U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES J. CHIODO and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Brooklyn, N.Y.

Docket No. 96-1901; Submitted on the Record;
Issued May 19, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded the acceptance of appellant's claim.

On May 12, 1995 appellant, then a 56-year-old postal distributor, filed a claim alleging that at 11:10 p.m., on May 8, 1995, he was assaulted by a mugger "while crossing Stanley Avenue," causing injuries to his head, right knee, hand and ribcage and mental depression. His supervisor indicated that appellant was on his way to work and was not on employing establishment property nor on any official "off-premises" duty when the incident happened. Appellant stopped work on May 8, 1995, and did not return, retiring on October 1, 1995. On June 26, 1995 the Office informed appellant of the type of information needed to support his claim, and by decision dated August 17, 1995 denied the claim on the grounds that fact of injury was not established. The Office found that the incident was established as alleged but that appellant failed to submit medical evidence to demonstrate that he was injured therefrom. Appellant subsequently submitted an emergency room report dated May 9, 1995.[1] By decision dated September 8, 1995, the Office vacated the August 17, 1995 decision and accepted that appellant sustained an employment-related contusion to the right ribs and abrasions of the right hand and knee.

By letter dated January 25, 1996, the employing establishment informed the Office that appellant had not been in the performance of duty at the time of the May 8, 1995 injury as he was injured on a public street while on the way to work, and enclosed a map showing the location of the assault on appellant. By decision dated January 31, 1996, the Office rescinded acceptance of appellant's claim on the grounds that he was not in the performance of duty as the injury occurred on a public street and happened 20 minutes before his tour of duty began. The

[1] Dr. V. Patel diagnosed contusion to the right ribs and abrasion to the right hand and knee. Chest and rib x-rays were normal.

Office noted that he was not in a protected category that would warrant special coverage under the Federal Employees' Compensation Act.

On February 5, 1996 appellant requested reconsideration, arguing that, because he was waiting for an ambulance, he had not been "on the clock." In a February 15, 1996 decision, the Office denied appellant's request, finding that his argument did not address the issue of whether he had been in the performance of duty at the time of the assault. On April 11, 1996 appellant again requested reconsideration, arguing that the incident and the red tape involved in pursuing his claim caused a nervous breakdown. He further argued that the employing establishment knew the area was unsafe and should have provided patrols. He submitted medical evidence.[2] By decision dated May 13, 1996, the Office denied appellant's request, finding the evidence submitted irrelevant and immaterial to whether he sustained an injury in the performance of duty. The instant appeal follows.

The Board finds that the Office properly rescinded the acceptance of appellant's claim.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted the claim. To justify rescission of a claim, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument or rationale.[3]

The Act[4] provides for payment of compensation for disability or death or an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase "while in the performance of duty" has been construed by the Board as consistent with the phrase "arising out of and in the course of employment" commonly found in workers' compensation.[6] "In the course of employment" deals essentially with the work setting, the locale, and the time of the injury, whereas "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement that an employment factor caused the injury.[7]

[2] This included certification that he had been treated at the Brookdale Hospital Medical Center emergency room on May 9 and September 1, 1995 and had been admitted there from September 2 to 6, 1995. He also provided certification that he had been an inpatient in the Brooklyn Veterans Administration Medical Center from October 27 to November 21, 1995.

[3] *Curtis Hall*, 45 ECAB 316 (1994).

[4] 5 U.S.C. § 8101 *et seq.*

[5] *Id.* at § 8102(a).

[6] *See Bernard Redmond*, 45 ECAB 298 (1994).

[7] 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 the master's business, at a place where he may reasonably be expected to be in connection with the employment and while the employee was reasonably fulfilling the duties of employment or engaged in doing something incidental thereto. *Id.*; *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

In the instant case, after the Office accepted appellant's claim, the employing establishment provided specific details regarding the May 8, 1995 incident, including a map, that showed that appellant was mugged on a public street before reporting for duty. The Office then rescinded the claim, finding that appellant's injury was not sustained in the performance of duty.

As a general rule, off-premises injuries sustained by an employee having fixed hours and a fixed 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 but out of ordinary nonemployment hazards of the journey itself which are shared by all travelers. While employment is the cause of an employee's journey between home and work, it is generally taken for granted that workers' compensation is not intended to protect against all perils of that journey.[8] There are recognized exceptions which are dependent upon the particular facts relative to each claim, but none is present in this case.[9] Furthermore, the facts in this case indicate that at the time of the assault, appellant was proceeding to his place of employment. There is no indication that work contributed to or facilitated the assault. The Board, therefore, finds that appellant was not in the performance of duty at the time of the assault, and the Office's rescission of appellant's claim was proper.[10]

The decisions of the Office of Workers' Compensation Programs dated May 13, February 15 and January 31, 1996 are hereby affirmed.

Dated, Washington, D.C.
May 19, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[8] *See Melvin Silver*, 45 ECAB 677 (1994).

[9] 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 fireman; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer. *Robert A. Hoban*, 6 ECAB 773 (1954) citing *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 479.

[10] *Id.*