# United States Department of Labor
# Employees' Compensation Appeals Board

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| **D.T., Appellant** | ) | |
| **and** | ) | |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Philadelphia, PA, Employer** | ) | **Docket No. 07-985**<br>**Issued: October 22, 2008** |

*Appearances:*
*James D. Rosen, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On February 28, 2007 appellant filed a timely appeal from the September 13 and December 11, 2006 merit decisions of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

### ***ISSUE***

The issue is whether appellant sustained an injury on June 5, 2006 in the performance of duty.

### ***FACTUAL HISTORY***

On June 9, 2006 appellant, then a 58-year-old transportation security officer, filed a claim alleging that he sustained an injury in the performance of duty on June 5, 2006: "While walking during break from Terminal B to A Terminal, I slipped on pavement and injured my right knee

and shoulder and back." He stated the injury occurred at 4:45 p.m. Appellant's regular work hours were from 1:00 p.m. to 9:30 p.m. Her screening manager indicated that the injury did not occur in the performance of duty because appellant was on break. Appellant submitted medical opinion evidence supporting that his diagnosed right knee, right shoulder and spinal sprains were directly related to his slip and fall at work.

Appellant's screening manager informed the Office that the injury occurred during his unpaid lunch break. "On the other hand," he stated, "TSA employees at Philadelphia Int'l Airport do not have any physical clock-in & out mechanism for them to use to clock out for their lunch breaks and the only time tracking tool is just a sign in/out sheet which shows only the start and end of their shift." The screening manager stated that the approximate distance from Terminal A East, which was appellant's duty station, and the location he claimed the incident occurred was 175 feet. He further stated there were two ways to get to Terminal A from Terminal B: an inside route containing two moving walkways and a curbside route linking all the terminals.

Appellant stated that he was on an assigned break, "which means I was still on the clock." He stated he chose the outside route to Terminal A to get some fresh air.

In a decision dated September 13, 2006, the Office denied appellant's claim. It found that he was not in the performance of duty at the time his injury occurred because the area in which he was injured was not federally owned, operated, and/or maintained. It also found that the injury happened during a lunch break which was unpaid.

Appellant requested reconsideration. His attorney argued that, while he was not actually engaged in the furtherance of his employer's business at the time of his injury because he was on a lunch break, he was on the premises and was required by the nature of his employment to be present on these premises. Appellant argued that since there was no mechanism by which he could leave the premises for a lunch break, and because he was only 175 feet from his duty station at the time of injury, his injury must come within the course and scope of his employment.

In a decision dated December 11, 2006, the Office reviewed the merits of appellant's claim and denied modification of its September 13, 2006 decision. It found that appellant was on an unpaid lunch break and did not have to leave the terminal to take lunch: "The claimant decided to go outside of his terminal and off the premises of his worksite and placed himself in the ordinary nonemployment hazards shared by all travelers and outside the performance of duty."

## ***LEGAL PRECEDENT***

Congress, in providing a compensation program for federal employees, did not contemplate a program of insurance against every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach upon the mere existence of an employer-employee relationship.[1] Instead, Congress provided compensation for

[1] *Christine Lawrence*, 36 ECAB 422 (1985); *Minnie M. Huebner*, 2 ECAB 20 (1948).

personal injuries sustained while in the performance of duty.[2] The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3] "In the course of employment" relates to 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 his employer's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[4]

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 that are shared by all travelers. But if the employee is on the premises of the employing establishment, an injury will generally fall within the performance of duty. 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. In some cases' the "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. The premises of the employer may therefore be broader or narrower than the property of the employer, depending more on the relationship of the property to the employment than on the status or extent of legal title.[5]

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.[6] Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[7]

## ***ANALYSIS***

The Office denied appellant's claim on the grounds that his injury occurred off the employer's premises during a lunch break. However, the Office has not developed sufficient evidence to support this finding. Appellant works as a transportation security officer at a major international airport. In this case, it is not clear where the federal premises begins and where it

[2] 5 U.S.C. § 8102(a).

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

[4] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

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

[6] *Thomas M. Lee*, 10 ECAB 175 (1958).

[7] *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

ends. Before the Office can support a finding that appellant was off the premises, it must first establish what the parameters of the premises. The mere fact that appellant's injury occurred in an area of the airport that is not federally owned or operated or maintained is not dispositive. The employer's premises may well extend beyond the immediate ground upon which appellant performs his screening duties inside Terminal A East. The premises could extend to bathrooms and restaurants and other public areas of the airport that are not owned or operated or maintained by the federal government. The premises could extend to any place on the airport grounds where appellant might reasonably be expected to be in connection with his employment and this, in turn, on whether the employer instructed appellant to take lunch only at certain designated locations or whether the employer specifically prohibited appellant from going to Terminal B for any incidental activities, such as getting a drink or a snack or taking an assigned break. The evidence, as developed does not allow the Board to make a fully informed adjudication of this claim.

The Office also found that appellant did not have to leave Terminal A East to take lunch, but the evidence is again insufficient to support the Office's finding. The record does not disclose when appellant may take lunch, where in the airport he may go for lunch, or when or where or for how long he may take assigned breaks. Although appellant's attorney appears to concede that appellant was returning from lunch, the record does not show where appellant went inside Terminal B, what he did while he was there or how long he stayed before making his way back to Terminal A East.

The Board will set aside the Office decisions denying compensation and remand the case for further development of the evidence. After such further development as may be necessary, it shall issue an appropriate final decision on appellant's claim for compensation.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 13 and December 11, 2006 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: October 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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