United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL A. HAZZARD, Appellant	)	
and	)	**Docket No. 05-1514**
	)	**Issued: November 4, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Lakewood, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On July 11, 2005 appellant filed an appeal of the June 10, 2005 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury on December 26, 2003 while in the performance of duty.

FACTUAL HISTORY

On March 5, 2004 appellant, a 41-year-old city letter carrier, filed a traumatic injury claim, alleging that at 5:45 p.m. on December 26, 2003 he sustained injuries to his right shoulder, arm, neck, chest and back when he slipped on the ice and fell while walking to his car after work. He indicated that his tour of duty on the date of the injury was from 7:30 a.m. until 4:00 p.m.

By letter dated March 19, 2004, the Office advised appellant that the information submitted was insufficient to establish his claim. The Office requested clarification concerning the exact time and location of the injury and the hours he worked on the date in question.

Appellant submitted medical reports, including an emergency room form entitled "home-going instructions" dated December 28, 2003 bearing an illegible signature; a December 28, 2003 radiologist report reflecting "the bony structures and joint spaces are unremarkable;" a December 28, 2003 history and physical work sheet bearing an illegible signature, reflecting a diagnosis of right shoulder strain; a nursing assessment indicating that the time of injury was approximately 6:00 p.m. on December 24, 2003; and a February 9, 2004 report of a magnetic resonance imaging (MRI) scan of appellant's right shoulder reflecting findings consistent with nonretracted full thickness tear of the anterior fibers of the supraspinatus tendon with findings suspicious for an anterosuperior labral tear as well.

By decision dated April 19, 2004, the Office denied appellant's claim on the grounds that he had failed to establish that he was injured in the performance of duty, taking into consideration the facts that, although the accident occurred at approximately 5:45 p.m., his tour ended at 4:10 p.m., and he had not been authorized to work overtime.

Appellant submitted a duty status report and medical certification, both dated April 13, 2004 and bearing illegible signatures, describing the alleged necessity for arthroscopic shoulder surgery due to a torn rotator cuff.

By letter dated April 27, 2004, appellant, by his representative, requested an oral hearing.

Appellant submitted unsigned clinic notes dated March 24, 2004 in which Dr. Mark S. Schickendantz reported that an MRI scan of appellant's right shoulder revealed a complete rupture of subscapulares tendon and medial dislocation of the biceps tendon of the right shoulder. He also submitted an unsigned medical report dated January 31, 2003 from Dr. Joseph W. Jasser relating to a January 4, 2003 injury.

At the oral hearing, which occurred on February 15, 2005, appellant testified that his supervisors "understood" that he was doing union work after his regular hours and that they always wanted to know if he was "off the clock" when he was working on union business. He stated that on the evening of the alleged incident, he had been parked on the lot behind the Burger King, which had been designated by the employing establishment as an off-premises employee lot. He explained that, because on-premises parking could not accommodate all employees, the employing establishment had contracted with the City of Lakewood to provide the off-premises parking for those employees with low seniority. He also stated that his tour ended at 4:10 p.m. and that he slipped on the ice on the way to his vehicle at approximately 5:45 p.m.

Appellant submitted unsigned progress notes from Dr. Schickendantz dated April 23, May 11, June 8, July 16 and August 24, 2004 and March 4, 2005.

In a narrative statement dated March 5, 2004, appellant stated that he delayed in reporting the injury because he didn't feel that the initial injury was "worth all the [hassles]," "especially since it happened after work and not on postal property."

Exhibit 5, entitled "Postal Facility Lot," reflected designated parking spots on the facility's South lot. Exhibit 6 reflected designated parking spots on the East lot. Exhibit 6 also contained the notice: "additional parking in lot behind Burger King."

By decision dated June 10, 2005, the Office hearing representative affirmed the Office's April 19, 2004 denial of appellant's claim, finding that at the time of the injury, appellant was not on the employing establishment's premises in furtherance of the employer's business or activity incident thereto.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress 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 disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] 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." The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance.[2]

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 employer's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[4] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in preparatory or incidental acts. However, presence at the employing establishment's premises during work hours, or a reasonable period before or after a duty shift, is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury "arising out of the employment." This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury.

[1] *See* 5 U.S.C. § 8102(a).

[2] *See Annie L. Ivey*, 55 ECAB ___ (Docket No. 02-1855, issued April 29, 2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

[3] *Id.*

[4] *See James P. Schilling*, 54 ECAB ___ (Docket No. 03-914, issued June 20, 2000); *see also Narbik A. Karamian*, 40 ECAB 617 (1989).

