United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 07-1929**
	)	**Issued: October 22, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Missoula, MT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 7, 2007 merit decision rescinding the Office's acceptance of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's claim for a low back injury.

FACTUAL HISTORY

On February 4, 2003 appellant, then a 37-year-old transportation security screener, filed a traumatic injury claim alleging that at 2:54 p.m. on January 22, 2003 he sustained injury to his right shoulder, arm, rib cage and hip when he fell at work.[1] Regarding the cause of the injury, he

[1] Appellant's scheduled shift was from 12:00 p.m. to 8:30 p.m.

stated, "I went to lunch and left out the side door of airport -- walked around the corner of building -- slipped and fell on sidewalk wheelchair ramp. The sidewalk was snow and ice."[2] Appellant stopped work on January 22, 2003 and returned to his regular full-time work on February 4, 2003. The Office accepted that appellant sustained displacement of his L5-S1 disc without myelopathy and paid him compensation for periods of disability.[3]

On August 11, 2003 appellant filed a claim alleging that he sustained a recurrence of total disability on August 10, 2003. He indicated that it became progressively more difficult to perform his work duties which included lifting and carrying passengers' luggage. On August 27, 2003 the Office accepted that appellant sustained a recurrence of total disability beginning August 10, 2003.

In a March 24, 2005 decision, the Office reduced appellant's wage-loss compensation to reflect that he was capable of working in the constructed position of automotive repair service estimator. In a September 9, 2005 decision, it affirmed its March 24, 2005 decision.

In a February 8, 2007 letter, the Office requested that the employing establishment respond to various questions regarding the area where appellant fell on January 22, 2003. The employing establishment indicated that the area where appellant was injured is not owned or controlled by the employing establishment, nor is it contracted by the employing establishment for its exclusive use. This area is a public access area that is owned and managed by the airport.[4] The airport door that appellant exited to get to the area where he fell is a public access door and it is primarily used by airline, airport and employing establishment employees to access an outdoor eating/smoking area and the parking lots. The employing establishment further noted, however, that the door does not have restricted access and the public can and does use the door. The area where appellant fell is near the airline and airport employee parking lot. The parking lot used by employing establishment employees is a distance away from this area, but can be accessed *via* the doorway/area in question. Employees of the employing establishment are granted parking rights, but not assigned spaces, in a parking lot which is a distance away from the area where appellant fell. The employing establishment stated that the airport provides parking space for employing establishment employees without charge and employing establishment employees do not have any other parking options that are free of charge.

In an April 19, 2007 letter, the Office advised appellant of its determination that its acceptance of his claim for displacement of his L5-S1 disc without myelopathy should be rescinded. It determined that his injury on January 22, 2003 did not occur in the performance of duty because he was not on the employing establishment premises at the time of his fall. The Office noted that the employing establishment had indicated that the area of appellant's fall, the wheelchair ramp outside the west doors of the airport terminal, was not in fact owned, controlled or contracted by the employing establishment for exclusive use by their employees. The area

[2] Appellant worked at the Missoula International Airport.

[3] Appellant returned to work in a limited-duty position.

[4] Therefore, the area was not monitored by the employing establishment to see that no unauthorized personnel entered the area.

was owned and managed by the airport and was a public access area used by employing establishment employees, airport employees, airline employees and the general public.

In a May 2, 2007 letter, appellant's attorney argued that the Office did not consider whether the employing establishment premises were constructively extended to the area where appellant fell under the proximity rule. Appellant's attorney claimed that the case of *Diane Bensmiller*[5] was applicable. He indicated that the employee in that case was found to be in the performance of duty because, as she was headed to a parking lot controlled by her employer during her lunch break, she was directed to another parking lot by construction workers and sustained her injury at that site. Appellant submitted a hand-drawn map purporting to show that he fell on a wheelchair ramp that is 15 feet from the west door of the airport building.[6] The "public parking" lot is shown to start about 50 feet beyond the wheelchair ramp and the parking lot used by employing establishment employees is shown to start about 20 feet beyond that parking lot. In an April 30, 2007 statement, appellant indicated that when he fell on January 22, 2003 he was on his way to retrieve his lunch from his vehicle in the parking lot used by employing establishment employees.

In a June 7, 2007 decision, the Office rescinded its acceptance of appellant's claim for displacement of his L5-S1 disc without myelopathy. It determined that his injury did not occur in the performance of duty. The Office noted that appellant was going to retrieve his lunch when he was injured and stated:

> "The Office found that you were not in fact on the premises of the employing establishment at the time of the injury as you were in a place which the [employing establishment] neither owned, controlled or contracted for the exclusive use of their employees. The area in question, that being a wheelchair ramp outside the airport, is not considered a part of the premises of the employing establishment even though it is a means of egress from the area were the employee is expected to work.
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> "Your attorney argued that the Office should take into consideration the proximity rule, that because the injury occurred at a place that was in direct route to the employee parking lot that the hazards associated with such travel should be considered as hazards of the employing establishment. However, the Office has determined that the parking lot in question has not been identified as part of the premises of the [employing establishment]. The [employing establishment] states the parking area is provided by the airport and is an airport employee parking lot. Thus [neither] the parking lot nor the extended area to get to it fall within the premises of the employing establishment." (Footnotes omitted.)

