United States Department of Labor
Employees' Compensation Appeals Board

H.S., Appellant	)	
and	)	**Docket No. 07-582**
	)	**Issued: June 14, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative decision dated December 8, 2006 which affirmed a September 19, 2006 decision, finding that appellant did not sustain an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained a traumatic injury on June 20, 2006 while playing softball during a temporary-duty assignment.

FACTUAL HISTORY

On June 26, 2006 appellant, then a 51-year-old electronics technician, filed a traumatic injury claim alleging that on June 20, 2006, while playing softball, he dove into third base and sustained a low back injury. He noted that he further aggravated the injury on June 22, 2006 while playing softball again. Appellant stopped work on June 22, 2006. The employing

establishment controverted the claim. It noted that he was attending a one-week training class at the National Center for Employee Development (NCED) training facility that ended at 6:30 p.m. The employing establishment contended that appellant voluntarily engaged in the softball game at approximately 8:00 p.m.

By letter dated July 13, 2006, the Office requested additional information.

Appellant submitted a copy of his travel advance request and an itinerary, excerpts from a training manual, a position description for an electronic technician, a weekly fitness schedule and a photograph of several employees who had won a volleyball tournament. He also submitted a copy of the employing establishment's agreement with the U.S. Public Health Service and Federal Occupational Health (FOH) and a housing facility map of the location where he stayed while in training/travel status.

Appellant alleged that his responsibilities included attending on-the-job training and attending courses at the employing establishment facilities. While he was attending these courses, he was in the performance of duty from the time he left his home until his return. Appellant stated that the employing establishment sponsored a weekly softball tournament which was held on the employing establishment facilities. He contended that the employing establishment supported fitness activities and provided a running track, gymnasium, billiard room, a lighted softball field as well as the equipment and allowed the games to be played on its property. Appellant submitted medical evidence that included diagnostic reports and status reports. In a June 26, 2006 duty status report, it was noted that he was playing softball at a training facility when he dove into a base and hurt his back.

By decision dated September 19, 2006, the Office denied appellant's claim finding that he did not establish that the injury occurred while he was in the performance of duty. The evidence established that appellant was in a travel status; however, the injury occurred while he was playing in a softball game after his work duties had ended. The Office found that appellant voluntarily deviated from the normal incidents of his trip for personal recreational reasons. The Office also found that the evidence did not establish that the game was mandatory or sponsored by the employing establishment.

On September 25, 2006 appellant requested an examination of the written record. He contended that his activities were covered while he was at training. Appellant noted that the softball game took place on a lighted field at the employing establishment premises, that the employees drew names out of a hat to determine which team they would play and he had participated in an employing establishment sponsored softball tournament. He also argued that the activity was sponsored and all of the equipment was provided by the employing establishment. Appellant alleged that the employing establishment provided a full line of recreational activities as well as a state of the art fitness center and sponsored the softball tournament.

On October 1, 2006 the Office received a copy of a schedule related to appellant's seminar for the week of June 19 to 22, 2006. By letter dated October 19, 2006, the Office requested that the employing establishment provide additional information.

On November 17, 2006 Diane Casey, a case manager with the employing establishment, noted that the performance of duty for an employee in travel status did not usually include recreational or sightseeing trips. The recreational activity that appellant participated in was optional for employees. Ms. Casey advised the Office that appellant had a lumbar strain condition before the claimed injury which was related to an August 26, 2005 employment injury.[1]

By letter dated November 18, 2006, appellant alleged that he was not injured while on a recreational or sightseeing trip, but was in the performance of duty. He was injured while playing in a softball tournament which was sponsored by the employing establishment. Appellant enclosed copies of Board and court decisions. In a July 26, 2006 report, Dr. Megan J. Borror, Board-certified in family medicine, noted that appellant had a disc herniation which occurred on June 20, 2006 while playing softball.

By decision dated December 8, 2006, the Office hearing representative affirmed the September 19, 2006 decision.

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[2] This phrase is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws; namely, arising out of and in the course of employment.[3] Whereas arising out of the employment addresses the causal connection between the employment and the injury, arising in the course of employment pertains to work connection as to time, place and activity.[4]

Under the Act, an employee on travel status or a temporary-duty assignment or special mission for his employer is in the performance of duty and, therefore, under the protection of the Act 24 hours a day with respect to any injury that results from activities essential or incidental to his special duties.[5] Examples of such activities are eating,[6] returning to a hotel after eating dinner[7] and engaging in reasonable activities within a short distance of the hotel where the employee is staying.[8] However, when a claimant voluntarily deviates from such activities and

[1] Claim No. 03-2042933.

[2] 5 U.S.C. § 8102(a).

[3] *See Bernard E. Blum*, 1 ECAB 1 (1947).

[4] *See Robert J. Eglinton*, 40 ECAB 195 (1988).

[5] *Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd (James Kidd)*, 47 ECAB 670 (1996); *William K. O'Connor*, 4 ECAB 21 (1950).

[6] *Michael J. Koll, Jr.*, 37 ECAB 340 (1986); *Carmen Sharp*, 5 ECAB 13 (1952).

[7] *Ann P. Drennan; Janet Kidd (James Kidd); William K. O'Connor*, *supra* note 5.

[8] *Ann P. Drennan; Janet Kidd (James Kidd)*, *supra* note 5; *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

engages in matters, personal or otherwise, which are not incidental to the duties of his temporary assignment, he ceases to be under the protection of the Act. Any injury occurring during these deviations is not compensable.[9] Examples of such deviations are visits to relatives or friends while in official travel status,[10] visiting nightclubs and bars,[11] skiing at a location 60 miles from where an employee is undergoing training[12] and taking a boat trip during nonworking hours to view a private construction site.[13] The fact that a recreational activity occurs at the site of a conference, however, is not by itself sufficient to show that the employee was in the performance of duty when his injury was sustained.[14]

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states that recreational or social activities are within the course of employment when: (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[15]

These are three independent links, by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.[16] Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty.

