United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 08-2355**
	)	**Issued: May 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE Olive Branch, MS, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 1, 2008, which denied her request for an oral hearing. She also timely appealed a June 6, 2008 decision of an Office hearing representative that affirmed the denial of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a traumatic injury in the performance of duty on April 18, 2007; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b)(1).

FACTUAL HISTORY

On May 7, 2007 appellant, then a 52-year-old clerk, filed a traumatic injury claim alleging that on April 18, 2007 she fractured her right arm when she slipped and fell outside the

parking area gate.[1] She stated that, when she fell, she had gotten out of her car to ascertain who pulled behind her and whether they had a key to a locked gate. Appellant stated that it was dark and that she was unable to see where she tripped and fell. She stopped work on the date of the claimed injury. The employing establishment controverted the claim, alleging that appellant was not scheduled to work before 4:30 a.m. and that she was not on the premises when injured.

By letter dated May 18, 2007, the Office requested that appellant submit additional evidence to support her claim.

In a May 25, 2007 statement, appellant explained that she appeared for work on April 18, 2007 because her request for leave to attend a medical appointment was "disapproved." She believed that she was scheduled to work at what she "thought was 4:00 a.m. on April 18, 2007, just as the time had been on the preceding Saturday." Appellant alleged that she parked at the gate to the employing establishment with a cup of coffee, at 3:55 a.m., and waited for someone to arrive to unlock the gate. She noted that another car arrived after she had been waiting and parked behind her. Appellant alleged that there was no light where they waited, but she thought that the car belonged to a worker who sometimes came in early and might have a gate key. She noted that it was "imperative to have a key to the gate and a key to the building if you are expected to hit the clock -- which is locked in the building -- ON TIME." Appellant stated that she finally got out of her car and introduced herself to Teresa Gaters, a postmaster from another facility. Thereafter, an employing establishment vehicle arrived. Appellant stated that, as the truck pulled into the driveway, she tried to use the light from the truck for guidance back to her car, but something on the driveway tripped her and caused her to fall. She managed to find the keys to open the doors and let the other workers enter the building. Afterwards, Ms. Gaters took her to the hospital. When appellant returned to the employing establishment, the "clock in" time "said 4:25 a.m." although she later heard that it was 4:50 a.m.

In a May 7, 2007 statement, David G. Flippo, the postmaster, noted that he was apprised of the situation the day after appellant fell. He advised that Ms. Gaters stated that she did not see anything that appellant might have fallen on and noted that there was nothing that would cause a trip. Mr. Flippo contended that the incident did not happen on the clock.

In a May 7, 2007 statement, Nancy Spinosa, a customer service supervisor, alleged that there was nothing on the pavement that could have caused appellant to fall. She noted that appellant was not on the employing establishment's premises when the accident occurred, as she was outside the gate, which was locked. Moreover, appellant was not on the time clock or involved in any official "off premise" duties. Ms. Spinosa stated that an investigation revealed that there were "no obstructions, 'soft spots' or unevenness in the asphalt." It was noted that appellant "came out of her shoes when she fell." Ms. Spinosa stated that she and Mr. Flippo had observed appellant several times with untied shoelaces and advised that she had other accidents at home involving trips and falls. Regarding a leave request for Wednesday, April 18, 2007, Ms. Spinosa denied being aware of such a request and advised that appellant was scheduled to work at 4:30 a.m. She explained that there were two other clerks scheduled for that same time slot, who had keys to the gate and the building, which was why appellant was not scheduled for

[1] Portions of the May 7, 2007 notice of traumatic injury are illegible.

work at 4:00 a.m. Ms. Spinosa noted the procedure for opening the building and disabling the alarm. The employing establishment had two employee parking areas, at the north and south of the building and the alarm system was located by the south entrance to the building. Ms. Spinosa noted that there was no need for appellant to have a key to the gate as her regular schedule usually began at 7:30 a.m. If appellant had reported for work as scheduled at 4:30 a.m., the gate would have been open and she could have driven in, parked and entered the building, because she had keys to the back door. Ms. Spinosa also questioned appellant's "clock in" time of 4:25 a.m.

