

**United States Department of Labor
Employees' Compensation Appeals Board**

B.H., Appellant)	
)	
and)	Docket No. 14-0829
)	Issued: July 8, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Philadelphia, PA, Employer)	

Appearances: *Case Submitted on the Record*
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 3, 2014 appellant, through counsel, filed a timely appeal from a February 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 his burden of proof to establish an injury in the performance of duty on April 18, 2013.

FACTUAL HISTORY

On April 24, 2013 appellant, then a 33-year-old customs and border protection (CBP) officer, filed a traumatic injury claim alleging that on Thursday, April 18, 2013 at 11:45 a.m. he

¹ 5 U.S.C. §§ 8101-8193.

sustained a work-related fracture of the radial head of his right elbow and scrapes on his left hand. Regarding the cause of the claimed injury, he stated, "While on a paid 20 minute break, I had walked across the street to get something to eat. While returning with my food I was stepping over an approx. 3 ft. high metal barrier when I tripped over the barrier and landed face first onto the pavement." Appellant stopped work on April 18, 2013 and returned to limited-duty work on April 22, 2013.

On the same form, Dale Markowitz, appellant's supervisor, asserted that the claimed injury did not occur in the performance of duty. He indicated that appellant was injured during a paid 20-minute break while returning from an off-airport cafeteria located in a nongovernmental building through an undesignated pedestrian walkway, which necessitated climbing over a guardrail in order to return to the CBP cargo office.² Mr. Markowitz noted that the cafeteria, located across a two-lane roadway opposite the CBP cargo office, was not part of the employing establishment premises at the Philadelphia International Airport. He stated that "no work was involved" in appellant's travel to the cafeteria.

In an April 25, 2013 letter, OWCP requested that the employing establishment respond to several questions regarding such matters as the location of appellant's claimed injury relative to his workstation and the boundaries of the employing establishment premises.

In an undated statement, Mr. Markowitz stated that on April 18, 2013 appellant was assigned to the CBP cargo office of Cargo City (Building C-2, Room 17-18), located on the property of the Philadelphia International Airport, with a tour of duty from 8:00 a.m. to 4:00 p.m. He indicated that at approximately 11:45 a.m. appellant was injured during an authorized paid break of 20 minutes when he was returning from an off-airport cafeteria located in the One International Plaza building, a nongovernmental facility. The cafeteria was located opposite the CBP cargo office (a quarter mile away) and was separated by a two-lane roadway protected by a guardrail, an access road, and a parking lot. The CBP cargo office had a break area with a table and chairs, refrigerator, and microwave. Mr. Markowitz stated that appellant returned on foot from the cafeteria, cut through an undesignated pedestrian walkway, and climbed over the guardrail in order to return to the CBP cargo office. He asserted that appellant's travel to the cafeteria was not in the performance of duty and that no work was being performed at the time of his claimed injury.

On April 25, 2013 OWCP also requested that appellant submit additional factual and medical information in support of his claim. It asked him to complete an attached questionnaire regarding the events of April 18, 2013.

On May 9, 2013 appellant submitted a completed questionnaire, noting that his April 18, 2013 accident occurred approximately 15 feet from the property line of the CBP office in Cargo City at a guardrail separating a two-lane road from the property line of One International Plaza. He indicated that he had been assigned for the day at the CBP office in Cargo City. Appellant stated that during the normal course of duty he was entitled to a 20-minute paid break. Because the CBP office did not have any refreshment, dining, or vending facilities, he walked to a cafeteria at One International Plaza during his 20-minute paid break. Appellant indicated that

² Mr. Markowitz listed appellant's regular-duty station as the Philadelphia International Airport and his regular work hours as 8:00 a.m. to 4:00 p.m., Monday through Friday.

One International Plaza housed government employees from the Transportation Security Administration and the Federal Air Marshal Service and that it was the closest building that had refreshments. He stated that at the time of his fall he was in full uniform while wearing his duty belt and agency weapon and that he still was “on the clock” in a paid-break status. There was no designated walkway between the two facilities, only a well-worn foot path that was frequently used by employees of the warehouse to which he was assigned. Appellant stated that he was provided a paid-break period because, as a uniformed federal law enforcement officer, he was always on call and was expected to respond to any situation that might arise during the course of his shift, whether he was performing his regular work assignment or on a paid break. He noted that the employing establishment did not place any restrictions on where he could go or what he could do during his paid-break period.

