U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ASIA LYNN DOSTER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Belleville, Mich.

Docket No. 96-688; Submitted on the Record;
Issued April 20, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant established that she sustained an injury on June 7, 1995 while in the performance of duty.

On June 7, 1995 appellant, a 30-year-old air traffic controller, alleged injury to her back and neck, in addition to "mental distress" and nightmares, when she was involved in an automobile accident which occurred while she was driving to another "government building" to investigate a personal threat made against her. Appellant filed a Form CA-1 claim for continuation of pay on June 21, 1995, stating that she received a threatening note and experienced a hostile work environment, then sustained an automobile accident while in the performance of duty.

An Office of Workers' Compensation Programs' claims examiner scheduled a conference with an employing establishment supervisor on September 7, 1995 to determine whether appellant was in the performance of duty when she was injured on June 7, 1995. In the September 7, 1995 memorandum of conference, the supervisor stated that she had seen a copy of the threatening letter, which was anonymous, but did not have a copy herself, and that the matter was considered sufficiently severe so that the Federal Bureau of Investigation (FBI) and employing establishment security had been contacted to investigate it. The supervisor stated that the context of the letter was something to the effect of "[i]f Bob, the manager, is terminated, remember Oklahoma City." The supervisor, who assumed her position after the June 7, 1995 incident, further stated that there had been personality problems among the workers at the worksite, and that the "mood" had since quieted considerably. With regard to the automobile accident, the supervisor stated that appellant was on leave at the time of the incident and that to her knowledge, appellant was not conducting any official business. Lastly, the supervisor noted that the employing establishment had transferred appellant to another location upon her return to work.

The record also contains a September 7, 1995 memorandum of conference between the claims examiner and appellant, which also was conducted to determine whether appellant was in the performance of duty when she was injured on June 7, 1995. The memorandum notes:

> "[Appellant] stated that she has knowledge concerning who sent the letter to her. It was received at her home. She stated that after she received the letter she needed to show it to someone and she was going to a government building to get some advise [sic] on who to call or tell about the letter she received.
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> "She stated that she filed a grievance/EEO [equal employment opportunity] complaint against the manager at her facility. She stated that some coworkers would have been upset if he left because of their work habits. She stated that she has been at that facility for 3.5 years and prior to that she was an [a]ir [t]raffic [a]ssistant at Metro for 3 years.
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> "She stated the letter basically stated that '[i]f Bob is forced to leave Willow Run, you will be terminated -- [r]emember Oklahoma City.'
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> "The work environment was not pleasant upon her arrival at the [worksite]. She stated that there was no trust amongst the coworkers. Her coworkers were placed in a position that they worked against each other instead of together as a team…."

In a letter dated September 7, 1995, the Office advised appellant that it required medical evidence in support of her claim, including a comprehensive medical report and an opinion from a physician, supported by medical reasons, as to how the reported work incident caused or aggravated the claimed injury and how the claimed injury was causally related to factors of employment. Appellant never responded to this letter.

By decision dated November 15, 1995, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that she sustained the claimed injury of June 7, 1995 while in the performance of duty.

Appellant, through her representative, stated in a December 22, 1995 appeal letter to the Board that appellant did not go directly to work on the date of injury but "contacted a colleague who was employed as a law enforcement employee in a government building a short distance from her home. She met the employee, drove around the parking lot and discussed the letter. She did not leave her automobile due to her fear. After the employee got out of the car and she proceeded to return home, she was hit broadside by a … driver. She immediately thought this accident was directly related to the threat on her life contained in the letter. The colleague, upon whom she had called for guidance, was the husband of the person scheduled to assume the position of [m]anager of the [employing establishment] facility the following week." Appellant's representative contended that appellant's actions could reasonably be construed as in furtherance of her employer's business.

The Board finds that appellant failed to establish that she sustained an injury on June 7, 1995 while in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[1] 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."[2] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[3] 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 master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto."[4]

In the present case, the evidence of record clearly establishes that at the time of injury, appellant had fixed hours and place of work and that her injury occurred off the premises of the employing establishment while she was driving to a government building. The record indicates that appellant was on leave at the time of the accident. Unless appellant can show that she was on the actual industrial premises, the constructive premises of the employer or otherwise engaged in activities incidental to her employment, she cannot be considered within the protection of the Act.[5]

In addressing the basic coming to and going from work rule, Professor Larson distinguishes between risks incidental to the employment premises and risks arising from the journey to work. He states:

> "The course of employment is not confined to the actual manipulation of the tools of work, nor to the exact hours of work. On the other hand, while admittedly the employment is the cause of the workman's journey between his home and the factory, it is generally taken for granted that workmen's compensation was not intended to protect him against all the perils of that journey. Between these two extremes, a compromise on the subject of going to and from work has been arrived at, largely by case law, with a surprising degree of unanimity: for an employee having fixed hours and place of work, going to and from work is covered on the employer's premises.

