U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM ROBIDOUX and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, N.Y.

Docket No. 97-165; Submitted on the Record;
Issued December 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that the injuries he sustained on February 16, 1995 occurred in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On February 16, 1995 appellant, then a 40-year-old letter carrier, filed a claim for compensation alleging that he sustained injuries to his lower back while walking to the parking lot. On the reverse side of the claim form, appellant's supervisor noted that appellant was not in the performance of duty as he was walking to his private vehicle to get something (a telephone book) that was not required for his job.

In response to a March 23, 1995 letter, appellant stated that he had a drive-out contract (authorization to use his personal vehicle to deliver mail), but was not asked to use his vehicle that day. Appellant stated that he should be considered in the performance of duty as he had to get items from his car that were left behind in expectation of having to use his vehicle for official business. Appellant further stated that, if he had been asked to use his vehicle, he would have had to cross the same area to get his vehicle to load the mail, and that every carrier that has a drive-out contract has to go to his or her personal vehicle whether it is to load their vehicle or to retrieve personal effects.

The employing establishment submitted additional information to indicate that personnel are provided with lockers for storage of personal effects, that appellant did not request permission of his supervisor to leave the establishing employment, that appellant was injured on his way to the employee parking lot -- not the designated delivery parking area where vehicles used for drive outs are parked, and, lastly, that appellant's statement falsified the facts as appellant did not have a drive-out contract as of February 1, 1995 -- appellant had informed his supervisor that he was no longer willing to use his own vehicle for such purpose as he had just bought a new Lincoln.

In a July 27, 1995 decision, the Office denied appellant's claim for compensation on the grounds that his injury did not occur while he was in the performance of duty. The Office found that as appellant himself canceled the drive-out agreement, he had no justifiable expectations that he would be utilizing his vehicle on a drive-out contract. The Office further found that appellant's action of leaving work to retrieve items from his vehicle did not qualify as an authorized break or an activity incidental to employment. The Office concluded that the incident was related to a personal activity unrelated to his work and, therefore, took appellant's conduct outside the scope of employment.

By letter dated January 30, 1996, appellant requested reconsideration. Within his reconsideration request, appellant referred to the information he sent the Office on August 23, 1995.

In an August 23, 1995 statement, appellant raised objections to the July 27, 1995 decision. Appellant stated that as of the date of the injury his drive-out contract had not been canceled but was still in effect because he had not yet put his request to be removed from the drive-out list in writing. He additionally added that he was not going to his vehicle for personal articles when he fell, but was getting items required by his letter carrier duties, *i.e.*, hat, scarf, gloves and boots. Appellant argued that use of the lockers would have been "poor time management for someone who uses his vehicle as often as I did to leave his bag in his or her locker." A payment record for carrier drive-out agreement was submitted.

Also submitted with the August 23, 1995 statement were statements from coworkers pertaining to the habits of drive-out agreement letter carriers. Statements pertaining to a poor drainage problem at the site where appellant fell were submitted. And statements which aver that appellant fell "not in the employee parking lot but on the sidewalk where the Postal Vehicles are parked" were submitted.

Physical therapy notes and physical therapy return to work statements were also provided.

By decision dated April 30, 1996, the Office stated that it reviewed appellant's claim on the merits and found that the evidence provided was insufficient to warrant modification of the July 27, 1995 decision.

By letter dated June 5, 1996, appellant requested a hearing before an Office hearing representative.

By decision dated July 18, 1996, the Office denied appellant's request for a hearing stating that because appellant had already requested reconsideration, he was not entitled as a matter of right to a review of the record on the same issue and he could submit additional evidence germane to the issue of whether he sustained an injury in the performance of duty to the Office.

The Board finds that appellant has established that an incident occurred on February 16, 1995 in the performance of duty.

The Act provides for payment of compensation for personal injuries sustained while in the performance of duty.[1] The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[2] "Arising in the course of employment" relates to time, place and work activity: To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3] As to this phrase, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours, or at lunch time, are compensable.[4] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in incidental acts, and is based on the circumstances of the employee's activity.[5]

This alone is not sufficient to establish entitlement to compensation. The employee must establish the concurrent requirement of an injury "arising out of the employment." "Arising out of employment" requires that a factor of employment caused the injury.[6] It is incumbent upon appellant to establish that it arose out of his employment; that is, the accident must be shown to have resulted from some risk incidental to the employment. In other words, some contributing or causal employment factor must be established.

In the present case, appellant fell on postal property while going to his personal vehicle also on postal property. At the time of his fall, appellant was going to retrieve personal effects from his vehicle. The evidence establishes that appellant was at a place he would be expected to be in connection with his employment, walking to his personal vehicle while on postal property, and thus the incident occurred at a place where appellant was reasonably expected to be as a result of his employment.

Further, appellant was engaged in an activity which may be characterized as reasonably incidental to the conditions of his employment. Although appellant's activity of retrieving personal effects from his personal vehicle, which appellant alleges was required by his letter carrier duties (*i.e.*, hat, scarf, gloves and boots), was not required by the employing

[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

[4] *See Narbik A. Karamian*, 40 ECAB 617 (1989).

[5] *See id.*

[6] *Dwight D. Henderson*, 46 ECAB 441 (1995).

establishment, the Board finds that it can be characterized as an activity reasonably incidental to his employment. Appellant's action of attempting to retrieve items from his vehicle was connected to the work he was employed to perform because, although appellant no longer engaged in the drive-out contract at the date of the injury, it is reasonable that appellant might leave his bag in his car as opposed to using the lockers which management provided. Therefore, appellant was engaged in an action incidental to the duties of his employment. Appellant has met his burden of proof to establish that he was in the performance of duty on February 16, 1995 at the time of the incident.

The decisions of the Office of Workers' Compensation Programs dated July 18 and April 30, 1996 are hereby set aside and the case remanded to the Office for further development and a *de novo* decision as to whether the February 16, 1995 employment incident caused any employment-related disability or impairment.[7]

Dated, Washington, D.C.
December 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[7] In light of the fact that the Board is remanding the case for further development, the Board need not address the second issue in this case, *i.e.*, whether the Office properly denied appellant's request for a hearing.