

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. BURGESS and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

*Docket No. 97-2116; Submitted on the Record;
Issued November 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant established that she was injured in the performance of duty on January 4, 1993.

On March 21, 1996 appellant, then a 39-year-old modified router, filed a notice of traumatic injury and claim for compensation alleging that on January 4, 1993 she sustained multiple injuries when she was involved in an automobile accident on her way home from work.¹ The employing establishment indicated on appellant's CA-1 claim form, that appellant was off the clock for two and one-half hours when she was involved in the car accident, and that she was not required to use her car in her duties.

By letters dated February 28 and April 19, 1996, the employing establishment advised that, on January 4, 1993, appellant was working a temporary, limited-duty assignment as a router from 4:30 a.m. until 1:30 p.m., with a 30-minute lunch break. It was reiterated that appellant was not under contract to drive her vehicle in her job.²

¹ On August 10, 1988 appellant sustained an injury to her left hand and arm as a result of an automobile accident. The Office accepted appellant's claim for sprained right wrist, triangular fibrocartilage tear, lunar triquetra tear, and subsequent corrective surgeries. On July 14, 1993 appellant filed a claim for recurrence of disability alleging that the January 4, 1993 accident caused a recurrence of her earlier injuries. An Office hearing representative ruled that appellant was not in the performance of duty when the January 4, 1993 automobile accident occurred and, therefore, denied compensation.

² The employing establishment noted that appellant has not performed city carrier duties since 1988, but that even city carriers are responsible for getting to and from work. The employing establishment further alleged that appellant was not on a direct route home.

On April 26, 1996 the Office of Workers' Compensation Programs received a handwritten statement from Jerry Miller, an employing establishment official, who stated:

“At no time do I remember sending [appellant] to take or pick up clerks and do any business outside of the Randolph Station. Therefore she was in no way required to use her personal vehicle as a router. She would take a one-minute lunch so she could leave at eight hours and one minute for her own personal convenience.”

In an April 29, 1996 decision, the Office denied compensation on the grounds that the evidence of record failed to establish that appellant was injured on January 4, 1993 in the performance of duty.³

Appellant filed a request for reconsideration along with additional evidence on March 18, 1997.

In conjunction with her reconsideration request, appellant submitted additional evidence including several statements offered to refute Mr. Miller's statement.

Appellant submitted a February 14, 1997 letter signed by Charlie McDaniel, a customer service supervisor. Mr. McDaniel's letter did not address whether he was appellant's supervisor but he advised that appellant used her personal vehicle to transport clerks and to run errands on the job from April 1992 through January 4, 1993. He also advised that appellant was neither assigned to travel a particular route to and from work, nor was she required to take lunch breaks at any particular place during that same period.

Appellant submitted a February 27, 1997 letter from the employing establishment in response to her request under the Freedom of Information Act, which stated that employees in the “carrier craft” were generally scheduled for 30-minute lunch breaks, that any employee who altered his lunch schedule was expected to have supervisor approval and that appellant was not expected to take a certain route home from work.

Appellant further submitted a statement from a supervisor, Ken Penland, which stated that appellant used her personal car to run errands at Randolph Station.

In a March 6, 1997 letter, Alberta Summers, a coworker, similarly stated that during the month of April 1992 she was transported from Randolph Station back to the general mail facility by appellant in a red vehicle that did not appear to belong to the employing establishment.

In a decision dated April 24, 1997, the Office denied modification following a merit review of the case.

The Board finds that this case is not in posture for a decision.

³ The Office incorporated the March 13, 1996 decision from the Branch of Hearings and Review denying appellant's July 14, 1993 claim for recurrence of disability.

An employee seeking benefits under the Federal Employees' Compensation Act 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 of the Act, that an injury was 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. These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of an employee/employer relation. 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. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite 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 the 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 something incidental thereto."

The Board has also 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.⁴ 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.⁵

There are four categories of "off-premises" employees recognized by the Office in its procedure manual: "(1) Messengers, letter carriers and chauffeurs 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

⁴ *Melvin Silver*, 45 ECAB 677 (1992); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

⁵ *Melvin Silver*, *supra* note 5.

employment who are sent on errands or special missions by the employer; and (4) Workers who perform services at home for their employer.

In the present case, appellant was involved in an automobile accident that occurred off premises while she was commuting from work. Although appellant had fixed hours and place of work, she alleged that she was required on occasion in her job to use her vehicle to transport clerks from one post office to another and to run errands for the employing establishment. The employing establishment has denied that appellant by contract was required to drive as part of her duties. In support of its position, the employing establishment submitted a scribbled note dated February 27, 1996 from Mr. Miller, stating that he did not remember sending appellant to pick up clerks on that day. Appellant, however, submitted a written statements from two supervisors, Mr. McDaniel and Mr. Penland, who verified that appellant used her vehicle for various job-related reasons including transporting clerks from one postal station to another from April 1992 to January 4, 1993. Appellant also submitted a statement from Ms. Summers, who indicated that appellant transported her from Randolph Station, appellant's work station, to the general mail facility during the month of April 1992.

The Board finds that the Office has not adequately addressed whether appellant as part of her job was required to perform errands for the employing establishment, including the transportation of fellow postal workers from one facility to another. The Board finds that the Office improperly dismissed Mr. McDaniel's statements as not relevant because he did not specifically verify that appellant transported clerks on the day of the accident. It is a well-settled principle of worker's compensation law that where "an employee as part of his job is required to bring with him his own car, truck or motorcycle for use during his working day, the trip to and from work is by that alone embraced within the course of employment."⁶ Thus, if appellant was required to use her vehicle to run errands on behalf on the employing establishment, her travel to and from work on the day in question may be compensable.

The Board further notes that in the April 24, 1997 decision, the Office referenced testimony by appellant that she was not "on the clock" and was not transporting clerks at the time of the accident. The Board, however, is unable to review this testimony as the hearing transcript wherein the testimony was elicited is not of record.

This case is therefore remanded for further development and consideration of whether appellant was required to use her car in her job and whether her travel to and from her work is compensable. Because a deviation from a direct route home would take appellant out of the performance of duty, the Office must further determine whether appellant deviated from her route home to engage in a personal activity. If appellant deviated on her way home then she was not in the performance of duty when the accident occurred.⁷ Thus, after further development of the record as the Office deems necessary, the Office shall issue a *de novo* decision.

⁶ *Barbara Stamey*, 32 ECAB 1767 (1981).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(b) (August 1992); see *Thomas E. Keplinger*, 46 ECAB 699 (1995); *Godfrey L. Smith*, 44 ECAB 738 (1993).

The decision of the Office of Workers' Compensation Programs dated April 24, 1997 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
November 12, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member