

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS L. FORSGREN (claiming as widower of LINDA N. FORSGREN) and
U.S. POSTAL SERVICE, POST OFFICE, Whitewater, CO

*Docket No. 00-765; Submitted on the Record;
Issued October 19, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the employee's death on July 11, 1996 was sustained in the performance of duty.

On July 11, 1996 the employee, a part-time postal clerk, died from multiple trauma after a one-car accident. She was traveling from her job at the Palisade post office, where she had recently started working, to the Whitewater, Colorado, post office where she had worked for 17 years. The accident occurred at 2:14 p.m. and the employee's death occurred at 3:17 p.m. On July 22, 1996 the employee's husband filed a claim for death benefits.

By decision dated October 18, 1996, the Office of Workers' Compensation Programs denied appellant's claim.

By letter dated November 6, 1996, appellant requested an oral hearing that was held on December 9, 1997.

By decision dated February 12, 1998, the Office hearing representative affirmed the Office's October 18, 1996 decision.

By letters dated February 8 and September 1, 1999, appellant requested reconsideration and submitted additional evidence. By decisions dated May 21 and October 26, 1999, the Office denied modification of its February 12, 1998 decision.

In a memorandum dated July 16, 1996, the employing establishment stated that on July 11, 1996 the employee had worked at the Whitewater post office from 7:30 to 9:45 a.m.

She then proceeded to the Palisade post office¹ where she was picking up additional hours. The employee generally worked at the Palisade post office from 11:00 a.m. to 1:45 p.m. and was receiving IRT debit card² training for approximately 45 minutes of that time. The remaining two hours were charged as normal work hours. She was due to report to the Whitewater post office at 2:30 p.m.³ to cover for the postmaster. The memorandum noted that the employee died following a one-car accident and the state police listed the apparent cause of the accident as “asleep at the wheel.” The employing establishment noted that the employee was not on the clock or in official travel status at the time of the accident.

In a letter dated September 6, 1996, the employing establishment noted that the employee died on July 11, 1996 as a result of a motor vehicle accident while she was driving her private vehicle to her job at the Whitewater post office. The employee was hired in January 1979 to work at the Whitewater post office as a part-time flexible clerk to substitute for the only full-time employee, the postmaster. She was hired to work an eight-hour shift on Saturday, the postmaster’s day off and to substitute for the postmaster on other occasions when needed. In order to obtain more hours of employment, the employee worked, when needed and when she was available, at the Palisade post office beginning in June 1996. Two different time cards were kept for her employment, one for each post office. The employee was not paid for travel time, mileage, or for the use of her personal vehicle to travel to or from the Palisade post office when work was available for her there. She was not hired with the stipulation that her work hours or shift would be split between the two post offices. On Thursday, July 11, 1996 the date of the accident, the employee worked at the Whitewater post office from 7:30 to 9:45 a.m. She then clocked off and went to the Palisade post office where she worked from 11:00 a.m. to 1:45 p.m. The employee clocked off and was traveling to the Whitewater post office when the accident occurred at 2:14 p.m. She had agreed to clock in and cover for the Whitewater postmaster from 2:30 to 5:00 p.m. The employee was also scheduled to work July 12 through 16, 1996 as the postmaster was taking annual leave.

In a letter dated October 4, 1996, appellant alleged that the employee had been directed to report to the Palisade post office by the postmaster for additional training and to work mail. He stated that it was common for the Postal Service to “loan” a part-time employee to different post offices. Appellant stated that the employee had volunteered to work at the Palisade post office because help was needed there and she wished to work additional hours. He alleged that the employee traveled to the Palisade post office at the direction of and for the benefit of, the Postal Service. Appellant enclosed a copy of a portion of the union agreement, which stated that postal management had the exclusive right to direct employees in the performance of their duties and

¹ She began working at the Palisade post office on June 8, 1996. Her employment at the Whitewater post office began in January 1979.

² The employing establishment noted that the Whitewater post office did not have an IRT debit card system.

³ In a September 6, 1996 memorandum, the employing establishment indicated that appellant was scheduled to work from 2:30 to 5:00 p.m. that day.

alleged that the employee could have been fired for insubordination if she refused to go to the Palisade post office. Appellant enclosed a portion of the Postal Service's Employee and Labor Relations Manual dated May 1, 1989, which states:

“438 Pay During Travel or Training

“438.1 Pay During Travel

“438.11 Definitions

“438.111 Travel time is time spent by an employee moving from one location to another during which no productive work is performed and excluding the normal meal time if it occurs during the period of travel.

