United States Department of Labor
Employees' Compensation Appeals Board

LUIS A. VELEZ, Appellant	)	
and	)	**Docket No. 05-755**
	)	**Issued: June 17, 2005**
DEPARTMENT OF THE ARMY, TOBYHANNA ARMY DEPOT, Tobyhanna, PA, Employer	)	

Appearances:
Richard F. Solan, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 9, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 7, 2005, denying his claim for an injury on October 5, 2004 on the grounds that it did not occur in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 7, 2005 decision.

ISSUE

The issue is whether appellant has established that he sustained an injury on October 5, 2004 in the performance of duty. On appeal, appellant alleges that the injury he sustained during a softball game was work related because the event was sponsored by the employing establishment and was held on federal property.

FACTUAL HISTORY

On October 5, 2004 appellant, then a 39-year-old electronics mechanic, filed a traumatic injury claim alleging that on that date he injured his left arm and shoulder while playing softball during a noontime game on the employing establishment softball field.

An emergency room report dated October 5, 2004 indicated that appellant sustained a shoulder sprain on that date while playing softball. October 14 and November 10, 2004 medical reports indicated that appellant sustained a left rotator cuff tear requiring surgical repair.

By letter dated November 29, 2004, the Office advised appellant that the evidence submitted was not sufficient to establish that he sustained an injury in the performance of duty on October 5, 2004.

In response to a November 29, 2004 letter from the Office, the employing establishment advised that the noontime softball game in which appellant participated was a voluntary event held on federal property and that no employee was required, persuaded or paid to participate.

By decision dated January 7, 2005, the Office denied appellant's claim on the grounds that his injury was not sustained in the performance of his federal employment.[1]

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury "sustained while in the performance of his duty."[2] This phrase is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws; namely, "arising out of and in the course of employment."[3] Whereas "arising out of the employment" addresses the causal connection between the employment and the injury, "arising in the course of employment" pertains to work connection as to time, place and activity.[4]

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states:

"Recreational or social activities are within the course of employment when:

> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
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> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

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[1] Appellant submitted additional evidence subsequent to the Office's January 7, 2005 decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[2] 5 U.S.C. § 8102(a).

[3] *See Bernard E. Blum,* 1 ECAB 1 (1947).

[4] *See Robert J. Eglinton,* 40 ECAB 195 (1988).

> (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."[5]

These are three independent links, by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.[6] Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty.

ANALYSIS

Appellant alleged that the left shoulder injury he sustained during the softball game on October 5, 2004 occurred in the performance of duty because the employing establishment sponsored the event and it took place on federal property. The evidence of record, however, fails to satisfy any of the above-noted criteria.

The claimed injury is not covered under the first criterion for recreational and social activities. Although the injury did occur on the employing establishment premises at noontime,[7] there is no evidence that the softball game was a regular incident of appellant's employment. The mere fact that an injury occurs on industrial property during the workday is not sufficient, in and of itself, to bring the injury within the performance of duty. For compensability, the concomitant requirement of an injury, "arising out of the employment," must also be shown and this encompasses not only the work setting but also a causal concept -- the requirement being that the employment caused the injury. It is incumbent upon appellant to establish that the injury arose out of his employment; that is, the accident must be shown to have resulted from some risk incidental to the employment. In other words, some contributing or causal employment factor must be established.[8] In this case, the evidence does not establish such a causal relationship between the noontime softball game and appellant's employment, *i.e.,* that the softball game was a regular incident of his employment.

The second criterion is whether the employing establishment required appellant to participate in the softball game or otherwise made the activity part of appellant's services as an employee. Appellant argued that the softball game was sponsored by the employing establishment. However, the employing establishment stated that the noontime softball game in which appellant participated was a voluntary event and that no employee was required, persuaded or paid to participate. When the degree of employer involvement descends from

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[5] A. Larson, *The Law of Workers' Compensation* § 22.01 (2000); *see Steven F. Jacobs,* 55 ECAB ___ (Docket No. 03-2251, issued January 14, 2004). *See also* FECA (Federal) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992).

[6] *Steven F. Jacobs, supra* note 5; *Archie L. Ransey,* 40 ECAB 1251 (1989).

[7] Generally, 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 from work, before and after working hours, or at lunch time, are compensable. *See Barbara Roy,* 42 ECAB 960 (1991).

[8] *Barbara Roy, supra* note 7; *Narbik A. Karamian,* 40 ECAB 617 (1989).

compulsion to mere sponsorship or encouragement, the question become closer and it is necessary to conduct a further inquiry.[9] This inquiry focuses on the issue of whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment financed the event. The record in this case establishes that the employing establishment did not either expressly or implicitly require participation by employees or pay employees for participating in the event, or otherwise finance the event. The record supports that the activity was not one which appellant was compelled to attend. Participation in the noontime softball game was neither part of appellant's job nor was it an activity for which he would be evaluated. It was a voluntary activity. The Board has held that, if attendance at an event is completely voluntary and there is no direct, substantial benefit to the employer, this outweighs the employer's sponsorship of the event when determining whether an activity occurred in the course of employment.[10] Under the circumstances of this case, appellant has failed to demonstrate that the employing establishment required him to participate in the softball game or otherwise made the activity part of his services as an employee.

Appellant has also failed to satisfy the third criterion that the employing establishment derived substantial direct benefit from the October 5, 2004 softball game beyond the intangible value of improvement in employee social life and morale. No evidence of record suggests that the social activity in this case was in any way related to the employing establishment's business.[11] Consequently, the evidence of record does not establish that the employing establishment derived substantial direct benefit from the activity beyond the intangible value of improvement in health and morale that is common to all kinds of recreation and social life.[12]

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on October 5, 2004.

[9] Larson, *supra* note 5 at § 22.04(3); *see also Anna M. Adams,* 51 ECAB 149 (1999).

[10] *Barbara Roy, supra* note 7.

[11] *Steven F. Jacobs, supra* note 5; *Anna M. Adams, supra* note 9 at 154.

[12] Larson, *supra* note 5 at § 22.05(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation dated January 7, 2005 is affirmed.

Issued: June 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member