In a letter dated May 25, 2007, Ted Woodall, the employing establishment's human resources manager, controverted the claim. He stated that appellant had a long history of filing claims. Mr. Woodall noted that appellant was scheduled to report to work at 4:30 a.m. although her normal reporting time was 7:30 a.m. He advised that two other clerks, whose normal reporting time was 4:30 a.m., were also scheduled to be there at the same time as appellant. Mr. Woodall noted that appellant reported to work "40 minutes before her reporting time even though she knew that she would not be able to gain access to the parking lot because there is a locked postal gate where only employees who were assigned keys to the gate can gain entrance." He noted that it took at least an hour to unload the mail truck and there was no work for her to perform that early. Mr. Woodall stated that there was "absolutely no need for [appellant] to be there at that time." He questioned why appellant parked her vehicle in front of the entrance and contended that it was "so that other [employees] would have to park behind her vehicle and they would be in position to clearly see the alleged fall." Mr. Woodall related that Ms. Gaters, who was parked behind appellant, advised him that she and appellant were engaged in conversation for a few minutes and that, afterwards, appellant, "with coffee in her hand walked back to her vehicle where she mysteriously fell down right alongside her vehicle in plain view of Ms. Gaters." He indicated that Ms. Gaters "reported that there were no obstructions, soft spots or uneven pavements. There was nothing at all that could have caused a fall." Ms. Gaters reported that both of appellant's shoes were off her feet and, despite any pain, she refused immediate medical assistance and insisted on driving her vehicle onto the parking lot. Appellant proceeded to make telephone calls and perform other unnecessary tasks before letting Ms. Gaters take her to the hospital. Mr. Woodall reiterated that appellant had no reason to be at work before her reporting time, that there was no work for her to perform that early and she was not required to open the facility. He reiterated that the fall occurred off employing establishment premises.

In a June 29, 2007 decision, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged. It found that appellant was not in the performance of duty as the injury did not occur on the employing establishment premises and more than 30 minutes prior to her report time. Appellant's representative requested a telephonic hearing.

By decision dated September 27, 2007, an Office hearing representative determined that the case was not in posture for a hearing and set aside the June 29, 2007 decision. She found that the injury occurred within a reasonable time before appellant's scheduled work shift. The Office hearing representative directed the Office to determine whether the location at which appellant fell was owned, controlled or managed by the employing establishment.

By letter dated October 4, 2007, the Office requested that the employing establishment provide additional information regarding the location at which appellant fell. The employing establishment was advised to submit the requested information within 30 days.

In an October 16, 2007 statement, Mr. Woodall noted that appellant's supervisor believed that she fell outside the gate to the parking lot, which was believed to be a part of the employing establishment's property. He reiterated that appellant was not scheduled to report to work before 4:30 a.m.

In an October 9, 2007 statement, appellant alleged that she had originally requested to be off on April 18, 2007, as she was required to see a fitness-for-duty examination. However, Ms. Spinosa denied her request as she was needed the next day. Appellant came in early and worked with "Darla," who was scheduled to work at 4:00 a.m., and confirmed that she was following a "direct order to be there." She stated that she parked her car just a few feet from the locked gate at 3:55 a.m. No one came at 4:00 a.m., but another car pulled up to the wrong gate and then eventually pulled up behind her. Appellant recalled that there was no moonlight and, around 4:10 a.m., she got out of her car and went to that of Ms. Gaters. After briefly speaking with Ms. Gaters, appellant tried to walk back to her car using light from the headlights of a truck that had just arrived. However, she tripped on the driveway, fell and broke her right humerus. Appellant stated that Ms. Gaters and Jerry Gray, the truck driver, came to her aid. She did not know how she fell. As appellant had the only key to the building, she opened it, reset the alarm, found keys for another individual to open the bay and eventually sat in a chair answering the telephone until Ms. Gaters took her to the hospital. Appellant referred to a union contract to support that she was supposed to be there at 4:00 a.m.

