United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 12-145**
	)	**Issued: March 25, 2013**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Linthicum, MD, Employer	)	

Appearances:
Robert A. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 28, 2011 appellant, through his attorney, filed a timely appeal from a July 29, 2011 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 sustained an injury on October 19, 2010 in the performance of duty.

FACTUAL HISTORY

On November 29, 2010 appellant, then a 41-year-old transportation security inspector, filed a traumatic injury claim alleging that on October 19, 2010 he broke his right tibia in the performance of duty. He related that he was injured while on travel to Pueblo, Colorado.

[1] 5 U.S.C. § 8101 *et seq.*

Appellant stopped work on October 21, 2010. The employing establishment controverted the claim, indicating that he was off duty at a hotel lounge at the time of the injury and had been drinking alcohol "when he became involved in an altercation with another individual."

In a statement dated December 23, 2010, appellant related that on October 19, 2010 he attended training classes in Pueblo, Colorado from 7:00 a.m. until 3:00 p.m. At 5:30 p.m. he went across the street from his hotel to the Marriott hotel for a reception. Appellant related that he drank four to five beers over the course of a few hours and could tell from his training as a police officer that he was not intoxicated. He stated, "This was an informal gathering that included both instructors and course attendees and was certainly business related." Appellant ate dinner around 7:00 p.m. and at 8:45 p.m. was talking with his colleagues. He stated:

> "At that time, I felt someone touch the lower left side of my back, near my kidney. I was touched from behind by a fireman who wanted me to agree with him on an unknown issue and shake his hand. I did not recognize the subject or understand what he was talking about. I felt the fireman was intoxicated and up to some type of joke or prank, because his associates were snickering. I told him that I did not know him or know what he was talking about and turned around. Again the fireman wanted me to agree with him and shake his hand. Again I told him that I did not know him. He stated you are a 'Dick!' I tried to downplay the situation stating, I am sorry that is just the way things are. He made another comment and again I tried to downplay the situation stating, that is just too bad. At that point he stated, 'Let's settle things outside,' and he stood up. I instinctively stood up, as I felt threatened, but I had no intention to fight, putting my position and or agency's reputation at stake. After I stood up, the male quickly punched me two times in the face."

Appellant threw a counterpunch but another individual pushed him down from behind, injuring his leg and bruising his arm.[2]

By decision dated January 5, 2011, OWCP denied appellant's claim on the grounds that he was not in the performance of duty at the time of the altercation on October 19, 2010. It determined that the injury arose due to a personal argument that was unrelated to the performance of his work duties.

In a statement received January 6, 2011, Daniel L. Crews, a surface transportation security inspector, related that he saw a firefighter try to shake appellant's hand but appellant refused. Both men stood up and appellant "chest bumped the firefighter and the two men exchanged blows. The firefighter threw the first punch."

In a police report dated October 19, 2010, an officer noted that both appellant and Jeremy Davis alleged that the other man initiated the altercation. Mr. Davis maintained that he tried to introduce himself to appellant and appellant grew angry. Appellant indicated that Mr. Davis "was mouthing off toward him, then swung on him as both were standing up at [the] same time."

[2] Appellant submitted a sworn statement to the employing establishment describing the events of October 19, 2010.

A few customers at the bar related that appellant began the fight by "standing up and 'chest bumping' [Mr. Davis] into a column."

In an e-mail dated October 20, 2010, received by OWCP on January 6, 2011, appellant again described the October 19, 2010 altercation. He related that he refused to shake the fireman's hand as he believed that it was a joke. The fireman told him that they should go outside to "settle things." Appellant indicated that he stood up to protect himself and was hit twice in the face.

In an October 21, 2010 witness statement, a Christopher M. Huerta related that he attended the reception held at the Marriott for individuals in the training program. The reception ended about an hour prior to the altercation. A group of firefighters seemed intoxicated. One firefighter was talking to appellant. Mr. Huerta stated:

> "The firefighter was standing and with at least five other firefighter[s] when talking to [appellant] and I had noticed that he seemed agitated. I could not hear the conversation, though it was clear to me that [appellant], who was seated, was not trying to engage the firefighter. I turned away to talk with my colleagues, and then turned back to watch the game again on the big screen, when I noticed the firefighter had moved closer to [appellant]. I saw the firefighter say something, [appellant] shook his head as if to say no, and then the firefighter spoke again loudly, though it was slurred and the bar was loud and again I did not understand. Right after that, [appellant] stood up and was immediately hit by the firefighter."

