. Young, Dckt. No. 89 3233 (May 1, 1991). In the Young case, the worker received per diem in addition to an hourly wage. The Department calculated benefits solely on the basis of the hourly wage. We concluded that as the worker had to incur the expense of eating whether or not he was on the job, the per diem was intended as an additional economic benefit to the worker, not as mere reimbursement for a work-related expense.

Similarly, Ms. Bemis would have the expense of eating lunch whether she attended the training program or not. Nor is the fact that the per diem was only $8.00 and not received in conjunction with an hourly wage or salary determinative.

The value of the course itself was further compensation. Neither party introduced evidence of the costs incurred by Alaska Airlines in providing training, but consider the elements involved. Alaska paid for the training location, the aircraft used for training, the personnel who conducted the training, and any materials incidental to the training. The trainees bore none of this expense by way of fees or educational "tuition" and, to that extent, they received "consideration of like nature" from Alaska Airlines.

Finally, Alaska Airlines guaranteed that upon successful completion of the training course, each participant would be considered "on call" as an Alaska Airlines flight attendant. This guarantee, along with the control the airline exercised over the trainees' attendance at the training program, the right to discharge them from the course at any time, and the consideration paid to the trainees in the form of per diem and free training, add up to an implied contract of employment at the onset of training.

Even in light of an implied contract of employment, Ms. Bemis had the burden of proving that an injury incurred during training, but before the actual beginning of full flight attendant duties, constituted an injury in the course of her employment. RCW 51.08.013 defines "course of employment" as an action undertaken 1) at the employer's direction or 2) in furtherance of the employer's interest. It is clear from the record that Ms. Bemis undertook flight attendant training at the direction of Alaska Airlines. She prevails, furthermore, even under an analysis of whether the training furthered the employer's business.

There is no Washington case law directly addressing injury to a worker who is being trained but has not yet begun performing the full duties of the intended job. Our research discloses a brief, but highly relevant, line of cases in other jurisdictions addressing the question of workers injured during "tryout" periods. The leading case on the issue is Smith v. Venezian Lamp Co., 168 N.Y.S.2d 764, 5 A.D. 12, (1957). In that case, the claimant had applied for a job as a lamp polisher with the defendant employer. The defendant agreed to an unpaid tryout. Mr. Smith received a lamp to polish. During the tryout, the lamp fell from the polishing machine, injuring him. The New York court concluded, at page 766, that "...[Where] the tryout involves an operation which would ordinarily be viewed as hazardous under the Worker's Compensation Law a special employment exists.... A tryout is for the benefit of the employer, as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the statute."

The common threads throughout the cases adopting the reasoning in Smith v. Venezian Lamp Co. are the risks to which the applicant is exposed, control exercised by the employer, and the benefit to the employer. See, e.e., Bode v. O. & W. Restaurant, 193 N.Y.S.2d 845, 9 App. Div.2d 969 (1959), as well as cases in other jurisdictions. Laeng v. Workmen's Compensation Appeals Board, 100 Cal.Rptr. 377, 494 P.2d 1 (1972); Moore v. Gundelfinger, 56 Mich.App. 73, 223 NW2d 643 (1974). According to the California court in Laeng, the benefit to the employer derives from the employer's ability "to select workers who are likely to be better suited for the available position." On that basis, the

Laeng court extended coverage to an applicant for the job of refuse collector who was injured during a pre-employment agility test.

While the Oregon Court of Appeals declined to extend coverage to an applicant injured during a pre-employment agility test, it distinguished that case from the circumstance where an employee is injured while engaged in pre-employment training. The court noted that under the latter circumstance the worker is "nevertheless performing services for the employer, namely, receiving training for the future benefit of the employer." In re: Dykes v. State Accident Ins. Fund, 47 Or.App 18, 7613 P.2d 1106,1107 (1980).

It is apparent that Alaska Airlines requires access to a pool of F.A.A. certified flight attendants. As an employer, it derived considerable benefit from Ms. Bemis' and her classmates' participation in the training which leads to that certification. Ms. Bemis was injured in the course of the required training. We must conclude, therefore, that she was injured while furthering the interest of her employer, Alaska Airlines.

