United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 08-306**
	)	**Issued: July 1, 2008**
DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Woodlawn, MD, Employer	)	

Appearances:
Milo Martin, Jr., for the appellant
No appearance, for the Director

Oral Argument May 7, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 6, 2007 appellant, through her representative, filed a timely appeal from the July 9, 2007 decision of an Office of Workers' Compensation Programs' hearing representative rescinding acceptance of her traumatic injury claim. Pursuant to 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 the Office met its burden of proof to rescind acceptance of appellant's claim. On appeal, appellant contends that the Office based its decision on improper evidence.[1]

[1] The Board notes that appellant's argument made reference to evidence that was submitted after the final merit decision. As this evidence was not a part of the record at the time the Office made its final decision, the Board had no jurisdiction to review it for the first time on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On May 11, 2006 appellant, then a 61-year-old information technologist specialist, filed a traumatic injury claim alleging that she injured her legs, knees and ankles when she fell down two steps while exiting a restaurant in Atlantic City, New Jersey, where she was attending a conference. Her supervisor witnessed the event, which occurred at 6:45 p.m. The following day, appellant was treated for contusions of her right wrist and left foot, a left knee derangement and a puncture wound to her right leg. The Office authorized treatment under short-form closure.

On June 19, 2006 the employing establishment controverted appellant's claim. It contended that she was not in the performance of duty at the time she fell because she had left the site of the one-day conference to have a meal at a restaurant several blocks away.

On July 10, 2006 the Office requested additional information about the purpose of appellant's trip and any authorization for her presence in Atlantic City on the day she fell.

Appellant submitted the employing establishment's "Authorization to Attend Non-Government Sponsored Meetings" for the conference. This form authorized appellant and seven coworkers to travel to Atlantic City for a Mail-Com conference on May 11, 2006 to "get [first-]hand exposure to the latest technology for mail workloads." Transportation was provided between Baltimore and Atlantic City by a government van. No other expenses were authorized.

The employing establishment again controverted the claim. The memorandum of a personnel manager stated that appellant was "not in a temporary-duty (TDY) status. We have learned that the van that transported the claimant and her coworkers to Atlantic City was parked at the convention center while they separated to go 'eat.' They agreed to meet at the van at 7 p.m. for the return trip home."

By decision dated August 17, 2006, the Office denied appellant's claim, finding that she had not established that she was in the performance of duty when she fell.

On August 23, 2006 appellant requested an oral hearing, which was held on December 22, 2006. She stated that the government van left from the employing establishment's building at 7:30 a.m. and arrived at the convention center in Atlantic City at 10:30 a.m. She spent the day with her supervisor at the convention looking at mail equipment and talking to vendors. The conference ended at 5:00 p.m. and all of her coworkers dispersed for dinner with the plan to meet back at the van at 7:00 p.m. to return to the employing establishment. The convention center, where the van was parked, did not have a food court. Appellant and her supervisor walked across the street from the convention center and took a "Jitney bus" to a nearby casino, through which they walked to gain access to the boardwalk. While in the casino, they stopped to watch some people gambling and appellant played a dollar's worth of slots. Once out on the boardwalk, appellant and her supervisor walked until approximately 6:15 p.m., when they returned to a restaurant near the casino. They ate and talked until 6:45 p.m. and then exited the restaurant, at which time appellant fell while descending two stairs. After filling out an accident report for the restaurant, appellant took the Jitney bus back to the convention center, where the van was parked. Appellant and her coworkers returned to the employing establishment in the government van.

In response to appellant's testimony, the employing establishment contended that appellant's injury did not arise in the performance of duty. It advised that it only authorized use of a government van for transportation to attend the meeting and that no other cost was involved or *per diem* authorized so meals were not paid by the employing establishment. The employing establishment also argued that appellant had walked approximately eight blocks from the conference center and that she had substantially deviated from her employment by gambling and walking on the boardwalk.

By decision dated March 2, 2007, an Office hearing representative reversed the denial of appellant's claim. He found that she was in travel status and, therefore, her activities associated with eating in a restaurant were covered by the Federal Employees' Compensation Act. He stated that appellant's selection of a restaurant three blocks from the convention center was an "insignificant departure" from the performance of duty.

On March 20, 2007 the Office accepted appellant's condition for internal derangement of the left knee, left foot sprain and right wrist sprain.

On June 6, 2007 the employing establishment notified the Office that, according to payroll records, appellant was compensated for a regular eight-hour workday on May 11, 2006 and was not in a TDY status. It contended that there were several restaurants closer to the convention center where appellant could have eaten and that her activities leading up to her injury at a restaurant several blocks away showed that her actions were for her own social benefit.