Mr. Huerta indicated that his statement was true, that he did not know the names of either appellant or the firefighter, and was "aware of [appellant] due to the fact that he was in a class at the same site as me, but not in my class and I have never met or spoke[n] with him…."

In a December 20, 2010 e-mail message apparently from Mr. Davis, he informed Charles Stone that appellant gave him a negative look when he spoke to a woman at the next table. Mr. Davis tried to shake appellant's hand but appellant refused to shake hands and swore at him. Appellant told him that they could move outside and appellant threw a punch at him when they both stood up and he returned in kind.

On December 30, 2010 the employing establishment related that the hotel where the altercation occurred was one-tenth of a mile from appellant's hotel. It stated, "On October 19, 2010 after class had ended, a few of the students met at the Marriott hotel at 5:30 p.m. as the hotel was serving free beer and barbeque sandwiches. [Appellant] was meeting with fellow inspectors and surface training personnel." The employing establishment summarized the police report and statements from appellant and Mr. Davis.

On January 1, 2011 appellant requested an oral hearing before an OWCP hearing representative. On May 17, 2011 his attorney described the events of October 19, 2010. Counsel argued that appellant was in the performance of duty as he was in the location where the incident occurred to meet his coworkers "for dinner and to engage in discussion about training and work…." He further asserted that consuming alcohol did not remove him from the performance of duty absent an affirmative defense of intoxication or engaging in a personal

deviation. Counsel maintained that the injury occurred during the course of employment as the employing establishment facilitated "the assault by causing the participants of the assault to come together in one place at the host hotel where free beer was served." He noted that the assault was not imported into the workplace as appellant did not know his assailant.

At the hearing, held on May 17, 2011, appellant related that the Marriott was the host hotel for the training. He again described the events of October 19, 2010. Appellant related that the man hit him twice in the back, stood over him and asked him to go outside. He stated, "I [did not] like the way -- being a police officer he [has] kind of got an advantage over me standing up over top of me and just kind of instinctively I stood up and I was like -- then he hit me twice, punched me twice in the face." Appellant denied ever meeting the man before or taking any courses with him. He related that his injury occurred around 7:30 or 7:45 p.m. and that he had arrived at the location around 5:30 p.m. Appellant ate dinner where he was sitting and visiting with coworkers around 6:00 p.m. It was not a formal event sponsored by the employing establishment but a reception hosted by Marriott for all guests. Appellant went there to meet colleagues.

By decision dated July 29, 2011, the hearing representative affirmed the January 5, 2011 decision. She found that appellant was in the performance of duty when he met his colleagues for dinner at the Marriott hotel and that his moderate alcohol consumption did not remove him from the performance of duty. The hearing representative further found that the altercation was not imported into the workplace. She determined, however, that appellant deviated from employment when he stood up after the other man challenged him as it "resulted in an escalation of the argument into physical violence."

On appeal appellant's attorney argues that appellant responded to being threatened by standing up in accordance with his police training. Counsel argued that assuming a defensive posture was insufficient to remove him from the performance of duty. He noted that the Board had found FECA provided coverage even to a claimant who was with the aggressor in an altercation, citing *Leslie C. Moore*.[3]

LEGAL PRECEDENT

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.[4]"

[3] 52 ECAB 132 (2000).

[4] A. Larson, *The Law of Workers' Compensation*, § 25.01 (2009); *see also Susan A. Filkins*, 57 ECAB 630 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

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, except when a distinct departure on a personal errand is shown.[5] To determine whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from 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 represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment. The standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective."[6] The Board has recognized that there are limitations to coverage or employees in travel status. When the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of FECA and any injury occurring during these deviations is not compensable.[7]

ANALYSIS

Appellant alleged that he broke his right tibia on October 19, 2010 while on travel to attend training. OWCP denied his claim after finding that he had deviated from his employment at the time of his injury. The issue is thus whether the injury occurred in the performance of duty.

