United States Department of Labor
Employees' Compensation Appeals Board

JAMES G. PIMENTA, Appellant	)	
and	)	**Docket No. 06-598**
	)	**Issued: June 15, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Mansfield, MA, Employer	)	

Appearances:
James G. Pimenta, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 20, 2006 appellant filed a timely appeal from a January 10, 2006 merit decision of the Office of Workers' Compensation Programs finding that he had not established an injury on November 11, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained an injury on November 11, 2005.

FACTUAL HISTORY

On November 17, 2005 appellant, then a 50-year-old expediter, filed a traumatic injury claim stating that he was in an automobile accident on November 11, 2005 while in the performance of duty. He sustained multiple bruises to his head, face, arms and legs, a left hand infection and a right knee injury. The employing establishment controverted the claim stating that, at the time of the accident, appellant had left the premises without authorization to get a cup

of coffee. The employing establishment noted appellant's fixed hours and place of work. Appellant was off work from November 12 to December 13, 2005.

In a report dated November 23, 2005, appellant's supervisor stated that on November 11, 2005 appellant left the premises to get coffee without anyone knowing where he was and without authorization. The supervisor became aware that appellant had left the premises when he called indicating that he had been in an automobile accident.

In a report dated November 14, 2005, Dr. Arbetta Kambe, an attending Board-certified family practitioner, indicated that appellant sustained multiple contusions to the face, hands and knees and had right knee effusion as a result of a November 11, 2005 injury. The physician placed appellant off work. In a report dated December 5, 2005, Dr. Kenneth H. Guild, a Board-certified orthopedic surgeon, stated that appellant was unable to work until December 12, 2005 at which time he would be able to return to full duty.

On December 8, 2005 the Office advised appellant of the evidence needed to support his claim.

On December 20, 2005 the employing establishment stated that appellant was on an "unauthorized drive to get a coffee for himself" on November 11, 2005. It contended that he should not have left the building and should have continued to work. The employing establishment stated that it did not allow employees to leave the premises for breaks and provided a break room on the premises. In a report received by the Office on December 29, 2005, appellant stated that on November 11, 2005 he drove a mile down the road from the premises while on break to get coffee, and that he never did anything without someone knowing what he was doing.

By decision dated January 10, 2006, the Office denied appellant's claim on the grounds that he was not in the performance of duty when he sustained injury on November 11, 2005.

On appeal, appellant asserts that at the time of the accident he was on the clock with the knowledge of management as he had gone for coffee for managers in prior trips. Appellant also alleged that he had observed hundreds of employees going for coffee as he did on November 11, 2005.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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 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. 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 the following: "In the compensation field, to occur in the course of 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."[3]

The Board has stated as a general rule that 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.[4] Exceptions to this general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[5] or which are in the nature of necessary personal comfort or ministration.[6] The fact that no deduction is made from the employee's salary for the time he or she engages in the questioned activity does not, by itself, constitute that activity as being incidental to the employment.[7]

The Board has issued several decisions regarding the off-premises injuries of on-premises workers. In *Helen L. Gunderson*,[8] the employee was injured off the premises of the employing establishment while on her way to get coffee on her morning break. The evidence established that appellant was on a paid break at the time of her fall; that coffee was not available on the premises; and that her leaving the premises was in accordance with past practice and was done with the knowledge and consent of the employing establishment management. Based on these factors, the Board held that the injury was sustained in the performance of duty.[9] On petition for

[3] *Christine Lawrence*, 36 ECAB 422 (1985).

[4] *Anne R. Rebeck*, 32 ECAB 315 (1980); *Alvina B. Piller (Robert D. Piller*), 7 ECAB 444 (1955).

[5] *Mary Chiapperini*, 7 ECAB 959 (1955); *Lillie J. Wiley*, 6 ECAB 500 (1954).

[6] *See Abraham Katz*, 6 ECAB 218 (1953).

[7] *Julianne Harrison*, 8 ECAB 440 (1955).

[8] 7 ECAB 288 (1954), *reaff'd on recon.*, 7 ECAB 707 (1955).

[9] *Id*. at 289.

reconsideration by the Director of the Office (then the Bureau of Employees' Compensation), the Board clarified its opinion by adding the following paragraph:

> "The drinking of coffee and similar beverages, or the eating of a snack, in the opinion of the Board, during recognized breaks in the daily work hours is now so generally accepted in the industrial life of our Nation as to constitute a work-related activity falling into a general class of activities closely related to personal ministrations so that engaging in such activity does not take an employee out of the course of his employment."

