U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL C. KUBASKA and U.S. POSTAL SERVICE,
POST OFFICE, Ocean City, NJ

Docket No. 03-140; Submitted on the Record;
Issued March 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on January 11, 2001.

On May 10, 2001 appellant, then a 48-year-old distribution/window clerk, filed a traumatic injury claim alleging that on January 11, 2001, while driving to work, a motorist pulled out in front of him and hit his vehicle. Appellant stated that he received a severe jolt to his body, which has caused pain in his lower back, both legs, hip and neck. The employing establishment controverted the claim, contending that appellant was not in the performance of duty at the time of the motor vehicle accident. The employing establishment noted that the accident occurred while appellant was on his lunch break.

On June 26, 2001 the Office of Workers' Compensation Programs claims examiner had a telephone conference with appellant's supervisor, who noted that appellant was not driving a government vehicle on the date and at the time in question, that he did not have permission to drive his vehicle for employment purposes as appellant did not need a car for his position and that the employing establishment had not given permission for appellant to drive his car to and from home for lunch. On July 3, 2001 the claims examiner had a telephone conference with appellant, who stated that at the time of the accident he was returning to work from lunch. He noted that he was driving his private vehicle and had not been asked by the employing establishment to use his car that date to perform job duties.

In a letter dated June 19, 2001, appellant indicated that it was his normal routine to go home for lunch and that, on the date of the accident, he did not deviate from his normal route of going to and from his home for lunch. He noted that he lived approximately 10 blocks from the employing establishment.

By decision dated August 29, 2001, the Office denied appellant's claim, finding that his injury did not arise in the course of employment as he was off duty and engaged in a personal activity at the time of the injury.

By letter dated September 4, 2001, appellant, through his attorney, requested a hearing.

At the hearing, held on May 15, 2002, appellant testified that he usually drove home for his lunch breaks and that he assumed his supervisor was aware that this was his practice. Appellant stated that his supervisor never objected to him taking his lunch break in this fashion. He noted that at the time of the accident he was going directly from his home to return to work. Appellant described the nature of his injuries and treatment.

On August 5, 2002 the Office hearing representative found that appellant's motor vehicle accident did not occur in the performance of duty and affirmed the August 29, 2001 decision.

The Board finds that appellant did not sustain an injury while in the performance of duty on January 11, 2001.

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 with or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation.[1] The Federal Employees' Compensation Act[2] provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[3] In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.[4] As a general rule, 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 and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5]

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;

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

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8102(a).

[4] *Conrad F. Vogel*, 47 ECAB 358 (1996).

[5] *Randi H. Goldin*, 47 ECAB 708 (1996).

"(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."[6]

The record establishes that appellant has fixed hours and place of work and that his injury occurred while he was coming back from his lunch break.[7] As his status was that of a "fixed premises" employee with fixed hours and place of work, he is, therefore, subject to the "going and coming" rule generally applicable to such employees. Unless his injury occurred on the actual or constructive premises of the employing establishment, his injury cannot be considered as sustained in the performance of duty. The facts of this case establish that the public street on which the motor vehicle accident occurred is neither owned nor controlled by the employing establishment. Furthermore, appellant has not alleged and the evidence does not suggest, that he worked at home, that he was on travel status or that his position was similar to that of a letter carrier, messenger or chauffeur, who performed services away from their employer's premises by the nature of their work. Appellant acknowledged that he was not required to use his automobile that day to perform any job duties over his lunch break.

Therefore, because appellant's injury occurred off the premises while he was taking his lunch break and because the record fails to support any exception to the off-premises rule, the Board finds that appellant's injury did not arise out of and in the course of federal employment.[8]

On appeal, appellant's counsel contends that as a result of appellant taking his lunch break at home for 18 years, he had implied permission of the employing establishment to leave work. The evidence of record does not establish any errand or special mission on the part of appellant, a fixed premises employee, on the date of injury. The fact that appellant chose to take lunch off premises on a routine or regular basis is not an activity reasonably incidental to his employment. Appellant's lunch practice constitutes a personal activity not related to his work.

Appellant also contends that the Office did not follow the appropriate procedure in developing the claim in that it did not obtain a statement from the supervisor with regard to the injury or diagram the injury, so as to determine whether or not the injury occurred in the course of employment.[9] The procedural rule to which appellant's attorney refers involves cases where there is a question as to whether appellant, in his capacity as messenger, letter carrier or chauffeur, was in the course of employment at the time of the injury. This is not the factual situation in the case at hand. The Board notes that the claims examiner did have a telephone conference with appellant's supervisor and that a police diagram of the accident is of record. There was no procedural error in the development of this claim.

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804(5)(a) (August 1992); *see also Samuel Curiale*, 48 ECAB 468 (1997).

[7] Appellant's work as a window clerk was listed as Monday through Friday, 7:30 a.m. to 4:30 p.m.

[8] *Michael K. Gallagher*, 48 ECAB 610 (1997).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(c)(3) (May 1996).

The decision of the Office of Workers' Compensation Programs dated August 5, 2002 is hereby affirmed.

Dated, Washington, DC
March 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member