United States Department of Labor
Employees' Compensation Appeals Board

JOHN J. PRATTI, Appellant	)	
	)	**Docket No. 03-520**
and	)	**Issued: June 9, 2004**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Arsheem Honor, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 20, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 1, 2002 which denied his claim that he sustained an injury in the performance of duty on March 8, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant was injured while in the performance of duty on March 8, 2002.

FACTUAL HISTORY

On April 28, 2002 appellant, then a 43-year-old dispatcher, filed a claim for compensation, alleging multiple injuries sustained on March 8, 2002 when his motor vehicle collided with a tractor trailer during his morning commute to work. Appellant stopped work on March 8, 2002.

Medical records dating from March 19 to 27, 2002 indicate that appellant was treated for multiple fractures due to a motor vehicle accident. Appellant was diagnosed with a right pneumothorax, eight rib fractures, right scapula fracture, right humerus fracture, left clavicle fracture, right acetabulum, fracture of the spinous process at T5-6 and anemia. A physician, whose signature is illegible, noted that appellant suffered a number of significant injuries from a car accident and would be disabled for six months from the date of the accident.

In a statement dated May 14, 2002, Larry Brown, appellant's supervisor, indicated that he disagreed that appellant sustained an injury while in the performance of duty. He noted that appellant was not on the clock at the time of the injury as he was commuting from his home in Brooklyn to work. Mr. Brown stated that appellant's injury did not occur on the employing establishment property and the third party in the accident was not a postal employee.

In a June 8, 2002 letter, the Office advised appellant that the information submitted in support of his claim was insufficient to establish that he sustained an injury while in the performance of duty. Appellant was requested to submit additional information in support of his claim for compensation. The Office also requested that appellant submit a medical report in support of his claim.

Appellant submitted a police report which detailed the automobile accident of March 8, 2002. Appellant advised that he was half way between his home and the employing establishment (approximately six miles) when the accident occurred. In time and attendance documents, appellant's tour of duty began at 3:00 a.m. Appellant advised that his shift was from 3:00 a.m. to 11:30 a.m. at the Madison Square Station. He noted that the automobile accident occurred five miles from the employing establishment and he was driving from his home and took his usual route to work. His union representative noted that as a dispatcher appellant was required to begin his tour of duty at 3:00 a.m. in order to open the bay area door. The union representative advised that appellant's original tour was from 3:45 a.m. to 12:15 p.m. but that management authorized his change of tour to 3:00 a.m. Appellant had been working in dispatcher position, beginning his tour at 3:00 a.m., for over a two-year period prior to the accident. The union representative further noted that appellant's accident while traveling to work on a changed schedule was at the specific request of management and should be viewed as in the performance of duty.

On May 28, 2002 the employing establishment controverted the claim on the grounds that appellant was driving to work when the accident took place and he was neither on the clock nor on employing establishment property when the accident occurred. It was noted that the third party involved in the accident was not associated with the employing establishment. Although appellant stated that his accident was due to a change in his work shift, his tour of duty had been changed for approximately one year prior to the accident due to the needs at the employing establishment. On June 12, 2002 Mr. Brown advised that appellant's duty station was the Madison Square Station and his tour of duty was from 3:00 a.m. to 11:30 a.m. He indicated that the accident occurred eight miles from the employing establishment while appellant was driving to work. Mr. Brown noted that he had no knowledge of appellant's routes of travel and that appellant used his personal vehicle to drive to work.

In an October 1, 2002 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty.

LEGAL PRECEDENT

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 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 the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[2]

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relation.[3] 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 prerequisite in workers' compensation law of "rising out of and in the course of employment."[4] 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 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 doing something incidental thereto."[5]

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

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[1] 5 U.S.C. § 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

[3] *Bruce A. Henderson*, 39 ECAB 692 (1988); *Minnie M. Huebner*, 2 ECAB 20 (1948).

[4] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[5] *Melvin Silver*, 45 ECAB 677 (1994); *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58, 59 (1954).

travelers.[6] 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.[7]

ANALYSIS

The record establishes that appellant's injury occurred approximately six to eight miles off the premises of the employing establishment on a public street while he was driving to work and, therefore, did not occur in the performance of duty. The evidence of record establishes that, at the time of injury, appellant had fixed hours and place of work and that his injury occurred at 2:40 a.m., prior to the start of his tour-of-duty hours at 3:00 a.m. during his morning commute to work. Unless appellant can show that he was on the actual industrial premises, the constructive premises of the employer or engaged in activities incidental to his employment, he cannot be considered within the protection of the Act.[8]

In *Robert A. Hoban*,[9] an employee sustained injury when he fell on an icy street while walking to work and fractured his left wrist. The Board found that nothing in the facts of the case brought the claim within any of the recognized exceptions to the general going to and coming from rule and affirmed the denial of the claim.[10] Similarly, appellant has not demonstrated that any of the above exceptions to the general going to and coming from rule apply to his case. The facts in evidence do not establish that appellant was required by his employer to travel on the highways, that his employer contracted for or furnished transportation to and from work as appellant was driving his own automobile, or that his use of the highway was in conjunction with any incident of his employment and with the knowledge and approval of his employer. Nor does the record demonstrate that appellant was responding to an emergency call at the time of injury.

