

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

| | | |
|--|---|-----------------------------------|
| M.H., Appellant |) | |
| |) | |
| and |) | Docket No. 11-204 |
| |) | Issued: September 13, 2011 |
| DEPARTMENT OF COMMERCE, U.S. |) | |
| CENSUS BUREAU, Rainelle, WV, Employer |) | |
| |) | |

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 1, 2010 appellant filed a timely appeal from a May 18, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) rescinding its acceptance of his claim and a July 27, 2010 merit decision denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ 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 OWCP met its burden of proof to rescind acceptance of appellant's traumatic injury claim as he was not in the performance of duty when injured on March 4, 2009.

On appeal, counsel contends that appellant's injury occurred in the performance of duty and that OWCP erroneously rescinded acceptance of his claim on the basis of hearsay.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 30, 2009 appellant, a 26-year-old recruiting assistant, filed a traumatic injury claim alleging that he sustained a right knee injury in front of his home on March 4, 2009, when he slipped and fell on an icy sidewalk while on his way to work. He stated that he was on his way to a testing site to administer tests to applicants in the performance of his duties.

In a July 1, 2009 telephone conversation, appellant's supervisor informed OWCP that appellant was on duty on the date in question. In the course of his duties, appellant was required to use his privately-owned vehicle to drive from his home to the testing sites and was reimbursed for mileage. The supervisor was unaware whether a test was scheduled on March 4, 2009.

On July 1, 2009 OWCP accepted the claim for partial tear of the right medial collateral ligament and tear of the right anterior cruciate ligament.

In a letter dated July 27, 2009, the employing establishment controverted appellant's claim contending that he was an intermittent temporary employee and was not in the performance of duty when injured on March 4, 2009. Dwight Dean, regional director, stated that personnel in West Virginia were aware that appellant had a knee injury; however, appellant did not indicate that the injury was work related until April 27, 2009, when he told a colleague that he wanted to file a workers' compensation complaint. He noted that appellant was not scheduled to administer any test on March 4, 2009, did not report any hours of work on that date or call to request that another employee fill in for him on that day. Additionally, recruiting had already ended for the region. Mr. Dean also contended that the record contained conflicting accounts of the alleged injury and there were no eye witnesses to the incident.

The employing establishment submitted a July 27, 2009 report of injury reflecting that appellant had slipped on the ice and twisted his right knee on March 4, 2009. Supervisor Charles Adkins stated that appellant called and indicated that he hurt his knee at home and would not be able to make testing on Friday.² In a letter dated July 30, 2009, Victoria Gail Smoot, a testing scheduler, stated that there was no testing scheduled for the date in question. The record contains payroll reports reflecting no hours claimed by appellant on March 4, 2009.

In a November 10, 2009 decision, OWCP rescinded its acceptance of the claim on the grounds that appellant was not in the performance of duty at the time of the March 4, 2009 incident.

On November 25, 2009 appellant requested an oral hearing.

At a March 4, 2010 hearing, appellant testified that he called the employing establishment five minutes after he fell on March 4, 2009. He allegedly talked to "some girl" and told her that he could not make the testing. Appellant did not fill out the time sheet for 15 minutes of work on the date of injury because it was the last thing on his mind.

Appellant submitted a copy of a schedule reflecting that people were scheduled for testing on March 4, 2009 at Snowshoe Career Center in Marlinton, WV. On April 2, 2010 the employing establishment acknowledged that, while appellant prebooked the Snowshoe resort on

² The Board notes that March 4, 2009 was a Wednesday.

March 4, 2009; the staff at Snowshoe, however, confirmed that no one appeared for the testing. Further, there was no log of applicants, no record of appellant's having cancelled testing and no record of appellant's telephone call to the "girl." In an April 6, 2010 letter, recruiting coordinator William Fuller stated that there was no sign-in sheet to validate that there was a test administered on March 4, 2009, and no document to establish that an actual test was scheduled for that day in Pocohontas County.

In a May 18, 2010 decision, an OWCP hearing representative affirmed the November 10, 2009 decision rescinding acceptance of appellant's claim on the grounds that the evidence did not establish that the claimed injury occurred in the performance of duty. In a decision dated July 27, 2010, OWCP formally denied appellant's claim based on the findings of the hearing representative.

LEGAL PRECEDENT

Section 8128 of FECA 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.³ The Board has upheld OWCP'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. OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁴

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 personal injury sustained while in the performance of his duty.⁵ 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."⁶ In deciding whether an injury is covered by FECA, the test is whether,

³ 5 U.S.C. § 8128.

⁴ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

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

⁶ *George E. Franks*, 52 ECAB 474 (2001).

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.⁷

The Board has recognized that, as a general rule, 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.⁸

In addressing the coming and going rule, Larson states that 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.⁹ 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, 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.¹⁰

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.¹¹

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

⁷ Mark Love, 52 ECAB 490 (2001).

⁸ Connie J. Higgins (Charles H. Higgins), 53 ECAB 451 (2002); Melvin Silver, 45 ECAB 677 (1994).

⁹ A. Larson, *The Law of Workers' Compensation* § 14.06(1) (2008).

¹⁰ Elmer L. Cook, 11 ECAB 163 (1964).

¹¹ A. Larson, *supra* note 8 at § 14.07(1).

