United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 10-1337**
	)	**Issued: April 19, 2011**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Denver, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
No appearance, for the Director

Oral Argument September 1, 2010

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2010 appellant filed a timely appeal from an October 30, 2009 merit decision of the Office of Workers' Compensation Programs that affirmed a rescission of his claim. Pursuant to the Federal Employees' Compensation Act[1] and 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 the Office met its burden of proof to rescind acceptance of appellant's claim on the grounds that he was not in the performance of duty when injured on April 18, 2007.

On appeal, counsel contends that appellant's injury occurred in the performance of duty because he was in travel status and the employing establishment paid his mileage from his home in Conifer, Colorado to the Denver International Airport (DIA).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 18, 2007 appellant, then a 47-year-old federal air marshal whose duty station was in Denver, Colorado, sustained multiple injuries in a head-on collision while traveling from his home in Conifer, Colorado to the Denver, Colorado airport.[2] On April 26, 2007 the Office accepted the claim.[3] By letter dated May 9, 2007, the employing establishment controverted the claim, stating that appellant was not in the performance of duty at 7:30 a.m., when the motor vehicle accident occurred as he was traveling to work. The employing establishment noted that an air marshal is not in duty status until arrival at the duty station; that he was not scheduled for duty until 12:45 p.m. on April 18, 2007; that he was not in official travel status at the time of the injury; that he was not traveling in a government vehicle; and that per diem would not begin until 2:15 p.m., appellant's scheduled departure time.

The employing establishment submitted copies of local travel and temporary travel policies. They provided that an air marshal could not claim mileage, tolls, parking or any other expenses for travel between his or her office and the field office. For missions originating within 50 miles of the field office, travel time began with the departure of the marshal's scheduled outbound flight and ended with the arrival of the scheduled inbound flight and when missions originated at airports outside the 50 mile radius of the field office, travel time began when the marshal departed his or her residence or field office en route to the airport and ended with the arrival of the marshal at his or her residence or field office. The Denver area field office is approximately 10 miles from DIA.

By letter dated May 23, 2007, the Office proposed to rescind acceptance of the claim on the grounds that appellant was not in the performance of duty at the time of the April 18, 2007 motor vehicle accident. On July 16, 2007 it finalized the rescission.

Appellant timely requested a hearing, that was held on November 28, 2007. At the hearing, counsel asserted that appellant was on duty at the time of his accident and was in the performance of duty because travel to the airport was incidental to his mission. Appellant testified that, on the date of injury, he intended to go to the Denver field office to drop off paperwork on his way to DIA.

In an April 9, 2008 decision, an Office hearing representative affirmed the July 16, 2007 decision.

---

[2] Appellant's home in Conifer, Colorado is approximately 56 miles from DIA. He was not at fault in the accident that occurred when the other driver fell asleep and crossed the median.

[3] The claim was accepted for concussion with loss of consciousness of unspecified duration; contusion of chest wall; closed fracture of rib(s), unspecified, right; contusion of abdominal wall; open fracture of shaft or unspecified parts of femur, right; trimalleolar fracture of ankle, closed, right; and open wound of hip and thigh with complications, right.

On January 7, 2009 appellant, through his attorney, requested reconsideration.[4] In an attached affidavit, he asserted that he was always reimbursed for mileage from his home to DIA. Contrary to his hearing testimony that he intended to stop at the field office on April 18, 2007, appellant was en route to DIA at the time of the accident. Counsel contended that appellant was in the performance of duty because he was reimbursed for mileage and was in travel status.[5]

In a May 8, 2009 merit decision, the Office denied modification of the prior decisions.

On July 29, 2009 appellant, through counsel, requested reconsideration and submitted expense reimbursement documents for trips taken from June 5, 2008 to June 7, 2009, showing that he was reimbursed for mileage at the rate of 55.55 cents a mile. In a July 1, 2009 affidavit, he noted that, when he took trips from DIA, the employing establishment paid for his parking fees and travel expenses, and reimbursed him for the mileage to and from his home. Appellant retired effective August 15, 2009.

