United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 09-154**
	)	**Issued: July 16, 2009**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 28 and September 16, 2008 denying her claim for an employment-related injury. 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 was injured while in the performance of duty on January 7, 2008.

FACTUAL HISTORY

On January 25, 2008 appellant, a 53-year-old tax-examining technician, filed a traumatic injury claim, alleging that on January 7, 2008 she sustained injuries to her knees, hands, left shoulder and left muscle in her groin when she tripped on a loose floor tile in her "pod" 25 minutes before her shift began. She stated that she was unable to see the tile because the area was dark, and that she tried to grab onto something in order to prevent falling. Appellant's

supervisor indicated that appellant did not report an injury until the following day, noting that she had "slipped a little" and that someone "could have been hurt."

In a January 22, 2008 letter, the Office advised appellant that the information submitted was insufficient to establish her claim and requested additional information regarding her activities at the time of injury, her reasons for being at the employing establishment 25 minutes prior to the start of her shift, and a physician's narrative medical report with a firm diagnosis.

By decision dated February 28, 2008, the Office denied appellant's claim, finding that the evidence was insufficient to establish that the work-related event occurred as alleged. It also found that there was no medical evidence which provided a diagnosis that could be connected to the claimed incident.

On March 13, 2008 appellant requested an oral hearing. She submitted an undated statement describing the claimed January 7, 2008 incident. Appellant noted that her legs slid apart as she tried to catch herself after tripping on the loose tile. She stated that her daughter was present but was unable to help her. Appellant indicated that she informed her "lead" that she had been injured due to the loose tile. In a January 10, 2008 accident report, she repeated her description of the alleged incident.

The record contains a daily attendance report dated January 7, 2008, which reflected that appellant "clocked in" at 6:00 a.m. and "clocked out" at 3:30 p.m. on that date; a March 11, 2008 "Manager's Statement" noting that appellant did not sign in for duty on January 7, 2008 until 6:00 a.m., 25 minutes after the alleged incident; a January 9, 2008 report of an x-ray of the left knee; and a March 3, 2008 report of an MRI scan of the left lower extremity.

Appellant submitted medical reports from Dr. Matthew Barth, a Board-certified family practitioner, for the period January 30 to February 27, 2008. On January 30, 2008 Dr. Barth diagnosed left rotator cuff sprain, stating that appellant had injured her left arm and shoulder as a result of a "broad fall." On February 13, 2008 he stated that appellant had sustained injuries on January 7, 2008 when she slipped on a tile. Dr. Barth diagnosed left shoulder pain, swelling and rotator cuff sprain, as well as left knee pain. He prescribed a course of physical therapy and provided work restrictions prohibiting climbing, kneeling, bending, stooping, pulling, pushing, reaching above the shoulder, or lifting or carrying more than 5 pounds continuously or 10 pounds intermittently. On February 27, 2008 Dr. Barth recommended that appellant be "off work" until the week of March 10, 2008.

In a March 18, 2008 report, Dr. Daniel Terpesta, a treating physician, diagnosed left knee medial/lateral meniscal tear and left shoulder impingement. He opined that appellant's condition was related to a work injury, but that some symptoms might be chronic and could be due to an exacerbation of her osteoarthritis condition.

Appellant submitted a January 9, 2008 statement from Acting Manager Charles Thompson, Jr., who reported that appellant arrived for work at 6:00 a.m. on the date in question, indicating that she had stepped on a loose tile and "could have had an accident." In a March 19, 2008 statement, Manager Jaquelin Ketola related that appellant informed her that she "could have fallen" when she tripped on January 7, 2008 and that she almost "did the splits."

In a July 7, 2008 telephonic hearing, appellant testified that her 32-year-old daughter was with her at the time of the claimed incident. She stated that she fell into her keyboard as she tried to keep herself from falling when she tripped over a big hole in the tile in her office on January 7, 2008. As appellant tried to maneuver her left knee, she allegedly slipped on the tile and "did the splits." She stated that she arrived at work 25 minutes early on the date in question, as she usually does. In response to the hearing representative's question as to why she arrived at work 25 minutes early, appellant stated:

> "I always come in and put my lunch box down and sometimes do my Bible study. Sometimes I go up and get my coffee, get me something for breakfast and I chat with my friends for a little while and then I come back down and start my work."