The Department order of August 30, 1990 which rejected the claim because there was no proof of a specific injury at a definite time and place in the course of employment, because the claimant's condition was not the result of an industrial injury as defined by the laws of the state of Washington, and because no licensed physician's report or medical proof had been filed as required by law, is incorrect. The order should be reversed and the claim remanded to the Department with direction to allow the claim and direct the self-insured employer to provide further benefits according to law.

Proposed Finding of Fact No. 1, and Proposed Conclusion of Law No. 1 are hereby adopted as this Board's final finding and conclusion. In addition, the Board makes the following findings and conclusions:

FINDINGS OF FACT

2. In the spring of 1990, claimant Kimberly J. Bemis applied for employment as an Alaska Airlines flight attendant. Upon completion of a two month interview process, Alaska Airlines approved her application and directed that she attend flight attendant training at an Alaska Airlines facility staffed by Alaska Airlines employees.

3. In accordance with the requirements of 14 CFR Ch.1, Sec. 121.400 et seq., Alaska Airlines is required to use only F.A.A. certified flight attendants on its commercial flights.

4. The five-week training program Ms. Bemis attended starting April 16, 1990 was designed by Alaska Airlines to satisfy the requirements of the Federal

Aviation Administration for certification of flight attendants, and to meet the company needs specific to Alaska Airlines. All facets of the training, including the specific hours of attendance and dates of training, were controlled by Alaska Airlines.

5. Alaska Airlines provided flight attendant training to Ms. Bemis and other program participants free of charge.

6. Alaska Airlines paid Ms. Bemis and other participants in the flight attendant training program per diem of $8.00 per day for each day of the training.

7. Graduates of the Alaska Airlines flight attendant training course are automatically placed on the rolls of on-call flight attendants available to serve on Alaska Airlines' commercial flights without undergoing any further employment application process.

8. Alaska Airlines retained the right to discharge participants from the flight attendant training program prior to its conclusion, thereby precluding them from permanent employment as Alaska Airlines flight attendants.

9. Ms. Bemis' attendance at the flight attendant training program was in the course of her employment with Alaska Airlines in that it furthered the airline's business by contributing to the pool of its certified flight attendants.

10. On April 27, 1990, while in the course of her employment with Alaska Airlines, Kimberly J. Bemis injured her low back and coccyx when she landed hard on her buttocks during a flight evacuation exercise in which she exited from an Alaska Airlines aircraft on an inflatable slide or evacuation chute to the mattress-covered hanger floor.

11. Ms. Bemis' physical condition causally related to the industrial injury of April 27, 1990 was acute lumbosacral sprain/strain with aberrant, abnormal joint motion in her lumbar spine, lumbar subluxations and anterior displacement of the coccyx.

12. Medical proof of the injury was filed as required by the Industrial Insurance Act.

CONCLUSIONS OF LAW

2. The per diem and tuition-free training provided by Alaska Airlines to Kimberly J. Bemis constituted wages within the meaning of the provisions of RCW 51.08.178.

3. On April 27, 1990, Kimberly J. Bemis was a covered worker within the meaning of the industrial insurance act and was engaged in the performance of duties in the course of her employment with Alaska Airlines as defined in RCW 51.08.013.

4. As an employee of Alaska Airlines, Kimberly J. Bemis was not a trainee or apprentice within the meaning and special coverage provided by RCW 51.12.130.

5. The Department order of August 30, 1990, which affirmed a Department order dated July 9, 1990 which rejected the claim because there was no proof of a specific injury at a definite time and place in the course of employment, because the claimant's condition was not the result of an industrial injury as defined by the laws of the state of Washington, and because no licensed physician's report or medical proof had been filed as required by law, is incorrect. The order should be reversed and the claim remanded to the Department with direction to allow the claim for the injury incurred on April 27, 1990, and direct the self-insured employer to provide further benefits according to law.

It is so **ORDERED**.

Dated this 1st day of May, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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