ANALYSIS

Appellant alleged that he sustained a low back injury during a softball game on June 20, 2006 which was aggravated on June 22, 2006. He contends that the injury arose in the performance of duty because he was on a temporary-duty assignment away from his regular

[9] *Karl Kuykendall,* 31 ECAB 163 (1979).

[10] *George W. Stark,* 7 ECAB 275 (1954); *Miss Leo Ingram,* 9 ECAB 796 (1958); *Ethyl L. Evans,* 17 ECAB 346 (1966).

[11] *Conchita A. Elefano,* 15 ECAB 373 (1964).

[12] *Karl Kuykendall, supra* note 9.

[13] *Mattie A. Watson,* 31 ECAB 183 (1979).

[14] *See, e.g., Lindsay A.C. Moulton,* 39 ECAB 434 (1988). The Board found that an employee attending a conference at a ski resort did not die while in the performance of duty when he collapsed due to cardiac arrest while skiing. The Board held that the employee's participation in skiing was a personal, recreational activity available to the employee at the worksite, that the skiing was not reasonably incidental to the purpose of the employee's travel and that the recreational activity that the employee engaged in did not meet the criteria of being within the performance of duty.

[15] A. Larson, *The Law of Workers' Compensation* § 22.01 (2000); *see Steven F. Jacobs*, 55 ECAB 252 (2004). *See also* FECA (Federal) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992).

[16] *Steven F. Jacobs, supra* note 15; *Archie L. Ransey*, 40 ECAB 1251 (1989).

place of employment. Appellant asserted that, while on such an assignment, he is covered 24 hours a day with respect to any injury that results from activities incidental to his temporary-duty assignment. However, the fact that an employee is on a special mission or in travel status during the time that a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of the employment. In the instant case, there is no evidence that appellant's lower back injury of June 20, 2006 and the subsequent aggravation on June 22, 2006 resulted from activities incidental to his employment, as his participation in a softball game after duty hours has not been shown to have any relationship to his employment as an electronics technician or to activities incidental to his employment as an electronics technician.

The Board notes that appellant's injury did not occur during a lunch or recreation period as a regular incident of his employment, but after his duty hours had ended. The employing establishment did not either expressly or impliedly require appellant's participation in that activity, as supported by its June 27, 2006 statement in which it noted that appellant's participation was voluntary. As the employing establishment neither expressly nor impliedly required appellant's participation in the game, nor made the activity part of appellant's services while on temporary duty at that facility, the activity in question, a softball game, is not brought within the orbit of the temporary-duty employment.

Appellant alleged that the game was sponsored by the employing establishment. The Board notes that, when the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the question becomes closer and it is necessary to conduct a further inquiry.[17] This inquiry focuses on the issue of whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment financed the event. The record in this case establishes that the employing establishment did not either expressly or implicitly require participation by employees or pay employees for participating in the event, or otherwise finance the event. The record supports that the activity was not one which appellant was compelled to attend. Participation in the evening softball game was neither part of appellant's job nor was it an activity for which he would be evaluated. It was a voluntary activity after work. The Board has held that, if attendance at an event is voluntary and there is no direct, substantial benefit to the employer, this outweighs the employer's sponsorship of the event when determining whether an activity occurred in the course of employment.[18]

The Board notes that the employing establishment derived no substantial benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. This fact is supported by the information provided by appellant that the facility included a state of the art recreation center, as well as a lighted softball field on the premises. While it is true that the employing establishment provided facilities and equipment, it appears that this was to allow employees to maintain their fitness routines while away from home, and for purely health oriented and morale reasons. As none of the requirements for bringing injuries occurring during recreational activities within the course of employment have been met, the softball game after work must be found to be a purely personal

[17] Larson, *supra* note 15 at § 22.04(3); *see also Anna M. Adams*, 51 ECAB 149 (1999).

[18] *Barbara Roy*, 42 ECAB 960 (1991).

pursuit. As such, the activity constitutes a deviation from the performance of duty of an individual on temporary-duty assignment and the 24-hour-a-day coverage under the Act does not apply.

Consequently, appellant's low back condition on June 20, 2006 and the subsequent aggravation on June 22, 2006 were not causally related to the incidents of his employment. Under the circumstances of this case, appellant has failed to demonstrate that the employing establishment required him to participate in the softball game or otherwise made the activity part of his services as an employee. Thus, the evidence does not establish that the employing establishment derived substantial direct benefit from the activity beyond the intangible value of improvement in health and morale that is common to all kinds of recreation and social life.[19]

The Board further notes that cases cited by appellant in support of his claim are inapposite. The Board's decision in *Mark E. Peterson*[20] does not pertain to whether the claimant sustained an injury in the performance of duty but to whether he was entitled to a schedule award for permanent impairment due to an accepted injury. The Board did not purport to make findings on any performance of duty issue similar to appellant's claim. Likewise, the case of *Elman v. United States*,[21] pertains to whether the claimant who has received benefits under the Act may also file a claim against the United States under the Federal Tort Claims Act.[22]

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty while playing softball during a temporary-duty assignment, causally related to factors of his federal employment.

[19] Larson, *supra* note 15 at § 22.05(3).

[20] Docket No. 94-2204 (issued July 15, 1996).

[21] Docket No. 98-1186, slip op. (3d Cir. Apr. 27, 1999).

[22] The determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under the Federal Employees' Compensation Act. *Dianna L. Smith*, 56 ECAB ___ (Docket No. 04-2256, issued May 6, 2005).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2006 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: June 14, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board