U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. SCHILLING and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Jackson, MS

Docket No. 03-914; Submitted on the Record;
Issued June 20, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether appellant has established that the traumatic fractures of the left leg and both feet he sustained on December 12, 2001 occurred in the performance of duty.

On December 27, 2001 appellant, then a 51-year-old distribution clerk, filed a traumatic claim for multiple fractures of his left leg and both feet sustained when, in a "crowded" work area, he was run over by the rear wheel of a forklift driven by a coworker, Albert Lee Jordan.[1] This incident occurred on the employing establishment's premises during appellant's duty shift at approximately 10:15 p.m., on December 12, 2001. On the reverse of the form, Althastine Green, an employing establishment supervisor, controverted appellant's claim, asserting that the injuries were caused by appellant's willful misconduct.

In a December 13, 2001 electronic mail message, Loretta K. Brown, an employing establishment official, stated that the night before, appellant "was run over by a tow motor, driven by Albert Jordan. Apparently, Mr. Jordan owed [appellant] five dollars and [appellant] was so determined to get his money back, he followed closely behind Mr. Jordan on the tow motor, jumping onto the bars on the back of the tow motor." Ms. Brown asserted that Ms. Tangy Smith, a supervisor, "yelled for [appellant] to 'stop.' Mr. Jordan went in reverse, felt a bump and heard hollering. [Appellant] was underneath the rear wheel of the tow motor." Ms. Brown noted that there were photographs of the incident and that she had obtained a witness statement from James Johnson, a contract driver. Thirty minutes after sending this message, Ms. Brown stated that "[i]t was not a tow motor but a forklift."

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[1] On December 13, 2001 appellant underwent surgical reduction and fixation of multiple open fractures of both feet and the left lower extremity. December 13, 2001 x-rays showed multiple fractures of the first and third metatarsals of the left foot requiring external fixation, status-post fixation of the left tibia and distal left fibula and fasciotomy of the lateral compartment, fractures of the third metatarsals of the right foot requiring internal and external fixation and a comminuted fracture of the tuft of the distal phalanx of the right great toe. Additional surgery was performed on December 15, 2001 to irrigate and debride the surgical wounds. Appellant was discharged to go home on December 20, 2001.

In reply to Ms. Brown's messages, Ted Woodall, an employing establishment human resources manager, stated that there was "gross negligence for safe operation of powered equipment should consider termination [i]f facts support conclusion." In a January 4, 2002 letter, Mr. Woodall asserted that appellant's injuries did not arise from the requirements of his assigned duties or requirements imposed by his employment.[2]

Appellant and Mr. Jordan submitted statements describing the circumstances of the December 12, 2001 incident. In a December 21, 2001 statement, Mr. Jordan recalled that at 10:15 p.m. on December 12, 2001, while he was driving a forklift to the dispatch area, appellant approached him asking for the five dollars he owed appellant. Mr. Jordan told appellant that he had a $100.00 bill, but needed to get change. Appellant told Mr. Jordan that he could change the bill. Mr. Jordan stated that he would "be right back." He then "went to pouch post and [appellant] came back to pouch post and stated again" that he could change the bill. Mr. Jordan again told appellant that he would be right back and continued on "to the slide-inside pouch post to drop a load." Mr. Jordan recalled that he looked left and right before backing up, but after backing up "felt a bump and look[e]d down" and saw appellant under the forklift.

In a February 6, 2002 statement, appellant recalled that, three months before the December 12, 2001 incident, he loaned Mr. Jordan five dollars. Appellant attempted to collect the debt several times over the ensuing months, but Mr. Jordan made excuses and did not return the money. Appellant stated that on December 12, 2001 he learned that Mr. Jordan had a $100.00 bill and offered to give him $90.00 that day and $5.00 the next. Appellant alleged that Mr. Jordan said he did "not have the time." Appellant "let it go again for about 15 seconds, then decided it was time to take care of this small matter while [Mr. Jordan] had $100.00." Appellant stated that he then followed Mr. Jordan to the site where the accident occurred. He asserted that he stood "about two feet to the right side … and back about two feet … for at least two seconds saying loudly 'Albert,' a couple or three times trying to get his attention watching the back of his head, thinking [Mr. Jordan] would see [him] when he looked behind his forklift before backing up." However, appellant alleged that Mr. Jordan did not look back. He asserted that "from the time that [he] heard the noise of the forklift letting the load down, making a clanging noise, dumping [the] load and the time [he] was mashed was one second or less."

The record also contains several witness statements from appellant's coworkers. In a December 12, 2001 statement, Jessie P.[3] stated that appellant was "walking behind Mr. Jordan while [he] was driving a forklift. The supervisor, Ms. Smith, called out to [appellant] to stop. As they w[ere] passing by the expeditions desk. This is all [Jessie P.] saw." In a December 13, 2001 statement, Curtis Clay, Jr., stated that at 10:15 p.m. on December 12, 2001 he saw appellant and Mr. Jordan having "a discussion on the parcel post dock," with appellant "holding on to the back of the forklift Mr. Jordan was operating. [I] observed [appellant] following Mr. Jordan as he drove toward the inside of the building," but "did not observe the accident."

