United States Department of Labor
Employees' Compensation Appeals Board

K.G., Appellant	)	
and	)	**Docket No. 18-1725**
	)	**Issued: May 15, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Aurora, OH, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a May 31, 2018 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 her burden of proof to establish an injury in the performance of duty.

FACTUAL HISTORY

On July 7, 2017 appellant, then a 37-year-old carrier field representative/modified rural carrier associate, filed an occupational disease claim (Form CA-2) alleging that she developed left shoulder, arm, elbow, and back conditions when driving to training while in the performance of duty. She first became aware of her condition and of its relationship to her federal employment on June 19, 2017. Appellant sought medical treatment on that same date and stopped work on June 20, 2017.

In a July 7, 2017 narrative statement, appellant reported that on June 9, 2017 her original modified job located in Akron, Ohio ended. She was told to report to a station located in Cleveland, Ohio on June 12, 2017 at 7:30 a.m. for training for her new modified job offer, which assigned her to work at various offices in Northern Ohio from 7:30 a.m. to 4:00 p.m. Tuesday through Friday. Appellant reported that she was paid mileage differential by the employing establishment for the difference in travel from her home to her original duty station in Aurora, Ohio and the location for training in Cleveland, Ohio. She advised that her injury occurred on June 19, 2017 at approximately 4:05 p.m. to 5:15 p.m. while she was driving home from the Cleveland, Ohio facility in heavy traffic. Appellant reported that she was driving in five lanes of stop and go traffic with cars crossing in all directions. She reported twisting, turning, and pulling towards the steering wheel to check her blind spots when she began to feel a great amount of discomfort in her left shoulder and arm. Appellant stated that she was in excruciating pain by the time she arrived home and did not drive again until July 7, 2017.

In support of her claim, appellant submitted an offer of modified assignment form from the employing establishment for a rural carrier associate position which was signed on June 12, 2017. The position was for 30 hours per week from 7:30 a.m. to 4:00 p.m. Tuesday through Friday. The location of the position was documented as "various offices in Northern Ohio." Appellant also submitted a June 23, 2017 postal service claim for reimbursement for expenditures on official business form (PS Form 1164). The form noted her official duty station located in Aurora, Ohio and documented the difference in mileage for travel to the Cleveland, Ohio station from her home. The mileage differential amounted to 28 miles and a reimbursement of $14.98 for each trip. Appellant claimed mileage reimbursement for the difference in travel to and from work for four days of training on June 12, 13, 14, and 19, 2017.

In a development letter dated July 18, 2017, OWCP informed appellant that the evidence of record was insufficient to support her claim, noting that the evidence failed to establish that she was injured in the performance of duty. It advised her of the medical and factual evidence needed. OWCP provided appellant a questionnaire for completion and requested further information to determine if she was in the performance of duty at the time of her injury. It noted that it appeared that she was claiming her injury occurred as a result of her commute to and from work for training. OWCP requested that appellant indicate if she was on the clock while she was driving for her training, when her workday began once she arrived at the training site, and if she was in a paid

travel status for the entire period of the training. It afforded her 30 days to submit the necessary evidence.

In an August 3, 2017 narrative statement, appellant responded to OWCP's questionnaire and provided further information pertaining to her June 19, 2017 left shoulder injury. She reported that she originally injured her left shoulder on May 18, 2013 and returned to limited duty on September 1, 2014, but still remained under the care of her physician.[3] Appellant reported that on June 19, 2017 she had been working on her newly assigned limited-duty training requirement for four of the eight training days when she had to seek emergency medical treatment for her left shoulder. She reported that she was required to drive an additional 28 miles per day in heavy traffic to attend the training which was located in Cleveland, Ohio. Appellant further reported that the employing establishment paid for her mileage. She explained that, on June 19, 2017 at approximately 4:10 p.m., she was driving in extremely heavy traffic on her way home from the Cleveland, Ohio station. Appellant reported that her left arm was injured because she had to use her arm for defensive driving techniques. She also reported that her training duties required her to use her left arm to shuffle papers which she also believed contributed to her driving injury.

In support of her claim, appellant submitted a number of medical reports dated June 20 through September 11, 2017 documenting diagnostic testing, physical restrictions, and appellant's progress.

By decision dated October 13, 2017, OWCP denied the claim finding that the evidence submitted was insufficient to establish that appellant was injured in the performance of duty. It explained 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.

