

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

D.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 11-751
Issued: March 12, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2011 appellant, through his attorney, filed a timely appeal from a November 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 met his burden of proof to establish that he sustained an injury in the performance of duty on February 12, 2010.

FACTUAL HISTORY

On February 13, 2010 appellant, a 55-year-old custodian, filed a traumatic injury claim alleging that he sustained neck and back injuries in the performance of duty on February 12,

¹ 5 U.S.C. § 8101 *et seq.*

2010 when he was involved in an off-premises motor vehicle accident. He stated that the vehicle he was driving was hit from behind at a stop light. Appellant's supervisor, Robert Kinnerman, controverted the claim, stating that appellant did not have authority to use the postal vehicle and the injury was caused by his willful misconduct.

In a statement dated February 18, 2010, supervisor Mr. Kinnerman stated that, on the date in question, appellant informed him that he had to take a snow plow to the repair shop and needed someone to pick him up. He told appellant that he "could not do it today and not to take the truck to get it fixed." At 4:20 p.m., appellant asked Supervisor Tom Lafferty the same question and was told again that nobody was available to pick him up. When he asked if Joe Scarpato, a casual worker, could pick him up, he was told Mr. Scarpato had to be off the clock by 4:30 p.m. At 4:45 p.m., Mr. Kinnerman received a telephone call from appellant reporting that he had been involved in an accident while taking the postal vehicle to the repair shop and that Mr. Scarpato had hit the truck in the rear. He reiterated that appellant was never told to take the truck to get repaired.

By letter dated February 22, 2010, OWCP advised appellant of the factual and medical evidence needed to establish his claim. Appellant was asked to provide details regarding the claimed incident. He was also asked whether he was authorized to use the vehicle on the date in question and, if so, who authorized its use; whether he was disciplined for his actions on February 12, 2010; and whether he had ever taken a postal vehicle before without authorization.

The record contains a February 13, 2010 (Form CA-16) authorizing medically necessary treatment for injuries related to a February 12, 2010 incident when appellant was rear-ended. Appellant submitted medical evidence reflecting treatment for neck and back pain related to the claimed injury.

At a February 23, 2010 predisiplinary hearing, Supervisor Russ Carmody informed appellant that management alleged that he took the truck without permission. Appellant denied the charge and stated that he had never taken a vehicle without permission. He contended that the employing establishment's statements were inconsistent with the evidence. Noting that appellant would have nothing to gain by taking the vehicle for repair without authorization, he argued that the employing establishment's story made absolutely no sense.

In a March 10, 2010 statement, appellant indicated that he was scheduled to work from 11:00 a.m. until 7:30 p.m. on the date of the claimed injury. While plowing snow in the late afternoon, the plow on the "state body" became stuck in one direction. When appellant telephoned Hale Truck Service (Hale) to inquire about having the plow repaired, he was told to "bring it down and they would fix it." When he talked to Mr. Kinnerman about taking the plow for repairs, he was reportedly referred to Mr. Lafferty. In a conversation occurring at approximately 4:05 p.m., appellant explained that the plow needed repairs, as snow was expected. He informed both supervisors that he had contacted Hale, which had previously repaired the plow for the same problem and was told "they needed it by Monday so that they could fix it by Tuesday, so that we would have it back Tuesday Morning." When appellant asked whether either supervisor could follow him to Hale so that he could get a ride back to the office, he was told that neither was available. When he suggested that casual worker Mr. Scarpato could assist him, using his own vehicle, Mr. Lafferty "said it was OK and that

[Mr. Scarpato] could go with [him].” Appellant noted that Mr. Lafferty did take a minute to think over allowing Mr. Scarpato to be on the overtime clock, but did agree that they should proceed with getting the truck repaired. Before leaving the employing establishment, he “got Bob’s attention and let him know that we were leaving. He acknowledged.” Appellant and Mr. Scarpato reportedly left the employing establishment at approx. 4:15 p.m. without clocking out and Mr. Scarpato followed in his own vehicle. At 4:28 p.m., appellant’s vehicle was struck from behind by Mr. Scarpato’s vehicle.

The record contains a March 1, 2010 Notice of Suspension, suspending appellant for 14 days for failure to follow instructions. The notice indicates that on February 12, 2010 appellant was involved in an accident while driving in an unauthorized vehicle. The record also contains a February 12, 2010 accident report from the Voorhees Township Police Department.

By decision dated April 8, 2010, OWCP denied appellant’s claim finding that, though the incident occurred as alleged, the evidence failed to establish that it had occurred in the performance of duty. It found that he did not have permission from the employing establishment to take the government vehicle to the garage on February 12, 2010.

On April 22, 2010 appellant requested an oral hearing.

At the August 25, 2010 hearing, appellant testified that, in performing his duties as a custodian, he was often required to go off premises. In doing so, he went without written instructions and merely informed his supervisor that he was leaving the premises. Appellant repeated the circumstances surrounding the February 12, 2010 incident. Noting that Mr. Lafferty had “hemmed and hawed” about whether to permit Mr. Scarpato to work overtime in order to give appellant a ride from Hale back to the employing establishment, appellant stated that he had ultimately stated, “O.K., Do that.” He argued that he had no reason to take the vehicle for repair without permission, because he would have performed other work assignments if the truck was not fixed.²

Appellant filed a grievance in response to the March 1, 2010 Notice of Suspension. On June 16, 2010 the 14-day suspension was reduced to a letter of warning, which was to remain in his file for 18 months provided that there were no subsequent disciplinary issues.

