U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE E. BANKS and U.S. POSTAL SERVICE,
NORTH END STATION, Colorado Springs, CO

Docket No. 01-96; Submitted on the Record;
Issued July 19, 2001

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 on May 6, 1999.

On May 7, 1999 appellant, then a 44-year-old city carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that on May 6, 1999, he was in a motor vehicle accident and as a result thereof suffered from cervical strain and cephalgia.

By memorandum from a manager dated May 25, 1999, the employing establishment controverted this claim. He indicated that at the time of the accident, appellant was finishing his lunch break at a location that was not authorized by management. The manager noted that appellant's authorized lunch location was a Burger King on Fillmore Street. He further noted that appellant stated that he took his lunch break at 1:30 p.m., but that his authorized lunch break period was from 12:00 p.m. to 12:30 p.m. The employing establishment submitted a copy of a Form 1564-A, which noted that appellant's authorized lunch location was Burger King and that his authorized lunch period was from 12:00 p.m. to 12:30 p.m. The employing establishment also submitted a copy of a page from their handbook, which stated, in relevant part, "Do not deviate from your route for meals or other purposes unless authorized by your manager or if local policies concerning handling out of sequence mail permit minor deviations."

By letter dated June 3, 1999, appellant responded by stating that, at the time of the accident at 1:55 p.m., he had finished his lunch and was on his way back to deliver mail. He noted that he ate his lunch at a stop that he had been eating at "on and off for the past [three] years." With regard to the form which the employing establishment alleged designated his lunch place as Burger King, he stated that he chose three lunch stops, but that there was only one listed for his route and that the form had not been updated in three years.

The employing establishment submitted a May 3, 1999 memorandum to "All North End Carriers" which indicated that they expected the employees to adhere to their authorized lunch and break locations that are listed on the Form 1564A. The employing establishment stated that

this memorandum was distributed at a safety session held on May 5, 1999, the day before appellant's accident.

Appellant submitted a statement dated June 16, 1999, alleging that his supervisor knew that he took his lunch when he finished his business on the route and that he was never told that he could not eat lunch at that time. He further noted that he did not remember a stand-up/safety talk in which he was instructed to adhere to lunch and break locations listed on the Form 1564-A.

Appellant submitted various documents, including a map of his delivery route, police reports of the accident and a copy of a document from the employing establishment, which offers support for his allegation that he left work to deliver his mail at 11:06 a.m. on the date of the accident.

By decision dated October 28, 1999, the Office of Workers' Compensation Programs denied appellant's claim as it found that appellant had not established that he sustained an injury in the performance of duty. The Office determined that appellant had deviated from his normal course of employment when the injury occurred.

Appellant filed a timely request for an oral hearing, which was held on May 2, 2000. At the hearing, appellant testified that, on the day of the accident, he got to work at 7:00 a.m. in the morning, that it took him longer than usual to sort his mail and he did not leave for his postal route until 11:30 a.m. Appellant finished most of his route and decided to take lunch. The motor vehicle accident occurred around 1:55 p.m. or 2:00 p.m. He stated that the A & W restaurant where he ate lunch was about one-half mile from his route and that the A & W and Burger King restaurants were equidistant from his route. Appellant estimated that he ate at the A & W restaurant about four to five times a month and at Burger King about three or four times a year. He noted that he also ate at McDonalds, Taco Bell, Subway and Arbys. Appellant stated that he knew of a form that said where he could eat lunch, but that he had never been asked where he would eat and that he was not aware that he was supposed to eat at Burger King. He noted that after the accident, the postal form was updated and he was allowed to eat at the A & W restaurant. Appellant stated:

> "[I]t has been past practice at our station that as long as the employees went anywhere that was reasonable, nothing has been pushed about going by our 1564A's at all. And still to this day, a year later everyone in the station, the 1564's have not been updated and everyone else is still going more or less wherever they want to eat."