Subsequent to the July 7, 2008 hearing, appellant submitted reports from Dr. Angelo J. Colosimo, a treating physician, and Dr. Bruce E. Holaday, a chiropractor. On July 17, 2008 Dr. Holaday stated that appellant sustained a work-related "trip and fall" accident on January 7, 2008, which resulted in a moderate cervical sprain/strain; moderate lumbar sprain/strain; moderate left knee sprain/strain; left meniscal tear; prepatellar bursitis of the left knee; and left shoulder rotator cuff syndrome. He also stated that appellant's conditions of lumbar and cervical spondylosis and chondromalacia patella were aggravated by the work incident. On April 2, 2008 Dr. Colosimo diagnosed left knee medial/lateral meniscal tear and left shoulder impingement, with decreased ROM and weakness. He opined that appellant was totally temporarily disabled. On July 17, 2008 Dr. Colosimo indicated that appellant fell while working at her desk on January 7, 2008. He opined that there was a causal relationship between her knee pathology and the work incident.

In a July 10, 2008 statement, appellant indicated that she arrived at work early on January 7, 2008 in order to find a good parking place. She stated that she was not working at her station when she arrived at approximately 5:30 a.m., and that she did not start working until 6:00 a.m., when she signed in. Appellant noted that, upon arrival, she usually goes to her cubicle, drops off her personal things and then goes to the canteen for coffee or hot tea or a breakfast snack. She indicated that her daughter followed her to her work area on the morning in question.

Appellant submitted a July 12, 2008 statement from her brother-in-law, a July 9, 2008 statement from her husband, and a July 10, 2008 statement from her daughter, who stated that she and her mother usually ride to work together. On January 7, 2008 they arrived at the employing establishment at approximately 5:30 a.m. Her daughter stated: "Mom likes to arrive early to get a better parking place, and it also enables us to get our coffee, sodas, water, snacks or breakfast prior to our shift."

By decision dated September 16, 2008, the Office hearing representative affirmed the February 28, 2008 decision on the grounds that appellant had failed to establish fact of injury. The representative found that the evidence failed to establish that the claimed incident occurred at the time, place and in the manner alleged. He also found that the claimed injury did not occur in the performance of duty, as appellant was not performing the employer's business at the time of the alleged incident.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[1] provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.[3] 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.[4] The phrase course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In addressing this issue, the Board has stated the following:

> "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 or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[5]

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.[6] 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 or her 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.[7]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8102(a).

[3] *Julian C. Tucker*, 38 ECAB 271, 272 (1986).

[4] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[5] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[6] *See Venicee Howell*, 48 ECAB 414 (1997); *Narbik A. Karamian*, 40 ECAB 617 (1989). In the cases concerning what constitutes a reasonable interval before or after work, the Board has been influenced by the activities engaged in by the employees before or after work. In *Howell*, the Board found coverage when the employee was injured five minutes after work while performing the incidental task of submitting a job bid. However, in *Arthur A. Reid*, 44 ECAB 979 (1993), the Board denied coverage when the employee was injured 45 minutes after work while engaging in a private conversation.

[7] *See Venicee Howell*, *supra* note 6.

The Board has found that some actions are not job duties but are sufficiently related to such duties or specific instructions to be considered incidental to the employment.[8] In his treatise on workers' compensation, Professor Larson indicates that, if the ultimate effect of the employee's helping others is to advance her employer's work by removing obstacles or otherwise, it should not matter whether the immediate beneficiary of the helpful activity is a co-employee, independent contractor, employee of another employer or a complete stranger. Professor Larson described several cases where coverage was found when employees were injured while attempting to rectify unsafe conditions.[9] In other cases, the Board's denial of coverage has been at least partially due to the seemingly personal nature of the employee's actions.[10]

ANALYSIS

The Board finds that the incident in this case occurred as alleged on the premises of the employing establishment. This factor alone, however, is not sufficient to establish entitlement to benefits as the concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also that the employment caused the injury.[11] 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.[12] It is incumbent upon appellant to establish that it arose out of his employment. In other words, some contributing or causal employment factor must be established.