On October 26, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

A hearing was held on March 16, 2018. At the hearing, appellant testified that her official duty station was located in Aurora, Ohio. Her previous modified-duty assignment was eliminated and she was temporarily transferred to Cleveland, Ohio for training of her new modified assignment which was going to be located in Chagrin Falls. Appellant noted that she had a history of left shoulder injury from her prior claim which she continued to have problems with, OWCP File No. xxxxxx015. She reported that her shoulder flare-up occurred after clocking out at training in Cleveland, Ohio. Appellant was no more than five minutes into her trip home when she entered a ramp to get on a five-lane highway which was congested with traffic. This caused her to tense up and grip the steering wheel as she tried to maneuver through the lanes, resulting in her left shoulder injury. Appellant testified that she was not provided wages for travel to and from her home and the training located in Cleveland, Ohio. Counsel argued that she was in the performance

[3] The record reflects that, under OWCP File No. xxxxxx015, OWCP accepted appellant's May 18, 2013 traumatic injury claim for left rotator cuff sprain of shoulder and upper arm, complete left rotator cuff rupture, left bicipital tenosynovitis, and adhesive capsulitis of the left shoulder. Appellant underwent OWCP-approved surgery on December 23, 2013 and April 10, 2014. On September 20, 2014 she returned to work with restrictions.

of duty because she was traveling for training and had not been assigned a new work location as her official duty station. The record was held open for 30 days.

In a letter dated March 23, 2018, counsel argued that appellant was in the performance of duty at the time of her injury. He maintained that she was on a special mission to obtain training in another designated city, the duty was assigned, she was in a travel status and last performed her duties in Cleveland, Ohio and the training and travel were required. Counsel referenced Chapter 2.800.4 of OWCP's procedures in support of his arguments.[4]

By decision dated May 31, 2018, OWCP's hearing representative affirmed the October 13, 2017 decision finding that the evidence of record was insufficient to establish that appellant was injured in the performance of duty.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress 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 disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5]

The Board has interpreted the phrase while in the performance of duty 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, the locale and time of injury whereas, 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. In addressing this issue, the Board has held that 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 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 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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804 (August 1994).

[5] *See* 5 U.S.C. § 8102(a).

[6] *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

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

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 his employment with the knowledge and approval of the employing establishment.[8]

The Board has also held that an exception to the general going and coming rule is made for travel from home when the employee is to perform a special errand. In such a situation 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 special 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 during the trip may differ from that involved in normally going to and returning from work. The essence of the exception, however, 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.[9]

In addressing the going and coming rule, Larson relates, "when the employee is paid an identifiable amount as compensation for time spent in a going or coming trip, the trip is within the course of employment"[10] Regarding payment for expense of travel, Larson states 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 has not met her burden of proof to establish an injury in the performance of duty.[12]

The record reflects that appellant's regularly assigned duty station was located in Aurora, Ohio with fixed work hours from 7:30 a.m. to 4:00 p.m., a location 19 miles from her home. On June 12, 2017 she accepted an offer for a modified rural carrier associate and began her two week training assignment in Cleveland, Ohio on that date. Appellant's fixed work hours remained the same during her training, her commute did not occur during her work hours. She received reimbursement in the amount of $14.98 from the employing establishment for the mileage differential from Aurora, Ohio to Cleveland, Ohio due to the additional 28 miles of travel for each

[8] *Connie J. Higgins (Charles H. Higgins),* 53 ECAB 451 (2002); *Melvin Silver*, 45 ECAB 677 (1994).

[9] *Elmer L. Cook*, 11 ECAB 163 (1964).

[10] A. Larson, *The Law of Workers' Compensation* § 14.06(1) (2008).

[11] A. Larson, *id*.

[12] *Jon Louis Van Alstine,* Docket No. 03-1600 (issued November 1, 2004).

commute to and from work. At the March 16, 2018 hearing, appellant testified that she was not provided wages for travel to and from her home to attend the training.