In *Roma A. Mortenson-Kindschi*,[10] the employee was injured off the premises of the employing establishment when she slipped and fell on ice during a smoking break. The injury occurred a few steps into a parking area that was adjacent to the back doors of the employing establishment building. Appellant was on an authorized break in accordance with past practice and with the knowledge and consent of the employing establishment. The Board found that this activity was not of such a nature to take her out of the course of employment as such smoking breaks were condoned by the employing establishment and thus the activity was considered similar to activities that are engaged in for personal comfort and ministration.

In *Harris Cohen,*[11] the employee was injured in an off-premises accident while he was returning from getting coffee. The evidence established that there were several coffee machines in appellant's office building including one near appellant's "swing room." The employing establishment had a posted rule that employees were not permitted to leave the building during "rest, coffee or relief periods." The Board held that the employee's injury did not occur in the performance of duty because his "off-premises activities were neither accepted nor approved by the employer and were not in accordance with any generally accepted past practice."[12]

ANALYSIS

In the instant case, appellant had fixed hours and place of work when, on November 11, 2005, he absented himself from the premises to take a break and drove to get coffee. While en route, he struck a parked truck and sustained multiple injuries to his face, head, arms, left hand, legs and right knee. The injury did not occur on the employment premises, but instead occurred on a public street not controlled by the employing establishment. In view of the foregoing, the general "going and coming" rule will apply unless it is established that one of the exceptions to the general rule applies to the circumstances of this case.

In *Estelle M. Kasprzak*,[13] the Board enumerated four recognized exceptions to the general going and coming rule which it characterized as the "off-premises" exceptions. The Board stated

[10] 57 ECAB ___ (Docket No. 05-977, issued February 10, 2006).

[11] 8 ECAB 457 (1955).

[12] *Id*. at 458.

[13] 27 ECAB 339 (1976).

that these exceptions are related to situations which: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[14]

In the present case, appellant did not contend that his trip away from the premises was required by work, nor did he contend that the accident occurred while he was a passenger in a contracted conveyance to transport him to and from work. Further, he did not assert that the accident occurred while he was on an emergency call required by his job. Thus none of the first three exemptions to the "coming and going" rule apply.

Appellant contends that his injuries are compensable for the reason that his employer knew of the practice to leave the premises to obtain coffee. He alleged that managers also left the premises to get coffee and he had previously brought coffee to them. The facts in this case are similar to those found in *Harris Cohen*,[15] where the Board found that the employee's injuries were not sustained in the performance of duty. The injury occurred when he left the premises without authority to get coffee when it was available to him at the work site.[16] In this case, the employing establishment stated that employees were not allowed to leave the premises for breaks and that it maintained a break room on premises for that purpose. These facts are distinguishable from *Gunderson* because the employing establishment specifically prohibited off-premises work breaks and maintained a break room specifically for that general class of activities related to personnel ministrations which was not available in *Gunderson.* In *Gunderson*, there was a recognized past practice where the employing establishment consented to allow employees to go off premises to get coffee whereas, in the present case, the employing establishment acknowledged no past practice or consent. As such, it cannot be said that appellant's trip off premises activities falls into the general class of activities closely related to personal ministrations or comfort so that engaging in such activity does not take an employee out of the course of his employment since the employing establishment prohibited off premises breaks and provided a break room on premises for drinking coffee.

Appellant's injury did not occur in the performance of duty because his off-premises activity was neither accepted nor approved by the employer and was not in accordance with any generally accepted past practice. There were no employment factors involved in appellant's absence from the employment premises at the time his injury occurred. Although the injury occurred during his tour of duty, the act of leaving the employing premises to get coffee was not an incident of his employment. Rather, it was a matter of personal convenience.[17] Appellant did not submit sufficient evidence to support that management had some awareness of employees leaving the workplace to get coffee. There is no evidence that it consented to or encouraged this

[14] *See Cardillo v. Liberty Insurance Co*., 330 U.S. 469, 479.

[15] *Harris Cohen, supra* 11.

[16] *Helen L. Gunderson, supra* 8. In *Gunderson*, coffee was not available on premises whereas in this case the employing establishment provided a break room for employees and prohibited off-premises breaks.

[17] *See Wesley T. Miller*, 38 ECAB 106 (1986).

activity. It was a voluntary activity which was not required of the employees. Any knowledge of such practice by appellant's supervisors is not sufficient to make an informal office practice an activity that is incidental to the employment.[18] Appellant has not established that the injury he sustained on November 11, 2005 arose in the performance of duty.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2006 is affirmed.

Issued: June 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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