United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant	)	
and	)	**Docket No. 13-761**
	)	**Issued: July 18, 2013**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Ogden, UT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 13, 2013 appellant filed a timely appeal from the December 18, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met her burden of proof to establish that she sustained an injury in the performance of duty on May 18, 2012.

FACTUAL HISTORY

On May 22, 2012 appellant, then a 41-year-old tax examining technician, filed a traumatic injury claim alleging that she sustained a left knee injury due to a fall on May 18, 2012

[1] 5 U.S.C. §§ 8101-8193.

at 11:30 a.m.[2] She indicated that the injury occurred at 2365 Lincoln Avenue, Ogden, UT. Regarding the cause of injury, appellant stated, "On Friday May 18, 2012 it had by raining that morning, then stopped. About 11:25 a.m. I was walking with my friend Heidi Wilhelm. We was walking outside heading north then going to head east to her car, and I slipped and fell on the ground and landed on my right side." On the same form, Shelby Romero, appellant's supervisor, checked a box indicating that the claimed injury did not occur in the performance of duty and stated, "Employee was outside on break and fell due to wet sidewalk from rain." He listed 2365 Lincoln Avenue, Ogden, UT, as appellant's duty station. Appellant stopped work on various occasions after May 18, 2012.

Appellant submitted statements of three witnesses, including Ms. Wilhelm, who indicated that they saw her fall on May 18, 2012 or observed her on the ground just after she fell. None of the witnesses identified the precise location of the incident; one witness indicated that it occurred "outside." In a May 18, 2012 note to Mr. Romero, appellant stated:

> "I'm sending this e-mail per our conversation about my incident/accident that happened today on Friday May 18th 2012. It had by raining and about 11:25 a.m. I was going to lunch with my friend Heidi Wilhelm. We was walking outside heading north then going to head east to her car, and I slipped and fell on the ground and landed on my right knee and at the same time I was trying to reach for my friend Heidi to help support my fall with my right arm. However, I only ended up touching her waist because the fall happened so fast as I was pulling myself up from the ground there was two lady witness outside smoking…."

The record contains e-mails from May 31, 2012 memorializing an attempt by Tammy Payne, a human resources specialist for the employing establishment, to gain more details from Mr. Romero regarding appellant's claimed May 18, 2012 injury. In response to a question regarding whether the area in which appellant fell was government owned or maintained property, Mr. Romero stated, "The area [appellant] fell is the sidewalk outside of the building that houses the Compliance Operation for Ogden. I really do [not] know if [the employing establishment] owns the building, but the grounds and building are new and properly maintained." Mr. Romero also indicated that appellant fell while she was on a break on May 18, 2012.

In a September 14, 2012 decision, OWCP denied appellant's claim for a May 18, 2012 work injury, finding that she had not shown that her fall occurred in the performance of duty. Regarding the reasons that appellant did not sustain an injury in the performance of duty on that date, OWCP stated:

> "Specifically, your case is denied because the evidence is not sufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. The reason for this finding is that you left your assigned duty station and left the building for a walk which is considered personal pleasure and not within the performance of

[2] Appellant's regular hours were 6:00 a.m. to 3:30 p.m., Monday through Friday.

your official duties. You were on the public sidewalk outside the [employing establishment] building and not on [its] premises."

In a September 26, 2012 letter, appellant requested reconsideration of her claim. She indicated that when she fell on May 18, 2012 she was on the property of her "post of duty" within 25 feet of the entrance to the building. Appellant stated, "The public sidewalk is the perimeter of the property, not the outside entrance to the building."[3]

In a December 18, 2012 decision, OWCP affirmed its September 14, 2012 decision finding that appellant had not shown that she sustained an injury in the performance of duty on May 18, 2012. It stated, "Although, you were injured while taking a break the accident did not occur on the employ[ing] [establishment] premises. Specifically, the accident occurred outside of the building of the property that your employ[ing] [establishment] leases space."

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.[4] 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."[5] "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 his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment and while he or she was reasonably fulfilling the duties of his or her 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.[6]

[3] Appellant submitted a copy of a photograph purporting to show the site of her fall on May 18, 2012, but little detail is discernible from the copy. She also submitted a document regarding authorized breaks for employees of her employing establishment.

[4] 5 U.S.C. § 8102(a).

[5] 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).

[6] *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).

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 employ[ing] [establishment]; in other cases even though [it] does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[7]

The Board notes that the mere fact that an alleged injury did not occur on the employing establishment premises would not be fatal to an employee's claim.[8] With regards to off-premises breaks, the operative principle used to determine whether the off-premises injury is within the course of employment is whether the employer, in all of the circumstances including duration, shortness of off-premises distance, and limitations of off-premises activity during the interval, can be deemed to have retained authority over the employee. If so, the off-premises injury may be found to be within the performance of duty.[9]

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[10]

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[7] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "The 'premises' of the employ[ing] [establishment], as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employ[ing] [establishment]; 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." *Dollie J. Braxton*, 37 ECAB 186, 188-89 (1985). The proximity rule dictates that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

[8] As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or from the employing establishment premises are not compensable. *See Mary M. Martin*, 34 ECAB 525 (1983). However, exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto (*see Betty R. Rutherford*, 40 ECAB 496 (1989)) or which are in the nature of necessary personal comfort or ministration. *See, e.g.*, *Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

[9] *See Lola M. Thomas*, 37 ECAB 572 (1986).

[10] *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

ANALYSIS

On May 22, 2012 appellant filed a traumatic injury claim alleging that she sustained a left knee injury due to a fall on May 18, 2012 at 11:30 a.m. She indicated that the injury occurred at 2365 Lincoln Avenue, Ogden, UT. Regarding the cause of injury, appellant stated:

> "On Friday May 18th 2012 it had by raining that morning, then stopped. About 11:25 a.m. I was walking with my friend Heidi Wilhelm. We was walking outside heading north then going to head east to her car and I slipped and fell on the ground and landed on my right side."[11]

OWCP denied appellant's injury claim, finding that her fall on May 18, 2012 did not occur in the performance of duty. In denying appellant's claim in its September 14 and December 18, 2012 decisions, it placed great emphasis on its finding that her accident did not occur on the premises of the employing establishment.

The Board finds that OWCP did not adequately develop the question of whether appellant's May 18, 2010 accident occurred on the premises of the employing establishment. Given the above-described precedent for performance of duty cases, the question of whether the accident occurred on the premises is an important one. Currently, the evidence of record is vague with respect to this matter. On May 31, 2010 Mr. Romero responded to a question from a human resources specialist for the employing establishment regarding whether the area in which appellant fell was government owned or maintained property. He stated, "The area [appellant] fell is the sidewalk outside of the building that houses the Compliance Operation for Ogden. I really do [not] know if [the employing establishment] owns the building, but the grounds and building are new and properly maintained." The record contains no other response from an employing establishment official regarding this matter.

For these reasons, additional development by OWCP is required with respect to the question of whether the May 18, 2010 accident occurred on the premises of the employing establishment. This is especially necessary since information regarding employing establishment premises is the type of information usually obtained from an employing establishment.[12] After such development as it deems necessary, OWCP shall issue an appropriate decision regarding whether appellant sustained an injury in the performance of duty on May 18, 2012.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty on May 18, 2012.

[11] On the same form, Mr. Romero, appellant's supervisor, listed appellant's duty station as 2365 Lincoln Avenue, Ogden, UT.

[12] *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 18, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board