“438.112 Local Commuting Area is the suburban area immediately surrounding the employee's official duty station and within a radius of 50 miles.

“438.12 Commuting to and from Work

“438.121 Commuting time before or after the regular workday between an employee's home and official duty station, or any other location within the local commuting area, is a normal incident of employment and is not compensable. It is not compensable regardless of whether the employee works at the same location all day or commutes home after the workday from a location different from the one where the workday started.

“438.122 Commuting time to and from work also is not compensable when an employee is called back to work after the completion of the regular workday. However, such commuting time is compensable if the employee is called back to work at a location other than his or her regular work site.”

“438.123 When an employee is employed to work on a permanent basis at more than one location in the same service day, the time spent commuting between the locations is not compensable travel time, provided there is a break in duty status between the work performed in the different locations. A break in duty status occurs when an employee is completely relieved from duty for a period of at least 1 hour that may be used for the employee's own purposes. This 1 hour or greater period must be in addition to the actual time spent in travel and the normal meal period, if the normal meal period occurs during the time interval between the work at the different locations. (See 438.132 for travel time between job locations when there is no break in duty status.)

“438.13 Types of Compensable Travel Time

“438.131 *General.* The determination of whether travel time is compensable or not depends upon (1) the kind of travel involved, (2) when the travel takes place;

and (3) the eligibility of the employee.... The three situations that may involve compensable travel time are described below.

“438.132 *Travel from Job Site to Job Site.* The following applies:

a: *Rule.* Time spent at any time during a service day by an eligible employee in travel from one job site to another without a break in duty status within a local commuting area is compensable. (See 438.123 which makes the travel time noncompensable as commuting time when there is a break in duty status between the work performed in different locations.)

b: *Eligibility.* This type of travel is compensable for all employees during their established hours of service on a scheduled workday. At all other times, this type of travel is compensable only for employees who are entitled to receive overtime pay.”

* * *

“438.15 Compensation Provisions

“438.151 Compensable travel time is counted as worktime for pay purposes and is included in hours worked in excess of 8 hours in a day, 40 hours in a week, or on a nonscheduled day for a full-time employee , for the determination of overtime for eligible employees.” (Emphasis in the original.)

Appellant also submitted a November 2, 1983 document titled “Local Travel Procedures” from a postal service Director of Finance in support of his position that the employee should have been in pay status at the time of her accident. This document was based on the postal service Time and Attendance Handbook and the Travel Manual and stated:

“Local Travel is any travel where overnight lodging is not required or the employee is not entitled to *per diem* (not away from his home for more than [10] hours). An employee within commute distance (50 miles) *does not* travel on-the-clock when told to report directly from home to another duty station and to return home when through working. The employee is, however, entitled to mileage....

“If an employee reports to work at his home office and is told to then report to another work location, the employee travels on-the-clock and mileage is computed as the distance between the two work locations. (Except for when a break in service of more than one hour where the time can be used for the employee’s own purposes. This one hour or greater period must be in addition to the actual time spent in travel and the normal meal period.)

“When an employee is told to report directly to an office outside the commute area, he receives actual mileage with no normal commute deduction and drives on-the-clock (employees who earn overtime are paid for travel time even outside their normal schedule).”

* * *

“Local Postmasters are authorized to pay LOCAL TRAVEL when the cost is less than \$100.00 Local travel may be paid either by the home duty station or the temporary duty station.

“Please read the attachments as the references go into greater detail on procedures. I have attempted to simplify and condense the information from the two manuals.” (Emphasis in the original. The attachments to which he referred are not of record.)

Appellant submitted a page from the Employee and Labor Relations Manual, section 444.22 (1989), which stated that “actual work” was defined as “all time which management suffers or permits an employee to work” and included steward’s duty time, travel time, meeting time and training time.

Appellant submitted copies of letters regarding grievances filed by two employees concerning travel between two locations. In a letter dated August 14, 1985, the postal service and the union agreed that the grievant would be compensated for travel between two locations under section 260.153⁴ of the Time and Attendance Manual because the grievant had not been relieved from duty for a period of at least one hour, not including travel time. In a letter dated January 5, 1989, the postal service and the union agreed that a part-time flexible employee should not be required to end her tour and then report to another station to continue working without being compensated as provided for in section 438.132 of the Employee and Labor Relations Manual.

