United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 16-1839**
	)	**Issued: September 20, 2017**
U.S. POSTAL SERVICE, CONWAY POST OFFICE, Conway, SC, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 16, 2016 appellant, through counsel, filed a timely appeal from a June 24, 2016 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 to consider the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty on March 17, 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 contends that appellant was in the performance of duty at the time of her motor vehicle accident.

FACTUAL HISTORY

On July 24, 2015 appellant, then a 52-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, during the morning of March 17, 2014, she sustained neck, arm, and back injuries as a result of a motor vehicle accident while she was on the way to work using her personal vehicle. Her regular work hours were listed 7:00 a.m. to 4:00 p.m., Monday through Friday. On the back of the claim form the employing establishment challenged the claim as it did not occur in the performance of duty. Appellant stopped work on the date of the incident and has not returned.

By letter dated July 31, 2015, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional factual and medical evidence. It related that the evidence was insufficient to support that she was injured while in the performance of duty. OWCP also noted that appellant had not provided a physician's opinion explaining how her injury resulted in a diagnosed condition.

By letter dated July 31, 2015, the employing establishment controverted appellant's claim. It noted that the March 17, 2014 motor vehicle accident occurred while she was on her way to work. Appellant had been assigned a delivery route and a motor vehicle on the date of the accident. She was not required to use her personal vehicle to deliver mail on the day in question.

On August 4, 2015 OWCP received a statement from David G. Fram, postmaster, and George B. Graham, supervisor at the time of the incident, noting that appellant was not in the performance of duty at the time of the motor vehicle accident. They noted that she was rear ended in her private motor vehicle on her way to work. Appellant was scheduled that day to deliver mail for Route 20, which had an assigned motor vehicle for the delivery route. As there was an assigned vehicle, they noted that her vehicle was not hired for delivery of mail that day.

On August 28, 2015 OWCP received additional factual and medical evidence.

A March 17, 2014 South Carolina Traffic Collision Report related that appellant's vehicle had been rear ended by another motor vehicle. The accident occurred at 8:30 a.m. on E. 155 Cultra Road, Conway, SC.

In a September 4, 2015 memorandum of conference between OWCP and Charles Johnson, an employing establishment human relations (HR) specialist, the claims examiner sought clarification from the employing establishment regarding the issue of performance of duty as appellant's work shift began at 7:00 a.m. and the accident occurred at 8:30 a.m. Mr. Johnson noted that she was scheduled to drive an employing establishment vehicle that day and not her personal vehicle. He further noted that shifts for rural carriers could differ daily, but that appellant had not clocked into work at the time of the accident and was on her way to work.

By decision dated September 4, 2015, OWCP denied appellant's claim, finding that she was not in the performance of duty at the time of the alleged injury. In support of its finding, it

noted that the motor vehicle accident occurred while she was on her way to work in her personal motor vehicle, she had been scheduled to use an employment vehicle to deliver mail, and the incident occurred before her tour of duty began.

On October 4, 2015 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on May 23, 2016.

In an October 19, 2015 letter, the employing establishment countered that appellant had not been in the performance of duty on the day of the motor vehicle accident and, thus, the injury was not employment related. It asserted that she was scheduled to use a postal vehicle that day to deliver mail and her vehicle was not in active status at the time she drove to work.

On November 3, 2015 Mr. Fram responded to two questions posed by OWCP. He noted that rural carrier associate employees were given a weekly schedule by the close of business on Wednesday prior to the upcoming week. At this point employees were aware of whether they would be using an employing establishment vehicle or their own vehicle to deliver mail. In cases of an emergency, the employing establishment would contact employees the morning of the emergency to advise that they were being called in on an unscheduled day, the route they had, and whether their motor vehicle or employing establishment vehicle was to be used. Next, Mr. Fram noted that employees were aware in advance as to whether their personal vehicle would be rented/hired that day for employing establishment business.

At the May 24, 2016 hearing, appellant testified that she used her personal motor vehicle to deliver mail most of the time. The only time she used a postal vehicle was when she was covering for another employee. Appellant testified that she did not know whether she would be using a postal vehicle or her own vehicle on March 17, 2014 until she arrived at work and was assigned her route for the day.

By decision dated June 24, 2016, the hearing representative affirmed the denial of appellant's claim. He found that the evidence of record was insufficient to establish that she was in the performance of duty at the time of the March 17, 2014 motor vehicle accident. The hearing representative also found that the record was devoid of any evidence supporting appellant's contention that it was only after being informed of the motor vehicle accident that the employing establishment assigned her to a route with a postal vehicle.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.[3] The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, locale,

[3] 5 U.S.C. § 8102(a). *See also P.S.*, Docket No. 08-2216 (issued September 25, 2009).

and time of injury whereas, arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.[4]

To occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[5]

The Board has recognized, as a general rule that off-premises injuries sustained by employees having fixed hours and places 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. Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers. There are recognized exceptions 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 employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighters; and (4) where the employee uses the highway to do something incidental to her employment with the knowledge and approval of the employing establishment.[6]

There are many workers who are required to perform some or all of their duties away from the employing establishment's premises. OWCP procedures include letter carriers in the first of four general classes of off-premises workers.[7] In determining whether this class of employees has sustained an injury in the performance of duty, the factual evidence must be examined to ascertain whether, at the time of injury, the employee is within the period of the employment, at a place where the employee reasonably may be and while the employee is fulfilling employment duties or engaged in activities reasonably incidental thereto.[8]

Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.[9]

ANALYSIS

OWCP denied appellant's claim as it found that she was not in the performance of duty at the time of the March 17, 2014 motor vehicle accident. The record establishes that appellant was

[4] *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-217 (issued October 21, 2009).

