United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 12-298**
	)	**Issued: November 19, 2012**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Honolulu, HI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2011 appellant, through her attorney, filed a timely appeal from the June 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a September 8, 2010 work injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on September 8, 2010.

FACTUAL HISTORY

On October 4, 2010 appellant, then a 60-year-old senior field representative, filed a traumatic injury claim alleging that she sustained multiple injuries, including bone fractures, in a

[1] 5 U.S.C. §§ 8101-8193.

motor vehicle accident on September 8, 2010 at 10:20 p.m. while on temporary travel-duty status in Santa Barbara, CA. She stopped work on September 8, 2010.[2]

Appellant submitted medical evidence showing that, due to the September 8, 2010 accident, she sustained a fractured transverse process at C6, left first rib fracture and multiple fractures of her feet and ankles. On September 10, 2010 she underwent surgery for these conditions.

In an October 12, 2010 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim, including information about the purpose of her vehicular trip on September 8, 2010.

Appellant provided handwritten answers to OWCP's request for additional information on the October 12, 2010 letter. She noted that the September 9, 2010 vehicular accident occurred after she attended a work conference and group dinner and while she was "traveling from a group dinner to a social outing" at the Chumash Casino.[3] Appellant also submitted medical reports further describing the injuries she sustained in the crash.

In an October 26, 2010 record of a telephone call, an OWCP employee advised that appellant stated during the call that the motor vehicle accident occurred after a group of census workers got together to go to the casino to "get to know each other better."

In an October 27, 2010 letter, Robert Heitman, a senior workers' compensation specialist, noted that the employing establishment controverted appellant's claim. At the time of the September 8, 2010 accident, appellant was going to the Chumash Casino with a group of census takers. While on travel-duty status on September 8, 2010, she had attended a training session at the Fess Parker Doubletree Inn and a group dinner with the training participants, but instead of returning to the hotel after dinner, she chose to go on a social outing to the casino.

In a November 17, 2010 decision, OWCP denied appellant's claim finding the evidence did not establish that her injuries arose in the performance of duty. The September 8, 2010 accident happened when she deviated from the normal incidents of her work to go to a casino. It found that appellant was on a personal trip at the time of the accident and that she "had departed from any activity considered reasonably incidental to your work assignment."

Appellant disagreed with this decision and requested a telephonic hearing with an OWCP hearing representative. During the April 5, 2011 hearing, she testified that she was never given

[2] The Board notes that the record contains an Authorization for Examination and/or Treatment document (Form CA-16), signed by an agency official, which authorized appellant to receive medical care for up to 60 days related to the claimed September 8, 2010 injury. The record also contains documents showing that appellant was on temporary travel-duty status during the period of the claimed September 8, 2010 injury.

[3] The record reflects that the Chumash Casino is about 32 miles northwest from the Santa Barbara hotel in which appellant stayed while on travel duty status. A police accident report confirms that the accident occurred on California State Route 154 at 10:20 p.m. on September 8, 2010 near the Rancho San Marcos Golf Course, a site about 17 miles northwest of Santa Barbara. It was reported that a vehicle crossed over the center line and struck the vehicle driven by appellant head on. Appellant had four passengers in her vehicle.

any prohibition about what she could do while on travel status. Appellant was never advised that she had to stay in her hotel room when on off-duty status. She stated that she usually traveled by herself when on travel duty and ate dinner outside the hotel in which she stayed. Appellant stayed in the same hotel in Santa Barbara, the Fess Parker Doubletree Inn, as the other employees who were present for the meeting which included support staff and the regional director. She had previously attended work conferences in various locations and asserted that they were seen as a reward for the senior field representatives who generally had no interaction with coworkers. The conference was held once a year and was meant to enhance team-building skills and to allow attendance at presentations that were of particular interest to the field representatives. These conferences also provided an opportunity to meet face-to-face with staff and administration. Appellant noted that she always had a list of topics and issues to discuss with people she did not normally get to see.

