

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**K.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Smithville, AR, Employer**

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) **Docket No. 09-726**  
) **Issued: November 9, 2009**  
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*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 22, 2009 appellant filed a timely appeal from a December 16, 2008 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

**ISSUE**

The issue is whether appellant sustained an injury in the performance of duty on October 23, 2007.

On appeal appellant, through his attorney, contends that the Office decisions are contrary to fact and law.

**FACTUAL HISTORY**

On October 30, 2007 appellant, then a 34-year-old postmaster, filed a Form CA-1, traumatic injury claim, alleging that she was injured in a motor vehicle accident on October 23, 2007 that resulted in the amputation of her left arm. She stopped work that day. A witness advised that appellant left work at 11:30 a.m. to pick up lunch. Her regular work hours were

from 7:30 am. to 4:00 p.m., Monday through Friday. Appellant acknowledged that she was not in the performance of duty but stated that she was an exempt employee and therefore on the clock. By letter dated November 20, 2007, the Office informed appellant of the evidence needed to support her claim.

By letter dated November 9, 2007, the employing establishment controverted the claim, contending that appellant's injury did not occur in the performance of duty because she was going to pick up lunch. On December 6, 2007, the employing establishment advised that appellant was an exempt employee for pay purposes only and that she was not on the clock when the accident occurred. The employing establishment stated that management did not direct or mandate her to travel and pick up her lunch at an off-premises location.

In a report dated November 8, 2007, Dr. Edward A. Perez, a Board-certified orthopedic surgeon, noted that appellant sustained an open humerus fracture of the left arm with vascular injury following an automobile accident, and that she developed complications from ischemia, necessitating a through shoulder amputation. On December 5, 2007 he noted that appellant had significant phantom pain and mental health issues and that she might not be able to return to permanent employment.

In a December 7, 2007 statement, appellant advised that at the time of the October 23, 2007 motor vehicle accident, she was on her 30-minute lunch break. She stated that she was an exempt employee who was paid on a salary basis regardless of the hours worked or quantity of work performed and had at times performed work at lunch and after work hours. She reiterated that because she was an exempt employee who was in pay status at the time of the accident, her injury was compensable.

By decision dated December 21, 2007, the Office denied the claim on the grounds that appellant did not sustain an injury in the performance of duty.

On January 11, 2008 appellant, through her attorney, requested a telephonic hearing that was held on April 29, 2009. At the hearing, appellant described the October 23, 2007 motor vehicle accident. It was a very rainy day and, as she drove to pick up lunch on a curvy rural highway, she lost control of her car when it hydroplaned. She stated that she had not returned to work and contended that, as she was an exempt employee who was paid for lunch, the injury was compensable. Appellant generally worked alone in a small post office, noting that she had a set lunch hour daily from 11:30 a.m. to 12:00 noon, when she would close the post office. On occasion she had work duties at lunchtime but that on the date of injury she was just going to get lunch in her private vehicle. Appellant's attorney argued that her injury occurred in the course of employment because, as she was a 24-hour a day employee, her lunch was no different than a bathroom break, that she was covered as if she was on travel status, and that her lunch was not a frolic or detour. He noted that there were no lunch facilities at the employing establishment. By letter dated May 2, 2008, the attorney argued that the cases of *Helen L. Gunderson* and *Annette Stonework* established that appellant was in the performance of duty when injured.<sup>1</sup>

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<sup>1</sup> *Annette Stonework*, 35 ECAB 306 (1983); *Helen L. Gunderson*, 7 ECAB 288 (1954).

On May 30, 2008 Hilda Owens, an employing establishment health and resource management specialist, contended that appellant was on a personal lunch break when the injury occurred. She stated that no postal employee was paid for their lunch hour, even if exempt. Ms. Owens noted that appellant had an assigned 40-hour work week from 7:30 a.m. to 4:00 p.m. with a 30-minute, nonpaid lunch period, and acknowledged that the Smithville Post Office did not have a restaurant on the premises.

In a June 23, 2008 letter, appellant described her work duties. She retired on disability effective July 9, 2008. In reports dated August 7, 2008, Dr. Charles Davidson, Board-certified in family medicine, diagnosed left upper extremity amputation, depression, anxiety, right upper extremity thoracic outlet syndrome and phantom pain. He advised that appellant was unable to work in any capacity and would be unable to return to work in the future. In a September 29, 2008 report, Dr. Davidson noted that the October 23, 2007 motor vehicle accident resulted in an amputation of the left upper extremity at the shoulder joint. Appellant had significant depression and phantom pain, reporting that she had developed right upper extremity thoracic outlet syndrome and, due to her conditions, was unable to work or to return to work in the future.

