United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 14-40**
	)	**Issued: August 12, 2014**
DEPARTMENT OF THE NAVY, 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:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 17, 2013 appellant filed a timely appeal from the September 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant was in the course of employment at the time of his September 17, 2011 accident.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On the prior appeal,[2] the Board remanded the case for further development of the factual evidence and a *de novo* decision on appellant's traumatic injury claim.[3] The Board noted that OWCP should obtain statements from the other two passengers in the car as to what they did and when, as well as a statement from the driver as to appellant's account of events. The Board noted that OWCP should give due consideration to the fact that appellant was but one member of a group. There were three witnesses to the accident, any one of which might confirm the time of the accident. Information from appellant's supervisor and a coworker's call to 911 might also establish the approximate time. Although a police officer arrived at the scene, the record contained no police report. The Board found that OWCP should further develop the sources of information, including just how far away from appellant's hotel the accident occurred. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

OWCP obtained information that the San Diego Police Department did not prepare an accident report because there was not enough damage and no one was hurt. "They no longer provide reports in those situations."

OWCP requested statements from the driver and the other two passengers in the car. One of the passengers explained that, after work, she returned to the hotel in Old Town to shower and change clothes for dinner. "I went with my crew to Mission Beach to locate a restaurant which had a long wait time. We then decided to leave Mission Beach area and head back towards hotel to locate another restaurant. Upon leaving area we were struck by a vehicle from behind."

A second passenger offered the same account: "When we left our hotel that evening after work, the intention was to go to dinner. When we arrived, the restaurant was full and the wait was at least an hour. We then decided to find another place to eat. During that time, we were at a stoplight and were hit from behind. Police were called."

The driver of the car stated: "When we left the hotel our plan was to go eat. We did stop to eat at a hamburger place, but the wait was too long. On our way to the next restaurant is when we got into the accident. The only sight we saw was from the window of the car and walking to and from the first restaurant."

Appellant explained that the group's priority was food. They had worked all day and were hungry. "There was no predetermined restaurant that was special, touristy or famous that we were going to. We just wanted to eat."

In a decision dated August 13, 2013, OWCP denied appellant's injury claim on the grounds that the evidence did not establish that he was in the performance of duty at the time of injury. It found that the fact that the driver recanted his story and the fact that none of the statements explained what the employees did after 3:20 p.m., when they stopped work, casted serious doubt on their credibility. OWCP noted that there were two hours and 40 minutes of

[2] Docket No. 13-68 (issued May 1, 2013).

[3] On September 17, 2011 appellant, a 46-year-old composite/plastic fabricator leader on temporary duty to the North Island Naval Air Station in San Diego, was involved in a motor vehicle accident when the car in which he was a passenger was struck from behind at a traffic light.

time unaccounted for, allowing a 20-minute commute to the hotel after work and a 30-minute shower.

Appellant took issue with OWCP's assumptions about commuting and showering. He explained that the trip from the North Island facility to the hotel might be 20 minutes after rush hour, but not at quitting time: "At 3:20 traffic is bumper to bumper and it can take an hour or more. To expect tired filthy people to zip through a shower in 30 minutes and be ready to go is ridiculous. This takes more like an hour. Then to get everyone together is like herding cats and can take a while."

In a decision dated September 30, 2013, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It noted that even if commuting and showering each took one hour, there was still one and a half hours unaccounted for. "You have not provided a detailed account of your activities from the time you left work up to the time of the accident."

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] 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."[5] 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 employer's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[6]

An employee on a special mission for his or her employer remains in the course of employment not only during his or her actual work time but in respect to all normal incidents of his or her trip.[7] The "course of employment" on a specified errand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employing establishment would normally contemplate as occurring in the course of it.[8]

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[4] 5 U.S.C. § 8102(a).

[5] 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).

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

[7] *William K. O'Connor*, 4 ECAB 21 (1950) (finding that the claimant, at the time of injury, was en route to his hotel after an evening meal and a short walk -- all normal incidents of the mission).

[8] *Id*., quoting *Hurley v. Lowe*, 168 F.2d 553, 555 (D.C. Cir. 1948), *cert. denied*, 68 S. Ct. 1338 (1948). The court in *Hurley* continued: "This is not only the normal concept established in the business world, but fits the intent of the law as to coverage against injury. We do not mean to imply that anything that an employee might do while on an errand would be in the course of his employment. Any activity which would not normally be contemplated by the employer as incident to the errand, would not be in the course of employment. But an ordinary dinner with one's father and mother in a restaurant, when in their neighborhood on a business errand, would not be such an affair."

