United States Department of Labor
Employees' Compensation Appeals Board

LARRY SLOUGH, Appellant	)	
and	)	**Docket No. 05-500**
	)	**Issued: August 22, 2005**
DEPARTMENT OF AGRICULTURE, NATURAL RESOURCE CONSERVATION SERVICE, Hollis, OK, Employer	)	

Appearances:
James R. Lineman, Esq., 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
DAVID S. GERSON, Judge

JURISDICTION

On December 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 21, 2004, wherein the Office denied his claim on the grounds that he had not established that the claimed injury arose within the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury in the performance of duty on August 30, 2002.

FACTUAL HISTORY

This case is on appeal to the Board for a second time.[1] On September 23, 2002 appellant, then a 48-year-old soil conservationist, filed a traumatic injury claim for compensation (Form CA-1), alleging that he suffered injuries to his left shoulder, arm, lower back and that his left knee popped when he lifted the wooden garage door to get to his government pickup at approximately 8:30 a.m., on August 30, 2002. In support of his claim, appellant submitted notes and reports from Dr. Richard Schafer, an osteopath, which advised that he was treated for and was off work due to migraine headaches.

The employing establishment controverted the claim. The employing establishment stated that on August 19, 2002 appellant was placed on a Performance Improvement Plan (PIP) due to poor performance and that he worked until August 22, 2002. From August 26 to 29, 2002 he used sick and annual leave as the balance of his sick leave was zero. Appellant worked again on August 30, 2002 which was his supervisor's nonwork day. Since September 2, 2002, which was a holiday, he did not work having used his accrued sick and annual leave. The employing establishment stated that appellant was on leave restrictions and was required to have prior approval before any leave could be taken. On September 23, 2002 he told his supervisor that he would not be in to work and informed him of the August 30, 2002 injury. The employing establishment noted that appellant's work schedule on August 30, 2002 did not reflect a need for using a government vehicle as he was scheduled to work in the office all day finishing plans, working on notes and entering data into the computer. Thus, the employing establishment asserted that he was not authorized to be at the conservation district warehouse and there was no reason for him to be checking on his government vehicle. Additional contentions were that appellant had obtained medical assistance prior to reporting the injury to his supervisor, the employing establishment had not authorized any medical treatment and the Form CA-16 was not valid as it was never signed by an authorized official. Copies of evidence supporting the employing establishment's assertions were received along with a September 24, 2002 "reply to why at warehouse," from appellant which stated that "my purpose for being at the conservation district warehouse was to check on my government vehicle which is stored in the warehouse. It is correct that I was in the office that day, but I still raised that door and got hurt."

By letter dated October 22, 2002, the Office requested that appellant submit additional factual and medical information as the initial evidence was insufficient to establish his claim. In a November 12, 2002 statement, he described prior workers' compensation claims and how his injuries were obtained on August 30, 2004. Additional medical reports and progress notes from Dr. Schafer were submitted, noting that appellant was unable to work as a result of the August 30, 2002 injury. Also submitted was a November 6, 2002 report, in which Dr. Laurence H. Altshuler, a Board-certified internist, opined that appellant was temporarily totally disabled because of the injuries sustained on August 30, 2002.

By decision dated November 26, 2002, the Office denied appellant's claim on the basis that fact of injury was not established. The Office noted that his initial evidence of file was

[1] On September 24, 2004 the Board issued an order dismissing the appeal on the basis that there was no final decision of the Office issued within one year from the date of appeal. Docket No. 04-1352 (issued September 24, 2004).

insufficient to establish that he actually experienced the claimed incident because there was a lack of medical evidence. The Office further noted that the supervisor's statement that the schedule showed that appellant was in the office all day and "if you went to check on your vehicle you did so on your own time not on the job's time."

In a letter dated November 6, 2003 and received by the Office on April 28, 2004, appellant, through his attorney, requested reconsideration of the November 26, 2002 decision and presented legal arguments. By decision dated October 21, 2004, the Office modified its prior decision to reflect the denial of the claim on the basis that the evidence was insufficient to establish that the injury occurred within the performance of duty. The Office found that there were no reasons for appellant to have checked on his government vehicle incidental to his employment on August 30, 2002.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[2] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained "while in the performance of duty." The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "rising out of and in the course of employment."[3] In addressing this issue the Board has stated in the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while the employee is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.[4]

Under the Federal Employees' Compensation Act[5] an injury sustained by an employee, having fixed hours and place of work, 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 workmen's compensation agencies. One such exception almost universally recognized is the premises rule: an employee going to or coming from work is covered under workmen's compensation while on the premises of the employer. The "premises" of the employer, as that term is used in workmen's compensation law, are not

[2] *Bruce A. Henderson*, 39 ECAB 692 (1988); *Minnie M. Huebner*, 2 ECAB 20 (1948).

