United States Department of Labor
Employees' Compensation Appeals Board

J.N., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Newark, NJ, Employer	)	**Docket No. 14-1764** **Issued: December 2, 2015**

Appearances:
Appellant, pro se
Catherine P. Carter, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2014 appellant filed a timely appeal from a March 12, 2014 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 over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was in the performance of duty when injured on January 15, 2014.

On appeal, the Director of OWCP filed a November 19, 2014 pleading in which she asserts that the decision on appeal should be affirmed pursuant to the "going and coming rule."[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991).

She contends that, while appellant was clearly commuting to a training when the motor vehicle accident occurred, he was approximately 7.5 miles away and had not yet signed in at the offsite facility. The Director further contends that none of the recognized exceptions to the "going and coming rule" apply to the present case, and as appellant has not demonstrated that he was doing anything other than coming or going to work, his injury did not occur in the performance of duty.

FACTUAL HISTORY

On January 18, 2014 appellant, then a 30-year-old federal air marshal whose duty station was located in West Orange, New Jersey, filed a traumatic injury claim alleging that he sustained a cervical spine fracture, a collapsed right lung, a concussion, numerous lacerations, high blood loss, and extensive bruising when he was involved in a motor vehicle accident at 7:50 a.m. on January 15, 2014. He stated that the accident occurred while he was *en route* from his home in Cream Ridge, New Jersey to an offsite training class in New Lisbon, New Jersey. Joseph J. Koury, an employing establishment supervisor, controverted the claim, stating that appellant was not in the performance of duty and was driving his personal vehicle at the time of the accident. Appellant stopped work on January 15, 2014.

In an e-mail dated January 21, 2014, Mr. Koury stated that appellant's January 15, 2014 training class was scheduled from 8:00 a.m. to 3:30 p.m. and he had instructed the air marshals to arrive at the training venue at 7:30 a.m. Those air marshals electing to use government-provided transportation were to arrive at the employing establishment at 6:30 a.m. for transit to the training facility. Mr. Koury noted that, because appellant lived near the training venue, he was authorized to use his personal vehicle for transportation, as did two other air marshals. Appellant was not provided mileage reimbursement. At 5:44 a.m. on January 15, 2014 Mr. Koury notified training attendees by e-mail that the weather conditions were hazardous, and he advised everyone to exercise caution and take their time. He changed the arrival time to 7:45 a.m. as he did not want anyone to rush due to the poor road conditions.

A New Jersey Police crash investigation report dated January 15, 2014 indicated that a motor vehicle accident occurred at approximately 7:39 a.m. that morning on State Highway 70 in Pemberton Township. The roadway was wet with heavy fog in the air. Appellant was forced off the road by another vehicle, lost control, and was struck by a third vehicle.[3] He was transported to Cooper University Hospital Trauma Center in Camden, New Jersey. In a discharge report dated January 15, 2014, Dr. Ju Lin Wang, noted that appellant was diagnosed with a fracture of the occipital condyle on the right, a pneumothorax on the right, and a scalp laceration. He was discharged on January 16, 2014 with a neck brace and was to follow-up with his primary care physician and Dr. Johnathan David Bussey, an osteopath who practices neurosurgery.[4] By letter

[3] Two witnesses verified the circumstances of the collision.

[4] A computerized tomography (CT) scan of the head and cervical spine at 9:40 a.m. on January 15, 2014 demonstrated a nondisplaced right occipital condyle fracture, a right apical pneumothorax, no intracranial hemorrhage, and no acute facial bone fractures. Portable bilateral shoulder x-rays were unremarkable. An abdomen and pelvis CT scan demonstrated no acute injury. A follow-up chest x-ray on January 23, 2014 demonstrated no pneumothorax or pleural effusion.

dated February 7, 2014, OWCP informed appellant of the evidence needed to support his claim and also requested evidence from the employing establishment.

An ambulance service report dated January 15, 2014 indicated that upon arrival at the crash scene, appellant was sitting in his vehicle with blood on his face and did not appear to be in distress. He was stabilized and transported to Cooper Trauma Center. In a January 15, 2014 consultation report, Dr. Bussey noted that appellant was neurologically intact. He diagnosed right occipital condyle fracture, status-post motor vehicle accident and prescribed a cervical collar for six weeks and pain medication. On March 4, 2014 Dr. Bussey advised that appellant could return to work on March 10, 2014.

In a March 4, 2014 statement, appellant related that he was instructed by his supervisor to attend a training class being held in New Lisbon, New Jersey, on January 15, 2014, and he was authorized to report directly to the venue rather than first reporting to the employing establishment. He indicated that the motor vehicle accident occurred approximately 7.5 miles from the training location at 7:50 a.m. on January 15, 2014. Appellant maintained that he was in pay status and indicated that he did not receive mileage reimbursement for using his personal vehicle to travel to the training site. He attached e-mail correspondence dated January 13, 2014 which provided directions to the training facility. A timesheet signed by appellant but not by a supervisor indicates that his compensable hours were 7:45 a.m. to 3:45 p.m. and he claimed 0.25 hours of regular pay and 7.75 hours of sick leave. He returned to full-time modified duty on March 10, 2014.

