United States Department of Labor
Employees' Compensation Appeals Board

HERMAN DRAKE, Appellant	)	
and	)	**Docket No. 04-1604**
	)	**Issued: November 4, 2004**
DEPARTMENT OF THE ARMY, U.S. ARMY EUROPE, SEVENTH ARMY, HANAU GERMANY, Employer	)	

Appearances:
Herman Drake, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 5, 2004, which denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty.

FACTUAL HISTORY

On December 31, 2003 a 51-year-old accounting technician filed a traumatic injury claim (Form CA-1) alleging that, on December 1, 2003, while he was waiting to make a right turn at the entrance to Sportfield Housing Area during his lunch hour, he sustained injury to his neck

(whiplash), back trauma and possibly trauma to his left leg when his vehicle was struck from behind by another vehicle. No other evidence was submitted in conjunction with the claim.

By letter dated January 29, 2004, the Office notified appellant that the information previously submitted was insufficient to substantiate his claim and requested additional factual information from both appellant and his doctor. Appellant was requested to provide certain information within 30 days, including the duty he was performing at the time of the accident, where he was going when the accident occurred, and whether he was at work or at lunch. Appellant was also advised to obtain from his treating physician a comprehensive medical report which provided a description of his symptoms; objective findings; results of examinations and tests; diagnosis; treatment provided; his opinion, with medical reasons, on the cause of any diagnosis; and specifically, an explanation as to how appellant's motor vehicle accident caused, aggravated, accelerated or precipitated the diagnosed condition. The letter asserted that the requested information was "crucial" to the consideration of his claim.

The Office also told appellant that it had sent a request to the employing establishment for information regarding his work hours and its policy with respect to his activities at lunch.

In response to the Office's request, appellant provided clinic notes from HNU Primary Care dated December 3, 2003; treatment notes and a "sick slip" dated December 3, 2003 and signed by Dr. Helen Zavadovsky, a family physician with the Hanau Health Clinic; a letter dated December 19, 2003 from Operations Sergeant Kyle Simpson stating that the area in which the accident occurred, though off post, is under Military Police and U.S. Army control by virtue of a verbal agreement between the German and Military Police;[1] responses to the questionnaire provided to appellant, indicating that the accident occurred "on the way to pay car insurance off base. Lunch;" and a Military Police Report dated December 1, 2003, indicating that appellant was not at fault in the accident and that the accident had occurred at the location described by appellant.

By decision dated March 5, 2004, the Office denied appellant's claim for compensation on the grounds that the evidence was not sufficient to establish that appellant sustained an injury as defined by the Federal Employees' Compensation Act. Specifically the Office stated that no accident reports or other documents pertaining to the accident itself were provided; that there was no evidence provided that appellant was engaged in a work activity at the time of the accident; and there was no medical evidence which provided a diagnosis which could be connected to the claimed event.[2]

[1] Under the agreement, for force protection and law enforcement purposes, Military Police respond to and process incidents that occur in the area.

[2] The record includes a memorandum to the file reflecting that the Office received a telephone call from appellant on May 4, 2004 asking for information as to the status of his case. The memorandum indicates that appellant had not yet received a copy of the denial letter, which was allegedly sent by the Office on March 5, 2004, and that the Office confirmed appellant's address and offered to send another copy of the report. Appellant stated that he viewed the issue as to whether he was "on post" and that he believed that he was "on post" because he was in an area under the control of the military.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.[3] Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[4] "In the course of employment" deals with the work setting, locale and the time of the injury, whereas, "arising out of the employment" encompasses not only the work setting, but also a causal connection between the employment factor and the injury.[5] In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while the employee is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.[6]

The general rule is that an injury sustained by an employee having fixed hours and place of work, while going to and from work or on a lunch hour, is not compensable because it does not occur in the performance of duty. However, there exist many exceptions to the rule. One such exception, almost universally recognized, is the premises rule: an employee driving to and from work is covered under workers' compensation while on the premises of the employer. The term "premises," as it is generally used in workers' compensation law, is not necessarily synonymous with "property," but rather may be broader or narrower and is dependent more on the relationship of the property to the employment than on the status or legal title.[7]

