United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
	)	
and	)	**Docket No. 07-54**
	)	**Issued: March 8, 2007**
DEPARTMENT OF DEFENSE, DEFENSE INFORMATION SYSTEMS AGENCY, Arlington, VA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2006 appellant filed a timely appeal from November 14, 2005 and August 3, 2006 decisions of the Office of Workers' Compensation Programs affirming the denial of her traumatic injury claim. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained right knee and lumbar injuries in the performance of duty.

FACTUAL HISTORY

On April 4, 2005 appellant, then a 51-year-old statistician, filed a traumatic injury claim (Form CA-1), alleging that at 7:55 a.m. on June 2, 2004 she sustained low back and right knee injuries shortly after parking her car in a lot adjacent to the employing establishment on her way to work. She stated that as she got out of her car, a cicada flew toward her. "To avoid the bug

attacking me, I tried to get back into the car. In doing so, I twisted my right knee and fell, hitting the car step." Appellant fell to the pavement on her side. Jose Finn, a coworker, noted that on June 3, 2004 appellant complained of an injury "she sustained in the parking lot." The employing establishment noted that she reported the injury to her supervisor on June 3, 2004 and was examined by an occupational health nurse that day. The employing establishment contended that the injury did not take place on its premises.

In a May 12, 2005 letter, the Office requested that the employing establishment clarify if it owned, operated or controlled the premises on which the June 2, 2004 incident occurred. In a second May 12, 2005 letter, the Office advised appellant of the additional factual and medical evidence needed to establish her claim. The Office also noted the necessity of submitting rationalized medical evidence supporting causal relationship.[1]

In a June 3, 2005 letter, the employing establishment stated that on June 2, 2004 appellant was to report for work at 7:30 a.m. as she was on a compressed schedule. The incident occurred at 7:55 a.m., before appellant reported for duty and while she was not in the performance of official duties. The employing establishment stated that the building where she worked was leased by the government and managed by REIT Management. The parking lot where appellant fell was managed by Colonial Parking for REIT Management. The government leased four parking spaces in the lot. The "remaining parking spaces around the building [were] not covered by the lease and employees may contract with Colonial Parking for parking on the premises." Appellant had parked in a space controlled by the private management company and fell against her car in that space. It was noted that the car was her private vehicle and that she was not required to drive the car.

The employing establishment provided a diagram of employing establishment and surrounding premises, showing "four leased spaces for gov[ernmen]t vehicles" opposite Columbia Pike, directly adjacent to the building leased by the employing establishment. Appellant submitted her hand-drawn diagram showing that she parked her car directly adjacent to the employing establishment's building on the Columbia Pike side. She drew additional lines and asterisks delineating an area where she alleged there was a swarm of cicadas.

In a January 25, 2005 report, Dr. John L. Abrigo, an attending orthopedic surgeon, noted a history of right knee discomfort since a fall in June 2004 with an unspecified reinjury in December 2004. He diagnosed a possible meniscal tear. March 2005 reports from Dr. Charles Ubelhart, an attending orthopedic surgeon, and Dr. Rodrigo Hurtado, a Board-certified allergist and pediatrician, diagnose lumbar conditions but did not mention the June 2, 2004 incident.

By decision dated June 13, 2005, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant submitted insufficient evidence that the June 2, 2004 incident occurred at the time, place and in the manner alleged.

[1] The record contains a May 12, 2005 decision denying continuation of pay from June 2 to July 17, 2004 on the grounds that appellant did not timely file her claim within 30 days of the date of injury. Although the decision stated that appeal rights were enclosed, there are none of record associated with the decision. Therefore, it is unclear as to whether the Office issued the May 12, 2005 decision.

The Office further found that she submitted insufficient medical evidence diagnosing any condition caused or aggravated by the claimed June 2, 2004 incident.

In a July 15, 2005 letter, appellant requested reconsideration. In a June 30, 2005 letter, Dr. Tushar Patel, an attending Board-certified orthopedic surgeon, diagnosed an L5-S1 spondylolisthesis "exacerbated to the point that [appellant] required surgery as a result of the injury sustained by herself at work, as per her report." Appellant also submitted a timekeeping form showing that she was on a compressed work schedule on June 2, 2004, with a start time of 7:30 a.m.

In an April 21, 2005 letter, the employing establishment asserted that appellant filed her claim in an attempt to attribute March 7, 2005 nonoccupational leg and back injuries to the June 2, 2004 incident. The employing establishment contended that appellant provided conflicting accounts of how she injured her knee in the June 2, 2004 incident. Appellant noted in an undated letter that on March 7, 2005 while at home, she twisted her ankle and burned her left arm when she stepped on a dog toy and fell against a hot coffee pot. She contended that the March 7, 2005 incident aggravated back and leg injuries caused by the June 2, 2004 incident.

By decision dated November 14, 2005, the Office modified the June 13, 2005 decision to find that appellant was not in the performance of duty when the June 2, 2004 incident occurred. The Office found that the area of the parking lot in which appellant was injured was not owned, operated, maintained or controlled by the employing establishment.

