United States Department of Labor
Employees Compensation Appeals Board

J.E., Appellant	)	
and	)	**Docket No. 07-814**
	)	**Issued: October 2, 2007**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Warwick, RI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 5, 2007 appellant filed a timely appeal of the decisions of the Office of Workers' Compensation Programs dated February 23, June 14 and September 22, 2006 and January 10, 2007 denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on January 6, 2006; and (2) whether the Office properly denied appellant's requests for subpoenas and other discovery.

FACTUAL HISTORY

On January 10, 2006 appellant, then a 39-year-old internal revenue agent, filed a traumatic injury claim alleging that on January 6, 2006, while driving home from work, his car was hit from behind as he slowed to stop for a red light. As a result of this accident, he sustained

neck and back injuries. Appellant submitted a copy of the police report related to the automobile accident. By letter dated February 10, 2006, the employing establishment controverted his claim, contending that the injury occurred off its premises at a time when appellant was not engaged in official duties. According to appellant's manager, appellant was not in a travel status and was working at the office on that date. The employing establishment noted that appellant's job description stated that the performance of his duties might require travel and the operation of a motor vehicle, but it was not mandatory that appellant bring his own automobile for use during the workday.

By decision dated February 23, 2006, the Office denied appellant's claim because he had not established that the injury was sustained in the performance of duty.

On March 6, 2006 appellant requested an oral hearing. By letter dated April 5, 2006, he requested that the Office issue subpoenas and require that various supervisors and revenue agents at his post-of-duty station respond to certain questions.[1] By decision dated June 14, 2006, the hearing representative denied appellant's request for the issuance of subpoenas for records and other documents. She noted that on May 16, 2006 her office sent appellant a copy of the record. The hearing representative further noted that she was not able to compel any other discovery actions, such as directing the employing establishment to answer interrogatories or provide affidavits.

During a telephonic hearing held on July 10, 2006, appellant described his post-of-duty station, indicating that it was a stopping point where he would pick up cases and internal documents and where he had a telephone line with voice mail. He also noted that it was where he submitted his cases and picked up his mail. Appellant worked at that location about 10 percent of the time. He stated that, as a field revenue agent, he spent most of his time on independent investigations in the field. Appellant noted that, when he was not working in the field he was allowed to work at an alternative site or at home. He did not have to report to the post-of-duty station on any particular day but did have to account for his time. On the date of the accident, he had worked the whole day at the post-of-duty station. He noted that, although he was at the station the whole day, he could have, at his discretion, left for government business. Appellant stated that his commuting expenses for business trips to and from his post-of-duty station were reimbursed. He further indicated that he would be reimbursed for expenses driving from his home to an alternate work site and back. Appellant was not reimbursed for trips between his post-of-duty station and his home. He noted that there was no legal requirement that he use his own vehicle; however, public transportation was not a viable option for his job because he had to transport a computer and physical files belonging to taxpayers. Appellant noted that there was no bus stop near his post-of-duty station and that there were no routes stopping at "a lot of the relevant … areas." He also called Mike Bastow, his union representative, as a witness. Mr. Bastow noted that there were no government owned or leased vehicles provided to any revenue agents in appellant's office and, for about the last 15 to 20 years, all revenue agents in Rhode Island used their privately owned vehicles in the course of

[1] Appellant requested that the Office subpoena all documents in his official file as well as any e-mail correspondence and notes of telephone conversations between the employing establishment and the Office with regard to this claim.

their day-to-day work. He noted that the employing establishment did not have any leased government vehicles.

In a letter dated July 10, 2006, Mr. Bastow restated that, during the previous 15 to 20 years, the employing establishment expected that the revenue agents provide their own transportation to and from work assignments as it was not conducive to use public transportation. He also noted that it was the policy of the employing establishment that agents spend 70 percent or more of their time out of the post-of-duty workstation on assignments and that, even when an agent was in the office for an entire day, he might be called upon to report to the field to serve summons or perform other outside duties.

Appellant also submitted copies of e-mails indicating that he informed the employing establishment on March 6, 2006 that his personal vehicle would no longer be available for official duties and that, if an alternative method of transportation was not made available, he would cancel all appointments for the rest of the week and drive only to the duty station. In a reply dated March 7, 2007, his supervisor stated:

> "I realize that the [government] cannot make you use your [personal vehicle]. If you do not use your [personal vehicle], how will you get your job done?? Please let me know how you plan to do your job. Because you have refused to use your [personal vehicle], your job performance may be impacted."

Appellant submitted a position description indicating that an internal revenue agent spent the majority of his time in the field. It noted that office time was spent ordering new returns, conducting preaudit analysis, scheduling new appointments, researching, consulting with group managers or audit specialists and preparing administrative reports.

On March 5, 2006 appellant sent an e-mail to several of his colleagues asking them to respond to various questions concerning their work as field revenue agents and transportation for their jobs. Approximately 14 agents responded. The agents agreed that they did not have access to a government vehicle and were expected to get to appointments using their personal vehicles. Several noted that public transportation was not a viable alternative because it did not go to the places they needed to be and that it would be very difficult to utilize public transportation lugging their computers. They also noted that public transportation was not reasonable due to New England winters, the fact that appointments often changed without notice, the bus schedules and security issues. They agreed that using their personal vehicle was a requirement of the job.

On August 4, 2006 the employing establishment, through the group manager, submitted its response to the hearing representative. It noted that appellant had a cubicle within the post-of-duty station, that he has a desk, computer hookup/monitor and telephone. He also had access to the group manager and the group secretary. Appellant spent his entire workday on January 6, 2006, the date of his accident, at his post-of-duty station and, at the time of the accident, he had completed his work and was on his way home. The manager noted that appellant spent an average of 33 percent of his time from January 2005 through June 2006 at his post of duty and 37 percent of his time in the field. The manager noted that revenue agents were not reimbursed for their commuting expenses to and from the post of duty unless a work-related stop was made

either before arriving or after leaving the post of duty. He stated that revenue agents in Rhode Island used their privately-owned vehicles in the course of their duty and day-to-day work.

