

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SYED M. JAWAID and DEPARTMENT OF AGRICULTURE,  
APHIS-VETERINARY SERVICES, Sacramento, Calif.

*Docket No. 96-2176; Submitted on the Record;  
Issued August 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether appellant has established that the injuries he sustained on November 2, 1994 occurred in the performance of duty as alleged.

On August 19, 1995 appellant, then a 49-year-old animal health technician, filed a Form CA-1, notice of traumatic injury, alleging that on November 2, 1994 at 9:15 a.m. as he was driving to work, his car rolled over due to rain. Appellant stated that his injury involved his shoulder and left jaw bone and that he has developed neck and shoulder pains and, at times, severe headaches. Appellant's supervisor indicated that the accident was not reported at the time that it happened and occurred before appellant reported for duty. No medical evidence was submitted with the claim.

In a September 22, 1995 conference call between appellant's supervisor, Ms. Nora Klinger, and a senior claims examiner, it was noted that Ms. Klinger had been appellant's supervisor for two years. Ms. Klinger stated that appellant worked intermittent hours and that appellant was told the day before to report to work at 11:30 a.m. on November 2, 1994. It was additionally noted that appellant was driving a private vehicle, not a government car.

In a decision dated October 2, 1995, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the basis that he did not establish a work-related traumatic injury occurring on November 2, 1994. In the accompanying memorandum, the Office found that, since appellant was on his way to work in his private vehicle, and that the accident occurred over two hours prior to appellant's starting time, the injury could not be covered as arising in the performance of duty.

In an undated letter, which the Office received on April 26, 1996, appellant requested reconsideration of his claim. Appellant stated that on November 2, 1994, he was scheduled to work at 9:00 a.m., his commute was about 30 minutes to 1 hour depending on traffic conditions and weather, and, although the schedule says the starting time was 9:00 a.m., work always starts

half an hour late. In support of his reconsideration request, appellant submitted a copy of the work schedule for the week of October 30 to November 5, 1994. Also submitted were March 8 and January 19, 1996 medical reports from Dr. Joseph E. Anthony, a dentist, which note that appellant was in an automobile accident on November 2, 1994 and was seen for temporomandibular joint apparatus dysfunction.

In a May 1, 1996 report, the Office called the employing establishment to clear up points not covered during the conference call. The Office noted that appellant was not paid mileage for traveling from his home to the work site. The Office further noted that appellant's handwritten notes on the work schedule did not reflect the actual schedule.

In a decision dated May 1, 1996, the Office denied modification of the October 2, 1995 decision. The Office found that appellant provided no evidence to establish that he was in the performance of duty at the time the accident occurred as he stated that he was enroute from his home to the work station.

The Board finds that appellant has failed to establish that the injuries he sustained on November 2, 1994 occurred in the performance of duty, as alleged.

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.<sup>1</sup> The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."<sup>2</sup> "Arising in the course of employment" relates to time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.<sup>3</sup> To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.<sup>4</sup>

As to an employee having fixed hours and a fixed place of work, an injury occurring on the premises while the employee is going to and from work before or after working hours or at lunch time is compensable, but if the injury occurs off the premises, it is not compensable, subject to certain exceptions. Underlying some of these exceptions is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.<sup>5</sup> The most common ground of extension is

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<sup>1</sup> 5 U.S.C. § 8102(a).

<sup>2</sup> This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

<sup>3</sup> *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

<sup>4</sup> See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

<sup>5</sup> 1 A. Larson, *The Law of Workmen's Compensation* § 15.00 (1993).

that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the plant, and that therefore the special hazards of that route become the hazards of the employment.<sup>6</sup> This exception contains two components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned.<sup>7</sup>

While driving his automobile to his work site on November 2, 1994, appellant was involved in an automobile accident at approximately 9:15 a.m. The record reflects that appellant worked intermittent hours and was notified the day before to report to work at 11:30 a.m. on November 2, 1994. As an employee with fixed hours and a fixed place of work, appellant is not covered because the injury occurred off the premises while he was going to work before working hours. Further, the record does not support the application of exceptions to the off-premises rule: Appellant was not driving an employing establishment vehicle at the time of his injury, there is no evidence in the record to support the fact that appellant was paid mileage for travel, and the accident occurred two hours prior to his starting time. Nor does the record support the application of the special hazard rule. The hazard encountered by appellant, his car rolling over due to rain, is not an exceptional or uncommon hazard. Unfortunately, weather conditions are dangers inherent to the motoring public. This case therefore fails the component of the special hazard rule, that is, the presence of a special hazard at the particular off-premises point.<sup>8</sup>

Appellant argues that he was instructed to report to work early, 9:00 a.m., on the day of the injury. The record, however, reflects that appellant was notified the day before to report to work at 11:30 a.m. on November 2, 1994, and that he reported to work at 11:30 a.m., and worked for 7 hours. As Professor Larson explains:

“The course of employment is not confined to the actual manipulation of the tools of the work, nor to the exact hours of work. On the other hand, *while admittedly the employment is the cause of the workman’s journey between his home and the factory, it is generally taken for granted that workmen’s compensation was not intended to protect him against all the perils of that journey.* Between these two extremes, a compromise on the subject of going to and from work has been arrived at, largely by case law, with a surprising degree of unanimity.”<sup>9</sup> (Emphasis added.)

Because appellant’s injury occurred off the premises while he was going to work before working hours, and because the record fails to support the application of an exception to the off-

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<sup>6</sup> *Id.* § 15.13.

<sup>7</sup> *Id.* § 15.13(b).

<sup>8</sup> The Board therefore need not address the second component of the special hazard exception, namely, whether the off-premises point at which the injury occurred lay on the only route, or at least on the normal route, that employees must traverse to reach the employing establishment.

<sup>9</sup> *Id.* § 15.11; accord *Lillie J. Wiley*, 6 ECAB 500 (1954).

premises rule, the Board finds that appellant's injury did not arise out of and in the course of his federal employment.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 1, 1996 and October 2, 1995 are hereby affirmed.<sup>10</sup>

Dated, Washington, D.C.  
August 10, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

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<sup>10</sup> On appeal, appellant submitted new evidence pertaining to mileage paid for traveling from his home to his work site for the relevant time in question. The Board, however, is precluded from reviewing new evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a request for reconsideration; *see* 20 C.F.R. § 10.138.