The Board finds that, at the time of the injury, appellant was on the employing establishment premises solely for personal reasons. The record reflects that appellant's injury occurred 25 minutes before the start of her shift. Appellant testified at the July 7, 2008 hearing that she usually arrived at work 25 minutes early to engage in Bible study, drink coffee, eat breakfast, chat with friends and put her lunch away. In a July 10, 2008 statement, she indicated that she arrived at work early on January 7, 2008 in order to find a good parking place. Appellant stated that she was not working at her station when she arrived at approximately 5:30 a.m., and that she did not start working until 6:00 a.m., when she signed in. She noted that, upon arrival, she usually goes to her cubicle, drops off her personal things and then goes to the canteen for coffee or hot tea or a breakfast snack. Appellant's daughter indicated that she and her mother usually ride to work together, and that on January 7, 2008 they arrived at the employing

[8] *See Maryann Battista*, 50 ECAB 343 (1999) (finding that delivering signs and a bad check list and checking on a customer's telephone request, while not the claimant's job duties, were reasonably incidental to her job duties); *Venicee Howell*, *supra* note 6 (finding that submitting a job bid, while not one of the claimant's job duties, was reasonably incidental to her job duties).

[9] *See* A. Larson, *The Law of Workers' Compensation*, § 27.02 (2008).

[10] *See Margaret Gonzalez*, 41 ECAB 748, 751-54 (1990) (finding that pushing a coworker's vehicle after the end of a workday was not related to the claimant's reasonable fulfillment of her employment duties or of something incidental thereto); *Narbik A. Karamian*, *supra* note 6 (finding that changing a tire after the end of a workday was not related to the claimant's reasonable fulfillment of his employment duties or of something incidental thereto).

[11] *Narbik A. Karamian*, *supra* note 6.

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

establishment at approximately 5:30 a.m. She stated: "Mom likes to arrive early to get a better parking place, and it also enables us to get our coffee, sodas, water, snacks or breakfast prior to our shift." The Board notes that appellant did not identify any specific preparatory or incidental activity related to her employment that required her to be present 25 minutes before her tour of duty began. On the contrary, the activities appellant cited as the reasons for her early arrival were purely personal in nature and unrelated to her employment.

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.[13] Appellant's supervisor reported that, on the date of the injury, appellant was not scheduled to be at work prior to 6:00 a.m., nor did she advise her supervisor of any condition that required her to be on the premises prior to her official hours in order to prepare for her daily activities. Accordingly, the Board finds that appellant's presence on the premises 25 minutes prior to the commencement of her tour of duty on the morning of the claimed incident did not constitute a reasonable interval before the start of the work shift, under the circumstances of this case.

Appellant's arrival at the employing establishment prior to official starting time does not automatically place her activities outside the scope of the employment.[14] However, her activity prior to work on January 7, 2008 did not further the employer's business or provide a substantial benefit to the employer. Appellant's presence on the premises at the time of the claimed injury was not required as a condition of his employment, nor was she involved in any preparatory activity reasonably incidental to her employment activities on the morning of the claimed injury. Only as a matter of personal convenience did appellant choose to arrive at the employing establishment early.[15]

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 she sustained an injury in the performance of duty.

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[13] *See Maryann Battista*, *supra* note 8. *See also Narbik A. Karamian*, *supra* note 6 (*citing Clayton Verner*, 37 ECAB 248 (1985).

[14] *See James E. Chadden*, 40 ECAB 312, 315 (1988) (stating that claimant's arrival at the employing establishment a half hour prior to his official starting time was not so early as to place the claimant's activity outside the scope of employment). *But cf. Nona J. Noel*, 36 ECAB 329, 331-32 (1984) (noting that an employee had stated that she arrived at the employing establishment early in order to avoid traffic congestion and finding that the act of having breakfast was not a preparatory activity reasonably incidental to the employee's work activities).

[15] *See Timothy K. Burns*, 44 ECAB 125 (1992) (Where the 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*, *supra* note 14.

CONCLUSION

The Board finds that appellant was not injured while in the performance of duty on January 7, 2008.[16]

ORDER

IT IS HEREBY ORDERED THAT the September 16 and February 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: July 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] In light of the Board's ruling on the issue presented, it is not necessary to address the Office's finding that the evidence failed to establish the occurrence of the incident at the time, place and in the manner alleged.