By decision dated September 22, 2006, the hearing representative affirmed the February 23, 2006 decision.

By letter dated October 4, 2006, appellant requested reconsideration. He argued that the hearing representative erroneously interpreted the law when he found that appellant had fixed hours and a fixed workplace. Appellant also submitted a letter dated July 20, 2006 from the employing establishment's Washington, D.C., office indicating that there were no government vehicles assigned to appellant's post-of-duty station.

By decision dated January 10, 2007, the Office denied modification of its September 22, 2006 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees, Compensation Act[2] 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; that an injury was sustained while 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

The Act provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] 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 the issue, the Board has stated that for an incident 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 employment or engaged in doing something incidental thereto.[6]

---

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See Irene St. John*, 50 ECAB 521(1999); *Michael E. Smith*, 50 ECAB 31 (1999); *Elaine Pendleton, supra* note 3.

[5] 5 U.S.C. §8102(a).

[6] *George E. Franks*, 52 ECAB 490 (2001).

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.[7] 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.[8] 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 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."[9]

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."[10]

ANALYSIS

The evidence establishes an exception to the general going and coming rule applicable to most employees with fixed hours and place of employment as appellant was required to use his personal vehicle for work in the field. The Board has noted that for coverage to arise, the injury must take place while the employee is in the motor vehicle driving to or coming from work. In *Gabe Brooks*[11] the employee was an IRS agent whose "work was generally conducted out in the

---

[7] *See P.S.*, 57 ECAB ___ (Docket No. 06-114, February 8, 2006); *Gabe Brooks*, 51 ECAB 184 (1999).

[8] *Melvin Silver*, 45 ECAB 677 (1994); *Estelle M. Kasprazak*, 27 ECAB 339 (1976); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a)(1) (August 1992).

[9] *Id.* at Chapter 2.804.6(b).

[10] A. Larson, *The Law of Workers' Compensation* § 15.05 (2000); *Ronda J. Zabala*, 36 ECAB 166 (1984).

[11] 51 ECAB 184 (1999).

field." He was injured in an automobile accident after finishing work for the day. The Board found that "persons whose work requires them to be in a travel status as 'off premises workers' and accordingly determines claims involving such workers under different principles…." The Board recognized, "'An off premises worker' injured between work and home is generally provided protection under the Act." The Office and the Board each noted that the IRS revenue agent there was an "off premises employee" and would have been considered to be in the course of his employment were not for a deviation on his way home.

In *Barbara Stamey* (*Ray C. Stamey*)[12] the employee, a Department of Agriculture extension service agent, was killed in an automobile accident while driving his own car. The employee there was required to use his own car to conduct business. While the Board there found that the employee had deviated from his normal route, it recognized the "well-settled principle of workers' compensation law that where 'the 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.'"

The Board finds that, based on the limited facts of this case, appellant is entitled to coverage under the Act as his employment required him to travel on the highways. The record demonstrates that appellant spent approximately 30 percent of his time at the post-of-duty office where he would pick-up and drop-off cases and documents. He stated that he spent his other work time in the field meeting taxpayers. Appellant spent about 30 percent of his work time at the post-of-duty office and was in the field a greater period of time. Appellant needed to use the vehicle to keep appointments in diverse areas that were not accessible by public transportation. Mr. Bastow noted that there were no government motor vehicles provided for use by any revenue agent and, for approximately 15 to 20 years, revenue agents customarily used their private motor vehicles for work. On March 6, 2006 appellant informed his supervisors that he would no longer make his personal motor vehicle available and, if other methods of transportation were not found, he would have to cancel certain appointments. In a March 7, 2006 response, his supervisor acknowledged that appellant could not be compelled to use his personal vehicle in his work; however, she noted that his job performance could be impacted by his refusal to do so. Although appellant did work at the post-of-duty station for the entire day of the accident, his car was necessary in case he was called away for other business. The evidence indicates that, although the employing establishment may not have contracted with appellant to provide the vehicle, the testimony of appellant and his union representative and the responses to questions by appellant's colleagues indicate that a personal vehicle was essential for the performance of his job. The evidence establishes that appellant used the highways to do work incidental to his employment with the knowledge and approval of his employer. The evidence clearly establishes that the use of his personal vehicle was a necessary requirement of his job. Thus, contrary to the Office's findings, the Board finds that appellant's use of his personal vehicle was not at his discretion.

Accordingly, because appellant in this case needed his vehicle to get to his appointments and perform his duties which was a requirement of his job as well as being a benefit to the employing establishment, the Board finds that he was in the performance of his duties when he

[12] 32 ECAB 1767 (1981).

was driving his vehicle to and from his employment. Therefore, although there is a presumption that employees with fixed hours and places of work are not entitled to coverage for commuting in the case of employees furnishing their own conveyance, coverage is extended when the employee is in the vehicle and driving to and from work because he is required to take his vehicle to perform his regularly assigned duties. Appellant has established that the injury occurred in the performance of duty. The case must be remanded to the Office for development of the medical evidence.

CONCLUSION

The Board finds that appellant was in the performance of duty at the time of the January 6, 2006 accident. The Board further finds that this case is not in posture for a decision as the Office did not address whether appellant submitted sufficient medical evidence to establish that he sustained an injury in the performance of duty.[13]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 10, 2007 and September 22, June 14 and February 23, 2006 are vacated and the case is remanded for further consideration consistent with this opinion.

Issued: October 2, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[13] In light of the Board's disposition of the first issue, the second issue is moot.