[2] In a January 22, 2002 letter, the Office advised appellant of the type of additional evidence needed to establish his claim, including his detailed statement regarding the circumstances of the December 12, 2001 incident.

[3] The coworker's surname is not legible.

In a January 9, 2002 statement, Mr. Johnson, a contract driver at the employing establishment, recalled that, on December 12, 2001, appellant and Mr. Jordan discussed changing a $100.00 bill so Mr. Jordan could repay appellant $5.00 dollars. Mr. Jordan said that "he had a dispatch and he would get right back with him. [Appellant] came back to parcel post" and told Mr. Jordan he could change the bill. "[Mr. Jordan] said he was on his way back to parcel post multislide with a load on the forklift (RC sacks). [Appellant] approached him again. [Mr. Jordan] sa[id] he told him he would be right back. Then while backing up, [Mr. Jordan] did n[o]t see anyone behind the forklift," but then felt a bump and heard yelling and saw appellant under the rear wheel. Mr. Johnson stated that Mr. Jordan asserted that he was unaware that appellant followed him and was behind the forklift.

By decision dated February 25, 2002, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence demonstrated that his injuries did not arise in the course of his federal employment. The Office found that the incident "arose due to nonemployment factors, a purely personal dispute" unconnected to appellant's assigned duties. The Office further found that appellant "acted negligently by jumping on the tow motor, while in reverse. This is against all safety procedures put in place by the employing establishment."

The Board finds that appellant did not sustain an injury in the performance of duty on December 12, 2001.

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.[4] The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[5] The phrase "in the course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time the employee may be reasonably said to be engaged in the 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 her employment or engaged in doing something incidental thereto.[6]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[7] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in incidental acts and is based on the

[4] 5 U.S.C. § 8102(a).

[5] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[6] *Robert W. Walulis*, 51 ECAB 122 (1999).

[7] *Narbik A. Karamian*, 40 ECAB 617 (1989).

circumstance of the employee's activity.[8] However, presence at the employing establishment's premises during work hours, or a reasonable period before or after a duty shift, is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury "arising out of the employment." This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[9]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective."[10]

The record establishes that appellant was not in the performance of duty at the time of the December 12, 2001 incident, as he stopped work and deviated from his duties to follow Mr. Jordan to the parcel post area in order to attend to a purely personal errand retrieving money owed to him. In his February 6, 2002 statement, appellant explained that, prior to December 12, 2001, he attempted several times to collect a five-dollar debt from Mr. Jordan. When appellant became aware on December 12, 2001 that Mr. Jordan had a $100.00 bill, he again attempted to collect the debt, but Mr. Jordan put him off again and left appellant's immediate area. Appellant recalled that after first "letting it go for about 15 seconds," he decided to take care of this matter while Mr. Jordan had money. This is precisely the type of "specific personal objective" that removes an employee from the performance of duty.[11] In pursuit of this objective, appellant then followed Mr. Jordan to the parcel post area where the forklift incident occurred.

Appellant acknowledged that, when he left his work area, his intention and sole purpose was to "take care of this small matter" while Mr. Jordan had cash on hand to repay him. When the injury occurred, he was not engaged in his master's business, but in the purely personal mission of trying to collect the money from Mr. Jordan. There is no evidence of record that any aspect of the five-dollar debt is in any way related to appellant's assigned duties as a postal distribution clerk. There is no evidence of record that the employing establishment benefited in any way from appellant's attempt to collect the five-dollar debt from Mr. Jordan. The Board finds that appellant was not in the performance of duty when he was struck by the forklift on

[8] *Maryann Battista*, 50 ECAB 343 (1999).

[9] *Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[10] *Rebecca LeMaster*, 50 ECAB 254 (1999).

[11] *Id*.

December 12, 2001 as he cannot be said to have been in the course of his employment while attempting to collect a personal debt.

The circumstances of this case is similar to those in *Paula G. Johnson*.[12] In *Johnson*, the employee came to the employment premises on a day she was not scheduled to work in order to remove plants from her office. While removing the plants, she injured her right wrist. The employee stated that she was never directly instructed to remove the plants, but felt that her supervisor implied she should do so, although the supervisor refuted this assertion. The Board found that the employee was not engaged in her master's business when injured, but was on a personal mission unrelated to her employment duties. She did not show that returning to the employment premises on her day off provided any substantial employment benefit. Therefore, the employee was not in the performance of duty.

The present case may be distinguished from the line of cases delineating the personal comfort doctrine.[13] This doctrine holds acts of personal comfort, such as eating a snack, using the bathroom or drinking water or other beverages, are considered to be in the performance of duty. An employee engaging in such actions within the time and space limits of employment does not leave the course of employment. Thus, an injury sustained on the way to, from or during a period of ministering to such needs is compensable as arising out of and in the course of employment, unless there is a departure so great that an intent to abandon the job temporarily may be inferred or unless the conduct cannot be considered an incident of the employment.[14]

The Board finds that collecting a personal debt does not fall within the scope of activities covered by the personal comfort doctrine. It is expected that, during the course of the workday, employees will need to eat, drink and attend to bodily functions. However, collecting a debt is not a personal necessity equivalent to these activities.

