Oneida Appeals Commission

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Trial Court

Doris Smith, Deceased and
David Smith, surviving spouse and
Special Administrator of the Estate of Doris Smith,
Petitioners,

vs.

Human Resources Department-Benefits and
Crawford & Company Insurance,
Respondents.

Docket No: 06-TC-021

Date: August 9, 2006

DECISION AND JUDGMENT

The above-captioned case has come before the Oneida Appeals Commission Trial Court. Judicial Officers Anita Barber, Gerald Cornelius and Leland Wigg-Ninham, presiding.

Background

Petitioner, David Smith, is seeking benefits under the Oneida Worker's Compensation Ordinance, Chapter 13, based on the injury and eventual death of his wife, Doris Smith. While at work on the employer's premises and on the clock, Mrs. Smith tripped when walking towards the door to take a cigarette break during her lunch hour. The parties have stipulated to the facts. In order for Petitioner to recover benefits, we must find that her injury and death "arose out of" and was "in the course of employment" within the meaning of those terms as used in Chapter 13 of the Oneida Tribal Ordinances. We so find and rule in favor of the Petitioner.

Before we proceed to the merits of the case, a brief review of the procedural history is in order. Petitioner filed a hearing application with the Oneida Appeals Commission on March 16, 2006.

The types of relief sought include Total Temporary Disability from September 27, 2005 to October 5, 2005; medical expenses; death and funeral benefits.

Respondents submitted answers and a brief in support of answers responding to the Hearing Application and Claim Petition on April 10, 2006. Respondents assert that Mrs. Smith's injuries did not arise out of her employment and were not in the course of her employment. On April 14, 2006, Petitioner submitted claimant's statement of position.

A pre-trial hearing was held on Tuesday, April 18, 2006, at which time the parties essentially agreed the matter was ripe for summary judgment. The parties agreed to reach a stipulation on the facts and file briefs on the legal issues.

On May 18, 2006, Claimant filed the stipulated facts and a brief in support of summary judgment. On June 16, 2006, Respondent's Motion for summary judgment was submitted. On June 28, 2006, Claimant filed a responsive brief in support of summary judgment. We now turn to the merits.

Issue

Did Mrs. Smith's injury and death arise out of and occur within the course of her employment?

Finding of Facts

The relevant facts have been agreed to by stipulation of the parties. We adopt the parties' stipulation as our findings of fact and recite the most relevant facts here. Doris Smith, 77, was employed by the Oneida Tribe for 19 years as a custodian at the Norbert Hill Center. Her gross weekly wage was $423.20 at the time of her injury. On September 26, 2005, during her lunch break, Mrs. Smith decided to smoke a cigarette on the employer's premises, but outside the building. As Mrs. Smith walked through the kitchen to leave the building, she tripped and fell on some rolled up rugs inside the building. The fall caused her to fracture her right kneecap.

Her injury caused pulmonary emboli[1] to develop and as a result she passed away on October 5, 2005.

Analysis

Under Section 13.11-2, the burden of proof is upon the Petitioner to establish his claim by a preponderance of the evidence. The parties appear to agree that Ms. Smith's fall, on the employer's premises, caused the injuries that led to her death. Therefore, we share the parties' assumption that causation is not an issue. The only question unresolved is whether her injury and death are compensable under the Worker's Compensation Ordinance. Under Section 13.6-1, if the employee's death arose out of and was in the course of employment, the employer "shall be liable for the payment to . . . the employee's surviving spouse . . . as provided in this law." The parties appropriately have focused their arguments on whether Ms. Smith's injury and subsequent death "arose out of" and were "in the course of" her employment. We turn now to this question.

Unfortunately, there are no sources of Oneida law interpreting the terms "arising out of" and "in the course of." Chapter 13 does not define these terms. No prior Oneida Appeals Commission case that we are aware of interprets them. Although some cases examine whether an injury was "work related,"[2] that is not the phrase before us. Respondents cite Chantell Skenandore v. Human Resources Department-Benefits et al., No. 05-TC-016, as favorable to their cause, however that case turned on factual issues and did not interpret, as a matter of law, the terms at issue here.

In some jurisdictions, including Wisconsin, the worker's compensation law is considered a remedial statute intended to provide injured employees with compensation in lieu of wages and therefore the laws are construed liberally to grant benefits. Kiel v. Industrial Commission, 164 Wis. 441, 444-45, 185 N.W. 68 (1916). However, the tribal ordinance rejects this approach:

[1] Although the parties' stipulation does not specify, a pulmonary embolism occurs when a blood clot develops, usually in the legs, becomes dislodged and travels to the lungs where it blocks an artery and can cause death.
[2] See e.g., Young v. Oneida Human Resources Dep't., No 02-TC-05; Skenandore v. Oneida Human Resource Dep't Benefits, et al., No. 04-TC-094.

"The law is not remedial in any sense and is not to be given a broad liberal construction in favor of any claimant or employee." Sec. 13.1-1.

Nonetheless, there are three facts here that persuade us that Ms. Smith's fall should be considered a covered injury. First, Mrs. Smith was on the employer's premises; second, she was being paid for her time; and third, she was walking through the kitchen to take a cigarette break due to the employer's policy that cigarettes must be smoked outside.[3] The first two facts alone provide firm ground for ruling that Mrs. Smith's injury meets the arising out of-in the course of standard.

We find that an injury to an employee on the employer's premises and while being paid create a rebuttable presumption that the injury arises out of and is in the course of employment. Employment means being at work and being paid to work. This presumption may be rebutted by evidence that the employee, at the time of his or her injury, was making a substantial deviation from her regular employment activities.