In correspondence dated March 10, 2014, David Wichterman, an employing establishment workers' compensation manager, advised that since appellant lived near the training facility, for his personal convenience he was allowed to drive his personal vehicle and report directly for training on January 15, 2014. He maintained that appellant was not in the performance of duty because the motor vehicle accident occurred off-premises and, at the time of the accident, he was not engaging in any duties related to his employment. Mr. Wichterman cited the case *M.H.* in which the Board affirmed the rescission of acceptance of injuries sustained in a motor vehicle accident when the employee in that case, also a federal air marshal, was injured while driving to work.[5]

In an undated statement, appellant asserted that he was in the performance of duty on January 15, 2014 because he was on the clock, and his ability to report directly to the training avoided approximately three hours of overtime pay status. He indicated that his assigned duty location was at an employing establishment field office 15 miles from an airport and he attached the January 21, 2014 e-mail communication from Mr. Koury.

By decision dated March 12, 2014, OWCP denied the claim, finding that appellant was not in the performance of duty when injured on January 15, 2014.

[5] Docket No. 10-1337 (issued April 19, 2011).

LEGAL PRECEDENT

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."[6] 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."[7] In deciding whether an injury is covered by FECA, the test is whether, 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.[8]

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, 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 employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighters; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employing establishment.[9]

In addressing the going and coming rule, Larson states, "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."[10] 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 a 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.

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[6] 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

[7] *George E. Franks*, 52 ECAB 474 (2001).

[8] *Mark Love*, 52 ECAB 490 (2001).

[9] *Supra* note 4.

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

In such a case the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception 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.[11]

ANALYSIS

Appellant's fixed duty station was at an employing establishment field office located in West Orange, New Jersey. On January 15, 2014 he left his home in Cream Ridge, New Jersey, to drive his personal vehicle to a training class held at an offsite location in New Lisbon, New Jersey. The employing establishment provided transportation from appellant's duty station to the training location, but appellant had permission to drive to the training in his personal vehicle because the offsite location was closer to his home. At approximately 7:39 a.m. that morning appellant was injured in a motor vehicle accident as he was traveling to the New Lisbon, New Jersey training session. He had been instructed to arrive at the training at 7:45 a.m.

The employing establishment controverted the claim, noting that appellant was driving his personal vehicle at the time of the accident. Both Mr. Koury, appellant's supervisor, and Mr. Wichterman, an employing establishment workers' compensation program manager, noted that appellant was permitted to drive his personal vehicle to the training session for personal convenience and asserted that, because appellant's injury occurred off premises and when he was not engaging in any duties related to his employment, he was not in the performance of duty.

As noted above, 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.[12] While appellant did not have fixed weekly hours as an air marshal, the record supports that he was instructed to report for training at 7:45 a.m. on January 15, 2014. Regarding the exceptions to the going and coming rule, appellant's employment did not require that he travel on the highways and he was not engaged in a special errand or mission incident to his employment at the time of the injury. The accident occurred on a public highway, which was not a part of or under the control of the employing establishment. As the Board noted in the case *Joyce Hodge*,[13] the fact that appellant was reporting to an alternate work site or that she was attending training did not exclude her from the going and coming rule. The Board concluded that appellant's injury was the result of an ordinary, nonemployment hazard of the journey itself, which was shared by all travelers.

[11] *Elmer L. Cook*, 11 ECAB 163 (1964).

[12] *Supra* note 4.

[13] Docket No. 96-1958 (issued December 8, 1998).

Similarly, in the case at hand, no evidence of record supports that appellant's injury falls within any of the exceptions to the general going and coming rule.[14]

The Board has 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.[15] However, as the Board noted in the case *M.H.*,[16] air marshals are not in travel status while commuting to work. Moreover, in this case appellant was not reimbursed for mileage from his home to either his duty station in West Orange, New Jersey or to the training location in New Lisbon, New Jersey.

Appellant did not establish any special degree of inconvenience or urgency or show that his trip on January 15, 2014, in and of itself, was a substantial part of any service for which he was employed.[17] His travel to attend training and was no more for the benefit of the employer than any other worker's commute. Appellant's decision to travel to the training in his personal vehicle was by his own choice, not by any mandate of the employer.[18] He was driving his own vehicle for his personal convenience when transportation to the training was otherwise provided by the employing establishment.

The Board therefore finds that, based on these considerations, appellant was not in the performance of duty at the time of the January 15, 2014 motor vehicle accident.[19]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on January 15, 2014.

[14] *Id*.

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

[16] *Supra* note 4.

[17] *Jon Louis Van Alstine*, 56 ECAB 136 (2004).

[18] *Supra* note 4.

[19] *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.[20]

Issued: December 2, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Boar

[20] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.