As a general rule, 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.[13] Regarding the exceptions to the going and coming rule, appellant's employment did not require that she travel on the highways and she was not engaged in a special errand or mission incidental to her employment at the time of the injury. As the Board held in the case of *Joyce Hodge*,[14] the fact that appellant was reporting to an alternate worksite or that she was attending training did not exclude her from the going and coming rule. The Board concluded that appellant's injury was the result of an ordinary, nonemployment hazard of the journey itself, which was shared by all travelers. Similarly, in the case at bar, no evidence of record supports that appellant's injury falls within any of the exceptions to the general going and coming rule.[15]

In considering application of the "special errand" exception to the going and coming rule, Larson provides:

> "The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the work is employed."[16]

Counsel argues that appellant was in the performance of duty because the nature of the trip represents a special mission to obtain training in another designated city. The Board is not persuaded by this argument as the evidence does not establish that the trip made on June 19, 2017 was in any way other than her ordinary commute to and from a work location.[17] Appellant has not established any special degree of inconvenience or urgency or shown that the trip, in and of itself, constituted a substantial part of any service for which she was employed.[18] The record reflects that she was proceeding from the Cleveland, Ohio station to her home after her work shift had ended at the customary time. This was a trip that appellant made every day to and from work, similar to her commute to and from work at the Aurora, Ohio station.[19] As such, there is no evidence that she was performing an important service for her employing establishment on

[13] *Id.*

[14] Docket No. 96-1958 (issued December 8, 1998).

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

[16] Larson, *supra* note 10 at Chapter 14. *See Connie J. Higgins (Charles H. Higgins), supra* note 8.

[17] *Supra* note 13.

[18] *Supra* note 9 at § 14.05(3).

[19] *See Mary Margaret Grant*, 48 ECAB 696 (1997).

June 19, 2017 other than driving her car from work to home such that her commute would be characterized as a special mission.[20]

Turning to consideration of travel reimbursement, Larson indicates that a majority of cases involve the determination of whether a "deliberate and substantial payment" was made for the expense of the travel.[21] 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.[22] Larson notes, however, that a travel allowance must be distinguished from mere extra pay,[23] *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.[24]

In this case, the employing establishment's PS Form 1164 indicates that appellant was reimbursed $14.98 for the 28-mile difference between the worksites in Aurora and Cleveland, Ohio totaling $29.96 daily. The form reflects that appellant had three days of training in the first week and was injured in the second week following her fourth day of training on her commute home. Similar to the case of *Jon Louis Van Alstine*,[25] it is readily apparent that her monetary reimbursement from her employing establishment was not for "all or substantially all" of the cost of her travel to work. The record reflects that appellant was to be reimbursed only the difference in mileage between her home and the Aurora, Ohio station (19 miles) and the Cleveland, Ohio station (47 miles). The Board finds that the payment solely for the difference in mileage in this case does not constitute a "deliberate and substantial payment" of the expenses of travel, such as to constitute an exception to the going and coming rule.

The Board further finds that appellant was not compensated for the time spent traveling to and from work for the training in Cleveland, Ohio.[26] Nor was appellant in a travel status at the time of the injury. She did not establish a special degree of inconvenience or urgency or show that

[20] *See Asia Lynn Doster*, 50 ECAB 351 (1999).

[21] Larson, *supra* note 10 at § 14.04(1).

[22] *Id*. at § 14.07(2).

[23] *Id.* at § 14.07(3).

[24] *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.

[25] *Supra* note 12. In this case, the Board found that appellant was not in the performance of duty when he was working a detail at an alternative worksite and was injured during his commute to work. The Board noted that appellant was reimbursed at 31 cents a mile for the 13-mile difference between his regular and alternate worksites. However, it found that this monetary reimbursement for payment of mileage differential from his employing establishment did not constitute a "deliberate and substantial payment" of the expenses of travel, such as to constitute an exception to the going and coming rule.

[26] For cases involving travel to a training seminar; *see Sondra J. Mills*, 33 ECAB 1092 (1982); *see also Janet R. Landesberg*, 50 ECAB 538 (1999).

her commute for training, in and of itself, was a substantial part of a service for which she was employed.[27] Appellant's travel to attend training was no more for the benefit of the employing establishment than any other worker's commute.[28] She, therefore, has failed to establish an injury in the performance of duty.[29]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2019
Washington, DC

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

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

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

[27] *Supra* note 16. *See generally M.H.*, Docket No. 10-1337 (issued April 19, 2011).

[28] *L.P.*, Docket No. 07-959 (issued August 2, 2007).

[29] The Board notes the medical evidence of record submitted in support of appellant's claim related her left shoulder conditions to the long hours spent driving to Cleveland, Ohio for her work training. Given that appellant has failed to establish that her injury occurred in the performance of duty, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreas*, 57 ECAB 364, 368 n.10 (2006).