United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 13-1376**
	)	**Issued: February 11, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 20, 2013 appellant, through his attorney, filed a timely appeal from a February 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on February 12, 2010.

On appeal, counsel asserts that OWCP did not properly investigate appellant's claim when directed to do so by the Board. He notes that it was illogical to claim that appellant took a truck from the employing establishment's premises without permission as he would accrue no benefit from doing so. Also, neither appellant or Joe Scarpato, a coworker, who accompanied appellant to the off-premises garage on February 12, 2010, clocked out before leaving the

[1] 5 U.S.C. § 8101 *et seq.*

premises, indicating that they would return after completing the errand. Counsel noted that someone at the employing establishment clocked out Mr. Scarpato after the accident and that the supervisors had altered or tampered with appellant's claim form.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated March 12, 2012,[2] the Board set aside OWCP's November 10, 2010 decision denying appellant's claim for traumatic neck and back injuries sustained in a February 12, 2010 off-premises motor vehicle accident. A car driven by Mr. Scarpato struck the rear of appellant's vehicle while on the way to shop repair a plow attached to the truck appellant was driving. Appellant had been using the truck to plow the employing establishment's parking lot when it broke. He arranged to have it repaired off premises. OWCP found that appellant was not in the performance of duty at the time of the accident as he was not authorized to take the vehicle to an off-premises repair facility. The Board remanded the case to OWCP to attempt to obtain statements from Thomas Lafferty, a supervisor, and Mr. Scarpato regarding whether appellant was authorized to take the employing establishment's truck to an off-premises repair shop on the night of February 12, 2010. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

On remand, in a May 10, 2012 letter, OWCP requested that the employing establishment "provide clarification from Mr. Lafferty, Mr. Scarpato and/or any other individuals who may have relevant knowledge" regarding whether appellant "routinely performed errands off premises and, if so, whether he required permission to do so."

In response, Mr. Lafferty submitted a May 15, 2012 statement. He asserted that "[o]n February 12, 2010 [appellant] took the stake body truck without permission, nor was there any implied permission. Mr. Lafferty was directed by me personally not to take the [t]ruck, but he took it anyway without my permission."

By decision dated July 17, 2012, OWCP denied appellant's claim on the grounds that he was not in the performance of duty at the time of the February 12, 2010 motor vehicle accident. It found that Mr. Lafferty's May 15, 2012 statement established that appellant was off premises without permission. Therefore, the motor vehicle accident did not fall under the special errand exception to the "going and coming" rule, as the employing establishment did not expressly or impliedly agree "that the employment service should begin when the employee leaves home to perform the errand."

In a July 26, 2012 letter postmarked on July 27, 2012, counsel requested a hearing, held on November 28, 2012.[3] At the hearing, he contended that Mr. Lafferty and other employing establishment personnel made untruthful or evasive statements in an attempt to deny appellant compensation benefits. Counsel asserted that Robert Kinnerman, a supervisor, authorized appellant to take the truck to be repaired as it was needed for snow removal in an upcoming storm. He contended that Mr. Kinnerman approved appellant's suggestion that Mr. Scarpato

[2] Docket No. 11-751 (issued March 12, 2012).

[3] Counsel also submitted medical evidence.

accompany him. Counsel alleged that unknown persons clocked appellant out at 4:30 p.m. on February 12, 2010, although appellant left the premises before that time and intended to return. He noted that on appellant's initial claim form, Mr. Kinnerman checked a boxed indicating that the injury occurred in the performance of duty and that he agreed with appellant's version of events. Mr. Kinnerman then altered the form to reflect that appellant did not have authorization to take the truck. Counsel asserted that Mr. Scarpato refused to submit a statement as he was a casual employee and feared for his job if he contradicted his supervisors. The hearing representative noted the alterations on the claim form.

Following the hearing, appellant submitted January 3 and 4, 2013 statements alleging that employing establishment personnel intimidated Mr. Scarpato so that he would not file a statement. The hearing representative held the record open for 30 days to receive a statement from Mr. Scarpato but none was received.

By decision dated and finalized February 19, 2013, OWCP's hearing representative affirmed OWCP's July 17, 2012 decision denying appellant's claim on the grounds that the claimed injuries did not occur in the performance of duty. The hearing representative found that appellant was not in the performance of his job duties at the time of the accident as he was not authorized to take the vehicle off premises for repair.

LEGAL PRECEDENT

FECA provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase while in the performance of duty in FECA 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.[4]

In addressing this issue, the Board has generally held that, in the compensation field, to occur in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[5]

The Board has stated, 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 but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[6] Due primarily to the myriad factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of the travel may fairly be considered a

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

[5] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *Gabe Brooks*, 51 ECAB 184 (1999); *Robert F. Hart*, 36 ECAB 186, 191 (1984).

hazard of the employment. These recognized exceptions are dependent upon the particular facts and related to situations: (1) where the employment requires the employee to travel on the highways; (2) where the employing establishment 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 employing establishment.[7]

The Board has also recognized the special errand exception to the going to and coming from work rule. When the employee is to perform a special errand, the employing establishment is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the 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.[8]

ANALYSIS

The Board remanded the case to OWCP to attempt to obtain statements from individuals with relevant knowledge regarding whether appellant had permission to take the employing establishment's truck to the repair shop on February 12, 2010. On remand of the case, OWCP obtained Mr. Lafferty's May 15, 2012 statement asserting that on February 12, 2010, appellant took the truck off premises without express or implied permission, adding that Mr. Lafferty directed appellant not to take the truck. Appellant contended that his supervisors had intimidated Mr. Scarpato into silence. He did not submit a statement from Mr. Scarpato or evidence to support his allegation. In a February 19, 2013 decision, OWCP found that the February 12, 2010 accident did not occur in the performance of duty as appellant did not have permission to remove the truck from the employing establishment's premises.

The Board finds that Mr. Lafferty's May 15, 2012 statement is sufficient to establish that the February 12, 2010 motor vehicle accident in which appellant was injured did not occur in the performance of duty. The evidence of record establishes that Mr. Lafferty did not direct appellant to drive the truck to the repair shop. Mr. Lafferty clearly stated that appellant did not have express or implied permission to remove the truck from the employing establishment's premises. He added that he specifically instructed appellant not to take the truck. Mr. Lafferty's statement is similar to those submitted by Mr. Kinnerman and a Mr. Carmody previously of record. Under these circumstances, appellant was not engaged in his master's business or fulfilling the duties of his employment at the time of the accident.[9] Also, driving to the repair

[7] *Joan K. Phillips*, 54 ECAB 172 (2002); *see also Janet Rorrer*, 47 ECAB 764, 768 (1996).

[8] *J.H.*, Docket No. 10-185 (issued July 19, 2010); *Elmer L. Cooke*, 16 ECAB 163 (1964).

[9] *Supra* note 5.

shop does not fall under the special errand exception to the going and coming rule, as appellant was not using the highway to do something incidental to his employment approved by the employing establishment.[10] Therefore, OWCP's February 19, 2013 decision denying appellant's claim was proper under the law and facts of this case.

On appeal, counsel asserts that OWCP did not properly investigate appellant's claim that he had no reason for taking the truck without permission, that he and Mr. Scarpato intended to return after completing the errand and that the employing establishment tampered with his claim form. As stated, appellant did not submit any evidence to substantiate intimidation or other interference with his claim. The evidence does not indicate that he had permission to take the truck to the repair shop on February 12, 2010. Therefore, OWCP properly found that appellant was not in the performance of duty at the time of the accident.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on February 12, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2013 is affirmed.

Issued: February 11, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

[10] *Joan K. Phillips, supra* note 7.