

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MOHSEN S. PAYOMBARI and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Seattle, WA

*Docket No. 02-1097; Submitted on the Record;
Issued September 24, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury in the performance of duty on September 1, 2000.

Appellant filed a traumatic injury claim alleging that on September 1, 2000 while in travel status, he was lifting weights at the hotel gym just prior to going to work and sustained an injury to his right shoulder. By decision dated March 23, 2001, the Office of Workers' Compensation Programs denied the claim, finding that appellant was not in the performance of duty at the time of the alleged injury. In a decision dated January 7, 2002, the Office denied modification of the prior decision.

The Board finds that appellant was not in the performance of duty at the time of the September 1, 2000 incident.

The general rule regarding coverage of employees on travel status or on temporary duty assignments is set forth in Larson, *The Law of Workers' Compensation Law*:

"An employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand. Thus, injuries flowing from sleeping in hotels or eating in restaurants away from home are usually compensable."¹

The Board has recognized that the Federal Employees' Compensation Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.² When the employee deviates from the normal incidents of

¹ 2 A. Larson & L.K. Larson, *The Law of Workers' Compensation Law* § 25.01 (2002).

² *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987).

his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employer ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.³

The issue, therefore, is whether appellant had deviated from the normal incidents of his travel status by lifting weights in the hotel gym, thereby placing himself outside the scope of coverage of the Act. The Board has held that when an employee on travel status makes a personal decision to engage in recreational activities such as jogging,⁴ or working out at a health club,⁵ the employee has deviated from the normal activities reasonably incidental to the travel assignment.

In this case, appellant has raised two arguments to support his contention that the weight-lifting activity was in the performance of duty: (1) the activity was a requirement of his position as a deportation officer; and (2) the weightlifting was pursuant to his participation in an employing establishment exercise program. With respect to the first argument, there is no probative evidence of record establishing that the position required weightlifting. The job description states that “running and physical contact involving some restraint of detained subjects may take place occasionally.” There is no express or implied requirement to engage in weightlifting exercise. The Board finds no probative evidence establishing weightlifting as a job requirement in this case.

With respect to an authorized exercise program, the record does establish that appellant was participating in a Health Improvement Program (HIP) sponsored by the employing establishment. A document describing the basic elements of the program states that employees would be permitted three hours “of physical fitness and health education per week.” A review of the “approved physical activity conditioning and aerobics exercises,” however, does not include weightlifting as a recommended activity. Activities such as swimming, jogging, treadmill running and cycling are listed as “highly recommended,” while activities such as water skiing and rock climbing are “not approved.” There is no specific mention of weightlifting as a recommended or authorized activity under the HIP. The Board, therefore, finds that the record does not establish weightlifting as an authorized activity of the employing establishment exercise program. Appellant’s decision to use the weightlifting equipment at the hotel is not incidental to his employment, but a personal decision to engage in recreational activity while in travel status. It is accordingly a deviation that removes appellant from the continuous coverage that is provided to employee’s on travel status. He was not in the performance of duty at the time of the incident and, therefore, is not entitled to compensation in this case.

³ *Id.*

⁴ See *Evelyn S. Ibarra*, 45 ECAB 840 (1994).

⁵ See *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

The January 7, 2002 and March 23, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 24, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member