United States Department of Labor
Employees' Compensation Appeals Board

CHARLES J. SOLTYS, Appellant	)	
and	)	**Docket No. 05-1630**
	)	**Issued: February 17, 2006**
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, CHICAGO FIELD OFFICE, Chicago, IL, Employer	)	

Appearances:
Randall W. Schwartz, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 28, 2005 appellant filed a timely appeal of a May 2, 2005 decision of the Office of Workers' Compensation Programs denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he sustained a back or neck injury in the performance of duty on October 26, 2004.

FACTUAL HISTORY

On October 29, 2004 appellant, then a 43-year-old special agent, filed a claim asserting that he sustained a neck and back "whiplash" injury on October 26, 2004 at approximately

6:00 p.m. when his motor vehicle was rear-ended by a tractor-trailer. On the claim form, the employing establishment noted that appellant's regular tour of duty was from 8:30 a.m. to 5:00 p.m.

In a November 19, 2004 memorandum, the employing establishment stated that the motor vehicle accident occurred at 6:05 p.m. on October 26, 2004, while appellant was driving on a public expressway "en route to his residence from the Chicago field division office." Louis Palombella, appellant's supervisor, submitted a December 10, 2004 accident report corroborating that the accident occurred at 6:00 p.m. on October 26, 2004, while appellant was "[t]raveling home from work," outside of his established working hours. He noted that the tractor trailer was leased by a private company. Mr. Palombella stated that he had authorized the trip in writing and permitted appellant to use his official government vehicle to drive home. He also checked a box "yes" indicating that the accident occurred within appellant's "scope of duty."

In a December 20, 2004 form report, Dr. Richard A. Whitney, a chiropractor, noted a diagnosis of "low back sprain/strain" and noted work restrictions.

In a February 14, 2005 letter, the Office advised appellant that the evidence of record was insufficient to establish his claim as there were no medical reports attributing any diagnoses to the October 26, 2004 motor vehicle accident. The Office advised appellant of the additional evidence needed and afforded him 30 days to submit such evidence. In a March 9, 2005 letter, the Office advised appellant that under the Federal Employees' Compensation Act, a chiropractor was not considered a physician unless treating a subluxation of the spine diagnosed by x-ray. The Office requested that appellant submit information regarding the dates of any spinal x-rays, radiologic findings and diagnoses and a statement from his chiropractor addressing whether the x-ray findings were occupationally related. The Office afforded appellant 30 days in which to submit such evidence. The record indicates that appellant did not submit additional evidence prior to the issuance of the May 2, 2005 decision.

By decision dated May 2, 2005, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that Dr. Whitney's report was not considered medical evidence as he had not diagnosed a subluxation by x-ray.[1]

LEGAL PRECEDENT

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim. These elements include the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the

[1] Following issuance of the Office's May 2, 2005 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Such evidence may be submitted to the Office pursuant to a valid request for reconsideration.

[2] 5 U.S.C. §§ 8101-8193.

applicable time limitation, that an injury was sustained while in the performance of duty[3] as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

Regarding performance of duty, 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.[6] Certain exceptions to this rule have, of course developed where the hazards of the travel may fairly be considered dependent upon the particular facts and relation to situations: "(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 the employee is subject to emergency call 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."[7] Professor Larson, in his treatise on workers' compensation, notes that coverage is usually afforded in cases "involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control."[8] However, under most circumstances, the travel must be sufficiently important in itself to be regarded as part of the service performed and therefore within the performance of appellant's duties.[9]

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[3] The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation of "arising out of and in the course of employment." The phrase "in the course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where she 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. *Robert W. Walulis*, 51 ECAB 122 (1999). This 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. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury. *Cheryl Bowman*, 51 ECAB 519 (2000); *Charles Crawford*, 40 ECAB 474 (1989).

[4] *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Eileen R. Gibbons*, 52 ECAB 209 (2001); *Mary Kokich*, 52 ECAB 239 (2001).

