United States Department of Labor
Employees' Compensation Appeals Board

STEVEN SLAVIN, Appellant	)	
and	)	**Docket No. 03-1865**
	)	**Issued: August 5, 2004**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated July 19, 2002 and April 14, 2003 which denied his claim that he sustained an injury in the performance of duty on May 8, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on May 8, 2002.

FACTUAL HISTORY

On May 10, 2002 appellant, then a 45-year-old tractor-trailer operator, filed a claim alleging that he sustained injury to his lower back, neck, left knee, left calf and right calf at work on May 8, 2002.[1] In a statement dated May 8, 2002, appellant noted that he was driving a truck

[1] Appellant stopped work shortly thereafter and returned to work in mid June 2002.

on the employing establishment premises on that date when another truck driver, Charles Auckerman, ran a stop sign.[2] He stated that Mr. Auckerman almost drove into him and, when appellant pulled next to him in order to speak with him, he became angry and gave appellant the finger. Appellant indicated that he then made a turn and stopped his truck and Mr. Auckerman drove into the rear of his truck. He noted that he got out and stood on his truck and Mr. Auckerman punched him and grabbed his legs in an attempt to pull him off his truck. Appellant indicated that he called for a supervisor and Kathy Lindsay arrived and restored order. He asserted that he drove in safe manner on May 8, 2002.[3]

In two statements dated June 2, 2002, appellant provided an account of the events of May 8, 2002 which was similar to the one he provided in his May 8, 2002 statement. He noted that he followed Mr. Auckerman in order to get his tractor number and company name so he could report his unsafe driving.[4] He indicated that he was holding on to the handrail of his truck while Mr. Auckerman punched him and pulled on his legs and he asserted that he never touched Mr. Auckerman. Appellant indicated that he continued to experience pain in his neck, back, and legs and participated in physical therapy.[5] Appellant submitted various medical reports concerning the treatment of neck, back, and leg ailments. He consistently indicated in these reports that he sustained injury when Mr. Auckerman attempted to pull him down from his truck.

In an undated statement received by the Office on June 4, 2002, Mr. Auckerman stated that on May 8, 2002 he was driving on the employing establishment premises and may have rolled his truck very slowly through a stop sign. He indicated that a "jockey," presumably appellant, had already cleared his path of movement and that appellant then stopped to tell him about the stop sign. Mr. Auckerman stated that appellant then pulled in front of him at an angle and that he almost ran into the rear of appellant's truck. He indicated that appellant alternately pulled forward eight or nine feet three times and stopped three times and stated that, when appellant pulled in front of him for a final time, he pulled his truck to the right but could not avoid hitting the right rear side of appellant's truck. Mr. Auckerman stated that he got out of his truck to ask appellant what he was doing and that appellant called him an "asshole." He noted that appellant tried to kick him in the chest and that he put his hand up for protection. In a statement dated July 16, 2002, Mr. Auckerman stated that he tried to grab appellant's leg or foot

[2] Appellant did not initially refer to Mr. Auckerman by name. It was later revealed that Mr. Auckerman was the owner of a private business, CA Express, Inc., and contracted his services to the employing establishment.

[3] On July 10, 2002 the employing establishment placed appellant in off-duty status for "allegations involving failure to observe safety rules and regulations" and, in a document dated August 14, 2002, it advised appellant that it was removing him from his job for failure to observe safety rules and regulations. As of early 2003, these disciplinary actions were in arbitration status.

[4] In a preliminary investigative memorandum dated July 16, 2001, Edward J. Barry, an inspector for the employing establishment, recounted his interview with appellant which was held after he returned to work on June 25, 2002. Mr. Barry indicated that appellant asserted he followed Mr. Auckerman in order to tell him that he had run the stop light and to retrieve his tractor number and company name so he could report the matter to management as an unsafe condition.

[5] In a statement dated July 12, 2002, appellant again noted that he had pain in his neck, back and legs.

when he kicked him, but that he pulled back his leg faster than he could grab it and he did scratch appellant's legs or make physical contact in an manner.[6]

In a statement dated May 8, 2002, Ms. Lindsay stated that on that date she was called over the radio by appellant and that, when she arrived, appellant and Mr. Auckerman were "both standing on the ground in a heated argument." She indicated that she tried to get appellant to go to her office to write a statement but that Mr. Auckerman "kept on instigating the problem with comments." Ms. Lindsay stated that there were no skid marks in the area, that a bumper cover was on the ground, and that appellant's right rear mud flap was bent and had red paint on it. In an undated statement received by the Office on June 4, 2002, Matt Israel, a coworker of appellant, stated that when he arrived at the scene of the accident on May 8, 2002 the driver from CA Express, presumably Mr. Auckerman, told Ms. Lindsay that appellant tried to kick him in the chest.