He alleged that the time he was assigned to eat lunch was never enforced. He noted that the employing establishment had previously sent out a memorandum which indicated that they wanted all businesses delivered by noon, or as soon as possible after noon, because they did not want all the competition they had from other delivery services. On examination by the hearing representative, appellant noted that he did not fill out the Form 1564A, that a manager saw him 3 or 4 times eating at a place other that Burger King, that at the time of the accident, he probably had 10 to 15 minutes of businesses left on his route. Finally, he noted that he did not remember a talk about adhering to assigned lunch times and places.

By letter dated May 26, 2000, the employing establishment responded to appellant's allegations, contending that appellant was not in the performance of duty at the time of the accident. On June 26, 2000 appellant filed a response, wherein he noted at the time of the accident, he had terminated his lunch break and had resumed his work activities. Appellant contended that neither Burger King nor A & W restaurant were located on his actual route and submitted a map in support thereof. He noted that for him to drive from his last delivery to the A & W restaurant would have taken approximately two minutes and did not take substantially more time than if he had gone to the Burger King restaurant. Appellant also submitted a copy of a note dated September 17, 1999, indicating that appellant was now approved for lunch at various restaurants, including A & W. Appellant submitted statements from nine coworkers who indicated that they did not recall having a stand-up meeting concerning restrictions on lunch breaks.

By decision dated July 10, 2000, the hearing representative affirmed the October 28, 1999 decision of the Office. The hearing representative found that appellant's injury was not sustained in the performance of duty.

The Board finds that appellant was not in the performance of duty at the time of his May 6, 1999 injury.

An employee seeking benefits under the Federal Employees' Compensation 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 timely 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. These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with 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 from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of an in the course of employment." In addressing this issue the Board has stated:

> "In the compensation field, to occur in the course of employment in general, an injury must occur: (1) at the time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in something incidental thereto."

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.

In the present case, the evidence of record establishes the traffic accident involving appellant, a letter carrier, occurred on May 6, 1999 at 1:55 p.m. and that appellant sustained an injury as a result. At the time of the accident, appellant was returning to his route after eating lunch at an A & W restaurant. Appellant alleges that the accident occurred at a time when he was seeking personal comfort and, therefore, the deviation from his route was insubstantial and his injury occurred in the performance of duty.

In *James E. Johnson*,[1] the Board stated:

> "An employee who is on a trip for his employer is under the protection of the Act while engaging in activities essential to or reasonably incidental to these special activities. However, when he deviates from the activities incidental to his employment, he ceases to be within the protection of the Act and an injury occurring during such deviation is not compensable. An identifiable deviation from a business trip for personal reasons takes the employee out of his employment until he returns to the route of the business trip unless the deviation is so insubstantial that it may be disregarded.[2]

In *Johnson*, the employee mentioned extenuating circumstances for seeking an unauthorized lunch stop, these being a Christmas collection route and unfamiliarity with the route itself. The Board upheld the denial of compensation noting that the employee's journey took him more than two and one-half miles from his assigned postal route in search of a familiar restaurant and, at time of the injury, he had not resumed his journey to his directed location or engaged in any activity reasonably incidental to his employment mission.

In *Juan Antonio Bonilla*,[3] the employee left his assigned postal route to journey to a familiar restaurant at the time of the injury and was not engaged in any activity reasonably incidental to his employment. The Board found his journey constituted a personal mission and that his injury was sustained under such circumstances as to not be compensable.[4]

In the instant case, the employing establishment established appellant's authorized lunch stop at the Burger King restaurant. Rather than eating his lunch at Burger King, appellant deviated from his route and ate at an A & W restaurant, which was not an approved lunch spot.

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[1] 35 ECAB 695 (1984).

[2] *Id.* at 699.

[3] 37 ECAB 598 (1986).

[4] *Id.* at 602.

This case is similar to both *Johnson* and *Bonilla* in that appellant deviated from his accepted postal route, which removed him from being in the performance of duty at the time of the accident. Whether the employing establishment subsequently approved the A & W restaurant as an approved lunch stop is immaterial to the issue in this case. Because appellant was engaged in a deviation from his authorized route, his injury did not occur in the performance of duty.

The July 10, 2000 and October 28, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member