United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 11-1050**
	)	**Issued: November 14, 2011**
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL ARKANSAS HEALTH CARE SYSTEM, Little Rock, AR, Employer	)	

Appearances:
B. Norman Williamson, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 23, 2011 appellant filed a timely appeal from the January 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 established that she sustained an injury in the performance of duty on July 1, 2009.

FACTUAL HISTORY

On April 14, 2010 appellant, then a 50-year-old nursing assistant, filed a traumatic injury claim alleging that on July 1, 2009 she sustained injuries to her right shoulder and lower back

[1] 5 U.S.C. § 8101 *et seq.*

when she was involved in a motor vehicle accident on her way to attend a mandatory meeting.[2] At the time of the incident, she was allegedly preparing to enter an employing establishment parking lot when her vehicle was hit by an employing establishment shuttle bus. The employing establishment controverted the claim, contending the claimed injury did not occur in the performance of duty.

On April 23, 2010 OWCP informed appellant that the information provided was insufficient to establish that she was injured in the performance of duty. It asked her to submit additional details of the alleged event, including when and where the incident occurred, and additional evidence, including a physician's report with a diagnosis and an opinion as to the cause of any diagnosed conditions.

The record contains a July 2, 2009 police report documenting a July 1, 2009 motor vehicle accident. The report reflects that appellant's vehicle was struck at 9:30 a.m. at the intersection of Zoo Drive and Monroe Street.

On April 19, 2010 Supervisor Candice Workman, of the employing establishment, controverted appellant's claim. She stated that the incident occurred off-premises on a public street, as evidenced by the July 2, 2009 police report. Ms. Workman also contended that appellant's claim was not filed in a timely manner and that there was a factual discrepancy, noting that the incident occurred when appellant was supposed to be in a mandatory meeting.

The record contains medical reports, physical therapy progress notes and disability slips for the period August 13, 2009 through April 26, 2010.

On May 19, 2010 appellant informed OWCP that, on the morning in question, she was on her way to attend a mandatory meeting of the employing establishment's Education Advisory Committee when she was struck by the employing establishment's shuttle bus. She stated that she reported the accident to the employing establishment's legal department and received medical treatment on the date she was injured.

The record contains a report of a May 27, 2010 telephone call from appellant received by Angela Boggess of the employing establishment. Appellant stated that the July 1, 2009 mandatory meeting was scheduled to begin at 9:30 a.m. She also stated that the accident did not occur on the employing establishment's property.

By decision dated June 1, 2010, OWCP denied appellant's claim on the grounds that the evidence did not establish that she sustained an injury on July 1, 2009 in the performance of duty. It found that the incident was an off-premises injury and was not compensable because it did not arise out of the course of employment. On June 9, 2010 appellant, through counsel, requested a telephonic hearing.

During the November 3, 2010 telephonic hearing, appellant contended that the off-site parking lot was an extension of the employing establishment's property. She argued that her

[2] Appellant noted that although she was not scheduled to work on the day in question, she was scheduled to attend the mandatory meeting.

injury was in the performance of duty because, when the July 1, 2009 accident occurred, she was in front of the off-site parking area preparing to enter the lot. Appellant stated that she was attempting to park in the off-site lot because there were no available spaces in the employee lot closer to the employing establishment.

In a December 9, 2010 statement, appellant reiterated her argument that the off-site lot was an extension of the employing establishment. She stated that management had distributed a map to employees advising them of the availability and location of the off-site facility. Appellant also indicated that the off-site lot was monitored by Veterans Administration police officers and that it was necessary to travel on the roadway where the accident occurred in order to reach the off-site lot. The record contains a map of the off-site lot, which is largely illegible.

An undated memorandum from the employing establishment to all employees stated that off-site parking had been arranged in the South Union Commuter parking lot in the event that the Fair Park parking lots were full or unavailable.

On November 29, 2010 Harry McQueen of the employing establishment responded to appellant's hearing testimony. He stated that the accident did not occur in front of the off-site lot, as appellant indicated, but rather on the corner of Zoo Drive and Monroe Street, as noted on the police report. Mr. McQueen indicated that the off-site lot is off of Fair Park Drive. He noted that, although employees were directed to park at the overflow lot due to construction, the lot is not owned or maintained by the employing establishment. Further, though the employing establishment shuttle bus operates from the lot, the general public is permitted to park in the lot.

By decision dated January 21, 2011, an OWCP hearing representative affirmed the June 1, 2010 decision on the grounds that the incident did not occur in the performance of duty. The representative found that the incident did not occur on the employing establishment's premises, and that there was no special hazard at the off-premises point.

On appeal, counsel argues that the circumstances of this case qualify for an exception to the general "going and coming rule." He contended that, although the incident did not occur on the employing establishment's premises, appellant was struck by a shuttle bus that was owned and operated by the employing establishment; that the off-site lot was used because there was construction on the main premises; and that the shuttle bus constituted a hazard that "spilled over" from the main premises. Accordingly, appellant should be compensated for her injury.