By decision dated November 10, 2010, an OWCP hearing representative affirmed the April 8, 2010 decision. The hearing representative found that the evidence established that appellant was not authorized to take the employing establishment vehicle off premises on the date in question. Therefore, appellant failed to establish that he was in the performance of duty when the February 12, 2010 accident occurred.

On appeal, counsel argues that appellant was injured in the performance of duty because he was performing an authorized errand when the February 12, 2010 motor vehicle accident occurred and that the case should be remanded for further development of the facts.

² The record contains medical notes and reports of x-rays and magnetic resonance imaging scans submitted in support of appellant’s claim.

LEGAL PRECEDENT

FECA provides for the payment of compensation benefits 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 in FECA 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.³

In addressing this issue, the Board has generally held that, in the compensation field, to occur in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁴

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 from work, 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.⁵ Due primarily to the myriad factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of the travel may fairly be considered a hazard of the employment. These recognized exceptions are dependent upon the particular facts and related to situations: (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 her employment with the knowledge and approval of the employer.⁶

The Board has also recognized the special errand exception to the going to and coming from work rule. When the employee is to perform a special errand, the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the errand. Ordinarily, cases falling within this exception involve travel which differs in time or route or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason, coverage is

³ *Bernard D. Blum*, 1 ECAB 1 (1947).

⁴ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *Gabe Brooks*, 51 ECAB 184 (1999); *Robert F. Hart*, 36 ECAB 186, 191 (1984).

⁶ *Joan K. Phillips*, 54 ECAB 172 (2002); see also *Janet Rorrer*, 47 ECAB 764, 768 (1996).

afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.⁷

ANALYSIS

OWCP determined that appellant did not sustain an injury in the performance of duty on February 12, 2010. The Board finds that this case is not in posture for decision.

The evidence establishes that although appellant's injury occurred during his normal work hours, it did not occur on the employing establishment premises. Rather, he was injured on a public street while taking a postal vehicle to a repair shop. As noted, the general coming and going rule would preclude coverage under FECA for this off-premises injury, unless appellant can establish an applicable exception.⁸

Appellant argues that this case falls within the special errand exception, contending that his supervisor sanctioned his trip to the repair shop on February 12, 2010. As noted, when the employee is to perform a special errand, the employer is deemed to have agreed, expressly or impliedly, that an employee is engaged in an employment service while performing the errand. In such a case, the essence of the exception is found in the agreement to undertake a special task.⁹ The Board finds that the evidence in this case is insufficient to establish whether the employing establishment agreed, either expressly or impliedly, to permit appellant to take the postal vehicle off-premises for the purpose of having the vehicle repaired.

The employing establishment denied that appellant was authorized to perform the errand. Mr. Kinnerman asserted that appellant was never told to take the truck to be repaired. When he asked if someone could follow him to the repair shop, appellant was reportedly told that nobody was available to pick him up. When he asked if Mr. Scarpato could pick him up, he was told Mr. Scarpato had to be off the clock by 4:30 p.m. On the other hand, appellant stated that although his supervisor initially indicated that, no one was available to give him a ride to the repair shop, he ultimately agreed that they should proceed with getting the truck repaired and that Mr. Scarpato could give appellant a ride. The Board is unable to make a determination based on these conflicting versions of the facts.

The circumstances surrounding the February 12, 2010 incident are consistent with appellant's allegations. It is undisputed that appellant had been plowing the employing establishment parking lot when the plow broke down and that he contacted Hale to make arrangements to have it repaired in anticipation of a forecasted snow storm. Therefore, his purported reason for taking the vehicle off premises was to benefit his employer. The employing establishment did not contend and the evidence did not in any other way reflect, that appellant had any personal motive for taking the postal vehicle to be repaired without implied or actual permission. Appellant has noted that he would have simply worked on other projects if the snow plow was not functional.

⁷ *Elmer L. Cooke*, 16 ECAB 163 (1964); *J.H.*, Docket No. 10-185 (issued July 19, 2010).

⁸ See *supra* note 5 and accompanying text.

⁹ See *supra* note 7 and accompanying text.

The record reflects that appellant received a Notice of Suspension for failure to follow instructions regarding the events of February 12, 2010. The suspension was later reduced to a letter of warning. With regard to claims under FECA, the Board has held that the determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under FECA and the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability arising under FECA.¹⁰

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹ The Board notes that the claims examiner did not develop the factual evidence or attempt to ascertain from the employing establishment whether appellant routinely performed errands off-premises and, if so, whether he required prior permission to do so. Accordingly, the November 10, 2010 decision will be set aside and the case remanded for further evidentiary development as to whether he had actual or implied permission to take the employing establishment's truck to the repair shop on the date in question. On remand, OWCP should attempt to obtain a statement from Mr. Lafferty, Mr. Scarpato and any other individuals who may have relevant knowledge regarding this issue. Following this and such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁰ See *Beverly R. Jones*, 55 ECAB 411 (2004).

¹¹ See *Phillip L. Barnes*, 55 ECAB 426 (2004); *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983); *L.L.*, Docket No. 10-16 (issued October 1, 2010).

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for action in accordance with this decision.

Issued: March 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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