

to 4:00 a.m. Several witnesses provided statements confirming the fall. Appellant's supervisor noted that he had already signed out and was not on the clock when the injury occurred.

The employing establishment controverted appellant's claim stating that his tour ended at 4:00 a.m., but his injury did not occur until 4:45 a.m., 45 minutes after his tour ended. The employing establishment opined that, therefore, he could not be considered to be in the performance of duty. It noted that appellant was "off the clock" when he was injured.

The initial medical report from Dr. Peter J. Kinahan, a Board-certified orthopedic surgeon, dated January 9, 2003 revealed that appellant had sustained an acromioclavicular separation in the right shoulder from the fall.

By letter dated January 31, 2003, the Office requested that appellant submit evidence demonstrating that he was in the performance of duty when the injury occurred. *I.e.*, what employment activities he was engaged in at the time of the injury and his whereabouts. No further factual evidence was submitted, only medical reports.

By decision dated March 7, 2003, the Office rejected appellant's claim finding that employing establishment records revealed that he clocked in at 7:50 p.m., that he clocked out at 4:01 a.m. and that it was 44 minutes later when the fall occurred. The Office found that the injury, although occurring on the premises, did not occur in the performance of duty.

Appellant disagreed with this determination and on March 24, 2003 he requested an oral hearing.

In support, he resubmitted previously submitted and considered evidence and he argued that, although he signed out at 4:01 a.m., he had hygienic needs due to a prior prostatectomy such that he had to stay near the men's room until right before his bus came at 4:53 a.m., to ensure that his ride home was without embarrassing accidents. Appellant claimed that that was the reason he did not leave the premises until 4:45 a.m. He claimed that he usually left the facility at 4:30 a.m.

Also submitted were articles from publications about the employing establishment sponsoring Lance Armstrong in the Tour de France, incontinence as a risk of a prostatectomy, bicycle safety, a bus time table and further medical reports. Appellant also submitted a map showing that the accident occurred on employing establishment property.

A hearing was held on January 28, 2004 at which appellant testified.

By decision dated March 18, 2004, the hearing representative affirmed the March 7, 2003 Office decision, finding that appellant's presence on the premises in no way was in furtherance of his master's business. The hearing representative found that his waiting around the employing establishment for 45 minutes after clocking out for the purpose of personal convenience, was not within the reasonable time allowed for an employee to leave the premises and, therefore, was not within the performance of his duty.

LEGAL PRECEDENT

The Federal Employees' Compensation Act¹ 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 The phrase "sustained while in the performance of his duty"³ 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."⁴ "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur; (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with his employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto;⁵ and (4) 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

This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement on an injury "arising out of the employment" must be shown and this encompasses not only the work setting, but also a causal concept 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 that substantial employer benefit is derived or an employment requirement gave rise to the injury.⁷

Under the Act,⁸ an injury sustained by an employee having fixed hours and place of work while going to or coming from work is generally not compensable because it does not occur in the performance of duty. However, many exceptions to the rule have been declared by the courts and workers' compensation agencies. One such exception almost universally recognized is the premises rule: an employee going to or coming from work before or after working hours or at

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 810 2(a).

³ "In the course of employment" deals with the work setting, the locale and the time of the injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. See *Larry J. Thomas*, 44 ECAB 291 (1992).

⁴ 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).

⁵ *Eugene G. Chin*, 39 ECAB 598 (1988). See *Charles Crawford*, 40 ECAB 474 (1989). (The phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury). See also *Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

⁶ See *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

⁷ *Charles Crawford*, *supra* note 5.

⁸ 5 U.S.C. §§ 8101-8193.

lunch, while on the premises of the employer, is compensable.⁹ This includes a reasonable interval before and after official working hours while the employee is on the premises engaging in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity. The mere fact that an injury occurs on an industrial premises following a reasonable interval after working hours is not sufficient to bring the injury within the performance of duty. The concomitant requirement of an injury arising out of the employment must also be shown.¹⁰

However, some substantial employer benefit or an employer requirement must be shown in order to consider the activity involved to be arising out of employment.¹¹ It is incumbent upon appellant to establish that the injuries arose out of his employment; that is, the accident must be shown to have resulted from some risk incidental to the employment.¹²

ANALYSIS

The Board finds that appellant's injury on January 9, 2003 did not arise within the performance of duty.

In *Nona J. Noel*,¹³ the Board noted the general rule that the course of employment for employees having a fixed time and place of work embraces a reasonable interval before and after official working hours, while the employee is on the premises engaged in preparatory or incidental acts.¹⁴ What constitutes a reasonable interval depends not only on the length of time involved but also on the interval and the nature of the employee's activity. The employee, whose tour of duty started at 8:00 a.m., stated that she customarily left home between 6:20 and 6:40 a.m. in order to avoid heavy traffic and to eat breakfast on the base prior to work. The Board found that the act of having breakfast at the N.C.O. club was not a preparatory activity reasonably incidental to her work activities which, coupled with the length of time that she arrived at the employing establishment prior to her official starting time, placed her activities outside the scope of her employment.¹⁵

In *Clayton Varner*,¹⁶ the employee sustained injury on the premises of the employing establishment at 4:15 a.m., although his tour of duty did not begin until 7:00 a.m. He related that

⁹ See *Emma Varnerin, M.D.*, 14 ECAB 253 (1963).

