United States Department of Labor
Employees' Compensation Appeals Board

JON LOUIS VAN ALSTINE, Appellant	)	
and	)	**Docket No. 03-1600**
	)	**Issued November 1, 2004**
DEPARTMENT OF THE NAVY, NAVAL SURFACE WARFARE CENTER, CORONA DIVISION, Norco, CA, Employer	)	

Appearances:
Max Gest, Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument October 7, 2004

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 13, 2003 appellant filed a timely appeal from an April 7, 2003 decision, in which a hearing representative of the Office of Workers' Compensation Programs found that he did not sustain an injury in the performance of duty and also denied his request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merits of this case and the denial of the subpoena requests.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty; and (2) whether the Office properly denied appellant's requests for subpoenas. At the oral argument, counsel contended that appellant should not be found subject to the usual going to and coming from work rule for two primary reasons: that his detail assignment from the Pomona facility to the Corona facility constituted a special mission based on his expertise and that he was reimbursed mileage for the difference between his home and the Corona facility and his home and his regular-duty station in Pomona. The Director disputed that the case was in posture for decision, contending that the record was unclear as to whether the reimbursement of travel constituted a "deliberate and substantial

payment." Counsel for appellant requested that the Board proceed to decision based on the assembled case record.

FACTUAL HISTORY

On July 12, 2001 appellant, then a 54-year-old retired engineering technician, filed a traumatic injury claim alleging that an August 25, 1998 vehicle accident in which he sustained severe injuries that resulted in hemiplegia and severe depression, occurred in the performance of duty. The accident occurred at 5:49 a.m. when appellant's motorcycle rear-ended a car as he was riding to work. He underwent emergency medical treatment that day and, due to his injuries, he could not return to work. The record contains extensive evidence documenting his ongoing medical treatment beginning on August 25, 1998.

The employing establishment controverted the claim and in an August 8, 2001 letter, Lisa G. Morgan, an employee relations specialist, noted that the accident occurred 14 miles from appellant's assigned duty station at the Corona Naval Surface Warfare Center, in Norco, California and occurred while appellant was riding his motorcycle to work. She stated that appellant's usual duty station was the Naval Surface Warfare Center, in Pomona, California, but that he had been assigned to the Corona facility since July 20, 1998 and had been periodically assigned to the Corona site over the previous two years. She further noted that appellant's assignment depended on funding and that he worked fixed hours from 6:00 a.m. to 3:30 p.m., Monday through Thursday with alternate Fridays off. The record indicates that appellant was reimbursed for mileage during his assignment to the Corona facility. He retired on April 25, 2001.

In a decision dated February 26, 2002 and finalized February 27, 2002, the Office denied the claim finding that, as appellant was on his way from his home to the Corona work site, the "coming and going" rule applied and his injury was not sustained in the performance of duty. The Office found that the special errand or assignment exception to the rule did not apply stating that appellant's detail to the Corona facility made it his fixed place of work with fixed hours. Appellant, through his attorney, requested a hearing and also submitted subpoena requests for documents and the appearance of Jim Walton, Steve Harms and Gregory Hiltumen of the employing establishment. In a decision dated September 6, 2002, an Office hearing representative denied appellant's subpoena requests. At the September 17, 2002 hearing, counsel contended that appellant was in the performance of duty at the time of the

August 25, 1998 motorcycle accident. By decision dated April 7, 2003, an Office hearing representative affirmed the February 27, 2002 decision again and denied the subpoena requests.[1]

LEGAL PRECEDENT -- ISSUE 1

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[2] The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated: "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[3] In deciding whether an injury is covered by the Federal Employees' Compensation Act,[4] the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.[5]

The Board has recognized, as a general rule that 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 which are shared by all travelers. There are recognized exceptions which are dependent upon the particular facts relative to each claim: (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

[1] On June 13, 2003 appellant, through his attorney, filed an appeal with the Board and requested oral argument. On September 16, 2003 the Director filed a motion to remand for the Office to obtain specific evidence regarding the reimbursement of mileage to appellant and in regard to the employing establishment's reimbursement practices and any discussion or negotiation regarding appellant's assignment to the Corona site. By order dated September 30, 2003, the Board granted remand and cancelled the oral argument. On October 15, 2003 appellant requested reconsideration, asserting that he had timely submitted an opposition to the Director's motion. In an order dated February 13, 2004, the Board granted appellant's petition and vacated its September 30, 2003 order. The appeal was reinstated and oral argument was scheduled for October 7, 2004. On June 14, 2004 the Director resubmitted the September 16, 2003 motion to remand. In a June 24, 2004 letter, appellant advised that he wished to proceed to oral argument. By order dated September 10, 2004, the Board denied the Director's motion. Oral argument was held on October 7, 2004.

