United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 10-1350**
	)	**Issued: March 1, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2010 appellant filed a timely appeal from an April 2, 2010 merit decision of the Office of Workers' Compensation Programs which denied his traumatic injury claim. 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 sustained an injury on January 30, 2010 while in the performance of duty.

FACTUAL HISTORY

On February 12, 2010 appellant, then a 48-year-old mail-processing clerk, filed a claim for traumatic injury alleging that on January 30, 2010 at 7:05 a.m. he injured his left elbow when he slipped on ice on the front stairs entering the building. He noted that his regular work shift was 10:00 p.m. to 6:30 a.m. Appellant stopped working on January 31, 2010. He submitted an undated and unsigned duty status report, a description of his work duties as a mail-processing

clerk and pay rate information. The employing establishment controverted the claim stating that the injury did not occur in the performance of duty and that it was not rainy or icy the day of the alleged incident.[1]

Appellant submitted a January 31, 2010 report from Dr. Mustafa M. Akif, a Board-certified family practitioner, who stated that appellant reported being ill since January 30, 2010 and complained of elbow pain secondary to a fall. Dr. Akif diagnosed a closed fracture of the humerus, lower end and ordered an x-ray of appellant's elbow. He stated that appellant should be excused from work from January 31 to February 3, 2010.

In a February 5, 2010 medical slip, Dr. Anuj Gupta, a Board-certified orthopedic surgeon, diagnosed appellant with a left triceps tendon rupture and scheduled him for surgery on February 10, 2010.

In a February 24, 2010 letter, the Office requested additional information from the employing establishment regarding the alleged January 30, 2010 incident. It asked for information regarding whether appellant was on premises which were owned, operated or controlled by the employing establishment at the time of his alleged injury, whether he was engaged in official duties or activities that were considered reasonably incidental to the assignment and why he was on the premises at 7:05 a.m. when his normal work shift ended at 6:30 a.m. The employer did not respond to the letter.

The Office also requested additional information from appellant. It asked for a detailed description of how the injury occurred, what he was doing on the premises outside of his normal work schedule, whether his supervisor approved of any overtime and of any similar disabilities or symptoms he sustained prior to the injury. The Office also requested a detailed narrative medical report from a physician which included dates of examination and treatment, history of injury, examination and test results, a firm diagnosis and an opinion with stated medical reasons on whether the work incident caused or aggravated the alleged injury.

On February 10, 2010 Dr. Gupta performed surgery. He diagnosed appellant with a left triceps tendon rupture, noting that a magnetic resonance imaging (MRI) scan confirmed his diagnosis. Dr. Gupta noted that appellant injured his left elbow approximately two weeks prior when appellant slipped and fell. In a February 23, 2010 duty status report, he noted that appellant underwent a left elbow triceps repair. Dr. Gupta reiterated that appellant injured himself when he fell and struck his left elbow against a step at work.

On March 15, 2010 appellant responded to the Office's development letter. He stated that on January 30, 2010 he was working at the employing establishment facility when he slipped and fell on the north steps. Appellant explained that his supervisor authorized overtime so he passed up a normally scheduled break at 4:45 a.m. He took a break at the end of his tour in order to expedite the processing of a DPS zone. While on break appellant took his personal belongings to his vehicle and slipped on ice on the front stairs when he returned to the building.

[1] The employing establishment noted that appellant was on overtime when according to appellant he exited the building to put his lunch box in his car.

In a March 3, 2010 letter from Adonis S. Henderson, a witness, stated that he was leaving work when he saw appellant getting up from a fall on the steps at the employing establishment.

Appellant resubmitted a copy of Dr. Gupta's surgical report. In MRI scan findings dated February 5, 2010, Dr. John D. Hamilton, a Board-certified diagnostic radiologist, noted that appellant sustained a left triceps tendon rupture with full thickness discontinuity and a large amount of hemorrhage extending to the entire triceps muscle belly, compatible with muscle tearing and strain. He advised that the findings may be related to calcific tendinitis. Dr. Hamilton's ultimate impression was that appellant had a large full-thickness tear of the majority of the distal triceps tendon with partial tearing of the long head of triceps tendon and tendinopathy and probable small partial tear of the common flexor tendon.

In an April 2, 2010 decision, the Office denied appellant's claim for compensation. It found that the injury occurred when he passed up his normally scheduled break for one at the end of his work shift without permission. Therefore, appellant's injury did not occur in the performance of duty.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[4] The Act provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5]

The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation laws, namely, arising out of and in the course of performance.[6] In the course of employment relates to the elements of time, place and work activity. Generally, an injury occurs in the course of employment when it occurs at a time when the employee may reasonably be said to be engaged in his master's business, at a place when he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7]

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[2] 5 U.S.C. § 8102(a).

