



## **FACTUAL HISTORY**

On March 6, 2013 appellant, then a 54-year-old health aid, filed a traumatic injury claim (Form CA-1) alleging that at 3:45 p.m. on March 4, 2013 he fractured his elbow when he slipped on ice in a parking lot. He stopped work on March 5, 2013. On the claim form, Daniel P. Bracker, an escort service manager, controverted the claim contending that appellant should not have been in the parking lot at the time of injury. He indicated that appellant's regular work hours were from 7:30 a.m. to 4:00 p.m., Monday through Friday. In a separate statement dated March 6, 2013, Mr. Bracker stated that on that date, appellant requested that a Form CA-1 or an occupational disease claim (Form CA-2) be completed for his fall. He reviewed paperwork from the employing establishment's employee health unit in which appellant stated that the incident occurred in the parking lot at 3:45 p.m. Mr. Bracker again noted that appellant's work schedule was from 7:30 a.m. to 4:00 p.m. and related that appellant informed him and the employee health unit that he was going to wait by the vehicle of Romeo Gallegos for a ride home.

Medical reports dated March 6 and 7, 2013 and diagnostic test results dated March 21, 2013 advised that appellant had a right radial head fracture of the elbow and addressed his medical treatment, physical restrictions and work capacity. In a March 6, 2013 report, Dr. Philip E. McAndrew, a Board-certified family practitioner, advised that appellant's right radial head fracture was caused by the March 4, 2013 incident.

By letter dated May 10, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It further advised him of the medical and factual evidence needed and was asked to respond to the questions provided in the letter within 30 days. OWCP also requested that the employing establishment submit factual evidence regarding the parking lot where appellant fell.

On May 15, 2013 appellant stated that he could be wrong about the time of injury. He stated that "I know it was close to 4:00." Appellant slipped and fell on the ice as he walked in the employing establishment's parking lot to a friend's car to try to get a ride home. He did not know if it was his or someone else's responsibility to pay for parking.

Also, on May 15, 2013 the employing establishment responded yes to the questions regarding whether it agreed that appellant was injured in the parking lot that it owned, it controlled or managed the parking facilities and paid for parking; the public was allowed to use this lot; other parking was available; and the parking area was monitored to see that no unauthorized cars were parked in the lot. The employing establishment responded "no" to the questions whether it assigned parking spaces on the lot or that appellant was entitled to reimbursement for travel to and from the parking lot or for parking expenses.

Medical reports dated March 13, April 2 and May 15, 2013 addressed appellant's right elbow fracture and work capacity.

In a July 1, 2013 decision, OWCP denied appellant's claim. It found that the evidence was sufficient to establish that the March 4, 2013 incident occurred as alleged and that a medical condition had been diagnosed in connection with the injury or event. OWCP, however, found that the evidence was insufficient to establish that the claimed injury arose during the course of

appellant's employment or within the scope of compensable work factors as he was not in his work area at the time of injury and there was no indication that he was excused early from work which might account for his presence in the parking lot at that time.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> 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.<sup>3</sup> 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 employer's business, at a place where 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.<sup>4</sup> 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.<sup>5</sup>

As to what constitutes the premises of an employing establishment, the Board has stated that 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.<sup>6</sup>

The Board has pointed out that factors, which determine whether a parking lot 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 of the

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<sup>2</sup> 5 U.S.C. § 8102(a).

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

<sup>4</sup> See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

<sup>5</sup> *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).

<sup>6</sup> *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

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.<sup>7</sup>

### ANALYSIS

Appellant alleged that he sustained a fractured right elbow in the performance of duty on March 4, 2013 when he slipped on ice in a parking lot. OWCP denied his claim because he deviated from his regular employment duties, thereby removing himself from the performance of duty. The Board finds that appellant has not established that he sustained an injury in the performance of duty.

Appellant had fixed hours and a fixed place of employment. His work shift was from 7:30 a.m. to 4:00 p.m., Monday through Friday. The employing establishment indicated that appellant was on the grounds of the parking lot at the time of his fall. It stated that it owned, controlled and managed the parking lot. The employing establishment checked the parking lot for unauthorized use and paid for employees' use of the lot although it did not assign parking spaces and other parking was available. Under these circumstances, the Board finds that the parking lot was part of the employing establishment's premises.<sup>8</sup>

OWCP denied appellant's claim because he left his work location prior to the end of his tour of duty, thereby removing himself from the performance of duty. The mere fact that the employee was on the premises at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that he or she was engaged in activities which may be described as incidental to his or her employment, *i.e.*, that he or she was engaged in activities which fulfilled or were incidental to his or her employment duties or responsibilities thereto.<sup>9</sup> In *B.I.*,<sup>10</sup> the claimant was robbed at gunpoint during his work tour while walking on the premises of the employing establishment's parking garage. The Board held that he was not in the performance of duty as he did not submit any evidence showing that he was engaged in any duty reasonably incidental to his employment at the time of the robbery. The Board further found that appellant departed from his workstation for unknown reasons and without authorization at the time of the robbery.

In the present case, the Board notes that appellant offered conflicting evidence regarding the time of injury on March 4, 2013. Initially, appellant alleged that his injury occurred at 3:45 p.m. on the date of injury. He subsequently related that he could have been wrong about the time of injury and stated that "I know it was close to 4:00" when he was walking to his friend's car in

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<sup>7</sup> See *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

<sup>8</sup> See *D.L.*, 58 ECAB 217 (2007); *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004); *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

<sup>9</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010).

<sup>10</sup> Docket No. 12-1060 (issued January 11, 2013).

the employing establishment parking lot to get a ride home. In both scenarios, appellant was in the parking lot prior to the end of his work shift which ended at 4:00 p.m. The record does not indicate why he would be in the parking lot before 4:00 p.m. when his shift did not end until that time on the date of injury. The record also does not explain why appellant left work early on the date of injury. According to Mr. Bracker appellant should not have been in the parking lot at 3:45 p.m. as his work shift did not end until 4:00 p.m. Based on his statement, appellant did not have permission to leave the employing establishment's premises early on March 4, 2013. Regardless of whether the incident occurred at 3:45 p.m. or 4:00 p.m., appellant has not submitted any evidence to establish that on March 4, 2013 he was engaged in the duties of his employment with the employing establishment or in activities which may be characterized as reasonably incidental to the conditions of his employment at the time the injury occurred.<sup>11</sup> He was not in the performance of his work duties at the time of the incident, but was instead in the parking lot waiting for a ride to go home. For the stated reasons, the Board finds that appellant has failed to meet his burden of proof to establish that he sustained an injury while in the performance of duty.

On appeal, appellant contended that he was on the job when he fell on March 4, 2013. As found above, the record establishes that appellant was on the employing establishment's premises at the time of injury, but he failed to submit any evidence to establish that he was engaged in any duty reasonably incidental to his employment at the time of his fall.

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.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish an elbow injury on March 4, 2013 in the performance of duty.

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<sup>11</sup> *Joseph C. Grzesik*, Docket No. 03-1492 (issued February 5, 2004); *Socorro Chimels, claiming as the widow of Angel Chimelis*, 22 ECAB 132 (1971).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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