Appellant submitted medical reports dated from April to June 2013 in which attending physicians detailed their treatment of his right elbow condition. It was indicated that he sustained a fracture of the radial head of his right elbow when he fell on April 18, 2013. Reports from early May 2013 showed “good healing” of the fracture without any bone nonalignment.

In a June 7, 2013 decision, OWCP denied appellant’s claim for an April 18, 2013 work injury, finding that he had not established an injury in the performance of duty. It indicated that his April 18, 2013 fall occurred off the employment premises while he was returning with food he had retrieved and did not arise “during the course of employment and within the scope of compensable work factors as defined by ... FECA.”³

Appellant submitted additional medical evidence detailing the medical treatment of his right elbow condition.

In a November 11, 2013 statement, appellant noted that at the time of his April 18, 2013 accident he was on a paid break as required by the collective bargaining agreement with the employing establishment. He indicated that on April 18, 2013 he was the only CBP officer working in the CBP office because another CBP officer had called in sick. Appellant noted that he had worked at this location a few times before but that he was never provided instructions “in any format about lunch.” The food he brought to work on April 18, 2013 seemed tainted and therefore he left the CBP office to seek refreshments elsewhere. Appellant indicated that, in the past, a coworker would bring food from a food court off the premises and that he was not criticized for doing so.

In a November 15, 2013 statement, Bernadette Howe, a CBP manager, stated that CBP officers such as appellant worked 40 hours per week with a variety of shift schedules. She noted that, other than the rare occasions when unpaid breaks were included in a shift, CBP officers were still “on the clock” during rest periods and could be pulled away by management to perform work duties if needed. Ms. Howe stated, “At the time of [appellant’s] accident he was working a straight eight[-]hour shift from 8 a.m. to 4 p.m. with no time for an unpaid lunch break built into the shift, and this was confirmed by his own manager on the reverse of the notice of traumatic injury and [he] was thus in the course of employment at the time of the injury.”

³ OWCP suggested that appellant was seeking personal comfort by retrieving food at the time of the claimed injury, but that the injury was not covered because he left the employing establishment premises. It noted that the premises had a break room with a table and chairs, refrigerator, and microwave.

In an undated statement received on November 15, 2013, Daniel Arencibia, a CBP officer, stated that his job required him to work at an alternate location within the Philadelphia International Airport for two nonconsecutive months per year. He indicated that this location was known as Cargo City and was the main hub of processing all paperwork for incoming international cargo. The building at this location did not have anywhere to purchase food and it only provided a table and microwave to prepare food that workers brought themselves. If a worker wanted to acquire food, he needed to walk across the street to One International Plaza *via* a worn-down path, which cut through the median strip between two roads. Mr. Arencibia stated that it was understood that he and his coworkers were allowed to take a 20-minute “on the clock” break during which they could leave Cargo City and have their meals. During this time, he and his coworkers were still expected to be on notice (*via* personal mobile telephone) for any calls from management.

In a November 15, 2013 statement, counsel cited the case *D.M.*⁴ for the proposition that the term premises, as used in workers’ compensation law, was not synonymous with property owned by the employing establishment. He argued that this case showed that in some cases premises might include all the property owned by the employing establishment and, in other cases, even though the employing establishment did not have ownership or control of the place where the injury occurred, the place was nevertheless considered part of the premises. Counsel stated that an exception to the premises rule dictated that the course of employment should include an injury occurring at a point where the employee was within the range of dangers associated with the employment and would include an injury occurring off the employing establishment’s premises that happened on the only route or the normal route which employees must traverse to reach the premises.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the November 26, 2013 hearing, he testified that his normal-duty station was in Terminal A West (third floor) on the grounds of the Philadelphia International Airport. Appellant stated that on April 18, 2013 he had been assigned to work in the CBP office at Cargo City, a separate area of the Philadelphia International Airport, which was located approximately a half mile away from his normal-duty station. The assignment lasted about a month and this type of assignment happened twice per year. Appellant indicated that at the time of his April 18, 2013 injury he was on a paid 20-minute rest break, the only break that he received during his eight-hour work shift. He stated that the CBP office at Cargo City had a room with a refrigerator and a microwave, but there were no restaurants or vending machines in the warehouse where he was working. Appellant indicated that none of the officers who worked at Cargo City were told that they had to bring their lunch to work and asserted that he went to the closest place to obtain food utilizing the most direct route.

