

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACK E. TALBERT and FEDERAL DEPOSIT INSURANCE
CORPORATION, DIRECTOR OF PERSONNEL, Washington, D.C.

*Docket No. 94-1810; Submitted on the Record;
Issued February 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of his federal duties.

On February 10, 1994 appellant, then a 40-year-old audit specialist, filed a traumatic injury claim alleging that on February 4, 1994 he sustained a torn Achilles tendon of the right leg in the performance of duty. At the time of the alleged injury, he was on temporary duty performing an audit in Dallas, Texas and tore the Achilles tendon of his right leg while playing basketball with a co-worker on their hotel grounds.

In clinical notes dated February 11, 1994, Dr. Thomas B. Fleeter, a Board-certified orthopedic surgeon, related that appellant was playing basketball when he felt something snap or pull in his right ankle. He diagnosed an Achilles tendon rupture.

By letter dated March 1, 1994, the Office of Workers' Compensation Programs asked appellant to submit additional information in support of his claim including a statement as to whether he was attending a meeting or special training on the date of the injury, whether the injury occurred during a regularly scheduled activity or recreation which was part of the meeting, whether the basketball game was organized by the planners of the meeting, and whether the game took place on the property of the hotel or site where the meeting was held.

By letter dated March 8, 1994, appellant stated "the injury took place at our hotel (private property) which was one-half mile from the audit site. A co-worker and I were playing basketball after work."

By decision dated April 11, 1994, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty.

The Board finds that appellant has not established that his injury was sustained in the performance of duty on February 4, 1994.

The Federal Employees' Compensation Act¹ provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The phrase "while in the performance of duty" in the Act has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."³ "Arising out of employment" tests the causal connection between the employment and the injury; "arising in the course of employment" relates to the time, place and work activity involved.⁴ For the purposes of determining entitlement to compensation under the Act, "arising in the course of employment," *i.e.*, performance of duty must be established before "arising out of the employment," *i.e.*, causal relation, can be addressed.⁵

With regard to recreational and social activities, the Board has held that such activities arise in the course of employment when:

"(1) They occur on the premises during a lunch or recreational 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 the employee, brings the activity within the orbit of employment; or

"(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."⁶

In the instant case, none of the traditional indicia of coverage for recreational or social activities are present. The February 4, 1994 incident did not take place on the employer's premises, nor is there any indication that the basketball game between appellant and a co-worker after work hours was expressly or impliedly required by the employer or that the employer derived substantial benefit from the activity.

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* § 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 See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985).

⁵ *Kenneth B. Wright*, 44 ECAB 176 (1992).

⁶ *Lawrence J. Kolodzi*, 44 ECAB 818 (1993); *Kenneth B. Wright*, *supra* note 5; see also 1A Larson, *The Law of Workmen's Compensation* § 22.00 (1995).

In this case, the record shows that appellant was on temporary duty performing an audit in another city when the incident occurred. Although traveling employees on temporary-duty assignment are generally within the course of employment during the trip, there are limitations. Larson, in his treatise *The Law of Workmen's Compensation*, notes:

“Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, *except when a distinct departure on a personal errand is shown*. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.”⁷ (Emphasis added.)

The Board has also recognized that there are limitations to coverage of employees in travel status. When the employee deviates from the normal incidents of his or 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 the Act and any injury occurring during these deviations is not compensable.⁸

Examples of noncompensable, personal deviations from normal incidents of employment while on travel can be found in prior Board decisions. In *Karl Kuykendall*, the employee was on temporary duty in Denver and sustained injury, after his regularly scheduled duty hours, at a ski lift approximately 60 miles west of Denver.⁹ The Board found that the employee’s injury was not sustained while in the performance of duty as he had deviated from activities reasonably incidental to his temporary-duty assignment to engage in recreational activities. In *Lawrence J. Kolodzi*, the employee was injured at a health club approximately one mile from the motel where he was staying a few hours after his scheduled workday had ended.¹⁰ The Board found that appellant was not engaged in activities reasonably incidental to his temporary-duty assignment but had deviated for purposes which were personal and recreational in nature.

The principles underlying the above cases are equally applicable in the instant case. Appellant was on a temporary-duty assignment in Dallas and decided to play basketball with a co-worker after work hours on the grounds of his hotel which was approximately one-half mile from his temporary work site. This is not a situation implicating the “necessity” of sleeping in hotels or eating in restaurants which would keep the activity within the scope of employment.¹¹ At the time of his injury, appellant was not engaged in activities reasonably incidental to his temporary-duty assignment but had deviated for purposes which were personal and recreational in nature. Under the facts of the case, appellant engaged in a voluntary deviation by

⁷ 1A Larson, *The Law of Workmen's Compensation* § 25.00 (1995).

⁸ See *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

⁹ 31 ECAB 163 (1979).

¹⁰ *Supra* note 4.

¹¹ See, e.g., *William K. O'Conner*, 4 ECAB 21 (1950), where a compensable injury occurred when an employee on temporary assignment was injured while in route to his hotel from his place of employment.

participating in the basketball game which was not made pursuant to any activity directed by his employer nor arising out of the necessity of his employment.¹² The Board accordingly finds that appellant was not in the course of his employment when he sustained injury on February 4, 1994.

¹² See *Hershel A. Rodgers*, 48 ECAB ____ (Docket No. 95-2746, issued August 20, 1997).

The decision of the Office of Workers' Compensation Programs dated April 11, 1994 is affirmed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member