[7] *Dennis L. Forsgren (Linda N. Forsgren)*, 53 ECAB 174 (2001); *Gabe Brooks*, 51 ECAB 184 (1999); *see Mary Margaret Grant*, 48 ECAB 969, 703 (1997); *see generally* A. Larson, *The Law of Workers' Compensation* § 13.01 (2000) (explaining the "coming and going" rule).

[8] Larson, *supra* note 7 at § 14.07(1) (2000); *see also Mary Margaret Grant*, *supra* note 7.

[9] *Id*. at § 14.07(3).

Once it has been established that the identified employment factor occurred as alleged and in the performance of duty,[10] it must then be determined whether that incident caused a personal injury. Generally, causal relationship between the claimed injury and employment can be established only by medical evidence based on a complete factual and medical background supporting such a causal relationship.[11]

ANALYSIS

The record establishes that the October 26, 2004 motor vehicle accident occurred off the premises of the employing establishment, on a public expressway, after appellant's assigned tour of duty, while he was driving to his residence from his duty station. However, the record indicates that appellant's journey may fall under an exception to the "coming and going" rule. Mr. Palombella stated in a December 10, 2004 accident report that he had authorized appellant's trip home in writing and checked a box "yes" indicating that appellant was within the "scope of duty" at the time of the accident. However, the precise scope of this authorization, including the purpose of appellant's journey to his home, is not evident from the record. Therefore, it is unclear whether the travel was sufficiently important in itself to be regarded as part of the service performed and therefore within the performance of appellant's duties.[12] Also, the record does not indicate whether appellant was in pay status at the time of the accident and if employing establishment or other applicable rules would then bring the accident within the performance of duty.[13]

Also, Mr. Palombella permitted appellant to use his official vehicle to drive home. The record thus establishes that the employing establishment furnished appellant's transportation home on October 26, 2004. But the fact that the employing establishment provided the vehicle does not, in and of itself, establish an exception to the "coming and going" rule. In his treatise on workers' compensation, Professor Larson explains that other factors must be weighed when an employer provides an automobile, including whether transportation involves a considerable distance or payment is made as a special inducement to hire.[14] These elements are not evidence

[10] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[11] *See* 20 C.F.R. § 10.115(e); *Gary Fowler*, 45 ECAB 365, 371 (1994).

[12] Larson, *supra* note 7 at § 14.07(3).

[13] *Dennis L. Forsgren* (*Linda N. Forsgren*), 53 ECAB 174 (2001) (the employee died from injuries resulting from a one-car accident when she traveled from one duty station to another. Appellant cited to employing establishment rules indicating that the accident would be considered to be within the performance of duty were the employee in pay status at the time of the accident. The Board remanded the case to determine if appellant was in pay status at the time of the accident).

[14] Larson, *supra* note 7 at 14.07(2); *Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004) (the Board found that a 31 cent a mile reimbursement provided to the employee by the employing establishment did not cover "all or substantially all" of the cost of travel. Therefore, the reimbursement was not a "deliberate and substantial payment" sufficient to bring an accident which occurred on the public highway on the employee's way to work under an exception to the "going and coming rule." Larson, *supra* note 7 at § 14.04(1), *loc cit 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).

from the record. The employing establishment's provision of the official vehicle and its assertions that appellant was within the performance of duty at the time of the accident are sufficiently compelling to warrant further development.

On remand, the Office shall conduct appropriate development to determine whether appellant was in pay status at the time of the accident, the nature and purpose of appellant's drive home, why appellant's supervisor characterized the trip as being within the scope of appellant's duties, whether provision of the automobile was related to the performance of his duties and whether there was an additional travel allowance provided. Following such development, the Board shall issue an appropriate decision in the case.[15]

CONCLUSION

The Board finds that the case is not in posture for a decision. The case must be remanded to the Office for further development to determine whether the October 26, 2004 accident occurred within the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 2, 2005 is set aside and the case remanded for further development consistent with this opinion.

Issued: February 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[15] As the case must be remanded for further development to determine whether or not the October 26, 2004 accident occurred in the performance of duty, it is premature to address whether appellant has established that he sustained an injury resulting from that accident. Therefore, the Board will not address the medical aspects of the claim on the present appeal.