Counsel also produced a November 26, 2013 letter in which he further argued that appellant’s April 18, 2013 accident occurred in the performance of duty. He indicated that the case *D.T.*,⁵ which involved a Transportation Security Administration officer who had an accident after he left his immediate work area while on a paid break, stood for the proposition that such an employee could still be considered on the premises of the employing establishment depending on

⁴ Docket No. 10-1723 (issued August 23, 2011).

⁵ Docket No. 07-985 (issued October 22, 2008).

the particular facts of the case. Counsel recited portions of *D.T.* and stated, “Accordingly, it appears that [appellant] did not stray from the [employing establishment’s] premises based upon the unique circumstances of his temporary work location in office space furnished to CBP at Cargo City.” Citing the case of *Theresa B.L. Grissom (Thomas H. Grissom)*,⁶ counsel asserted that an alternative basis of approving appellant’s claim could be based on a finding that he was on temporary duty (TDY) at the time of his accident on April 18, 2013. He stated that this case shows that, when an employee is in TDY status, coverage extends to all of the ordinary incidents of the errand, which the employing establishment would normally contemplate as occurring in the course of it. Counsel argued that if appellant had to leave the CBP office at Cargo City to obtain lunch, that meant that the accident sustained during the trip was compensable.

In a February 24, 2014 decision, the hearing representative affirmed OWCP’s June 7, 2013 decision finding that appellant had failed to establish an injury in performance of duty on April 18, 2013. She noted that appellant was not on the premises of the employing establishment at the time of his April 18, 2013 accident and found that the proximity rule did not apply such that the premises were extended to the site of his accident. The hearing representative indicated that he was returning from his lunch break at the time of his accident and that he was not engaged in activities incidental to his work duties.

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.⁷ The phrase sustained while in the performance of duty in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of arising out of and in the course of employment.⁸

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master’s business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.⁹ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.¹⁰

The Board has recognized a general principle, called the premises doctrine, that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period, are not compensable, as they do not arise out of

⁶ 18 ECAB 193 (1966).

⁷ 5 U.S.C. § 8102(a).

⁸ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁹ *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

¹⁰ *Mark Love*, 52 ECAB 490 (2001).

and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers, subject to certain exceptions.¹¹

Exceptions to the premises doctrine have been made to protect activities that are so closely related to the employment itself as to be incidental thereto,¹² or which are in the nature of necessary personal comfort or ministrations.¹³ The Board has also found that the 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.¹⁴ This principle is called the proximity rule and the most common ground of extending coverage 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.¹⁵ This exception contains two components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned. The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.¹⁶

ANALYSIS

On April 24, 2013 appellant filed a traumatic injury claim alleging that on April 18, 2013 at 11:45 a.m. he sustained a work-related fracture of the radial head of his right elbow and scrapes on his left hand. Regarding the cause of the claimed injury, he stated, “While on a paid 20 minute break, I had walked across the street to get something to eat. While returning with my food I was stepping over an approx. 3 ft. high metal barrier when I tripped over the barrier and landed face first onto the pavement.” Appellant noted that his April 18, 2013 accident occurred approximately 15 feet from the property line of the CBP office in Cargo City at a guardrail separating a two-lane road from the property line of One International Plaza. He indicated that he had been assigned on that date to the CBP office in Cargo City, Philadelphia International Airport, rather than to his normal-duty station in Terminal A West on the grounds of the Philadelphia International Airport. Appellant stated that, during the normal course of duty, he was entitled to a 20-minute paid break, the only break he was allowed to take during his eight-hour work shift. Because the CBP office did not have any refreshment, dining, or vending facilities, he walked to a cafeteria at One International Plaza during his 20-minute break.¹⁷

¹¹ *V.P.*, Docket No. 13-74 (issued July 1, 2013); *M.L.*, Docket No. 12-286 (issued June 4, 2012); *John M. Byrd*, 53 ECAB 684 (2002).

