United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 10-753**
	)	**Issued: December 15, 2010**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK, Employer	)	

Appearances:
Roy A. Shobert, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 27, 2010 appellant, through his representative, filed a timely appeal from the November 12, 2009 merit decision of the Office of Workers' Compensation Programs, which found that his right knee injury did not arise in the course of employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant's alleged right knee injury on April 30, 2007 arose in the course of employment.

FACTUAL HISTORY

On June 5, 2007 appellant, then a 49-year-old aircraft painter, filed a claim for compensation alleging that he injured his right knee on April 30, 2007 when he slipped and fell while bowling. The injury occurred between 4:15 and 4:30 p.m. A witness saw appellant fall: "He appeared to slip and twist landing on his back." Appellant did not stop work.

Appellant's supervisor stated that he had no knowledge of the alleged injury. He advised that appellant's regular work hours were 7:00 a.m. to 3:00 p.m. and that he was not injured in the performance of duty: "Employee was bowling." The supervisor indicated that appellant first received medical care on June 4, 2007 from Dr. William M. McAfee, a family physician, but no report from Dr. McAfee appears in the record.

The earliest medical report following the incident at the bowling alley was a February 29, 2008 report from Dr. John W. Ellis, a family physician, who stated that "the injury occurred to [appellant's] right knee when he slipped and fell while bowling." Dr. Ellis did not provide a diagnosis of appellant's right knee condition.

A claims review investigator for the agency found that the bowling activity was sanctioned by the employing establishment. An incident report described the activity as "bowling in a partnership gathering, agency & union."

The Office asked appellant for additional information to support his claim. It noted, among other things, that it received no diagnosis of any condition resulting from the April 30, 2007 injury or a physician's opinion on causal relationship.

In a July 23, 2007 decision, the Office denied appellant's claim on the grounds that there was no evidence of a connection between his federal employment and the described incident that led to the claimed injury.

Appellant's representative requested reconsideration, contending that appellant was the 1st Vice President of AFGE Local 916 and was in full-time representational duty in accordance with the Master Labor Agreement, Article 4, section 4.13: "100 percent official time will be granted to full-time representatives in the quantities listed below to each installation at each installation to perform the specific functions listed in section 4.06." Appellant's representative explained that section 4.06, item 13, listed the following as one of the functions for which a reasonable amount of official time was authorized: "Participate in partnership activities as authorized by the [p]artnership [c]ouncil." He argued that appellant was on official business at the time of injury because the bowling outing was an activity that the partnership council approved for the purpose of management and labor to get to know each other better, and because appellant was a full-time representative and was present at the bowling outing as a representative for the union.

The employing establishment provided a timesheet showing that appellant worked from 7:00 a.m. to 3:00 p.m. on April 30, 2007, the day of the bowling incident. The employer contended that the incident occurred more than a reasonable amount of time after appellant's shift was over.

Appellant's representative countered that the hours shown on the timesheet were artificial, that it came from a program the supervisor used as a convenience to put time in for pay, as though appellant were working as a painter for the shop. He explained that, if the supervisor deviated from this time, the program would show that appellant worked overtime. Appellant's representative advised that it was the union president who set appellant's work hours, and he submitted a note from the president stating that appellant's work hours were from

9:00 a.m. to 5:00 p.m. and had been since November 2005. Appellant was allowed to flex his work hours to meet labor-management duties. His representative submitted the timesheet appellant actually signed for the pay period in question, one that showed 80 hours worked with no sign-in or sign-out times. "So how would [appellant's] [s]upervisor know what time he came in and left for the day?"

In an October 22, 2007 decision, the Office denied modification of its prior decision. It found that a bowling meeting set up for management and labor to get to know each other better did not fall within the guidelines of representational functions.

Appellant sought reconsideration. Relying again on language from the Master Labor Agreement designating functions for which a reasonable amount of official time is authorized, his representative argued that appellant was performing representational duties while participating in the Partnership Bowling Tournament, a partnership council approved function.[1]

The employing establishment noted that, even if appellant's hours were 9:00 a.m. to 5:00 p.m., his official federal timesheet, which appellant signed, showed that he was paid only through 3:00 p.m. on the date of the alleged injury. The employer further noted that appellant submitted no evidence to establish that he was bowling in a "Partnership Bowling Tournament."