Walking through the employer's kitchen to smoke a cigarette is not a substantial enough deviation to overcome the presumption that the injury arose out of and in the course of Mrs. Smith's employment. Mrs. Smith was at work in the service of her employer. Employees have scores of personal decisions or moments at work. Employees go to the bathroom, attend to minor health issues, socialize, make personal phone calls, smoke cigarettes and take short breaks. Even with Chapter 13's disclaimer that the law is not remedial, we are not convinced these minor deviations from the actual work of the employee would mean exclusion from worker's compensation coverage. When performing these personal tasks, the employees are still within the workplace environment and under the direction of the employer. If the Tribe intended coverage to be narrower, it can change the law.

[3] Although the parties' stipulation of facts does not include it, both parties discuss and assume that the employer's Clean Air Policy was in effect and required Mrs. Smith to leave the building when smoking a cigarette. We rely on the tacit agreement of the parties that Mrs. Smith was subject to the Clean Air Policy and was walking through the kitchen to smoke a cigarette outside the building as required by the policy.

Respondent argues Mrs. Doris Smith was not in the course of her employment when she was injured and her injury does not fit the definition of "Covered Injury/Accident" under Oneida Law.

Respondent cites Chapter 13's definition of "Covered Injury/Accident:"

> Mental or physical harm to an employee caused by accident or disease and arising out of and in the course of employment. Injury includes mental harm or emotional stress or strain without physical trauma, which arises from exposure to conditions or circumstances beyond those common to occupational and/or non-occupational life and is predominantly work related, extraordinary or unusual.
> Sec. 13.3-12.

Despite Respondents' arguments, the second sentence of this definition is not applicable. It specifically addresses mental harm or emotional stress or strain without physical trauma. Mrs. Smith's injuries are physical. The Respondent goes on to state Mrs. Smith's injury was caused by an accident that arose from her personal choice to smoke a cigarette during her lunch break. The employee typically took a thirty-minute lunch break during her shift. However, the employee was paid for the entire eight-hour shift.

Respondents emphasize that Mrs. Smith's decision to smoke a cigarette was a "personal choice." Without stating so directly, Respondents imply that Mrs. Smith's personal choice means her injury could not have arisen out of or been in the course of her employment. We disagree. Mrs. Smith was on a paid break and following the Tribe's Clean Air Policy that prohibits tribal employees from smoking inside the building. If violated, the person in violation could be disciplined.

Therefore, while Mrs. Smith's decision to smoke was her own, the employer dictated *where* Mrs. Smith was required to smoke. This factor strengthens our finding that Mrs. Smith's death arose out of and was in the course of her employment: when Mrs. Smith fell, she was walking towards the door due to the employer's policy, not her own choice. The more the employer is in control of the employee's time, space and environment, the more reasonable it is to expect that the employee will receive the benefit of the exclusive remedy of worker's compensation.

Respondents cite Chantell M. Skenandore v. Human Resources Department, (Docket #05-TC-06, March 24, 2005, p.2) in favor of their case. However, in this case the employee could not clearly remember if she was performing work duties when she injured her knee. The decision in this case was for the Respondent. In our view, the Chantell M. Skenandore case is not relevant to Mrs. Smith's. Ms. Skenandore did not remember if she was performing her job duties when she was injured.

Conclusions of Law

In reviewing the documentation submitted for consideration, the Trial Court finds Mrs. Smith's injury and death both arose out of and were in the course of her employment. She was on a paid lunch break. Therefore, her time was the employer's time. The Court also finds the employee was following a tribal regulation requiring her to smoke outside.

It has been determined the employee was punched in, being paid and working on the employer's premises.

Decision

Under the Worker's Compensation Ordinance, Mr. Smith is entitled to the death benefit described in Sec. 13.6-7. Mr. Smith is entitled to receive 50% of Mrs. Smith's weekly wage or $211.60 until the total benefit reaches four times Mrs. Smith's average annual earnings. The Court does not have sufficient information to determine Mrs. Smith's average annual earning. If the parties cannot agree on this amount, either party may petition the Court for a determination.

Mrs. Smith's estate is entitled to receive benefits for her Total Temporary Disability for the period of September 27, 2005 to October 5, 2005. Under Sec. 13.6-10(d), her estate is entitled to 60% of the average weekly wage not to exceed 200 weeks. The Court does not have sufficient information to calculate Mrs. Smith's average weekly wage in accordance with Sec. 13.6-6. The parties will make this calculation and apply the ordinance appropriately. If the parties cannot agree, either party may petition the Court for a determination.

Mr. Smith is awarded $1,309.36 for unreimbursed medical expenses in accordance with Sec. 13.8-2.

Mr. Smith identifies $1,172.22 in unreimbursed funeral expenses. Funeral expenses are not identified as a benefit under Sec. 13.6. Therefore, no funeral expenses are awarded.

By authority vested in the Oneida Appeals Commission pursuant to Resolution 8-19-91-A, by the Oneida General Tribal Council, it is so held on this the 9th day of August, 2006, in the matter of Doris Smith, Deceased and David Smith, Surviving Spouse and Special Administrator of the Estate of Doris Smith v. Oneida HRD-Benefits and Crawford & Co. Insurance, Docket No. 06-TC-021.

Anita Barber, Lead Judicial Officer

Gerald Cornelius, Judicial Officer

Leland Wigg-Ninham, Judicial Officer