The present case may also be distinguished from the line of cases dealing with assaults occurring on employing establishment premises but arising from nonwork matters. Generally, the Board has held that personal disputes between coworkers that arise outside the scope of employment and are then imported into the workplace, are not compensable.[15] However, in this case, there is no evidence of record that appellant and Mr. Jordan had a personal friendship or relationship outside of work, which was then imported into the workplace. Also, there is insufficient evidence of record that Mr. Jordan intended to assault appellant at the time appellant was struck by the forklift.

The Board notes that, in its February 25, 2002 decision, the Office raised the affirmative defense of willful misconduct. The Board also notes that, although the phrase "willful misconduct" does not appear in the Office's decision, the Office nevertheless made the substance

[12] *Paula G. Johnson*, 53 ECAB ___ (Docket No. 02-552, issued August 5, 2002).

[13] *Lee R. Haywood*, 48 ECAB 145 (1996); *Tia L. Love*, 40 ECAB 586 (1989); *Dorothy F. Huber*, 19 ECAB 147 (1967).

[14] *James E. Chadden, Sr.*, 40 ECAB 312 (1988); *JoAnn Curtis*, 38 ECAB 122 (1986).

[15] *Agnes V. Blackwell*, 44 ECAB 200 (1992).

of this charge by finding that appellant "acted negligently by jumping on the tow motor while in reverse … against all safety procedures put in place by the employing establishment." The failure to follow set safety rules and procedures of the employing establishment is frequently cited by the Office as evidence of negligence or recklessness constituting willful misconduct.[16]

As the Board noted above, section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another or if intoxication of the employee is the proximate cause of the injury or death. These exceptions are in the nature of an affirmative defense to the payment of compensation. When the Office relies on such a defense in rejecting a claim, it has the burden of proving that defense affirmatively.[17]

The Board has held that "willful misconduct" is generally regarded as deliberate conduct, involving premeditation, obstinacy or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct which is in wanton or reckless disregard of probable injurious consequences.[18] In the present case, appellant stopped working at his assigned duties to follow Mr. Jordan to the parcel post area for the sole purpose of collecting a personal debt. This activity was of an utterly different nature from appellant's assigned duties as a distribution clerk.

However, the Office has made no showing that appellant knew that his conduct was likely to result in serious injury or that he wantonly or recklessly disregarded probable injurious consequences by following Mr. Jordan to parcel post. The statements from coworkers Jessie P. and Mr. Clay indicate that appellant was walking behind Mr. Jordan's forklift. Mr. Clay observed that appellant was "holding on" to the back of the forklift, but did not provide further description and admitted he did not see the actual incident. In his February 6, 2002 statement, appellant recalled that he stood at what he judged to be a safe distance to the side of the forklift and called loudly to Mr. Jordan several times. These actions indicate that appellant was exercising some level of caution and was not behaving recklessly.

The Board also notes that, in his December 21, 2001 statement, Mr. Jordan recalled looking left and right before backing up, but not that he looked behind him. This supports appellant's assertion that Mr. Jordan did not look behind him before backing up.

The Board notes that the Office's assertion of willful misconduct appears to be based, in part, on erroneous information. In its February 25, 2002 decision, the Office found that appellant had "jumped on a tow motor while in reverse." The statements of appellant and Mr. Jordan, as

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[16] *Soo Dong*, 47 ECAB 800 (1996). (Appellant sustained an injury while assaulting a security officer. This assault violated a conduct policy to which appellant had previously agreed.); *Morris Preminger*, 18 ECAB 341 (1967). (Appellant sustained a fractured leg in an accident, when he deviated from his assigned duties to drive an unattended tractor. He drove the tractor without prior authorization, in violation of an employing establishment rule forbidding employees to operate motor vehicles without a license or authorization).

[17] *Alice Marjorie Harris*, 6 ECAB 55, 57 (1953).

[18] *Abraham Finkelstein*, 4 ECAB 130, 132 n. 8 (1951).

well as the witness statements of record, do not mention either a tow motor or that appellant "jumped" on any moving vehicle. The erroneous information about a tow motor appears to originate in a December 13, 2001 note by Ms. Brown, an employing establishment official, who did not witness the December 12, 2001 incident. She stated that appellant was injured when he jumped "onto the bars on the back of the tow motor." Yet, in a second December 13, 2001 note, Ms. Brown corrected herself to state that there was no tow motor involved in the incident. It appears the Office relied on Ms. Brown's first statement in issuing its February 25, 2002 decision asserting willful misconduct

The Board finds that the Office has not met its burden of proving the affirmative defense of willful misconduct, as there is insufficient evidence showing that appellant behaved either recklessly or with deliberation in a manner likely to result in injury to him. However, for the reasons stated above, appellant's injury on December 12, 2001 did not arise in the course of his employment as a distribution clerk.

The decision of the Office of Workers' Compensation Programs dated February 25, 2002 is hereby affirmed, as modified.

Dated, Washington, DC
June 20, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member