In an October 24, 2008 decision, the Office again denied modification of its prior decisions. It found that the mere undertaking of a representation function, such as an agency-union partnership gathering at a bowling alley, which, if established, might entitle appellant to official time during a period when he was in duty status, would not, without evidence of a demonstrable and significant employer benefit beyond that normally associated with that activity, entitle him to coverage under the mutual benefit theory.

On reconsideration, appellant's representative submitted evidence that the bowling activity on April 30, 2007 was a partnership event. He submitted a copy of the partnership agreement between the agency and the union. The agreement was "grounded in a shared, overriding interest to deliver the highest quality product and services while reducing costs to the [agency] customers." The parties committed themselves "to pursue solutions that promote partnership, to achieve increased quality and productivity, customer service, mission accomplishment, efficiency, quality of life, employee empowerment, organizational performance, and military readiness, which considering the legitimate interests of both labor and management." The agreement listed seven principles upon which a sound relationship is built and charged the partnership council to lead the implementation of those principles by: (1) applying them in dealing with each other on matters that affect the civilian workforce as a whole; (2) developing comprehensive staff evaluations of collective workplace issues and development of recommendations for the [agency] director; (3) establishing a framework for

[1] Section 4.06 of the agreement states: "When work conditions are such that the steward/official may be excused from work, a reasonable amount of official time will be granted. Representatives will provide the supervisors sufficient information to allow the supervisors to understand the complexity of issues for which the official time is requested. It is the parties' intent that any official time agreed to by the parties authorized under section 7131(d) of the Federal Service Labor Management Relations Statute will be encompassed within one of the following activities."

labor-management relations and collective bargaining at all subordinate levels; (4) developing measures of organizational performance and evaluating improvements in those measures that result from the council; (5) developing a comprehensive strategy to train management and union officials in consensual methods of dispute resolution; and (6) developing a nonadversarial atmosphere to enhance open discussion, specifically, prohibiting retribution by any of the parties concerning the discussions or actions of the [p]artnership [c]ouncil."

In a November 12, 2009 decision, the Office reviewed the merits of appellant's claim and again denied modification. It found that a bowling tournament did not fall within the scope of representational functions. The Office further found that appellant's presence at the bowling alley for the agency-union function could not be considered of mutual benefit and did not place him in the performance of his official union duties.

On appeal, appellant's representative recounted the factual history of the case. He contends that appellant met his burden of proof to establish a compensable injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[2] The Board has interpreted the phrase "sustained while in the performance of his duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3] "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 employer'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.[4]

This alone is not sufficient to establish entitlement to compensation. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[5]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. Thus, when an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a

[2] 5 U.S.C. § 8102(a).

[3] 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).

[4] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

[5] *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[6]

Causal relationship is a medical issue,[7] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[8] must be one of reasonable medical certainty,[9] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[10]

With respect to whether injuries arising in the course of union activities are related to employment, the general rule is that union activities are personal, that attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment. Larson notes, however, that it is being increasingly held that an activity undertaken by an employee in the capacity of union officer may simultaneously serve the interests of the employer.[11]

The Office recognizes that certain representational functions performed by employee representatives of exclusive bargaining units benefit both the employee and the agency. Its stated policy is that employees performing representational functions entitling them to official time are in the performance of duty and entitled to all benefits of the Act if injured in the performance of those functions. Consistent with Larson, activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not included.[12]

When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted official time or, in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty.[13]

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[6] *E.g.*, *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Mary J. Briggs*, 37 ECAB 578 (1986).

[8] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[9] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[10] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[11] 2 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 27.03(3) (2006).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

[13] *Id*. at Chapter 2.804.16.e.

