U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GABE BROOKS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Laguna Niguel, CA

Docket No. 98-1022; Submitted on the Record;
Issued November 30, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on June 30, 1993.

On June 30, 1993 appellant, then a 43-year-old revenue agent, filed a notice of traumatic injury for a motor vehicle accident, in which he incurred injuries to his back and neck. The accident occurred off premises and after duty hours.

In a July 1, 1993 report, Dr. Todd Krombein, a chiropractor, noted a history of the June 30, 1993 motor vehicle accident, diagnosed sprains/strains of the cervical, thoracic and lumbosacral areas and stated that treatment consisted of chiropractic adjustments to correct "vertebral misalignments." A July 1, 1993 x-ray analysis indicated a diagnosis of subluxation at C1-2, L4-5 and L5-S1.

By letter dated January 22, 1997, an Office of Workers' Compensation Programs' representative wrote:

> "Revenue Agents (RA) are required to supply their own transportation for field work and commuting to and from work. There has never been any requirements to take any work home after the regular tour of duty. RAs are supposed to stop at the office (the morning of the day they will be out in the field) to pick up their cases for that day. It was not required that the RAs take their cases for the following day's field work home the evening prior. The decision to do this was at the discretion of the RA; and was done for the sake of convenience only. When [appellant] left the office on June 30, 1993, he was on his regular commute home according to [Kathy] Petronchak [appellant's former manager]."

A copy of appellant's calendar reflected that appellant was working in the office all day on June 30, 1993 and was scheduled to be in the office all day on July 1, 1993.

In a January 13, 1997 statement, appellant stated that his manager, Ms. Petronchak, had ordered him to close the case he was working on within a week. He stated that this put pressure on him to do a great deal of work at home or in the library. On June 29, 1993 the day before the accident, appellant indicated that he learned that the case he was working on involved a novel tax issue. He stated that it was his intention on June 30, 1993, the day of the accident, to go to the law library before his law class to research the novel tax issue. Because of the accident, he was not able to go to the library before his law class as intended. Copies of his schedule written on the calendar and evidence that Ms. Petronchak instructed appellant to finish the assignment were provided.

By decision dated February 13, 1997, the Office denied appellant's claim finding that fact of injury was not established.

Appellant requested a hearing and testified as to the general nature of his job and the events on June 30, 1993. At the hearing, appellant testified that RAs spend most of their time out in the field, but they have standard hours. Appellant testified that his general hours were from 8:00 a.m. to 5:30 p.m. and that he worked an alternative work schedule. Appellant stated that on June 30, 1993 he came into work at the employing establishment about 8:20 a.m. and worked there all day. He stated that he left the office at about 6:00 p.m. and was going to do some research at the law library prior to attending his class. Appellant stated that although the employing establishment had research facilities, they did not have adequate research information to address the novel issue he was working on. Appellant stated that it was common practice for agents to use the law library. When asked whether his employer was aware that appellant was using time after his official workday to research these issues, appellant stated that "that [i]s a difficult issue and the reason being is that, yes, you were expected to get work done, period. If you need to use extra time, fine. Officially, you [a]re off, but everybody knows." On the day of the accident, appellant stated that he left work about 6:00 p.m. and the accident happened at 6:20 p.m.

In an October 23, 1997 statement, appellant asserted that his trip to the law library to research a tax issue, was "reasonably incidental" to his duties as an RA and, therefore, he should be covered under the Federal Employees' Compensation Act as he was on a trip for his employer. Appellant further argued that he was not a "fixed premises" employee by the nature of his job description and he should be covered for injuries occurring off premises. He argued that he should not be considered a fixed premises employee merely because he performed work in the office on the date of the accident.

By decision dated November 18, 1997, an Office hearing representative affirmed the denial of benefits but modified the reason. The hearing representative found that appellant was not a "fixed premises" employee, although he was performing work at the employing establishment on the date in question. The hearing representative noted that the injury occurred after appellant's tour of duty ended, and not during his commute home. As appellant was not directed by his employer to perform additional legal research after hours appellant's injury, which was sustained while he was traveling to Santa Ana, was not sustained in the performance of duty. The hearing representative denied appellant's claim for compensation on the grounds that appellant's claimed injury was not sustained in the performance of duty.

An employee seeking benefits under the Act 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."[1] 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 any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting in personal injury sustained while in the performance of duty. 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 this issue, the Board has stated the following:

> "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 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 her employment or engaged in doing something incidental thereto."[3]

The Board has stated as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of in and the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[4] Exceptions to this general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[5] or which are in the nature of necessary personal comfort or ministration.