[2] 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

[3] *George E. Franks*, 52 ECAB 474 (2001).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Mark Love*, 52 ECAB 490 (2001).

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.[6]

In addressing the coming and going rule, Larson describes the special errand rule as "When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey; or the special inconvenience, hazard; or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."[7]

The Board has held that an exception to the general going and coming rule is made for travel from home when the employee is to perform a "special errand:" in such a situation the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform a special errand. Ordinarily, cases falling within this exception involve travel which differs in time or route; or because of an intermediate stop from the trip which is normally taken between home and work. In such a case the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered, but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[8]

Regarding payment for expense of travel, Larson states that "in the majority of cases involving a deliberate and substantial payment for the expense of travel or the provision of an automobile under the employee's control, the journey is held to be in the course of employment."[9]

ANALYSIS -- ISSUE 1

It is well established that, as to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable; but if the injury occurs off the premises, it is not compensable.[10]

---

[6] *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB ____ (Docket No. 00-2703, issued March 14, 2002); *Melvin Silver*, 45 ECAB 677 (1994).

[7] A. Larson, *The Law of Workers' Compensation* § 14.05(1) (2000).

[8] *Elmer L. Cook*, 11 ECAB 163 (1964).

[9] *Id.* at § 14.07(1).

[10] Larson, *supra* note 7 at Chapter 13. *See Linda S. Jackson*, 49 ECAB 486 (1998). (Employee injured in an automobile accident off premises on commute to work; coverage denied as her employment did not fall within any exception to the rule).

At the oral argument, counsel contended that appellant should not be found subject to the usual going to and from work rule for two primary reasons: (1) his detail assignment from Pomona to Corona constituted a special mission based on his expertise; (2) he was reimbursed mileage for the difference between Corona and his regular-duty station in Pomona. The Director disputed that the case was in posture for decision, contending that the record was unclear as to whether the reimbursement of travel constituted a "deliberate and substantial payment." Counsel for appellant requested that the Board proceed to decision based on the assembled case record.

The facts in this appeal are not in dispute. Appellant sustained injury on August 25, 1998 at 5:49 a.m. while riding his motorcycle to work at the Corona facility of the employing establishment. He had been working at the Corona location since July 20, 1998 based on a detail to that facility.[11] Prior to July 20, 1998, appellant's regular-duty station was located in Pomona with fixed work hours from 6:00 a.m. to 3:30 p.m., a location eight miles from his home. With the detail assignment, appellant worked in Corona and received reimbursement of 31 cents a mile for the additional 13-mile commute to and from work.[12]

In considering application of the "special errand" exception to the going and coming rule, Larson states:

> "The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the work is employed."[13]

The facts in evidence do not establish that the trip to work appellant made on August 25, 1998 was in any way other than his ordinary commute to work. Appellant had been working at the Corona facility since his assignment on July 20, 1998 or approximately six weeks. There is no evidence showing that his trip that Tuesday morning was other than to report for work at the 6:00 a.m. commencement of his regular tour of duty. Appellant has not established any special degree of inconvenience or urgency or shown that the trip, in and of itself, constituted a substantial part of any service for which he was employed.[14] The record reflects that appellant

[11] Mr. Walton, a supervisor, noted that the detail was anticipated to last from two to four weeks. Appellant's work included the calibration of gauge pressure units and, as of the date of injury, he had not completed the work assignment. Mr. Walton stated that appellant was not on travel orders and was expected to report to work in Corona during his regular tour of duty.

[12] Ms. Morgan, an employee relations specialist, noted that appellant was periodically assigned to work at Corona when funding for work at Pomona had expired or when his expertise was required. The record indicates that funding at Pomona had run out and appellant was assigned to work at Corona. His work schedule at both facilities was Monday through Thursday with alternate Fridays off.

[13] Larson, *supra* note 7 at Chapter 14. *See Connie J. Higgins (Charles H. Higgins), supra* note 6.

[14] *Id.* at § 14.05(3). There is less difficulty when the trip is one which is made every day, is not in itself unusually long or burdensome and is not made for the performance of some such brief service as throwing a switch or unlocking a door.

was proceeding from his home to the Corona work site. This was a trip that appellant made every day to go to work, similar to his commute to and from work at Pomona.[15]

Counsel argues that the nature of the trip represents a special errand because of appellant's expertise in his field and the reimbursement of travel for the difference in mileage between Corona and Pomona. The Board finds that these arguments fail.