The mere fact that an employee was on the premises at the time of the injury, however, is not sufficient to establish entitlement to compensation benefits. It must also be established that an employee was engaged in activities which may be described as incidental to his or her employment, *i.e.*, that he or she was engaged in activities which fulfilled his or her employment duties or responsibilities or were incidental thereto.[8] Whether or not a particular case falls within the scope of the Act[9] depends upon the general test of whether the particular risk may be said to

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[3] *Barbara D. Heavener*, 53 ECAB ___ (Docket No. 00-1453, issued October 3, 2001).

[4] *Timothy K. Burns*, 44 ECAB 291, 296 (1992).

[5] *Barbara D. Heavener*, *supra* note 3.

[6] *Id. See also Mary Beth Smith*, 47 ECAB 747, 748 (1996).

[7] *Anneliese Ross*, 42 ECAB 371, 373-74 (1991).

[8] *Id*. at 374; *see also Barbara D. Heavener*, *supra* note 3.

[9] 5 U.S.C. §§ 8101-8193.

be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed.[10] In determining whether an injury occurs in a place where the employee may reasonably be or whether it constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[11] The standard to be used in determining that an employee has deviated from his employment requires a showing that the deviation was aimed at reaching some specific personal objective.[12]

It is incumbent upon appellant to establish that the injury arose out of her employment; that is, the accident must be shown to have resulted from some risk incidental to the employment. In other words, some contributing or causal employment factor must be established.[13]

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[14] When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purpose of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions. These exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and are dependent upon the particular facts and related to situations: (1) Where the employment requires the employee to travel on highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.[15]

Closely allied to the off-premises exception is the proximity rule which the Board has defined by stating that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally related to the employment.[16] Underlying the proximity exception to the premises rule is the principle that

[10] *Mary Beth Smith, supra* note 6 at 749.

[11] *Janet M. Abner*, 53 ECAB ___ (Docket No. 00-1838, issued January 2, 2002).

[12] *Dannie G. Frezzell*, 40 ECAB 1291, 1294 (1989).

[13] *Maryann Battista*, 50 ECAB 343, 345 (1999).

[14] *John M. Byrd*, 53 ECAB ___ (Docket No. 01-922, issued July 19, 2002).

[15] *Cheryl Bowman*, 51 ECAB 519, 521 (2000).

[16] *Id*. at 521-22.

course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment. Factors that generally determine whether an off-premises point used by employees may be considered part of the "premises" include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[17]

ANALYSIS

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

Generally, an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while the employee is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.[18] Although the employing establishment in this case did not provide documentation of its official policy, it appears that the injury occurred within the period of employment, *i.e.*, during appellant's lunch break. However, appellant has not met the remaining three requirements. He was not in a place where the employee could reasonably be expected to be in connection with the employment, nor was he reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto. In determining whether an injury occurs in a place where the employee may reasonably be or whether it constitutes a deviation from the course of employment, the Board focuses on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment, or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[19] The standard to be used in determining that an employee has deviated from his employment requires a showing that the deviation was aimed at reaching some specific personal objective.[20] Appellant's job as an accounting technician could not reasonably be performed at an intersection from within his vehicle. Furthermore, appellant stated in his claim form that he was on his was to perform a personal errand, to-wit: to pay his automobile insurance off base. Therefore, the Board determines that appellant deviated from his employment when he embarked on his journey to pay his car insurance, a specific personal objective. Finally, it is incumbent upon appellant to establish that the injury arose out of his employment; that is, the accident must be shown to have resulted from some risk incidental to the employment. In other words, some contributing or causal employment factor must be

[17] *Linda D. Williams*, 52 ECAB 300, 302 (2001).

[18] *Barbara Heavener*, *supra* note 3.

[19] *Janet M. Abner*, 53 ECAB ___ (Docket No. 00-1838, issued January 2, 2002).

