United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 17-0995**
	)	**Issued: November 3, 2017**
U.S. POSTAL SERVICE, KENTUCKIANA DISTRICT, Louisville, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 6, 2017 appellant, through counsel, filed a timely appeal from a January 31, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 her burden of proof to establish an employment-related injury in the performance of duty on July 14, 2014.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel asserts that the January 31, 2017 decision is contrary to law and fact

FACTUAL HISTORY

On March 3, 2016 OWCP received a December 13, 2014 traumatic injury claim (Form CA-1) from appellant, then a 54-year-old rural carrier who was working as a supervisor of customer services. Appellant alleged that she injured her shoulders and neck when she was involved in a motor vehicle accident at approximately 7:40 a.m. on July 14, 2014. She stopped work that day and did not return.

In correspondence dated March 3, 2016, an employing establishment human resources specialist controverted the claim. He indicated that the claim form was not received until March 3, 2016 and, at the time of the accident on July 14, 2014, appellant was not acting as a rural carrier, but instead was driving from her home to her duty station where she acted as supervisor of customer services. Pay information and a prior March 4, 2015 letter from the human resources specialist, which had not been mailed, also indicated that at the time of the July 14, 2014 motor vehicle accident, appellant had been working in a supervisory position. The letter cited employing establishment procedures indicating that rural carriers were protected under FECA if an injury was sustained while in the performance of duty. The procedures noted that rural carriers were considered to be in the performance of duty for purposes of FECA when driving their own vehicle between their home and the post office and between the post office and their home, provided employing establishment records indicated that the carrier was required to furnish their own vehicle. They further indicated that an investigation was conducted to determine if an injury occurred on the way to or from the assigned postal facility, as well as if the carrier was clearly working within the scope of employment at that time.

An employing establishment accident report noted that the motor vehicle accident occurred at 7:40 a.m. on July 14, 2014, and that appellant was a rural carrier.

By letter dated March 7, 2016, OWCP informed appellant of the evidence needed to support her claim. Appellant was asked to provide answers to an attached questionnaire which questioned whether she was going to deliver mail on the day of the accident or oversee customer service operations. She was afforded 30 days to respond.

In a decision dated April 11, 2016, OWCP noted that appellant had not responded to the March 7, 2016 development letter and denied the claim because she had failed to submit medical evidence containing a diagnosis caused by the July 14, 2014 motor vehicle accident.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. Copious medical evidence was submitted. An emergency department report dated July 14, 2014 noted that appellant was seen on a nonurgent basis following a motor vehicle accident. Dr. Michael Howard, a Board-certified family physician, diagnosed shoulder and lumbosacral strain. Appellant was discharged that day. Dr. David P. Bealle, a Board-certified orthopedic surgeon, performed right shoulder arthroscopic rotator cuff repair on October 15, 2014, and left rotator cuff repair on February 11, 2015. On November 13, 2015 Dr. Gregory B. Lanford, a Board-certified neurosurgeon, performed anterior cervical discectomy at C5-6 for a herniated disc.

Evidence of record indicates that appellant received a third-party settlement regarding the July 14, 2014 motor vehicle accident. Correspondence from OWCP to an attorney representing appellant in her third-party claim dated October 5, 2016 noted that, as appellant did not have an accepted FECA case, no refund was due OWCP. A Long Form Statement of Recovery (Form EN-1108) documented the third-party recovery. The EN-1108 reported a gross recovery of $300,000.00. After deducting attorney's fees ($99,990.00), court costs ($1,862.03), and an additional 20 percent ($39,629.59), the balance remaining was $158,518.38. The form noted that there had been no OWCP disbursements, and that the $158,518.38 would be a credit against future FECA benefits, if the claim was ever accepted.

