# United States Department of Labor
# Employees' Compensation Appeals Board

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| **MATTHEW GUTOWSKI, Appellant** | ) | |
| **and** | ) | **Docket No. 04-1393** |
| | ) | **Issued: September 15, 2004** |
| **DEPARTMENT OF VETERANS AFFAIRS, ASHVILLE VERTERNS ADMINISTRATION MEDICAL CENTER, Ashville, NC, Employer** | ) | |

*Appearances:*
*Matthew Gutowski, 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
MICHAEL E. GROOM, Alternate Member

### ***JURISDICTION***

On May 3, 2004 appellant timely appealed from an April 15, 2004 decision of the Office of Workers' Compensation Programs which found that he was not injured in the performance of duty. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

### ***ISSUE***

The issue is whether appellant was injured while in the performance of duty on June 16, 2003.

### ***FACTUAL HISTORY***

On June 16, 2003 appellant, then a 47-year-old physician's assistant, was running on the grounds of the employing establishment when he injured his right ankle. He filed a traumatic injury claim on the same date. The employing establishment indicated that the incident occurred at 7:30 a.m. and appellant's work hours were 8:00 a.m. to 4:30 p.m. In a June 20, 2003 report,

Dr. S. Keith McMurdo, Jr., a radiologist, stated that a magnetic resonance imaging scan showed a complete tear of the anterior talofibular ligament, a probable tear of the calcaneofibular ligament and a subacute hematoma. In a June 23, 2003 report, Dr. Peter G. Mangone, a Board-certified orthopedic surgeon, diagnosed a Grade 3 right ankle sprain and a mild midfoot strain.

The Office asked appellant to provide further details on how he was injured. In an undated response, received by the Office on March 29, 2004, appellant stated that on June 16, 2003 he was jogging on the grounds of the employing establishment. He indicated that the employing establishment had set up an Employee Fitness Trail on its property for the use of employees before and after work and during lunch or break hours to assist with the fitness and well-being of employees. Appellant related that he came upon a groundskeeper who was driving his cart on the fitness trail. Appellant attempted to go around the cart but stepped in a hole and fell to the ground. He experienced pain and swelling of the ankle and was helped to the emergency room.

In an April 15, 2004 decision, the Office denied appellant's claim, finding that the injury did not arise out of and in the course of employment.

## ***LEGAL PRECEDENT***

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation of "arising out of and in the course of employment." The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[2]

[1] 5 U.S.C. § 8102 (a).

[2] *Charles Crawford*, 40 ECAB 474 (1989).

The general criteria for performance of duty as it relates to recreational and social activities is set forth in Professor Arthur Larson's *The Law of Workers' Compensation* as follows:

> "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 moral that is common to all kinds of recreation and social life."[3]

Larson states that, in using these three independent tests by which recreation can be tied to the employment, if one of the tests is met, the absence of the other factors is not fatal.[4]

## ***ANALYSIS***

Although appellant's ankle injury occurred on the premises of the employing establishment, it did not occur during appellant's regular workday or during a lunch break or recreation period as an incident of his employment.[5] Some substantial employer benefit or an employee requirement must be shown in order to consider the activity in this case to be arising out of the employment.[6] Appellant must show that the injury arose from some risk incidental to the employment.[7]

On June 16, 2003 appellant was jogging on the premises of the employing establishment a half-hour before his regular time to begin work. The Board notes that, in *Timothy Burns*, the employee arrived at the employing establishment premises 20 to 30 minutes early to walk around the grounds for exercise. The Board found that the employee was on the premises early solely for personal reasons. The Board concluded that the employee was not in the performance of duty as the mere fact that an injury occurred on the employing establishment's premises during a reasonable interval prior to work is insufficient to bring an injury within the performance of duty.[8] In this case, appellant was on the premises before work to engage in exercise. There is no evidence that jogging was a requirement for his job as a physician's assistant or that the employing establishment derived a substantial benefit from appellant's exercise before work. This activity did not further his master's business and appellant could not be said to be

[3] A. Larson, *The Law of Workers' Compensation* § 22.01.

[4] *Id.* at § 23.03(1).

[5] *Timothy Burns*, 44 ECAB 125, 129 (1992).

[6] *Nona J. Noel*, 36 ECAB 329, 331-32 (1984) (appellant's injury was not in the performance of duty when she arrived early at work to avoid traffic and the act of eating breakfast was not a preparatory activity reasonably incidental to appellant's work duties).

[7] *Clayton Varner*, 37 ECAB 248, 251 (1985).

[8] *Timothy Burns*, *supra* note 5 at 129, 130.

performing his master's business. The activity of jogging before work, therefore, cannot be considered to be an injury arising while in the performance of duty.

Appellant stated that the employing establishment established the fitness trail for the well-being of its employees. Recreational activities are covered if they occur on the premises of the employing establishment during regular work hours, if the employer explicitly or implicitly requires participation in the activity and if the employer derives a benefit more specific than the intangible value of improving an employee's health or morale. As noted about, the recreational activity, while it occurred on the employing establishment's premises, took place before appellant's regular working hours. Appellant did not present any evidence to show that such exercise was required by the employing establishment. He also did not show that the employing establishment received a substantial benefit beyond the several fitness and well-being of the employees. The injury, therefore, did not arise within the performance of duty.

## ***CONCLUSION***

The Office properly found that appellant was not injured in the performance of duty.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs, dated April 15, 2004, be affirmed.

Issued: September 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member