United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 13-68**
	)	**Issued: May 1, 2013**
DEPARTMENT OF DEFENSE, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2012 appellant filed a timely appeal from the June 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his 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. The Board also has jurisdiction to review OWCP's September 21, 2012 nonmerit decision denying reconsideration.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on September 17, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On or about October 4, 2011 someone filed a traumatic injury claim alleging that appellant, a 46-year-old composite/plastic fabricator leader, injured his neck, mid back and low back on September 17, 2011 when the car in which he was riding was rear ended.[2]

Appellant and three coworkers were on temporary duty to the North Island Naval Air Station in San Diego, California. He explained that after work on September 17, 2011 the four of them decided to go to a restaurant for dinner. As their first choice was an hour's wait, they proceeded toward Mission Beach. Finding no place to their liking, they headed back toward Old Town, where their hotel was located to find something along the way. While sitting at a red light, their car was struck from behind. After moving the car around the corner to a safer place, one passenger called 911 and appellant called his supervisor, Monica Manley, to notify her of the accident. He then telephoned the rental car company to report the accident.

Appellant stated that a police officer arrived a few minutes after the other vehicle left the scene. As the other driver had given his information, no one was injured at the time and the vehicle appellant was in was not damaged, "there was nothing more he could do." The officer advised appellant that a report would be filed.

The record contains no police report of the accident but does contain a police report number and contact information for three witnesses.

Kenneth Peterson, the driver of the car, explained that after work on September 17, 2011 he and his three coworkers proceeded to Mission Beach "to see the beach and enjoy the sites of southern California." After a short while, they decided to get a bite to eat. They left the parking lot heading north on Mission Boulevard and while stopped at a traffic light waiting to turn right onto West Mission Bay Drive, a minivan struck them from behind.

On December 2, 2011 OWCP denied appellant's claim for workers' compensation benefits. It found that the injury did not arise in the performance of duty, as the accident occurred when he and his coworkers were driving to find a restaurant after sightseeing.

Appellant explained that when he and his coworkers finished work on September 17, 2011 they went back to their hotel to shower. At approximately 5:00 p.m. they drove to dinner. Their first restaurant of choice had a one-hour wait, so they headed to Mission Beach to another restaurant. The accident, appellant stated, happened at approximately 6:00 p.m. Given the traffic at rush hour, he argued that there was no time to have accomplished any sightseeing "prior to our main objective which was to have dinner after our workday." Appellant requested reconsideration.

On June 15, 2012 OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It found that, by taking time out from his day to sightsee and leaving the

[2] The claim form shows no signature of appellant or any person acting on his behalf. The back of the form shows the name of the supervisor, but again there is no signature.

hotel vicinity where a dining facility was available, he voluntarily deviated from reasonable activities within a short distance of the hotel in which he was staying.

Appellant responded by stating that he was not sightseeing He explained that the first restaurant they went to was six miles or so from the hotel and it was near the beach. Appellant explained that they were trying to get dinner, not go to the beach. Because the wait at the first restaurant was an hour or so, at that point they decided to go to another restaurant "as we wanted food quickly."

Appellant stated that the accident occurred as they were heading toward the second restaurant. This was about eight miles from the hotel and within one to one-and-a-half hours after getting off work. "We had gone home, showered and left in search of food all within 1 – 1½ hours. This is not recreational sightseeing but a normal course of seeking dinner." Appellant confirmed that there was a restaurant at their hotel, but he was not a huge fan of Mexican food "and I did not want to eat Mexican every day for my month long stay."

Appellant argued that eating at a variety of nearby restaurants was not unreasonable. He added that, even if they had not gone to the first restaurant, they were still within eight miles of the hotel and within a reasonable period of time. Appellant again requested reconsideration.

On September 21, 2012 OWCP denied appellant's request for reconsideration. It found that his statement was substantially similar to his earlier statement and OWCP previously considered his contention that he was not sightseeing.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of 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."[4] 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 his or her employer's business, at a place where he or she may reasonably be expected to be in connection with his or her employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[5]

FECA provides coverage 24 hours a day when the employee is on travel status, a temporary assignment or a special mission and is engaged in activities essential or incidental to such duties. When an employee deviates from the normal incidents of the trip and engages in activities, personal or otherwise, that are not reasonably incidental to the duties of the temporary

[3] 5 U.S.C. § 8102(a).