If the agency states that the employee was not performing an activity for which official time is allowed, the Office should issue a letter warning the claimant that the case will be denied unless addition information is provided, and allowing 30 days for a response. If the claimant provides evidence contradicting the agency's position, the official superior should be asked to reply to this evidence, providing documentation in the form of appropriate regulations, executive order or union agreement covering the specific situation. The Office will accept this ruling of the agency as to whether a representative was entitled to official time, unless this ruling is later overturned by a duly authorized appellate body.[14]

ANALYSIS

Appellant claimed injury on April 30, 2007 while performing representational functions. The employer contended that he was off the clock and therefore not on official time.[15] The employing establishment produced evidence showing that appellant worked from 7:00 a.m. to 3:00 p.m. on April 30, 2007. Appellant explained that the time kept by his supervisor was an artificial convenience that did not represent his actual hours on April 30, 2007. He provided evidence that his regular work hours, set by the union president, were 9:00 a.m. to 5:00 p.m., which would place his 4:15-4:30 p.m. injury on the clock and therefore on official time, as he was a full-time union representative. The employer noted that, even if appellant's hours were 9:00 a.m. to 5:00 p.m., his official federal timesheet, which appellant signed, showed that he was paid only through 3:00 p.m. on the date of the alleged injury. So he was not in a regular-duty status at the time of the alleged injury.

Office procedures are clear: When there is a dispute between the employing establishment and the claimant as to whether the claimant was entitled to official time at the time of the alleged injury, the Office will accept the employer's ruling, unless that ruling is overturned by a duly authorized appellate body. It is appellant's burden to establish the time element of work connection, and he has not met his burden.

The employing establishment's argument aside, appellant has not established when he actually began work on April 30, 2007 or when he actually stopped work that day. He did not sign in or out, which led his representative to observe: "So how would [the] [s]upervisor know what time he came in and left for the day?" Without documentation to establish what time appellant came and left for the day, neither the supervisor nor the Office can determine with any certainty whether the alleged injury occurred on the clock.[16] Lost in the development of the time issue is the fact that appellant never specifically alleged what time he came to work on April 30, 2007 and what time he left. Though for obvious reasons of abuse, the Office cannot allow a claimant to self-certify his work hours after the fact to cover an alleged injury.

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[14] *Id*.

[15] *See Bernard Redmond*, 45 ECAB 298 (1993) (finding that the claimant could not be entitled to official time at 9:00 a.m. because he finished his tour of duty at 8:00 a.m.).

[16] Although the union president indicated that appellant's hours were 9:00 a.m. to 5:00 p.m. as a general matter, he provided no supporting documentation. More to the point, he provided no probative evidence of when appellant came to work on April 30, 2007 and when he left.

The place element of work connection is not in dispute. The alleged injury occurred at the Tinker Bowling Center on base, but with only one of the two overt physical indicia of work connection established, the activity element of work connection must bear greater weight in establishing whether appellant was in the course of employment at the time of the alleged injury.[17]

Appellant has submitted some evidence to support that the bowling outing in question was approved by the partnership council, but there is no direct documentation of this fact. The record does not contain the relevant minutes recorded by the labor relations officer and approved by the council co-chairs. Under the partnership agreement, one of the council co-chairs is the employing establishment's executive director. If the executive director authorized the bowling outing as a partnership activity, such authorization might establish sufficient employer sponsorship and benefit to bring the alleged injury within the course of appellant's employment.

The Board will set aside the Office's November 12, 2009 decision and remand the case for further factual development to determine whether the employer, through the executive director and co-chair of the partnership council, effectively extended appellant's "course of employment" to include the April 30, 2007 bowling outing. The executive director should address whether appellant was compelled to attend, whether his attendance was voluntary, degree of any encouragement, how the outing was financed and advertised, whether the participants wore bowling shirts, and whether the employer benefited from the event, beyond general improvement of morale and good will.[18] After such further development as may become necessary, the Office shall issue an appropriate final decision on whether appellant's injury arose in the course of employment.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

[17] *See* 2 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 22.03[1] (2006) (recreational and social activities).

[18] *Id*. at § 22.04(2) *et seq*. (employer sponsorship of recreational and social activities).

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: December 15, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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