

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KURT A. HICKMAN and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Oreg.

*Docket No. 97-1042; Submitted on the Record;
Issued January 5, 1999*

DECISION and ORDER

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

The issue is whether appellant sustained an injury in the performance of duty, as alleged.

On February 5, 1996 appellant, then a 44-year-old letter carrier, filed a claim for a traumatic injury, Form CA-1, alleging that he broke his hip and injured his wrist on his way to work. Appellant explained that on February 5, 1996 he telephoned his supervisor, Tom Gibson, to tell him that it was too icy for him to go into work as he could not get his car out of the driveway. Mr. Gibson stated that he would go to appellant's house and pick him up. Appellant told Mr. Gibson that he (Mr. Gibson) would not be able to make it up the hill and he would meet him at the intersection of Hart and "185th." When Mr. Gibson arrived, appellant stated that he could hear the sound of spinning tires. Appellant, who wears an orthopedic boot to protect his foot against ulcers and performs light-duty work, began to walk down to Mr. Gibson's truck. He stated it was very dark, the street lights were still on, and Mr. Gibson had turned around and apparently was trying to reach appellant "pointing east." Appellant stated that he slipped, fell and slid 10 to 15 feet and was probably about 20 feet from Mr. Gibson's truck when he came to a stop. Appellant stated that on the last snow storm he had asked a coworker who had a truck to take him to work and the coworker assisted him in walking to his truck. Appellant stated that Mr. Gibson knew that he wore an orthopedic boot. In his undated statement received by the Office of Workers' Compensation Programs on February 22, 1996, Mr. Gibson stated that in response to appellant's request for help to go to work, he offered to pick him up.

By letter dated February 20, 1996, the employing establishment controverted the claim, stating that it agreed that appellant fractured his right hip as a result of a fall on the ice on February 5, 1996 but it did not believe that the injury occurred while appellant was in the performance of duty.

By decision dated March 18, 1996, the Office denied the claim, stating that the evidence in the record did not establish that the injury occurred in the performance of duty.

By letter dated March 26, 1996, appellant requested an oral hearing before an Office hearing representative which was held on September 24, 1996. At the hearing, appellant's representative described the circumstances of the February 5, 1996 employment injury. He stated that appellant could not have taken leave that day unless his supervisor gave his discretionary approval; otherwise, he would have been absent without leave. Appellant stated that, when he talked to Mr. Gibson on February 5, 1996, he knew he would not be granted leave. He stated that he felt "obligated" to go to work and felt that he had received an implied order to go to work.

By decision dated December 3, 1996, the Office hearing representative affirmed the Office's March 18, 1996 decision.

In the present case, appellant was injured off the premises while commuting to work. 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 travelers. There are recognized exceptions which are dependent upon the particular facts relative to each claim. These pertain to the following instances: (1) where the employer 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.¹

Appellant has not demonstrated that any of the above exceptions to the general going to and coming from rule apply as he was not required to travel as a requisite of his employment; he was not using transportation supplied by the employing establishment in his commute to and from work; he was not subject to emergency calls; and he was not engaged in an activity incidental to his employment at the time of the accident. In particular, the employing establishment had not contracted or had any informal agreement to furnish appellant transportation to and from work in bad weather. Rather, his supervisor agreed on the particular day of the accident to provide appellant with transportation as a courtesy due to the bad road conditions. Larson's treatise indicates that the contractual exception to the premises rule covers the direct furnishing of transportation by the employer in buses, trucks, or other conveyances controlled and operated by the employer, and that these conveyances can be considered as an extension of the premises, carrying with them the risks of the employment.² Larson suggests, however, that it would "be undesirable to start the dangerous and unending game of fixing a 'reasonable distance' to which protection is extended."³ Thus, a conveyance as the truck in this case might be regarded as an extension of the premises. However, since appellant had not yet reached the premises when he was injured, he was not injured in the course of employment.

¹ *Marthell T. Adams*, 49 ECAB ____ (Docket No. 96-1140, issued March 16, 1998); *Melvin Silver*, 45 ECAB 677, 681 (1994).

² A. Larson, *The Law of Workers' Compensation* § 17.10; see *Marthell T. Adams*, *supra* note 1.

³ Larson, *supra* note 2 at §§ 15.11, 15.12(a), 17.40, p. 4-77.

Further, the fact that appellant felt “obligated” or that he had an “implicit order” to report to work does not bring his February 5, 1996 injury within coverage of the Federal Employees’ Compensation Act.⁴ Moreover, the “proximity rule” whereby, 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 employment, is not applicable as appellant was commuting on public streets and was not near his workplace.⁵

Since none of the exceptions to the going to and coming from work rule applies, appellant has not established that his February 5, 1996 hip injury arose in the course of his employment.

The decisions of the Office of Workers’ Compensation Programs dated December 3 and September 24, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 5, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ 5 U.S.C. §§ 8101-8193; *see Stuart K. Stanton*, 40 ECAB 859, 864 (1989); *Robert F. Hart*, 36 ECAB 186, 191-92 (1984).

⁵ *See Melvin Silver*, *supra* note 1 at 680; *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923).