[4] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

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.[6] It is OWCP's burden, however, to show that such a deviation occurred.[7]

In his treatise, Larson sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments: 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.[8]

ANALYSIS

OWCP denied appellant's claim on the grounds that he removed himself from coverage when he took time out from his day to sightsee. Appellant, however, denied that he was sightseeing. He explained that there was no time for such activity. Appellant's coworker, the driver of the car at the time of injury, stated that the group proceeded to Mission Beach after work "to see the beach and enjoy the sites of southern California." After a short while, he stated, they decided to get a bite to eat.

These two statements represent two seemingly different accounts of what happened. OWCP did not explain why it discounted one person's version of events or appeared to give more credibility to another's.

There were two other passengers in the car, coworkers whose accounts do not appear in the record. As the question of the group's activities prior to the accident may be critical to the adjudication of appellant's claim, OWCP should further develop the factual evidence. Not only should OWCP obtain statements from the other two passengers as to exactly what they did and when, it should obtain a response from the driver of the car to appellant's account of events. It should also give due consideration to the fact that appellant was but one member of a group, which could raise an issue whether any deviation was voluntary on his part.

As the time of the accident might bear on appellant's assertion that there was no time for sightseeing, OWCP should further develop this aspect of the case. In addition to the passengers in appellant's car, there were three witnesses to the accident, any one of whom might confirm the time of day. Appellant called his supervisor after the accident occurred and a coworker called 911. Information from either source might also establish the approximate time. A police officer arrived at the scene, but the record contains no police report, which again might confirm the time of day. OWCP should further develop all these sources of information.

[6] *Janice K. Matsumura*, 38 ECAB 262 (1986).

[7] *John M. Byrd*, 53 ECAB 684 (2002).

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

In its June 15, 2012 decision, OWCP raised an issue of proximity. It should further develop just how far from the hotel the accident took place before determining whether the injury occurred at a place where appellant may reasonably be expected to be in connection with his temporary duty in San Diego.

The Board is unaware of any rule that would limit coverage to the one restaurant found in appellant's hotel. As Larson notes, with regard to temporary duty, injuries arising out of the necessity of eating in restaurants away from home are usually held compensable. The issue is simply one of reasonableness. Time and distance, if they are unusual under the circumstances, may become factors for consideration.

For example, in *Lydia Muse Shields (John Marcellus Shields)*,[9] the employee's whereabouts were unknown from 8:00 p.m. to 3:00 a.m., when he was seen exiting from a taxi. The employee began to walk towards his hotel when he fell to the ground and hit his head. Because of the unusual time element, it was not possible for the Board to infer that his return to the hotel at 3:00 a.m. was one of the normal incidents of the mission, such as the eating of a meal at an ordinary place at an ordinary time.

The Board addressed the basic test in *Theresa B.L. Grissom (Thomas H. Grissom)*:

> "In each and every instance the employee had been directed, as part of his duties, to remain in a particular place or locality until directed otherwise or for a specified length of time. In those circumstances, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place and if he does so the risk inherent in such activity is an incident of his employment."[10]

As the Board explained, this rule covers the activities performed to satisfy the employee's ordinary physical needs, including relaxation, if performed in a reasonable manner and within reasonably normal hours consistent with the circumstances. In *Grissom*, the employee "was only five miles away from his hotel" when the accident occurred and the evidence did not warrant any conclusion as to the nature of his activities or intentions. In the absence of a showing that he was engaged in activity that was unreasonable and that removed him from the scope of his employment, the Board found that the employee was in the performance of duty at the time of the accident.

The Board will set aside OWCP's June 15, 2012 decision and remand the case for further development of the factual evidence and a *de novo* decision on appellant's claim for workers' compensation benefits. OWCP's September 21, 2012 nonmerit decision denying reconsideration is thus rendered moot.

[9] 2 ECAB 162 (1949).

[10] 18 ECAB 193 (1966), *citing Davis v. Newsweek Magazine*, 305 N.Y. 20, 27-28, 110 N.E.2d 406, 409 (1953).

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 21 and June 15, 2012 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action.

Issued: May 1, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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