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[1] *Bruce A. Henderson*, 39 ECAB 692 (1988); *Minnie M. Huebner*, 2 ECAB 20 (1948).

[2] Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193.

[3] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[4] *Melvin Silver*, 45 ECAB 677 (1994); *Carmen B. Guiterrez* (*Neville R.. Baugh*), 7 ECAB 58, 59 (1954).

[5] *Melvin Silver*, 45 ECAB 677 (1994).

> "Getting one wheel of a car across the property line has been found no more effective in establishing presence on the premises than getting one hand across, as long as it was the dangers of the public street that caused the harm…."[6]

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.[7] There are, however, recognized exceptions which are dependent upon the particular facts relative to each claim. These pertain to the following instances: (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 employment with the knowledge and approval of the employer.[8]

The Board finds that nothing in the facts of this case bring the claim within any of the recognized exceptions to the general going to and coming from rule. The facts in evidence do not establish that appellant was required by her employer to travel on the highways, that her employer contracted for or furnished transportation to and from work, or that her use of the highway was in conjunction with any incident of her employment and with the knowledge and approval of her employer. Nor does the record demonstrate that appellant was responding to an emergency call at the time of injury.

The Board has noted that, closely allied to the off-premises exceptions, is the so-called "proximity" rule recognized by the United States Supreme Court in *Cudahy Packing Co. v. Parramore*.[9] This case stands for the proposition that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may therefore be considered as hazards of the employment.[10] In *Cudahy Packing*, the employee sustained injury on his way to work while on a road which was the only means of access to the industrial premises. In the present case, however, the evidence is clearly distinguishable as appellant had left her home and was driving on a public street at the time of her accident. The proximity rule does not apply to this case as the hazard causing injury was clearly a hazard common to all travelers on the street.

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[6] *Larson, The Law of Workers' Compensation* § 15.11 (1993).

[7] *Thomas P. White;* 37 ECAB 728 (1986); *Robert F. Hart,* 36 ECAB 186 (1984); *Estelle M. Kasprzak,* 27 ECAB 339 (1976).

[8] *Robert A. Hoban,* 6 ECAB 773 (1954), *citing Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S.C. 469, 479 (1953).

[9] 263 U.S.C. 418 (1923).

[10] *See Sallie B. Wynecoff,* 39 ECAB 186 (1987); *Estelle M. Kasprzak,* 27 ECAB 339 (1976).

The next determination is whether the "special errand" exception to the going to and coming from rule is applicable to this case. This exception was described by the Board in *Elmer L. Cooke*,[11] as follows:

> "It is a general rule that injuries to an employee while traveling between his home and a fixed place of employment are not in the course of employment and therefore are not compensable. However, exceptions to the rule have been developed over the years. An exception 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. 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.
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> "A second exception, often related to the 'special errand' situation, affords coverage of the compensation law to the employee who leaves his place of employment under direction to continue his work at home, or who, as a consistent and recognized practice, performs part of his work at home. The scope of this exception is not as definite as the special errand exception. It is clear that it does not mean that an employee who carries home business papers or tools of his trade is by that fact covered by the compensation law during his journey to and from work. However, where the work is done at home by the direction of and for the benefit of the employer, or where the work is regularly performed at home with the knowledge and consent of the employer, or where there is an essential continuity of the work done at home and that performed at the regular place of employment, the journey between home and 'work' is in the course of the employment."[12] (Emphasis in the original, citations omitted.)

In the present case, the evidence of record does not establish that appellant was engaged on any special errand when she left her home. There is no evidence which would establish that appellant's journey on the date of injury was an integral part of any errand or special task either expressly or impliedly agreed to by her employer

The evidence of record indicates that appellant was injured in an automobile accident on a public street. She left her house, went to a government building where a friend worked and

[11] 16 ECAB 163 (1964).

[12] *Id*. at 164-65.

was involved in the accident. There does not appear to be any nexus with her federal employment, as the September 7, 1995 memorandum of conference with the supervisor noted that appellant was "on leave" at the time of the accident and had never reported to work on the day of her accident. Based on these facts, therefore, the Board finds that appellant was not in the course of her federal employment at the time of her accident, *i.e.,* she was never engaged in her master's business nor reasonably fulfilling the duties of her employment as an air traffic controller. Her automobile accident would be the ordinary hazard encountered by the commuting public.[13] Further, the accident did not occur during a time when appellant can be said to have been in the course of her employment nor at a place covered by the premises or off-premises rules, or any of the exceptions to those rules. While appellant did receive a threatening letter at her home and contacted the FBI and the employing establishment's security staff to report the threat, this by itself is insufficient to extend coverage under the Act.

The November 15, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 20, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[13] *Melvin Silver*, 45 ECAB 667 (1994).