

was attacked at the Embassy Suites Hotel in Houston, Texas, sustaining injuries to her neck and back. She met an Englishman at a hotel who claimed to work for Exxon Mobil and entered his room at 10:30 p.m. to watch football highlights on his big screen television and was assaulted. After entering the assailant's room, appellant realized she should not be there and got up to leave. He sexually assaulted her and threw her around the room causing her to sustain a sprained neck and back, post-traumatic stress disorder and depression. While deployed to Houston due to Hurricane Ike, the incident occurred "after work." Appellant was treated at a local emergency room on December 8, 2008 when she realized that she could no longer handle the matter and reported the incident to the police that day. She reported the incident to Alan Dobson, her supervisor, on December 2, 2008. Appellant stopped work on December 20, 2008.

In a May 15, 2009 statement, the employing establishment controverted the claim asserting that appellant's description of injury suggested that it did not occur while in the performance of duty. Appellant was deployed to Houston and had gone to dinner across the street from her hotel and stayed after dinner to watch a football game. She reported that she had a casual conversation with someone at the restaurant and alleged that later that night the man sexually assaulted her. The employer noted at the time of the alleged incident, she was not on the premises of a duty station or in the performance of duty.

In a June 22, 2009 decision, the Office denied appellant's claim, finding that she was not injured while in the performance of duty.

Appellant requested reconsideration. She submitted reports dated February 26 to June 17, 2009 from Rita Van Dyck, a therapist, who diagnosed post-traumatic stress disorder, adjustment disorder with mixed anxiety and depressed mood, sexual assault in November 2008, inability to work and severe financial stress. In a February 26, 2009 report, Ms. Van Dyck noted that appellant reported being sexually assaulted in November 2008 when she was deployed by her employer to assist with Hurricane Ike. Appellant stated that on Thanksgiving evening she was watching the Oregon State/University of Oregon football game on a big screen at a tavern near her hotel when a guy sat next to her and appeared to be nondescript. She indicated that she was always careful about her safety and kept watching the game and not really engaging in conversation with him.

Appellant was treated by Dr. Gordon P. Anderson, a Board-certified family practitioner, on December 23, 2008 for a hamstring pull, abdominal muscle strain and sexual assault. She related to the physician that on November 29, 2008 she was watching a football game with a group of people and was assaulted by a man without sexual penetration. Appellant sought treatment on May 14 and June 15, 2009 from Dr. James M. Kassube, a Board-certified orthopedic surgeon, for neck and low back pain. Dr. Kassube noted that appellant continued to be plagued with a post-traumatic stress disorder since her attack. He diagnosed myofascial pain, low back pain and radiculitis recommended trigger point injections. A March 29, 2009 report from Dr. Phillip Taggart, a Board-certified family practitioner, noted treating appellant for asthmatic bronchitis. Dr. Taggart diagnosed work-related stress, chronic otitis and cervical disc disease.

In a July 31, 2009 decision, the Office denied appellant's reconsideration request on the grounds that it was insufficient to warrant further review of the merits.

On March 15, 2010 appellant requested reconsideration. In a February 5, 2010 statement, her attorney contended that employees on travel status were covered 24 hours a day for all reasonable incidents in their temporary duty including injuries off premises during meal time. At the time of the incident, appellant was deployed to Houston, Texas, and was having dinner in a restaurant and watching an Oregon football game. She reported that appellant was introduced to the assailant who claimed he was staying at a nice hotel at which some of appellant's coworkers were also staying. Counsel indicated that appellant proceeded to see the hotel facility for herself and on behalf of other employees of the employing establishment as the employer often had a need to locate available housing. Appellant was doing this when she was assaulted by the man. Counsel argued that appellant was acting in a representative capacity for the employer when she went across the street to see the hotel facility with the assailant.