In order for an injury to be considered as arising out of the employment, the facts of the case must show that substantial employer benefit is derived or an employment requirement gave rise to the injury.[5]

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."[6]

With respect to whether injuries arising in the course of union activities are related to employment, the general rule is that union activities are personal in nature and devoid of any mutual employer/employee benefit that would bring it within the course of employment.[7] The involvement of union activities, however, does not preclude the possibility that an injury occurred in the performance of duty. The Board has recognized an exception to the general rule, finding that employees performing representational functions which would entitle them to "official time" are in the performance of duty and entitled to all benefits of the Act if injured in the performance of those functions.[8]

ANALYSIS

The injury in this case occurred as appellant was leaving the premises of the employing establishment. Appellant contends that he slipped while he was walking to his vehicle, which was properly parked on property that was within the control of the employing establishment. However, assuming arguendo that appellant's vehicle was parked on a lot that was under the control of the employing establishment, this factor alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[9] In order for an injury to be considered as "arising out of the employment," the facts of the case must show some "substantial employer benefit or requirement" which gave rise to the injury.[10]

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[5] *See Eileen R. Gibbons*, 52 ECAB 209 (2001). *See also Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[6] *Rebecca LeMaster*, 50 ECAB 254 (1999).

[7] *See Dwight D. Henderson*, 46 ECAB 441 (1995).

[8] *Id. See also Ray C. Van Tassell, Jr.*, 44 ECAB 316 (1992). "Official time" is the time the employee receives without charge to leave or loss of pay. *See Bernard Redmond*, 45 ECAB 298 (1994).

[9] *Narbik A. Karamian*, 40 ECAB 617 (1989).

[10] *Catherine Callen*, 47 ECAB 192 (1995).

The Board finds that in the present case, appellant was on the employing establishment premises solely for personal reasons after his tour ended at 4:10 p.m. Appellant admittedly undertook union business after his regular work shift and sustained injury at approximately 5:45 p.m. while walking between the premises and a parking lot. The record is clear that appellant was not in a regular duty status after 4:10 p.m., nor did he have scheduled or unscheduled overtime after 4:10 p.m. on December 26, 2003. As appellant was not in a duty status, he could not be entitled to official time for this period.[11] Therefore, appellant cannot be considered in the performance of duty under this analysis.

The fact that appellant was not granted official time to perform union duties does not necessarily preclude a finding that his union activities were of benefit to the employing establishment, therefore placing his injury in the performance of duty. In this case, appellant testified that he was a shop steward. However, appellant failed to introduce evidence of the exact nature of the union duties he undertook. He also has failed to submit sufficient evidence to establish the degree of benefit his employer derived from his union activities.[12] The Board finds that appellant has failed to present the necessary evidence regarding the nature of his representational duties during the time period in question to establish that he was in the course of employment when his injury occurred.[13]

No evidence was presented that appellant's presence on the premises from 4:10 p.m. until approximately 5:45 p.m. prior to the injury was required as a condition of his employment or that he was involved in any activity reasonably incidental to his employment during that period of time. Appellant has not established that he engaged in an authorized representational function after 4:10 p.m. on the afternoon in question. Although he stated that his supervisor generally "understood" that he was doing union work after his regular hours and always wanted to know if he was "off the clock" when he was working on union business, he did not provide evidence or even allege that his supervisor consented to or was aware of his union activities on the evening of the injury. Therefore, appellant was not in the course of his federal employment. After he completed his union activities, appellant did not enter into any activity that would bring him into the course of employment prior to his injury. Thus, when appellant injured himself while walking to the parking lot he could not be considered to be

[11] *Bernard Redmond*, 45 ECAB 298 (1993). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16(c) (March 1994). "Official time is defined as time granted to an employee by the agency to perform representational functions, when the employee would otherwise have been in duty status, without charge to leave or loss of pay. … [The Office of Personnel Management] has stated that this may include scheduled overtime or a period of irregular unscheduled overtime, if an event arises which requires representational capacity." *Id.*

[12] Appellant has not submitted sufficient evidence that his union activities on December 26, 2003 constituted "representational functions" as defined by the Office's procedure manual. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16(b) (March 1994).

[13] *Bernard Redmond, supra* note 11.

"going from work."[14] Appellant was present on the employer's premises, not in furtherance of the employer's business or any activity incidental thereto.

There is no evidence that appellant's injury resulted from any employment-related factors. Thus, the Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

CONCLUSION

The Board finds that appellant has not established that he sustained injury on December 26, 2003 arising in the course of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

[14] *Timothy K. Burns*, 44 ECAB 125 (1992). (where claimant sustained injury after tripping over an elevated portion of a sidewalk on the employing establishment premises approximately 20 minutes prior to his scheduled tour of duty, and while he was walking for exercise before beginning work, and noted his practice of arriving early at work to avoid traffic congestion, the Board found that the employee failed to establish that his injury arose in the performance of duty as he was on the premises of the employer for purely personal reasons and not engaged in activities that could be characterized as reasonably incidental to the commencement of his work duties); *see also Nona J. Noel*, 36 ECAB 239 (1984) (where claimant sustained injury when she fell on a sidewalk located on the employing establishment premises and noted that she arrived at work an hour and one-half before the official starting time in order to avoid heavy traffic and to take advantage of the low cost breakfasts, the Board found that the employee's injury was not sustained while she was in the performance of duty).