United States Department of Labor
Employees' Compensation Appeals Board

DONALD R. GERVASI, Appellant	)	
and	)	**Docket No. 05-1622**
	)	**Issued: December 21, 2005**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Jamaica, NY, Employer	)	

Appearances:
Donald R. Gervasi, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2005 appellant filed a timely appeal of the April 29, 2005 merit decision of the Office of Workers' Compensation Programs which found that he did not sustain an injury in the performance of duty on January 22, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on January 22, 2005.

FACTUAL HISTORY

On January 24, 2005 appellant, then a 31-year-old security screener, filed a traumatic injury claim alleging that on January 22, 2005 he slipped and fell while "entering through the doors to the elevators on the first floor of the (Airtrain) terminal." The incident occurred at 2:00 p.m. and his regularly scheduled work hours were from 5:30 a.m. to 2:00 p.m. Appellant

stopped work on January 23, 2005. On the back of the form, the employing establishment checked "no" to the question of whether he was injured in the performance of duty. The reason given was that he was "injured while going home *via JFK Airtrain* immediately after shift discharge."

Accompanying appellant's claim form was a January 22, 2005 JFK Medport report. Land Inoyatova, a physician's assistant, diagnosed left elbow contusion and biceps tendinitis and released him to light-duty work on January 25, 2005.

On February 9, 2005 the Office received a January 31, 2005 report by Dr. Harvey Orlin, a treating Board-certified orthopedic surgeon, which noted that appellant injured himself while leaving work on January 22, 2005 when he slipped and fell. He diagnosed left elbow pain, left medial sprain and lateral collateral ligaments. A physical examination revealed "marked tenderness over the medial and lateral collateral ligaments and over the left radial head." With regard to range of motion, Dr. Orlin reported "limitation of the terminal 10 degrees of full pronation and supination" and "left elbow lacks 10 degrees of extension."

On February 24, 2005 the Office received a January 22, 2005 treatment note and January 28, 2005 attending physician's report (Form CA-20), by Dr. Gerald Surya, an attending Board-certified internist. He noted that appellant slipped and fell while "walking up to the [A]irtrain station" and diagnosed left biceps tendinitis and left elbow contusion. A physical examination revealed limited pronation, hyperextension and supination and "+ flexion." Dr. Surya related that appellant sustained an injury to his left elbow due to slipping and falling on a wet terminal floor. He diagnosed left elbow contusion and left forearm muscle strain.

In a letter dated March 8, 2005, the Office informed appellant that the information of record was insufficient to establish his claim and advised him as to the medical and factual information required. He was given 30 days to submit the requested information.

On March 9, 2005 the Office received a February 14, 2005 report by Dr. Orlin. He stated that appellant "sustained a work-related injury to his left elbow on January 22, 2005." A physical examination revealed "tenderness over the medial and lateral collateral ligaments of the elbow" and "direct marked tenderness over the radial head." An x-ray interpretation revealed a healing facture of the left radial head and neck. Dr. Orlin diagnosed left elbow pain and left radial head and neck fracture as demonstrated by an x-ray interpretation.

On March 28, 2005 the Office received appellant's March 22, 2005 response and a March 14, 2005 report by Dr. Orlin. Appellant stated that the injury occurred at the "Airtrain station that services terminals 8/9 at JFK International Airport" and that he slipped and fell on water which "was between the entrance doors and elevator." Appellant contended that, at the time of the injury, he was still on the clock, but "not performing any official business." He noted that the Airtrain was accessible to workers and patrons of the airport.

In a March 14, 2005 report, Dr. Orlin reported that appellant sustained injury when "he was released early from his shift and fell on exiting work." A physical examination revealed continued tenderness of the lateral and medial collateral ligaments and "a small snapping sensation in certain motions" during rotation of the left elbow.

On March 29, 2005 the Office received a March 19, 2005 claim for compensation (Form CA-7), for the period March 9 to 14, 2005. In a March 16, 2005 report, Dr. Orlin diagnosed a fractured left elbow and released appellant to work on April 3, 2005 with lifting restrictions.

In an April 29, 2005 decision, the Office rejected appellant's claim on the grounds that he did not establish that he was injured on the premises of the employing establishment.[1] The Office found that the injury did not occur on the premises as the "Airtrain is *not* controlled" by the employing establishment and it was not solely for the use of federal employees nor owned or operated by the Federal Government. (Emphasis in the original.)

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law 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.[5]

In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his employer's business; (2) at a place where he may reasonably be expected to be in connection

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[1] The Board notes that, following the April 29, 2005 decision the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c). *See Rosemary A. Kayes*, 54 ECAB ___ (Docket No. 02-1397, issued January 23, 2003).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *See* 5 U.S.C. § 8102(a).

[5] *See Annie L. Ivey*, 55 ECAB ___ (Docket No. 02-1855, issued April 29, 2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[6]

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 cases, the "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.[7] The term "premises" of the employer, as that term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employer; the term may be broader or narrower depending more on the relationship of the property to the employment than on the status or extent of legal title.[8]

The Board has recognized, as a general rule, that off-premises injuries sustained by employees having fixed hours and places 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.[9] Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.[10] There are recognized exceptions which are dependent upon the particular facts relative to each claim. The exception pertinent to this claim is whether the "proximity" rule as recognized by the United States Supreme Court in *Cudahy Packing Co. v. Parramoe*[11] applies. That case stands for the proposition that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employment. In *Cudahy Packing*, the employee sustained injury on his way to work while on a road which was the only means of access to the industrial premises.[12]

ANALYSIS

The Board finds that this case is not in posture for decision. Appellant stated that he slipped and fell while "entering through the doors to the elevators on the first floor of the (Airtrain) terminal" at 2:00 p.m. His regularly scheduled hours were from 5:30 a.m. to 2:00 p.m. The fact that appellant was injured at Airtrain and that the Office found it was not controlled or owned by the employing establishment does not entirely resolve the issue in this case.[13]

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[6] *Id.*

[7] *Linda Williams*, 52 ECAB 300 (2001).

[8] *See Dollie J. Braxton,* 37 ECAB 186 (1985); *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

[9] *Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004).

[10] *Melvin Silver*, 45 ECAB 677, 682 (1994).

[11] 263 U.S. 418 (1923).

[12] *Id.*

[13] The Board notes that a description of the premises is not contained in the record.

Appellant stated that employees and the public used Airtain to gain access to the terminal. It was necessary for the Office to inquire as to whether employees were able to access the premises of the employing establishment without using the Airtrain, was there another route by which employees working at terminals 8/9 could access the work site and how employees normally arrived at the premises.[14] Without answers to these questions, the Board is unable to determine whether appellant's injury occurred on the premises of the employing establishment.

The Board notes that 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 benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[15] The case will be remanded for the Office to further develop the evidence and make a determination as to the premises of the employing establishment and the available access to the premises. Following such further development, the Office shall issue a *de novo* decision on whether appellant's injury occurred in the performance of duty.

CONCLUSION

The Board finds that this case is not in posture for decision. The case will be remanded for further development as to whether appellant was injured on the premises of the employing establishment.

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[14] *See Loleta Britton*, 51 ECAB 596 (2000); *see also Randi H. Goldin,* 47 ECAB 708 (1996).

[15] *See Richard E. Simpson*, 55 ECAB ___ (Docket No. 04-14, issued May 3, 2004); *see also William J. Cantrell*, 34 ECAB 1223 (1983).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2005 is set aside and the case remanded for further development consistent with this decision.

Issued: December 21, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board