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.”¹²

The Board has similarly recognized that FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.¹³ It is a well-established principle that where the employee as part of her job is required to bring along her own car, truck or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.¹⁴

OWCP’s procedure manual identified four broad categories of off-premises workers.¹⁵ In determining whether this class of employees has sustained an injury in the performance of duty, the factual evidence must be examined to ascertain whether, at the time of injury, the employee is within the period of the employment, at a place where the employee reasonably may be and while the employee is fulfilling employment duties or engaged in activities reasonably incidental thereto.¹⁶

ANALYSIS

The Board finds that appellant was not in the performance of duty at the time of the March 4, 2009 injury and therefore the acceptance of his claim was properly rescinded.

Appellant alleged that, in the early morning of March 4, 2009, he sustained a knee injury on the sidewalk in front of his house when he slipped on ice and fell while on his way to an employing establishment testing site. Based upon his representations, OWCP accepted his claim. Based on additional information and evidence received from the employing establishment, on May 18, 2010 OWCP rescinded acceptance of appellant’s claim on the grounds that he was not in the performance of duty at the time of the March 4, 2009 incident. On July 27, 2010 OWCP formally denied the claim. The Board finds that appellant was not in the performance of duty at the time of the March 4, 2009 incident.

It is not disputed that appellant was an intermittent, temporary employee and, as such, did not have fixed hours or a fixed duty station. Appellant was responsible for scheduling and administering tests to applicants at various locations and times, required to use his personal vehicle in the course of performing his duties and was reimbursed for mileage. It is a well-established principle that where the employee as part of his job is required by the employing

¹² *Id.* at § 25.01 (2008); *see also Susan A. Filkins*, 57 ECAB 630 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

¹³ *See Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

¹⁴ *A. Larson, The Law of Workers’ Compensation*, *supra* note 8 at § 15.05 (2000); *J.E.*, 59 ECAB 119 (2007); *L.T.*, Docket No. 09-1798 (issued August 5, 2010).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5a (August 1992). *See David P. Sawchuk*, 57 ECAB 316 (2006); *Donna K. Schuler*, 38 ECAB 273 (1986).

¹⁶ *Thomas E. Keplinger*, 46 ECAB 699 (1995); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5b (August 1992).

establishment to use his own vehicle, the trip to and from work is by that fact alone embraced within the course of employment.¹⁷ Therefore, if appellant was, indeed, on his way to work in his vehicle then his knee injury would fall within the performance of duty.

The evidence does not establish, however, that appellant was in his vehicle on his way to work at the time of the March 4, 2009 incident.

OWCP rescinded the claim on the grounds that appellant was not on his way to work at the time of the incident. The Board finds that the evidence of record does not establish that appellant had scheduled work on the day in question. Appellant does not contest that no testing occurred on March 4, 2009. Dwight Dean, regional director, stated that appellant was not scheduled to administer a test on March 4, 2009, did not report any hours of work on that date or call to request that another employee fill in for him on that day. Additionally, recruiting had already ended for the region on that date. Ms. Smoot, a testing scheduler, stated that there was no testing scheduled for the date in question, and payroll reports document that no hours were claimed by appellant on March 4, 2009. Although appellant alleged that he spoke with “some girl” at the employing establishment on the morning he was injured, there is no evidence of record of such a telephone call, no log of applicants and no record of appellant’s having cancelled testing. The Board finds that the evidence does not establish that appellant was scheduled to work on the morning of March 4, 2009.

As noted, where an employee is required to use his or her own vehicle as part of his or her job during the working day, the trip to and from work is by that fact alone embraced within the course of employment.¹⁸ Accordingly, an injury sustained while traveling to and from work may be within the performance of duty for that employee.¹⁹ Because appellant was required to use his own transportation, which was a benefit to the employer, he may be deemed to be in the performance of his duties when driving his vehicle to and from work, but he was not in the performance of duty when he fell on March 4, 2009. At that time, he was not driving or inside his motor vehicle at the time of injury. Appellant sustained a knee injury on the sidewalk in front of his house. Regardless of whether he used his private vehicle in the course of his employment, the act of leaving one’s residence to get to work is an activity in which all employees engage. The extension of coverage would not apply until the point that he entered the vehicle to drive to work.²⁰ The Board finds that appellant did not sustain an injury in the performance of duty as he was not yet engaged in his master’s business or otherwise fulfilling the duties of his employment or something incidental thereto.

On appeal, counsel argues that OWCP improperly determined, in part, based on hearsay evidence, that appellant did not have an appointment at the employing establishment on the date in question. Based on the evidence of record, the Board finds that OWCP properly rescinded acceptance of appellant’s claim and correctly determined that he did not sustain an injury in the performance of duty.

¹⁷ A. Larson, *The Law of Workers’ Compensation*, *supra* note 8 at § 15.05 (2000); *L.T.*, *supra* note 14; *J.E.*, *supra* note 14.

¹⁸ *J.E.*, *supra* note 14.

¹⁹ *Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001).

²⁰ *L.T.*, *supra* note 14. *See also id.*

The Board finds that OWCP properly reopened appellant's claim for further review and determined that he was not in the performance of duty at the time of the March 4, 2009 incident.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim and properly determined that appellant did not sustain an injury in the performance of duty on March 4, 2009.

ORDER

IT IS HEREBY ORDERED THAT the July 27 and May 18, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 13, 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