Cleary, Eileen

BOARD

New evidence

The record will not be opened to allow the worker to present additional evidence where there is no showing that the evidence could not have been discovered with reasonable diligence prior to the conclusion of the hearings. **….*In re Eileen Cleary*, BIIA Dec., 92 1119 (1993)**

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

Sidewalk

A worker is not covered if injured on a sidewalk on the employer's premises unless the worker is in the course of employment at the time of the injury. A public sidewalk, even if owned by the employer, is not part of the jobsite unless it meets the definition of jobsite contained in RCW 51.32.015 and 51.36.040. **….*In re Eileen Cleary*, BIIA Dec., 92 1119 (1993)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EILEEN P. CLEARY	**)**	**DOCKET NOS. 92 1119 & 92 1119-A**
	)	
CLAIM NO. T-593702	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Eileen P. Cleary, by
Harpold & Leininger, P.C., per
David R. Harpold, Attorney (Withdrawn), and by
Cable, Haagensen, Benedict, Lybeck & McElroy, per
James P. Murphy

Self-Insured Employer, Auburn General Hospital, by
Schwabe, Williamson, Ferguson & Burdell, per
Edith Bowler and Elizabeth K. Reeve, Attorneys at Law

This proceeding involves two consolidated appeals arising from the same industrial insurance claim. An appeal was filed by the claimant, Eileen P. Cleary, on March 4, 1992 from an order of the Department of Labor and Industries dated February 19, 1992 which cancelled a prior order and denied the claim because the injury occurred in a parking area and is not covered under the Industrial Insurance Laws in accordance with Section 51.08.013 (assigned Docket No. 92 1119). The appeal assigned Docket No. 92 1119-A is a cross-appeal filed by the self-insured employer, Auburn General Hospital, on April 6, 1992, from the same February 19, 1992 Department order. **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, Eileen P. Cleary, to a Proposed Decision and Order issued on November 24, 1992 which reversed and remanded this claim to the Department to issue an order determining that the claim should be rejected because claimant's injury did not occur during the course of her employment or on her jobsite, and to reject any bills for services or treatment regarding this claim, except for those authorized by the self-insured employer for diagnosis.

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.

DECISION

The issue in both of these appeals is whether the Department properly rejected Ms. Cleary's claim for benefits under the Industrial Insurance Act. We agree with our industrial appeals judge's resolution of this issue. We have granted review because claimant's Petition for Review requests leave to submit additional evidence which she alleges to be crucial to her appeal. We have granted review in order to address Ms. Cleary's request.

The facts necessary for resolving this appeal are not seriously in dispute. On December 11, 1991, Ms. Cleary was employed by Auburn General Hospital, working a 3:30 P.M. to 11:30 P.M. shift. At approximately 8:30 P.M., during a work break, Ms. Cleary left the hospital premises to move her car from the far side of the hospital parking lot to an area, in the parking lot, closer to the hospital entrance. As she was returning to the hospital premises she fell on a sidewalk adjacent to the parking lot, across the street from the hospital, suffering serious injuries. The evidence supports our industrial appeals judge's finding that Ms. Cleary's injury did not occur in the parking lot, therefore, the Department order rejecting the claim based on the "parking lot exclusion" is incorrect as a matter of law.

Our industrial appeals judge also found, based on the evidence, that Ms. Cleary was not acting in the course of her employment and that the fall did not occur on her jobsite.

In addition to the legal arguments in support of the Petition for Review, Ms. Cleary requests this Board to remand the matter for additional proceedings to allow claimant to present evidence on the issue of ownership or control of the sidewalk where Ms. Cleary was injured. Attached to the Petition for Review are exhibits offered in support of claimant's contention that the sidewalk in question was owned by Auburn General Hospital.

On the issue of whether claimant should be allowed to present additional evidence, Rogers Walla Walla v. Ballard, 16 Wn. App. 81 (1976), is determinative. The Rogers court stated that a motion to reopen for newly discovered evidence is addressed to the sound discretion of the trial court, disturbed only on a showing of manifest abuse. The moving party must show that the proposed evidence was newly discovered and could not have been previously supplied with reasonable diligence. Id, at 90. (See, also, In re Christina M. Nelson, Dckt. No. 88 1221, (November 15, 1989) citing Rogers, in which a motion to reopen the record filed along with the Petition for Review was denied because of the moving party's failure to show reasonable diligence in producing relevant information prior to the time the hearings were concluded.)

In this case, claimant's new counsel apparently discovered the proffered evidence after the hearings were concluded in this matter. The Petition for Review states: "Little evidence was presented by claimant's former attorney establishing that the employer owned the property where the claimant fell . . . although the same was apparently obvious to persons who had visited the site." 1/21/93 Petition for Review at 1. There is no showing here of reasonable diligence on the part of claimant's former counsel, and it is apparent that information about ownership of the sidewalk in question was readily available prior to hearing. Under these circumstances, claimant's request to reopen the record must be denied. However, even if we were to assume for the sake of argument that Auburn General Hospital did own the sidewalk where Ms. Cleary fell, such evidence would not change the result in this appeal. Ms. Cleary argues that she is entitled to coverage under the Industrial Insurance Act, either because she was in the course of employment at the time of her unfortunate injury, or she was in furtherance of her employer's business when injured, or the sidewalk was part of her jobsite.

