

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM T. BODILY and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT AUDIT AGENCY, Memphis, TN

*Docket No. 00-1954; Submitted on the Record;
Issued September 25, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained an injury on May 28, 1997 arising in the performance of duty.

On December 11, 1997 appellant, then a 44-year-old auditor, filed a claim for a post-traumatic stress condition related to a May 28, 1997 incident, in which he was robbed at gunpoint while on travel status. The employing establishment controverted the claim, indicating that appellant and his immediate supervisor had left the vicinity of their hotel and went to a nightclub and were subsequently robbed at gunpoint during a personal deviation.

The record establishes that appellant and his supervisor, Donnie Benfield, were on temporary duty in Dallas, Texas from May 27 to 30, 1997 from their permanent duty station in Memphis, Tennessee.¹ The men had completed their work duties on May 28, 1997 at approximately 4:00 p.m. and returned to their hotel.² They left the hotel at 8:30 p.m. to find a restaurant recommended by a Dallas coworker. After driving for approximately an hour, they were unable to locate the restaurant. During this period, they made a stop at a convenience store and Mr. Benfield purchased a six pack of beer and cigarettes for their consumption "in some of the shops on Deep Ellum." After arriving in an area of Dallas identified by Mr. Benfield as Deep Ellum, the two men parked the car and started looking for a place to eat.³ After some time, they found a dining place at approximately 9:30 p.m.⁴

¹ The Board's chronology is taken from statements and a March 18, 1998 affidavit submitted by appellant, his supervisor and police reports.

² The record indicates the hotel was located northeast of Irving, Texas, along Interstate 635.

³ This area of Dallas is located approximately 15 miles from the hotel.

⁴ Neither appellant nor his supervisor could recall the name or exact location of the restaurant where they dined. The restaurant was described as a building with a rooftop area and live music and open bar.

Appellant and Mr. Benfield alleged that they ate dinner, had several beers and stayed to listen to music until 11:30 p.m. As they prepared to leave, appellant went to the restroom and Mr. Benfield went outside to wait. A man, later identified as Tracy Gray, approached Mr. Benfield and stated that he was having car trouble. Mr. Gray mentioned that he was originally from Memphis and Mr. Benfield discussed being on temporary duty from that city. Mr. Gray told Mr. Benfield that he had a sister or cousin who lived nearby and asked for a ride. Mr. Benfield decided to help Mr. Gray, as he indicated the house was on the way back to the hotel. At 11:40 p.m., appellant joined Mr. Benfield outside, who related Mr. Gray's situation. Appellant and Mr. Benfield indicated that they spent 20 minutes talking with Mr. Gray before getting into the car.

The men got into the car at 12:10 a.m. with appellant driving while Mr. Gray gave directions. Mr. Gray initially directed them towards Interstate 30, however, any discernable route is not available from the statements in evidence. They drove in various directions until 12:45 a.m. when Mr. Gray directed appellant to pull over.⁵ Mr. Gray produced a handgun and demanded money from appellant and Mr. Benfield. He took \$2,460.00 in cash and \$100.00 in a traveler's check from appellant and \$80.00 in cash from Mr. Benfield. Mr. Gray ordered the men outside the car and then drove off with the vehicle. Appellant and Mr. Benfield stated that they walked around until they found a telephone booth at 1:20 a.m. and called the police. Statements were taken and the men were subsequently escorted back to their hotel, arriving at 2:40 a.m.

The report of the Dallas police indicates that the location of the robbery was the 1700 block of South Oakland Street. The police narrative states that at approximately 2:00 a.m., appellant and Mr. Benfield were at the corner of Elm and Walton Streets when they were approached by Mr. Gray, who asked for help to jump his car. When informed they did not have jumper cables, Mr. Gray asked them to take him to get some. They got into the rental vehicle and Mr. Gray directed them south on Oakland. Mr. Gray then produced a small black handgun and demanded their money. Mr. Gray then made the two men get out of the vehicle and took the rental vehicle. Appellant and Mr. Benfield then called the police. The report notes that at approximately 9:00 a.m. Mr. Gray was apprehended in the stolen rental car along with a female passenger. The police recovered a black .380 automatic, cash in the amounts of \$1,150.00 and \$646.00, appellant's wallet and traveler's check and a controlled substance.

In a February 19, 1998 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he was not in the performance of duty at the time of the robbery. In a February 16, 1999 decision, an Office hearing representative affirmed the February 19, 1998 decision. Appellant's requests for reconsideration were denied in a September 30, 1999 nonmerit decision and a May 4, 2000 merit decision.

The Board finds that appellant has not established that he sustained an injury while in the performance of duty.

⁵ Mr. Benfield indicated that Mr. Gray pointed out a house and they pulled into a driveway, the total time in the vehicle being approximately 10 minutes after leaving the restaurant. The police report does not conform to this statement as to time or location.

The general rule regarding coverage of employees on travel status or on temporary duty assignments is set forth by *Larson*, in his treatise, *The Law of Workers' Compensation*:⁶

“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 similarly recognized that the Federal Employees’ Compensation Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.⁸ When the employee, however, 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 such deviation is not compensable.⁹

In this case, the Office hearing representative found that appellant’s presentation of the case cast doubt on the circumstances leading up to the assault and robbery. The hearing representative noted several factual inconsistencies between the statements of appellant, Mr. Benfield and the police report. He noted appellant’s actions were more consistent with the employing establishment’s assertion that the men went to a nightclub and were pursuing personal entertainment, rather than activities reasonably related to their temporary duty assignment. Even if appellant’s presentation of the circumstances was accepted as factual, the hearing representative found that their diversion was of a personal nature. Therefore, the May 28, 1997 robbery incident was not reasonably incidental to appellant’s temporary duty assignment and did not occur while he was in the performance of duty.

