U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of MARTHELL T. ADAMS and DEPARTMENT OF THE NAVY, CIVILIAN PERSONNEL OFFICE, New Orleans, La.

*Docket No. 96-1140; Submitted on the Record;*
*Issued March 16, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's accepted low back pain injury was sustained in the performance of duty.

On February 13, 1992 appellant, then a 47-year-old computer systems analyst, filed a claim alleging that on that date she injured her left leg and lower back when she fell through a floor hatch on a naval support activity shuttle boat en route to work crossing the Mississippi River. Appellant was treated at the employing establishment clinic where she was diagnosed as having sustained left lower extremity and left lower back musculoskeletal strain. Appellant was released to return to regular work on March 30, 1992.

With appellant's claim form the employing establishment submitted a copy of a 1984 letter from the associate director for Federal Employees' Compensation to the chief of staff of the employing establishment in New Orleans where the issue of injury while using a naval commuter boat service had been previously raised. The associate director stated:

> "Employees are considered to be in performance of duty while on the premises of employment, a reasonable time before and after duty hours and while traveling to and from work in transportation furnished by the employer. Where parking facilities are owned or leased by the employer, the premises of employment extends to the parking lot and employees are in performance of duty while on a direct route to and from the parking lot, notwithstanding any charge which may be imposed for parking or for transportation.
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> "Thus, civil employees are in performance of duty for workers' compensation purposes while on the Navy Support Activity, west bank; while using commuter boat service furnished by the Department of the Navy; and during incidental related on-premises activities. Claims are adjudicated on their merit and must satisfy all program criteria for compensability. In effect, this means that the

medical condition claimed must be causally related to the injury sustained and the injury must not have resulted from willful misconduct, intoxication or the employee's intent to injure himself or another."

On April 15, 1992 appellant's claim was accepted for low back pain.

On April 21, 1992 appellant notified the employing establishment that he did not feel the claim should be considered as a workers' compensation claim, noting: "My opinion is that the injuries to [appellant] were not job related and not on the premises of her employer."

The employing establishment advised appellant's attorney by letter dated August 10, 1992 that an Admiralty claim file had been opened. It further noted:

"The chief obstacle to proving naval liability in your client's particular case results from her employment status. Your client was, at the time of her injury, an employee of the federal government who was being transported across the Mississippi River, for the purpose of reporting to work, on a vessel belonging to her employer. The government therefore compensated your client for her injury under the procedure specified by law, namely the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-92 (1988) (FECA)."

The employing establishment further noted:

"Section 8106(c) of that statute provides that the United States bears no further liability to your client, in Admiralty or otherwise, beyond the FECA compensation already provided."

Appellant contended the claim that appellant was not in the performance of duty at the time of the injury and therefore, was not covered under the Act. Appellant's attorney brought suit under the Public Vessels Act, 46 U.S.C. §§ 781-90 (1988) and the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1988) for recovery of damages; however, a United States district judge ruled that the Department of Labor had found that appellant was in the performance of her duty and therefore, the Court lacked jurisdiction over the claim. The judge ordered that the government's motion to dismiss be granted.

Appellant then appealed to the Court of Appeals for the Fifth Circuit Court. He also requested rescission of acceptance of the claim by the Office.

The Office requested review of the issue before the Office regional solicitor who rendered an opinion dated December 14, 1993 finding that the Act's exclusive liability provision disallowed appellant's claim against the Navy and that the acceptance of her claim for benefits was correct.

Appellant then appealed to the Employees' Compensation Appeals Board; however, the Board advised appellant that they were unable to docket an appeal because there appeared to be no formal final decision issued by the Office on the claim.

The case was returned to the district Office for issuance of a formal final decision with full appeal rights. This was accomplished on November 14, 1994, wherein the Office again determined that the evidence of record established that appellant was in the performance of duty when injured and was entitled to coverage under the Act.