Appellant submitted a January 19, 2010 declaration noting that in November 2008 she was deployed to Houston as a community relations officer and was on active duty 24 hours a day seven days a week. During Hurricane Ike, her agency was expecting over 200 new employees to assist in its efforts and she was known as the go-to person to find housing. On November 29, 2008 she was having dinner and watching a football game at a restaurant near the hotel where she was staying and engaged in a conversation with a gentleman about the facilities at the hotel across the street for a possible stay for herself or other employees. Appellant went across the street to look at the hotel and took photos. While she was checking the facility, she was attacked and sexually assaulted by the man who was showing her the hotel. She asserted that she was acting as a representative of the employer.

In a January 21, 2010 declaration, Mr. Dobson, appellant's supervisor, noted that during appellant's deployment she was on duty 24 hours a day seven days a week and often worked a 12-hour day. He stated that agency employees were required to find their own housing and accommodations could be very difficult to find. Mr. Dobson stated that "it was my understanding that at the time of the incident, [appellant] had gone across the street with a man to look at a hotel facility to gather information to give to [employing establishment] employees on how to register in the area and navigate the disaster recovery process." He advised that appellant was acting in a representative capacity as community relations officer and this activity was reasonably associated with her employment. Appellant submitted a January 27, 2010 declaration statement from Benard Dew, a cadre manager, who noted that at the time of the incident in November 2008 he worked with appellant and found hotel rooms to be in short supply as new staff arrived. He and appellant were trying to identify additional rooms in the area. Mr. Dew noted appellant was a person of the highest integrity.

Appellant submitted reports from Dr. Kassube dated May 29, 2009 to January 18, 2010. Dr. Kassube treated appellant for myofascial pain syndrome, cervical neck and thoracic pain and peripheral neuropathy versus radiculopathy. Appellant submitted physical therapy notes dated June 29 to August 3, 2009. In a September 22, 2009 report, entitled "corrected version of previous document," Dr. Anderson noted that appellant reported being deployed to Houston. On November 29, 2008 appellant ate at a restaurant after a football game. She went to a hotel where

she met an Exxon executive who invited her to look at a hotel across the street. Appellant reported that other employing establishment employees were there and it was approximately 10:30 at night. She stated that there was no flirtation involved when she went over to check out the hotel and went to the sixth floor by elevator and leaned over the rail to take pictures. The assailant invited appellant into his room to check out the big screen TV. Appellant reported that the man handed her the remote and she entered his room where he grabbed her and assaulted her.

In an April 22, 2010 decision, the Office denied modification of the prior decisions finding that appellant was not engaged in activities on November 29, 2008 that were reasonably incidental to her duties while on travel status.

LEGAL PRECEDENT

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 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

² 5 U.S.C. § 8102(a).

³ *Bernard D. Blum*, 1 ECAB 1 (1947).

⁴ 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); *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).

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 training¹¹ and taking a boat trip during nonworking hours to view a private construction site.¹²

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.¹³

ANALYSIS

Appellant alleged that on November 29, 2008 she was in temporary travel status when she was sexually assaulted after entering a man's hotel room at 10:30 p.m. to watch football highlights on his big screen television. She asserted that she sustained neck and low back injuries and post-traumatic stress syndrome. Appellant contends that the injury arose in the performance of duty because she was on a temporary-duty assignment away from her regular place of employment and was covered by the Act 24 hours a day.

The fact that an employee is on a special mission or in travel status during the time that a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of the employment. The evidence does not support that appellant's claimed conditions resulted from activities reasonably incidental to her employment. Appellant's participation in viewing football highlights in the hotel room of a man she met at a nearby tavern at 10:30 p.m., after work, is not incidental to her employment as a disaster assistance employee on temporary duty for hurricane assistance. The Board finds that accompanying a relative stranger to his hotel room was a personal deviation from the normal incidents of her duty 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.¹⁴

⁸ *Id.*

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*, 31 ECAB 163 (1979).

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

¹³ *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

¹⁴ *Karl Kuykendall*, *supra* note 11.

Appellant was deployed to Houston, Texas, to assist with the Hurricane Ike recovery effort. However, her injury did not occur while providing disaster assistance, community relations, while eating or while at her hotel. Appellant's injury occurred after dinner, at 10:30 p.m., while located at a different hotel facility while with an individual she described as an Englishman. The record does support that her injury arose from the duties of her temporary assignment or an activity reasonably incidental to her employment.

