U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSIE P. COLMER and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, San Jose, CA

Docket No. 03-116; Submitted on the Record;
Issued May 2, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained back, neck and right hand and arm injuries, while in the performance of duty.

On January 7, 2002 appellant, then a 38-year-old claims representative, filed a claim alleging that on December 12, 2001 at 8:35 a.m. she slipped and fell on the sidewalk outside the employees' entrance of the employing establishment building. On an accident report form dated December 12, 2001, appellant described the location of the incident as the "parking area sidewalk." However, in a narrative statement submitted in support of her claim, appellant explained that she slipped and fell while walking on the wet, algae covered sidewalk leading to the employees' entrance. The employing establishment noted that appellant's workday began at 9:00 a.m. and that she had not yet signed in to begin working when the accident occurred.

On March 6 and June 11, 2002 the Office of Workers' Compensation Programs conferred with the employing establishment's injury compensation specialist. The Office was informed that there are two buildings on the premises, one occupied by the employing establishment and the other by the Pipefitter's Union. The employing establishment's building was leased from Cottle Associates, L.L.C. and managed by Wakemoto Management, Inc. The adjacent parking lot was shared by the tenants of both buildings and is also available to the general public on a first come, first served basis. While three slots in the parking lot were reserved for management, they were not marked and were not currently being used by management officials. There is also limited street parking available to employees.

By decision dated June 11, 2002, the Office 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 fall occurred before she had begun her workday and that the parking lot where she fell was not on the employing establishment's premises.

On July 11, 2002 appellant requested reconsideration and asserted that her injuries were not sustained in the parking lot but on the sidewalk directly adjacent to the building, which was

the only sidewalk leading to the employees' entrance. Appellant further asserted that the sidewalk was algae covered and had not been properly maintained. Finally, appellant asserted that she was in fact on duty when she was injured, because there is no way for her to start her duties without entering the building. She submitted a number of photographs of the sidewalk where the accident occurred, but these are not contained in the record before the Board.

By letter dated July 19, 2002, the Office forwarded appellant's statements to the employing establishment and asked for comments as to the accuracy of appellant's statements and whether the employing establishment concurred with these statements. The Office informed the employing establishment that failure to respond could lead to the acceptance of appellant's allegations as factual.

On August 22, 2002 the employing establishment informed the Office that it would not provide any further comments with respect to appellant's claim.

In a decision dated October 2, 2002, the Office denied modification of its June 11, 2002 decision finding that appellant's injury occurred off premises, prior to her reporting time.

The Board finds that this case is not in posture for a decision.

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 worker'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; (3) and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.

This alone is insufficient 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]

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8102(a).

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

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] The Board has stated:

> "The 'premises' of the employer, as that term is used in workers' 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 workers' 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 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. Therefore, whether appellant's injury occurred on the premises of the employing establishment appears to be the critical issue in this case. While the Office diligently explored the ownership and management of the parking area, the evidence pertaining to the ownership of

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[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).

[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.

the sidewalk where the injury occurred is not well developed. After receiving appellant's request for reconsideration, in which she reiterated that her fall had not occurred in the parking lot but on an algae covered sidewalk adjacent to the employing establishment and leading to the employees' entrance, the Office attempted to obtain additional information from the employing establishment. The employing establishment declined to comment further, however, and, therefore, whether the sidewalk in question is part of the actual or constructive premises of the employing establishment remains unclear. Without seeking further clarification on this issue, the Office rejected the claim. The Board finds that this was in error.

A claimant seeking compensation under the Act[10] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[11] including that he sustained an injury in the performance of duty.[12] Nonetheless, proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[13]

Therefore, the Board will set aside the June 11 and October 2, 2002 decisions and remand the case for proper handling and for further development of the factual evidence to clarify the circumstances of appellant's injury. The Office shall then issue an appropriate final decision on appellant's claim.

[10] 5 U.S.C. §§ 8101-8193.

[11] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[12] *Elaine Pendleton*, 40 ECAB 1143 (1989); *see Daniel R. Hickman*, 34 ECAB 1220 (1983).

[13] *Shirley A. Temple*, 48 ECAB 404 (1997); *Mary A. Wright*, 48 ECAB 240 (1996); *Richard Kendall*, 43 ECAB 790 (1992); *Monroe Fears*, 43 ECAB 608 (1992).

The decisions of the Office of Workers' Compensation Programs dated October 2 and June 11, 2002 are hereby set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
May 2, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member