U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JOSEPH C. GRZESIK and U.S. CUSTOMS SERVICE,
KENNEDY AIRPORT, Queens, NY

*Docket No. 03-1492; Submitted on the Record;*
*Issued February 5, 2004*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that he sustained injuries to his face, neck and his left arm while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied his request for an oral hearing on his claim by an Office hearing representative.

Appellant, a 34-year-old customs data technician, filed a claim for benefits on June 6, 2002, alleging that he was involved in an automobile accident on May 31, 2002 at 4:05 p.m. while in the performance of duty, resulting in injuries to his face, neck and his left arm.

In a handwritten statement accompanying the claim, appellant stated:

> "Having recollected that additional certified letters still needed to be mailed on that day, I was in the process of returning to my office to retrieve said letters when my vehicle was struck broadside by a work van traveling at an excessive speed. This accident occurred at an intersection … that was along my path of return and not an intersection that I have ever associated with my daily route home."

In a letter dated June 17, 2002, the employing establishment controverted the claim, contending that, on the day of the accident, appellant signed out at 4:30 p.m., then took nine certified letters to the mail facility, as evidenced by receipts found in his possession following the incident. The employing establishment asserted that it was highly unlikely that appellant would leave the office with nine certified letters, go to the mail facility, leave the facility and decide to return to his permanent duty station to retrieve additional certified letters.

The Office arranged a conference with William Hever, appellant's supervisor, to discuss the events of May 31, 2002. The memorandum of conference indicated that, when Mr. Hever was asked whether appellant would have been aware that he had left letters behind, he replied that when appellant called in sick on June 2, 2002, he mentioned that there were letters in his

desk that he had left behind, that needed to be delivered. He asserted that appellant had never claimed before May 31, 2002 that he had returned to work after signing out in order to complete a work assignment about which he had momentarily forgotten. Mr. Hever also stated that the site of the work accident was between appellant's duty station and his home.

The record contains a copy of the police report as well as three maps which outline the location of the May 31, 2002 accident. The police report was completed at 4:30 p.m.

By decision dated December 3, 2002, the Office denied the claim, finding that appellant's automobile accident and resulting injuries were not sustained while he was in the performance of duty. The Office found that appellant was on his way back to the office at the time of the accident after signing out of the worksite, to be not credible, especially in light of the fact that the accident occurred on a Friday afternoon. The Office also noted that appellant's description of the accident was at odds with that depicted in the police report, which, was consistent with the maps introduced into the record, indicated that appellant was headed northbound at the time of the accident, in a direction away from his worksite. The Office therefore found that the May 31, 2002 injury did not occur in the course of his employment.

In a letter received by the Office on January 7, 2003 and postmarked January 4, 2003, appellant requested an oral hearing.

In a decision dated February 24, 2003, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked January 4, 2003, which was more than 30 days after the issuance of the Office's December 3, 2002 decision and that appellant was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

The Board finds that appellant's injury on May 31, 2002 was not sustained while in the performance of his federal employment.

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. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.[1] Congress has provided for the payment of compensation for disability or death 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 prerequisite in workers' compensation law of "arising out of and in the course of employment."[2]

[1] *George A. Fenske*, 11 ECAB 471 (1960).

[2] *Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

"In the course of employment" deals with the work setting, the locale and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.[3]

In addition, as a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, 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.[4]

The Board notes that appellant's injury occurred, not during lunch or during a recreation period as a regular incident of his employment, but after duty hours had ended. The Board has recognized that an employee on travel status or a temporary-duty assignment or special mission for his employer is under the protection of the Federal Employees' Compensation Act 24 hours a day with respect to any injury that results from activities incidental to such duties.[5] When any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable.[6] An employee whose work entails travel away from the employer's premises is held to be within the course of his or her employment continuously during the trip or special mission -- except when a distinct departure for a personal pursuit is shown. It is the Office's burden to show that such a deviation occurred.[7]

Appellant and his supervisor submitted statements indicating that appellant was authorized to leave his duty station, prior to the end of his tour of duty, at 4:30 p.m., in order to take certified mail to the airport mail facility, which is located on the airport premises. The Board notes that there is some conflicting evidence in the record regarding when appellant actually signed out of work on the date of injury, May 31, 2002. While appellant's supervisor, Mr. Hever, asserted that appellant signed out at 4:30 p.m., appellant contended that he signed out at 4:05 p.m. and that since Mr. Hever customarily signs out at 3:00 p.m., he would have no way of knowing when appellant actually left the premises on the day in question. Further, the May 31, 2002 police report was completed at 4:30 p.m., which would have made it impossible for appellant to sign out at work at 4:30 p.m. Nevertheless, regardless of the exact time of day

[3] *See Carmen B. Gutierrez (Neville R. Baugh),* 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

[4] *Randi H. Goldin,* 47 ECAB 708 (1996).

[5] *Richard Michael Landry*, 39 ECAB 232, 236 (1987).