[20] *Dannie G. Frezzell*, 40 ECAB 1291, 1294 (1989).

established.[21] Appellant's injury was not the result of a risk involved in or incidental to the employment, but rather it was a result of a risk taken by appellant for personal reasons.

One exception to the general rule that an injury sustained by an employee having fixed hours and place of work, while going to and from work or on a lunch hour, is not compensable because it does not occur in the performance of duty, is the premises doctrine: an employee driving to and from work is covered under workers' compensation while on the premises of the employer. In the instant case, a threshold issue is whether or not appellant was on the premises of the employing establishment. The evidence shows that the intersection where the accident occurred was not technically on post but was under the control of the Military Police and the U.S. Army for purposes of protection and law enforcement. Since the accident location was not on premises, appellant must establish an exception which will render the location effectively on premises.

Since the evidence fails to show that he was required by his employer to travel to the cite of the accident or that he did so at the request or with the knowledge and approval of his employer, appellant must attempt to rely on the proximity rule. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally related to the employment.[22] Appellant contends that the injury is compensable because the cite of the accident was an area that was under the control of the employing establishment and, therefore, he was "on post." Factors that generally determine whether an off-premises point used by employees may be considered part of the premises include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[23] In *Linda D. Williams*, on her way into work in the morning, the employee slipped and fell on a walkway that was technically not property owned by the employing establishment. The Board found that even though the walkway was owned by the City of Atlanta, it was maintained, controlled and restricted by the employing establishment, and, therefore, could be properly considered as part of the premises of the employing establishment.[24] In the instant case, the area in which the accident occurred was off post. Although, by verbal agreement, the Military Police and the U.S. Army had limited control of the area for purposes of law enforcement and protection, there is no evidence that the employing establishment was required to maintain the area, that it could restrict the area in any way or that it was necessary for appellant to use the area in going to and coming from the employing establishment. Thus, the intersection in this case can be distinguished from the walkway in *Williams.*

In *Diane Bensmiller*,[25] an employee was injured in a parking lot adjacent to her employing establishment when she tripped on a protruding metal post. The Board initially considered the issue of whether she was on premises that were owned, operated or controlled by

[21] *Maryann Battista*, 50 ECAB 343, 345 (1999).

[22] *Cheryl Bowman*, *supra* note 15 at 521-22.

[23] *Linda D. Williams*, 52 ECAB 300, 302 (2001).

[24] *Id*. at 303.

[25] *Diane Bensmiller*, 48 ECAB 675 (1997).

the employing establishment. Although the Board determined that the parking lot was technically not within the premises of the employing establishment, it held that the facts of the case brought it within the proximity exception to the premises rule: the employee parked her car in a lot located off premises only because the employing establishment's lot was inaccessible at the time; the premises were not accessible to public transportation and, thus, she had no alternative but to use the lot; and the injury occurred during work hours in a pay status while she was involved in an activity related to her employment *i.e.*, obtaining her lunch from her car and moving her car into the lot operated and owned by the employing establishment. *Bensmiller* can be distinguished from the instant case, in that the vehicle in *Bensmiller* was in the lot adjacent to employing establishment as a matter of necessity related to her employment. Further, had she been parked in the employer-owned lot, which was inaccessible to her on the date of injury, her injury, which occurred when she returned to her vehicle to retrieve her lunch on her lunch hour, would have been covered under the Act. In the instant case, appellant was attempting to leave the employing establishment's premises for the purpose of engaging in personal business.

