United States Department of Labor
Employees' Compensation Appeals Board

RICKY A. PAYLOR, Appellant	)	
and	)	**Docket No. 05-1881**
	)	**Issued: May 11, 2006**
BUREAU OF PRISONS, FEDERAL MEDICAL CENTER, Butner, NC, Employer	)	

Appearances:
Martin Kaplan, 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 September 12, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 6, 2005 merit decision denying his claim that he sustained an employment injury on July 2, 2003. 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 met his burden of proof to establish that he sustained an injury in the performance of duty on July 2, 2003.

FACTUAL HISTORY

On August 5, 2003 appellant, then a 44-year-old therapeutic recreational specialist, filed a traumatic injury claim alleging that he sustained injury in the performance of duty on Wednesday, July 2, 2003. He indicated that he sustained injury to his back and shoulders at 4:15 p.m. on that date when he was using the standing calf raise machine in the Wellness Center

on the work premises and his feet slipped such that 250 pounds came down on his shoulders.[1] Appellant's supervisor reported that appellant's regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. Appellant stopped work on July 3, 2003 and returned to work on July 29, 2003. The employing establishment controverted appellant's claim indicating that he was not on the clock at the time of injury and he was not engaged in his assigned duties or a related employment activity. Appellant submitted several brief notes detailing his medical condition.

By decision dated September 25, 2003, the Office denied appellant's claim on the grounds that he did not show that he sustained an injury in the performance of duty on July 2, 2003.

In an undated statement, appellant described his therapeutic recreational specialist position, indicating that it required him to design and carry out recreation and rehabilitation programs which included the use of exercise machines. He contended that he was required to demonstrate the use of such machines and asserted that it was important for him to "maintain a higher level of physical fitness."

Appellant submit numerous medical reports detailing his condition, including several reports of Dr. Thomas Dimming, an attending Board-certified orthopedic surgeon, who diagnosed thoracic spine pain, right shoulder pain and cervicalgia. He also submitted physical therapy reports and diagnostic testing from July 2003, which showed disc bulging in the low back. In a report dated November 24, 2004, Dr. Mark Gallard, an attending Board-certified orthopedic surgeon, indicated that appellant sustained a left rotator cuff tear while using an exercise machine at work.

In a record of a conference held on December 15, 2004, Richard Meyerson, a safety specialist for the employing establishment, indicated that appellant was off the clock at the time of the claimed injury. He stated that appellant was not required to participate in a physical fitness program as part of his job and indicated that his use of an exercise machine on July 2, 2003 was not part of his work duties or any task incidental to his work.

By decision dated January 26, 2005, the Office affirmed its September 25, 2003 decision, indicating that appellant did not show that he sustained an injury in the performance of duty on July 2, 2003.[2]

In a letter dated February 10, 2005, appellant claimed that the Office had not adequately considered whether his activities on July 2, 2003 occurred during a reasonable interval after official working hours while he was on the premises engaged in preparatory or incidental acts. In an undated statement, appellant asserted that he was on the clock at 4:15 p.m. on Wednesday,

[1] In an August 6, 2003 statement, a coworker indicated that appellant's injury on the exercise equipment occurred at 4:20 p.m. on July 2, 2003.

[2] The record also contains what appears to be drafts of the January 26, 2005 decision, which were dated December 20, 2004.

July 2, 2003 because he was required to work every other Wednesday between 11:30 a.m. and 8:00 p.m.[3]

In a statement dated May 16, 2005, A.F. Beeler, the warden at the employing establishment, indicated that appellant was off the clock at the time of his claimed injury on July 2, 2003. He noted that appellant was not required to participate in a physical fitness program as part of his job.

In a July 6, 2005 decision, the Office denied modification of its prior decisions.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[4] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase "sustained while in the performance of duty" 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."[6] "Arising out of the employment" tests the causal connection between the employment and the injury; "arising in the course of employment" relates to the time, place and work activity involved.[7] For the purposes of determining entitlement to compensation under the Act, "arising in the course of employment," *i.e.*, performance of duty, must be established before "arising out of the employment," *i.e.*, causal relation, can be addressed.[8]

With regard to recreational or social activities, the Board has held that such activities arise in the course of employment when:

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

[3] In a statement dated June 22, 2005, a coworker stated that appellant had to work two Wednesday evenings per month beginning about May 2003.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id.* at § 8102(a).

