United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 18-0445**
	)	**Issued: August 14, 2018**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Tallahassee, FL, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 29, 2017 appellant, through counsel, filed a timely appeal from a November 28, 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.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on December 7, 2016, as alleged.

FACTUAL HISTORY

On December 7, 2016 appellant, then a 60-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he was seriously injured by hard impact when his vehicle ran off the road and hit a tree at 9:00 p.m. that day. He stated that he was on official business and noted head, rib, and extremity injuries. The claim form indicated that appellant's duty station was at 2800 South Adams Street, Tallahassee, Florida, and his regular work hours were 8:00 a.m. to 5:00 p.m.

The employing establishment controverted the claim, maintaining that appellant was not in the performance of duty, noting that he was off the clock and had deviated from the direct line of travel to retrieve his vehicle from a repair shop while travelling home. It also noted that no medical documentation had been submitted.

By development letter dated January 24, 2017, OWCP informed appellant of the deficiencies of his claim and advised him of the type of medical and factual evidence needed to establish the claim. It afforded him 30 days to submit the necessary evidence. In a note to the employing establishment, OWCP stated that, if appellant had been treated at an employing establishment medical facility, his treatment notes should be submitted to OWCP.

In an undated response, appellant indicated that on the date of injury he went to work, and after delivering mail for about three miles, his personal vehicle that he used for mail delivery, broke down. He called his supervisor and a tow truck which took him back to the employing establishment and then towed his SUV to AAA1 Transmission to be repaired. Appellant related that he used an employing establishment long life vehicle (LLV) to complete his route, and that when he returned the LLV, the night supervisor advised him at 9:00 p.m. that he had permission to pick up his personal vehicle. He stated that he needed his personal vehicle for work the next day, and that the postmaster, day and night supervisors, were aware that he had to deviate from his usual route home to pick up his vehicle, which had been repaired. Appellant reported that his wife picked him up and took him to AAA1 Transmission where he picked up his personal vehicle. He indicated that the motor vehicle accident at issue occurred in front of the employing establishment as he was driving home, and that he was hospitalized for one week following the accident.[3]

Dr. Colby Scott Redfield, Board-certified in emergency medicine, completed a Tallahassee Memorial Healthcare, Inc. emergency department report dated December 7, 2016. He reported a history that appellant's mail truck had hit a tree, and that he had been transported to the hospital by emergency services. Dr. Redfield noted appellant's complaint of right rib and right abdominal pain. Physical examination demonstrated multiple facial lacerations, chest abrasions, and a deep laceration of the right lower leg which was repaired. Chest x-ray demonstrated right-sided rib

[3] The employing establishment is located at 2355 Centerville Road, Tallahassee, Florida. AAA1 Transmission is located at 1023 North Monroe Street, Tallahassee, Florida.

fractures. Head and cervical spine computerized tomography (CT) scans demonstrated no acute injuries. Torso CT scan demonstrated multiple bilateral rib fractures, hemoperitoneum, and possible liver fracture. Facial CT scan demonstrated nasal fracture. Dr. Redfield diagnosed contusion, fracture, laceration, head injury, neck injury, and noted that lacerations were repaired.

Dr. Shelby L. Blank, a Board-certified surgeon, examined appellant after he was admitted on December 6, 2017. She noted a history that he was transported to the hospital after running his truck into a tree. Dr. Blank advised that appellant was alert and oriented, in no acute distress, and mildly confused. Following physical examination, she diagnosed bilateral rib fractures, liver contusion, mild mental status changes, nasal and facial abrasions and fractures, and lower extremity lacerations, which had been repaired in the emergency department.

On February 1, 2017 Dr. L. Chris DeRosier, a Board-certified plastic surgeon, noted that appellant developed a hematoma on his leg following a car accident. He advised that appellant could not work until March 1, 2017 and that surgery was pending.

In a January 5, 2017 statement, R.W., manager of customer service, reported that, on December 7, 2016 appellant, a rural carrier, was involved in a single vehicle accident at approximately 9:00 p.m. He noted that appellant reported to work in his personal vehicle at 7:00 a.m., and that at approximately 11:00 a.m. appellant called to state that his SUV had broken down, and that he needed an LLV. R.W. related that a tow truck driver brought appellant back to the employing establishment, that appellant finished his route in the LLV, and signed out at 8:10 p.m. Appellant then retrieved his personal vehicle at some time during the period between 8:10 p.m. and 9:00 p.m. when he was involved in a single vehicle accident. R.W. indicated that it was the employing establishment's contention that appellant was not in the performance of duty for two reasons. First, because appellant had not used his personal vehicle to finish his route and, therefore, would not be covered for the drive home. Second, because he had deviated from a direct line of travel to retrieve his vehicle from the shop.

By decision dated March 2, 2017, OWCP denied appellant's claim. It found that he was not in the performance of duty at the time of the December 7, 2016 motor vehicle accident because he had deviated from his usual route home to conduct personal business.