The statements of the incident most contemporaneous with the date of the alleged injury, specifically the CA-1 filed on March 30, 2009, noted that on November 29, 2008 appellant was attacked at the Embassy Suites Hotel by an unidentified man who allegedly claimed to work for Exxon Mobil. Appellant entered his hotel room at 10:30 p.m., apparently to check out football highlights on a big screen television. She specifically stated on her claim form that the assault occurred "after work." Similarly, in a December 23, 2008 report, Dr. Anderson noted appellant reported that on November 29, 2008 she was watching football game with a group of people in Houston and was assaulted by a man. Likewise, on February 26, 2009, appellant's therapist, Ms. Van Dyck noted appellant reported a similar account of the event that she had been sexually assaulted in November, 2008 when she was deployed to assist with Hurricane Ike. Appellant stated that on Thanksgiving evening she was watching the football game at a tavern near her hotel when a guy sat next to her who appeared to be nondescript.

The Board notes that various accounts of the November 29, 2008 incident are inconsistent with appellant's initial depiction of the incident. In a January 19, 2010 declaration, appellant stated that on November 29, 2008 she was having dinner and watching a football game at a restaurant near the hotel where she was staying and had a conversation with a gentleman about the facilities in the hotel across the street for a possible stay for herself or other employees arriving in town. Appellant asserted that she accompanied the man to the hotel facility across the street for the purpose of taking pictures to show other employees arriving in Houston and during this effort she was attacked and sexually assaulted by the Englishman. However, appellant's initial account of the incident made no reference to any business purpose for her visit to the man's hotel room. The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence.¹⁵ Appellant's later statement does not clearly explain the reason why she did not mention any business purpose for her visit to the man's room. The earliest evidence from Dr. Anderson¹⁶ and Ms Van Dyck also did not mention a work-related reason for appellant entering the assailant's hotel room. While appellant noted that she was the go-to person for finding accommodations for new employees, she did not explain why she chose to examine the hotel facilities at 10:30 p.m. and why she did not request the hotel staff accompany her on a tour of the facility.

¹⁵ See *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

¹⁶ Dr. Anderson later provided a September 22, 2009 "corrected" version of the report in which he stated that appellant related that she went to the hotel to check it out and to take pictures. He did not address why he did to relate this in his more contemporaneous December 23, 2008 report. Dr. Anderson also did not specifically indicate that appellant related that any of her activities in the assailant's room were work related other than noting that appellant felt that her condition was work related due to being "covered 24 hours a day" on her job.

Appellant also provided statements from a manager and a supervisor. A January 27, 2010 declaration from Mr. Dew, a manager, who noted at the time of the incident in November 2008 he was working with appellant and found rooms to be in short supply as new staff was arriving and he and appellant were trying to identify additional rooms in the area. Similarly, a January 21, 2010 declaration from Mr. Dobson, appellant's immediate supervisor noted that during appellant's deployment she was on duty 24 hours a day seven days a week and on many occasions worked 12-hour days. He indicated that agency employees were required to find their own accommodations which can be very difficult in the recovery. Mr. Dobson noted being informed that, at the time of the incident, appellant went across the street to gather information about the hotel facility. The Board notes that the accounts from Mr. Dew and Mr. Dobson are of limited probative value as neither noted that appellant contemporaneously related an account of the incident in which the reason for her entry into the assailant's room could be considered work related. The fact that appellant often worked extra hours and helped locate accommodations is insufficient to show that, at the time of the assault, she was performing work duties, especially in light of appellant's more contemporaneous statement that the assault occurred "after work." These statements also conflict with the employing establishment May 15, 2009 statement which disputed that appellant was in the performance of duty when the assault occurred.

Appellant has not established that her visit to the Embassy Suites Hotel and the assailant's room at 10:30 p.m. on November 29, 2008 was reasonably incidental to her employment. Rather the evidence supports that she was engaged in a voluntary deviation from activities incidental to her duties when the assault occurred. There is no evidence that the deviation ended before the assault occurred. Appellant has not met her burden of proving she sustained an injury in the performance of duty.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty on November 29, 2008, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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