In a statement dated July 2, 2002, J. Bullock, a contract truck driver, indicated that he witnessed a big red truck make a turn and the driver of the truck, presumably Mr. Auckerman, and that "one of the jockeys," presumably appellant, then "got into a thing there at the stop sign." He indicated that appellant stopped his truck in front of Mr. Auckerman's truck to force him to stop. Mr. Bullock stated that this happened several times before they "went down the O line" and that he saw nothing else of the incident.[7]

By decision dated July 19, 2002, the Office denied appellant's claim that he sustained an employment-related injury on May 8, 2002. The Office determined that appellant engaged in willful misconduct on that date and therefore took himself out of the performance of duty.[8] Appellant requested a hearing before an Office hearing representative which was held on January 23, 2003. He repeated his earlier assertions that he followed Mr. Auckerman's truck as part of his duty to report safety violations, that he drove in a safe manner, and that he sustained injury when Mr. Auckerman became aggressive without provocation and tried to pull him down from his truck.

On January 30, 2003 the Office received an undated statement of Robert M. Cummons, a coworker of appellant. Mr. Cummons indicated that on May 8, 2002 he saw two trucks turn a corner and then heard an apparent collusion between the trucks. He noted that the driver of the "road truck," presumably Mr. Auckerman, got out of his truck and "charged up" to the truck of

[6] In his July 16, 2001 memorandum, Mr. Barry detailed his interviews with Mr. Auckerman on May 28 and July 2, 2002. The interviews were consistent with the contents of the above-described statements of Mr. Auckerman.

[7] In his July 16, 2001 memorandum, Mr. Barry stated that he conducted an interview on July 2, 2002 with Mr. Bullock. Mr. Barry stated that Mr. Bullock reported that he saw Mr. Auckerman's truck come around the corner from the stop sign and that Mr. Auckerman and appellant, "got into a thing at the intersection." He noted that Mr. Bullock indicated appellant stopped his vehicle several times in front of Mr. Auckerman's vehicle causing him to stop quickly each time; Mr. Auckerman started to get out of his truck and appellant drove away each time. Mr. Barry noted that Mr. Bullock stated that, after appellant pulled away from the area, he had no knowledge of what transpired thereafter.

[8] The employing establishment had previously expressed its belief that appellant engaged in willful misconduct and controverted his claim on that basis.

the "jockey," presumably appellant's truck. Mr. Cummons indicated that appellant got out of the cab of his truck but stayed up on his deck plate. He stated that they exchanged words and Mr. Auckerman "put his arms up" and attempted to pull appellant down from his truck, but he was unsuccessful. Mr. Cummons noted that at no time did he see appellant try to physically harm Mr. Auckerman and indicated that he was present when a supervisor arrived at the scene. In a July 26, 2001 supplemental investigative memorandum, which was received by the Office on February 21, 2003, Mr. Barry stated that he interviewed Mr. Cummons on July 24, 2002. Mr. Barry stated that Mr. Cummons related that he heard the collision between the vehicles of appellant and Mr. Auckerman and heard them arguing in loud voices but could not hear the words. He further noted that Mr. Cummons stated that he saw Mr. Auckerman waving his hands at appellant in an attempt to grab his legs, but could not tell whether contact was made, and that he did not witness appellant's attempt to kick Mr. Auckerman.

By decision dated and finalized April 14, 2003, the Office hearing representative affirmed the Office's July 19, 2002 decision. The Office again determined that appellant engaged in willful misconduct on May 8, 2002.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[9] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act. An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged, that the injury was sustained while in the performance of duty and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[10] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[11]

Congress, in providing 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 his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. 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.[12] The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated that to occur in the course of

[9] 5 U.S.C. §§ 8101-8193.

[10] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[11] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[12] *Mary Kokich*, 52 ECAB 239, 240 (2001).

employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her 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 his or her employment or engaged in doing something incidental thereto.[13]

Section 8102(a)(1) of Act states:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is --
>
> (1) caused by willful misconduct of the employee…."[14]

The Board has defined willful misconduct 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 probably injurious consequences.[15] The allegation of willful misconduct is an affirmative defense which the Office, if it invokes such defense, has the burden to prove.[16]

ANALYSIS

In the present case, appellant claimed that he sustained an employment-related injury to his neck, back, and legs when Mr. Auckerman, a contract truck driver, tried to pull him down from his truck on May 8, 2002. Appellant repeatedly asserted that he followed Mr. Auckerman's truck in order to advise him that he had run a red light and to get his tractor number and company name so he could report his unsafe driving. He claimed that he drove in a safe manner at all times; Mr. Auckerman claimed that appellant's vehicle stopped short and caused him to drive into the rear of his vehicle. While there is some evidence that appellant may have stopped his truck in front of Mr. Auckerman's truck in an attempt to get it to stop, none of the independent witnesses who submitted statements actually directly witnessed the accident.[17] Therefore, there is no clear evidence that appellant drove in an unsafe manner as alleged by Mr. Auckerman. Nor is there a clear indication that in the course of driving appellant intended to cause the collision that ultimately occurred between his truck and Mr. Auckerman's truck.