¹² See *Maryann Battista*, 50 ECAB 343 (1999) (activities such as delivering a bad check list and checking on a customer’s telephone were incidental to employee’s listed duties).

¹³ *J.L.*, Docket No. 14-368 (issued August 22, 2014).

¹⁴ *R.O.*, Docket No. 08-2088 (issued February 18, 2011).

¹⁵ *Shirley Borgos*, 31 ECAB 222 (1979).

¹⁶ See *supra* note 10.

¹⁷ Appellant also indicated that he had brought food to work but did not eat it because it appeared to be tainted.

Appellant stated that at the time of his fall he was in full uniform while wearing his duty belt and agency weapon and that he still was “on the clock” in a paid break status.

In this case, appellant sustained a fall on April 18, 2013 while on a paid break in an area that was not on the employing establishment premises. On April 18, 2013 he was assigned to the CBP office in Cargo City, an area on the grounds of the employing establishment premises at the Philadelphia International Airport.¹⁸ Appellant fell while climbing over a guardrail which was adjacent to an access road, which in turn was near the outer boundaries of the employing establishment premises.

The Board has held that, even if a given public area were the customary means of access to the employing establishment for its employees, this would not alter the public nature of the area or render it a part of the employing establishment’s premises.¹⁹ There is no evidence to support that the use of the area where appellant fell on April 18, 2013 was restricted to the employees of the employing establishment or that the employing establishment owned, operated or maintained the area where the incident occurred. The off-premises area was open to the general public. The Board finds that the hazard that caused appellant’s injury, a guardrail adjacent to an access road, is a hazard commonly faced by all pedestrians. Therefore, there was no special hazard at the off-premises point and the premises did not extend to this area under the principles of the proximity rule.²⁰ Before OWCP and on appeal, counsel argued that the Board case *D.T.*,²¹ showed that the premises of the employing establishment extended to the area where he was injured on April 18, 2013. However, counsel’s reliance on this case is misplaced as the Board merely found in *D.T.* that further development of the evidence was necessary to determine whether there was an extension of the employing establishment premises in that case. The facts of the case do not shed any light on the circumstances of the present case.

Citing the case of *Theresa B.L. Grissom (Thomas H. Grissom)*,²² counsel asserted that an alternative basis of approving appellant’s claim could be based on a finding that appellant was on TDY at the time of his accident on April 18, 2013. He stated that this case shows that, when an employee is in TDY status, coverage extends to all of the ordinary incidents of the errand, which the employing establishment would normally contemplate as occurring in the course of it. However, there is no indication that appellant was on TDY status on April 18, 2013 and the principles of *Grissom* and other TDY cases do not apply to appellant’s circumstances.²³ Moreover, the evidence of record does not establish that appellant was engaged on any special

¹⁸ Appellant’s usual duty station was in Terminal A West on the grounds of the Philadelphia International Airport.

¹⁹ See *R.O.*, *supra* note 14.

²⁰ See *supra* notes 14 through 16.

²¹ See *supra* note 5.

²² See *supra* note 6.

²³ The evidence reveals that on April 18, 2013 appellant was assigned to another part of the employing establishment premises, which was about a half mile away from his normal-duty station located on the same premises. TDY status typically involves travel of some distance to another work site rather than, as in this case, assignment to another part of a given work premises. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(d) (August 1992).

errand when he left the premises to retrieve food. There is no evidence which would establish that his journey to obtain food on the date of injury was an integral part of any errand or special task either expressly or impliedly agreed to by the employing establishment. He indicated that he was in uniform and “on call” at the time of his accident on April 18, 2013, but there is no evidence that he was responding to a work-related call or otherwise performing work duties or any special work tasks at the time of his fall.

On appeal counsel also argued that principles enunciated in *B.P.*²⁴ were applicable because an injury could be covered in some circumstances where an employee off the premises was on a paid break, on a brief errand, and acted with the consent of the employing establishment. He indicated that current situations, which fall under the category of personal comfort and ministration, included going off premises to get coffee when no coffee was available in the building and taking a smoke break adjacent to the office building when smoking was not allowed on the premises.

