

FACTUAL HISTORY

On February 3, 2008 appellant, then a 65-year-old rural mail carrier, filed a traumatic injury claim alleging that on January 22, 2008 she broke her ankle when she slipped and fell on ice in the performance of duty. She stopped work that day. On January 30, 2008 Dr. Robert Zura, Board-certified in orthopedic surgery, performed right ankle surgery and advised that appellant could not work from four to five months.

The employing establishment controverted the claim, contending that appellant was not in the performance of duty at the time of injury. On February 27, 2008 the Office advised appellant that the evidence submitted was not sufficient to establish that she was injured while in the performance of duty, noting that it occurred on her property. In a February 4, 2008 statement, appellant stated that she drove one of her personal automobiles to deliver her route or an employing establishment vehicle. On January 22, 2008 she went to her vehicle to warm it up and returned to her house to gather her belongings. When returning to her car, she slipped on ice and broke her ankle. Appellant did not know until she reported to work whether she would be using her own automobile or a postal vehicle to deliver mail. She attached medical reports from Dr. Zura, who advised that she would be out of work four or five months.

By decision dated April 4, 2008, the Office denied the claim, finding that appellant was not in the performance of duty when injured.

On April 14, 2008 appellant, through her representative, requested reconsideration. She argued that she had already entered and started her car and was in the performance of duty. Appellant returned to her house to get the supplies necessary for her postal duties and noted that she was required to maintain a safe vehicle.

In a July 15, 2008 decision, the Office denied modification of the April 4, 2008 decision. It noted that a rural carrier was required to maintain his or her vehicle in order to serve the route safely and efficiently and that appellant would be in the performance of duty while driving her own vehicle between home and the employing establishment. But since she started the car and then returned to her home to get supplies, she was not performing actual duties and her injury was not in the course of her employment.

On March 17, 2009 appellant's representative requested reconsideration, arguing that appellant was performing a required safety check before entering the vehicle when she slipped and fell on January 22, 2008, which placed her in the performance of duty. He submitted copies of employing establishment policies and publications regarding safety checks and duties and responsibilities of rural carriers.

In a May 4, 2009 decision, the Office denied appellant's reconsideration request, finding that her contention had been previously addressed and the materials submitted were not relevant.

LEGAL PRECEDENT -- ISSUE 1

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might

befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.”² The phrase “while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.” 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 or her master’s business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.”³ In deciding whether an injury is covered by the Federal Employees’ Compensation Act,⁴ the test is 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.⁵

The Board has also recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place 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. Rather such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.⁶ Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts to each claim: (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; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or other reasons.⁷ The Office’s procedure manual further indicates:

“*Where the Employment Requires the Employee to Travel.* This situation will not occur in the case of an employee having a fixed place of employment unless on an errand or special mission. It usually involves an employee who performs all or most of the work away from the industrial premises, such as a chauffeur, truck

² 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

³ *George E. Franks*, 52 ECAB 474 (2001).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Mark Love*, 52 ECAB 490 (2001).

⁶ *See Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

⁷ *Melvin Silver*, 45 ECAB 677 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a)(1) (August 1992).

driver, or messenger. In cases of this type, the official superior should be requested to submit a supplemental statement fully describing the employee's assigned duties and showing how and in what manner the work required the employee to travel, whether on the highway or by public transportation. In injury cases a similar statement should be obtained from the injured employee."⁸

It is a well-established principle that where the employee as part of his or her job is required to bring along his or her own car, truck or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant did not sustain an injury in the performance of duty on January 22, 2008. As noted, where an employee is required to use his or her own vehicle as part of his or her job during the working day, the trip to and from work is by that fact alone embraced within the course of employment.¹⁰ Accordingly, an injury sustained while traveling to and from work may be within the performance of duty for that employee.¹¹ Because rural carriers may use their own transportation to deliver their routes, which is a benefit to the employer, they may be deemed to be in the performance of their duties when they are driving their vehicles to and from their route, when they are required by the employing establishment to provide their own transportation.¹² In this case, appellant stated that she would not know until she arrived at the employing establishment whether she would have to use her automobile or an employing establishment vehicle to deliver her route. She was not driving or inside her vehicle at the time of injury. Appellant sustained an ankle injury while walking from her house to her vehicle. Regardless of whether she used her private vehicle in the course of her employment, the act of leaving one's residence to get to work would remain the same and is an activity that all employees engage in. The extension of coverage to rural carriers would not apply until the point that she entered the vehicle to drive to work.¹³ Although appellant had previously entered her vehicle to warm it up, she left the vehicle to get "her belongings" and it was upon her return to the vehicle, that she slipped and fell, injuring her ankle. She had not reentered the vehicle and had not begun her drive to work. While appellant contends on appeal that the Office did not properly apply case precedent, the Board finds that appellant sustained her ankle injury in front of her residence prior to entering her vehicle. She did not sustain an injury in the performance of duty as she was not yet engaged in her master's business or otherwise fulfilling the duties of her employment or something incidental thereto.

⁸ Federal (FECA) Procedure Manual, *id.* at Chapter 2.804.6(b).

⁹ A. Larson, *The Law of Workers' Compensation* § 15.05 (2000); *J.E.*, 59 ECAB ____ (Docket No. 07-814, issued October 2, 2007).

¹⁰ *J.E.*, *id.*

¹¹ *Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001).

¹² *Supra* note 8.

¹³ *Kathryn A. Tuel-Gillem*, *supra* note 11.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁴ Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁶ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁰

ANALYSIS -- ISSUE 2

On reconsideration, counsel argued that appellant was performing a required safety check before entering the vehicle when she slipped and fell on January 22, 2008. Appellant had not previously raised this argument before the Office. It pertains to whether she was engaged in a matter incidental to her employment as a rural carrier. The Office noted in its July 15, 2008 decision that a rural carrier was required to maintain his or her vehicle in order to serve the route safely and efficiently. Appellant has advanced a relevant legal argument not previously considered by the Office, and is consequently entitled to a review of the merits of her claim based on the second above-noted requirements under section 10.606(b)(2).²¹

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.608(a).

¹⁶ *Id.* at § 10.608(b)(1) and (2).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *James E. Norris*, 52 ECAB 93 (2000).

¹⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

²⁰ *Vincent Holmes*, 53 ECAB 468 (2002).

²¹ 20 C.F.R. § 10.606(b)(2).

With respect to the third above-noted requirement under section 10.606(b)(2), with her reconsideration request, appellant submitted copies of employing establishment policies and publications regarding safety checks and rural carriers' duties and responsibilities. This evidence is relevant to the argument raised on reconsideration. As appellant advanced a relevant legal argument not previously considered and submitted relevant evidence in that regard, the Office improperly denied her request for further review of the merits. The case will be remanded to the Office to conduct further merit review. Following this and such other development as deemed necessary, the Office shall issue a merit decision on appellant's claim.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on January 22, 2008. The Board finds, however, that the Office erred in refusing to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 15, 2008 is affirmed. The decision dated May 4, 2009 is vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 5, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board