U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOLETA BRITTON and U.S. POSTAL SERVICE,
WOLF LEDGES POST OFFICE, Akron, OH

Docket No. 99-1111; Submitted on the Record;
Issued July 27, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's injury on December 16, 1997 was sustained in the performance of duty.

On December 22, 1997 appellant, then a 43-year-old temporary clerk, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that she injured her right ankle in a fall on December 16, 1997. Appellant stated that she was walking in the Teamsters' Union parking lot across the street from the employing establishment when she tripped on a curb or block of ice and fell. Appellant stopped work on December 16, 1997 and has not returned.

In support of her claim, appellant submitted a statement describing the incident. Appellant claimed that a supervisor had told her not to park in the employing establishment's parking lot since those spaces were reserved for permanent employees. Instead, she argued that the employing establishment insisted that she park in the Teamsters' lot. While walking in the Teamsters' lot, she fell over something and twisted her ankle and wound up on her knees and hands.[1]

Appellant also submitted several return to work certificates from Dr. Kenneth Bulen, a Board-certified family practitioner, who diagnosed right ankle sprain and indicated that appellant could return to work as long as she used crutches, sat and kept her foot elevated. On January 30, 1998 Dr. Bulen indicated that appellant could return to work without restrictions.

On January 14, 1998 the employing establishment controverted the claim. The employing establishment contended that appellant's sprained ankle was not sustained while she was in the performance of duty since the parking lot was not owned, controlled or maintained by the employing establishment.

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[1] In her statement, appellant stated that she was due at work at 2:00 a.m. Appellant's CA-1 form indicated that the injury occurred at 2:00 a.m. A December 20, 1997 medical record listed the time of injury as 1:50 a.m.

By telephone conference on January 30, 1998, participants from the employing establishment and the Office of Workers' Compensation Programs discussed whether the parking lot where the injury occurred was owned, leased, rented, maintained or controlled by the employing establishment. The employing establishment indicated that it paid nothing for the lot's use and did not require that its part-time employees park there, as was alleged. Although part-time employees were not allowed to park in the employing establishment's lot, the employing establishment advised that appellant had a number of other available options, including street parking. The employing establishment argued that it was appellant's choice to park in the Teamsters' Union parking lot located across the street from the employing establishment. The Office memorialized these findings in a memorandum of conference resolution dated February 19, 1998.

By decision dated February 19, 1998, the Office determined that appellant's injury on December 16, 1997 was not sustained while in the performance of duty. The Office determined that the parking lot where the injury occurred was not federal property as it was not owned, controlled or maintained by the employing establishment.

On March 17, 1998 appellant requested a hearing before an Office hearing representative. Appellant also submitted a February 13, 1998 report from Dr. Bulen, who, based on an examination, concluded that appellant's right ankle strain was resolving nicely and that she could return to full duty.

On October 27, 1998 a hearing was held before an Office hearing representative. At the hearing, appellant testified that, when she interviewed for the temporary clerk position, she was told she should not park in the employing establishment's lot and should also not park on the side streets since her car would be towed. She alleged she was advised to park in the Teamsters' Union lot across the street from the employing establishment.

In response to appellant's hearing testimony, the employing establishment submitted a December 7, 1998 letter contesting appellant's allegation that her injury occurred within the performance of duty. The employing establishment maintained that "Christmas casuals" were not allowed to park in the employing establishment's lot because there was not enough parking for all of their permanent employees. The employing establishment further disputed appellant's assertion that she had been advised at orientation to park in the Teamsters' Union lot. Although the employing establishment conceded that appellant's car could be towed if she parked in certain spaces on the street, it contended that there were many legal spaces on surrounding streets in addition to available parking in other nonemploying establishment parking lots.

By decision dated January 7, 1999, the Office hearing representative found that appellant's injury on December 16, 1997 was not sustained in the performance of duty. The hearing representative found that the parking lot was not considered part of the premises of the employing establishment as it was neither owned nor operated by them. The hearing representative further determined that the employing establishment had not contracted with the Teamsters' Union or had an obligation to provide parking for its employees.

The Board finds that appellant has not met her burden of proof in establishing that she was in the performance of duty at the time of her December 16, 1997 injury.

Appellant's injury occurred before work while she was walking in the Teamsters' Union parking lot, which was not part of the employing establishment's premises. The issue before the Board, therefore, is whether this off-premises injury was sustained while she was 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 an 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 this parking for its employees.[4]

The evidence submitted by appellant is not sufficient for the Board to find that the Teamsters' Union parking lot constituted part of the premises of the employing establishment. While the employing establishment's employees had permission to park at night in the Teamsters' Union parking lot, the employing establishment stated that the lot was owned and operated by the Teamsters, that it did not pay anything for its use and did not maintain the lot.[5] Even though the employing establishment concedes that appellant, as a temporary employee, was told not to park in the employing establishment's own parking lot, there is no evidence that it required that appellant park in the Teamsters' Union lot. Additionally, the record reveals that there was street parking available and parking in other area lots not controlled by the employing establishment. There is no evidence 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.[6] The evidence submitted by appellant

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

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

[4] *Diane Bensmiller*, 48 ECAB 675, 677 (1997); *Edythe Erdman*, 36 ECAB 597, 599 (1985); *see* Larson's *The Law of Workers' Compensation* § 13.04(2)(a) (May 1999).

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

[6] *Id.*

does not establish that the employing establishment's premises should extend to the Teamsters' Union parking lot. Therefore, appellant's injury was not sustained in the performance of duty.[7] Consequently, appellant has failed to establish that she sustained an injury in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated January 7, 1999 is hereby affirmed.

Dated, Washington, D.C.
July 27, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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