United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 11-106**
	)	**Issued: August 17, 2011**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Windsor Locks, CT, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2010 appellant filed a timely appeal from the September 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a January 4, 2010 injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on January 4, 2010.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 15, 2010 appellant, then a 57-year-old transportation security officer, filed a traumatic injury claim noting that she sustained multiple injuries on January 4, 2010 due to being hit by a shuttle bus in a crosswalk at the airport. On the claim form, the employer indicated that the injury did not occur in the performance of duty because the incident occurred as appellant was returning to the airport after searching for a missing cell phone she believed was lost between her car and the employing establishment office. The employer stated that appellant had signed in for an overtime shift but had requested to be allowed to search for her missing phone.

By letter dated January 27, 2010, OWCP advised appellant of the additional evidence required to establish her claim and requested that she submit such evidence.

Appellant's supervisor, Richard McGinn, provided a January 5, 2010 statement which advised that appellant came to his office shortly before 11:00 a.m. on January 4, 2010 and told him that she was supposed to start her scheduled overtime at 11:00 a.m. although the daily manning sheet listed her starting time at 11:30 a.m. He indicated that appellant was given permission to start at 11:00 a.m. and noted that about a minute later she came back and told him that she lost her cell phone between her car and the agency building. Appellant asked if she could retrace her steps in an effort to find the phone. Mr. McGinn reported that he asked appellant where she was to be working and she replied that she would be working in the A1 section of the airport's Terminal A. He stated that he gave her permission to go find her phone and noted that he would contact the supervisor in section A1 and explain her delay. Mr. McGinn received a call shortly thereafter informing him that appellant had been hit by a bus in front of American Airlines between the terminal and the parking lot. An accident report confirmed appellant was struck by a shuttle bus in front of American Airlines in the lower level pedestrian crosswalk of Terminal B at approximately 11:12 a.m.

OWCP also received information from Brian Fleming, program analyst with the agency, noting that the employer felt the injury did not occur within the performance of duty because appellant was in the process of retrieving her cell phone from her vehicle at the time of her injury, an action which had no relationship to her duties. Mr. Fleming advised that appellant had already signed in for her overtime shift prior to the occurrence of the injury. He indicated that appellant did not use her cell phone as part of her job duties and asserted that employees were forbidden to use a cell phone while on duty, even though they are allowed to carry them. Mr. Fleming stated that employees are only allowed to use their phones while on regular breaks.

Appellant provided a February 11, 2010 response which advised that she was scheduled for an overtime shift on January 4, 2010 that was to begin at 11:00 a.m. She stated that the injury occurred in the crosswalk of the lower level of Terminal B when a shuttle bus failed to stop as she was headed back to her office to pick up her lunch bags before proceeding to Terminal A for her duty assignment.

By decision dated March 4, 2010, OWCP denied appellant's claim on the grounds that she failed to establish that the injury occurred within the performance of duty. Appellant's actions prior to the injury removed her from the performance of duty. It determined that, at the

time of the injury, she was engaged in a personal act of retrieving her cell phone which was unrelated to her regular work duties.

Appellant's counsel requested an oral hearing by letter dated April 1, 2010. A telephonic hearing was scheduled for July 12, 2010. In a July 9, 2010 letter, counsel requested that the hearing be changed to a review of the written record and contended that OWCP's decision to change the request from an in-person hearing to a telephone hearing was an abuse of discretion. He presented reasons why he felt appellant's injury should be considered to have occurred in the performance of duty. Counsel acknowledged that appellant had previously reported to work but asked for and received permission from her supervisor to return to the employee parking lot to look for her lost cell phone. He stated that appellant found her cell phone on the ground near her car and proceeded directly back to work and used the crosswalk to the terminal when she was hit by a bus. Counsel acknowledged that appellant was not performing assigned duties at the time of her injury or required to use her cell phone in her assigned duties. However, he indicated that the employer did not prohibit an employee from having a cell phone on their person while performing their duties and indicated that employees were not prohibited from visually checking their cell phones for calls or using them on breaks. Counsel contended that appellant's carrying or looking for her cell phone should be considered a personal act for her comfort, convenience, and relaxation and to remain in contact with her elderly mother. He argued that appellant's injury should be considered to be in the performance of duty under the industrial premises rule and the proximity rule.