Larson notes that there may be many employees who, because of their key position in an organization, might be considered essential to the successful carrying-on of the employer's business. He states that in consideration of the special errand exception: "Relative indispensability can hardly be the test of status while going and coming. This leaves the question whether the journey itself was an important part of the service…."[16] As noted, there is no evidence that appellant was performing any important service for his employer on the morning of August 25, 1998 other than driving his motorcycle to work. His trip to work was to report at his customary time and no different from the other employees with regular hours at the assigned workstation. There is not any evidence that the trip was to perform any type of overtime or irregular work or that there was any emergency or special urgency to report at the work site. The Board finds that counsel's characterization of appellant's commute to work at Corona as a "short[-]term special errand, special mission or temporary[-]duty" assignment based on his expertise is not supported by the evidence of record.[17]

Turning to consideration of travel reimbursement, Larson indicates that a majority of cases involve the determination of whether a "deliberate and substantial payment" was made for the expense of the travel.[18] Factors to consider include whether an automobile is provided for the travel, whether transportation involves a considerable distance or payment is made as a special inducement to hire.[19] Larson notes, however, that a travel allowance must be distinguished from mere extra pay,[20] *i.e.*, added compensation with no evidence that the travel is sufficiently important in itself to be regarded as part of the service performed. The treatise discusses several court cases which have noted that to apply an exception to the going and coming rule, the employer must defray "all or substantially all" of the cost of travel.[21]

In this case, appellant was reimbursed at 31 cents a mile for the 13-mile difference between the work sites in Pomona and Corona. At 26 miles a day this would total $8.06. The

[15] *See Mary Margaret Grant*, 48 ECAB 696 (1997).

[16] *Id*. at § 14.11.

[17] *See Asia Lynn Doster*, 50 ECAB 351 (1999).

[18] Larson, *supra* note 7 at § 14.04(1).

[19] *Id*. at § 14.07(2).

[20] *Id*. at § 14.07(3).

[21] *See Ricciardi v. Aniero Concrete Co.*, 64 N.J. 60, 312 A.2d 139 (1973). The employer paid 40 percent of the commuting expenses which was found an inadequate percentage to bring the accident under the exception to the going and coming rule.

evidence from Mr. Walton and Ben Snethen, a former employee and current consultant at Corona, agreed that appellant was to be reimbursed the **difference** in mileage between his home and the Pomona office (8 miles) and his home and the Corona facility (21 miles). (Emphasis added.) This fact is recognized in the briefs of both appellant and the Director.[22] It is readily apparent that appellant's monetary reimbursement from his employer was not for "all or substantially all" of the cost of his travel to work. For this reason, the record is sufficiently developed for the Board to find that the payment of the difference in mileage in this case did not constitute a "deliberate and substantial payment" of the expenses of travel, such as to constitute an exception to the going and coming rule. For the reasons enumerated above, the Director's contention on appeal is without merit.

Lastly, counsel argues that appellant was in the performance of duty because he was compensated for the time spent in going to or coming from work.[23] The evidence of record, however, supports that he was not compensated for any time until he arrived at the Corona facility when he began his regular tour at 6 a.m. Appellant, therefore, failed to establish that he sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[24] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained. The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[25]

Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as

[22] The record indicates that the employing establishment may have paid appellant the cost of his entire commute, in excess over the agreed upon difference in mileage between duty stations. Any overpayment in travel reimbursement is not subject to review by the Board under the Act.

[23] Counsel cites to §§ 16.20 and 16.30 in Larson's. The language cited in support of appellant's argument, however, is found in § 14.06(1) of Larson's, *supra* note 7.

[24] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[25] *Id.*

evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[26]

ANALYSIS -- ISSUE 2

In this case, appellant requested subpoenas for certain documents and that employees Mr. Walton, Mr. Harms and Mr. Hiltumen appear. The Board, however, finds that the Office hearing representative did not abuse her discretion in denying appellant's subpoena requests. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[27] Here appellant did not show why information could not be obtained other than through the subpoena process.[28] Furthermore, as noted above, the Board finds the record sufficiently developed to find that the August 25, 1998 injury did not occur in the performance of duty. Thus, the Office hearing representative acted within her discretion in not issuing subpoenas as requested by appellant.[29]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that the injury sustained on August 25, 1998 was in the performance of duty. The Board further finds that the Office hearing representative did not abuse her discretion in denying appellant's subpoena requests.

[26] 20 C.F.R. 10.619(a)(1).

[27] *Claudio Vazquez*, 52 ECAB 496 (2001).

[28] *Janet L. Terry*, 53 ECAB ___ (Docket No. 00-1673, issued June 5, 2002).

[29] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 7, 2003 be affirmed.

Issued: November 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member