Performance of Duty

Monique Madrid
Jacksonville District Management Advisor

July 2019
Performance of Duty (POD) determinations are made by the Office of Workers’ Compensation Program Claims Examiner.

POD is the fourth of the five required elements for a claim to be accepted.

An injury is generally said to have occurred in the POD if it arose out of and in the course of employment.

If the agency has questions or concerns about whether an employee falls under POD, the claim should be challenged.
Three Exclusions

Injuries stemming from the following circumstances are not considered covered:

• Willful misconduct at the time of the injury the employee was violating a safety rule, disobeying other orders of the employer, or violating a law. Must be deliberate and intentional versus careless and heedless.

• Intoxication as a direct cause of injury (alcohol and any other drug).

• The employee’s intention to cause injury to himself or herself or to another.
Industrial Premises

An employee who has a fixed place of employment and is injured on the premises will be covered if it can be shown that the employee was onsite and:

• Performing assigned duties.

• Engaged in activities that are incidental to work position (e.g. eating lunch on premise, restroom, or authorized breaks).

• Must be within a reasonable period of time before/after scheduled work shift (usually within 30 minutes).

• Performing an accepted practice of employment (e.g. getting supplies off shelf or relaxing in work lounge).

Please Note: Injuries in parking lots that are owned, controlled, or managed by your agency are covered unless engaged in an activity sufficient for removal from the scope of employment.
Off Premises

The following are situations where workers being off premise is covered:

• Those who by nature perform their duties off site (e.g. messenger, letter carrier, or chauffer).

• Workers on travel status.

• Workers having a fixed place of employment but who are sent on errands by their employer.

• Those who perform services at home.

Please Note: Cannot deviate from assignment or perform personal, non-work related activity.
Scenario #1

An employee is injured at an off site party luncheon held at a public restaurant, which was planned by a co-worker at the agency. However, the employing agency did not require the employees to participate, and the employer did not finance or sponsor the event.

Is employee in performance of duty?
Telework

Teleworkers are covered if it can be determined they were engaged in work related duties while injured at home.

Activities of “personal comfort” are not covered while working from home (e.g. preparing lunch or getting coffee).

Supervisor should submit a statement that addresses the following:

• What directive/arrangements given for performing work at home or outside usual working hours.
• Particular work that was performed at time of injury.
• Official superior’s opinion on if injury was in performance of official duties.
Travel Status

Generally covered 24 hours a day while in travel status provided that they were performing duties related to the reason for the travel.

Diversion from duty is not covered (e.g. sightseeing or shopping).

TDY is considered ‘specially assigned duty’ and injuries that occur during incidental acts are covered (e.g. taking a shower or eating).

Use of hotel exercise rooms, pools, or jogging in surrounding area before/after work is not covered unless agency requires employee to exercise.
Scenario #2

An employee travels to a city on temporary duty to perform an audit for the employer. He leaves the temporary duty work premises and returns to hotel to change clothes. He departs from the hotel and walks approximately ten blocks to a restaurant for dinner. While on his way back from restaurant, he is assaulted and robbed.

Is employee in performance of duty?
What if the same employee that is on TDY and walked approximately ten blocks to go to dinner strikes up a conversation with some locals about the baseball game that is playing on one of the screens in the building. After the game, they all celebrate with a couple of rounds of beer. While on his way back to hotel from dinner, he is assaulted and robbed.

Is employee in performance of duty?
During Employee’s Commute

In general, employees are not covered during the commute to and from work except for the following reasons:

- The employment requires the employee to travel.

- The employer contracts from and furnishes transportation to and from work.

- The employee is subject to emergency duty (e.g. firefighters).

- The employee uses the highway or public transportation to do something incidental to employment with the knowledge and approval of employer.
Recreational Injuries

Formal recreation is considered covered. The employee is paid for participating or the recreational activity is required/directed as a part of training or assigned duties.

An employer sponsored activity in which the employer provides substantial support, equipment of direction, organizes or controls the activity and the employer derives material benefit from the activity. The benefit must be more than improving morale. Can be on or off premise.

Partake in agency sponsored structured wellness programs.
Recreational Injuries

Informal recreation refers to activities in which participation is not required by employer (simply encouraged).

• If it occurs on the premises or during an employee’s lunch break would be covered.
Idiopathic Falls

Injuries caused by falls that are due to a personal and/or non-occupational pathology (e.g. cardio vascular condition, diabetes, or seizures) are not covered unless there is intervention or contribution by any hazard or special condition of employment.

• If some factor of the employment intervened or contributed to the injury resulting from the fall (e.g. had a seizure and hit head on desk while falling to floor) then they are covered for injury.

Please Note: If it cannot be established that an incident was caused by idiopathic condition, by some hazard or by condition of employment then it is considered “unexplained”. Unexplained incidents are covered.
An employee was using the copier machine to make copies of a handout that would be given out during a staff meeting that afternoon. The flashing lights from the copier trigger her seizure which caused her to fall and sustain an injury.

Is employee in performance of duty?
Assault

Injuries arising from an assault may be covered. Factors that must be considered:

• Whether it arose from an activity related to workplace.

• Whether it was the result of a (non-work) personal matter.

Important to note:

• An assault occurring off the agency’s premises and outside of work hours may be covered if it arose from reasons related to the employment.

• An assault when derived from employees who did not socialize outside of work and disliked one another and they get into a fight over something non-work related is not covered because it involved a personal matter.
Injuries during horseplay can be covered if the horseplay was of a character that could reasonably be expected where a group of workers is thrown into personal association for extended periods of time.