[3] *Timothy K. Burns*, 44 ECAB 125 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990).

[4] *Barbara D. Heavener*, 53 ECAB 142 (2001); *Angela J. Burgess*, 53 ECAB 568 (2002).

[5] 5 U.S.C. §§ 8101-8193.

necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent on the status or extent of legal title. The term "premises" as it is generally used in workers' compensation law is not synonymous with "property." The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases "premises" may include all the "property" owned by the employer; in other cases even though the employer does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the "premises."[6]

ANALYSIS

Applying the premises principles to the present case, the Board finds that appellant's injury sustained at the conservation district warehouse on August 30, 2002 occurred within the performance of duty. In his CA-1 form, appellant alleged that on August 30, 2002 at approximately 8:30 a.m., he was on federal property and suffered injuries when he lifted the wooden garage door to get to his government pickup. There is no dispute that the conservation district warehouse where the alleged injury occurred was on the employing establishment's premises. Additionally, as the employing establishment did not controvert appellant's claim that the injuries which he sustained at approximately 8:30 a.m., occurred during work hours, the Board will accept that he was on the employing establishment's premises during work hours. Therefore, his injury was sustained while on the premises of the employing establishment during work hours.

However, the mere fact that the employee was on the premises at the time of the injury is insufficient to establish entitlement to compensation benefits. It must also be established that appellant was engaged in activities which may be described as incidental to his employment, *i.e.*, that he was engaged in activities which fulfilled his employment duties or responsibilities or were incidental thereto. In a September 24, 2002 statement, he acknowledged that he was in the office that day and advised that his purpose for being in the conservation district warehouse was to check on his government vehicle. The employing establishment has argued that appellant's office work did not include or establish a need for the use of his government vehicle. In determining whether an injury occurs at a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his employment.[7]

The Board finds that the evidence currently of record establishes that appellant was engaged in an activity which may be characterized as reasonably incidental to his employment. It is not contested that he was on a PIP and scheduled to be in the office all day August 30, 2002 finishing plans, working on notes and entering data into the computer. Thus, on August 30, 2002 appellant was an on premises worker having fixed hours and a fixed place of work.[8] Although

[6] *Denise A. Curry*, 51 ECAB 158 (1999); *Thomas P. White*, 37 ECAB 728 (1986).

[7] *Janet M. Abner*, 53 ECAB 275 (2002).

[8] *See Pamela R. Perry*, 54 ECAB ___ (Docket No. 02-1830, issued December 5, 2002).

the employing establishment argued that his office work did not include or establish a need for the use of appellant's government vehicle due to the conditions of his employment on August 30, 2002 the Board finds that, on the current record, it can be characterized as an activity reasonably incidental to his employment. Although appellant did not provide a specific reason for wanting to check on his governmental vehicle, the Board finds it was not unreasonable to expect that employees who typically use a government vehicle in their normal line of work might want to check on their vehicle. Moreover, there is no evidence to establish that appellant or other employees were prohibited from checking on their government vehicle when they knew that they would be in the office all day (as opposed to field work) or employees who were on a PIP. Thus, appellant was at a place where he would reasonably be expected to be in connection with his employment.[9] Because he was engaged in an action incidental to his employment on the employing establishment's premises at the time of his injury, the Board concludes that he has met his burden of proof to establish that he was in the performance of duty.[10] Thus, the case is remanded to the Office for further review of the medical evidence to see whether appellant's injuries were otherwise sustained in the performance of duty.

CONCLUSION

As appellant established that he was in the performance of duty on August 30, 2002, the Office's October 21, 2004 decision denying his claim must be reversed and the case remanded to the Office for further development and the issuance of a *de novo* decision.

[9] *Cf. Eileen R. Gibbons*, 52 ECAB 209 (2001). Appellant was in the performance of duty when she fell in an employing establishment controlled parking lot while walking to her personal vehicle to inspect the size of a tire, during an authorized break. Although the employing establishment did not require the activity, it was an activity reasonably incidental to her employment. *Eileen R. Gibbons*, 52 ECAB ___ (Docket No. 99-2517, issued January 10, 2001).

[10] In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective." *James P. Schilling*, 54 ECAB ___ (Docket No. 03-914, issued June 20, 2003); *see also Mona M. Tates*, 55 ECAB ____ (Docket No. 03-892, issued October 6, 2003.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2004 decision of the Office of Workers' Compensation Programs is reversed and the case remanded to the Office for further development consistent with this decision of the Board.

Issued: August 22, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board