It is not disputed that when appellant was in Dallas he was on a business trip. He was directed by his employer to be in Dallas and was clearly serving his employer’s interest in making the trip. The issue is whether appellant deviated from the business trip for personal reasons.

It is well established that “an identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.”¹⁰ The initial question, therefore, is whether appellant deviated from a business trip for “personal reasons.”

⁶ 1 A. Larson, *The Law of Workers' Compensation* § 25.00 (1994).

⁷ *Id.*

⁸ See *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

⁹ *Id.*

¹⁰ 1 A. Larson, *The Law of Workers' Compensation* § 19.00.

Larson notes that deviations are seldom “easily defined,” and this case is no exception. Appellant contends on appeal that he was away on business, went out for an evening meal at a restaurant with his supervisor and was subsequently robbed at gunpoint when returning to the hotel. His testimony from the December 9, 1999 hearing, however, is less persuasive.

“Q. What time did the incident occur?”

“A. It would have had to have been between 11:30 around approximately 11:30 on the 28th, which is the time that we probably came out of the restaurant and by the time the police got there it was probably close to 2:00 a.m. in between there.

“Q. Okay. You left the restaurant at 11:30 and ...

“A. And talked on the sidewalk.

“Q. How long did you talk on the sidewalk?”

“A. I don’t -- probably ten minutes, 15 minutes.

“Q. How many blocks, how far did you, how far had you traveled in the car before the, before this person pulled the gun on you?”

“A. I just can’t remember.”

* * *

“Q. Okay. So the incident happened about 2:00 [a.m.]?”

“A. No. No, the incident happened ...

Counsel: About 12:00 [a.m.].

“Q. I thought I heard you say 2:00 [a.m.]?”

“A. That’s when the police came.

“Q. That’s when the police came, okay. So there was about a two hour, there’s about a two hour difference between the time that the incident happened and the police finally came?”

“A. We got in the car, so we estimate that we were in the car there approximately 30 minutes. Yeah, I don’t ...

“Q. So you’re saying that you were driving for 30 minutes before you ...

“A. No. No, the guy said pull over and it took time for him to do the things to us that he did and, you know, he did some things in the car there, you know, whatever he was talking about and so forth....”

* * *

“Q. Okay. Looking at this police report it says something about on -- it says this. On May 29, 1997, at approximately 2:00 a.m. [appellant] and witness Benfield were at the corner of Elm and Walton when they were approached by arrestee Gray.

“Counsel: That’s not correct.

“A. That’s not correct....”

* * *

“Q. You were at the restaurant then for two hours?

“A. Yes, that’s correct.

“Q. How is it that you suppose this police report is so wrong? I mean it’s very wrong?

“A. I know that it is incorrect because...

“Q. I mean if I’m to understand what you’re telling me about the time frame, this is completely incorrect?

“A. That’s correct. That is correct.

“Q. Did you have, did you make any kind of effort to correct -- to get that police report corrected? Or to ...

“A. I don’t ... I didn’t see any need to....”

Mr. Benfield’s responses to the Office’s inquires were even less precise. He noted he could not recall the location of the restaurant in Deep Ellum, was unsure of the relation of the restaurant to the parked car and did not know the length of time they were in the car prior the robbery. Further, while identifying the location of the robbery in front of a house in a residential area, he explained that they had to walk between two to four miles before finding a telephone booth to call the police. There is no explanation of why the men did not seek immediate assistance in the residential vicinity. Both men insist, however, that while driving with Mr. Gray they were traveling towards Interstate 30, thereby resuming the route to their hotel and completing any personal deviation. The Board does not agree.

The general rule is that, once a personal deviation has been completed and the main business route resumed, an employee is once again in the performance of duty.¹¹ As Larson points out, “the first step in a clear analysis of any deviation case is to draw a picture of the entire trip.”¹² In this case, the picture drawn by appellant and Mr. Benfield is not one of clarity. The facts establish that appellant and Mr. Benfield were on a temporary duty assignment in Dallas and that they last performed duties related to their employment at 4:00 p.m. on May 28, 1997.

¹¹ Katherine A. Kirtos, 42 ECAB 160 (1990); 1 A. Larson, *The Law of Workers’ Compensation* § 19.32.

¹² 1 A. Larson, *The Law of Workers’ Compensation* § 19.10 (1990).

Following their departure from the hotel for dinner, the time, place and location of their activities is not ascertainable from the record. After they left a restaurant at 11:30 p.m., appellant and Mr. Benfield met Mr. Gray, were robbed and left stranded in an unknown neighborhood. The record does not account for the approximately one and one-half hours between their departure at 12:10 a.m. with Mr. Gray and the arrival of the police at 1:35 a.m. Appellant and Mr. Benfield allege that they walked until they found a public telephone and they called the police at approximately 1:20 a.m. on May 29, 1997. Statements from appellant and Mr. Benfield further allege that the police told appellant that they were in a bad area, to remain on the street where the telephone was located and that the police would pick them up. The police arrived at approximately 1:35 a.m. on May 29, 1997, took statements and drove appellant and Mr. Benfield to their hotel.

The Board finds that appellant did not complete his personal deviation and resume the main business route until the police drove him back to his hotel. The personal deviation ceased only when the police arrived to take appellant back to the hotel. Since the aggravated robbery occurred during a deviation for purposes that were personal in nature, appellant cannot be found to have been in the performance of duty when the incident occurred. Appellant was not engaged in activities reasonably incidental to his temporary duty assignment or to any activity directed by his employer.

The May 4, 2000 and September 30, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 25, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member