In a November 21, 2005 letter, appellant requested reconsideration. She contended that the parking lot should be considered as part of the employing establishment's premises as the only entrance to the building was through the parking lot. Appellant submitted a diagram showing that the building was entirely surrounded by the parking lot. She asserted that the lot was for the use of government employees and "deli workers." Appellant acknowledged that the June 2, 2004 incident occurred in a private parking space that was not one of the four leased by the agency.

By decision dated August 3, 2006, the Office denied modification of the November 14, 2005 decision finding that the June 2, 2004 incident did not occur in the performance of duty. The Office found that the June 2, 2004 incident occurred in a private parking space not owned, maintained or controlled by the employing establishment. The Office further found that there was no "special hazard' exception resulting from "traveling through an unavoidable yet hazardous area on [appellant's] direct way to [her] work location.… [A] parking lot surrounding an office building in a metropolitan area such as Washington, DC [was] not considered to be a special hazard" under the Act.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the

[2] 5 U.S.C. §§ 8101-8193.

performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[4] "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place when she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[5]

Regarding what constitutes the "premises" of an employing establishment, the Board has stated:

> "The term 'premises' as it is generally used in workmen's 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 '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.'"[6]

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. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained or controlled the

[3] 5 U.S.C. § 8102(a).

[4] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

[6] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). Another exception to the rule is the proximity rule which the Board has defined by stating that, under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may, therefore, be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

parking facility, used the facility with the owner's special permission or provided parking for its employees.[7]

ANALYSIS

Appellant alleged that she sustained right knee and low back injuries on June 2, 2004 when she slipped and fell in a parking lot while trying to avoid a cicada. The Board finds that the June 2, 2004 incident did not occur in the performance of duty because the parking lot where she fell was not part of the employing establishment premises.

Appellant was in the process of coming to work for her tour of duty beginning at 7:30 a.m. She sustained an injury at 7:55 a.m., before commencing her employment duties, in a parking lot adjacent to the employing establishment. It is well established that, as to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable, but, if the injury occurs off the premises it is not compensable.[8]

The Board finds that the evidence submitted is insufficient to establish that the parking lot was part of the premises of the employing establishment. The Board notes that appellant's injury occurred on her way to work when she twisted her knee and fell while attempting to avoid a cicada. The employing establishment explained that it did not own, lease, maintain or control the area of the parking lot where the incident occurred. The employing establishment leased only four spaces adjacent to the building. The lot was managed by Colonial Parking on behalf of REIT Management, the company that maintained the leased the building in which appellant worked. The employing establishment indicated that its employees could contract with Colonial Parking to use the lot.[9] The evidence submitted by appellant does not establish that the employing establishment's premises extended to the parking lot. Therefore, the exception regarding the employing establishment parking lots does not apply as there was insufficient connection with the employing establishment or appellant's duties.[10] The Board finds that the evidence is insufficient to find that the parking lot should be considered part of the premises of the employing establishment.[11]

Under the facts of this case, it also cannot be said that appellant's injury occurred within the special hazard exception to the premises rule. The Board has determined that, under special circumstances the "premises rule" is extended to hazardous conditions which are proximately

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[7] *Roma A. Mortenson-Kindschi*, 57 ECAB ___ (Docket No. 05-977, issued February 10, 2006).

[8] *Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004).

[9] *See Rosa M. Thomas-Hunter*, 42 ECAB 500, 504-05 (1991) (mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment).

[10] 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 this parking for its employees. *See Edythe Erdman*, 36 ECAB 597, 599 (1985).

[11] *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

located to the premises and, therefore, may be considered as hazards of the employing establishment. 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 the employment. 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 to the premises.[12] As noted above, the employing establishment did not have contracts for the exclusive use of the parking lot in the area where appellant was injured. The parking lot was not an exclusive location in which appellant could park her vehicle. She noted that the lot was also used by "deli workers" indicating that nongovernment employees were allowed to use the lot. Therefore, this exception does not apply.

Appellant's slip and fall in the parking lot did not occur in the performance of duty. It did not occur on the employing establishment's premises as the parking lot was not under the exclusive control of the employing establishment as noted above. At the time of appellant's injury, she had fixed hours and place of work and had not yet reported to work. Her injury was an ordinary, nonemployment hazard of the journey to work itself which is shared by all travelers. The cicadas were a hazard common to all travelers and were not a hazard related to the employment.[13]

The Board also finds that the special hazard exception to the premises rule also does not apply as the route to appellant's car that day was personal to her, depending upon which space she parked in.[14] The cicadas had no connection with her employment and access to the parking lot had not been proven to be limited to the employing establishment's personnel.

CONCLUSION

The Board finds that appellant has not established that she sustained right knee or lumbar injuries in the performance of duty on June 2, 2004.

[12] *Roma A. Mortenson-Kindschi, supra* note 7.

[13] *See Jimmie Brooks*, 54 ECAB 248 (2002).

[14] *Idalaine L. Hollins-Williamson, supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 3, 2006 and November 14, 2005 are affirmed.

Issued: March 8, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board