

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

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| D.F., Appellant                          | ) |                        |
|  | ) |                        |
| and                                      | ) | Docket No. 09-1674     |
|  | ) | Issued: March 11, 2010 |
| U.S. MARINE CORPS BASE, CAMP             | ) |                        |
| PENDELETON, Camp Pendleton, CA, 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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 22, 2009 appellant filed an appeal of a merit decision of the Office of Workers' Compensation Programs dated March 17, 2009 denying his claim. Pursuant to 20 C.F.R. §§ 501.2 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 November 17, 2008.

**FACTUAL HISTORY**

On December 28, 2008 appellant, then a 50-year-old information technology (IT) specialist, filed a Form CA-1 (notice of traumatic injury) alleging that on November 17, 2008 at approximately 4:00 p.m. he sustained a laceration of his left hand between the middle and index fingers. He was using scissors to cut a piece of wire material to repair the earplug connection of his Blackberry device when they slipped and snipped the skin of his left hand. On the claim form, Larry Bishop, a coworker, confirmed seeing appellant exit his office at approximately 4:14 p.m. on November 17, 2008 holding his left hand. Appellant stated that he had accidentally cut his left hand with a pair of scissors. Appellant's regular work hours are from 7:00 a.m. to 4:30

p.m. The employing establishment controverted the claim noting that appellant was repairing the earplug connection of his personal Blackberry. The record does not indicate that appellant stopped work.

By letter dated January 20, 2009, the Office advised appellant that factual and medical evidence were needed to establish his claim. It requested that appellant address where he was while cutting the wire to his Blackberry; whether the Blackberry was for his personal use; and whether he was on a break at the time of the incident. The Office also requested that he submit rationalized medical evidence to support that an injury occurred in connection with the November 17, 2008 incident. Appellant was provided 30 days to submit the requested information.

On February 9, 2009 the Office received a November 17, 2008 emergency department record from Dr. James Killeen, Board-certified in emergency medicine, who diagnosed a finger laceration between the middle and index fingers of the left hand. A simple suture repair was performed.

By decision dated March 17, 2009, the Office denied appellant's claim on the grounds that the evidence of record did not establish that the claimed incident occurred in the performance of duty. It noted that no factual evidence was received to determine whether the act of cutting a piece of wire was related to his federal employment.

On appeal, appellant stated his Blackberry was government issued. He indicated that the earplug to his Blackberry had malfunctioned since July 2008 and he had reported this problem to his supervisor. Appellant alleged that he had responded to the Office's January 20, 2009 request for further information. He attached a copy of the domestic return receipt and electronic mail "track and confirm" which noted that the Employment Standards Administration, Office of Workers' Compensation Programs, London, Kentucky 40742, had received a delivery from appellant on February 6, 2009.

### **LEGAL PRECEDENT**

Congress, in providing for 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. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.<sup>1</sup>

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of his or her claim. When an employee claims that his injury was sustained in the performance of duty, the employee must submit sufficient evidence to establish that the specific event, incident or exposure occurred at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury.<sup>2</sup>

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<sup>1</sup> *Barbara D. Heavener*, 53 ECAB 142 (2001).

<sup>2</sup> *L.D.*, 58 ECAB 344 (2007).

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> The phrase sustained while in the performance of his duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.<sup>4</sup> Arising in the course of employment relates to the elements of time, place and work activity.<sup>5</sup> 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.<sup>6</sup> Arising out of employment relates to the causal connection between the employment and the injury claimed.<sup>7</sup>

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.<sup>8</sup>

### ANALYSIS

The record supports that on November 17, 2008 appellant sustained a laceration to his left hand during his regular work hours. Appellant indicated that the laceration occurred as a result of cutting a piece of wire to repair the earplug connection on his Blackberry. There is no other evidence in the record on appeal regarding his use of the Blackberry and his attempt to repair the earplug connection was related to or incidental of his federal employment duties as an IT specialist.

Appellant was notified by the Office on January 20, 2009 that he was required to submit factual evidence so it could make a determination of whether the Blackberry was for his personal use, where he was when he cut the wire and the time the incident occurred. The Office required this information to make factual findings regarding whether he was in the performance of duty when the November 17, 2008 incident occurred. Appellant, however, failed to submit any factual evidence in response to the Office's notice of the deficiencies in his claim. Appellant submitted insufficient evidence to establish that he was in the performance of duty at the time of his claimed injury. He has not met his burden of proof to establish his claim of injury.

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *R.A.*, 59 ECAB \_\_\_ (Docket No. 07-1814, issued June 19, 2008); *Bernard D. Blum*, 1 ECAB 1 (1947).

<sup>5</sup> *V.O.*, 59 ECAB \_\_\_ (Docket No. 07-1684, issued May 2, 2008); *R.S.*, 58 ECAB 660 (2007).

<sup>6</sup> *L.K.*, 59 ECAB \_\_\_ (Docket No. 07-1763, issued April 22, 2008); *D.L.*, 58 ECAB 667 (2007).

<sup>7</sup> See *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).

<sup>8</sup> *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

On appeal, appellant asserts that he responded to the Office's request for additional information and submitted a receipt on appeal to support his contention that the Office received documentation from him on February 6, 2009. However, this receipt is not of record and constitutes new evidence. The Board may not consider this for the first time on appeal as its review is limited to the evidence of record that was before the Office at the time of its final decision.<sup>9</sup> Appellant also asserts that his Blackberry was government issued. However, there is no factual evidence of record before the Board to support this contention. Appellant has not met his burden of proof to establish he was in the performance of duty at the time of the November 17, 2008 incident.

**CONCLUSION**

The Board finds that appellant failed to establish that his injury of November 17, 2008 arose in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated March 17, 2009 is affirmed.

Issued: March 11, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> See 20 C.F.R. § 501.2(c).