United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 07-1217**
	)	**Issued: November 2, 2007**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, San Antonio, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 4, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 9, 2007 which denied his claim that he sustained an injury in 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 on October 4, 2004 while in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated October 16, 2006, the Board set aside the Office's January 13, 2006 decision denying appellant's claim and remanded the case for further development.[1] The Board found that the Office did not properly develop the

[1] Docket No. 06-1168 (issued October 16, 2006).

factual evidence with regard to why appellant was on the premises of the employing establishment two hours after his tour of duty ended and whether he was engaged in any preparatory or incidental activity related to his employment. The facts and the history relevant to the present issue are set forth.

On October 6, 2004 appellant, then a 35-year-old immigration enforcement agent, filed a claim alleging that on October 4, 2004 he was injured in a motor vehicle accident that occurred on the employing establishment's premises while he was driving out of the facility at about 6:00 p.m. Medical records indicated that appellant lost control of his vehicle and struck a pole while leaving work and sustained a dislocated right hip and a fractured posterior acetabulum. The employing establishment indicated that appellant was off duty at the time of the accident as his normal working hours were from 8:00 a.m. to 4:00 p.m.

Following the Board's October 16, 2006 decision, the Office requested additional factual information from the employing establishment and appellant regarding why he was on the employing establishment premises over two hours after his tour of duty ended.

In a November 22, 2006 statement, appellant advised that on October 4, 2004 he had worked Administrative Uncontrollable Overtime (AUO) from 4:00 p.m. to 6:00 p.m. performing his normal marshal duties. He also supplied a list of individuals whom he stated could verify his overtime that day. No statements from such individuals were provided by appellant.

In a January 3, 2007 statement, Marc J. Moore, Field Office Director, advised that on October 4, 2004 appellant had worked AUO from 4:00 p.m. to 4:30 p.m. in addition to his normal tour from 8:00 a.m. to 4:00 p.m. At the time of the 6:00 p.m. accident, he stated that appellant was not engaged in duties or work incident to his employment and was not involved in official "off-premises" duties. Mr. Moore further stated that, at the time of the accident, appellant was in his private vehicle on his commute home. He advised that appellant's work duties did not require that he engage in any work activities while in a personal vehicle. Mr. Moore indicated that employing establishment records confirmed that appellant worked from 8:00 a.m. to 4:30 p.m. on October 4, 2004.

In a January 3, 2007 statement, Bertha Cardinas, Mission Support Specialist, indicated that appellant last performed official duty on October 4, 2004 at 4:30 p.m. She indicated that the 6:00 p.m. accident took place approximately a tenth of a mile from the place where appellant last performed official duty. Ms. Cardinas further indicated that appellant was in his personal vehicle commuting home at the time of the accident.

By decision dated January 9, 2007, the Office denied appellant's claim, finding that the evidence was insufficient to establish that he sustained an injury while in the performance of his federal duties on October 4, 2004.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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. In the course of employment relates to the elements of time, place or circumstance. To arise in the course of employment, an injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[4] The employee must also establish an injury arising out of employment. To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[5]

Under the Act, 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. However, many exceptions to the rule have been declared by the courts and workers' compensation agencies. One such exception almost universally recognized is the premises rule, an employee going to or coming from work before or after working hours or at lunch, while on the premises of the employer, is compensable.[6] This includes a reasonable interval before and after official working hours while the employee is on the premises engaging in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity. The mere fact that an injury occurs on an industrial premises following a reasonable interval after working hours is not sufficient to bring the injury within the performance of duty. The concomitant requirement of an injury arising out of the employment must also be shown.[7] That is, some substantial employer benefit or an employer requirement must be shown in order to consider the activity involved to be arising out of employment.[8] It is incumbent upon appellant to establish that the injuries arose out of his employment; that is, the accident must be shown to have resulted from some risk incidental to the employment.[9]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.*

[4] *Mona M. Tates*, 55 ECAB 128 (2003); *Timothy K. Burns*, 44 ECAB 125 (1992).

[5] *John B. Shutack*, 54 ECAB 336 (2003); *see also Bettina M. Graf*, 47 ECAB 687 (1996).

[6] *See Emma Varnerin, M.D.*, 14 ECAB 253 (1963).

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

[8] *Timothy K. Burns*, *supra* note 4.

[9] *Id.*

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[10]

ANALYSIS

While it has been established that appellant's accident took place on the employing establishment premises while he was going home, it has not been established that he 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. It is incumbent upon appellant to establish that it 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]

The evidence shows that appellant worked his normal hours from 8:00 a.m. to 4:00 p.m. and then worked a half-hour AUO until 4:30 p.m. He injured himself at 6:00 p.m., an hour and a half later, while driving off the employing establishment premises in his personal vehicle. There is no accounting of appellant's time from 4:30 p.m. to 6:00 p.m. and the employing establishment denied that he was engaged in any duties or work incidental to his employment after 4:30 p.m. or that his work duties required the use of his personal vehicle. Although, appellant asserted that he worked until 6:00 p.m., the employing establishment disputed this and advised that its records supported that appellant only worked until 4:30 p.m. The Board finds that the evidence establishes that appellant's workday ended at 4:30 p.m.

Although the incident occurred on the employing establishment premises, it did not occur during appellant's regular working hours (including authorized overtime) or during a lunch or recreation period as a regular incident of employment. Some substantial employer benefit or an employer requirement must be shown in order to consider the activity involved arose out of the employment.[12] There is no evidence of record that appellant was engaged in the duties of the employing establishment, which ended an hour and a half earlier, or in activities that can be characterized as reasonably incidental to his employment within a reasonable interval after he stopped work. Thus, when appellant injured himself while driving from the employing establishment an hour and a half after his normal working hours ended, he could no longer be considered in the course of employment. He was present on the employer's premises, not in furtherance of the employer's business or any activity incidental thereto. Appellant's presence on the employing establishment premises an hour and a half after his tour of duty ended coupled with the length of time after his tour of duty ended placed the injury outside the scope of employment. Thus, the Board finds that his injury on October 4, 2004 was not sustained while in the performance of duty.

[10] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[11] *See Bernard Redmond*, 45 ECAB 298 (1994).

[12] *See id.; Nona J. Noel*, 36 ECAB 329 (1984).

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty, as he had been off work for approximately an hour and a half, was on his way home and was not performing any function for the employing establishment.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board