

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY R. HOWE and U.S. POSTAL SERVICE,
POST OFFICE, Fremont, MI

*Docket No. 03-797; Submitted on the Record;
Issued August 22, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury as alleged, and if so, whether such injury occurred in the performance of duty.

On May 20, 2002 appellant, then a 53-year-old rural carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on January 19, 2002 at 6:30 p.m., while crossing the parking lot to his car, he was hit by another carrier backing up and sustained a compressed or herniated disc. The employing establishment controverted the claim, alleging that appellant had "already signed out for the day" at the time of the incident and further indicated that appellant's regular hours were from 7:30 a.m. to 4:00 p.m. The employing establishment also noted that the person who was driving the vehicle which appellant alleged hit him disputed his claim.

In a statement dated January 24, 2002, appellant alleged that at 6:30 p.m. on Saturday, January 19, 2002, Cheri Kennedy, who did not appear to see him, struck him when she was pulling out of her parking space in reverse. He indicated that he was struck on his left hip and left shoulder and that he was moved approximately two feet. Appellant indicated that at first he did not appear to be hurt, but that about five minutes after impact, he developed a fist-sized knot in his back on his lower left side, and that the pain has since progressed into his legs. Other witnesses submitted statements. In a statement dated January 24, 2002, Tanya Tyink indicated that, as she stopped in her vehicle at a stop sign, she saw the alleged incident. She indicated:

"It was at that time that Cheri ran into [appellant]. I saw [appellant] put one hand out against the car, jumping up and turning either to get away from the car or it was the car turning him sideways, it was hard to tell as it happened so quickly."

In a statement dated January 28, 2002, Ms. Kennedy disputed appellant's account of the incident, indicating:

"I personally feel that if I would have hit him with my car I would have felt or heard something and I did not. He also claims that he had pounded his hand on my back window and I checked on Tuesday when I was informed for handprints or any kind of body prints and I did not see anything."

Lori Boes submitted a statement, dated May 29, 2002, wherein she indicated that she heard nothing about the incident of January 19 until January 25, 2002, despite the fact that she was available to all employees by her cellular telephone seven days a week.

By letter dated June 4, 2002, the Office of Workers' Compensation Programs requested that appellant submit a medical report including "the physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury." In response, he submitted a May 15, 2002 progress note by Dr. Kathy C.B. Gembarowski which states that appellant is a veteran who had a service-related spinal disc condition. She also described the January 2002 incident and stated that appellant told her that at the time of the incident he had his back x-rayed and that he was told he had a collapsed or bulging disc at L4. Dr. Gembarowski found that appellant had minimal degenerative joint disease L3-L5 areas. She further noted, "As likely as not the veteran's current lower back condition is impacted by his service-connected injuries."

By decision dated July 15, 2002, the Office denied appellant's claim as the medical evidence was not sufficient to establish that appellant's condition was caused by the injury. The Office further noted that as the incident occurred more than two hours after appellant's quitting time, and that the evidence did not establish that appellant, at the time of the incident, was performing assigned duties, engaged in an activity reasonably incidental to his employment, or that the injury occurred within a reasonable time before or after the end of his normal work shift. Accordingly, the Office found that the accident did not fall in the performance of duty.

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

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 her employment; liability does not attach merely because of an employee/employer relation.¹ 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.² 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 and in the course of employment." As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises

¹ *Christine Lawrence*, 36 ECAB 422-24 (1985).

² *See* 5 U.S.C. § 8102(a).

of the employing establishment, while the employees are going to and from work, before or after working hours, or at lunch time, are compensable.³ Given this rule, the Board has also noted that the course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts, and that what constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the employee's activity.⁴

In the instant case, the Board finds that the evidence is sufficient to establish that the alleged incident occurred as appellant's statement with regard to the incident was corroborated by the statement of Ms. Tyink, who was an eyewitness to the incident. However, the Office never fully developed the evidence with regard to whether this accident occurred in the performance of duty. For example, no evidence was submitted with regard to whether the parking lot where appellant sustained his injury was on the premises of the employing establishment. The Board further notes that the Office indicated that the accident occurred two hours after appellant's quitting time. However, the Office did not give appellant a chance to provide an explanation as to what he was doing at the employing establishment at this time.

The decision of the Office of Workers' Compensation Programs dated July 15, 2002 is set aside, and this case is remanded for further development of the evidence, to be followed by an appropriate decision.

Dated, Washington, DC
August 22, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

³ See *Margaret Gonzalez*, 41 ECAB 748, 751-52 (1990).

⁴ *Narvik A. Karamian*, 40 ECAB 617, 618 (1989).