In each instance the employee has 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.[9]

Discussing the extension of a broad rule to all travel, Larson quotes *Schneider v. United Whelan Drug Stores*, 284 A.D. 1072, 135 N.Y.S.2d 875 (1954): "When an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of injury was engaged in a reasonable activity."[10]

Such broad coverage arises from the doctrine of positional risk.[11] The Board's decision in *William K. O'Connor*, explains:

> "It is no answer to say that at the time, the employee was performing a personal act, in that he would have had to eat, exercise, or return to his place of abode whether in Pittsburgh or New York City, or that he is not covered for after-hour off-premises injuries where he is transferred temporarily for a fixed period of time to a location away from his home. The fact is, were it not for the mission undertaken at the direction of his employer, he would not have encountered the particular traffic hazard or risk which caused his injuries. It was the employment which brought him to that place and exposed him to that risk."[12]

Larson notes that injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.[13] Traveling employees, whether or not on call, usually receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals. So when a traveling employee slips in the street or is struck by an automobile, when traveling on foot, or is

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[9] *Theresa B.L. Grissom (Thomas H. Grissom)*, 18 ECAB 193 (1966), quoting *Davis v. Newsweek Magazine*, 305 N.Y. 20, 110 N.E.2d 406 (1953).

[10] 2 Lex K. Larson, *The Law of Workers' Compensation* § 25.05[3] (Matthew Bender, Rev. Ed. 2008).

[11] *Carmen Sharp*, 5 ECAB 13 (1952) (if an employment situation is regarded as a special mission, this indicates that the ambit of the employment is broad, and that, unlike more ordinary employment situations, many off-premises, after-hours acts of the employee may be incidental to the employment because such acts are incidental to the accomplishment of the mission, and because the employment exposes the employee to the particular risk).

[12] *O'Connor, supra* note 7, citing *Katz v. A. Kadams & Co.*, 239 N.Y. 420, 134 N.E. 330 (1922) and *Roberta v. Newcomb & Co.*, 201 App. Div. 759 (1922), affirmed 234 N.Y. 533, 138 N.E. 443 (1922). *See Anne Elizabeth Gruber*, Docket No. 04-1769 (issued January 24, 2005), in which the employment did not expose the employee to the risk. The employee was at the hotel where she attended meetings. While waiting for an elevator on her way to dinner, she lost her balance and fell. Although she was in travel status and engaging in an activity incidental to her duties at the time the injury occurred, the Board found that the injury did not arise in the performance of duty because it was due to a personal, idiopathic condition with no intervening or contributing work conditions.

[13] Larson, *The Law of Workers' Compensation* § 25.01.

involved in an accident while driving between the hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening, a day off, or involved an extended trip occasioned by the employee's wish to eat at a particular restaurant.[14]

When an employee is in the performance of duty 24 hours a day, he remains in the course of his employment unless and until the evidence establishes facts or circumstances sufficient to constitute a departure from the scope of his employment. It is OWCP's burden to establish or show that a significant deviation from the scope of the employment occurred.[15]

ANALYSIS

OWCP denied appellant's injury claim on the grounds that he did not provide a sufficiently detailed accounting of what happened on September 17, 2011 between 3:20 p.m., when he left work, and about 7:00 p.m., when the accident occurred. It found approximately ond and a half hours of unexplained time during this interval.

The critical question, however, is whether appellant was in the course of employment at the time of the accident. Even if it were established through positive, probative evidence that he engaged in some activity after 3:20 p.m. that was not a normal incident of working and living for a period of time in San Diego, such a deviation would have terminated sometime before the accident. The evidence establishes that appellant and his coworkers left their hotel and were looking for a place to have dinner at the time the accident occurred. They had already gone to one restaurant only to find that the wait time was over an hour. Given the lengthy wait time, they set out toward their hotel to find another place to eat. The traffic accident occurred a short distance from the first restaurant. At that time appellant was engaged in an activity that was reasonable, one that was a normal or ordinary incident of his temporary relocation to San Diego, and one that is generally accepted as falling within the course of employment for purposes of workers' compensation.

As the Board has noted, the necessity of eating in restaurants away from home is usually held compensable. The issue is simply one of reasonableness.[16] In *O'Connor*,[17] an employee on travel status in Pittsburgh went to dinner after work with several fellow supervisors. Following dinner, the employee and one of the supervisors went for a short walk, after which, at about 7:15 p.m., he boarded a street car to go to his hotel. He left the street car at a point diagonally across the street from the hotel and was struck by a passing motorist while waiting for the traffic signal to change. The injury occurred at about 7:30 p.m. The Board described this as a typical case of an employee injured in an off-premises accident while on a special mission for his employer. The rule in such cases, the Board explained, was that an employee on a special mission for his employer remains in the course of his employment not only during his actual work time but in

[14] *Id*. at § 25.03[1] (citations omitted).

