United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 11-1029**
	)	**Issued: February 1, 2012**
DEPARTMENT OF VETERANS AFFAIRS, JAMES A. HALEY VETERANS MEDICAL CENTER, Tampa, FL, Employer	)	

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 22, 2011 appellant, through her representative, timely appealed from the November 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her traumatic injury claim. 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 was in the performance of duty at the time of her January 20, 2010 injury.

On appeal appellant contends that she was in the performance of duty at the time of the injury. She was on an authorized break and was en route to a parking lot owned or controlled by her employing establishment when she slipped and fell in a bus depot. Appellant was moving

[1] 5 U.S.C. § 8101 *et seq.*

her car to a closer parking lot for safety reasons and alleged it was common practice among her colleagues.

FACTUAL HISTORY

On February 2, 2010 appellant, then a 59-year-old registered respiratory therapist, filed a traumatic injury claim alleging that on January 20, 2010 she fractured her right elbow when she fell while walking through a bus depot. The employing establishment controverted her claim, contending that the injury did not arise in the performance of duty as she went to move her motor vehicle at an off-site lot. It noted that the injury occurred off the premises while on county property and appellant was not involved in any official off-premise duties.

In a memorandum dated February 5, 2010, appellant stated that on January 20, 2010 at approximately 3:45 p.m., she left the building with the permission of her supervisor and walked across the street and through the bus terminal using the proper walkways. She slipped and fell on the pavement and landed on her right side, breaking her right arm and elbow. Appellant stated that the purpose of the trip was to move her car from the employing establishment's parking lot to the main campus while it was still daylight. She contended that this was a common practice and that she used her 15-minute paid break to do so.

By decision dated March 12, 2010, OWCP denied appellant's claim finding that the evidence did not establish that she was injured in the performance of duty.

On March 23, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the August 11, 2010 hearing, she testified that on January 20, 2010 she asked her supervisor if she could park nearer to the building as she was permitted to do after 4:00 p.m. Appellant stated that her supervisor gave her permission and, as she was walking across the bus terminal, she slipped off a curb, fell and sustained injury to her arm. She moved her car almost every day that she worked a 12-hour shift, which was most days. Appellant stated that this was typical of other employees. She assumed that the parking lot was under the control of her employing establishment, that she had an employment sticker on her car so that she could park there, and the sticker was necessary to park at the location and that she got her sticker from the employing establishment's police. Appellant did not pay for parking and there was a designated place in the parking lot for her to park. She stated that the parking lot was not connected to the employing establishment in any way, and that she had to walk on the street or through the bus terminal to reach the parking lot. Appellant's attorney argued at the hearing that there was no evidence of record that the employing establishment did not own the parking lot and to reach the parking lot, appellant was forced to traverse land not under the control of the employing establishment. He contended that appellant's claim should be compensable under case law pertaining to performing personal ministrations. Counsel argued that even if the employing establishment did not own the parking lot, it had a certain amount of control over the lot as evinced by the fact that it controlled parking permits.

By decision dated November 9, 2010, the hearing representative affirmed the March 12, 2010 decision finding that appellant was not injured while 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] 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 where 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.[3] For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time is compensable.[4] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their employment.[5] On the other hand, when a claimant departs from his workstation without authorization to retrieve a personal item, such activity is not considered an activity necessary for personal comfort or administration or incidental to his employment.[6] 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.[7] The reason for the distinction is that the later injury is merely a consequence of the ordinary, nonemployment hazard of the journey itself, which are shared by all travelers.[8]

The employing establishment premises may include all the property owned by the employer.[9] But even though an employer does not have ownership and control of the place where an injury occurred, the locale may nevertheless be considered part of the premises.[10] For example, a parking lot used by employees may be considered a part of the employing establishment premises when the employer contracted for the exclusive use of the facility or where specific parking spaces were assigned by the employer.[11] Other factors to be considered include whether the employer monitored the parking facility to prevent unauthorized use, whether the employer provided parking at no cost to the employee, whether the general public

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[2] *Id.* at § 8102(a).

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

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

[5] *K.M.*, Docket No. 10-1350 (issued March 1, 2011); *R.H.*, Docket No. 09-13, issued March 6, 2009); A. Larson, *The Law of Workers' Compensation* § 21 (2007).

[6] *See A.K.*, Docket No. 09-2032 (issued August 3, 2010); *Robert A. Pszczolkowski*, Docket No. 01-1645 (issued April 11, 2002).

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

[8] *Id.*

[9] *Denise A. Curry, supra* note 4.

[10] *B.B.*, Docket No. 08-1338 (issued November 4, 2008).

[11] *Roma A. Mortenson-Kindschi, supra* note 3.

had access to the parking facility and whether there was alternate parking available for the employee.[12] An employee's mere use of an offsite parking lot, by itself, is not sufficient to demonstrate that the parking lot is part of the employer's premises.[13]

The premises of the employer, as the term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employer;[14] 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 the legal title.[15] The term premises as 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. Moreover, 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.[16]

The Board also recognizes the proximity exception to the premises rule, which states that under special circumstances the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employing establishment.[17] Underlying the proximity exception is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.[18] The most common ground of extension is that the off-premises location where the injury occurred lies on the only route or at least on the normal route, which employees must traverse to reach the plant and the special hazards of that route become the hazards of employment.[19] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[20]

ANALYSIS

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 where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her

[12] *Diane Bensmiller*, 48 ECAB 675 (1997); *B.B., supra* note 10.

[13] *Id.*

[14] *Jimmie Brooks*, 22 ECAB 318, 321 (1971); *D.C.*, Docket No. 08-1782 (issued January 16, 2009).