A showing that the employing establishment owned, controlled or had managerial responsibility over the area in which the injury occurred, might qualify the injury for coverage under the Act. In *Cheryl Bowman*,[26] an employee was injured when she was struck by a vehicle approximately a half-block away from her employing establishment while returning from lunch. The Board found that there were no factors to bring the case within the recognized exceptions to the general rule regarding the noncompensability of off-premises injuries and held that the employee did not establish that she was injured in the performance of duty. At the time the employee was struck, she was at a public intersection during her lunch period, and the hazards of her travel to and from lunch that day were not incidental to her employment.[27] The Board also held that the proximity rule did not apply in that case, but rather that her injury was an example of a hazard common to all travelers on public streets; that the record did not establish that the intersection at which the accident occurred was so connected with the employing establishment as to be constructively considered part of its premises; that the employing establishment did not own, control or have any managerial responsibility over that area where the claimed injury occurred; and that because she clocked out before she left the premises, her employing establishment had no control over her actions whatsoever during that time. The employee's activity of walking back to work from lunch was deemed to be in the nature of a personal activity and not causally connected to her employment.[28] The instant case can be distinguished from *Bowman* in that appellant's employing establishment did have some limited control over the area where the accident occurred and, therefore, the location of the accident can arguably be considered on premises.[29] However, appellant's mere presence on the premises at the time of the injury would not be sufficient to establish his entitlement to compensation. Assuming *arguendo* that the proximity rule does apply to appellant's case and that the location of the accident is

[26] *Cheryl Bowman*, *supra* note 15.

[27] *Id.*

[28] *Id*. at 522.

[29] *Id*.

deemed to have been on premises, his claim still fails because he has not established that he was engaged in activities incidental to his employment.

The Board has consistently held that injuries which occur on the premises of the employing establishment while the employee is engaged in an activity unrelated to his or her employment are not compensable. In *Valerie C. Boward*,[30] the employee was injured on the employing establishment's premises while washing her car windows during her lunch break. The Board found that the employee's task of washing her car windows during her lunch break constituted a task personal in nature inasmuch as she was not reasonably fulfilling the duties of her employment as a secretary, and the task was not necessary for personal comfort or personal ministration, and, therefore, was not incidental to her employment.[31]

In *Mary Beth Smith*,[32] the employee left her office building to attend to her injured child, who was located in another building in the employing establishment's day care center. When she entered this building, the employee stumbled over the carpet and sustained a fracture of her left foot. The Board held that although the employee had obtained permission from her supervisor to leave her building to attend to her injured child, her injury could not be characterized as a "special mission" authorized by the employer to further the business or mission of the agency, and that upon her departure from her workstation, the employee was no longer engaged in the master's business, but in a personal mission that was not related to the fulfillment of her employment duties or responsibilities.[33] Similarly, in *Barbara D. Heavener*,[34] the Board held that the employee's injury, which occurred on the premises of the employing establishment while she was retrieving her address book from her automobile, was not sustained while in the performance of duty. The Board found that her action was not related to her employer's business or reasonably incidental to her employment, but rather was a personal mission unrelated to her employment. The Board further determined that her departure from her workstation to retrieve her address book was not to be considered an activity necessary for personal comfort or ministration, and was, therefore, not incidental to the employee's employment.[35]

Having considered all of the circumstances, the Board finds that, whether the injury occurred on or off premises, appellant's driving to pay his automobile insurance bill constituted a task personal in nature, inasmuch as he was not reasonably fulfilling the duties of his employment as an accounting technician, and the act was not necessary for personal comfort or personal ministration and was, therefore, not incidental to his employment. Since appellant has

[30] *Valerie C. Boward*, 50 ECAB 126 (1998).

[31] *Id.* at 128. In *Boward*, the Board elaborated that the employee's washing of windows could not be likened to those incidental tasks such as using a toilet facility, drinking coffee, eating a snack during recognized breaks, which are generally recognized as personal ministrations so that engaging in such activities does not take an employee out of the course of her employment. *Id.*

[32] *Mary Beth Smith*, *supra* note 6*; see also Bernard D, Blum*, 1 ECAB 1, 2 (1947*).*

[33] *Mary Beth Smith*, *supra* note 6 at 749.

[34] *Barbara D. Heavener*, *supra* note 3.

[35] *Id.*

failed to substantiate with probative and reliable evidence a compensable factor of employment, the medical evidence need not be discussed.[36]

CONCLUSION

Appellant has failed to meet his burden of proof that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[36] *Roger Williams*, 52 ECAB 468, 473 (2001).