In a July 28, 2007 statement, Mr. Gray, a truck driver, noted arriving at the employing establishment at about 3:55 a.m. on April 18, 2007. He indicated that he turned to unlock the gate and saw appellant fall beside her car. Mr. Gray confirmed that it was dark and that the lights were out.

In an October 31, 2007 statement, Loretta Brown, an employing establishment manager, stated that an investigation was conducted to determine whether the location where appellant fell was owned by the employing establishment. Ron Allen, an architectural engineer, visited the site on October 30, 2007 and investigated the property boundary in relation to the accident site. He reported that the accident occurred on the asphalt (black pavement), which was not owned by the employing establishment but by the city of Olive Branch. Ms. Brown stated that the area adjoining the asphalt and the driveway that led to the gate contained a four foot "right of way" that was also owned by the city. She contended that appellant did not fall on property owned or controlled by the employing establishment. On November 2, 2007 the Office received a map of the employing establishment.

By decision dated November 5, 2007, the Office found that the evidence did not establish that appellant was injured in the performance of duty. It found that the area where she fell was owned by the city of Olive Branch and not the employing establishment.

Appellant's representative requested a telephonic hearing, which was held on February 11, 2008. In a November 14, 2007 statement, appellant indicated that she went to the office of the Architectural Engineer for the City of Olive Branch, Steve Bigelow. She alleged that the persons with whom she spoke had never heard of Mr. Allen. In a December 4, 2007 statement, appellant noted meeting with Mr. Bigelow regarding ownership of the property where she fell. She asserted that Mr. Bigelow verified that she fell on employing establishment property. Appellant subsequently submitted a December 3, 2007 letter from Mr. Bigelow. On November 28, 2007 Mr. Bigelow met with appellant at the rear entrance to the employing establishment. He stated that appellant showed him where she had parked her car and fell on the concrete driveway. Mr. Bigelow noted that the area where she fell was behind the fence facing Mid-South Drive. He stated that he returned the next day to check a few measurements with a copy of a June 1, 1998 survey. Mr. Bigelow concluded that if appellant "fell in the concrete driveway (behind the curb line) [she] was not on the 50 foot right of way on Mid-South Drive." He also confirmed that property subject to a 10-foot utility easement was owned by the employing establishment.

During the hearing, appellant confirmed that she fell on the concrete driveway. She also alleged that the employing establishment "never" asked her where she fell. Appellant testified that Ms. Gaters incorrectly reported that she fell on the asphalt. She reiterated that she was to report work at 4:00 a.m. and not 4:30 a.m.

By decision dated June 6, 2008, the Office hearing representative found that appellant was not engaged in any activity reasonably incidental to her employment when she fell. She also found that the circumstances under which appellant's injury occurred did not establish that her injury arose out of and in the performance of her duties. The hearing representative noted that Mr. Allen supported that the location where appellant fell was owned by the City of Olive Branch.

On July 15, 2008 appellant's representative requested a hearing.

By decision dated August 1, 2008, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and that the case could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT

The Federal Employees' Compensation Act 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] In order to be covered, 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 employing establishment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[3] For an employee with fixed hours and a fixed workplace, an injury that occurs on the

[2] 5 U.S.C. § 8102(a) (2000).

[3] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time, is compensable.[4] However, that same employee with fixed hours and a fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.[5] The reason for the distinction is that the latter injury is merely a consequence of the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[6]

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.[7] The term premises of the employer, as that term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employer; the term may be broader or narrower depending more on the relationship of the property to the employment than on the status or extent of legal title.[8]

ANALYSIS

The Board finds that this case is not in posture for decision as the evidence is insufficient to establish the status of the property where appellant fell on April 18, 2007. The Board cannot make an informed decision with regard to the question of whether appellant's fall occurred on or off the industrial premises.