¹⁰ *Narbik A. Karamian*, 40 ECAB 617 (1989).

¹¹ *Timothy K. Burns*, 44 ECAB 125 (1992).

¹² *Id.*

¹³ 35 ECAB 439 (1983).

¹⁴ *Id.* at 441.

¹⁵ *Nona J. Noel*, 36 ECAB 329, 331-32 (1984).

¹⁶ 37 ECAB 248 (1985).

he was on the premises to retrieve pain medication. The Board found that the employee was on the premises for purely personal reasons, to retrieve pills and remained on the premises to avoid the personal inconvenience of having to travel back home and return to work by bus. It was found that his actions were not preparatory or reasonably incidental to his work activities which, coupled with the length of time prior to his official starting time placed his injury outside the scope of his employment.

In *JoAnn Curtis*,¹⁷ the employee's tour of duty ended at 4:00 p.m. On the date of injury she clocked out at 4:20 p.m. and then drove to a hospital on the employing establishment premises to have a prescription filled for her sister. At 4:40 p.m. she was abducted by an unidentified assailant, robbed and sexually assaulted. The Board found that the employee's continued presence on the premises after her regular working hours was not due to the conditions of her employment and that her activities were for her personal convenience and not incidental to her employment.

In *Timothy K. Burns*,¹⁸ the employee was injured at 6:40 a.m. after tripping over an elevated portion of a sidewalk on the premises. His tour of duty began at 7:00 a.m. and he noted that his purpose for being at the employing establishment early was to perform a personal exercise program of walking prior to work and to avoid traffic congestion. The Board found that appellant's presence on the employing establishment premises was for purely personal convenience and that he was not engaged in any preparatory or incidental activity related to his employment. Further, there was no evidence that the employing establishment expressly or impliedly required appellant's presence on the premises prior to his official duty hours.

In cases in which coverage has been extended, some substantial employer benefit or requirement has been shown. In *Catherine Callen*,¹⁹ coverage was extended to a legal secretary who sustained a fractured left wrist after she fell over a chair. The injury occurred at 11:00 p.m., following her regular tour of duty which stopped at 5:00 p.m. The Board noted that the employee's presence on the premises that Friday evening was to complete a project for an attorney at the employing establishment which had been requested earlier that day in order that he could work on it during the weekend as the materials were needed the following Monday. The Board noted that there was no prohibition concerning her overtime work and the record established a substantial employer benefit from her presence at work.

In *Venicee Howell*,²⁰ coverage was extended to a clerk who injured her left knee after falling between two all-purpose containers. The injury occurred at 7:50 a.m., following her regular tour of duty which stopped at 7:45 a.m. The Board noted that the employee's presence on the premises occurred while she was walking to her supervisor's desk to obtain a bid sheet in order to apply for a position she saw posted on a bulletin board. Although not required by her

¹⁷ 38 ECAB 122 (1986).

¹⁸ 44 ECAB 125 (1992).

¹⁹ 47 ECAB 192 (1995).

²⁰ 48 ECAB 414 (1997).

employment, the Board found that she was engaged in an activity reasonably incidental to the conditions of her employment during a reasonable interval after her official working hours.

The evidence reflects that appellant ended his official tour of duty at 4:01 a.m. on January 9, 2003. He subsequently sustained injury at 4:45 a.m. after falling from a bicycle while riding down an icy hill to a local bus stop. Appellant contends that he was engaged in activities reasonably incidental to his employment after the time he ended his official tour of duty. He argued that residuals of prostate surgery required that he use the men's bathroom prior to the scheduled arrival of his bus at 4:53 a.m.²¹ Appellant stated that he usually left "the facility around 4:30 a.m. weekdays and much later, 6:00 a.m., on weekends because of the bus schedule." He also stated: "I feel the [employing establishment] accepted the fact that I do not hurry to leave the facility after I clock out and take my time because of several matters. I have never been challenged." Appellant noted that he would occasionally ride home with other employees who got off later than 4:00 a.m., stating: "Conservancy, carpooling and minor adjustments like overtime waiting in the lunch room have not been challenged."

The Board finds that the facts of this case establish that appellant remained on the premises of the employing establishment for personal reasons dealing with his commute home from work. He noted that he waited on the premises for the arrival of a commuter bus at 4:53 a.m., later on the weekends or to obtain a ride home from other employees as they were leaving. The record reflects that he was not engaged in any preparatory or incidental activity related to his employment. Although his use of the restroom facilities shortly after ending his official tour of duty would be recognized as a personal ministrations, this fact alone does not bring his injury into the course of employment. The 40- to 45-minute delay in leaving the premises was explained by appellant as one of personal convenience: in order to catch a local commuter bus at 4:53 a.m. There is no evidence that the employing establishment expressly or impliedly required his presence on the premises following his official tour or that he was otherwise engaged in activities incidental to his employment. The fact that appellant's presence on the premises following his official tour had not been challenged by his employer does not mean that his activities furthered his master's business or became a requirement of his employment. Only as a matter of personal convenience did he choose to remain at the employing establishment following the end of his work shift in order to facilitate his commute home. The Board finds that appellant's injury was not sustained in the performance of duty.

CONCLUSION

The Board finds that appellant has not established that he sustained injury on January 9, 2003 arising in the course of his federal employment.

²¹ Appellant indicated that he has extra hygienic needs requiring that he wear adult absorbent shields.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 18, 2004 is affirmed.

Issued: July 25, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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