United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 06-1345**
	)	**Issued: November 1, 2006**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, East Haven, CT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2006 appellant filed a timely appeal of the July 6, 2005 and February 17, 2006 merit decisions of the Office of Workers' Compensation Programs denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant was in the performance of duty on May 8, 2005 at the time of the alleged injury

FACTUAL HISTORY

On May 14, 2005 appellant, then a 40-year-old lead screener, filed a traumatic injury claim (Form CA-1), alleging that he sustained an injury in a motor vehicle accident on May 8, 2005. He stated that he was on his way to work the second portion of his split shift when the accident occurred.

On June 2, 2005 the employing establishment stated that appellant was not in pay status when the accident occurred; that he was not in a government-owned vehicle; and that his travel expenses were not reimbursable. A May 8, 2005 accident report reflected that appellant was involved in an accident on that date on Interstate 95 at exit 44. He submitted a June 20, 2005 certificate bearing an illegible signature from the Orthopedic and Sports Medicine Center containing the notation "tibial plateau fracture from motor vehicle accident on May 8, 2005." An unsigned Yale-New Haven Hospital patient referral report reflected that appellant was admitted on May 8, 2005 for a head laceration and perinephric hematoma and discharged on May 9, 2005.

In a June 22, 2005 narrative, appellant stated that he was not engaged in official business and was in a nonpay status at the time of the accident. He indicated that he was assigned to work a split shift, which required him to work from 5:00 a.m. to 7:30 a.m. and from 10:00 a.m. to 6:00 p.m. Appellant allegedly returned home on May 8, 2005 after finishing the first portion of his shift. On his way back to the employing establishment to work the second part of his shift, appellant stated that he either fell asleep or blacked out at approximately 9:30 a.m., losing control of his vehicle on Interstate 95, five miles from the work site.

By decision dated July 6, 2005, the Office denied the claim for compensation, finding that the claimed event occurred, but that there was no medical evidence providing a diagnosis that could be connected to the established event. On July 26, 2005 appellant requested an oral hearing, indicating that he was open to the option of a telephone conference. In support of his request, appellant submitted several documents, including a June 3, 2005 work excuse from Dr. Peter S. Broome, a treating physician; nursing notes dated May 9, 2005 from Elizabeth Borrelli; a December 19, 2003 letter from Dr. Mark J. Hotchkiss, a Board-certified internist, reflecting that appellant had a kidney disease that might require him to miss work to keep appointments; and a June 23, 2005 report from Dr. Jagdeep Hundel, a treating physician, who stated that appellant sustained scalp lacerations and a perinephric hematoma as a result of a May 8, 2005 motor vehicle accident.

A telephone hearing was conducted on January 6, 2005. Appellant testified that he fell asleep on the date of the accident because he was exhausted from working a split shift. He contended that the employing establishment should "cover" employees who work split-shifts because they "are giving a lot for their agency." Appellant testified that, instead of staying at work he went home between shifts in order to eat breakfast and let his dogs out. He stated that "it helps sometimes just to kind of break up that long of a day." Appellant claimed that he suffered from a chronic kidney condition and that, 12 days before the accident, he had emailed his screening manager asking to be taken off the split shift due to his medical condition. He allegedly received no response. Appellant testified that his employment contract did not include a provision for working split shifts. He also stated that he had never obtained or provided to the employing establishment a note from his physician restricting him from working a split shift. Richard Schmid who testified for the employing establishment, stated that employees commonly work split shifts at the airport where appellant works. He indicated that the employing establishment had not entered into a contract with appellant, but that appellant had been sent an offer letter which contained no mention of his required work schedule. Mr. Schmid stated that "operational considerations kind of drive the schedules and that is explained to the employees

when they are hired." The hearing representative informed appellant that he would leave the record open for 30 days for receipt of additional evidence in support of his claim.

In a January 25, 2006 letter, Mr. Schmid, management analyst for the employing establishment, controverted appellant's claim contending that his injury was not sustained in the performance of duty. He stated that appellant was driving his private vehicle on a public roadway when the accident occurred; that his split-shift work assignment had no bearing on the matter; that appellant was in a nonpay status at the time of the accident; that he had never provided any medical documentation to the effect that he could not work a split shift; and that appellant had no contract defining a specific work schedule. Mr. Schmid took the position that work schedules are mission-driven and, therefore, must be set at management's discretion.

In a January 27, 2006 narrative statement, appellant contended that his May 8, 2005 injury took place in the performance of duty. Reiterating that he had received no response to his request to be removed from split-shift work, he contended that management had a responsibility to inform him of its need for a physician's note, stating that he should not be placed on a split shift. Appellant stated that, although he was not in pay status at the time of the accident, his day was "totally monopolized by [his] job." He indicated that, when morning flights are delayed, employees are required to work through their split shift and that, if there were no split shifts, additional employees would have to be hired.