[5] *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[6] *See J.N.*, Docket No. 14-1764 (issued December 2, 2015).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992).

[8] *Thomas E. Keplinger*, 46 ECAB 699 (1995).

[9] *Michael E. Smith*, 50 ECAB 313 (1999).

a rural carrier associate working Monday through Friday with the usual hours of 7:00 a.m. to 4:00 p.m. She was on her way to work on March 17, 2014, driving her personal vehicle, when she was rear ended by another vehicle at 8:30 a.m. The Board finds that appellant has not established that she was in the performance of duty at the time of her alleged traumatic injury.

The basic test of coverage in each case of reported injury sustained while an employee is traveling to or from home and work in a personal vehicle is whether the employing establishment knew about and consented to the employee's use of a personal vehicle to perform his or her duties. The facts pertaining to the use of a privately-owned vehicle must be developed and each case must meet the other requirements that generally apply to establish that the employee was in the performance of duty, *i.e.*, traveling the most direct route.[10]

The record contains no evidence that appellant's personal vehicle had been scheduled to be used by the employing establishment on March 17, 2014 for the delivery of mail. Appellant acknowledged at the hearing that there were times an employing establishment vehicle was used instead of her personal vehicle to deliver mail. Mr. Fram, postmaster, informed OWCP that she had been scheduled to deliver mail for route 20, which had an assigned employing establishment motor vehicle for the delivery route, on March 17, 2104. He further noted that appellant's vehicle was not hired by the employing establishment for delivery of mail that day. In response to a request for clarification from OWCP, Mr. Fram reported that weekly schedules were posted for rural carrier associate employees by close of business on the Wednesday prior to the upcoming week. Information was also provided including whether or not the employee would be assigned an employing establishment vehicle or whether they would be required to use their own vehicle to deliver mail. Mr. Fram further noted that, when there was an emergency, employees would be contacted that, morning and informed that they were being called in on an unscheduled day, the assigned route they would have, and whether employing establishment vehicle was assigned. He also indicated that advance notice was given as to whether the employee's personal vehicle would be rented/hired. Mr. Johnson, HR specialist, agreed with Mr. Fram that appellant had not been scheduled to use her personal vehicle on March 17, 2014.[11]

In *David P. Sawchuck*,[12] claimant was a rural carrier who, while delivering mail in his personal vehicle, was injured when he lifted a damaged window from his personal vehicle. The Board found that claimant was injured while he was engaged in his master's business of delivering mail and the injury occurred at a place where he was expected to be in connection with his employment. Although the vehicle involved in the incident was the claimant's personal vehicle, the employing establishment did not controvert that the use of this vehicle was mandatory for appellant's employment as a rural route carrier. Unlike in *Sawchuck*, appellant's allegations that she was in the performance of duty at the time of the accident as she needed to

[10] *See S.L.*, Docket No. 14-1591 (issued December 24, 2014). The Board found that appellant was a rural carrier who was traveling from work to home in her personal vehicle with the knowledge and consent of her employing establishment; however, her injury did not occur in the performance of duty due to a deviation. Even if appellant's travel is covered under FECA, the timing of the injury must be within a reasonable interval before or after her work shift and she must be engaged in preparatory or incidental acts that benefit her employing establishment.

[11] *See supra* note 6.

[12] 57 ECAB 316 (2006).

drive her personal vehicle to work were contradicted by statements from the employing establishment.

The Board finds that appellant was a rural carrier who was traveling from home to work in her personal vehicle. There is no evidence that appellant was required to drive her own vehicle for delivery of mail on the day in question with the knowledge and consent of the employing establishment. Counsel argued that she used her personal vehicle 95 percent of the time and that, prior to arriving at work, she had no way of knowing whether she would be required to use her personal vehicle or an employing establishment vehicle. As noted above, appellant provided no evidence corroborating this allegation, which the employing establishment controverted through established policy. Counsel disagreed that appellant had knowledge that her personal vehicle would not be used that day for work. No evidence was provided by counsel to support that contention, however.

The Board finds that the evidence of record does not establish an applicable exception to the going to and coming from rule. Appellant therefore was not in the performance of duty at the time of the March 17, 2014 motor vehicle accident and OWCP properly denied her claim.[13]

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 was not in the performance of duty when she sustained her alleged injuries on March 17, 2014.

[13] *See Jon Louis Van Alstine*, 56 ECAB 136 (2004) (find that the employee did not fall within the exception to the general rule, the Board denied coverage where the claimant sustained an off-premises injury while riding his motorcycle to work). *See also Linda S. Jackson*, 49 ECAB 486 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2016 is affirmed.

Issued: September 20, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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