[6] *See Larson, The Law of Workers' Compensation* § 27.04 (December 2000).

[7] *Michael J Koll, Jr.,* 37 ECAB 340 (1986). In the present case, the Office met its burden by properly evaluating and analyzing the facts of the record.

when the injury actually took place, the totality of the circumstances in this case indicates that appellant was not engaged in the duties of his employment with the employing establishment or in activities which may be characterized as reasonably incidental to the conditions of his employment on May 31, 2002. Appellant's supervisor indicated that there was no record of appellant ever having completed his work shift, delivering the letters to the mail facility, leaving the facility, then returning to deliver more mail, as he claimed to have been doing on May 31, 2002; appellant submitted no evidence to contradict this assertion. The risk giving rise to the injury in this case, therefore, does not involve appellant's employment or conditions reasonably incidental thereto. It was understood by both the employing establishment and appellant that, once he made this last delivery, he was on his way home and his work assignment had ended. In addition, the police report and the maps submitted into evidence indicate that appellant was driving in a direction towards his home at the time of the accident, after having made the delivery. The Office therefore reasonably concluded that, at the time of his accident, appellant was not fulfilling the duties of his employment, but was on his way home after having completed his work assignment.

As a general rule, an off-premises injury sustained by an employee having fixed hours and place of work, while the employee is coming to or going from the employer's premises, is not compensable because the injury does not arise out of and in the course of employment, but out of ordinary nonemployment hazards of the journey itself, which are shared by all travelers.[8] Certain exceptions to this rule have, of course, developed, where the hazards of the travel may fairly be considered dependent upon the particular facts and related to situations: "(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 call 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."[9]

The Board finds that appellant's injuries did not arise out of and in the course of his employment. In this case, the evidence, based on appellant's statement and the police report, shows that appellant had signed out shortly before 4:30 p.m. and performed his final work-related Friday afternoon errand -- mailing letters at the mail facility -- before heading home, in accordance with custom. The police report and accompanying maps indicate that appellant was headed in a northern direction, toward his home, at the time of his accident. Therefore, his trip from the mail facility toward his home on May 31, 2002 would, therefore, be governed by the general rules for off-premises injuries. Thus, the condition claimed by appellant did not occur within the performance of duty inasmuch as it occurred off-premises on the way home from work. Further, appellant has not satisfied the exceptions to the off-premises rule. There is no evidence of record that the employing establishment required appellant to travel on the highways, that the employing establishment contracted to and furnished transportation to appellant, that appellant was subject to emergency calls and that appellant was performing

[8] *Mary Margaret Grant*, 47 ECAB 696 (1997); *Betty R. Rutherford*, 40 ECAB 496, 499; *Robert F. Hart*, 36 ECAB 186, 191 (1984); *see generally* 1 A. *Larson, The Law of Workers' Compensation* §§ 15.00, 15.11, at 4-3 (1990) (explaining the "coming and going" rule).

[9] *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479 (1947).

something incidental to his employment which required use of the highway, with the knowledge and approval of the employer.

The Board notes that Larson's treatise on workers' compensation law suggests, "employment should be deemed to include travel when the travel itself is a substantial part of the service performed."[10] Appellant has failed to submit evidence that his travel constituted a substantial part of his employment duties. There is no evidence that travel to and from work was a substantial part of the services performed by appellant for the employing establishment.

In the instant case, the employee was not engaged in a temporary-duty assignment or special mission for his employer and as such was not under the protection of the Act while engaged in activities essential to or reasonably incidental to his mission. There is no evidence that appellant's May 31, 2002 injury resulted from activities incidental to his employment, as a review of the statements and colored maps in the record, neither of which are in dispute, indicate that appellant was on his way home. Thus, his accident occurred after duty hours, at a time when he was not actually engaged in an activity having a relationship to his official business.

As none of the requirements for bringing injuries occurring within the course of employment have been met, the injuries appellant sustained from his May 31, 2002 automobile accident must be found to have occurred while appellant was not in the course of his employment duties. Consequently, the injuries that appellant sustained on May 31, 2002 were not causally related to the incidents of his employment.

Whether a particular case is or is not within the scope of the Act depends upon the general test of whether the particular risk may be said to be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed.[11] The Board finds that, under the circumstances of this case, appellant was not engaged "in the course of his employment" at the time of his injury on May 31, 2002 and, therefore, his face, neck and left arm injuries were not sustained while in the performance of duty.

The Board finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office final decision.[12] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[13] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a

[10] Larson, *The Law of Workers' Compensation* § 16.31 (1990).

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

[12] 5 U.S.C. § 8124 (b)(1).

[13] 20 C.F.R. § 10.131 (a)(b).

[14] *William E. Seare*, 47 ECAB 663 (1996).

case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

In the present case, because appellant's January 4, 2003 request for a hearing was postmarked more than 30 days after the Office's December 3, 2002 decision, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.[16]

The February 24, 2003 and December 3, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 5, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[15] *Id.*

[16] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).