U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL GAGLIARDI and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Latham, N.Y.

Docket No. 97-2272; Submitted on the Record;
Issued May 6, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 April 1, 1997.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet her burden of proof to establish that she sustained an injury while in the performance of duty on April 1, 1997.

On April 1, 1997 appellant, then a manager, filed a traumatic injury claim (Form CA-1) alleging that on that date she cut her left arm and left leg, and injured her left shoulder and the left side of her neck when she fell on the ice in a parking lot. Appellant stopped work on April 1, 1997 and returned to work on April 9, 1997. On the reverse of the Form CA-1, Katherine A. Deeb, appellant's supervisor, indicated that a third-party claim may be made against Latham Circle Mall. Ms. Deeb also indicated that appellant was not on government property and the medical evidence submitted failed to demonstrate that the claimed condition was causally related to the injury.

By decision dated June 10, 1997, the Office of Workers' Compensation Programs found that appellant had failed to establish that she sustained an injury while in the performance of duty on April 1, 1997.

The Federal Employees' Compensation Act[1] provides for payment of compensation for 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" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely,

[1] 5 U.S.C. §§ 8101-8193

[2] 5 U.S.C. § 8102(a).

"arising out of and in the course of employment."[3] "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 this phrase, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours, or at lunch time, are compensable.[4]

The crucial question in the present case is whether appellant was on the "premises" of the employing establishment at the time of her fall on April 1, 1997. The Board has held that "[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."[5] 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.[6] Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment.[7] 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 parking for its employees.[8]

In the instant case, the proximity rule does not apply. Appellant's injury in the parking lot arose out of ordinary nonemployment hazards of the journey itself which are shared by all travelers. Further, appellant was not on federal premises when she was injured. In an April 8, 1997 memorandum, Ms. Deeb stated that appellant's accident occurred in the front parking lot of the Latham Circle Mall because their regular parking area had not been plowed. Ms. Deeb further stated that this was not a federally owned building, that the employing establishment leased the space and that the building was maintained by the owner of the mall.

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[3] 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).

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

[5] *Rosa M. Thomas-Hunter,* 42 ECAB 500, 504-05 (1985); *Wilmar Lewis Prescott,* 22 ECAB 318 (1971).

[6] *Rosa M. Thomas-Hunter, supra* note 5; *Edythe Erdman,* 36 ECAB 597, 599 (1985).

[7] *Id.*

[8] *Id.*

In a May 27, 1997 telephone conference with the Office, the employing establishment indicated:

> "The parking lot where injury occurred is owned by the Latham Circle Mall. The owners assigned an area for [employing establishment employees] parking but that area is not fenced off nor are signs placed there forbidding use by the general public. There is no control over who parks in that area: the general public may park there. [Employing establishment] employees park there free of charge. The lot itself is not leased by the [employing establishment] but a number of parking spaces are stipulated in the lease for the work site."

The employing establishment also provided in a June 4, 1997 letter:

> "[E]nclosed is a copy of the lease which clearly specifies that the lessor is Plaza at Latham Associates. See that the contract clearly indicates that the lessor maintains, controls and owns the building and the parking lot. [The employing establishment] has no written contract for employees indicating specific parking spaces for them. The lessor merely asks our agency employees to park in a general area of the lot."

The accompanying lease revealed that Latham Associates leased the second floor of the building to the employing establishment together with parking for at least 80 cars. The lease also revealed that Latham Associates was responsible for the maintenance of the building, including the removal of snow and ice from parking lots of the building.

Inasmuch as the employing establishment neither contracted for the exclusive use by its employees of the parking lot nor assigned parking spaces to its employees, the area assigned for employing establishment employees was also available to the general public, and Latham Associates owned, maintained and controlled the parking lot, the Board finds that the parking lot in which appellant was injured did not have "such proximity and relation as to be in practical effect a part of the employer's premises." Appellant's fall on April 1, 1997, therefore, constituted an off-premises injury while going or coming from work, which is not compensable as it did not arise out of and in the course of employment, but out of ordinary nonemployment hazards of the journey itself which are shared by all travelers.[9]

[9] *Rosa M. Thomas-Hunter*, *supra* note 5.

The June 10, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
May 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member