United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
	)	**Docket No. 12-1430**
and	)	**Issued: January 9, 2013**
	)	
DEPARTMENT OF HOMELAND SECURITY, FEDERAL PROTECTIVE SERVICE, NATIONAL PROTECTION & PROGRAMS DIRECTORATE, Boise, ID, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2012 appellant, through his attorney, filed a timely appeal of the March 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 appellant met his burden of proof to establish that he sustained an injury on October 27, 2011 while in the performance of duty.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 17, 2011 appellant, then a 54-year-old police inspector, filed a traumatic injury claim alleging that at 1:00 p.m. on October 27, 2011 he sustained Guillain-Barre Syndrome. He related that, while on duty in Baker City, Oregon, he had lunch and became ill with food poisoning. Appellant had neurologic damage and paralysis of his bilateral legs, arms and hands. He stopped work on October 31, 2011. Appellant's regular work hours were from 6:00 a.m. to 4:00 p.m., Monday through Thursday.

On the claim form, Derno L. Rocca, an area commander, stated that appellant was in the performance of duty on October 27, 2011.

Hospital emergency room records dated November 1, 2011 provided a diagnosis of bilateral upper and lower extremity weakness. The record contains November 1, 2011 laboratory test results. Progress notes dated November 2 through 22, 2011 from Dr. Jackie J. Whitesell, a Board-certified neurologist, advised that appellant had Guillain-Barre Syndrome.

By letter dated February 9, 2012, OWCP advised appellant that when his claim was initially received it appeared to be a minor injury that resulted in minimal or no lost time from work. Based on this criteria and the fact that the employing establishment did not controvert continuation of pay or challenge the merits of the case, payment for a limited amount of medical expenses was administratively approved. As appellant's claim had not been formally considered it was reopened because his medical bills exceeded $1,500.00. He was advised to submit additional factual evidence in support of his claim. Appellant was afforded 30 days to submit the requested evidence. He did not respond.

On February 9, 2012 OWCP requested that the employing establishment submit evidence regarding appellant's travel status and work duties on October 27, 2011. It was asked to provide whether he was on travel or temporary duty status at the time of the injury, when and where he last performed his official duties, the purpose of the trip, where he was traveling to when the accident occurred and when and where was he expected to perform his next official duty.

During a February 9, 2012 telephone conference Commander Rocca advised OWCP that he was appellant's partner. They were on temporary duty for the day in Baker City, Oregon. Commander Rocca stated that he and appellant were affected by the lunch they ate at a restaurant. He ate pork and appellant ate turkey and mashed potatoes. Commander Rocca stated that he suffered from intestinal upset which was not as serious as appellant's condition. He could not recall the name of the restaurant.

In a November 2, 2011 report, Dr. Ryan D. Heyborne, Board-certified in emergency medicine, advised that appellant had upper and lower extremity weakness.

By letter dated February 14, 2012, the employing establishment stated that appellant was not on temporary duty. He was on a regular directed patrol within his area of responsibility at an assigned federal facility. Appellant last performed his official duties at Wheeler Federal Building, 1550 Dewey Street, Baker City, Oregon. The purpose of the trip was for him to

perform regular patrol and tenant contact at the federal facility. He was enroute to his area of responsibility in Boise, Idaho to perform his next official duty.

In a March 14, 2012 decision, OWCP denied appellant's claim, finding that his October 27, 2011 injury did not arise in the performance of duty. It found that he did not submit the requested factual evidence to establish that the injury or incident occurred as alleged. OWCP further found that the evidence was insufficient to establish that appellant sustained food poisoning while on patrol in Baker City, Oregon.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase sustained while in the performance of duty in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[3]

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[4]

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 or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5] This is generally known as the coming and going rule.[6] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts 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; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the

[2] *Id.* at § 8102(a).

[3] *Valerie C. Boward*, 50 ECAB 126 (1998).

[4] *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

[5] *See John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[6] *See R.C.*, 59 ECAB 427 (2008).

employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or other reasons.[7]

Where an employee is on temporary-duty assignment away from his federal employment he is covered by FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his temporary assignment.[8]

The Board has recognized that Larson, in his treatise, *The Law of Workers' Compensation*, 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."[9]

ANALYSIS

OWCP determined that appellant did not sustain an injury arising in the performance of duty on October 27, 2011. The Board finds that this case is not in posture for decision.

The evidence establishes that, although appellant became ill during his normal work hours, it did not occur on the employing establishment premises. Appellant argued that he was on duty in Baker City, Oregon when he developed food poisoning after eating lunch at a restaurant. Commander Rocca supported his contention, stating that appellant was in the performance of duty on October 27, 2011 as they were on temporary duty in Baker City, Oregon. Subsequently, the employing establishment contradicted this statement, contending that appellant was not on temporary duty but instead was on a regular directed patrol assignment at the Wheeler Federal Building in Baker City. The Board notes that there is no evidence of record as to whether this was a fixed place of employment where he regularly performed most of his duties or whether he performed the majority of his duties at sites located off of the employing establishment premises and should be considered an off-premises worker. Based on the conflicting evidence of record, the Board is unable to make a fully informed adjudication of the performance of duty issue. OWCP failed to make a determination as to whether appellant was on temporary duty as he contended, had a fixed place of employment as contended by the employing establishment or was an off-premises worker. The case shall be remanded to OWCP to obtain additional evidence from the employing establishment regarding appellant's employment status to be followed by a *de novo* decision on the merits determining whether he sustained an injury in the performance of duty.

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[7] *Melvin Silver*, 45 ECAB 677 (1994); *Estelle M. Kasprazak*, 27 ECAB 339 (1976); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a)(1) (August 1992).

[8] *See Susan A. Filkins*, 57 ECAB 630 (2006); *Cherie L. Hutchings*, 39 ECAB 639 (1988).

[9] A. Larson, *The Law of Workers' Compensation* § 25.01 (2008); *see also Susan A. Filkin*, *supra* note 8; *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant was injured on October 27, 2011 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision.

Issued: January 9, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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