On the date of injury, September 8, 2010, a group of coworkers had dinner at a nearby hotel and a boat outing had been planned. Appellant went to the group dinner and signed up for the boat outing. She stated that the staff member who had arranged the conference became ill and she and the regional director spent time at the dinner taking care of this staff member. Appellant noted that the boat outing fell through. As she had not eaten much or been able to spend time speaking to certain individuals, including the head administrator and a recruiter, appellant felt that it was important to speak to these people as she had a job vacancy to fill. Appellant had the option of going back to her room but another field representative told her a group was going out and the head administrator and recruiter would be in the group. She testified that she did not know where they were going, but offered to drive her government vehicle since it held more people than the other vehicles.

Appellant testified that it was determined they would go to Chumash Casino. She asserted that she had not been drinking alcohol and there was no alcohol served at the earlier function. As they were driving to the casino, another driver crossed the center line. Appellant swerved her vehicle, but had a head-on crash in which the other driver was killed. She contended that the trip to the casino was an extension of her work activities at the conference. All the individuals in the car were coworkers and appellant was never told she could not go to a casino while at the conference. She also asserted that the trip to the casino was meant to continue team building. Counsel presented argument concerning coverage of employees during travel duty status, noting that appellant's activities at the time she was injured were related to her work duties that did not constitute a substantial deviation.

A copy of the hearing transcript was sent to the employing establishment for review and comment on April 13, 2011. Mr. Heitman responded on April 27, 2011. He stated that, while appellant did not receive a written statement saying she could not eat dinner outside her hotel, it did not follow that going for dinner anywhere outside her hotel would satisfy the requirement for remaining within the performance of duty. Mr. Heitman noted that there were 384 restaurants in the city of Santa Barbara and that appellant could have chosen any one of them. He stated that the casino trip did not represent the only opportunity for appellant to have some "face-time" with her coworkers or those with whom she wanted to speak. There were many other times during, breaks, lunch, dinner and after dinner at the hotel, when this could be accomplished. Mr. Heitman stated that the hearing testimony established that a group of employees went on a

"social outing" and invited appellant to join them. The intention of the outing was nothing other than a social recreational event and not organized or sponsored by the employing establishment.

In a May 27, 2011 statement, appellant reiterated that the yearly conferences provided an opportunity for the senior field staff to build rapport with the regional office employees and to improve the support system for carrying out the mission of the employing establishment. She stated that, if the chief administrator and recruiter had not been in the group, she would not have gone to the casino.

In a June 22, 2011 decision, OWCP's hearing representative affirmed OWCP's November 17, 2010 decision denying appellant's claim for a September 8, 2010 injury. She found that appellant did not sustain an injury in performance of duty on September 8, 2010 because at the time of her vehicular accident she had deviated from her travel duty work.

LEGAL PRECEDENT

The general rule regarding coverage of employees on travel duty 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."[4]

The Board has similarly recognized that FECA covers an employee 24 hours a day when the employee is on travel duty status and engaged in activities essential or incidental to such duties.[5] When the employee, however, deviates from the normal incidents of 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 employee ceases to be under the protection of FECA and any injury occurring during these deviations is not compensable.[6]

The Board has addressed when an employee deviated from the normal incidents of travel duty such that the claimed injury was not covered under FECA. In *Conchita A. Elfano (Domingo P. Elfano)*,[7] the deceased employee was on a temporary-duty assignment at a navy base. He left the base at 11:30 p.m. and went to a nearby night club, where he remained until 4:00 a.m. The employee was fatally injured by a bullet when returning to the base in a taxi cab. The Board found that the injury was not sustained in the performance of duty as he had deviated from the

[4] A. Larson, The Law of Workers' Compensation Law § 25.01 (2012).

[5] *See Ann P. Drennan*, 47 ECAB 750 (1996). As an example of activities incidental to duties performed on travel-duty status, the Board has held that an employee's seeking of dinner away from a hotel where she is staying on travel-duty status may be compensable in some cases. *See A.W.*, 59 ECAB 593 (2008).