Appellant then requested a hearing which was held on September 13, 1995. Appellant testified at the hearing and was represented by her attorney. During testimony appellant explained that she parked her car on a military base, that she took a ferry ride across to the other side of the Mississippi River and that as she was going up the plank, she sustained her injury. Appellant described in detail the employment injury and her subsequent medical treatment for its effects. Appellant argued for rescission of acceptance of the claim. Submitted as Exhibit A was a copy of the shuttle boat ticket noting, "Suit to recover any claim shall not be maintainable unless commenced within one year after the date of the accident or loss." Submitted as Exhibit B was a copy of General Military Law, 10 U.S.C.S. § 2632. Appellant attempted to argue that the Secretary of the Navy or the Secretary of Defense erroneously provided transportation in this case, applying the provisions of General Military Law, 10 U.S.C.S. § 263 (Exhibit B). He was then advised that the Office has no jurisdiction over the actions of the Secretaries of the Navy or Defense regarding this issue and that no finding would be made regarding whether the Secretary of the Navy or the Secretary of Defense acted erroneously in providing this transportation.

Appellant then argued that 5 U.S.C. § 8116(b) provided for an election of benefits by appellant; however, the hearing representative found that this provision relates to benefits payable under the Civil Service Retirement Act or the Department of Veterans Affairs, as the Act prohibits receipt of dual benefits with the exceptions noted in section 8116(a).

By decision dated November 20, 1995, the hearing representative found that appellant was in the performance of duty at the time of her injury and that therefore the acceptance of the claim by the Office was appropriate. The hearing representative explained that under the Act, with an injury sustained by an employee having fixed hours and place of work, injury while going to or coming from work is generally not compensable because it does not occur in the performance of duty. This is in accord with the weight of authority under workers' compensation statutes that such injuries do not occur in the course of employment. However, many exceptions to the rule have been declared by courts and workers' compensation agencies.[1] Where the employer contracts for and furnishes transportation to and from work is one of the exceptions provided under Office procedures.[2] The hearing representative found that in this case the Office accepted the claim noting that the issue had been resolved previously in 1984.[3] The previous explanation specifically noted: "Thus, civil employees are in performance of duty for workers' compensation purposes while on the Navy Support Activity, west bank; while using commuter boat service furnished by the Department of the Navy; and during incidental-related on-premises activities." This issue was reviewed by the regional solicitor who concurred that the

[1] *See Anneliese Ross*, 42 ECAB 371 (1991).

[2] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(c) (August 1992).

[3] *See* Director's November 29, 1984 letter to the Chief of Staff at the Naval Reserve Force in New Orleans, Louisiana.

Office properly accepted the claim for benefits, determining that appellant was in the performance of duty while traveling to and from work in transportation furnished by her employer. The hearing representative found that appellant submitted no evidence to establish that she was not in the performance of duty at the time of her injury.

The Board finds that appellant's accepted low back pain injury was sustained in the performance of duty.

As to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or coming from work, before or after working hours, or at lunch time, are compensable. The course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts and that what constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the employee's activity.[4] As a general rule, off-premises injuries sustained by employees having fixed hours and places of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself that are shared by all travelers. There are, however, recognized exceptions which are dependent upon the particular facts relative to each claim. These pertain to the following instances: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[5]

In the instant case, the facts clearly demonstrate that the employer contracted to, furnished and oversaw transportation using an employing establishment shuttle boat operated by employing establishment personnel from an employing establishment parking lot on one side of the Mississippi River to the employing establishment annex on the other side. These facts definitely fall into the second of the above-identified exceptions to the "going and coming" rule and bring appellant into the performance of duty from the moment she entered the employing establishment-controlled parking lot and continuing as she boarded the shuttle boat. Consequently, appellant's injury occurred while she was in the performance of duty and the Office's acceptance of her claim was proper.

[4] *Dwight D. Henderson*, 46 ECAB 441 (1995); *Bernard Redmond*, 45 ECAB 298 (1994); *Timothy K. Burns*, 44 ECAB 125 (1992).

[5] *See Melvin Silver*, 45 ECAB 677 (1994); *Anneliese Ross*, 42 ECAB 371 (1991); *Hope J. Kahler (Roger A. Kahler)*, 39 ECAB 588 (1988); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a), (c) (August 1992).

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 20, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 16, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member