In a September 27, 2007 decision, the Office hearing representative found that the injury occurred within a reasonable time before her scheduled work shift and remanded the case to determine whether the premises were owned, controlled or managed by the employer, the issue of who owns, controls or maintains the property remains cloudy. The employing establishment in Mr. Woodall's October 16, 2007 letter, initially advised the Office that it believed that the area outside the gate was part of the employing establishment's property. However, it later submitted an October 31, 2007 letter from Ms. Brown, the manager, who advised that an engineer, Mr. Allen, visited the site and advised that the location where the accident happened was on the asphalt (black pavement), which was owned by the City of Olive Branch. Ms. Brown also indicated that the area adjoining the asphalt and the driveway that led to the gate contained a four foot "right of way" that was also owned by the city. However, appellant alleged that she did not fall on the asphalt, but on the concrete driveway. She further testified during her hearing that no one from the employing establishment asked her where she fell and while she noted that Ms. Gaters saw her fall and indicated that she fell on the asphalt; appellant alleged that she did

[4] *Id.; Denise A. Curry*, 51 ECAB 158, 160 (1999); *Narbik A. Karamian*, 40 ECAB 617, 618-19 (1989).

[5] *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

[6] *Id*.

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

[8] *See Dollie J. Braxton*, 37 ECAB 186 (1985); *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

not fall on the asphalt, but the concrete driveway. The Board notes that the record does not contain a statement from Ms. Gaters. Appellant explained that she went to officials in the City of Olive Branch to determine who owned the property. She subsequently obtained a December 3, 2007 statement from Mr. Bigelow, the city engineer, who concluded that, if she fell in the concrete driveway behind the curb line, she was not on the 50 foot right of way on Mid-south Drive.

The Board finds that these conflicting statements do not resolve the issue of whether the premises were owned, controlled or managed by the employing establishment. There are conflicting statements as to exactly where appellant fell and as to who owned or controlled the area. Furthermore, it does not appear that Ms. Gaters provided a statement to explain the details of what she observed. This is important as she was present in the area where appellant fell and any statement obtained from her would help clarify where appellant fell and the time at which she fell. The Office also has not developed the evidence regarding who controlled the property where appellant fell regardless of its technical ownership status. For example, there is no evidentiary development regarding who was allowed to use the area where the fall occurred such as whether public use was permitted or whether its use was restricted to employees of the employing establishment.[9] The Board cannot make an information decision without further development regarding whether appellant's fall occurred on the premises or constructive premises of the employing establishment.

Furthermore, the record remains unclear with regard to whether appellant was engaged in an activity reasonably incidental to her employment. While the Office hearing representative in the September 27, 2007 decision found that the injury occurred within a reasonable time before her scheduled shift and remanded the case to determine whether the premises where appellant fell were owned, controlled or managed by the employer, the Office hearing representative in the June 6, 2008 decision found there was no evidence to support that appellant was engaged in an activity reasonably incidental to her employment when she fell. She also found that the circumstances under which appellant's injury occurred did not show how her fall arose out of and in the performance of her duties. However, the Office hearing representative did not provide any reasoning to show why she concluded that appellant was not engaged in an activity reasonably incidental to her employment. The Board notes that the record contains conflicting findings and is unclear with regard to this and related matters. For example, there has been insufficient evidentiary development regarding exactly when appellant fell. Appellant indicated, on October 9, 2007, that her fall occurred at about 4:10 a.m., about 20 minutes before her shift began. As noted, the record contains no statement from Ms. Gaters and, while Mr. Gray noted arriving at the employing establishment at 3:55 a.m., his statement did not specifically address the time that the fall occurred.

[9] *See Idalaine L. Hollins-Williamson, supra* note 5 (underlying the proximity exception to the premises rule is the principle that course of employment should extend to an injury occurring at a point where the employee was within the range of dangers associated with the employment; the most common ground of extension is that the off-premises point at which the injury occurred lies on the only route or 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; 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).

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[10] Accordingly, the Office's decision will be set aside and the case remanded for further evidentiary development concerning the location, time and circumstances surrounding appellant's fall on April 18, 2007. The Board notes that the Office should attempt to obtain a statement from Ms. Gaters and any other individuals who may have relevant knowledge regarding the time and circumstances of appellant's fall. Following this and such further development as is deemed necessary, the Office shall issue a *de novo* decision.[11]

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 June 6, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is remanded for further consideration consistent with this opinion.

Issued: May 15, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[10] *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

[11] In light of the Board's disposition on the first issue, the second issue is moot.