United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 08-2440**
	)	**Issued: June 22, 2009**
DEPARTMENT OF JUSTICE, FEDERAL BEAUREAU OF PRISONS, FEDERAL DETENTION CENTER, Honolulu, HI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 7, 2008 appellant filed a timely appeal from an April 15, 2008 nonmerit decision of the Office of Workers' Compensation Programs finding that she had abandoned her request for a hearing and a May 21, 2007 merit decision denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on November 28, 2006; and (2) whether the Office properly determined that appellant abandoned her request for a hearing.

FACTUAL HISTORY

On February 2, 2007 appellant, a 42-year-old accounting technician, filed a traumatic injury claim (Form CA-1) for an injury to her lower back and the top of her buttocks which occurred on November 28, 2006. She alleged that on November 28, 2006 she was on travel

status. During a dinner break from a training session, appellant went to a Target store for supplies. She alleged that on the particular date in question it was snowing and that, as she entered the store, she fell.

In support of her claim, appellant submitted several medical reports from her treating physician, a Board-certified physiatrist, Dr. Tiva Hanjan. In a medical note dated December 7, 2006, Dr. Hanjan diagnosed appellant with lumbar spine dysfunction -- likely discogenic. He recommended that she return to work in a light-duty capacity.

By letter dated April 20, 2007, the Office notified appellant that the evidence of record was insufficient to support her claim because it did not establish that she was injured in the performance of duty.

Appellant thereafter submitted a summary of her claim dated May 8, 2007. She reported that her injury occurred while she was in Colorado, attending a mandatory training course required for her employment at the Bureau of Prisons. The employing establishment provided transportation, a government van, which appellant and her class of fellow employees utilized for meals and other necessities during the training program. Appellant also noted that they routinely used the van for store stops. On November 28, 2006 after the class ate dinner at a TGI Friday's Restaurant, the group went to a nearby Target store to purchase some personal items. As appellant entered the store, she slipped and fell. She alleges that this was not a personal errand because: she needed these personal items, consisting of gloves, toiletries, bottled water and breakfast food for her temporary-duty assignment; she was accompanied by a group of fellow employees; and she used a government-supplied van for the shopping trip.

By decision dated May 21, 2007, the Office denied appellant's claim because the evidence of record did not establish that she was injured in the performance of duty.

Appellant disagreed and requested an oral hearing. By letter dated February 21, 2008, the Office notified her that a hearing was scheduled for March 26, 2008 at 9:00 am. It advised appellant that she and/or her representative should be present.

Appellant failed to attend the hearing on March 26, 2008 and did not contact the Office, either before or after the hearing, to explain why she failed to appear. By decision dated April 15, 2008, the Office found that appellant had abandoned her request for a hearing.[1]

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of her duty.[2] The phrase "sustained while in the performance of [her] duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation

[1] Following the Office's April 15, 2008 decision, by letter dated April 24, 2008 appellant reported that she never received the Office's February 21, 2008 letter and therefore had no notice of the hearing.

[2] 5 U.S.C. § 8102(a).

laws, namely, arising out of and in the course of employment.[3] Arising in the course of employment relates to the elements of time, place and work activity. An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while they are fulfilling their duties or are engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.[4]

Under the Act, an employee on travel status or a temporary-duty assignment or special mission for her employer is in the performance of duty and, therefore, under the protection of the Act 24 hours a day with respect to any injury that results from activities essential or incidental to her special duties.[5] Examples of such activities are eating,[6] returning to a hotel after eating dinner and engaging in reasonable activities within a short distance of the hotel where the employee is staying.[7] However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, they cease to be under the protection of the Act. Any injury occurring during these deviations is not compensable.[8] Examples of such deviations are visits to relatives or friends while in official travel status,[9] visiting nightclubs and bars,[10] skiing at a location 60 miles from where an employee is undergoing training[11] and taking a boat trip during nonworking hours to view a private construction site.[12]

Such recreational activities fall within an employee's performance of duty only in certain specific circumstances. The general criteria for performance of duty as it relates to recreational and social activities is set forth in Larson as follows:

> "Recreational or social activities are within the course of employment when: (1) They occur on the premises during a lunch or recreational period as regular

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

[4] S*ee Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); *see also Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

[5] *Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd* (*James Kidd*), 47 ECAB 670 (1996); *William K. O Connor*, 4 ECAB 21 (1950).

[6] *Michael J. Koll, Jr.*, 37 ECAB 340 (1986); *Carmen Sharp*, 5 ECAB 13 (1952).

[7] *Ann P. Drennan*; *Janet Kidd* (*James Kidd*), *supra* note 5; *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

[8] *Karl Kuykendall*, 31 ECAB 163 (1979).