By decision dated October 30, 2009, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.[6] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[7]

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. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for "the disability or death of an employee resulting from

---

[4] Appellant had simultaneously filed an appeal with the Board. His attorney requested that the appeal be withdrawn and, by order dated February 10, 2009, appellant's appeal, Docket No. 08-1609, was dismissed at his request.

[5] Appellant received a third-party recovery.

[6] 5 U.S.C. § 8128.

[7] *Amelia S. Jefferson*, 57 ECAB 183 (2005).

personal injury sustained while in the performance of his duty."[8] The phrase "while in the 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."[9] In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[10]

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, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers. There are recognized exceptions which are dependent upon the particular facts relative to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[11]

In addressing the coming and going rule, Larson states, "When the employee is paid an identifiable amount as compensation for time spent in a going or coming trip, the trip is within the course of employment."[12] The Board has held that an exception to the general going and coming rule is made for travel from home when the employee is to perform a "special errand." In such a situation the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the special errand. Ordinarily, cases falling within this exception involve travel which differs in time, or route, or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered in the trip may differ from that involved in normally going to and returning from work. The essence of the exception, however, is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason,

---

[8] 5 U.S.C. § 8102(a); Angel R. Garcia, 52 ECAB 137 (2000).

[9] *George E. Franks*, 52 ECAB 474 (2001).

[10] *Mark Love*, 52 ECAB 490 (2001).

[11] *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB 451 (2002); *Melvin Silver*, 45 ECAB 677 (1994).

[12] A. Larson, *The Law of Workers' Compensation* § 14.06(1) (2008).

coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[13]

Regarding payment for expense of travel, Larson states that "in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment."[14]

In his treatise, *The Law of Workers' Compensation*, Larson sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments, as follows:

> "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."[15]

The Board has similarly recognized that the 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.[16]

ANALYSIS

The facts in this case are not in dispute. Appellant's duty station was in Denver, Colorado. On April 18, 2007 he left his home in Conifer, Colorado in the early morning and was injured in a motor vehicle accident at approximately 7:30 a.m. on U.S. highway 285 as he was traveling to assume his federal duties as an air marshal on a flight that left DIA that day at 2:15 p.m. Appellant was reimbursed for mileage from his home to DIA. On April 26, 2007 the Office accepted that he sustained multiple injuries caused by the April 18, 2007 motor vehicle accident. On July 16, 2007 it rescinded acceptance of appellant's claim on the grounds that he was not in the performance of duty at the time of the April 18, 2007 motor vehicle accident. At oral argument, counsel asserted that the rescission was in error because appellant was in travel status at the time of the accident and the employing establishment reimbursed him for mileage from his home to DIA.

---

[13] Elmer L. Cook, 11 ECAB 163 (1964).

[14] A. Larson, *supra* note 12 at § 14.07(1).

[15] *Id*. at § 25.01 (2008); *see also Susan A. Filkins*, 57 ECAB 630 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

[16] *See Ann P. Drennan*, 47 ECAB 750 91996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

The Board finds that the Office properly supported the rescission of its acceptance of appellant's claim. As a result of being provided new information from the employing establishment, a complete review of appellant's file was undertaken.

Regarding whether appellant was in travel status and therefore in the performance of duty when the motor vehicle accident occurred at 7:30 a.m. on April 18, 2007, he did not have fixed hours. Although he had a fixed duty station at the Denver field office, much of his work was spent in air travel. Therefore, neither the general rule regarding off-premises injuries nor the exceptions to that rule are applicable.[17] While an employee whose work entails travel away from the employer's premises is held to be within the course of his or her employment continuously during the trip,[18] appellant's accident occurred at 7:30 a.m., more than five hours before his 12:45 p.m. scheduled arrival at DIA and more than six hours before his scheduled flight departure at 2:15 p.m.[19]