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[6] *Eileen R. Gibbons*, 52 ECAB 209 (2001); *Mary Kokich*, 52 ECAB 239 (2001); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[7] *Gabe Brooks*, 51 ECAB 184 (1999); *Robert A. Hoban*, 6 ECAB 773 (1954) citing *Cardillo v. Liberty Mutual Ins. Co*., 330 U.S. 469, 479.

[8] *See Edith F. Bolet*, 6 ECAB 245 (1953).

[9] *Robert A. Hoban*, *supra* note 8.

[10] *See, e.g., Virginia Bernice Mitchell*, 32 ECAB 1437 (1981) (a noncompensable injury sustained when the employee was assaulted while on her way to work); *Anne R. Rebeck*, 32 ECAB 315 (1980) (a noncompensable injury when the employee tripped over a cobblestone sidewalk adjacent to the employing establishment premises); *Gloria C. Adalian*, 26 ECAB 131 (1974) (a noncompensable fall on a sidewalk immediately adjacent to the federal building in which the employee worked); *Harriett Williams (Harrison O. Williams*), 20 ECAB 327 (1969) (the death of the employee due to an automobile accident while driving to work found noncompensable); *Esther S. Freeman*, 12 ECAB 39 (1961) (a noncompensable injury on a public thoroughfare while on the way to work); *Rowena R. Davis*, 8 ECAB 226 (1955) (a noncompensable injury sustained while stepping down from a street car while en route to work); *Isidor S. Handelsman*, 7 ECAB 99 (1954) (a noncompensable injury sustained while crossing a street while on the way to work).

The Board has noted that, closely allied to the off-premises exceptions, is the so-called "proximity" rule which case stands for the proposition that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may therefore be considered as hazards of the employment.[11] In the present case, however, the evidence is clearly distinguishable as appellant was commuting on the public streets while proceeding from his home to his place of employment. He was in an automobile accident and sustained multiple injuries when he collided with a tractor trailer approximately six to eight miles from the premises of the employing establishment. The proximity rule does not apply to this case as the hazard causing injury was clearly a hazard common to all travelers on the street.

The next determination required by the facts of this case, is whether the "special errand" exception to the going to and coming from rule is applicable. This exception was described by the Board in *Elmer L. Cooke*,[12] as follows:

> "It is a general rule that injuries to an employee while traveling between his home and a fixed place of employment are not in the course of employment and therefore are not compensable. However, exceptions to the rule have been developed over the years. An exception is made for travel from home when the employee is to perform a "special errand": in such a situation the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform a special 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."

The evidence of record does not establish that appellant was engaged on any special errand when he left his home to commute to his place of employment. There is no evidence which would establish that appellant's journey to work on the date of injury was an integral part of any errand or special task either expressly or impliedly agreed to by his employer. Rather, his travel that date appears to conform to his regular work schedule and his normal morning commute in going to the office. The evidence of record, including appellant's own statement clearly establishes that, at the time of injury, appellant had fixed hours of work, from 3:00 a.m. to 11:30 a.m., and that his injury occurred during his morning commute to work at 2:40 a.m. approximately six to eight miles from the premises of the employing establishment. Appellant's

[11] *See Sallie B. Wynecoff*, 39 ECAB 186 (1987); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[12] 16 ECAB 163 (1964).

supervisor stated on June 12, 2002 that appellant's duty station was the Madison Square Station and his tour of duty was from 3:00 a.m. to 11:30 a.m. Mr. Brown advised that the accident occurred eight miles from the employing establishment while appellant was driving to work.

Appellant asserts that since his hours of duty were changed from a starting time of 3:45 a.m. to 3:00 a.m. by the employing establishment, and that he was required to arrive at work at 3:00 a.m., therefore his injury should be considered within the performance of duty. However, the Board finds this argument without merit. As Professor Larson[13] explains:

> "The course of employment is not confined to the actual manipulation of the tools of the work, nor to the exact hours of work. On the other hand, while admittedly the employment is the cause of the workman's journey between his home and the factory, it is generally taken for granted that workmen's compensation was not intended to protect him against all the perils of that journey. Between these two extremes, a compromise on the subject of going to and from work has been arrived at, largely by case law, with a surprising degree of unanimity."[14]

Because appellant's injury occurred off the premises while he was going to work before working hours, and because the record fails to support the application of an exception to the off-premises rule, the Board must conclude that appellant's journey between his home and office did not arise "in the course of the employment." As appellant has not established that he sustained an injury in the performance of duty, the medical record need not be addressed.

CONCLUSION

The Board finds that appellant was not injured while in the performance of duty on March 8, 2002.

[13] Larson, *The Law of Workers' Compensation* § 13.01, *see also Michael K. Gallagher*, 48 ECAB 610 (1997).

[14] *Id*. § 15.11; *see also Linda D. Williams*, 52 ECAB 300 (2001), *see Michael K. Gallagher, id.*

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member