# United States Department of Labor
# Employees' Compensation Appeals Board

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| **S.B., Appellant** | ) | |
| **and** | ) | **Docket No. 10-842** |
| | ) | **Issued: December 9, 2010** |
| **U.S. POSTAL SERVICE, GATEWAY PERFORMANCE CLUSTER, St. Louis, MO, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On January 15, 2010 appellant filed a timely appeal from the August 5, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for a January 29, 2008 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 met his burden of proof to establish that he sustained an injury in the performance of duty on January 29, 2008.

### *FACTUAL HISTORY*

On January 29, 2008 appellant, then a 38-year-old maintenance manager, filed a claim alleging that he sustained a left ankle injury in the performance of duty on January 29, 2008. He indicated that he injured himself playing volleyball while attending the Maintenance Leadership Development Program at the National Center for Employee Development (NCED) in Norman,

Oklahoma.[1] Appellant stopped work on January 29, 2008 at the time of the injury. He submitted medical evidence in support his claim including the report of fracture repair surgery on his left ankle on January 29, 2008.

In a February 8, 2008 letter, Loretta Grady, a health and resource management specialist, stated that the postal service was challenging appellant's claimed work injury because it was not job related. She indicated that he was attending postal training at an off-site postal facility when the injury occurred. Participation in the volleyball game was during appellant's own time and by his own volition and the postal service had not sponsored the activity. Ms. Grady stated that playing volleyball had nothing to do with his job duties while attending the training session.

In a February 21, 2008 letter, the Office requested that appellant answer a number of questions about his claim, including whether he was on travel duty status (TDY) at the time of injury; whether the injury occurred on postal service property; and whether his employer required or persuaded him to participate in the volleyball game.[2]

In an undated statement, appellant indicated that he was attending training at the NCED while on TDY when the injury occurred at about 5:50 p.m. on January 29, 2008.[3] He stated that his employer did not require him to play volleyball but indicated that whether he was persuaded to do so was "open to interpretation." Appellant indicated that as part of the Maintenance Leadership Development Program he developed an Individual Development Plan for work, self and family which included a personal pledge to lose weight and become more physically active. He indicated that he was playing volleyball with his mentor and 12 to 15 others.[4]

In a March 13, 2008 letter, Ms. Grady stated that appellant was injured while playing volleyball in the gymnasium that is located in the NCED housing facility which is owned by the postal service. Appellant was on TDY at the time of the injury on January 29, 2008. Ms. Grady stated that no employees were required or persuaded to participate in the volleyball game and noted that it was a recreational activity that took place after class was finished for the day. The volleyball game was not an organized activity that was sponsored by the postal service.

In a March 24, 2008 decision, the Office denied appellant's claim that he sustained an injury in the performance of duty on January 29, 2008. It found that appellant's injury did not occur in the performance of duty because he deviated from the normal incidents of his TDY trip and engaged in personal activities which were not reasonably incidental to his work.

[1] On the back of form, appellant's supervisor indicated that appellant was in training status at the time of the alleged injury, but asserted that it did not occur in the performance of duty.

[2] In another February 21, 2008 letter, the Office requested similar information from the employing establishment.

[3] Appellant indicated that the NCED was considered to be postal service property. He submitted documents which showed he was TDY on January 29, 2008. Another document showed that training sessions were scheduled to end at 5:00 p.m. on January 29, 2008.

[4] In another statement, appellant indicated that the postal service supplied the site of the volleyball game and the equipment to play it.

In an undated statement, appellant stated that he participated in the volleyball game as part of his individual development plan that was put together by his mentor, but he acknowledged that the plan only generally referred to improving physical fitness. He indicated that his mentor monitored his progress in the individual development plan. Appellant submitted a statement in which Bobbie McGee, another postal employee, stated that he took part in the volleyball game during which appellant was injured. Mr. McGee stated, "The volleyball games are put on by NCED and staffed by NCED employees (officiating duties). It was during one of … such games that [appellant] was injured. NCED employees provided first aid until paramedics arrived." In a March 24, 2009 letter, appellant's counsel at the time requested reconsideration. He argued that the postal service sponsored the volleyball game and therefore this fact meant that appellant did not deviate from his TDY trip coverage.[5]

In a July 21, 2009 letter, a postal service official stated that use of the recreational facilities at the NCED was entirely voluntary and indicated that appellant's individual development plan was in its draft stages when he was injured.