By decision dated December 16, 2008, an Office hearing representative affirmed the December 21, 2007 decision on the grounds that appellant was not in the performance of duty when she sustained the October 23, 2007 injury.

### **LEGAL PRECEDENT**

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 “the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.”<sup>2</sup> 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: “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.”<sup>3</sup> In deciding whether an injury is covered by the Federal Employees’ Compensation Act,<sup>4</sup> the test is whether, under all the circumstances, a causal

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<sup>2</sup> 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

<sup>3</sup> *George E. Franks*, 52 ECAB 474 (2001).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.<sup>5</sup>

In addressing the coming and going rule as applicable to lunch-time travel, Larson states, “when the employee has a definite place and time of work, and the time of work does not include the lunch hour, the trip away from and back to the premises for the purpose of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday, and should be governed by the same rules and exceptions.”<sup>6</sup> Larson also distinguishes coffee or rest breaks, stating that including the lunch period in the going and coming rule can be justified “because normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee’s freedom of movement is so complete, that the obligations and controls of employment can justifiably be said to be in suspension during this period.”<sup>7</sup>

There are recognized exceptions to the going and coming rule which are dependent upon the particular facts relative to each claim: (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.<sup>8</sup>

### ANALYSIS

Appellant sustained injury in a motor vehicle accident on October 23, 2007 when she was driving on a public highway in her personal car to pick up lunch. She contends that, as an exempt employee, she would be covered 24-hours a day, whether on or off the premises. The Board finds this is not the case. The CA-1 form submitted by appellant indicated that her regular duty hours were from 7:30 a.m. to 4:00 p.m. The employing establishment advised that she was not paid during her lunch break. There is no question that appellant had a fixed place and time of work and the Board finds that the evidence supports that she had fixed hours.<sup>9</sup>

The Board finds that the *Gunderson* and *Stonework* cases are distinguishable from the facts of the present case. In *Gunderson*,<sup>10</sup> the off-premises activity was approved by the employing establishment and was during a paid rest period. In the present case, while there was no cafeteria at the employing establishment, appellant was on her unpaid lunch period. As noted by Larson, when the employee has a definite place and time of work, and the time of work does not include the lunch hour, the trip away from and back to the premises for the purpose of getting

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<sup>5</sup> *Mark Love*, 52 ECAB 490 (2001).

<sup>6</sup> A. Larson, *The Law of Workers’ Compensation* § 13.05(1) (1999); see *S.A.*, Docket No. 09-169, issued July 21, 2009.

<sup>7</sup> *Id.* at § 13.05(4).

<sup>8</sup> *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

<sup>9</sup> *Donald R. Gervasi*, 57 ECAB 281 (2005).

<sup>10</sup> *Supra* note 1.

lunch is indistinguishable in principle from the trip at the beginning and end of the workday and should be governed by the same rules and exceptions.<sup>11</sup> In *Stonework*,<sup>12</sup> although the claimant was on her lunch period, the claimant was injured on employing establishment property. Unlike the instant case in which appellant was off premises during her unpaid lunch period. As noted, when an employee leaves the work premises for lunch or other personal activity, he or she is not considered within the performance of duty unless one of the recognized exceptions to the going and coming rule is applicable. There is no evidence that establishes appellant's employment required her to travel on the highway to obtain lunch. She was driving her personal vehicle. Appellant was not subject to emergency calls, as in the case of firemen, and, by her own admission, at the time of the October 23, 2007 motor vehicle accident, she was not doing anything reasonably incidental to her employment with the knowledge and approval of the employer.<sup>13</sup>

The facts in evidence do not establish that appellant's trip on October 23, 2007 to pick up lunch was other than a personal trip. Appellant chose to leave the premises for lunch. She was not fulfilling the duties of her employment or on the employing establishment premises. The Board finds that the injury appellant sustained on October 23, 2007 was a result of the ordinary, nonemployment hazards of a journey shared by all travelers and is not compensable.<sup>14</sup> Appellant was not in the course of employment. She therefore did not sustain a personal injury in the performance of duty.

### CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that the injury sustained on October 23, 2007 was in the performance of duty.

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<sup>11</sup> A. Larson, *supra* note 6.

<sup>12</sup> *Supra* note 1.

<sup>13</sup> *Phyllis A. Sjoberg, supra* note 8.

<sup>14</sup> *Donald R. Gervasi, supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 16, 2008 be affirmed.

Issued: November 9, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board