United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 09-80**
	)	**Issued: March 23, 2009**
NATURAL RESOURCE CONSERVATION SERVICE, Madisonville, TN, Employer	)	

Appearances:
Roy P. Neuenschwander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 15, 2008 appellant, through his attorney, filed a timely appeal from an August 4, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that he sustained an injury in the performance of duty on March 9, 2006, as alleged.

FACTUAL HISTORY

On March 26, 2007 appellant, then a 62-year-old soil conservation technician, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2006 at 5:07 p.m. he was involved in an automobile accident when his vehicle was hit by a second vehicle that pulled in front of him. He claimed that the impact caused his body to lunge forward and that he was held in by his seatbelt, resulting in upper and lower back pain, radiating down the right leg. At the time of the

accident, appellant was driving to a Blount County Soil Conservation District nominating committee and board meeting, scheduled for 5:30 p.m. and 6:30 p.m., respectively. The employing establishment controverted the claim, arguing that the incident occurred after his regular duty hours, that appellant was not approved to attend the meeting and that he was in his personal vehicle at the time of the accident.

In letters dated May 8, 2007, the Office requested that both appellant and the employing establishment provide additional information regarding the alleged incident.

In a May 17, 2007 letter, the employing establishment replied that appellant was not advised to attend the board meeting or paid compensatory time to attend. It enclosed a series of e-mails dated September 23, 2005 through March 8, 2007. In a September 23, 2005 e-mail, Charles Roberts, a supervisor at the employing establishment, provided appellant notice of an area personnel meeting on November 22, 2005, to which all employees were invited to attend. In an e-mail dated September 26, 2005, appellant requested permission from Mr. Roberts to drive an employing establishment vehicle to board meetings, noting that he had driven his personal vehicle to the evening board meetings for three and a half years. In a reply e-mail dated September 26, 2005, Mr. Roberts responded that appellant, as a soil conservationist technician, was not required to attend board meetings. This e-mail was carbon copied to appellant's immediate supervisor, Fred Walker. In an e-mail dated March 7, 2007, Mr. Walker stated that he did not approve appellant to work from 6:00 p.m. to 6:30 p.m. on March 9, 2006.

The employing establishment also enclosed a copy of appellant's time sheet dated March 5 through 18, 2006, certified by Mr. Walker. According to the time sheet, appellant's tour of duty hours for March 9, 2006 were 8:00 a.m. to 4:30 p.m., however, actual clock hours were 8:00 a.m. to 6:30 p.m.

In a May 26, 2007 statement, appellant alleged that on the date of the accident he left work to attend the Blount County nominating committee and board meeting scheduled for 5:30 p.m. He left from work and took a direct route following his supervisor. Appellant believed that his supervisor required his attendance and three people witnessed his supervisor telling him it was time to go. He stated that he attended most of the previous board meetings, was never told not to attend and previously drove a vehicle owned by the employing establishment to the meetings. Appellant claimed that his attendance at the meeting benefited the employing establishment by building a good relationship between the agency, the board and local land owners in the county and that he received credit time for several of the meetings he attended. He enclosed a copy of the accident report and a time sheet for the period March 5 through 18, 2006.

By decision dated June 5, 2007, the Office found that appellant was not injured while in the performance of duty. It noted that appellant did not provide any evidence to establish that his attendance at the meeting was required.[1]

[1] In a letter dated June 16, 2008, the Office contended that because appellant did not submit any medical evidence, the June 5, 2007 decision would be modified to deny the claim on the basis of fact of injury instead of performance of duty. On July 11, 2008 appellant, through his attorney, submitted a series of medical records dated March 21, 2006 through February 6, 2007.

On June 9, 2008 appellant requested reconsideration. In an affidavit dated June 3, 2008, appellant stated that he was required to attend the Blount County meetings as part of his job. He had attended the meetings for over three years as part of his job and received compensatory time from his employer. Appellant claimed that he attended the meetings for the purpose of coordinating state and federal resource best management practices in the county, as well as to update the committee on ongoing projects. He enclosed a map reflecting his route of travel from the premises of the employing establishment to the Blount County meeting.

In a June 3, 2008 affidavit, John Davis, chairman of the Blount County Soil Conservation District, stated that appellant had attended the Blount County meetings over the past three years, that his attendance was helpful and that he expected him to attend. He expected appellant to be present at the meeting scheduled for March 9, 2006.

In a statement dated July 17, 2008, appellant, through his attorney, contended that Mr. Walker specifically knew he was attending the meeting and that they talked while at the employing establishment premises prior to driving to the meeting in separate vehicles. He contended that the injury occurred on the most immediate and direct route to the meeting and that he believed his presence at the meeting was a substantial part of the services for which he was hired, as his job duties partly consisted of coordinating state and federal projects in the county.