[15] *Grissom*, *supra* note 9. *See generally Garrett M. Levie*, 6 ECAB 94 (1953) (holding that an employee on temporary assignment to Pittsburgh deviated from the course of his employment when he and four other employees embarked on a trip to New York City for reasons that were not incidental to the assignment).

[16] *R.G.*, Docket No. 13-68 (issued May 1, 2013).

[17] *Supra* note 7.

respect to all normal incidents of his trip. The Board held that going to his hotel after an evening meal and a short walk were all normal incidents of the mission.

As to the argument that the employee had deviated from the course of his employment when he took a walk after eating, the Board held that a walk of this kind would be one of the normal or ordinary incidents of a special mission. Further, had there been a deviation, the Board noted that the walk actually terminated sometime before the accident. In this case, the injury did not occur while he was taking a walk; it occurred while he was en route to his hotel after the walk.

> "Coverage of an employee under the compensation law while he is on a special mission should not take the characteristics of a kaleidoscope wherein he is protected under the law against one injury one minute and unprotected the next. An employee who has been ordered to a distant city and who, after having established himself in a hotel there, is injured in a street accident by an automobile while returning to his temporary abode after working hours, seems clearly to have been in an employment status and to have been as the result of a risk created by the employment."[18]

In the present case, the Board can find nothing unreasonable about the time or the place of the accident. The accident occurred around 7:00 p.m. and only about four miles from the employees' hotel. In *Kenneth B. Briggs*,[19] the injury -- a ruptured Achilles tendon -- occurred at about 12:15 a.m. while the employee was returning on foot to his hotel after a three-hour dinner ending at midnight. Reversing the denial of benefits, the Board noted no showing that spending three hours at dinner was unreasonable.

In *Grissom*,[20] the fatal motor vehicle accident occurred around 11:00 p.m., which the Board found was not an unreasonable hour to be driving. Also, the accident occurred only five miles from the employee's hotel. There was a dearth of evidence regarding the employee's activities since about 9:00 p.m., although his blood alcohol content showed him to be under the influence. The Board found that OWCP, then known as the Bureau of Employees' Compensation, failed to establish a substantial deviation or show that he was engaged in an unreasonable activity at the time of the accident.

In *A.W.*,[21] the Board again focused on the activity at the time of injury. The employee and her supervisor left the convention center after a one-day conference, took a bus to a casino,

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[18] *Cf. Lydia Muse Shield (John Marcallus Shields)*, 2 ECAB 162 (1949), in which the employee returned to his hotel around 3:00 a.m. He had dined with a coworker who suggested an after dinner walk. The employee declined, stating he intended to return to the hotel to work on some reports and then retire. Nothing was known of the employee's whereabouts from about 8:00 p.m. that evening until about 3:00 a.m., when he alighted from a taxicab in front of his hotel. As he started to walk toward the hotel entrance, he stiffened, took a step or two back, and fell backward, striking the back of his head on the sidewalk. Under the circumstances, the Board found that it was not possible to infer that returning to the hotel at that unusual hour was one of the normal incidents of the mission.

[19] 54 ECAB 411 (2003).

[20] *Supra* note 9.

[21] 59 ECAB 593 (2008).

walked on the boardwalk, and then had dinner at a local restaurant. The employee fell down two steps while exiting the restaurant at 6:45 p.m. She was on her way back to the van for its scheduled 7:00 p.m. departure to return to the employing establishment. The Board found that the facts of the case did not establish a substantial deviation from employment. "It was a reasonable necessity that the employees attending the conference eat meals at local restaurants prior to their departure in the van at 7:00 p.m. for a three-hour return trip to the employing establishment."

In the present case, appellant was reasonably engaged in traveling by car, as a passenger, to find a place to have dinner; therefore, any risk inherent in that activity, such as being struck from behind at a traffic light, was an incident of his assignment to San Diego. OWCP's denial of coverage rests on the lack of a more detailed description of what took place before this activity and, in part, placing the burden on appellant to prove there was no deviation. It is OWCP's burden of proof to establish a significant deviation from the course of employment at the time of the accident. The Board finds that OWCP has not met that burden.

The Board finds that appellant was in the course of employment at the time of his September 17, 2011 accident. The Board will set aside OWCP's September 30, 2013 decision and remand the case for further development of the issue of fact of injury. After such development as may become necessary, OWCP shall issue a *de novo* decision on appellant's claim for compensation benefits.

CONCLUSION

The Board finds that appellant was in the course of employment at the time of his September 17, 2011 accident. Further development of the case is therefore warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: August 12, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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