[6] *See Ann P. Drennan, supra* note 5.

[7] 15 ECAB 373 (1964).

normal activities incidental to his employment for purposes that were personal and diversionary in nature. In *Kathleen M. Fava (John R. Malley)*,[8] the Board found that OWCP properly rescinded acceptance of the claim where the evidence reflected that the employee, who was in travel status, was injured walking to a van after leaving a sports bar. In *Richard Michael Landry*,[9] the Board found that the employee on travel-duty status was not in the performance of duty when he was thrown from the bed of a truck while traveling between nightclubs after 1:30 a.m.

ANALYSIS

Appellant sustained multiple injuries, including bone fractures, in a motor vehicle accident on September 8, 2010 at about 10:20 p.m. when she and some coworkers were on temporary travel-duty status in Santa Barbara, CA. She had dinner with her coworkers and then a group decided to go to Chumash Casino later in the evening.[10] On the way to the casino, the motor vehicle appellant was driving was struck by another car that veered into her lane.

The Board finds that appellant has not established that she sustained an injury in the performance of duty on September 8, 2010.

When appellant traveled to the casino on September 8, 2010 she deviated from the normal incidents of her work trip and engaged in a personal activity which was not reasonably incidental to the duties of the temporary assignment contemplated by her employing establishment. At the time of the motor vehicle accident on September 8, 2010, she was involved in a personal deviation from her travel-duty work which was similar to the deviations described in the above-noted cases regarding employees who chose to engage in evening entertainment activities for personal reasons.[11] Appellant's trip to the casino was personal in nature in that it involved pursuing an activity for personal social and entertainment reasons and her deviation placed her outside the general rule that employees are covered by FECA while on travel-duty status.[12] The Board notes that it agrees with counsel that there was nothing nefarious or expressly prohibited by the employer about appellant's trip to casino while on travel-duty status, but there is no requirement that an employee's activities on travel duty status be nefarious or expressly prohibited before a deviation is found. Appellant has not shown that her trip to the casino after 10:00 p.m. would have been contemplated by her employer as incidental to the duties of her travel-duty trip or that it otherwise could be viewed as reasonably incidental to her work duties.

Appellant asserted that she took the trip to the casino with the intent to network with employing establishment officials, including the head administrator and recruiter. However, she

[8] 49 ECAB 519 (1998). The Board further determined, however, that injuries sustained when the employee returned to the hotel were compensable as his deviation had ended at that point.

[9] Docket No. 87-207 (issued November 30, 1987).

[10] The Chumash Casino is about 32 miles from the hotel in which appellant stayed while on travel-duty status.

[11] *See supra* notes 7 through 9.

[12] In her initial description of the September 8, 2010 trip to the casino, appellant explicitly described it as a "social outing."

has not clearly established that this was the intent of her trip to the casino or that her actions were reasonably incidental to her travel status duties. The employing establishment has stated that appellant had numerous opportunities to speak to these employees during the conference breaks and other occasions while she was at the conference. Appellant also claimed that one of her purposes to travel to the casino was to obtain something to eat. As noted above, the Board has held that an employee's seeking of dinner away from a hotel where she is staying on travel-duty status may compensable in some case.[13] However, appellant has acknowledged that she had something to eat at an earlier group dinner and she has not otherwise shown that her intent in traveling to the casino after 10:00 p.m. was to obtain dinner as opposed to engaging in a social and entertainment activity.

Appellant's trip to the casino was not part of any activity organized by the employing establishment and she voluntarily decided to go to the casino during her free time. The evidence of record establishes that a group of employees was going on a social outing to the casino and that appellant was invited to join them. The trip to the casino was a substantial deviation after hours and involved activities which were not reasonably incidental to her temporary work assignment. As the claimed injury occurred while appellant deviated from her travel-duty status, the injuries caused by the September 8, 2010 vehicular accident are not covered under FECA.

For these reasons, appellant has not shown that she sustained an injury in the performance of duty on September 8, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on September 8, 2010.

[13] *See supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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