United States Department of Labor
Employees' Compensation Appeals Board

DONALD G. WHEELER, Appellant	)	
and	)	**Docket No. 05-717**
	)	**Issued: June 10, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 February 3, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 8, 2004 denying appellant's traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a traumatic injury while in the performance of duty on August 12, 2004.

FACTUAL HISTORY

On September 14, 2004 appellant, a 47-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging that, on August 12, 2004, he injured his left knee and head when he slipped on a wet surface and fell in a parking garage while walking to his car. He stated

that he heard a pop in his left knee and felt a sharp pain. Appellant also indicated that he hit his head on the ground when he fell.

In conjunction with his claim, appellant submitted an unsigned emergency room report dated August 12, 2004 reflecting appellant's chief complaint as right-sided headache and appellant's report that he twisted his left knee on his way to his car. The report provided diagnoses of hypertension and left knee injury and indicated that results of a left knee x-ray and "CT [computerized tomography]" scan of the brain were negative.

On October 6, 2004 the Office notified appellant that the evidence submitted was insufficient to establish his claim and advised him to provide additional documentation, including a firm diagnosis and a physician's opinion as to how his injury resulted in the diagnosed condition. The Office asked appellant and the employing establishment to provide a detailed description as to how the injury occurred, including the cause of the injury; a statement as to whether the facility in which the incident occurred was owned, controlled or managed by the employer; statements from any witnesses or other documentation supporting his claim; and the reason he delayed filing his claim.[1]

In a merit decision dated November 8, 2004, the Office denied appellant's claim, finding that the evidence was insufficient to establish that his alleged medical condition was related to a work-related injury.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including 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.[2] If the alleged injury did not occur in the performance of duty, it is not necessary to develop and evaluate the medical evidence to establish a compensable condition or disability.

Congress, in providing for a compensation program for federal employees, 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.[3] Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers'

[1] In response to the Office's request, appellant submitted a letter dated October 6, 2004 advising the Office of attorney representation. The Office received a response from the employing establishment, but this response was not made a part of the record prior to the issuance of the Office's November 8, 2004 decision. The Board's review of the case is limited to the evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

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

[3] *Barbara D. Heavener*, 53 ECAB 142 (2001).

compensation law of "arising out of and in the course of employment."[4] "In the course of employment" deals with the work setting, locale and the time of the injury, whereas, "arising out of the employment" encompasses not only the work setting, but also a causal connection between the employment factor and the injury.[5] In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while the employee is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.[6]

The general rule is that an injury sustained by an employee having fixed hours and place of work, while going to and from work or on a lunch hour, is not compensable because it does not occur in the performance of duty.[7] However, there exist many exceptions to the rule. One such exception, almost universally recognized, is the premises rule: an employee driving to and from work is covered under workers' compensation while on the premises of the employer. The term "premises," as it is generally used in workers' compensation law, is not necessarily synonymous with "property," but rather may be broader or narrower and is dependent more on the relationship of the property to the employment than on the status or legal title.[8]

Under certain circumstances, a parking lot for the use of employees may be considered a part of the employment premises. Factors bearing on this determination are whether the employing establishment contracted for the exclusive use by its employees of the parking area; whether parking spaces on the lot were assigned by the employing establishment to its employees; and whether the parking areas were checked to see that no unauthorized cars were parked in the lot. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of an employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained, or controlled the parking facility, used the facility with the owner's special permission or provided this parking for its employees.[9]

Other recognized exceptions to the going and coming rule exist for those circumstances where the employee is not injured on the employers' premises because the employee was required to travel to complete his employment duties.[10]

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[4] *Timothy K. Burns*, 44 ECAB 291, 296 (1992).

[5] *Barbara D. Heavener, supra* note 3.

[6] *Id.; see also Mary Beth Smith*, 47 ECAB 747, 748 (1996).

[7] *See Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004); *see also Margaret Gonzalez*, 41 ECAB 748, 752 (1990); 5 U.S.C. § 8102(a).

[8] *Anneliese Ross*, 42 ECAB 371, 373-74 (1991).

[9] *See Loleta Britton***,** 51 ECAB 596, 2000; *see also Diane Bensmiller*, 48 ECAB 675, 677 (1997); *Edythe Erdman*, 36 ECAB 597, 599 (1985).

[10] *Gabe Brooks*, 51 ECAB 184 (1999).

ANALYSIS

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

The Office denied appellant's claim based upon a finding that the medical evidence did not establish that the alleged condition was caused by the alleged work injury. Prior to the determination of whether appellant sustained a medical condition or disability caused by his employment, the Office was required to determine whether the alleged injury occurred in the performance of duty. To determine that the alleged injury in the parking garage occurred in the performance of duty, the Office should have evaluated whether appellant was required to travel by car to perform his job duties, or whether the injury occurred on the actual premises of the employing establishment or in an area which may be considered part of the employing establishment.[11] The Office did ask appellant and the employing establishment whether the parking garage was owned, maintained or controlled by the employing establishment, the Office did not ask for clarification as to whether appellant's job duties required travel. Although there was no response to the Office's inquiry, it was improper for the Office to simply skip adjudication of this essential element of the claim.

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.[12] This is particularly true when the evidence is of a character normally obtained from the employing establishment or other government source.[13] Since the employing establishment, not appellant, would most likely possess the necessary evidence in this case such as documentation of ownership of the parking garage, as well as appellant's position description, the case must be remanded to the Office for further development of the evidence and determination of whether appellant's alleged injury occurred in the performance of duty.

CONCLUSION

Under the circumstances described above, the Board finds that this case is not in posture for decision. The case will be remanded for further development.

[11] *See Loleta Britton, supra* note 7; *see also Randi H. Goldin*, 47 ECAB 708 (1996).

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

[13] *Willie A. Dean*, 40 ECAB 1208 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2004 is set aside and this case is remanded for further consideration consistent with this opinion.

Issued: June 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member