The employing establishment authorized appellant's travel to attend a training program. Appellant attended training classes from 7:00 a.m. to 3:00 p.m. At 5:30 p.m. on October 19, 2010 he went to the Marriott hotel, the host hotel for the individuals attending the training program. The hotel was located across the street from his hotel, approximately one-tenth of a mile away. Appellant asserted that he attended a reception that included instructors and fellow trainees and was "certainly business related." Further he asserted that he ate dinner and had four to five beers over the course of a few hours. Around 8:45 p.m. Mr. Davis, a man that appellant did not know, touched him from behind and asked him to shake his hand. Appellant declined, believing Mr. Davis to be intoxicated, but Mr. Davis persisted in trying to get him to shake his hand. He alleged that Mr. Davis suggested that he and appellant take things outside and when appellant got up Mr. Davis punched him twice in the face. Appellant struck back but another person forced him to the ground, breaking his leg.

Mr. Davis, in contrast, maintained that appellant gave him a negative look and swore at him when Mr. Davis tried to speak with a woman at the table. He related that appellant told him that they could move outside and then appellant tried to punch him when they stood up.

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

[6] *See Thomas E. Keplinger*, 46 ECAB 699 (1995); *Dannie G. Frezzell*, 40 ECAB 1291 (1989).

[7] *See Jose H. Pico*, 46 ECAB 750 (1995); *Evelyn S. Ibarra*, 45 ECAB 840 (1994).

An October 19, 2010 police report indicated that both appellant and Mr. Davis identified the other as the aggressor and that witnesses (customers in the bar) related that appellant started the fight by chest bumping Mr. Davis into a column. Another witness, a Mr. Crews, related that Mr. Davis wanted to shake hands but appellant declined. Appellant then chest bumped Mr. Davis, who then threw a punch.

As discussed, FECA covers an employee 24 hours a day when the employee is on travel status and is engaged in activities essential or incidental to such duties. Thus, injuries arising out of the necessity of sleeping in hotels and eating in restaurants away from home are usually held compensable.[8] OWCP did not dispute that appellant was in the performance of duty while sitting with his fellow trainees and instructors in the Marriott hotel after eating dinner. It further found that he remained in the course of employment when he stayed after the reception to talk and have a couple of drinks with other students and instructors. OWCP determined, however, that appellant deviated from employment when he stood up after being confronted by Mr. Davis.

The Board finds that the weight of the evidence establishes that appellant initiated the physical confrontation with Mr. Davis. In particular, the police report constitutes credible and probative evidence that appellant began the fight by chest bumping Mr. Davis into a column.

The Board further finds that appellant removed himself from the coverage of FECA when he began the altercation. An employee on travel away from his normal post of duty is extended coverage under FECA for all ordinary incidents which the employer would normally contemplate as occurring in the course of such mission.[9] The broad coverage under FECA enjoyed by an employee in travel status comes with the requisite responsibility that the employee act in a manner envisioned by the employing establishment as its representative. In starting a physical confrontation with Mr. Davis, appellant engaged in an activity not reasonably expected or contemplated by the employer and thus removed himself from coverage of FECA.[10] Consequently, the Board finds that appellant has not met his burden of proof to establish that he was in the performance of duty at the time of the October 19, 2010 altercation.

On appeal appellant's attorney argues that he acted in a defensive manner in accordance with his police training. As discussed, however, the Board finds that appellant initiated the altercation by chest bumping Mr. Davis. The nature of the activity in which he engaged removed him from coverage under FECA.

Counsel also argues, citing *Leslie C. Moore*,[11] that FECA provides coverage to aggressors in altercations. The Board distinguishes this case. In *Moore* the claimant alleged that he sustained a stress-related condition after an assault in the parking lot of the employing

[8] *See Jimmy Zenny*, 54 E CAB 577 (2003); *Kenneth B. Briggs*, 54 ECAB 411 (2003).

[9] *See A.W.*, 59 ECAB 593 (2008); *Lawrence J. Kolodzi*, *supra* note 4.

[10] *See Donald R. Ford*, 56 ECAB 577 (2005) (where the Board found that appellant trying to free a bird entangled in a net while he was on TDY was not an activity reasonably incidental to his work duties or an activity contemplated by the employer and thus outside the protection of FECA).

[11] *See supra* note 3.

establishment. The Board found that, while the assault arose because of the claimant's inappropriate comments to a coworker, FECA does not exclude coverage because an employee either acts as an aggressor or otherwise engages in an action imputing culpability or fault. The Board determined that the assault arose on the premises from a work-related dispute which occurred while the claimant was performing his work duties and was, consequently, compensable. In the present case, however, appellant was not on the premises of the employing establishment but instead on travel as a representative of the employing establishment and the altercation was not premised on a work-related matter.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not sustain an injury in the performance of duty on October 19, 2010.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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