

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT BIRKLEY, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Stockton, CA

*Docket No. 03-1428; Submitted on the Record;
Issued October 1, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained a back injury in the performance of duty on February 11, 2003.

On February 12, 2003 appellant, then a 51-year-old city carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on February 11, 2003 he was in a motor vehicle accident, which caused an injury to his lower back. In support thereof, appellant submitted a copy of the accident report of the employing establishment. This report indicated that, on Tuesday, February 11, 2003 at 11:27 a.m., appellant was in an automobile accident, when he was sitting at a red light in a vehicle owned by the employing establishment, when a car hit the truck behind him, causing the truck to hit his vehicle. In completing the claim form, appellant's supervisor indicated that appellant was injured in the performance of duty. He further indicated that appellant's regular work hours were Monday through Saturday from 7:15 a.m. to 3:45 p.m., with rotating days off. Also submitted with the claim was a work status report by Dr. Corky Hull, a physician specializing in preventive medicine, indicating that appellant was treated on February 12, 2003 for a cervical strain and lumbar/lumbosacral strain.

By letter dated February 20, 2003, the Office of Workers' Compensation Programs requested that appellant submit further information and respond to further questions and to describe the activity he was engaged in at the time of injury. The Office noted that, if he did not respond within 30 days, a decision would be made based upon the evidence in the file. Thereafter, appellant submitted a couple of medical reports and a note from his physical therapist. However, he did not file a timely response to the Office's questions.

By decision dated March 24, 2003, the Office denied appellant's claim for compensation as he had failed to establish that an injury occurred in the performance of duty. The decision noted that, although appellant was in a postal owned vehicle at the time of the accident, it was not clear that he was in the performance of duty.

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

The Federal Employees' Compensation Act¹ provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The term while in the performance of duty has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation of arising out of and in the course of employment. The phrase in the course of employment is recognized as relating to the work situation and more particularly, relating to the 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 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 doing something incidental thereto. This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the 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.²

The Office, by letter dated February 20, 2003, requested that appellant submit further information. The Office noted that, if no response was received within 30 days, the case would be decided on the evidence in the file. When appellant did not file a timely response to the Office's questions, the Office issued a decision wherein it noted that as appellant had not responded to the questions, there was insufficient information to determine whether he was in the performance of duty at the time of the accident. However, the Office never fully addressed the evidence that was in the record. This evidence included a report by the employing establishment indicating that appellant was in a motor vehicle accident on Tuesday, February 11, 2003 at 11:27 a.m., while sitting in a postal vehicle at a red light. The date and time of the accident are within his regular working hours as listed by appellant's supervisor. His supervisor indicated that appellant was injured in the performance of duty. There is no evidence in the record that indicates that he was not in the performance of duty at the time of the accident. The Office should have evaluated the evidence and determined whether it was sufficient to establish that appellant was injured in the performance of duty even without his timely response to the Office's questions. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of the final decision be addressed by the Office.³ The Board, therefore, must set aside the March 24, 2003 decision and remand the case to the Office to fully consider the evidence which was properly submitted by appellant.

¹ 5 U.S.C. § 8102(a).

² *Cheryl Bowman*, 51 ECAB 519 (2000); *Charles Crawford*, 40 ECAB 474 (1989); *Eugene G. Chin*, 39 ECAB 598 (1988).

³ *William A. Couch*, 41 ECAB 548, 553 (1990).

The decision of the Office of Workers' Compensation Programs dated March 24, 2003 is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
October 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member