United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 14-368**
	)	**Issued: August 22, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 3, 2013 appellant, through counsel, filed a timely appeal from the September 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 an injury in the performance of duty on May 16, 2012.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 16, 2012 appellant, then a 52-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that he sustained a work injury on that date at 12:50 p.m.[2] In an attached statement, he indicated that on May 16, 2012 he was retrieving letters he had to mail that day from his truck which was parked near the recycle dumpsters at work. Appellant was leaving his truck when a driver named Marty backed up his truck to the loading dock at an accelerated speed. He yelled at Marty to stop and dropped the letters he was holding. Appellant reached for the letters, thinking that he could retrieve them in time and get out of the way of the truck. He slipped and fell on his left wrist and became stuck between the truck and the loading dock.[3] Appellant stopped work on May 16, 2012.

Appellant sought medical treatment on May 17, 2012 and an attending physician report from that date contained the diagnosis of displaced commuted distal radius fracture of the left wrist.[4] His left wrist initially was placed in a plaster splint and he later underwent a closed reduction procedure.[5] Appellant was found to be totally disabled.

The employing establishment challenged appellant's claim for a May 16, 2012 work injury. In a May 16, 2012 e-mail, Cheryl McNair-Johnson, a supervisor, stated that on the morning of May 16, 2012 appellant stated to her, "You know Cheryl, it's just no fun living anymore." Ms. McNair-Johnson told appellant that it could not be that bad and he responded, "I'm not kidding, it's just no fun living anymore." In light of his statements and the events later that day, appellant appeared to be under an extreme amount of stress.

In a May 16, 2012 e-mail, Peggy Clifford, the postmaster at appellant's workplace, stated that appellant claimed that he hurt his left wrist that day when he slipped and fell at the back dock. She noted that other witnesses claimed that appellant purposely put himself in harm's way and placed himself in a location against the dock where the truck driver would not see him. The driver backed up to appellant and pinned him against the dock, thereby injuring his wrist. Another custodian ran up to the driver and yelled at him to drive forward in order to unpin appellant. Ms. Clifford stated that she thought that this accident was a "strange act" and indicated that she took appellant to the hospital. She informed Ms. McNair-Johnson of the incident, who noted that when she spoke to appellant earlier that morning he mentioned that he did not feel like living anymore.

[2] Appellant's regular schedule was Monday through Friday, 10:30 a.m. to 7:30 p.m. May 16, 2012 fell on a Wednesday.

[3] John Galan, appellant's immediate supervisor, indicated on the Form CA-7 that the claimed May 16, 2012 injury did not occur in the performance of duty.

[4] On May 17, 2012 the employing establishment executed a Form CA-16 (Authorization for Examination and/or Treatment).

[5] The medical reports contain descriptions of the May 16, 2012 incident that are similar to the account appellant provided when filing his claim.

In response to the June 28, 2012 letter from OWCP appellant submitted additional medical evidence showing that in early June 2012, he was released to work with restrictions from using his left arm.

In an August 28, 2012 decision, OWCP denied appellant's claim finding that he did not sustain an injury in the performance of duty on May 16, 2012. It noted that in order for a claim to be accepted under FECA, the claim must meet five basic elements.[6] OWCP stated that appellant's claim was denied because the factual component of the third basic element, fact of injury, had not been met. It stated:

> "Specifically your case is denied because the evidence is not sufficient to establish that the event(s) occurred as you described. The reason for this finding is that you failed to respond to our letter and your agency's challenge; therefore the circumstances of your claim are in doubt as is your mental status at the time of the injury and whether you intended to harm yourself.
>
> "In the absence of a statement from you addressing your agency's challenge and validating the circumstances of your injury, we cannot assume the history provided by your physician is complete and accurate and therefore the medical aspects of your claim cannot be accepted. Additionally, if you had intended to harm yourself, you may not have been injured in the performance of duty."

On October 15, 2012 appellant requested reconsideration of the denial of his claim. In an August 9, 2012 statement received on September 17, 2012, he stated that on May 16, 2012 he did not injure his left wrist on purpose. Appellant noted that it was a freak accident. He read the statements of record from the employing establishment supervisors and questioned how they could be considered to be witnesses when they were not at the location of the accident at the time that it occurred. In an October 10, 2012 statement received on October 15, 2012, appellant indicated that on May 16, 2012 he was walking back to the loading dock when a contract driver named Marty backed into the loading dock without any warning and pinned him between the truck and the dock. He made every attempt to get out of the driver's way to avoid the accident, but that "things happened so fast" and his left wrist got pinned when he could not get out of the way. Appellant noted that he never made any statements that he would intentionally hurt himself and that he went to the hospital immediately for treatment. He stated that there were no witnesses to the accident except for the truck driver who was fired after the incident. The truck driver panicked after the accident and departed the scene in his own car.[7]

[6] OWCP indicated that the claim must: (1) be timely filed; (2) be made by a federal civil employee; (3) establish fact of injury both factually (accident or work factor alleged must have actually occurred) and medically (medical condition must be diagnosed in connection with the injury or event); (4) establish performance of duty (injury and/or medical condition must have arisen during the course of employment and within the scope of compensable work factors); and (5) establish causal relationship (medical evidence establishes that the diagnosed condition is causally related to the injury or event).

