U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL CLAY and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, La.

Docket No. 97-2181; Submitted on the Record;
Issued May 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an injury while in the performance of duty.

The Board finds that appellant was not in the performance of duty when he sustained an injury.

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from a personal injury sustained while in the performance of duty.[1] The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation of "arising out of and in the course of employment." The phrase "in the course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the 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. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[2]

Further, in *James E. Johnson*, the Board stated:

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[1] 5 U.S.C. § 8102(a)

[2] *Charles Crawford*, 40 ECAB 474 (1989).

> "An employee who is on a trip for his employer is under the protection of the Act while engaging in activities essential to or reasonably incidental to these special activities. However, when he deviates from the activities incidental to his employment, he ceases to be within the protection of the Act and an injury occurring during such deviation is not compensable. An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip unless the deviation is so insubstantial that it may be disregarded."[3]

In his discussion on deviation from a prescribed work-related route, *Larson* notes that the majority view is that a side trip for personal reasons remains a deviation until completed, that is, until the main work-related route is regained.[4]

In the instant case, appellant, a modified distribution clerk in a limited-duty assignment, was assigned to deliver mail to certain outlying employing establishment branches and then to return to the main office in Alexandria. On January 16, 1997 he had delivered delayed newspapers to the Montgomery branch of the employing establishment and was in the course of returning to Alexandria when the automobile accident in which he was injured, occurred. Police reports indicate that the accident occurred on Elliot Street at an intersection with appellant in the left lane being hit by a private vehicle running a red light.

The employing establishment explained that, from Montgomery, appellant should have traveled Highway 71 into Alexandria, taken the first exit ramp and driven to the Alexandria office on Odom Street. However, the employing establishment noted that appellant left Highway 71 to go to Highway 8 through Colfax, and then got on Interstate 49 to go south to Alexandria. The employing establishment noted that from Interstate 49 appellant should have taken the exit for MacArthur Drive to get to the employing establishment, but that instead he took the Elliot Street exit where the accident occurred. The employing establishment stated that there was no reason for appellant to be on Interstate 49 and certainly not on Elliot Street.

[3] 35 ECAB 695, 699 (1984) (part-time flexible letter carrier involved in a traffic accident had deviated from his assigned route to search for a familiar restaurant and had not, at the time of injury, resumed his journey to his directed location); *see also Norman R. Hemby*, 40 ECAB 901 (1989) (deviation from postal route, for personal reasons, took the claimant out of the course of his employment when the postal vehicle he was driving was struck by another vehicle); *Juan Antonio Bonilla*, 37 ECAB 598 (1986) (deviation of letter carrier, who sought to eat at an unauthorized lunch spot and whose vehicle was struck from behind, constituted an personal mission and could not be characterized as coming within the personal comfort doctrine); *Louis J. Barbera*, 18 ECAB 47 (1966) (letter carrier, who was injured in a fall from his mail truck after leaving the authorized mail route to drive home to speak to his wife, had substantially deviated from the course of his employment for personal reasons and did not sustain his injury in the performance of duty).

[4] *See* 1 A. Larson, *The Law of Workers' Compensation* § 19.33 (1990). Larson notes that a minority of decisions have held that the deviation ends once an employee is moving back toward the employment route. The Board expressly rejected the minority view in *Barbara Stamey*, 32 ECAB 1767 (1981); *see Ronda J. Zabala*, 36 ECAB 166 (1984) (letter carrier who failed to regain the main work-related route did not sustain her injury in the performance of duty).

Appellant offered two different explanations for why he was on Elliot Street. In one version he stated that because of the traffic, he could not get over into the right lane to exit on MacArthur, so he continued on Interstate 49 to the Elliot Street exit. He also added that he was in the left lane because of traffic when the accident occurred at 3:00 p.m.

The other explanation was that appellant was hungry and had intentionally taken the Elliot Street exit to get to Popeyes by turning right on Elliot Street and then right on Bolton Street. Appellant claimed that he was in the left lane on Elliot Street, even though he claims to have intended to turn right, because of traffic.

The employing establishment controverted appellant's claim noting that there were two signs, one marked one mile in advance, indicating the exit for MacArthur Drive on Interstate 49, and also that there were numerous places to eat on MacArthur Drive. The employing establishment further noted that appellant's wife worked on Murray Street, a few streets over from where appellant's accident occurred. The employing establishment also enclosed pictures of the accident in which it noted that the skid marks clearly indicated that appellant was in the left lane coming off Interstate 49 and certainly did not indicate that he was planning to turn right on Elliot Street, and that the skid marks appeared perfectly straight in the center of the left lane and were several feet before the impact, indicating speed. The employing establishment also noted a third explanation of why appellant was on Elliot Street, which was that he had gotten lost and had gotten onto Interstate 49 by mistake and was exiting to return to the employing establishment. The employing establishment noted that this was not plausible as appellant passed through the Highway 71/Interstate 49 exchange daily to and from work, as he lived on the opposite side from the employing establishment.

Appellant claimed that he was in the performance of duty and going to eat lunch, as he did not have a direct route for this job.

By decision dated March 21, 1997, the Office of Workers' Compensation Programs rejected appellant's claim finding that he was not in the performance of duty at the time of the accident. The Office found that the evidence of record indicated that appellant was out of the direct path of travel when the accident occurred.

By letter dated May 6, 1997, appellant, through his representative, requested reconsideration. Appellant alleged that he was never given a specific route to travel and had the discretion to use whatever route was most familiar to him and the most economical. Appellant's representative argued that the route appellant used was the most familiar route to him.

By decision dated June 2, 1997, the Office denied modification of its prior decision finding that the evidence submitted was insufficient to warrant modification. The Office noted appellant's inconsistencies in the history of how the accident happened and why he was where he was at occurrence.

The record in this case is clear that appellant had deviated from his anticipated route between Montgomery and Alexandria as he did not take the most direct route and did not take the appropriate exit for the route he chose. His reasons for being where he was, were inconsistent and were unsupported by the facts of record. Because appellant deviated from the

course of his employment for personal reasons and failed to regain his anticipated work route before sustaining his injury on January 16, 1997, his injury did not arise in the course of employment.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 2 and March 21, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 11, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member