By decision dated July 9, 2007, a different Office hearing representative rescinded the acceptance of appellant's claim. He noted that she had been compensated for only eight hours on May 11, 2006 and had not received funds for meals or other expenses. The Office hearing representative found that appellant was in the performance of duty only during the eight hours between 7:30 a.m. and 4:00 p.m. when she attended the conference and again during the time she was in the van returning to the employing establishment. Because her injury did not occur within these periods of time, it did not arise in the performance of duty.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.[2] The Office's regulation on rescission states: "If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied."[3] The Board has held that the power to annul an award of compensation is not an arbitrary one and that such an award can only be set aside in the manner provided by the statute. In establishing that its prior

[2] *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

[3] 20 C.F.R. § 10.610.

acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[4]

The Board has recognized that an employee on travel status or a special mission for his or her employer is under the protection of the Act 24 hours a day with respect to any injury that results from activities incidental to such duties.[5] When determining the general criteria for performance of duty as it relates to employees on travel, the Board has followed Larson's treatise, *The Law of Workers' Compensation*, which states:

> "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."[6]

ANALYSIS

On March 20, 2007 the Office accepted that appellant sustained a traumatic injury on May 11, 2006 for left knee derangement, left foot sprain and right wrist sprain. On July 9, 2007 the Office rescinded acceptance of her claim on the basis that she was not in the performance at the time of her injury. The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's injury as erroneous.[7]

The record establishes that appellant was authorized to attend a one-day conference in Atlantic City, New Jersey on May 11, 2006. She and seven coworkers were authorized to travel in a van furnished by the employing establishment to the Atlantic City conference and back. They left the employing establishment at 7:30 a.m. and arrived at the convention center at approximately 10:30 a.m. Appellant and her supervisor met with vendors until the conference ended at 5:00 p.m., at which time they left the convention center. They took a Jitney bus to a local casino and walked on the boardwalk until 6:15 p.m., at which time they ate dinner at a local restaurant. Appellant fell as she exited the restaurant at 6:45 p.m., on her way back to the van for its scheduled 7:00 p.m. departure to return to the employing establishment. These circumstances were not controverted by the employing establishment.

In rescinding the acceptance of her claim, the Office hearing representative determined that appellant was in the performance of duty only until 4:00 p.m. He found that her workday had commenced at 7:30 a.m. and ceased at the end of her eight-hour day. Therefore, at the time of her injury, she was not in the performance of duty. The Board finds that the decision of the hearing representative does not conform to case precedent.

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[4] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

[5] *Richard Michael Landry*, 39 ECAB 232, 236 (1987).

[6] A. Larson, *The Law of Workers' Compensation* § 25.01 (2000); *see also Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993).

[7] *Deborah S. Stein*, 56 ECAB 494 (2005).

The Board has held that an employee on a special mission away from his or her normal post of duty is extended coverage under the Act for all ordinary incidents which the employer would normally contemplate as occurring in the course of such mission. In *William K. O'Connor*,[8] the employee sustained injury when he was struck by an automobile two and one-half hours after the end of his workday. The injury occurred following a short walk after dinner and while the employee was returning to his hotel. The Board stated: "The rule in cases such as this is 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 respect to all normal incidents of his trip*."[9] (Emphasis in the original.) In *Frances A. Taylor (Leigh S. Taylor)*,[10] the Board noted that an employee on a special mission away from his home station is considered in the course of employment not only during his actual working time but also in respect to all normal incidents of his assignment.

The record is clear in that the employing establishment authorized appellant's travel or special mission to Atlantic City on May 11, 2006 to attend a conference. The fact that her employer did not provide a *per diem* for food or authorize other costs associated with the out-of-town travel is not dispositive of her claim for compensation, nor is coverage under the Act based on the eight hours of work for which she was ultimately paid. Rather, as noted, while on travel to Atlantic City, appellant remained in the course of employment with respect to all normal incidents of her employment. The record shows that appellant and her supervisor left the convention center at 5:00 p.m., traveled several blocks to a nearby casino and the boardwalk area and ate dinner at a restaurant at 6:15 p.m. The facts in this case do not establish a substantial deviation from her employment.[11] 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. The Board finds that appellant was in the performance of duty when she sustained injury on May 11, 2006.

Because the employing establishment authorized appellant's participation in the out-of-town conference and provided her transportation to the event, the Board finds that appellant was on travel status. Therefore, her injury while exiting a restaurant immediately prior to returning to the employing establishment arose in the performance of duty.[12]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's claim.

[8] 4 ECAB 21 (1950).

[9] *Id*. at 22-23.

[10] 8 ECAB 449 (1955).

[11] *Compare Richard Michael Landry*, *supra* note 5, and cases cited therein at 237-38.

[12] *See The Law of Workers' Compensation*, *supra* note 6 ("injuries arising out of the necessity of … eating in restaurants away from home are usually held compensable").

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 9, 2007 is reversed.

Issued: July 1, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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