RCW 51.08.013 provides in relevant part:

> 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 which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking areas, 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 time limits on which industrial insurance or medical aid premiums or assessments are paid.

RCW 51.32.015 defines "jobsite" as premises that "are occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged." (RCW 51.36.040 essentially contains the same definition.)

As to Ms. Cleary's various theories for coverage under the Act, we agree with our industrial appeals judge that her injury did not occur while she was acting in furtherance of her employer's business. Ms. Cleary's decision to move her car was furthering her own interests, not those of her employer who neither directed nor required her to do so. Accordingly, we conclude that Ms. Cleary was not acting in furtherance of her employer's business when injured.

Again, if we were to assume that Auburn General Hospital owned the sidewalk where Ms. Cleary fell, mere ownership of the sidewalk would not make it part of the jobsite for the purpose of determining industrial insurance coverage.

The definition of jobsite is quite explicit. Ownership alone is not a factor. In order to be considered part of the jobsite, the sidewalk would have to be "occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged". RCW 51.32.015 and 51.36.040. It would be a strained interpretation indeed to hold that a public sidewalk, even if "owned" by the employer, is part of the premises used by the employer for the business or work process in which the employer is engaged.

We agree with our industrial appeals judge that the facts of this case are similar to the Supreme Court decision in Waddams v. Wright, 21 Wn.2d 603 (1944) in which the court ruled that a worker injured on a sidewalk on the employer's premises while walking home was not entitled to coverage because he was not furthering his employer's interests at the time of the injury. See, also, In re Guillermina Estrada, BIIA Dec., 68,514 (1989) where this Board ruled that a worker injured on a private road leading to his jobsite was not covered under the Industrial Insurance Act despite evidence the employer had an easement to use the road. The Board held the access road was not part of the worker's jobsite because the employer did not use or lease it for business.

After consideration of the Proposed Decision and Order and the Petition for Review and Response to Petition for Review, and a careful review of the entire record before us, we hereby enter the following:

FINDINGS OF FACT

1. On December 30, 1991, the Department of Labor and Industries received an application for benefits from the claimant, Eileen P. Cleary, alleging she sustained an industrial injury on December 11, 1991, during the course of her employment with Auburn General Hospital.

   On February 19, 1992, the Department issued an order cancelling a prior January 9, 1992 order. The February 19, 1992 order denied the claim because the injury occurred in a parking lot and was therefore not covered by the Industrial Insurance Act.

   On March 4, 1992, claimant filed a notice of appeal with the Board of Industrial Insurance Appeals from the February 19, 1992 order. On March 18, 1992, the Board issued an order granting the claimant's appeal and assigned it Docket No. 92 1119.

   On April 6, 1992, the self-insured employer filed a notice of appeal with the Board from the February 19, 1992 order. On April 20, 1992, the Board

issued an order granting the employer's cross-appeal and assigned it Docket No. 92 1119-A.

2. On December 11, 1991, claimant was employed by Auburn General Hospital and worked an evening shift, from 3:30 to 11:30 P.M.

3. On December 11, 1991, during a work break, claimant left the hospital premises around 8:30 P.M. to move her car. Her car was parked in a parking lot used by Auburn General Hospital employees located across Second Avenue from the hospital. Her car was parked in a section of the parking lot that was relatively distant from the hospital entrance. Claimant intended to move her car closer to the hospital entrance.

4. While returning to Auburn General Hospital, claimant slipped and fell on a sidewalk adjacent to the parking lot on Second Avenue, across the street from the hospital. The accident occurred on the route customarily traveled by employees while walking between the employee parking lot and Auburn General Hospital. However, the sidewalk where claimant was injured was not occupied, used or contracted for by Auburn General Hospital for the business in which it was engaged. Claimant's accident was not caused by any special hazard found on the sidewalk or on the route on which she traveled between the parking lot and the hospital entrance.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to these appeals.

2. Under the provisions of RCW 51.08.013, claimant was not acting in the course of her employment when she fell on December 11, 1991. Her fall also did not occur on her jobsite, under the provisions of RCW 51.32.015.

3. The Department order dated February 19, 1992, that cancelled a January 9, 1992 order and denied the claim because the injury occurred in a parking lot, is incorrect and is reversed. This matter is remanded to the Department to issue an order determining that the claim is rejected because claimant's injury did not occur during the course of her employment or on her jobsite. The order will also reject any bills for services or treatment regarding this claim, except those authorized by the self-insured employer for diagnosis.

It is so ORDERED.

Dated this 12th day of April, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson
/s/_____
PHILLIP T. BORK Member