By decision dated August 4, 2008, the Office denied modification, finding that appellant was not advised to attend the Blount County meeting on March 9, 2006, was not paid compensatory time and was advised by Mr. Walker that he was not required to attend the meeting.

LEGAL PRECEDENT

Congress, in providing a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relationship.[2] Instead, Congress provided for the payment of compensation for personal injuries sustained while in the performance of duty. The phrase 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. In addressing this issue, the Board has stated:

> "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."[3]

[2] *Janet M. Abner*, 53 ECAB 275 (2002).

[3] *Christine Lawrence*, 36 ECAB 422 at 424 (1985).

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work while going to or coming from work, are not compensable.[4] An exception to this rule applies where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.[5]

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.[6]

ANALYSIS

The issue is whether appellant sustained an injury in the performance of duty on March 9, 2006 at 5:07 p.m. while driving to a Blount County Soil Conservation District nominating committee and board meeting. In the August 4, 2008 decision, the Office determined that, because appellant attended the meetings voluntarily and was not paid compensation, the accident occurred outside the performance of duty. The Board finds this case is not in posture for decision.

The Office, in denying the claim, found that appellant was not compensated for his time while traveling to and attending the Blount County meetings. However, this conclusion is not wholly supported by the record. In a March 9, 2006 e-mail, Mr. Walker, appellant's immediate supervisor, stated that he did not authorize appellant to work from 6:00 p.m. to 6:30 p.m. on March 9, 2006. However, the timesheet submitted by the employing establishment, and certified by Mr. Walker, shows that appellant's actual hours on March 9, 2006 were 8:00 a.m. to 6:30 p.m., which encompasses the time traveling to and attending the Blount County meeting. While the hours worked outside the usual tour of duty are not reflected in the totals on the timesheet, it is unclear whether appellant was compensated through credit time, as he alleges. Further, appellant contended that he was compensated for attending the Blount County meetings for the past three and a half years; however, the record is void of past timesheets that would either refute or support this claim. Thus, the Board finds that it is unclear whether appellant was compensated for attendance at the Blount County meetings, either on March 9, 2006 or for the three and a half years prior.

The Board further notes that the mere fact that appellant attended the meeting voluntarily or did not receive compensation would not necessarily preclude benefits. 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 off the employing establishments' premises. In *Lindsay A.C. Moulton,*[7] the Board focused on the benefit to the employing establishment arising out of the

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

[5] *Mary Margaret Grant*, 48 ECAB 696 (1997).

[6] *Phyllis A. Sjoberg, supra* note 4.

[7] 39 ECAB 434 (1988). *See also Sondra J. Mills*, 33 ECAB 1092 (1982).

employee's participation at a voluntary symposium, for which he was only granted annual leave and no expenses were paid. The Board found that attendance at the symposium was an incident of employment; however, his injury due to recreational skiing on the trip was not compensable. Further, in *Janet R. Landesberg*,[8] the Board looked to the nexus between the employing establishment and the seminar to which appellant was traveling when she was injured in a car accident, finding that the critical factor in the case included the degree of control that the employing establishment exercised over the seminar and attendance thereof, including payment for travel or other expenses, sponsorship or organization of the seminar and the authorization for attendance.[9]

The Board finds that not only did the Office fail to consider this precedent when denying appellant's claim, but also did not sufficiently develop the evidence related to these factors. For example, it is unclear the role of the employing establishment in sponsoring or organizing the Blount County meetings. Further, Mr. Davis, the Chairman of the Blount County Soil Conservation District, stated that he expected appellant to attend the meetings and that his attendance was helpful at the meetings. However, it is unclear whether a relationship existed between Mr. Davis and the employing establishment. Moreover, the employing establishment never addressed the benefit, if any, of appellant's attendance at the Blount County meetings, despite appellant's claims that he aided in coordinating state and federal resource best management practices.

It is long established that proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government sources.[10]

The Board, therefore, finds this case is not in posture for decision as ambiguities remain as to appellant's compensation for attendance at the meeting, the benefit, if any, to the employing establishment of appellant's attendance and the degree of control the employing establishment exercised over the meeting. The case is remanded for further proceedings consistent with this decision to be followed by a *de novo* decision.

CONCLUSION

The Board finds this case is not in posture for a decision.

[8] 50 ECAB 538 (1999).

[9] The Board found no such nexus in *Landesberg.*

[10] *Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983).

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development not inconsistent with this opinion.

Issued: March 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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