Can be denied coverage if:

- It was constituted as a prohibited activity.
- Resulted from intoxication, willful misconduct, or intent to bring about self-injury or injury to another.
- Occurred while the employee was so removed from assigned duties in point of time or space as to be removed from the course of employment.
Scenario #3

Two employees get into a heated argument about the way a job should be completed. The argument escalates into a fight in breakroom and both employees are injured.

Are both employees in performance of duty?
Cutler Rule

Claims of emotional conditions need to be evaluated to determine whether the condition was caused or aggravated by factors of employment/work connected events not considered by OWCP to be factors of employment.

Cutler Rule: “Workers’ compensation law does not apply to each and every illness that is somehow related to an employee’s employment...” Lillian Cutler, 28 ECAB 125.

The principles in this decision are used by Claims Examiners when adjudicating emotional/neuro-psychiatric claims.
Harassment or teasing of employees by coworkers is a compensable factor of employment and conditions resulting from this can be afforded coverage.

Employees who are harassed, teased, or called derogatory names by coworkers are considered to be in the performance of duty provided that the reasons for the harassment or teasing are related to the employment and not as a result of employee’s domestic or private life.

Please note: Each allegation must be substantiated.
Stress Claims Covered

Considered to be in performance of duty:

- Disciplinary actions that were overturned due to agency error or abuse.
- Agency requires an employee to prepare for an investigation or is given a special assignment to respond to charges.
- Harmful effects from agency “health service programs” such as periodic medical exams.
- Emotional reaction to situations in which employee is trying to meet position requirements.
- Verbal altercations involving supervisor and employee (extent of the employee’s involvement must be known).
- Assault that arose out of a work-related activity.
Stress Claims Not Covered

Considered not in the performance of duty:

- Employee’s perception of poor management.
- Frustration of not being assigned “meaningful” work.
- Changes to procedures or operations.
- Refusal to put employee in charge during supervisor’s absence.
- Desire to change one’s work schedule.
- Being sent home early due to lack of work or disapproval of leave.
- Fear of recurrence if employee returns to work after time off due to disability.
- Self-Generated.
Stress Claims Not Covered

Considered not in the performance of duty:

- Employee’s reactions to demotions.
- Reassignments to other positions or locations.
- Failure to be promoted.
- Reaction to action/inaction of OWCP claim.
- Being suspended, terminated, downgraded, or RIF’ed.
- Not being allowed to work overtime.
- Leave not being approved.
- Reaction after being ordered to undergo fitness of duty exam.
Scenario #5

The employee was called into the acting supervisor’s office. He was asked to cover for another employee that called out on sick leave earlier that morning due to having the flu. The employee was frustrated the remainder of the day because he believed the acting supervisor should have evenly distributed the task with other employees in office. He knew if his actual supervisor was in office this would have never happened. He felt as if acting supervisor was “singling him out”.

Is employee in performance of duty?
ICPAs can use a four-step process to aid in the analysis of emotional claims.

STEP ONE: Identify each of the issues in claim.

- When a claimant is indicating more than one event or issue caused the emotional condition it is best identify and list each event that claimant alleged occurred. Remember, that if more than one incident is being claimed as causing the same emotional condition then CA-2 should be filed.

- Possibly number them so the Claims Examiner is able to easily identify any and all incidents. If not enough room on OWCP form type out on a separate letter.

- List dates and times for each event if known. The key is to be as specific as possible.
Analyzing Claims

STEP TWO: Prioritize each issue under claim.

- At times claimants will file stress claims and in their statements or evidence claim several different things cause the condition. Really look to see which are the main issues and list them first.

- Next, figure out if there are any events or incidents as an agency you plan to challenge. List them next and ensure that your responses to why you disagree is attached or is made know it’s forthcoming.

- Lastly, look through evidence to see if incidents or complaints were mentioned but maybe no dates were given or they appear to be vague. List them last.
STEP THREE: Collect relevant information (e.g. supervisor’s rebuttal to claimant’s statement, EEO grievance in relation to claim, etc.). Information collected should be complete, factual, and accurate.

- The goal is to provide OWCP with statement or documentation that will help bring clarification to the claim. It helps to tell the story.

- Reach out to all parties involved (e.g. supervisor, eye-witness, to get as much information as possible and help provide a well-rounded view for Claims Examiner. This is vital so the CE can make a decision knowing all the facts.

- Provide any discrepancies with claim that CE should be made aware of and can be factually proven. Provide evidence to support your discrepancies.
STEP FOUR: Clearly and concisely communicate information to OWCP. Ensure whatever is sent to OWCP is easy to understand, organized, and has an agency POC (with email address, mailing address and phone) provided.

- If necessary to provide clarification to what is being claimed a timeline can be made. Stick to the facts!
- Do not mix medical evidence with factual evidence.
- Ensure that if names are listed in any document that the Claims Examiner is aware of their official work title in relation to the claimant.
An employee that was scheduled to telework from home was injured when she tripped while picking up an item off the floor after returning from a trip to the bathroom.

Is employee in performance of duty?
Scenario # 6 Follow Up

Let’s say the same employee, who was scheduled to telework exercises (immediately after she clocks off work) in a different room in the house. She is enrolled in voluntary physical fitness program. She pulls a hamstring during the work out.

Is employee in performance of duty?
Scenario # 7

A clerk claimed he slipped and fell on ice in an employing establishment parking lot. He reported it occurred when exiting his vehicle at 9:50am. His normal work shift starts at 6:00am. Employee reported incident and his tardiness for work immediately to his supervisor.

Is the employee in performance of duty?
References

FECA Procedure Manual, 2-0804

ECAB Decision, Lillian Cutler, 28 ECAB 125
Any Questions???

Thank you for your time!!