At the hearing held on December 9, 1997, appellant’s representative argued that the employee was in the performance of duty at the time of the July 11, 1996 motor vehicle accident because she was loaned to the Palisade post office by the Whitewater post office and because she was required to travel to the Palisade post office when she was needed to work there. He argued that appellant should have been on compensable travel status at the time of the accident. The representative alleged that the employee was told to report to the Palisade post office after working at the Whitewater post office in the morning and was traveling back to Whitewater when the accident occurred and that any travel performed after she reported to her official duty station should have been in pay status. He stated that the employee had not had her lunchtime meal period when she began her trip back to Whitewater and did not have a break in duty status and, therefore, her travel between the Palisade post office and the Whitewater post office at the time of the accident on July 11, 1996 should have been compensable travel time under section 438.132 of the Employee and Labor Relations Manual. The representative submitted copies of the employee’s timecards and stated that they indicated that she was a “loaned” employee, on loan from the Whitewater post office to the Palisade post office.

⁴ The Board notes that the language in sections 260.153 and 162 of the Time and Attendance Manual (1987) is identical to section 438.123 and 132 of the Employee and Labor Relations Manual (1989).

In statements dated February 2 and September 15, 1999, appellant asserted that the employee was in the performance of duty at the time of her accident. He alleged that she had been directed to report to the Palisade post office by the postmaster of the Whitewater post office. However, in a statement dated October 4, 1999, the Whitewater postmaster denied that she instructed the employee to go to the Palisade post office on the day of the accident. She stated that it was the employee's own decision to go to her job at the Palisades post office for training to be used solely at that post office.

In an affidavit dated August 2, 1999, appellant's representative stated that the employee was in the performance of duty at the time of the accident because her position was included under the union collective bargaining agreement with the employing establishment, which referenced the U.S. Postal Service as the "employer" which meant that the employee had one single employer and should be covered for an injury sustained between the Palisades post office and the Whitewater post office.

The Board finds that this case is not in posture for a decision.

As a general rule, an off-premises injury sustained by an employee having fixed hours and place of work, while the employee is coming to or going from the employer's premises, is not compensable because the injury does 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.⁵ Certain exceptions to this rule have, of course developed, where the hazards of the travel may fairly be considered dependent upon the particular facts and 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 call 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."⁶

In this case, the evidence shows that the employee had fixed hours and places of work. Therefore, her trip from her job at the Palisade post office to her job at the Whitewater post office would be governed by the general rules for off-premises injuries. However, in this case the Office failed to make a determination of the whether the employee should have been in pay status at the time of her accident under the employing establishment's rules and regulations cited by appellant.

Under section 438.132 of the employing establishment's Employee and Labor Relations Manual and section 260.162 of the Time and Attendance Manual, time spent during a service day by an eligible employee in travel from one site to another without a break in duty status within a local commuting area is applicable. Sections 438.123 and 260.153, respectively, of these employing establishment manuals, provide that when an employee is employed to work on a permanent basis at more than one location in the same service day, the time spent commuting between the locations is not compensable travel time, provided there is a break in duty status of

⁵ See *Mary Margaret Grant*, 48 ECAB 696, 703 (1997); *Betty R. Rutherford*, 40 ECAB 496, 498-99 (1989); see generally A. Larson, *The Law of Workers' Compensation* § 13.01 (2000) (explaining the "coming and going" rule).

⁶ See *Mary Margaret Grant*, *supra* note 5.

at least one hour that may be used for the employee's own purposes and that hour is in addition to the actual time spent in travel and the normal meal period, if the normal meal period occurs during the time interval between the work in the different locations. In the case on appeal, the employee was traveling from one work location to another at the time of her accident. She left the Palisade post office at 1:45 p.m. and was due to begin work at the Whitewater post office at 2:30 p.m. Therefore, she did not have at least a one hour break between her work at the two locations, excluding travel time. It appears that sections 438.132 and 160.162 of the Employee and Labor Relations Manual and the Time and Attendance Manual, respectively, may apply to the facts in this situation. However, further development of the evidence is necessary in order to make a determination.

On remand, the Office should further develop the evidence as to whether the employee should have been in pay status at the time of her accident, according to the employing establishment's rules and regulations and whether she should be deemed to have been in the performance of duty at the time of her accident based upon these employing establishment rules and regulations and/or any of the exceptions to the general rules for off-premises injuries. Following such further development as the Office deems necessary, the Office should issue a *de novo* decision.

The dated October 26 and May 21, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
October 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member