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *M.M.*, 60 ECAB __ (Docket No. 08-1510, issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Supra* note 2.

[6] *S.F.*, 61 ECAB __ (Docket No. 09-2172, issued August 23, 2010); *Bernard D. Blum*, 1 ECAB 1 (1947).

[7] *M.P.*, 61 ECAB __ (Docket No. 10-54, issued July 27, 2010); *Eugene G. Chin*, 39 ECAB 598 (1988); *William L. McKenney*, 31 ECAB 861 (1980).

Regarding employees having fixed hours and a fixed place of work, the Board has accepted the general rule of workers' compensation law that injuries occurring on the premises of the employing establishment, while the employees are going to and from work before or after working hours or at lunchtime are compensable.[8] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their employment.[9] On the other hand, when a claimant departs from his workstation without authorization to retrieve personal items, such activity is not considered an activity necessary for personal comfort or ministration or incidental to his employment.[10]

ANALYSIS

The Board finds that this case is not in posture for a decision. The Office denied appellant's claim on the grounds that he was engaged in personal activities, not in the employer's business or in the duties he was employed to perform. The Board finds, however, that the evidence of record is insufficient to determine whether he was on an authorized break at the time of the alleged injury. The case is remanded to the Office for development of the evidence.

The Office's procedure manual provides that injuries arising on the premises may be compensable if the employee was engaged in activity reasonably incidental to the employment such as personal acts for the employee's comfort, convenience and relaxation; eating meals and snacks on the premises; and taking authorized coffee breaks.[11] An employee's injury that occurs after returning from his vehicle from a regular lunch hour may be compensable as activity reasonably incident to employment.[12] However, if an employee is injured when on a break that is not approved by or with knowledge of the employer, the injury is not compensable.[13] In this case, the evidence is insufficient to establish whether appellant was on an authorized break when he returned items to his vehicle.

The Office denied appellant's claim on the grounds that he decided to take his "normal break" at the end of his work shift without permission. The record, however, is unclear whether appellant was allowed to pass up a normal break at 4:45 a.m. and take one at the end of his work shift before beginning his overtime shift, as he alleged. According to his claim form, his regular

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[8] *F.S.*, 61 ECAB __ (Docket No. 09-1573, issued April 6, 2010); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989); *Emma Varnerin, M.D.*, 14 ECAB 253, 254 (1963).

[9] *R.H.*, 60 ECAB __ (Docket No. 09-13, issued March 6, 2009); A. Larson, *The Law of Workers' Compensation* § 21 (2007).

[10] *See A.K.*, 61 ECAB __ (Docket No. 09-2032, issued August 3, 2010); *Robert A. Pszczolkowski*, Docket No. 01-1645 (issued April 11, 2002).

[11] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(a) (August 1992).

[12] *See J.O.*, Docket No. 09-1432 (issued February 3, 2010) (where the Board held that using a portion of appellant's lunch hour to clean the snow off her vehicle that was parked on government property did not take the injury out of the performance of duty); *see also Annette Stonework*, 35 ECAB 306 (1983).

[13] *See Harris Cohen*, 8 ECAB 457 (1955) (where the Board held that appellant's off-premises injury did not occur in the performance of duty because appellant was not permitted to leave the building during rest, coffee or relief periods).

duty hours were 10:00 p.m. to 6:30 a.m., but his injury occurred at 7:05 a.m. Appellant stated that he was still on the premises because he had been authorized overtime. He took his break at the end of his regular work shift instead of during his scheduled lunchtime. Whether an employee is on an authorized break may be determined by a schedule, such as a lunch break or past practice and knowledge of the employing establishment.[14] The employer noted on the claim form that appellant was on overtime. However, the employer did not respond to the Office's development letter. The evidence was not sufficiently developed as to when overtime commenced, whether it was customary for employees to take breaks at the end of their regular work shifts if they were to work overtime or whether there were limitations imposed by the employer on the breaks from work.

The Board finds that the evidence requires further development to determine whether appellant was on an authorized break at the time of the alleged injury. On remand, the Office should further develop the evidence as appropriate to determine whether appellant was in the performance of duty at the time of the alleged injury on January 30, 2010.

CONCLUSION

The Board finds that additional evidence is needed to determine whether appellant was injured in the performance of duty on January 30, 2010.

[14] *James G. Pimenta,* Docket No. 06-598 (issued June 15, 2006); *Roma A. Mortenson-Kindschi,* 57 ECAB 418 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development in conformance with this decision.

Issued: March 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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