Employing establishment policies provide that an air marshal, who is departing from a flight from an airport within 50 miles of an employee's duty station, as in this case, is not in travel status until the scheduled departure of the flight, which was 2:15 p.m. In rescinding acceptance of appellant's claim, the Office found that, at the time of acceptance, the employing establishment implied that he was on official duty at the time of the April 18, 2007 motor vehicle accident. After being informed by the employing establishment that appellant would not be on official duty that day until 12:45 p.m. or be on travel status until 2:15 p.m., he was found not in the performance of duty when injured. The April 18, 2007 motor vehicle accident occurred at 7:30 a.m., more than four hours before he was to report for duty. Appellant was not reasonably in travel status at the time of the 7:30 a.m. motor vehicle accident.

Turning to consideration of travel reimbursement, the Board finds that it is not readily apparent that, because appellant was reimbursed for mileage for the trip from his home to either the Denver field office or DIA, the monetary reimbursement from his employer constituted "all or substantially all" of the cost of his travel to work such as to constitute a "deliberate and substantial payment" of the expenses of travel so as to bring the trip itself within the course of employment. Larson indicates that a majority of such cases involve the determination of whether a "deliberate and substantial payment" was made for the expense of the travel.[20] Factors to consider include whether an automobile is provided for the travel, whether transportation involves a considerable distance or payment is made as a special inducement to hire.[21] Larson notes, however, that a

[17] *Connie J. Higgins (Charles H. Higgins), supra* note 11.

[18] *Supra* note 16.

[19] The Board finds appellant's hearing testimony that he planned to go by the field office on his way to the airport on April 18, 2007 more persuasive than his later affidavit.

[20] A. Larson, *supra* note 12 at § 14.04(1).

[21] *Id*. at § 14.07(2).

travel allowance must be distinguished from mere extra pay, *i.e.*, added compensation with no evidence that the travel is sufficiently important in itself to be regarded as part of the service performed.[22] The treatise discusses several court cases which have noted that to apply an exception to the going and coming rule, the employer must defray "all or substantially all" of the cost of travel.[23]

In *Jon Louis Van Alstine*, the employee was working a detail at an alternative work site. The Board noted that the employee was reimbursed at 31 cents a mile for the 13-mile difference between the work sites but found it readily apparent that this monetary reimbursement from his employer was not for "all or substantially all" of the cost of his travel to work.[24]

In this case, appellant was reimbursed for mileage from his home to either his duty station or to DIA at the rate of approximately 55 cents a mile. The Board finds that the reimbursement for mileage by his employer was employing establishment policy but not intended to cover "all or substantially all" of the cost of his travel to work. The reimbursement for mileage in this case does not constitute a "deliberate and substantial payment" of the expenses of travel. Furthermore, under most circumstances, the travel must be sufficiently important in itself to be regarded as part of the service performed and therefore within the performance of the employee's duties.[25] There is no evidence to support that appellant was on a special mission at the time he left home on April 18, 2007. The facts do not show that the trip was in any way different than his ordinary commute for a scheduled flight. Appellant did not establish any special degree of inconvenience or urgency or show that the trip, in and of itself, was a substantial part of any service for which he was employed.[26] His trip to work was to report at his assigned time and no different from that of other federal air marshals. The drive to work was no more for the benefit of the employing establishment than any other workers' commute. Appellant's 56-mile commute that morning was for his own convenience not by any mandate of the employing establishment.

The Board therefore finds that the Office properly reopened appellant's claim for further review and determined that he was not in the performance of duty at the time of the April 18, 2007 motor vehicle accident.

---

[22] *Id*. at § 14.07(3).

[23] *See Ricciardi v. Aniero Concrete Co.*, 64 N.J. 60, 312 A.2d 139 (1973). The employer paid 40 percent of the commuting expenses which was found an inadequate percentage to bring the accident under the exception to the going and coming rule.

[24] 56 ECAB 136 (2004).

[25] A. Larson, *supra* note 12 at § 14.07(3); *see R.C.*, 59 ECAB 427 (2008).

[26] *Jon Louis Van Alstine*, *supra* note 24.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board