[9] *Ethyl L. Evans*, 17 ECAB 346 (1966); *Miss Leo Ingram*, 9 ECAB 796 (1958); *George W. Stark*, 7 ECAB 275 (1954).

[10] *Conchita A. Elefano*, 15 ECAB 373 (1964).

[11] *Karl Kuykendall*, *supra* note 8.

[12] *Mattie A. Watson*, 31 ECAB 183 (1979).

> incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity within the orbit of the employment; or (3) The employer derives substantial direct benefits 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."[13]

Larson states that the outcome of these recreation cases turns on the "different 'mix' in the fact situation."

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[14]

ANALYSIS -- ISSUE 1

Applying these principles to the present case, the Board finds appellant's slip and fall upon the tiled floor of a Target department store on November 28, 2006 did not occur within the performance of duty. Appellant did not establish that she fell on the premises of the employing establishment when she fell on November 28, 2006. Rather, she established that she was on the private property of a Target department store. Appellant contends that, because she was attending a mandatory training course, traveled to and from the store using a government-provided van and was accompanied by a group of fellow employees, her injury falls within the scope of coverage provided by the Act.

This assertion, however, does not establish that the recreational activity (shopping) which the employee was engaged in and that precipitated her slip and fall was within the performance of duty. The Board has previously looked to a variety of factors to determine whether an employee is considered to be in the performance of duty while in temporary travel status.

When a claimant voluntarily deviates from work activities, or activities reasonably incidental to her work, and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, they cease to be under the protection of the Act. Any injury occurring during these deviations is not compensable.[15]

Appellant's attendance at the training conference was within the performance of duty and it is not disputed that the conference was relevant to appellant's job duties and would presumably have been of benefit to appellant in the performance of those duties and therefore a benefit to her employer as well. However, her injury did not occur while at the training conference, while eating or while at her hotel. The injury at issue here occurred while appellant was shopping at a

[13] *Larson* at § 22.00.

[14] *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[15] *Karl Kuykendall*, *supra* note 8.

Target department store, and appellant has not established that this was incidental to the duties of her temporary assignment.

Appellant has explained that, after her group of fellow employees finished dinner at a TGI Friday's Restaurant, the group decided to stop at a Target store before returning to the hotel. She noted that the group had routinely stopped at stores the previous nights following dinner. Appellant has not alleged that she needed to stop at the store because she specifically needed to pick up an item related to her temporary-duty assignment. Rather, she noted that once she was at Target, she shopped for personal items such as gloves, toiletries, bottled water and breakfast foods. Appellant has not established that the visit to the Target store was in any way reasonably incidental to the employment, rather than a recreational diversion. For example, she has not explained why gloves were related to her temporary-duty assignment, nor has she explained that water or breakfast foods were unavailable or unsuitable at the training conference site such that shopping for them should be considered reasonably incidental to her temporary duty. While appellant also noted that she purchased toiletries, she has not clarified the nature of these items to establish that these items were reasonably necessary for her personal hygiene such that they would be considered incidental to her temporary-duty status. Moreover, the facts that fellow employees accompanied her and that she traveled in a government-provided van are not sufficient to establish that appellant's Target shopping trip was reasonably incidental to the duties of her temporary assignment. Acting in concert with other similarly situated federal employees does not convert otherwise recreational activities into an activity incidental to an employee's federal employment.

Based on this, appellant has not met her burden of proving she sustained an injury in the performance of duty because her Target shopping trip was a recreational activity not incidental to the purpose of the employee's travel that was to attend a mandatory training conference. The evidence of record therefore fails to establish that the recreational activity in which appellant was engaged, and which caused her injury, meets the criteria of being within the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under the Act, 5 U.S.C. § 8124(b)(1), follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary [of Labor] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision

finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]."[16]

This course of action is correct even if Branch of Hearings and Review can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.[17]

ANALYSIS -- ISSUE 2

The record establishes that, on February 21, 2008, in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the scheduled March 26, 2008 hearing. The Board notes that the notice was sent more than 30 days prior to the hearing. Appellant asserts that he never received a copy of the hearing notice. However, the record reflects that a copy of the February 21, 2008 hearing notice was mailed to the correct address of record for appellant and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[18] This is known as the mailbox rule. As the record reflects that the Office mailed a hearing notice to appellant's address of record, it is presumed that it arrived at his mailing address. The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for his failure to attend within 10 days of the scheduled date of the hearing. As the circumstances of this case meet the criteria for abandonment, the Board finds that appellant abandoned his request for a hearing.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty on November 28, 2006, as alleged. The Board further finds that she abandoned her request for an oral hearing.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see G.J.*, 58 ECAB ___ (Docket No. 07-1028, issued August 16, 2007). *See also Claudia J. Whitten*, 52 ECAB 483 (2001).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[18] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2008 and May 21, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 22, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board