United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 08-1782**
	)	**Issued: January 16, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Bay City, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 1, 2008 merit decision denying modification of its prior decisions dated September 14, 2007 and January 7, 2008. 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 evidence establishes that appellant sustained an injury in the performance of duty on February 5, 2004.

FACTUAL HISTORY

On September 25, 2006 appellant, a custodian/laborer, filed a Form CA-1, traumatic injury claim, for an injury to his right wrist that occurred when he "fell on ice at a curb" on February 5, 2004 immediately following his work shift.

The employing establishment controverted appellant's claim, stating that his injury did not occur in the performance of duty because the injury occurred off the clock and off agency

premises. The employing establishment explained that it did not own, maintain or control the sidewalk where appellant was injured, but that the sidewalk was maintained by the city of Bay City, Michigan.

By decision dated February 23, 2007, the Office found that the evidence submitted did not establish that appellant was injured in the performance of duty. Appellant thereafter requested a hearing before an Office hearing representative.

The Office received a March 21, 2007 letter from the employing establishment which stated that "the sidewalk in question by [appellant] would not be an area that I would make the employees maintain. It is city of Bay City property and is beyond the entrance to the USPS [U.S. Postal Service] vehicle parking lot." At a hearing held July 27, 2007, appellant testified that his injury occurred two minutes after clocking out, as he was walking to his personal vehicle from the postal service building. He testified that his personal vehicle was parked on the public street because it was the closest parking space he could find. Appellant testified that, although the city of Bay City owned the sidewalk surrounding the USPS parking lot, pursuant to Bay City ordinance, the adjoining property owner, USPS, was responsible for snow removal.

Appellant also submitted a copy of Bay City Code § 94-7, entitled "Ice and snow -- Clearing of sidewalks by owner or occupant of adjoining property." The ordinance imposes upon owners and occupants of adjacent property a duty to remove ice and snow from sidewalks and make them safe for persons walking upon them.

By decision dated September 14, 2007, the Branch of Hearings and Review affirmed the Office's February 23, 2007 decision, stating that the evidence of record did not establish that appellant's injury occurred in the performance of duty. The hearing representative found that appellant fell on a public sidewalk, not one owned by the employing establishment. Moreover, the fact that the postal service was responsible, under local law, for keeping the sidewalk clear of ice and snow was not sufficient, of and by itself, to deem the sidewalk part of the employing establishment's premises under the proximity rule.

Appellant requested reconsideration and submitted a letter dated July 18, 2007 from the National Association of Letter Carriers. This letter stated that employing establishment maintenance employees were responsible for snow removal on all of the sidewalks surrounding the post office building, walks to the postal parking lots and the parking lot itself. The association asserted that on numerous occasions the letter carriers had taken the issue of snow removal to management and that the outcome of these meetings was always to have the maintenance crew remove the snow.

Appellant also submitted a hand-annotated copy of a survey map of the parking lot. Unlike the previously submitted hand-annotated map, on this map, he noted a different location for his injury: west of where he previously alleged his injury occurred. Appellant also submitted two three-page letters, photos, excerpts from a collection of state and federal workers' compensation cases and an Office memorandum.

By letter dated December 21, 2007, the employing establishment controverted appellant's claim, asserting that it maintains the city sidewalk only to the entrance of its parking lot, no

further. Furthermore, the employer stated that the area of the sidewalk upon which appellant fell was not an area maintained by the employer.

By decision dated January 7, 2008, the Office denied appellant's request to modify the previously rendered decisions of February 23 and September 14, 2007, because the evidence submitted failed to establish how a public sidewalk was part of the USPS premises.

By letter dated February 1, 2008, appellant again requested reconsideration. He alleged that he was not in fact parked on a public road but "on an indent, next to this public road." Appellant stated that the public road is a no parking area and that the "indent" upon which he was parked is part of the parking lot where the USPS does snow removal for the benefit of its employees. He also submitted written statements from two different USPS employees alleging that the USPS performed snow removal activities at the corner of Third and Boutell Place.

By decision dated May 1, 2008, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to establish that he was injured in the performance of duty.

LEGAL PRECEDENT

The Federal Employee's Compensation Act[1] 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.[2] The phrase "sustained while in the performance of duty" in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[3]

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place 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.[4] Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5] However, many exceptions to the rule have been declared by courts and workmen's compensation agencies. One such exception almost universally recognized is the premises rule: an employee going to or coming from work is covered under workers' compensation while on the premises of the employer.[6]

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8102(a).

