United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 09-169**
	)	**Issued: July 21, 2009**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Tucson, AZ, 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 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 15, 2008, denying his claim for compensation. 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 sustained an injury in the performance of duty on October 31, 2007.

FACTUAL HISTORY

On October 31, 2007 appellant, then a 33-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries when he was involved in a motor vehicle accident. He indicated on the claim form that the injury occurred at 1:00 p.m. and he was in a government-owned vehicle. The reverse of the claim form indicated appellant's

regular work hours were 8:30 a.m. to 5:00 p.m. at a Tucson, Arizona duty station. In response to an inquiry from the Office, an employing establishment supervisor indicated on December 11, 2007 that the accident occurred approximately one quarter of mile from the Tucson work site and appellant was returning from lunch.

By decision dated January 3, 2008, the Office denied the claim for compensation. The Office found appellant was not in the performance of duty at the time of the motor vehicle accident.

On January 17, 2008 appellant requested a hearing before an Office hearing representative. In a narrative statement of that date, he asserted that he was "on-duty" at the time of the accident, because his job was a law enforcement position and he was expected to be available 24 hours per day. Appellant stated that he did not have fixed hours and fixed place of work, as his place of employment "can literally be anywhere, anytime."

A hearing was held before an Office hearing representative on June 26, 2008. The employing establishment submitted a June 26, 2008 letter stating that at the time of the October 31, 2007 accident appellant was a special agent assigned as a criminal investigator "responsible to respond to law enforcement situations on a 24/7 basis." The employing establishment indicated that special agents were expected to respond to law enforcement situations whenever the need arose, and they received Law Enforcement Availability Pay (LEAP) as a result. In addition, the employing establishment noted that appellant was provided a government-owned vehicle for home to work transportation and use on the job.[1]

By decision dated September 15, 2008, the hearing representative affirmed the January 3, 2008 Office decision. The hearing representative found appellant was not in the performance of duty at the time of the motor vehicle accident on October 31, 2007.

LEGAL PRECEDENT

The Federal Employees' Compensation Act 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] The phrase "sustained while in the performance of duty" in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[3]

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may

[1] An employing establishment directive states that certain categories of employees can be considered for authorization to use government vehicles "between an employee's residence and various locations when this transportation is essential for the safe and efficient performance" of employment duties. A criminal investigator is recognized as an appropriate position for authorization. The record also contains a Customs Form 333A, notification of authorization for home-to-work use of official vehicles.

[2] 5 U.S.C. § 8102(a).

[3] *Valerie C. Boward*, 50 ECAB 126 (1998).

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 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 or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5]

ANALYSIS

The evidence of record indicates that appellant was involved in a motor vehicle accident on October 31, 2007 at approximately 1:00 p.m. Appellant had left the work premises and was returning from lunch, approximately one quarter of a mile from the employing establishment work site. He has argued that he is an employee without fixed hours and a place of work, but the evidence of record does not support such a finding. The CA-1 form indicated that appellant had scheduled work hours from 8:30 a.m. to 5:00 p.m., and on October 31, 2007 his duty station was an employing establishment site in Tucson, Arizona. While the job description of criminal investigator indicates he may have to work overtime hours as needed, the record indicates that appellant did have fixed hours and a fixed place of work.

As noted above, when an employee leaves the work premises for lunch or other personal activity, he is not considered within the performance of duty. As a law enforcement officer appellant must be available to respond to law enforcement situations at any given time, and if he had been responding to a law enforcement situation he would be covered. However, in this case there is no evidence that he left the premises in response to a law enforcement situation. Under the general rule with respect to leaving work for lunch, appellant is not in the performance of duty.

In order to bring the October 31, 2007 motor vehicle accident within coverage under the Act, there must be an applicable exception to the general rule. The Board has recognized exceptions to the general rule that off-premises injuries while going to or coming from work are not compensable.[6] If an employee is provided an automobile under the employee's control for coming to and going home from work, the journey is held to be in the course of employment.[7] In this case appellant was provided with a government-owned vehicle. The documentation provided by the employing establishment indicated that it was for transportation from home to work and for performance of his job duties. If appellant had been going to work or coming home from work in this vehicle, he would be in the course of employment.

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[4] *R.A.*, 59 ECAB ___ (Docket No. 07-1814, issued June 19, 2008); *Mary Keszler*, 38 ECAB 735 (1987).

[5] *See John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[6] *See Melvin Silver*, 45 ECAB 677, 681 (1994).

[7] A. Larson, *The Law of Workers' Compensation* § 14.07 (2003).

There is no basis, however, to extend this exception to the present situation. According to Larson, the reason for the exception is the "status of the journey as part of the compensated employment."[8] While the journey to and from home to work was part of the compensated employment, there is no evidence that using the vehicle for lunch or for other personal use was intended. Appellant chose to leave the premises for lunch in this case. He was not fulfilling the duties of his employment or on the employing establishment premises. The Board finds the injury appellant sustained on October 31, 2007 was a result of the ordinary, nonemployment hazards of a journey shared by all travelers and is not compensable. Appellant was not in the course of employment and therefore he did not sustain a personal injury in the performance of duty.

CONCLUSION

The Board finds that appellant was not in the performance of duty on October 31, 2007 when he was involved in a motor vehicle accident.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15 and January 3, 2008 are affirmed.

Issued: July 21, 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

[8] *Id.* at § 15.01.