U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNESTINE C. ROOTS and THE FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, DC

Docket No. 01-1895; Submitted on the Record;
Issued July 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish that she sustained an injury while in the performance of duty on June 21, 2000.

On June 23, 2000 appellant, then a 37-year-old technician, filed a notice of traumatic injury (CA-1) alleging that at approximately 9:40 a.m. on June 21, 2000, while on a break, she was walking to the employing establishment credit union located next door to the building where she worked. She walked up a loading dock ramp and stepped in a hole in the pavement approximately one foot deep and four feet wide. According to appellant, she "slipped and fell on my face and left side," injuring her left foot, knee, hand, hip and face. Appellant declined an ambulance but did not continue to the credit union. Instead she went to the employing establishment's health unit. In a CA-16, authorization for treatment from Kaiser Permanente, appellant was diagnosed with a sprained left hand, foot and shoulder. In a July 13, 2000 memorandum to the Office of Workers Compensation Programs, she amended her CA-1 to include the fact that she broke two teeth in the fall.

A June 21, 2000 incident report filed by an employing establishment guard, states that the two officers who assisted appellant after the fall indicated that she "lost her balance on the walkway adjacent to where the trucks pull in to load and unload."

An August 3, 2000 Office telephone memorandum indicates that Carter Silcox, of the employing establishment, advised the Office that appellant fell "just three feet inside the agency premises." The employing establishment controverted the claim on the grounds that appellant was not in the performance of duty at the time of the incident. Appellant's position description indicates that appellant had fixed hours and location.

On October 18, 2000 the Office denied appellant's claim finding that appellant was not in the performance of duty at the time of the incident. The Office found that appellant was engaged in a personal mission unrelated to employment duties and therefore not injured in the performance of duty.

On December 5, 2000 through her attorney representative, appellant requested reconsideration. She argued her claim was compensable under the "premises doctrine." Also submitted on reconsideration were statements from several coworkers indicating that the employing establishment employees received two authorized breaks each day and it was a common practice that employees went to the credit union next door to conduct personal business during their breaks.[1]

In a decision dated June 18, 2001, the Office denied modification finding appellant was not in the performance of duty because she had not established that she was performing an act incidental to her employment.

The Office did not address the sufficiency of the medical evidence in either of its denials.

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.[2] Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. 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."[3] "In the course of employment" deals with the work setting, the locale and the 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.[4] 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 she 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 to the conditions under which the employment is performed.[5]

It is a general rule of workers' compensation law that, as to employees having fixed hours and place of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after hours or at lunch time are compensable.[6] If an employee is on the premises of the employing establishment, an injury will generally fall

[1] *See Julianne Harrison,* 8 ECAB 440 (1955), *petition for recon. denied,* 8 ECAB 573 (1956).

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

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

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

[5] *See Carmen B. Gutierrez (Neville R. Baugh),* 7 ECAB 58 (1954); *Harold Vandiver,* 4 ECAB 195 (1951).

[6] *Annette Stonework,* 35 ECAB 306 (1983).

within the performance of duty.[7] There is a strong presumption that an employee who is injured on the premises of the employing establishment during his or her hours of work is injured while in the performance of duty.

In the present case, there is no factual dispute that appellant's injury took place within the period of her employment. The employing establishment did not contest that appellant was on an authorized break at the time of the incident at approximately 9:40 a.m.

The evidence is not clear, however, on whether appellant's injury occurred on the premises of the employing establishment. The term "premises" as it is generally used in workers' compensation law, is not synonymous with "property." The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases the "premises" may include all the "property" owned by the employer; in other cases, even though the employer does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[8] The "premises" of the employer, as that term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employer; the term may be broader or narrower depending more on the relationship of the property to the employment that on the status or extant of legal title.[9]

Underlying the proximity exception to the premises rule is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.[10] The most common ground of extension is that the off premises point at which the injury occurred lies on the only route or at least on the normal route, which employees must traverse to reach the plant and that the special hazards of that route become the hazards of employment.[11] Factors that generally determine whether an off-premises point used by employees may be considered part of the "premises" include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access of the premises.

The issue left unresolve is whether the location where appellant fell is part of the employer's premises. It is not clear from the record whether the hole that caused appellant to trip was located on the property owned or leased by the employing establishment or was it part of the municipal sidewalk used by the public. Nor is it clear who was responsible for maintenance of the area. The record indicates that subsequent to appellant's fall the hole was filled with a "green patch" but it is not clear who administered the patch. An incident report completed by an investigator for the employing establishment, states that an "outside contractor" will be brought in for a permanent repair, but again it is not clear who is responsible for the contractor's work.

[7] *James Gray, Jr.*, 45 ECAB 652 (1993).

[8] *See Diane Bensmiller*, 48 EAB 414 (1997).

[9] *See Dollie J. Braxton*, 37 ECAB 186 (1986)*; Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

[10] *See Michael Gallagher*, 48 ECAB 610 (1997).

[11] *Id*.

In addition, it is not clear if the employee had alternative ways to walk to her intended destination.

The Board finds the case should be remanded for further development. After such further development as necessary the Office shall issue an appropriate decision.

The Office of Workers' Compensation Programs decisions of October 18 and June 18, 2000 are set aside and this case is remanded to the Office for further development.

Dated, Washington, DC
July 24, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member