The Board finds that counsel is correct in stating that the cases pertaining to seeking personal comfort and ministration off the employing establishment premises while on a paid break apply to appellant’s circumstances on April 18, 2013. There is no dispute that appellant was on a 20-minute paid break when he went off the employing establishment premises to retrieve food.²⁵

The Board has issued a number of decisions regarding off-premises injuries of workers who had left the premises to seek personal comfort or ministration. In an early case, *Helen L. Gunderson*,²⁶ the employee was injured off the premises of the employing establishment while on her way to get coffee on her morning break. The evidence established that the employee was on a paid break at the time of her fall, that coffee was not available on the premises, and that her leaving the premises was in accordance with past practice and was done with the knowledge and consent of the employing establishment management. Based on these factors, the Board held that the injury was sustained in the performance of duty.

In *Roma A. Mortenson-Kindschi*,²⁷ the employee was injured off the premises of the employing establishment when she slipped and fell on ice during a smoking break. The injury occurred a few steps into a parking area that was adjacent to the back doors of the employing establishment building. The employee was on an authorized break in accordance with past practice and with the knowledge and consent of the employing establishment. The Board found that this activity was not of such a nature to take her out of the course of employment as such smoking breaks were condoned by the employing establishment and thus the activity was considered similar to activities that occur for personal comfort and ministration.

²⁴ Docket No. 14-411 (issued July 17, 2014).

²⁵ OWCP improperly suggested that appellant’s situation fell under the principles for employees who leave the employing establishment premises for unpaid lunch breaks. *See supra* note 11.

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

²⁷ 57 ECAB 418 (2006).

In some cases, the Board denied coverage when the employee's quest off premises for personal comfort and ministration was not consented to by the employing establishment. For example, in *Harris Cohen*,²⁸ the employee was injured in an off-premises accident while he was returning from getting coffee. The evidence established that there were several coffee machines in appellant's office building, including one near appellant's swing room. The employing establishment had a posted rule that employees were not permitted to leave the building during rest, coffee, or relief periods. The Board held that the employee's injury did not occur in the performance of duty because his off-premises activities were neither accepted nor approved by the employing establishment and were not in accordance with any generally accepted past practice. In *James G. Pimento*,²⁹ the employee suffered injury in an automobile accident when he left the employing establishment premises to get coffee. The Board upheld OWCP's denial of the claim noting the employing establishment explicitly did not allow employees to leave the premises for breaks and that the employee had not shown that the employing establishment consented to his actions.

These cases make clear that a claimant's journey away from the employing establishment premises to seek personal comfort and ministration would be covered under FECA if it could be determined that the employing establishment gave consent to such action.

The Board finds that the case is not in posture regarding whether appellant sustained an injury in performance of duty on April 18, 2013. Given the present evidence of record, it remains unclear how the principles of the *Helen L. Gunderson* line of cases would be applied to the present case. The employing establishment did not provide a clear indication of whether traveling off premises for food was an action to which it consented. It merely indicated in its response to an OWCP query that the CBP office at Cargo City had a break area with a table and chairs, refrigerator, and microwave for employees to prepare food. Appellant has asserted that the employing establishment did not place any restrictions on where he could go or what he could do during his paid break period. In addition, a coworker asserted that it was understood that he and his coworkers were allowed to take a 20-minute "on the clock" break during which they could leave Cargo City and have their meals.³⁰ However, without a clear statement on this matter from the employing establishment, the record remains uncertain with respect to whether there was any prohibition to leaving the premises or whether the employing establishment consented to off premises trips for food and other forms of personal comfort and ministration.

For these reasons, the case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty on April 18, 2013. The case should be remanded to OWCP for further development, to include an attempt to obtain information from the employing establishment and appellant as to whether the type of action appellant engaged in at the time of his claimed April 18, 2013 work injury, *i.e.*, retrieving food from an area just outside the boundaries of the employing establishment premises, had either been approved or

²⁸ 8 ECAB 339 (1976).

²⁹ Docket No. 06-598 (issued June 15, 2006).

³⁰ Both appellant and the coworker asserted that there was no opportunity in their workplace at Cargo City to purchase food or refreshments.

prohibited.³¹ After carrying out this development, OWCP shall issue an appropriate decision regarding whether appellant sustained an injury in the performance of duty on April 18, 2013.

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 April 18, 2013.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2014 merit 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 8, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

³¹ In carrying out this development, information should be requested about past practice and the employing establishment's knowledge of and reaction to such practice.