In *Estelle M. Kasprzak*,[6] the Board enumerated four recognized exceptions to the general going and coming rule which it characterized as the "off-premises" exceptions. The Board

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[1] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[2] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[3] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[4] *Alvina B. Piller (Robert D. Piller)*, 7 ECAB 444 (1955); *Anne R. Rebeck*, 32 ECAB 315 (1980).

[5] *Lillie J. Wiley*, 6 ECAB 500 (1954); *Mary Chiapperini*, 7 ECAB 959 (1955).

[6] 27 ECAB 399 (1976).

stated that these exceptions are related to situations: (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. The Office generally classifies persons whose work requires them to be in a travel status as "off-premises workers"[7] and accordingly determines claims involving such workers under different principles than employees having a fixed time and place of work.[8] There are four categories of "off-premises" employees recognized by the Office in its procedure manual: "(1) Messengers, letter carriers and chauffeurs who, by the nature of their work, perform service away from the employer's premises; (2) Traveling auditors and inspectors whose work requires them to be in a travel status; (3) Workers having a fixed place of employment who are sent on errands or special missions by the employer; and (4) Workers who perform services at home for their employer.[9]

The Office hearing representative properly found that appellant was an "off-premises worker" as there was no dispute but that appellant's work was generally conducted "out in the field" and was not performed on a daily basis at the employing establishment. Appellant's work in the field as an RA was in the nature of a traveling auditor or inspector whose work required that he generally be in travel status and that he provide transportation to perform his work duties.

An "off premise worker" injured while enroute between work and home is generally provided protection under the Act.[10] In this case, appellant had completed his workday and was traveling at the time of injury. Appellant was not traveling home, however, but allegedly to the law library, prior to his law school class. It is well established that "an identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviations so small as to be disregarded as insubstantial."[11] It must first be determined therefore whether appellant deviated from his trip home for "personal reasons" when he traveled to Santa Ana. In determining a business or personal purpose, the Board must look to whether the errand furthers the employer's business.

Appellant has argued that he should be considered to have been in the performance of duty at the time he was injured as he was on his way to the law library to investigate a work-related tax issue. In his testimony, appellant surmised that his employer was generally aware that employees worked beyond their formal hours. However, the mere knowledge of the practice by appellant's supervisor is not sufficient to make an informal office practice an activity that is incidental to employment. This alone does not establish that appellant was acting under the

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992); *see also Godfrey L. Smith*, 44 ECAB 738 (1993).

[8] *See generally id.* at Chapter 2.804.5(b) and (c) (August 1992).

[9] *Supra* note 7.

[10] *Supra* note 7 at Chapter 2.804.6.

[11] A. Larson, *The Law of Workers' Compensation* § 19.00.

direction of his employer at the time he was injured. There is no evidence that the employer had any awareness of appellant's plan to research a tax issue after work hours.

Appellant has stated that he left work at 6:00 p.m. Rather than traveling home to Corona in Riverside County, he was traveling to Santa Ana to attend a law class held at the Santa Ana Courthouse, through the auspices of the Western State University College of Law. Appellant stated that had the accident not occurred in Santa Ana at "6:20 p.m.," he would have had 30 minutes to perform tax law research for work at the Orange County Law Library, which was a short walk from his law class at the courthouse.

The Board finds that the evidence of record is conflicting and is not persuasive that appellant was traveling to the law library to perform business-related research at the time of the accident. The Board notes appellant's supervisor's statement that he was not expected to perform work after his tour of duty ended for the day. The Board also notes that the most contemporaneous evidence of record including appellant's statement to Dr. Krombein on July 1, 1993 and the deposition testimony of Jackson Thanh Luu taken on April 25, 1994 indicate that the accident occurred at 6:45 p.m., not at 6:20 p.m. Not until appellant filed his CA-1 on June 28, 1996 is there any allegation of record that the accident occurred at 6:20 p.m., which would have allowed appellant approximately 30 minutes to perform tax law research at the law library prior to his law school class. The evidence of record on its face does not establish that appellant was traveling to Santa Ana for business-related tax research, but rather suggests that he was traveling to Santa Ana to attend his night school law class.

Considering all the circumstances and evidence in this case, the Board finds that appellant was an "off-premises employee" with a fixed place of employment and that his motor vehicle accident on June 30, 1993 occurred during a personal deviation while coming from work, which is not compensable as it did not arise in the performance of duty.

The November 18 and February 13, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 30, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member