The employing establishment was provided a copy of counsel's July 9, 2010 letter. It submitted an August 16, 2010 letter commenting on the letter and the various issues involved in this case. The employing establishment did not dispute the fact that the claimed incident occurred at the reported location, that the location was directly adjacent to appellant's fixed place of work, and that she sustained physical injury as a result of the accident. It stated that appellant was not initially reporting for work at the time of the injury but rather had already signed in for her work shift and had asked for and received permission to return to the parking lot in an effort to find a lost cell phone. The employing establishment contended that the return to the parking lot was a personal act and did not assist the employing establishment in any way as the employing establishment did not require officers to use cell phones while on duty. It acknowledged that appellant was given permission to carry the cell phone with an understanding that it be kept out of public view and used only with discretion in support of her elderly mother. The employing establishment contended that this personal consideration did not alter the fact that appellant left the work area to go to the parking lot to search for her cell phone, a personal act unrelated to her job duties. It also disputed counsel's assertion that the parking lot at the airport used by appellant was only for airport employees and provided additional information on this issue.

In a September 29, 2010 decision, OWCP's hearing representative affirmed the March 4, 2010 decision, finding that the claimed January 4, 2010 injury did not occur in the performance of duty.

LEGAL PRECEDENT

FECA 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" 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."[3] 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."[4] 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 this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[5]

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.[6] 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.[7] 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,[8] or which are in the nature of necessary personal comfort or ministration.[9]

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[2] 5 U.S.C. § 8102(a).

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

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

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

[6] *Mary Keszler*, *supra* note 4.

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

[8] 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).

[9] *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).

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.'"[10]

ANALYSIS

The evidence of record establishes that appellant reported for work and signed in for a scheduled overtime work shift at 11:00 a.m. on January 4, 2010. Shortly after reporting for work she asked for and received permission from a supervisor, Mr. McGinn, to go to the parking lot to search for a lost cell phone. Mr. McGinn notified a supervisor in section A1 of Terminal A about appellant's delay in reporting to the work location. On her way back to the airport terminal, after locating the lost cell phone near her vehicle in the parking lot, appellant was hit by a shuttle bus in a pedestrian crosswalk just outside Terminal B. Appellant was allowed to carry her cell phone due to a personal situation involving her elderly mother.

The Board finds that the location of appellant's injury on January 4, 2004, the pedestrian crosswalk outside of Terminal B at the airport, is not considered to be part of the employer's premises under the circumstances of the present case. The employing establishment did not own, control, or maintain the area outside the airport and this was an area that was open to the public.

On appeal counsel argued that the proximity rule should apply to the present case.[11] The Board finds that the proximity rule does not apply in this case as the hazard encountered by appellant, motor vehicle traffic, is common to all travelers on the road outside the airport building. Even if the crosswalk on which appellant was struck by a vehicle was the customary means of access to the employer's premises for its employees, this would not alter the public nature of the walkway or render it part of the employing establishment's premises.

In addition, even if the location of appellant's accident was considered to be part of the employer's premises, the mere fact that an employee may be on the premises at the time of the injury is not sufficient to establish entitlement to compensation benefits. It must also be

[10] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "The '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). Another exception to the general 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).

[11] *See id.*

established that appellant was engaged in activities which may be described as reasonably incidental to her employment, *i.e.*, that she was engaged in activities which fulfilled her employment duties or responsibilities or were incidental thereto.

The Board notes that appellant was given permission by a supervisor to leave the building and search for her cell phone. However, despite receiving this permission, her injury cannot be characterized as a special mission authorized by the employing establishment to further the business or mission of the employing establishment. Upon her departure from the terminal, appellant was no longer engaged in her master's business, but on a personal mission that was not related to the fulfillment of her employment duties or responsibilities. Appellant received permission to search for a lost cell phone and this act is not considered to be part of appellant's work duties or an activity that can be characterized as reasonably incidental to the employment. The act of searching for a cell phone that is not required as part of her employment or reasonably incidental to her employment. Appellant's action was a personal mission unrelated to her employment. Her actions cannot be likened to incidental acts such as using a toilet facility, drinking coffee or similar beverages or eating a snack during a recognized break in the daily work hours, which are generally recognized as personal ministrations that do not take the employee out of the course of her employment. The departure from appellant's work area to retrieve a lost cell phone is not considered an activity necessary for personal comfort or ministration and therefore is not incidental to her employment.

On appeal counsel contended that OWCP's decision to change appellant's request for an in-person hearing to a telephone hearing was an abuse of discretion. The Board finds that OWCP acted within its discretion in scheduling the oral hearing *via* telephone. Counsel did not present any persuasive reasons of why a telephone hearing would prevent appellant from presenting and submitting the same evidence regardless of whether the hearing was conducted in person or *via* the telephone.

For these reasons, appellant did not establish that she sustained an injury in the performance of duty on January 4, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on January 4, 2010.

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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