

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGRETTE H. MAKRAM and DEPARTMENT OF ENERGY,
LOS ALAMOS AREA OFFICE, Los Alamos, NM

*Docket No. 00-448; Submitted on the Record;
Issued August 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant's exposure to natural gas occurred within the performance of duty.

On July 20, 1998 appellant, then a 55-year-old senior nuclear engineer, filed a claim for a February 26, 1993 incident. She stated that she was staying temporarily at a hotel when she became seriously ill due to a gas leak in the room in which she was sleeping and had to be taken to the emergency room. Appellant was treated for a possible hypoxic brain injury and complained of neurological symptoms, including seizures, memory loss, vision problems and dizziness. The employing establishment indicated on the claim form that appellant was injured after returning to the hotel room from work.

In a September 3, 1999 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that it was not timely filed. The Office also indicated in its decision that her injury did not occur on the premises of the employing establishment and therefore did not occur in the performance of duty. Appellant requested a written review of the record by an Office hearing representative. In a February 7, 2000 decision, the Office hearing representative noted that the Office had not developed the issue of whether appellant's supervisor was aware of appellant's exposure to natural gas within 30 days of the incident. She also indicated that appellant claimed the employing establishment did not allow her to file a claim for compensation until February 1998. The Office hearing representative therefore set aside the Office's September 3, 1999 decision and remanded the case for further development.

In an August 23, 2000 decision, the Office found that appellant's claim for compensation had been timely filed. However, the Office also found that appellant's injury occurred in her private residence which was not paid for, owned or operated by the employing establishment. It therefore found that appellant was not injured in the performance of duty when she was exposed to natural gas.

The Board finds that appellant was not injured in the performance of duty.

The Federal Employees' Compensation Act¹ 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."² The Board has stated as a general rule that 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 but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.³ In defining what constitutes the premises of an employing establishment, the Board has said:

"The 'premises' of the employer, as the term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; 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 the legal title."⁴

In this case, appellant moved into an apartment in the hotel on December 15, 1992. On February 26, 1993 she went to work, not feeling well. Appellant returned to her apartment and went to bed around noon. She was awakened at 10:45 p.m. by a telephone call from a friend, who felt appellant was not coherent and urged appellant to get help. Appellant called the front desk and an employee of the hotel came to the apartment, where she smelled gas. The evidence of record therefore shows that the incident occurred in appellant's residence and not on the premises of the employing establishment. It therefore did not occur within the performance of duty.

Appellant contended that the employing establishment was responsible for any injuries she sustained in her apartment, alleging that the employing establishment owned Los Alamos County from the utilities to the fire department, including the natural gas lines. She stated that the county and by reference, the employing establishment, allowed the hotel to operate without an occupancy certificate. Appellant argued that the fire department, which she claimed was supervised by the employing establishment, had violated the fire code to allow the hotel to operate. She also stated that the hotel was temporary housing for the employing establishment.

Appellant's supervisor indicated that the apartment building in which appellant was living was privately owned and not owned by the employing establishment. He noted that the owners of the apartment building also owned a hotel that was next to the building. Appellant's supervisor commented that the employing establishment may have still owned the natural gas lines but the county operated them. He stated that appellant was not on a travel or temporary duty status at the time of the incident. Appellant's supervisor reported that appellant's duty station was at the Los Alamos facility. He indicated that appellant paid for the apartment herself because it was her private residence.

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a)

³ *Robert F. Hart*, 36 ECAB 186 (1984); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

⁴ *See Conrad F. Vogel*, 47 ECAB 358 (1996).

The evidence of record therefore shows that the apartment in which appellant was injured was her private residence and therefore not part of the premises of the employing establishment. As the February 26, 1993 incident occurred off the premises of the employing establishment, it did not occur within the performance of duty. If appellant was in travel status, she would be covered 24 hours a day for matters incidental to travel, including sleeping.⁵ However, the evidence of record shows that the Los Alamos facility was appellant's duty station and had been for several years. She therefore could not be considered to be in travel status while she was working at the facility. Appellant alleged that the employing establishment owned and controlled the apartment building in which she lived and therefore was responsible for the February 26, 1993 incident. She claimed that the apartment was temporary housing for employees of the employing establishment. Appellant's supervisor, however, reported that the building was privately owned. Appellant has alleged that the employing establishment owned and controlled the apartment building in which she lived. However, she has not submitted any evidence that would show the employing establishment owned or controlled the apartment building to such an extent that it would be considered to constitute part of the premises of the employing establishment. Appellant, therefore, has not established that her exposure to natural gas on February 26, 1993 occurred on the premises of the employing establishment or otherwise within the performance of duty.

The decision of the Office of Workers' Compensation Programs, dated August 23, 2000, is hereby affirmed.

Dated, Washington, DC
August 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁵ *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).