At the hearing, held on December 6, 2016, appellant testified that she was terminated by the post office on September 17, 2016 because she could no longer physically perform her job duties. She described the July 14, 2014 motor vehicle accident and her medical condition and treatment, stating that she had been released from care in April 2016, but continued to have problems with her shoulders. Appellant indicated she was seeking wage-loss compensation from the date of injury and reimbursement for medical expenses. When questioned by the hearing representative, appellant testified that on the date of injury she was driving to a detail position as a supervisor of customer services at the Benton, Kentucky, post office. She indicated that she had been an acting supervisor at various post offices for most of the time since 2008, and had continuously been working as a supervisor for the 18-month period prior to the motor vehicle accident. Appellant indicated that she was reimbursed for travel to the Benton Post Office because of its distance from her home (over 50 miles), noting that it was the only detail for which her travel was reimbursed, and that she had been there for four months. She stated that she had not submitted a request for travel reimbursement for July 14, 2014.

By decision dated January 31, 2017, an OWCP hearing representative affirmed the April 11, 2016 decision, as modified to reflect that appellant was not in the performance of duty when injured on July 14, 2014. He further found that the fact that she was entitled to reimbursement for travel on July 14, 2014 was insufficient to place her in the performance of duty.

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."[3] 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 held: "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

[3] 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

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."[4] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[5]

The Board has also recognized 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. Rather such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[6] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts of 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 firefighter; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county, or state authorities because of civil disturbances or other reasons.[7] OWCP procedures indicate:

> "Where the Employment Requires the Employee to Travel. This situation will not occur in the case of an employee having a fixed place of employment unless on an errand or special mission. It usually involves an employee who performs all or most of the work away from the industrial premises, such as a chauffeur, truck driver, or messenger. In cases of this type, the official superior should be requested to submit a supplemental statement fully describing the employee's assigned duties and showing how and in what manner the work required the employee to travel, whether on the highway or by public transportation. In injury cases a similar statement should be obtained from the injured employee."[8]

It is a well-established principle that where the employee as part of his or her job is required to bring along his or her own car, truck or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.[9]

[4] *George E. Franks*, 52 ECAB 474 (2001).

[5] *Mark Love*, 52 ECAB 490 (2001).

[6] *See R.G.*, Docket No. 16-1419 (issued December 6, 2016).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(b) (August 1992).

[9] Lex K. Larson, *Larson's Workers' Compensation*, § 15.05 (2013).

Because rural carriers may use their own transportation to deliver their routes, which is a benefit to the employer, they may be deemed to be in the performance of their duties when they are driving their vehicles to and from their route, when they are required by the employing establishment to provide their own transportation.[10]

Regarding payment for expense of travel, Larson provides that "in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment."[11]

ANALYSIS

The Board finds that appellant did not sustain an injury in the performance of duty on July 14, 2014. As noted, it is well established that as to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable, but if the injury occurs off the premises, it is not compensable.[12] However, where the employee, as part of his or her job, is required to bring along his or her own car, truck, or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.[13] Because rural carriers may use their own transportation to deliver their routes, which is a benefit to the employer, they may be deemed to be in the performance of their duties when they are driving their vehicles to and from their route, when they are required by the employing establishment to provide their own transportation.[14]

In the case at hand, by her own testimony, at the time of the motor vehicle accident on July 14, 2014 appellant was not driving her vehicle to work as a rural carrier. Rather, she was driving to the Benton, Kentucky, post office where she had been an acting supervisor for four months. She had been acting as a supervisor for most of the time since 2008 and continuously for the 18 months prior to the motor vehicle accident. Thus, the "rural carrier" exception would not apply, and appellant would be held to the standard going and coming rule. Regardless of whether appellant used her private vehicle while acting as a rural carrier, she was not scheduled to perform the task of delivering mail on July 14, 2014. Rather, she was driving to the Benton, Kentucky, post office where she had been an activing supervisor for four months.

The general "coming and going" rule would preclude coverage under FECA for this injury, unless appellant established an applicable exception. There are, however, no recognized exceptions that are applicable under these circumstances. No evidence was presented as to an emergency call, a contract by the employer for transportation, a requirement of travel by

[10] *L.T.*, Docket No. 09-1798 (issued August 5, 2010).