By decision dated February 17, 2006, the Office hearing representative affirmed the Office's July 6, 2005 decision with modification. The hearing representative found that appellant had established the fact of injury and had provided medical documentation that he had suffered a diagnosed condition connected to the accepted trauma. However, he denied the claim on the grounds that appellant was not in the performance of duty at the time of the accident, finding that none of the exceptions to the general coming and going rule applied to this case.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase "sustained while in the performance of duty" in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[2] 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 or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[3]

[1] 5 U.S.C. § 8102(a).

[2] *Valerie C. Boward*, 50 ECAB 126 (1998).

[3] *See John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

The Board has recognized exceptions to this general coming and going rule, which are dependent upon the relative facts to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer.[4]

There are additional exceptions to the coming and going rule. The Act, for example, covers an employee 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.[5] Larson describes a special errand rule as follows:

> "When an employee, having identifiable time and space limits on the employment, makes an off-premises journey, which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey; or the special inconvenience, hazard; or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."[6]

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. 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.[7]

ANALYSIS

The facts in this case are not in dispute. Appellant sustained injuries in a motor vehicle accident on May 8, 2005 while driving his private vehicle to work. After working the first portion of his split shift, which required him to work from 5:00 a.m. to 7:30 a.m., appellant

[4] *Melvin Silver*, 45 ECAB 677 (1994); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

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

[6] A. Larson, *The Law of Workers' Compensation* § 14.05(1) (2000). The Board has indicated that a special errand is a situation where 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. *See Elmer L. Cooke*, 16 ECAB 163 (1964).

[7] *Elmer L. Cook*, *supra* note 6.

returned home to eat breakfast and to let his dogs out. The accident occurred at approximately 9:30 a.m. on an interstate highway approximately five miles from the employing establishment, when appellant lost control of his vehicle while returning to work the second portion of his shift (10:00 a.m. to 6:00 p.m.). He was not engaged in official business; was not reimbursed for travel expenses; and was in a nonpay status at the time of the accident.

As noted above, the general coming and going rule would preclude coverage under the Act for this off-premises injury unless appellant can establish that an exception to the general rule applies in this case. There are, however, no recognized exceptions that are applicable under these circumstances. The facts in evidence do not establish that the trip to work appellant made on May 8, 2005 was anything other than his ordinary commute to work. There is no evidence showing that his trip that morning was other than to report for work at the 10:00 a.m. commencement of the second shift of his regular tour of duty. No evidence was presented as to an emergency call, a contract by the employer for transportation, a requirement of travel by highways or use of the highway for an incident of employment with knowledge and approval of the employer. With respect to a special errand, there is no indication that the employing establishment expressly or impliedly agreed that employment service should begin when appellant left home on May 8, 2005, nor any special inconvenience, hazard or urgency of travel that would bring it within coverage under the Act. The record establishes that he was not in a travel status at the time of injury and that he was not reimbursed for travel to and from work.

Appellant testified in his telephone hearing that instead of staying at work between shifts, he decided to go home in order to eat breakfast and let his dogs out. He stated that, "it helps sometimes just to kind of break up that long of a day." Clearly, appellant was not in any way performing official duties at the time of the off-premises accident, in that his reasons for leaving the premises were admittedly personal in nature. This situation is similar to that of an off-premises injury occurring during an unpaid lunch period, which is not compensable, as it does not arise out of and in the course of employment. Rather, such an injury is merely the ordinary, nonemployment hazard of the journey itself, which is shared by all travelers.[8]

The Board finds that the evidence of record does not establish that an exception to the coming and going rule was applicable in this case. Appellant was not in the performance of duty

[8] *See supra* note 3.

at the time of the motor vehicle accident on May 8, 2005 and the Office properly denied the claim.[9]

Finally, the Board notes that appellant has alleged that the employing establishment was reckless and irresponsible in assigning him to work a split shift, in that it was aware that he had a chronic disease. He claimed that he had asked the employing establishment to change his schedule, so that he would not be required to work split shifts. The employing establishment has explained that work schedules, including split shifts are mission-driven and, therefore, must be set at management's discretion. The mere fact that appellant had asked to be removed from a split-shift schedule does not bring this event into the performance of duty, absent a showing that the split-shift fit into an exception of the going and coming rule.

CONCLUSION

The Board finds that appellant was not in the performance of duty when injured on May 8, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2006 is affirmed.

Issued: November 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[9] *See Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004). (Finding that employment did not fall within any exception to the general rule, the Board denied coverage where appellant sustained an off-premises injury while riding his motorcycle to work). *See also Linda S. Jackson*, 49 ECAB 486 (1998).