U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY G. FASCIANO and DEPARTMENT OF LABOR, VETERANS EMPLOYMENT & TRAINING SERVICE, Boston, Mass.

*Docket No. 96-967; Submitted on the Record;*
*Issued January 23, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant was injured while in the performance of duty on June 20, 1994.

On July 1, 1994 appellant, then a 58-year-old program assistant, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that on June 20, 1994 she sustained a possible slight concussion to the top right side of her head while walking through an "exit" of the parking area when an automatic gate came down and struck her on the head. Appellant stated that there were no vehicles exiting at the time but the gate had been delayed from a previous exit action. Appellant was on her way to her duty station in the Hurley building at the employing establishment when the injury occurred. Appellant had used the metro to go to work on June 20, 1994 and had walked through the parking lot to reach the back entrance of the Hurley building. Appellant's supervisor stated that the injury occurred while the employee was en route to work and did not occur on federal property nor at a duty station. The claim was not controverted and medical bills were paid up to $1,000.00.

In memorandum of a telephone conference held on September 14, 1995 between the employing establishment's compensation specialist and the Office of Workers' Compensation Programs, the Office stated that the employing establishment had accepted the claim because it thought the parking lot would be considered part of the Hurley building since people always walked through the parking lot to the back entrance of the building. The Office advised the compensation specialist that the case was being reviewed because the injury did not occur on federal premises and the Office needed to make a decision as to whether appellant could be considered in the performance of duty. The compensation specialist agreed to supply the Office with information necessary to make this determination.

In response to questions by the Office, the compensation specialist provided a diagram of the parking lot in question, showing that it was next to the rear entrance of the Hurley building and that the driveway of the entrance and exit of the parking lot was from a public road. The

metro station appellant used on June 20, 1994 was around the corner from the parking lot. The compensation specialist stated that the lot was owned and maintained by the state, that only state employees were permitted to park in the lot and federal employees were not permitted to park there. She stated that other than the back entrance of the federal building which appellant intended to enter the date of her injury, there were two entrances to the building, and employees did not exclusively use the back entrance to enter the building. The compensation specialist stated that people always walked through the parking lot because it was a shortcut to the federal building as an extra three blocks of walking was avoided. The compensation specialist stated that appellant's job required that she work at a fixed location each day. In a letter dated September 22, 1995, the compensation specialist stated that the parking lot no longer existed as the state had excavated the site to build a new courthouse. The compensation specialist stated that the building manager stated that the back/basement entrance to the building was not intended for general employee use but employees did use this entrance.

By decision dated October 25, 1995, the Office denied appellant's claim, stating that the evidence of record failed to establish that the June 20, 1994 employment injury occurred in the performance of duty.

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.[1] 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. The exception pertinent to this claim is whether the "proximity" rule as recognized by the United States Supreme Court in *Cudahy Packing Co. v. Parramoe*[3] applies. That case stands for the proposition that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may therefore be considered as hazards of the employment. In *Cudahy Packing*, the employee sustained injury on his way to work while on a road which was the only means of access to the industrial premises.[4]

The Board has also pointed out that factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's "premises" include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees.[5]

[1] *Melvin Silver*, 45 ECAB 677, 682 (1994).

[2] *Id.*

[3] 263 U.S. 418 (1923).

[4] *Id.*

[5] *Rosa M. Thomas-Hunter*, 42 ECAB 500, 504-5 (1985); *Edythe Erdman*, 36 ECAB 597, 599 (1985).

Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment.[6] The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained or controlled the parking facility, used the facility with the owner's special permission, or provided parking for its employees.[7]

In the instant case, the proximity rule does not apply. Appellant's injury in the parking lot arose out of ordinary non-employment hazards of the journey itself which are shared by all travelers. Further, appellant was not on federal premises when she was injured. The parking lot where she suffered the injury was owned and maintained by the state. Federal employees were not permitted to park there and, in fact, on June 20, 1994 appellant had not used the parking lot to park but had taken the metro and was walking through the parking lot as a shortcut to her office. While employees often used the back entrance of the Hurley building as a shortcut to enter the building, there were two other entrances so the back entrance was not the sole entrance. The evidence appellant submitted does not establish that the employing establishment premises extended to the parking lot and therefore appellant's injury was not sustained in the performance of duty.

[6] *Id.*

[7] *Id.*

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 25, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 23, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member