[11] *Supra* note 9 at § 14.07.

[12] *See R.G., supra* note 6.

[13] *Supra* note 9 at § 15.05 (2013); *supra* note 10.

[14] *Supra* note 10.

highways or use of the highway for an incident of employment with knowledge and approval of the employing establishment. There is no indication that the employing establishment expressly or impliedly agreed that employment service should begin when appellant left home on July 14, 2014, nor any special inconvenience, hazard or urgency of travel that would bring it within coverage under FECA.[15]

Turning to consideration of travel reimbursement, the Board finds that the record fails to establish that, because appellant was reimbursed for mileage for the trip from her home to the Benton post office, the monetary reimbursement from the employing establishment constituted "all or substantially all" of the cost of her travel to work such as to constitute a "deliberate and substantial payment" of the expenses of travel so as to bring the trip itself within the course of employment. Larson indicates that a majority of such cases involve the determination of whether a "deliberate and substantial payment" was made for the expense of the travel.[16] Factors to consider include whether an automobile is provided for the travel, whether transportation involves a considerable distance or payment is made as a special inducement to hire.[17] Larson notes, however, that a travel allowance must be distinguished from mere extra pay,[18] *i.e.*, added compensation with no evidence that the travel is sufficiently important in itself to be regarded as part of the service performed. The treatise discusses several court cases which have noted that to apply an exception to the going and coming rule, the employing establishment must defray "all or substantially all" of the cost of travel.[19]

In the case *Jon Louis Van Alstine*,[20] where the employee was working a detail at an alternative work site, the Board noted that the employee was reimbursed at 31 cents a mile for the 13-mile difference between the work sites, but found it readily apparent that this monetary reimbursement from the employing establishment was not for "all or substantially all" of the cost of his travel to work.

In this case, although appellant testified that she was reimbursed for mileage from home to the Benton post office because it was more than 50 miles from her home, the record does not indicate the rate of reimbursement. Nonetheless, the Board finds that the reimbursement for mileage by appellant's employing establishment was not intended to cover "all or substantially all" of the cost of her travel to work. Thus, the reimbursement for mileage in this case did not constitute a "deliberate and substantial payment" of the expenses of travel. Furthermore, under most circumstances, the travel must be sufficiently important in itself to be regarded as part of

[15] Federal (FECA) Procedure Manual, *supra* note 9; *see L.P.*, Docket No. 07-959 (issued August 2, 2007).

[16] *Supra* note 10 at § 14.04(1).

[17] *Id*. at § 14.07(2).

[18] *Id*. at § 14.07(3).

[19] *See Ricciardi v. Aniero Concrete Co.*, 64 N.J. 60, 312 A.2d 139 (1973). The employing establishment paid 40 percent of the commuting expenses which was found an inadequate percentage to bring the accident under the exception to the going and coming rule.

[20] 56 ECAB 136 (2004).

the service performed and therefore within the performance of the employee's duties.[21] There is also no evidence to support that appellant was on a special mission from the time she left home on July 14, 2014. The facts do not show that the trip to work was in any way different from her ordinary commute to her detail position at the Benton post office. Appellant did not establish any special degree of inconvenience or urgency or show that the trip, in and of itself, was a substantial part of any service for which she was employed.[22] Her trip to work was to report at her assigned time as an acting supervisor and no different from that of other supervisors of customer service. The drive to work was no more for the benefit of the employing establishment than any other worker's commute. Appellant's commute was not by any mandate of the employing establishment.[23]

The Board therefore concludes that, based on these considerations, OWCP properly found that appellant was not in the performance of duty at the time of the July 14, 2014 motor vehicle accident, and was thus not entitled to workers' compensation coverage under FECA.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an employment-related injury in the performance of duty on July 14, 2014.

[21] *Supra* note 10 at § 14.07(3); *see R.C.*, 59 ECAB 427 (2008).

[22] *Supra* note 20.

[23] *M.H.*, Docket No. 10-1337 (issued April 19, 2011).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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