[7] Appellant also submitted additional medical records and physical therapy notes in support of his claim.

In a January 9, 2013 decision, OWCP again denied appellant's claim that he sustained an injury in the performance of duty on May 16, 2012. It indicated that he provided "two details" of how and why the May 16, 2012 incident occurred.[8] OWCP denied appellant's claim on the grounds that the factual component of the third element of fact of injury was not supported. It found that appellant had not shown that the claimed injury or event occurred as alleged.

On January 23, 2013 appellant again requested reconsideration of the denial of his claim. In a January 18, 2013 statement received on January 23, 2013, he provided a clarification of his prior statements. Appellant noted:

> "What I meant by no warning the truck driver was backing up suddenly to the loading dock at a high rate of speed which did not enable me to get out of the way of the fast moving truck and loading dock. Therefore I was pinned between the truck and loading dock with my wrist as I was trying to hold on to my letters that were in my hand. Things happened at such a fast pace."[9]

In a July 15, 2013 letter, Ms. Clifford advised that the employing establishment continued to contest appellant's claim for a May 16, 2012 work injury. She stated that his statements reflected that on May 16, 2012 he was in a private vehicle doing personal business, including writing personal bills, when he exited his vehicle to mail his personal correspondence.[10] Ms. Clifford indicated that appellant was parked in a no parking zone near the loading dock and he had previously been subjected to corrective action for parking in this area. She stated that his parking in this area on May 16, 2012 constituted wilful misconduct. Ms. Clifford asked appellant if he deliberately was trying to hurt himself on May 16, 2012 and he responded, "No, but I know I am not thinking clearly, and I am not making good decisions. I could be making some wrong decision because of all of the things going wrong in my life." She referred him to the employee assistance program and stated, "There is absolutely no doubt in my mind that [appellant] was purposefully and willfully trying to hurt himself."

In an undated statement received on August 7, 2013, appellant indicated that on May 16, 2012 he was coming from his own personal vehicle with letters he retrieved from his vehicle to mail inside the employing establishment. He asserted that he was authorized to park in the space that day. Appellant acknowledged that he was experiencing personal problems around May 16, 2012.

---

[8] OWCP stated, "You initially stated that you were between the dock and the truck. When the truck backed up and accelerated, you yelled that you were back there. All during this time, you dropped letters and grabbed the letters you dropped. On your [October 10, 2012] statement, you stated that you had no warning and you made every attempt to get out of the way; but things happened so fast."

[9] Appellant submitted additional medical records including a May 30, 2013 report in which an attending Board-certified psychiatrist indicated that he did not appear to be a threat to himself or others. In a June 17, 2013 letter, counsel argued that OWCP did not show that the May 16, 2012 accident occurred due to wilful misconduct on appellant's part.

[10] Ms. Clifford noted that the personal nature of appellant's activities was confirmed by a coworker's statement, but the record does not contain a copy of the statement.

In a September 4, 2013 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on May 16, 2012. It modified its prior denial of appellant's claim noting that he had submitted a clarifying factual statement regarding the circumstances of how his injury occurred as well as a statement in response to the challenge from the employing establishment. Regarding the reason for the denial of the claim, OWCP stated:

> "However, the case remains denied for insufficient evidence to meet all five basic elements for FECA coverage because you have not provided sufficient evidence to establish that you were injured while in the performance of duty. In the statement from both you and your employing [establishment] it was noted that you were in your personal vehicle and handling your personal business when you exited the vehicle to mail your personal mail. There is no evidence which substantiates that you were engaged in work[-]related business or that you were performing the duties of your employing [establishment] or engaged in work-related business."[11]

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,[12] including that he or she is an employee within the meaning of FECA[13] and that he or she filed his or her claim within the applicable time limitation.[14] The employee must also establish 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.[15]

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. It is not sufficient under general principles of workers compensation law to predicate liability merely upon the existence of an employee-employer relationship.[16]

[11] OWCP effectively affirmed its January 9, 2013 decision as modified to reflect that appellant did not show that he was in performance of duty at the time of the May 16, 2012 injury because his personal actions were not related to the employing establishment's business or reasonably incidental to his employment.

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

[13] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[14] *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O Donnell*, 7 ECAB 227 (1954); *see* 5 U.S.C. § 8122.

[15] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[16] *George A. Fenske*, 11 ECAB 471 (1960).

Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty.[17] The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.[18] The phrase, in the course of employment deals with the work setting, the locale and the time of injury. Arising out of the employment encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.[19]

In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or the conditions under which the employment is performed.[20]

ANALYSIS

Appellant alleged that he sustained a left wrist injury on May 16, 2012 at 12:50 p.m.[21] He alleged that he had retrieved personal letters from his vehicle at work in order to mail them. When in the vicinity of the loading dock appellant fell to the ground and became trapped between the loading dock and a vehicle which was backing up. The employing establishment did not dispute that the May 16, 2012 incident occurred during his working hours and on the premises of the employing establishment. Further, the statements by appellant are consistent in indicating that, around the time of the incident, he was engaged in retrieving and carrying personal letters from his vehicle for the personal purpose of mailing them at the employing establishment.

The mere fact that appellant was on the premises and on duty at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that he was engaged in activities which may be described as incidental to his employment, *i.e.*, that he was engaged in activities which fulfilled his employment duties or responsibilities thereto.[22]

[17] 5 U.S.C. § 8102(a).

[18] *See Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

[19] *See Larry J. Thomas*, 44 ECAB 291 (1992).

[20] *R.S.*, 58 ECAB 660 (2007).

[21] Appellant's regular schedule was Monday through Friday, 10:30 a.m. to 7:30 p.m. May 16, 2012 fell on a Wednesday.

[22] *See Barbara D. Heavener*, 53 ECAB 142 (2001).

In the case of *Barbara D. Heavener*,[23] the Board found a claimant's fall while on duty and on the premises of the employing establishment was not in the performance of duty. The claimant left her office building to retrieve an address book from her motor vehicle. The Board found that she was engaged in a personal mission unrelated to her employment and not in activities reasonably incidental to her employment.

In *Robert A. Pszczolkowski*,[24] a claimant was injured during working hours in a parking lot on the premises of the employing establishment when he left his building to get personal mail from his vehicle and fell on ice. The Board held that he was not in the performance of duty as his action was not reasonably incidental to employment but constituted a personal mission unrelated to employment. The Board further found that obtaining his mail was not an activity necessary for personal comfort or ministration.

In *A.K.*, a claimant was injured during working hours on the premises of the employing establishment while going to his vehicle to retrieve personal correspondence. The Board held that he was not in the performance of duty as his actions were personal in nature and not related to the employing establishment's business or reasonably incidental to his employment. It found that the claimant's activities could not be likened to incidental acts, such as using a toilet facility, drinking coffee or similar beverages or eating a snack during a recognized break in the daily work hours, which are generally recognized as personal ministrations that do not take the employee out of the course of his employment.

In this case, appellant's injury occurred while he was retrieving personal letters from his motor vehicle, which he carried to the employing establishment. Despite occurring on the employing establishment's premise while on duty, his actions were personal in nature and not related to the employing establishment's business or reasonably incidental to his employment.[25] The Board finds that appellant's activities cannot be likened to incidental acts, such as using a toilet facility,[26] drinking coffee or similar beverages[27] or eating a snack during a recognized break in the daily work hours.[28] The departure of appellant from his workstation to retrieve personal items is not considered an activity necessary for personal comfort or ministration or incidental to his employment. Therefore, he was not in the performance of duty when he fell on

[23] *Id.*

[24] Docket No. 01-1645 (issued April 11, 2002).

[25] *See also Valerie C. Boward*, 50 ECAB 126 (1998) (where the Board found that an injury arising out of an employee's washing her car windows while on the employing establishment's premises did not occur in the performance of duty because she was engaging in a personal activity unrelated to her employment); *Mary Beth Smith*, 47 ECAB 747 (1996) (where the employee's injury on the employer's premise while picking up her child from day care did not occur in the performance of duty as her activity was purely personal in nature).

[26] See *V.O.*, 59 ECAB 500 (2008); *Frank M. Escalante*, 13 ECAB 160 (1961).

[27] *See Helen L. Gunderson*, 7 ECAB 707 (1955).

[28] *See Mary Kokich*, 52 ECAB 239 (2001). *See also Mary M. Martin*, 34 ECAB 525 (where the Board held that taking a walk was not an activity closely related to personal ministration).

May 16, 2012 and sustained injury. For these reasons, OWCP properly denied appellant's claim for a May 16, 2012 work injury.[29]

Before OWCP and on appeal, counsel argued that OWCP did not adequately support its denial of appellant's claim for a May 16, 2012 work injury on the grounds that the injury occurred due to his wilful misconduct. The Board notes that OWCP did not deny appellant's claim on the grounds that he engaged in wilful misconduct. The statutory defense was not invoked. OWCP found that appellant's injury did not occur in the performance of duty on May 16, 2012 because he was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto at the time of the claimed work injury.

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 his burden of proof to establish that he sustained an injury in the performance of duty on May 16, 2012.

[29] On May 17, 2012 the employing establishment executed a Form CA-16 (Authorization for Examination and/or Treatment). The Board notes that where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c). The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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