On March 14, 2017 appellant, through counsel, timely requested a hearing before an OWCP hearing representative. Counsel submitted evidence previously of record, and a Step 1 grievance denial by the employing establishment which indicated that appellant was not on the clock when he had the accident and had deviated on the trip home when he had the accident at 9:00 p.m., noting that he left at 8:10 p.m.[4]

An unsigned, partial copy of a State of Florida traffic crash report indicated that a single vehicle accident was reported at 8:58 p.m. on December 7, 2016, that it occurred on Centerville

[4] Appellant's union had provided a detailed statement of disputed facts. It maintained that after appellant left AAA1 Transmission he was following his normal line of travel when he lost control of his vehicle and hit a tree, suffering a head injury among other conditions. The union indicated that he was discharged from the hospital on December 12, 2016. Correspondence dated February 13, 2017 indicated that appellant's union appealed the Step 1 grievance denial.

Road 35-feet south of the intersection with Centre Point Boulevard, that appellant was driving, that he had run off the right side of the roadway, and that he had nonincapacitating injuries.

Medical evidence submitted included an undated report from Dr. Blank indicating that appellant was off work for one month due to the December 7, 2016 motor vehicle accident. A form dated January 12, 2017, indicated that appellant was discharged from the wound care center pending results of an ultrasound on his left leg. A left thigh CT scan order with an illegible signature noted pertinent history of a motor vehicle accident in December 7, 2016, now with large left thigh mass, likely fluid collection *vs.* hematoma. On March 28, 2017 Dr. DeRosier noted that appellant had a large traumatic injury to his left thigh that required extensive surgery and subsequent fairly intensive care for wound healing, with recovery extending until June 2, 2017.

On June 9, 2017 Scott O. Burkhart, Psy.D., clinical director of a concussion center, indicated that appellant was under his care and should not return to work until July 10, 2017. He noted that appellant was seen again on June 29, 2017. In an undated report, Dr. Burkhart related that appellant had been his patient since June 9, 2017 for a concussion sustained on December 7, 2016. He noted that appellant had been experiencing cognitive dysfunction in areas of attention, concentration, and memory and could also have difficulty in making judgment decisions, both personal and financial. Dr. Burkhart opined that appellant's cognitive difficulties and challenges were the direct result of the December 7, 2016 injury. On July 24, 2017 he referred appellant for vision therapy.

During the hearing, held on September 14, 2017, appellant described the events of December 7, 2017, indicating that his wife picked him up after work and took him to the vehicle repair shop. He testified that he did not remember how the motor vehicle accident happened and perhaps he had the wreck due to exhaustion because he was working 12 to 14-hour days. Counsel maintained that, because the employing establishment told appellant that he would need his vehicle the next day, appellant was in the performance of duty when picking it up, that he was reimbursed mileage for the use of his personal vehicle, and that he now had a traumatic brain injury and had not returned to work.

By decision dated November 28, 2017, an OWCP hearing representative affirmed the March 2, 2017 decision. She found that appellant was not in the performance of duty because, at the time of the December 7, 2016 motor vehicle accident, he was conducting personal business and had deviated from his direct route home.

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/employing establishment 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."[5] The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly

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

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 [stated] 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."[6] 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.[7]

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.[8] 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 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 firefighter; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employing establishment; 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.[9] 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."[10]

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,

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

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

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

[9] *Id.*

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

the trip to and from work is by that fact alone embraced within the course of employment.[11] Because rural carriers may use their own transportation to deliver their routes, which is a benefit to the employing establishment, 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.[12]

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 employing establishment 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 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.[13]

ANALYSIS

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

The facts indicate that on December 7, 2016 appellant was delivering mail in his personal vehicle when it broke down. He had it towed to AAA1 Transmission, and finished his route in an employing establishment LLV. After appellant signed out at 8:10 p.m., his wife picked him up and took him to AAA1 Transmission to pick up his repaired vehicle. Appellant alleges that he had to pick up his vehicle following work on December 7, 2016 because he needed it to perform his work the next day. The accident occurred as he was driving away from the repair shop, allegedly heading to his home.

The Board finds that the case record as transmitted to the Board is insufficient and would not permit an informed adjudication of the case by the Board. There is insufficient evidence regarding the employing establishment's policy regarding use of a personal vehicle by a rural carrier, particularly as it is relevant to whether appellant was required to use his personal vehicle each day and whether he would have needed his vehicle to perform his employment duties on December 8, 2016. Once OWCP has begun investigation of a claim, it must pursue the evidence as far as reasonably possible, particular when such evidence is in the possession of the employing establishment and is, therefore, more readily accessible to OWCP.[14]

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

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

[13] *D.T.*, Docket No. 11-0751 (issued March 12, 2012).

[14] *J.C.*, Docket No. 15-1517 (issued February 25, 2016); *T.M.*, Docket No. 14-1631 (issued December 2, 2014).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] The Board finds that the claims examiner did not sufficiently develop the factual evidence as required by its procedures by obtaining a statement from appellant's official superior describing the manner in which the work required the employee to travel with his own vehicle as a rural carrier.[16] OWCP should have attempted to ascertain additional information from the employing establishment including whether appellant was required to have his personal vehicle to deliver mail and, if so whether he was told on December 7, 2016 that he had to have it for mail delivery the next day.

Accordingly, the November 28, 2017 decision will be set aside and the case remanded for further development including, but not limited to evidence from the employing establishment evidence regarding its policies on personal vehicle use by rural carriers or any agreements between appellant and the employing establishment regarding the use of his own vehicle.

Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on the merits of appellant's claim.

CONCLUSION

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

[15] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

[16] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 14, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board