[15] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[16] *See Denise A. Curry*, *supra* note 4; *Jimmie Brooks*, *supra* note 14.

[17] *Id.*

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

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

[20] *See Jimmie Brooks*, *supra* note 14.

employment or engaged in doing something incidental thereto.[21] In the instant case, appellant was on an authorized break and was walking through a bus terminal when she slipped and fell off a curb. She testified that she was going to move her car from an employing establishment parking lot to a site closer to her office and that was necessary to walk through or around the bus terminal to get to her car.

The Board notes that appellant provided persuasive testimony that the parking lot where her car was parked was controlled by the employing establishment. Appellant noted that although she did not pay for parking, her employer controlled the lot. She had an employment sticker on her car to park there and there was a designated place for her to park. But appellant's injury did not occur while in the parking lot but at a curb near the bus terminal as she was walking to the parking lot.

Appellant contends that she was in the performance of duty as she was attending to a matter of personal ministration. The Board has held that certain injuries that arise on the employer's premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as personal acts for the employee's comfort, convenience and relaxation.[22] The Board has found that this doctrine applies in such cases as using the restroom facilities,[23] clearing snow off a claimant's car that is parked in the employing establishment's parking lot[24] and moving a car within the parking lot of the employing establishment.[25] The Board has also found claimant's to be in the performance of duty in certain instances when the injury occurred off the premises of the employing establishment. The Board has held that appellant was in the course of employment in cases where she was on a paid break on a brief errand and acted with the consent of the employer. These circumstances included going off premises to get coffee when no coffee was available in the building,[26] taking a smoke break adjacent to the office building,[27] or taking a walk when the employing establishment encouraged the word processing employees to take regular breaks for walking.[28]

The Board finds that appellant was not in the performance of duty at the time of her injury. This case is similar to *Mary Keszler*,[29] where the employee was injured while feeding parking meters on a public street for herself and other employees. In *Keszler*, the employee was on her lunch break when she went outside to put money in parking meters for herself and for two

[21] *V.H.*, Docket No. 10-1053 (issued April 20, 2011).

[22] *J.O.*, Docket No. 09-1432 (issued February 3, 2010).

[23] *V.O.*, 59 ECAB 500 (2008).

[24] *J.O.*, *supra* note 22.

[25] *Cheryl Bean-Welch*, Docket No. 03-714 (issued June 12, 2003).

[26] *Helen Gunderson*, 7 ECAB 288 (1954).

[27] *Roma A. Mortenson-Kindschi*, *supra* note 3.

[28] *Lola M. Thomas*, 34 ECAB 525 (1983).

[29] 38 ECAB 735 (1987).

other employees. She was struck by a motor vehicle and sustained injury. It was argued that her injury was compensable even though it occurred, off-premises on a public street because appellant's conduct was condoned or supported by her supervisors and that different staff members were assigned to feed the meters on a rotating basis. The administrative law judge in charge of the office stated that the practice of rotating employees to put money in meters was done with his knowledge. It was a voluntary duty employees were not required to perform. The Board found, however, that appellant's injury was not in the performance of duty as the practice constituted an informal arrangement among the employees who drove their private vehicles to work and was a personal convenience for the employees. Although there was no question that appellant's supervisor and the judge in charge of the office knew of and condoned this practice, no employment factors were involved in appellant's absence from the employer's premises at the time her injury occurred. The Board further noted that the mere knowledge of the practice itself by appellant's supervisors was not sufficient to make an informal office practice an activity incidental to her employment.[30] As in *Keszler,* appellant testified that going to move her car was a common practice which was condoned by her employing establishment but no employment factors were involved for appellant's absence from premises at the time of injury. As in *Keszler,* appellant's injury was sustained while she was engaged in a matter of a personal convenience, *i.e.,* moving her car from a parking lot to the main campus and while on a public street. Her activity did not relate to personal ministration while on the premises. The Board finds that appellant's injury, which occurred off-premises, was not in the performance of duty.

In *D.C.*,[31] the employee was parked on a public street because it was the closest parking space he could find to his office. The Board found that his slip and fall on a snow covered sidewalk was not covered because he was injured while on a public sidewalk, which was not controlled by his employer. The Board noted that the proximity rule did not apply as the hazard causing the injury, an ice and snow covered curb on a public sidewalk, was a hazard common to all travelers and is not related to the employment. The Board found that the employee's injury arose from an ordinary, nonemployment hazard of the journey from work that was shared by all travelers. The Board noted that even if the sidewalk on which appellant fell was the customary means of access to the employing establishment for its employees, this would not alter the public nature of this sidewalk or render it part of the employing establishment's premises.[32]

The Board finds that appellant has not established that the sidewalk on which she fell was used exclusively or principally by the employees of the employing establishment for the convenience of the employer.[33] There is no evidence to support that the use of the sidewalk was restricted to the employees of the employing establishment. The Board finds that appellant's injury occurred while she was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.[34]

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[30] *Id.*

[31] Docket No. 08-1782 (issued January 16, 2009); *Jimmie Brooks,* 22 ECAB 318, 321 (1971).

[32] *Id.*

[33] *Id.; see also Idalaine L. Hollins-Williamson, supra* note 7; *Mary Keszler, supra* note 29.

[34] *Shirley Borgos, supra* note 19.

Accordingly, appellant has not met her burden of proving that she sustained an injury in the performance of duty.

CONCLUSION

The Board finds that appellant has not established that she was in the performance of duty at the time of her January 20, 2010 injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 9, 2010 is affirmed.

Issued: February 1, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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