United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 17-0231**
	)	**Issued: July 10, 2017**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 9, 2016 appellant, through counsel, filed a timely appeal from an October 13, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 20 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish an employment-related injury in the performance of duty on November 2, 2015.

FACTUAL HISTORY

On November 4, 2015 appellant, then a 41-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 2015 at 4:20 p.m., he sustained shattered bones in his left wrist, a fracture of the right fibula below the knee, and possible damage of the lateral collateral ligament. He noted that he had gone into the office to retrieve case work and to meet with a grievant and, on his return home to finish his day with telework, his vehicle was struck by another vehicle while traveling through a green light. A supervisor checked a box indicating that appellant was not injured in the performance of duty, noting that he was traveling from one duty station to another. The supervisor requested further development on the issue of performance of duty for this reason.

By letter dated November 17, 2015, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It noted that the employing establishment had indicated that he was not in the performance of duty at the time of the motor vehicle incident because he was traveling from one duty station to another. OWCP requested that appellant provide a detailed description of the incident, a report from law enforcement, any statements from witnesses, and provide further information as to whether he was performing regularly assigned duties at the time of the incident.

In a traffic collision report dated November 2, 2015, a law enforcement officer noted that appellant's vehicle had been struck by another vehicle that failed to stop at a red traffic signal at an intersection onto Interstate 75.

In an e-mail dated December 3, 2015, a union officer noted that appellant was on a motorcycle when he was struck. The union officer further noted that appellant had visited the union office, worked on some cases, and then waited for an appointment with an employee. The employee with an appointment did not show up, and appellant left at around 4:00 p.m. to return home to continue work. The union officer noted that appellant was still in duty status when the incident occurred, using "bank time."

In an e-mail dated December 17, 2015, a manager at the employing establishment noted that appellant was performing union duties on November 2, 2015 and had asked for "reasonable travel time if possible for travel coverage" between the office and appellant's home.

By decision dated December 21, 2015, OWCP denied appellant's claim. It found that he was not within the performance of duty at the time of the motor vehicle incident because he was commuting between work and home at the time of the incident, despite the fact that he was in duty status for that time period.

On January 12, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on August 30, 2016. At the hearing, counsel argued that the incident of November 2, 2015 did not fall within the "coming and going" rule. He asserted that appellant's travel time was compensated and appellant regularly worked from home. Appellant noted that if he were called into the office on a day he was regularly scheduled to telecommute, he would be afforded travel time in order to have an in-person meeting. Counsel argued that travel was an essential element of appellant's job.

By decision dated October 13, 2016, the hearing representative affirmed OWCP's December 21, 2015 decision. The hearing representative found that because appellant was not going to continue working in a representative capacity when he returned home, when he left the union office to return home, it was an act of personal convenience undertaken for his personal benefit rather than in fulfillment of his representative function.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress 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 disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3]

The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, the locale and time of injury, whereas arising out of the employment encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. In addressing this issue, the Board has held that 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.[4]

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work while going to or coming from work, are not compensable.[5] An exception to this rule applies where the employee uses the highway to do something incident to his employment, with the knowledge and approval of the employer.[6]

[3] *See* 5 U.S.C. § 8102(a).

[4] *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

[5] *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[6] *Dennis L. Forsgren (Linda N. Forsgren)* 53 ECAB 174, 180 (2001); *Mary Margaret Grant*, 48 ECAB 696, 703 (1997).

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of 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 represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[7]

With respect to whether injuries arising in the course of union activities are related to the employment, the general rule is that union activities are personal, that attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit.[8] Under the procedure manual, OWCP has recognized that certain representational functions performed by employee representatives benefit both the employee and the employing establishment.[9] With regard to representational functions and when a person is considered to be on official time, OWCP's procedure manual provides:

> "When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted official time or in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty."[10]

ANALYSIS

Appellant is an employee with fixed hours and a telework arrangement with the employing establishment. At the time of the motor vehicle incident, he was in transit returning to his home after completing certain representational functions on the premises of the employing establishment. As the incident occurred off-premises, it did not occur at a place appellant could be reasonably expected to be in connection with his employment. However, counsel argued before OWCP's hearing representative that as travel was an essential element of appellant's job, this journey occurred within the performance of duty.

The Board finds that appellant was no longer engaging in a representational function at the time of the incident. Appellant completed his representational function when he left the premises of the employing establishment at 4:00 p.m. As such, the procedure manual's guidance regarding performance of duty during periods when an employee is engaging in a representative function is inapposite to this case. Furthermore, appellant has claimed that he was on "official time" during his journey from the office to home, and submitted a statement from a union official and an e-mail requesting such time from a supervisor. However, he did not submit a leave analysis that demonstrates he was actually afforded any "official time" for the period of the

[7] *Supra* note 5.

[8] *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997); *see K.L.*, Docket No. 06-2154 (issued February 8, 2007).

[10] *Id.*

journey. As such, there is no evidence of record actually proving the assertion appellant was on "official time" at the time of the motor vehicle incident.

In *M.T.*, Docket No. 16-0927 (issued February 13, 2017), appellant filed a claim for neck, shoulder, and right leg injuries as a result of falling on a stairway while relocating his telework items from his home to a commissary at the employing establishment. A supervisor stated that he had not approved this task, and that appellant did not have permission to travel back and forth between his home and his duty station during the workday without prior approval. The Board found that because appellant was not performing official duties, he was not within the performance of duty at the time of injury. In this case, as in *M.T.*, appellant was not performing official or representational duties at the time of the incident. Furthermore, he has not provided evidence that he was afforded "official time" for the duration of the journey. Therefore, appellant's journey home must be considered a personal activity unrelated to his employment. He was not in a place he could reasonably be expected to be in furtherance of the employing establishment's interests. Appellant has not established that he was performing a task incidental to the employing establishment's interests, or that he was performing a task pursuant to his representational status. The Board further notes that a telecommuting work arrangement does not, by itself, render travel between the site of telecommute and the premises of the employing establishment within the performance of duty.[11]

The Board therefore finds that appellant did not establish an employment-related injury in the performance of duty on November 2, 2015.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to establish an employment-related injury in the performance of duty on November 2, 2015.

[11] *See Mona M. Tates*, 55 ECAB 128 (2003); *John B. Shutack*, 54 ECAB 336 (2003); *Julietta M. Reynolds*, 50 ECAB 529 (1999).

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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