U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY KELLY and U.S. POSTAL SERVICE,
POST OFFICE, Glen Oaks, NY

Docket No. 98-2421; Submitted on the Record;
Issued July 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant's injury on March 23, 1998 was sustained in the performance of duty.

On March 23, 1998 appellant, then a 28-year-old clerk, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that she injured her back, neck, head and knee in a fall. Appellant stated that, at 6:35 a.m. on March 23, 1998, she fell on ice in the Glen Oaks Mall parking lot near the employing establishment. The employing establishment controverted the claim, asserting that, at the time of injury, appellant had not yet reported to work even though her usual tour of duty was from 6:30 a.m. until 3:00 p.m. The employing establishment further argued that the parking lot was common property utilized by all businesses in the shopping center. Additionally, the employing establishment argued that they neither owned nor maintained the parking lot but rather they leased office space in the Glen Oaks Mall from Jeffrey Management Company, who was also responsible for maintenance of the lot.

Dr. Jeffrey Shapiro, a Board-certified orthopedist, examined appellant on March 23, 1998, the day of injury, and diagnosed lumbar sprain and spasm. In an authorization for examination and/or treatment, Form CA-16, Dr. Shapiro indicated that appellant fell on the ice and was totally disabled. In an attending physician's report, Form CA-20, he indicated with a checkmark "yes" that appellant's condition was caused by or aggravated by an employment activity.

By letter dated April 9, 1998, the Office of Workers' Compensation Programs informed appellant of the employing establishment's contention that the parking lot where the injury occurred was neither owned nor maintained by the employing establishment and requested more information from appellant regarding this matter.

Appellant provided more medical reports and treatment notes from Dr. Shapiro, who indicated that appellant was still unable to return to work.

By decision dated May 15, 1998, the Office denied appellant's claim. The Office found that appellant's fall was not sustained in the performance of duty, as the parking lot did not constitute part of the premises of the employing establishment. The Office further noted that appellant was not on official duty at the time of the injury and that the parking lot was common ground which was used by all of the shoppers at the Glen Oaks Mall.[1]

The Board finds that appellant has not met her burden of proof in establishing that her March 23, 1998 injury was sustained in the performance of duty.

Appellant's injury occurred while she was walking in the Glen Oaks Mall parking lot, which was not part of the employing establishment's premises, before she started work. The issue before the Board, therefore, is whether this off-premises injury was sustained in the performance of duty. Concerning off-premises injuries, the Board has stated:

> "As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment, *i. e.*, in the performance of duty, but are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers."[2]

For appellant's claim to prevail, the evidence must establish that the injury occurred on the actual premises of the employing establishment or in an area, which may be considered part of the employing establishment.[3]

Under certain circumstances, a parking lot for the use of employees may be considered a part of the employment premises. Factors bearing on this determination are 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; and whether the parking areas were checked to see that no unauthorized cars were parked in the lot. 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

[1] Following the Office decision, appellant submitted two new medical reports from Dr. Shapiro. The Board cannot consider evidence on appeal that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).

[2] *Margaret Gonzalez*, 41 ECAB 748, 752 (1990); 5 U.S.C. § 8102(a).

[3] *Randi H. Goldin*, 47 ECAB 708 (1996).

the parking facility, used the facility with the owner's special permission or provided this parking for its employees.[4]

The evidence submitted by appellant is not sufficient to find that the Glen Oaks Mall parking lot should be considered part of the premises of the employing establishment.[5] While the employing establishment's employees utilized this lot, the employing establishment stated that the lot was owned and operated by the Jeffrey Management Company, that it did not pay anything for its use and did not maintain the lot.[6] There was no indication that the employing establishment had contracted for use of the parking lot; had assigned parking spaces on the lot to its employees; or policed the lot to see that unauthorized cars were not parked in the facility.[7] The evidence submitted by appellant does not establish that the employing establishment's premises extended to the parking lot and, therefore, appellant's injury was not sustained in the performance of duty.[8]

Appellant, through her attorney, argues that her injuries should be compensable since she was only at the Glen Oaks Mall at 6:30 a.m. on March 23, 1998 as she was required to report to work that day. Contrary to appellant's contention, however, the Board has held that off-premises injuries sustained by employees having fixed hours and a place of work while going to or coming home from work are not compensable.[9] Consequently, appellant has failed to establish that she sustained an injury in the performance of duty.

Lastly, notwithstanding the Board's affirmance of the Office's May 15, 1998 decision denying benefits, the Board finds that appellant is still entitled to reimbursement for payment of expenses incurred for medical treatment for the period March 23, 1998, the date the employing establishment official signed the Form CA-16, authorization for examination and/or treatment, to May 15, 1998, the date on which the Office denied the claim and terminated authorization of medical treatment at the Office's expense. By Form CA-16, authorization for examination and/or treatment, signed by an employing establishment official on May 23, 1998, the employing establishment authorized Great Neck Orthopaedics to provide medical care for a period of up to 60 days from that date. The employing establishment's authorization for appellant to obtain medical examination and/or treatment created a contractual obligation to pay for the cost of necessary medical treatment regardless of the action taken on the claim.[10]

The decision of the Office of Workers' Compensation Programs dated May 15, 1998 is hereby affirmed.

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[4] *Diane Bensmiller,* 48 ECAB 675, 678 (1997); *Edythe Erdman,* 36 ECAB 597, 599 (1985).

[5] *Id.*

[6] *See Rosa M. Thomas-Hunter,* 42 ECAB 500, 504 (1991).

[7] *Id.*

[8] *Edythe Erdman, supra* note 4.

[9] *Margaret Gonzalez, supra* note 2; *see Mary Keszler,* 38 ECAB 735, 739 (1987).

[10] *Robert F. Hamilton,* 41 ECAB 431 (1990); *Frederick J. Williams,* 35 ECAB 805 (1984); 20 C.F.R. § 10.403.

Dated, Washington, D.C.
July 12, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member