[5] 48 ECAB 675 (1997).

[6] The area between the west door and the wheelchair ramp is marked as "smoking area." The work spaces of the employing establishment are shown to be in several different places along most of the length of the depicted airport building.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[7] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[8] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[9]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[10]

The Act[11] provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[12] The phrase "sustained 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."[13] The phrase "in the course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. 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 the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto."[14] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown and

[7] 5 U.S.C. § 8128.

[8] *John W. Graves*, 52 ECAB 160, 161 (2000).

[9] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005). *See* 20 C.F.R. § 10.610.

[10] *John W. Graves*, *supra* note 8.

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8102(a).

[13] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[14] *Mary Keszler*, 38 ECAB 735, 739 (1987).

this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[15]

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[16] When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.[17] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[18] or which are in the nature of necessary personal comfort or ministration.[19]

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.'"[20]

Underlying the proximity exception to the premises rule is the principle that course of employment should extend to any injury that occurred at a point where the employee was within

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[15] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[16] *Mary Keszler*, *supra* note 14.

[17] *Donna K. Schuler*, 38 ECAB 273, 274 (1986).

[18] The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: "(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." *Betty R. Rutherford*, 40 ECAB 496, 498-99; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[19] *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

[20] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "[t]he 'premises' of the employer, as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of legal title." *Dollie J. Braxton*, 37 ECAB 186, 188-89 (1985).

the range of dangers associated with the employment.[21] 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 premises, and that therefore the special hazards of that route become the hazards of the employment.[22] 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.[23]

ANALYSIS

Appellant claimed that at 2:54 p.m. on January 22, 2003 he sustained injury when he fell at work.[24] He indicated that he fell on a wheelchair ramp that was about 15 feet from the west door of the Missoula International Airport building while he was on his way to retrieve his lunch from the parking lot used by employing establishment employees which was about 70 feet beyond the site of the fall.[25] Appellant stated that the wheelchair ramp was covered with ice and snow. The Office accepted that he sustained displacement of his L5-S1 disc without myelopathy. It later rescinded its acceptance of appellant's claim for a low back injury based on its determination that his injury did not occur in the performance of duty.

The Board finds that the Office justified its rescission of the acceptance of appellant's claim by showing that he was not in the performance of duty when he fell on January 22, 2003. First, the Office properly explained that appellant did not establish that he fell on the premises of the employing establishment when he fell on January 22, 2003. The Office noted that the evidence of record, including statements from employing establishment officials, showed that appellant's injury occurred on a wheelchair ramp and that the wheelchair ramp and the adjacent pathway were owned, controlled and maintained by the airport. The area was not exclusively used by employing establishment personnel and was open to the public.[26] Therefore, the Office properly explained that the wheelchair ramp where appellant fell was not part of the employing establishment premises.[27]

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

[22] A. Larson, *The Law of Workers' Compensation* § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

[23] *Linda D. Williams*, 52 ECAB 300 (2001).

[24] Appellant had fixed hours of work from 12:00 p.m. to 8:30 p.m. and was injured during a lunch break.

[25] It appears that the work spaces of the employing establishment occupied several different places along most of the length of the airport building.

[26] Although the parking lot used by employing establishment employees could be accessed *via* the area where appellant fell, the parking lot was more than 70 feet from where appellant fell. The pathway where appellant fell was also used by airport and airline employees. Moreover, the parking lot used by employing establishment employees is owned and controlled by the airport and employing establishment employees are granted parking rights, but not assigned spaces, in the lot.

[27] *See Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991). In *Thomas-Hunter* the employee was found not to be on the employing establishment premises in that she fell on a public-assess ramp which was not owned, controlled or maintained by the employing establishment.

The Office then properly explained that the wheelchair ramp did not constructively become part of the premises under the proximity rule. It indicated that the record did not establish that the wheelchair ramp where appellant fell was not so connected with the employing establishment as to be considered part of the premises of the employing establishment. The employing establishment did not contract for exclusive use of the area, nor did the employing establishment maintain the area to see who might gain access to the premises.[28] For these reasons, the Office provided sufficient explanation to justify its rescission of the acceptance of appellant's claim for displacement of his L5-S1 disc without myelopathy.[29]

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a low back injury.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 7, 2007 decision is affirmed.

Issued: October 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[28] *See supra* note 23 and accompanying text. Moreover, the fact that there was ice and snow on the ramp would not mean that appellant was exposed to a special hazard. *See Denise A. Curry*, 51 ECAB 158 (1991); *Syed M. Jawaid*, 49 ECAB 627 (1998). Appellant's off-premises injury would not be brought within the course of employment through the carrying out of an employment duty as appellant did not allege that he was carrying out such a task at the time of the fall. *See supra* note 18 and accompanying text.

[29] The Board notes that appellant's attorney claimed that the case of *Diane Bensmiller*, *supra* note 5, was applicable to the facts of the present case. That case involved a significantly different set of facts in that the employee in *Bensmiller* was headed to a parking lot controlled by her employer but was then directed to another parking lot and sustained injury at that site.