LEGAL PRECEDENT

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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, arising out of and in the course of employment.[4] In the course of employment relates to the elements of time, place and work

[3] 5 U.S.C. § 8102(a).

[4] 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).

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 master's business, at a place when 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. As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time, are compensable.[5]

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.'"[6]

Underlying the proximity exception to the premises rule is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[7] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that therefore the special hazards of that route become the hazards of the employment.[8] 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.[9]

The Board has also pointed out that factors which determine whether a parking area 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. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises

[5] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

[6] *Denise A. Curry*, 51 ECAB 158 (1999).

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

[8] A. Larson, *The Law of Workers' Compensation* § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

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

of the employing establishment. 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.[10]

ANALYSIS

The July 1, 2009 motor vehicle accident occurred on a public street while appellant was on her way to a required meeting at the employing establishment. As the incident did not occur on the employing establishment's premises, the general "coming and going" rule would preclude coverage under FECA for this injury, unless appellant establishes an applicable exception.[11] The Board finds that the evidence does not establish that appellant sustained an injury in the performance of duty.

There is no dispute that the street on which the accident occurred was a public roadway, which was not within the ownership, control or management of the employing establishment. Appellant's contention is that the employing establishment's premises should be constructively extended to include the off-site parking lot in which she intended to park the day the incident occurred, as well as the roadway on which the accident occurred. She argues that, as the roadway was a necessary route which she was required to traverse to reach the off-site lot, the special hazards of that route became the hazards of the employment and that, therefore, her accident occurred in the performance of duty. The Board finds appellant's argument to be without merit.

Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises of the employing establishment. 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.[12] In the instant case, the evidence reflects that the off-site parking and shuttle bus service was available to employees when the on-site parking lot was full. The off-site lot, however, was not controlled by, or for the exclusive use of, the employing establishment or its employees. Rather, the lot was open to the general public. Appellant's decision to park in the off-site public lot does not convert the lot to the premises of the employing establishment.

Appellant also argues that the premises should be constructively extended in this case to include the street on which the July 1, 2009 accident occurred, as it was the only route to the off-premises lot. As noted, underlying the proximity exception is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment,[13] such as on the only route available to

[10] *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 1841 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); ***R.M.,*** Docket No. 07-1066 (issued February 6, 2009).

[11] A. Larson, *The Law of Workers' Compensation* § 13.00 (2007).

[12] *Supra* note 10.

[13] *Idalaine L. Hollins-Williamson*, *supra* note 7.

employees to reach the premises, and that therefore the special hazards of that route become the hazards of the employment.[14] The proximity exception cannot be applied to the facts of this case. The street on which appellant was injured was not the only route available to appellant in order to reach the employing establishment premises. Appellant was not required to park in the off-site lot and, by extension, was not required to use the street in front of the lot. Rather, her act of driving on a public street was a hazard common to all travelers and was not causally related to the employment.[15] Thus, appellant's injury constitutes an ordinary, nonemployment hazard of the journey itself, shared by all travelers.[16]

On appeal, counsel argues that the circumstances of this case qualify for an exception to the general going and coming rule, to which he refers as "spill over risks."[17] He contends that the employing establishment's premises should be expanded to include the street on which the accident occurred, as the off-site lot was used because there was construction on the main premises, and appellant was struck by a shuttle bus that was owned and operated by the employing establishment.[18] For reasons stated, the Board finds that the employing establishment premises cannot be constructively extended in this case to include the off-site parking lot or the street on which the July 1, 2009 accident occurred.

As the record fails to support the application of an exception to the off-premises rule, 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 July 1, 2009.[19]

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.

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[14] A. Larson, *The Law of Workers' Compensation* § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

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

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

[17] Counsel cites A. Larson, *The Law of Workers Compensation* § 13.03 (1988) for the proposition that spill over risks are risks of employment that extend beyond the premises and therefore deserve to be compensated.

[18] Counsel cites two state workers' compensation cases, which he contends are analogous to the instant case. *In Nelson v. City of St. Paul*, 81 N.W. 2d 272 (MN Supreme Ct. 1957), the Minnesota Supreme Court held that a teacher was in the performance of duty when she was struck by a baseball on a public sidewalk while on her way to work. In *Friere v. Matson Navigation Co.*, 118 P2d 809 (CA Supreme Ct. 1941), the CA Supreme Court found that an employee was injured in the course of employment while exiting a taxi on a public bulkhead in front of the employing establishment, when a vehicle driven by another employee ran over his foot. These cases concern injuries that occurred adjacent to the premises of the employing establishment. Thus, they are not analogous to the case at hand, which concerns an incident that occurred in front of an off-site parking facility, which was not owned, operated or controlled by the employing establishment, or held for the exclusive use of its employees.

[19] *See Jon Louis Van Alstine*, 56 ECAB 136 (2004) (finding that employment did not fall within any exception to the general rule, the Board denied coverage where appellant sustained an off-premises injury while riding his motorcycle to work). *See also Linda S. Jackson*, 49 ECAB 486 (1998).

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty on July 1, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 21, 2011 is affirmed.

Issued: November 14, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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