Appellant claimed that after the accident Mr. Auckerman became aggressive without provocation and pulled on his legs in an attempt to get him down from his truck.

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[13] *Kathryn A. Tuel-Gillem*, 52 ECAB 451, 452-53 (2001).

[14] 5 U.S.C. § 8102(a)(1).

[15] *Karen Cepec*, 52 ECAB 156, 159 (2000).

[16] *Bruce Wright*, 43 ECAB 284, 295 (1991).

[17] In a statement dated July 2, 2002, Mr. Bullock, a contract truck driver, indicated that appellant stopped his truck in front of Mr. Auckerman's truck to force him to stop. He did not, however, witness the actual accident or any other events after witnessing this aspect of the incident.

Mr. Auckerman asserted that appellant was the aggressor and attempted to kick him in the chest. Several witnesses of record arrived around the same time that Ms. Lindsay, a supervisor, arrived at the scene and restored order. However, only one witness of record actually witnessed any physical confrontation between appellant and Mr. Auckerman. Mr. Cummons, a coworker of appellant, indicated in a statement that on May 8, 2002 he saw two trucks turn a corner and then heard an apparent collusion between the trucks of appellant and Mr. Auckerman. He noted that Mr. Auckerman got out of his truck and "charged up" to appellant's truck. Mr. Cummons indicated that appellant got out of the cab of his truck but stayed up on his deck plate. He stated that they exchanged words and Mr. Auckerman "put his arms up" and attempted to pull appellant down from his truck, but he was unsuccessful. Mr. Cummons noted that at no time did he see appellant try to physically harm Mr. Auckerman and indicated that he was present when a supervisor arrived at the scene.[18] The Board has reviewed all the relevant evidence and notes that the witness statement of Mr. Cummons is highly convincing and establishes that Mr. Auckerman attempted to pull appellant down from his truck on May 8, 2002. There is no convincing evidence that appellant tried to kick Mr. Auckerman on that date.

In the present case, the Office denied appellant's claim on the grounds that he engaged in willful misconduct on May 8, 2002. As noted above, the Office has the burden to prove the occurrence of willful misconduct and the Board finds that it did not meet this burden of proof. As discussed in Larson's *The Law of Workers' Compensation*, willful misconduct is a narrow defense and encompasses both a willful intent to injure and a greater than usual degree of culpability.[19] For the above-described reasons, the Office did not show that appellant's driving on May 8, 2002 was carried out with an intent to cause injury or with reckless disregard to its consequences. Nor did the Office show that appellant intended to cause injury or acted in a reckless manner by engaging in a physical confrontation with Mr. Auckerman. In fact, the evidence of record shows that Mr. Auckerman attempted to pull appellant down from his truck on that date. For these reasons, the Office has not established that appellant acted with a willful intent to injure or with reckless disregard of probable injurious consequences and, thus, has not met its burden of proof to bar appellant from establishing an injury on May 8, 2002 due to his willful misconduct.

Moreover, there is no evidence that appellant engaged in any activities on May 8, 2002 which were not reasonably related to his employment duties. On that date, he was engaged in driving his route on the employing establishment premises and attempted to report what he believed to be a safety violation. Thus, appellant has established the occurrence of an employment incident on March 8, 2002 to include the fact of a physical confrontation with Mr. Auckerman. Appellant submitted various medical reports regarding the treatment of neck,

[18] In a July 26, 2001 investigative memorandum, Mr. Barry, an inspector for the employing establishment, indicated that he interviewed Mr. Cummons on July 24, 2002. Mr. Barry's memorialization of this interview describes statements which are very similar to the statements made by Mr. Cummons in the above-described document. Mr. Barry stated that Mr. Cummons asserted that he did not see appellant kick Mr. Auckerman; he also noted that Mr. Cummons was not certain that Mr. Auckerman made contact with appellant when he waved his hands at him in an attempt to grab his legs.

[19] A. Larson, *The Law of Workers' Compensation* § 34.01 (2000).

back and leg ailments.[20] As the Office did not accept an employment incident on May 8, 2002, it did not evaluate the medical evidence of record. Therefore, the case should be remanded to the Office so that it may evaluate the medical evidence and determine whether it shows that appellant sustained a specific injury or disability in the performance of duty.

CONCLUSION

The Board finds that appellant met his burden of proof to establish that he sustained an employment incident on May 8, 2002. The case should be remanded to the Office for evaluation of the medical evidence to determine whether appellant sustained any specific injury or disability due to the accepted May 8, 2002 employment incident. After such development it deems necessary the Office should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 14, 2003 and July 19, 2002 are modified to reflect that appellant sustained an employment incident on May 8, 2002 and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[20] He consistently indicated in these reports that he sustained injury during an attempt to pull him down from his truck.