# United States Department of Labor
# Employees' Compensation Appeals Board

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| **MARIA V. LUONG, Appellant** | ) | |
| **and** | ) | **Docket No. 03-1726** |
| | ) | **Issued: January 27, 2004** |
| **U.S. POSTAL SERVICE, POST OFFICE, Kentwood, MI, Employer** | ) | |

*Appearances:*
*Maria V. Luong, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

### *JURISDICTION*

On July 1, 2003 appellant filed a timely appeal from an April 28, 2003 decision of the Office of Workers' Compensation Programs, which denied her claim. Under 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether appellant sustained an injury in the performance of duty on February 21, 2003.

### *FACTUAL HISTORY*

On March 3, 2003 appellant, then a 54-year-old manual clerk, filed a traumatic injury claim alleging that on February 21, 2003 she slipped on ice on the parking lot of the P1-Annex as she was walking back [to work] after starting her car during her last break. Appellant's description of how and where the accident happened was reiterated in an accident report, Form 1769, dated February 21, 2003. An attending physician's report dated February 21, 2003, a duty status report dated February 21, 2003 and an emergency instruction sheet dated February 24,

2003 reflect that appellant was treated for a contusion to the knees and face and a laceration as a result of the February 21, 2003 fall and told to remain off work until February 24, 2003. In a medical certificate dated February 24, 2003, Cheryl Schmitt, a certified physician's assistant, released appellant to return to work on February 27, 2003.

By letter dated March 24, 2003, the Office requested that appellant explain and provide evidence that she was in the performance of duty when the injury occurred.

In a letter dated April 15, 2003, appellant stated:

> "On February 21, 2003 approximately at 03:38 I went out to start my car while I was on my authorized work break at the end of my shift, as most [p]ostal employees including supervisors do so in the wintertime. When I was coming back into the building to finish my break I fell on the footpath provided by the [employing establishment]. Since there is no sidewalk available for employees coming into the [employing establishment], the footpath that I walked through and fell is shoveled by [p]ostal custodians and is the avenue of travel into the [employing establishment] by [p]ostal personnel."

In an April 28, 2003 decision, the Office denied the claim, stating that appellant did not establish that she sustained an injury in the performance of duty. The Office determined that although appellant had suffered injuries from a fall on February 21, 2003, her statement of April 14, 2003 changed the events or history of injury and, thus, she failed to demonstrate that a specific event, incident or exposure occurred at the time, place and in the manner alleged.[1]

## ***LEGAL PRECEDENT***

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury.[3]

## ***ANALYSIS***

In this case, appellant had initially alleged in her CA-1 form and accident report form that her injuries were sustained when she slipped on ice in the parking lot of the P1-Annex. In her April 15, 2003 statement, she subsequently changed the description of where the accident occurred by asserting that she fell on the footpath allegedly provided by the employing

[1] On appeal, appellant submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. 20 C.F.R. § 501.2(c)(1).

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *John J. Carlone*, 41 ECAB 354 (1989).

establishment. The Office found that her April 15, 2003 statement changed the events or history of the injury and denied the claim.

On appeal appellant asserts that her April 15, 2003 statement is correct as the injury occurred on the footpath. She alleges that she did not understand that the employing establishment footpath and parking lot were not the same until after March 9, 2003, when she went outside with a union representative and showed her where she fell. Appellant stated that she was told that she fell on the footpath provided by the employing establishment.

It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged.[4] The Board notes, however, that an employee's statement regarding the occurrence of an employment incident is of great probative value and will stand unless refuted by strong or persuasive evidence.[5] The Board notes that there is no dispute that appellant sustained an injury from a fall on February 21, 2003. Moreover, it can be presumed that the manner in which the injury allegedly occurred, a slip and fall on ice, would not change the nature of the injuries appellant sustained whether the incident took place on the parking lot of the P1-Annex or on the footpath. At issue, therefore, is where the injury took place -- whether on the parking lot of the P1-Annex or on the footpath -- and whether such location was on the premises of the employing establishment. The Board notes the record is devoid of any corroborating evidence to sustain exactly where the injury took place. Furthermore, the evidence of record does not establish whether the P1-Annex parking lot or the footpath are part of the employing establishment premises. Absent such evidence to establish exactly where appellant sustained her February 21, 2003 injury and whether it was on the premises of the employing establishment, it was premature for the Office to deny appellant's claim on the grounds that she failed to establish an injury in the performance of duty as alleged.

[4] *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

[5] *Thelma Rogers*, 42 ECAB 866 (1991).

## ***CONCLUSION***

The Board finds that this case is not in posture for a decision on the issue of whether appellant sustained an injury in the performance of duty. The Office's decision was premature as it failed to make a finding as to where the injury took place and whether it was on the employing establishment's premises.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 28, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for a *de novo* consideration and preparation of a proper decision in accordance with this decision.

Issued: January 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member