[3] *Bernard Blum*, 1 ECAB 1, 2 (1947); *Melvin Silver*, 45 ECAB 677, 680 (1994).

[4] *Julian C. Tucker*, 38 ECAB 271, 272 (1986).

[5] A. Larson, *The Law of Workers' Compensation* § 15.00 (1989); *see Melvin Silver*, *supra* note 3 at 681.

[6] *Jimmie Brooks*, 54 ECAB 248, 249 (2002).

The premises of the employer, as the term is used in workers compensation law, are not necessarily coterminous with the property owned by the employer;[7] 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 the legal title.[8] 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. Moreover, 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.[9]

The Board also recognizes the proximity exception to the premises rule, which states 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 employing establishment.[10] Underlying the proximity exception 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.[11] The most common ground of extension is that the off-premises location where 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.[12] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[13]

ANALYSIS

Applying these principles to the situation in the present case, the Board finds that appellant's slip and fall on a snow-covered sidewalk on February 4, 2004 did not occur in the performance of duty.

Appellant had fixed hours of work from 12:30 a.m. to 9:00 a.m. and was injured when he slipped on a sidewalk adjacent to USPS property at 9:02 a.m. Unless his injury occurred on the actual or constructive premises of the employing establishment, his injury cannot be considered as sustained in the performance of duty. The sidewalk where appellant fell, it is agreed, is not owned by the employing establishment but by the city of Bay City. Statements from him as well as the employing establishment confirm that this piece of property is not owned by the

[7] *Id*. at 249.

[8] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[9] *See Jimmie Brooks*, *supra* note 6 at 249; *Denise A. Curry*, 51 ECAB 158, 160 (1999).

[10] *See Jimmie Brooks*, *supra* note 6 at 249.

[11] *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 659 (2004).

[12] *Michael K. Gallagher*, 48 ECAB 610, 611 (1997).

[13] *See Jimmie Brooks*, *supra* note 6 at 249.

employing establishment. However, the term "premises" as it is used in workers' compensation is not exclusively dependent upon ownership.[14]

The sidewalk where appellant was injured was a public sidewalk. The Board finds that appellant has not shown that the sidewalk on which he fell was used exclusively or principally by the employees of the employing establishment for the convenience of the employer.[15] Furthermore, there is no evidence to support that the use of the sidewalk was restricted to the employees of the employing establishment. Thus, appellant's injury constitutes an ordinary, nonemployment hazard of the journey itself, shared by all travelers.[16] He therefore, has not established that he was injured on the premises of the employing establishment.[17]

Moreover, the proximity rule does not apply as the hazard causing the injury, an encounter with an ice and snow covered curb on a public sidewalk, is a hazard common to all travelers on the sidewalk and is not causally related to the employment. The injury was caused by the act of slipping on an ice and snow covered curb, which is an ordinary, nonemployment hazard of the journey from work itself that is shared by all travelers.[18] Even if the sidewalk on which appellant fell was the customary means of access to the employing establishment for its employees, this would not alter the public nature of this sidewalk or render it part of the employing establishment's premises.[19]

Finally, although the employing establishment's responsibility to clear the sidewalk may be relevant under local law, this is not the issue presented by this appeal. The Board has previously rejected appellant's reasoning that the employing establishment's responsibility under local law to clear a sidewalk of snow or ice renders the sidewalk part of the employing establishment's premises or brings the sidewalk within the proximity rule.[20]

Based on this, appellant has not met his burden of proving he sustained an injury in the performance of duty because the evidence establishes that appellant's injury did not occur on the premises of the employing establishment, as his injury occurred while he was walking on city property.

CONCLUSION

The Board finds appellant has not met his burden of establishing that he sustained an injury in the performance of duty.

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[14] *Id.*

[15] *See Idalaine L. Hollins-Williamson, supra* note 11 at 659; *Mary Keszler*, 38 ECAB 735, 742 (1987).

[16] *Shirley Borgos*, 31 ECAB 222, 223 (1979).

[17] *See Mark Love*, 52 ECAB 490, 492 (2001).

[18] *See Jimmie Brooks, supra* note 6 at 250.

[19] *Id*. at 250.

[20] *Id*. at 248.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 1, 2008 is affirmed.

Issued: January 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board