U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIOLET M. DIAL and DEPARTMENT OF LABOR,
EMPLOYMENT STANDARDS ADMINISTRATION, Detroit, MI

Docket No. 01-415; Submitted on the Record;
Issued September 20, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a left ankle injury while in the performance of duty.

On October 5, 1999 appellant, then a 65-year-old equal opportunity assistant, filed a claim alleging that on October 4, 1999 at 7:50 a.m. she twisted her left ankle while stepping from the street onto the curb in front of her employing establishment building after being dropped off by her husband. The employing establishment noted that appellant's regular hours of duty were 8:00 a.m. to 4:30 p.m. and controverted her claim.

By letter dated November 17, 1999, the employing establishment requested further information. Nothing was forthcoming.

By decision dated December 27, 1999, the Office of Workers' Compensation Programs rejected appellant's claim finding that her injury did not arise out of and in the course of her employment. It found that appellant's injury occurred before she had begun her workday, not on the employing establishment's premises, and not while she was involved in any of her employer's business.

On May 5, 2000 appellant submitted a revised claim with the time of injury changed to 8:00 a.m. She alleged that she had sustained a broken bone in her left foot.

On September 1, 2000 appellant requested reconsideration and argued that if an employee were within 5 to 15 minutes of the workstation and within 5 feet or less from the building, she was considered to be on the job. Appellant submitted photographs of the place of injury showing the curb where she stumbled, twisting her ankle. The photograph was labeled as showing the corner of Fort Street and Washington Boulevard where she indicated the accident had occurred. The photograph showed a corner curb with a very wide city sidewalk and the building entrance 45 to 50 feet away. Also submitted was a report from appellant's treating podiatrist.

By decision dated November 6, 2000, the Office denied modification of its December 27, 1999 decision finding that appellant's injury occurred off premises, prior to her reporting time.

The Board finds that appellant's left ankle injury did not occur in the performance of duty.

The Federal Employees' Compensation Act[1] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation of "arising out of and in the course of employment." The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance.

In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show that substantial employer benefit is derived or an employment requirement gave rise to the injury.[3]

Under the Act[4] an injury sustained by an employee having fixed hours and place of work, while going to or coming from work, is generally not compensable because it does not occur in the performance of duty but out of the ordinary nonemployment hazards of the journey itself, which are shared by all travelers. This is in accord with the weight of authority under workers' compensation statutes that such injuries do not occur in the course of employment.[5] However, many exceptions to the rule have been declared by courts and workers' compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee going to or from work is covered under workers' compensation while on the premises of the employer.[6]

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[1] 5 U.S.C. § 8101-8193.

[2] 5 U.S.C. § 8102(a).

[3] *Charles Crawford*, 40 ECAB 474 (1989).

[4] 5 U.S.C. §§ 8101-8193.

[5] Larson, *The Law of Workers' Compensation* § 15.00; *Nancy S. Hardin*, 38 ECAB 285 (1986); *John E. Phifer*, 8 ECAB 77 (1955).

[6] *William L. McKenney*, 31 ECAB 861 (1980).

The Board has stated:

> "The 'premises' of the employer, as that 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."[7]

The Board has further stated:

> "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 case '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.'"[8]

Another exception to the rule is the proximity rule that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[9]

In this case, appellant had fixed hours of employment, and that her injury occurred while she was coming to work. Unless her injury occurred on the actual or constructive premises of the employing establishment, her injury cannot be considered as sustained in the performance of duty. There is no evidence that appellant's injury occurred on the actual premises of the employing establishment. Appellant twisted her left ankle before she had entered the actual premises of the employing establishment, on the curb of the corner of two city streets 45 to 50 feet beyond the federal property line; the curb is on public property.

Under the facts of this case, appellant's injury did not occur on the constructive premises of the employing establishment. Appellant twisted her left ankle on the corner curb of a sidewalk immediately adjacent to the federal building housing the employing establishment. However, there was no hazard related to her employment or employer implicated. She physically mistepped on a public curb, without any other causative mechanism or material involved. The curb, if it is to be considered to be a hazard at all, was clearly a hazard common to all travelers on that public sidewalk. The Board can find no nexus with or causal connection to appellant's employment as an equal opportunity assistant.

In the case of *Gloria C. Adalian*,[10] the Board rejected the argument that an injury was compensable because the walkway on which it occurred was immediately adjacent to appellant's

[7] *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

[8] *Id.*

[9] *See Sallie B. Wynecoff*, 39 ECAB 186 (1987); *William L. McKenney*, *supra* note 6.

[10] 26 ECAB 131 (1974).

federal building and was the customary means of entry and exit. Appellant argued that performance of duty required her to enter the building from that walkway at the time of injury. In *Adalian* the Board held that the injury occurred while appellant was proceeding to her duty station and before she had reached the employing establishment premises.

Similarly, in this case, the Board finds that appellant twisted her left ankle before she had reached the employing establishment premises. Therefore, she was subject to the "going and coming rule" and her injury is not compensable. The fact that appellant may have been utilizing the only means of entrance to the employing establishment when she twisted her ankle does not alter the public characteristics of the corner curb and sidewalk or warrant that it be considered part of the constructive premises due to some extended hazard related to the employing establishment.

The decisions of the Office of Workers' Compensation Programs dated November 6, 2000 and December 27, 1999 are hereby affirmed.

Dated, Washington, DC
September 20, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member