U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL DIEFENBACH and U.S. POSTAL SERVICE,
MIDDLESEX CENTRAL DISTRICT OFFICE, North Reading, MA

Docket No. 01-801; Submitted on the Record;
Issued October 29, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury on January 14, 1998 in the performance of duty.

On December 14, 1999 appellant, then a 65-year-old employee assistance program (EAP) counselor, filed a notice of traumatic injury alleging that, on January 14, 1998, at approximately 1:00 p.m., he sustained multiple injuries when his vehicle was struck from behind by another vehicle as he was driving his private vehicle back to work following his lunch break. Appellant's wife was a passenger in the car. On the reverse of the claim form, appellant's supervisor stated that appellant was on his lunch break at the time of the alleged incident.

By letters dated January 3 and 4, 2000, the employing establishment controverted the claim, stating that at the time of the alleged injury, appellant was not "on-the-clock", was not engaged or involved in any official "off-premises" duties, was operating his own private vehicle while returning from lunch with his wife as a passenger in the car and filed his claim nearly two years after the incident occurred. The employing establishment indicated that appellant received disability retirement effective January 26, 1999.

In a letter received on January 7, 2000, appellant explained why he waited almost two years to file a claim. He alleged that, at the time of the incident, his supervisor refused to let him file an injury report telling him that he had been "on lunch" and "did not have a claim."

Appellant also alleged that around 12:45 p.m. on January 14, 1998, not long after he had ordered his lunch at the restaurant, he received an emergency page and immediately left the restaurant without finishing his food. On his way back to work he was struck by the other vehicle.

In a report dated February 11, 2000, appellant's treating physician, Dr. Douglas R. Howard, a Board-certified orthopedic surgeon, opined that appellant had a preexisting degenerative cervical spine problem, which was exacerbated by the motor vehicle

accident on January 14, 1998. He indicated that the accident caused further disc herniation which required appellant to undergo two neck surgeries.

The Office of Workers' Compensation Programs received answers to questions from appellant on February 17, 2000, explaining that his position as a manager of a crisis intervention team require him to respond immediately to all pages and telephone calls 24 hours a day, 7 days a week. Appellant's position involved analyzing employee workplace issues and dealing with conflict situations in order to minimize the development of serious incidents and provide quick, responses to incidents that already occurred.

Appellant did not recall who paged him on January 14, 1998 while he was at lunch, but noted there was a possibility that someone was reporting a crisis situation. Appellant also indicated that he had no usual and scheduled time for lunch and that he spent approximately 80 percent of his time traveling from various post offices and mail facilities within his district. He also stated that it was not uncommon for him to use his own personal vehicle while responding to emergency pages or calls.

By decision dated April 3, 2000, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained an injury while in the performance of duty.

By letter dated April 28, 2000, appellant requested an oral hearing which was held on September 26, 2000. At the hearing appellant testified that many of the pages he received were "very frivolous", stating: "they're (sic) union issues or they could be conflict issues or an issue with a supervisor or they might want an appointment with an EAP counselor." He also testified that it was his normal practice to call first and find out who the page was from before he returned to the office. He stated that he normally used his cellular phone to make the call but that on January 14, 1998 he did not have his cellular phone with him because it was being recharged.

Appellant also submitted a job description and several examples of situations handled by him and the employee assistance program in the past. He also submitted a letter from an area postmaster stating that appellant had responded to crisis situations that occurred at all times of the day or night.

By decision dated December 20, 2000, the Office hearing representative affirmed the April 3, 2000 decision.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was

[1] 5 U.S.C. §§ 8101-8193.

sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2]

The 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."[3] In deciding whether an injury is covered by the Act, the test if whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[4]

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.[5] There are 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.[6]

The evidence of record establishes that appellant's claimed injury of January 14, 1998 occurred off the premises of the employing establishment. The evidence reveals that appellant's claimed injury occurred while appellant was driving his private vehicle on a road which was not owned, controlled, or maintained by the employing establishment during his lunch period and while he was returning to his work location.

The evidence of record also establishes that appellant is an employee with mostly fixed hours and a fixed place of work. Even though appellant stated that he does not have fixed hours, is not "on the clock", does not have to fill out a timesheet and does not take a regular lunch hour, appellant does not fall into any of the categories of "off-premises" employees.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] 5 U.S.C. § 8102(a).

[4] *Julian C. Tucker*, 38 ECAB 271 (1986).

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

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

There are four categories of "off-premises" employees recognized by the Office in its procedure manual:

> "(1) Messengers, letter carriers and chauffers who, by the nature of their work, perform service away from the employer's premises;
>
> "(2) Traveling auditors and inspectors whose work requires them to be in a travel status;
>
> "(3) Workers having a fixed place of employment who are sent on errands or special missions by the employer; and
>
> "(4) Workers who perform services at home for their employer."[7]

Appellant has alleged that his position of employee assistance counselor is similar to that of a messenger, letter carrier, or chauffeur who performed services away from their employer's premises by the nature of their work. Even though appellant claimed that he spent approximately 80 percent of his time traveling to and from various post offices within his district, did not have fixed hours, did not punch a time clock and did not have a fixed time for lunch, the Board finds that appellant was not an off-premises employee.

The evidence of record demonstrates that each work morning, appellant reported to the Middlesex Central District Office and, upon arrival, he telephoned a human resources secretary to let her know that he was in. Appellant did not submit any evidence or a job description stating that he was indeed an off-premises employee who spent most of his time on the road and did not have a main office which he reported to every day.

Appellant alleged that he is subject to the emergency calls exception for employees having fixed hours and places of work. He claims that while he was at the restaurant during his lunch hour on January 14, 1998, he received an emergency page and was on his way back to the office when he was struck by another vehicle.

The Board finds that appellant does not fit the emergency calls exception for employees having fixed hours and places of work since he did not submit any evidence indicating that there had been an emergency call. The record demonstrates that appellant said that he could not even remember who the page was from, nor did he submit any records verifying that he got a page while at lunch. In addition, appellant testified during his oral hearing that many pages he received were "very frivolous" and that "they're (sic) union issues or they could be conflict issues or an issue with a supervisor or they might want an appointment with an EAP counselor." He also testified that his usual practice was to call first to respond to a page, which he did not do in this case. The Board finds that since appellant did not call about the page as he normally does and the fact that he did not submit any evidence suggesting that this may have been an emergency call, indicate that appellant knew or should have known that the page was not an emergency situation. Thus, he does not fall within the emergency calls exception.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992); *see also Godfrey L. Smith*, 44 ECAB 738 (1993).

Considering all of the circumstances and evidence in this case the Board finds that appellant was an employee with a fixed place of employment and that his motor vehicle accident on January 14, 1998 constituted an off-premises injury while returning to work during lunch, which is not compensable as it did not arise out of and in the course of employment, but rather out of ordinary nonemployment hazards of the journey itself which are shared by all travelers.[8]

As such, the December 20 and April 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[8] *Jacqueline Nunnally-Dunord*, 36 ECAB 217 (1984).