U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE J. HIGGINS, claiming as widow of CHARLES H. HIGGINS and DEPARTMENT OF THE AIR FORCE, KIRTLAND AIR FORCE BASE, NM

Docket No. 00-2703; Submitted on the Record;
Issued March 14, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the employee's death on August 12, 1997 occurred in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On August 22, 1997 appellant, the employee's widow, filed a claim for death benefits for the employee's death in an automobile accident on August 12, 1997. In its official superior's report of employee's death, the employing establishment indicated that the employee was in the performance of duty at the time of his injury. A police accident report determined that the employee's fatal accident occurred at about 11:00 a.m. near the intersection of Rio Bravo and Broadway when the automobile he was driving northbound on Broadway slid into the southbound lanes and struck a tractor trailer truck.

In response to a September 11, 1997 request from the Office for further information, the employee's supervisor provided a September 23, 1997 statement. He noted that on August 12, 1997 the employee arrived for work at approximately 7:00 a.m., attended a meeting until approximately 9:00 a.m. and, about 9:40 a.m., the employee told a coworker that he had a meeting on the west side of the base later that morning. The supervisor continued that the employee "was seen departing the site at about 10:00 stating he had forgotten something at his residence and needed to go get it." The employee's spouse saw him at his residence at approximately 10:45 a.m. and the fatal accident occurred at 11:00 a.m., when he apparently was returning to work. The supervisor stated, "I do not know what [the employee] went home to get and I have no way of obtaining this information. I have been unable to determine with whom [the employee] was meeting on the west side of the base."

By decision dated October 8, 1997, the Office found that there was no evidence that would bring the employee's activities on August 12, 1997 into the scope of employment.

By letter dated November 6, 1997, appellant requested a review of the written record. She stated that the drive from the employing establishment to their home took about 45 minutes,

that when the employee arrived at home on the morning of August 12, 1997, he informed her that he needed to pick up something for work. She asked him if he had time for lunch before he went back to work and he said he had to return to work because he had meetings. Appellant also stated that the employee was home for 10 to 15 minutes, that his usual route to work was on Broadway and that his fatal accident occurred less than three miles from their home. Appellant submitted a statement dated November 6, 1997 from her brother, who stated he was working at his sister's home on August 12, 1997 when the employee came home about 10:45 or 10:55 a.m. The employee told him "that he had to come to pick up something he had forgotten that he needed for work." Appellant's brother continued that the employee went into the house, "came out a few minutes later carrying what appeared to be a white paper or papers" and left immediately to return to work.

By decision dated March 23, 1998, an Office hearing representative remanded the case to the Office for further development on the employee's authority to schedule his work, meetings and leave the base during working hours without explicit permission and on what the employee picked up when he went home.

The Office obtained further evidence. A coworker stated that at about 10:20 a.m. on August 12, 1997 the employee checked his watch and said he needed to get to the other side of the base for a meeting. The employee's supervisor stated that the employee, an electrical engineer, "had the authority to schedule his work and meetings at his own discretion. He also had the authority to leave the base during working hours, if he deemed it necessary, without explicit permission from his supervisor." The employee's supervisor also stated that she was unable to find anyone at the employing establishment who knew where the employee was going or why and that she personally went to the wrecker yard and searched the employee's car, but was unable to find any work-related papers. In a statement dated April 28, 1998, appellant stated that officers from the employing establishment and friends searched the employee's wrecked automobile but did not find any documents or work-related materials. The employee's wrist watch was found in the middle of the street hours after the accident scene had been cleared.

By decision dated May 19, 1998, the Office found that the employee's fatal accident did not occur in the performance of duty.

By letter dated June 4, 1998, appellant requested a hearing, which was held on July 12, 1999. She testified that on the morning of August 12, 1997 her brother was outside their house irrigating when the employee arrived. The employee was at home for about five minutes and he was not in the habit of coming home for lunch. Appellant submitted a statement from the division secretary at the employing establishment, who stated that the employee always signed out when he took personal or sick leave and that he did not fill out a leave form on August 12, 1997.

By decision dated October 1, 1999, an Office hearing representative found that the employee's death did not occur in the performance of duty, even if he went home to pick up work material.

By letter dated July 6, 2000, appellant requested reconsideration and submitted an argument that the employee's death arose within the performance of duty. By decision dated

July 16, 2000, the Office found that no new evidence was submitted and that the arguments presented were repetitious and not sufficient to warrant a merit review.

The Board finds that appellant has not established that the employee's death occurred in the performance of duty.

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 duty." 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 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 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."[1]

The evidence establishes that the employee's fatal injury occurred during his normal work hours, but that it did not occur on the employing establishment's premises but rather on the public highway. 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.[2] 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 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 firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[3]

The Board has also recognized the "special errand" exception to the going to and coming from work rule. The Board described this exception in *Elmer L. Cooke*:[4]

> "It is a general rule that injuries to an employee while traveling between his home and a fixed place of employment are not in the course of employment and therefore are not compensable. However, exceptions to the rule have been

[1] *Jessica J. St. George*, 44 ECAB 895 (1993); *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

[2] *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[3] *Melvin Silver*, 45 ECAB 677 (1994).

[4] 16 ECAB 163 (1964).

> developed over the years. An exception is made for travel from home when the employee is to perform a 'special errand': in such a situation the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform a 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 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.
>
> "A second exception, often related to the 'special errand' situation, affords coverage of the compensation law to the employee who leaves his place of employment under direction to continue his work at home or who, as a consistent and recognized practice, performs part of his work at home. The scope of this exception is not as definite as the special errand exception. It is clear that it does not mean that an employee who carries home business papers or tools of his trade is by that fact covered by the compensation law during his journey to and from work. However, where the work is done at home by the direction of and for the benefit of the employer or where the work is regularly performed at home with the knowledge and consent of the employer or where there is an essential continuity of the work done at home and that performed at the regular place of employment, the journey between home and 'work' is in the course of the employment." (Emphasis in the original, citations omitted.)

Appellant has the burden of establishing that the employee's death occurred in the performance of duty.[5] The Board finds that appellant has not met her burden of proof, as she has not established that the employee's travel to and from work on August 12, 1997 falls within any of the exceptions to the coming to and going from work rule.

There is no evidence of the meeting the employee supposedly had scheduled on the west side of the base on the morning of August 12, 1997. The employee's supervisor was unable to locate anyone who had knowledge of a meeting scheduled with the employee that morning. Although appellant and her brother stated that the employee told them, upon his return to home that morning, that he forgot something or needed to pick up something for work, searches of the employee's wrecked vehicle and the accident site did not yield any material associated with the employee's employment.

The evidence thus does not lead to a conclusion that the employee was performing a "special errand" or that he was performing something incidental to his employment at the time of the fatal automobile accident. The burden is not on the Office to prove a nonemployment reason

[5] *See Janet Kidd*, 47 ECAB 670 (1996).

for the employee's trip home on the morning of August 12, 1997, but rather it is on appellant to prove that this trip was for employment purposes. Appellant has not met her burden of proof.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vest the Office with discretionary authority to determine whether it will review an award for or against compensation. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the mertits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a relevant legal argument not previously considered by the Office or submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7]

On reconsideration counsel for appellant submitted an argument contending that the employee's death arose while in the performance of duty. These contentions were essentially repetative and duplicative of the argument made at the second hearing of July 12, 1999. For this reason, they do not constitute a basis for reopening the claim for merit review.

[6] 20 C.F.R. § 10.608(b).

[7] *Eugene F. Butler*, 36 ECAB 393 (1984).

The July 16, 2000 and October 1, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
March 14, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member