In an August 5, 2009 decision, the Office affirmed its March 24, 2008 decision denying appellant's claim for a January 29, 2008 injury.

## ***LEGAL PRECEDENT***

The general rule regarding coverage of employees on travel status or on temporary-duty assignments is set forth in Larson, *The Law of Workers' Compensation*:

> "An employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand. Thus, injuries flowing from sleeping in hotels or eating in restaurants away from home are usually compensable."[6]

The Board has similarly recognized that the Federal Employees' Compensation Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.[7] When the employee, however, deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[8]

[5] In a July 27, 2009 letter, counsel argued that the volleyball game was incidental to appellant's training sessions.

[6] A. Larson, *The Law of Workers' Compensation* § 25.01 (2010).

[7] *See Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

[8] *Id.*

The general criteria for performance of duty as it relates to recreational or 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 a regular incident of employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life."[9]

## ***ANALYSIS***

On January 29, 2008 appellant filed a claim alleging that he sustained a work-related left ankle injury while playing volleyball on January 29, 2008. He indicated that he injured himself while attending the program at NCED.

The Board finds that appellant's injury did not occur in the performance of duty because he deviated from the normal incidents of his trip and engaged in personal activities which were not reasonably incidental to the duties of the temporary assignment contemplated by the employer.

In this case, the personal recreational activity was playing volleyball in the gymnasium located in the NCED housing facility on January 29, 2008. However, it is not an activity reasonably related to the temporary-duty assignment.[10] The employer did not expressly or impliedly require participation in the activity of playing volleyball, the activity was not part of the services of the employee[11] and the employer derived no substantial direct benefit from the activity.[12]

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[9] *See supra* note 6 at § 22.00 (2010). Examples of noncompensable, personal deviations from the normal incidents of employment while on travel or temporary duty are found in prior Board decisions: In *Karl Kuykendall*, 31 ECAB 163 (1979), the employee was on TDY for training in Denver and sustained an injury skiing. The Board found that he had deviated from activities reasonably incidental to his TDY assignment. In *Evelyn S. Ibarra*, 45 ECAB 840 (1994), the employee was injured while jogging during her lunch hour and the Board found that this was a personal recreational activity not reasonably related to her TDY assignment.

[10] *See Lawrence J. Kolodzi*, 44 ECAB 818 (1993) (finding that the employee deviated from his TDY assignment for personal and recreational purposes when he was injured at a health club playing racquetball after his workday had ended).

[11] *See Lawrence J. Kolodzi*, *supra* note 10; *see also Bernard D. Blum*, 1 ECAB 1 (1947). The employing establishment stated that no employees were required or persuaded to participate in the volleyball game and noted that it was not an organized activity that was sponsored by the postal service. Appellant stated that his employer did not require him to play volleyball. He also indicated that whether he was persuaded to do so was "open to interpretation," but he did not explain this statement. On appeal appellant argued that the employer sponsored the volleyball game, but the Board notes that the fact that NCED officials might have officiated the volleyball game does not mean that the employer sponsored or required participation in the game.

[12] *See Lawrence J. Kolodzi*, *supra* note 10; *see also Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

The Board notes that appellant was afforded the opportunity to play volleyball after duty hours.[13] He indicated that he played volleyball as part of a personal improvement plan he developed as part of the training program he was attending. However, the only benefit derived from this activity was by appellant for his improved health and morale. Therefore, the level of employer sanction is not sufficient to bring appellant's voluntary, personal activity of playing volleyball within the course of employment under the criteria established for recreational and social activities.[14]

Consequently, the Board finds no basis on which to bring appellant's volleyball activity at the time of injury within the coverage of the Act, either as reasonably incidental to his travel assignment, or as a covered recreational activity. Appellant is, therefore, found not to be in the performance of duty at the time of the claimed injuries on January 29, 2008.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on January 29, 2008.

[13] The employing establishment stated that the volleyball game was a recreational activity that took place after training classes were finished for the day.

[14] *See supra* note 9.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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