[6] *See Bernard D. Blum*, 1 ECAB 1 (1947).

[7] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988); *Clayton Varner*, 37 ECAB 248, 250 (1985).

[8] *Kenneth B. Wright*, 44 ECAB 176, 181 (1992).

"(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."[9]

The Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts and what constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the employee's activity.[10] This alone is not sufficient to establish entitlement to compensation. The employee must establish the concurrent requirement of an injury "arising out of the employment." "Arising out of employment" requires that a factor of employment caused the injury. It is incumbent upon the employee to establish that the claimed 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.[11] In *Joann Curtis*,[12] the Board found that the employee's engagement in a personal activity not incidental to her employment for approximately 20 minutes after the official end of her workday and before the occurrence of her alleged injury removed her from the performance of duty.

ANALYSIS

The Board finds that the evidence does not establish that appellant sustained an injury while in the performance of duty on July 2, 2003. Although appellant's claimed injury did occur on the premises of the employing establishment, it did not occur during a lunch or recreational period as a regular incident of his employment. The record reveals that appellant's accident injury while he was not on duty or in pay status.[13] Thus, while appellant has met the place aspect of the first test, he has not met the time aspect of the first test in the present case.

With respect to an express or implied requirement to participate in the activity, the evidence of record reveals that participation in the activity was purely voluntary on the part of appellant. Appellant suggested that he was required to use the exercise machines, even after hours, as part of an exercise regimen so that he could "maintain a higher level of physical fitness" and be prepared to demonstrate the proper use of the machines. However, several employing establishment officials indicated that appellant was not required to participate in a physical fitness program as part of his job and indicated that his use of an exercise machine on July 2, 2003 was not part of his work duties or any task incidental to his work. There is no

[9] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright, supra* note 8; *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (1994).

[10] *See Venicee Howell*, 48 ECAB 414 (1997); *Narbik Karamian*, 40 ECAB 617 (1989).

[11] *Id.*

[12] 38 ECAB 122 (1986).

[13] Appellant later alleged that he actually was on the clock at 4:15 p.m. because he had to work late every other Wednesday. However, several statements of employing establishment officials indicated that appellant was off the clock at that time and appellant has not submitted sufficient evidence to support his assertion.

evidence to show that participation in the activity was made part of the services of appellant. When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and the tests include whether the employer sponsored or financed the event and whether attendance was voluntary.[14] However, there is no evidence that the employing establishment encouraged appellant's activity as part of his employment and its involvement must be considered *de minimis* and insufficient to bring the activity within the course of employment.[15] Accordingly, there is no evidence that the second test has been met.

With respect to the third test, the employing establishment essentially indicated that the only benefit to the employing establishment was related to employee morale and well being. No evidence in the record suggests that the activity was related in any notable way to the employing establishment's business. Consequently, there is no evidence that the employing establishment derived substantial direct benefit from the activity beyond that intangible value of improvement in employee health and morale that is common to all kinds of recreational activity.

Considering these various factors, the Board finds that the evidence of record does not show that appellant's activities on July 2, 2003 at the time of his claimed injury constituted recreational activities within the performance of duty. Moreover, appellant has not shown that his claimed injury should be considered within the performance of duty under the theory that it occurred during a reasonable interval after official working hours while he was engaged in preparatory or incidental acts. For these reasons, appellant has not shown that his activities were reasonably incidental to his job or the employing establishment's mission. In addition, the length of the interval of time that passed between the end of appellant's workday and the occurrence of the claimed injury tends to show that the injury did not occur in the performance of duty.[16]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on July 2, 2003.

[14] *See Kenneth B. Wright, supra* note 8.

[15] The furnishing of financial support, athletic equipment, prizes and the like are relevant to the issue of employer encouragement, but standing alone this evidence is ordinarily not enough to establish compensability. *See* A. Larson, *The Law of Workers' Compensation* § 22.24(d) (1994); *see also Donald C. Huebler*, 28 ECAB 17 (1976) (where employer involvement such as printing of game results in the employing establishment newspaper, display of trophies, photographing of players during work hours and printing of admission tickets was insufficient to establish an activity in the performance of duty).

[16] *See supra* note 12 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 6 and January 26, 2005 decisions are affirmed.

Issued: May 11, 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