United States Department of Labor
Employees' Compensation Appeals Board

SHERRY L. VANNORTWICK, Appellant	)	
and	)	**Docket No. 05-1954**
	)	**Issued: March 8, 2006**
DEPARTMENT OF VETERANS AFFAIRS VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI, 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, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 5, 2005 which denied modification of a June 2, 2005 decision finding that appellant did not sustain an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an injury on January 11, 2005 while in the performance of duty.

FACTUAL HISTORY

On February 22, 2005 appellant, then a 42-year-old health technician filed a traumatic injury claim alleging that at 8:05 a.m. on January 11, 2005 she slipped in the parking lot and

injured her right knee, right thigh and right buttock in the performance of duty.[1] She did not initially stop work.[2] Appellant's regular hours were from 8:00 a.m. to 4:30 p.m.

In support of her claim, appellant submitted numerous physical therapy reports dating from March 14 to April 11, 2005 and multiple treatment notes from Dr. Linda M. Bessert, Board-certified in family medicine.

By letter dated April 27, 2005, the Office advised appellant that the submitted information was insufficient to establish her claim. The Office requested additional information, including information concerning the exact time and location of the injury and the hours she worked on the date in question.

The Office subsequently received documentation which included physical therapy reports and progress notes, some of which were previously submitted, email correspondence concerning appellant's physical therapy, email correspondence regarding an occupational disease claim.[3]

In an April 25, 2005 report, Dr. Bennett Willard, an osteopath, advised that appellant slipped and fell on ice in the parking lot at work on January 11, 2005. He diagnosed lumbago with right gluteal pain secondary to sacroiliac somatic dysfunction secondary to a fall. Dr. Willard also noted that she had possible lumbar facet arthritis with referred symptoms in the right lower extremity without radiculopathy.

In a memorandum of telephone call dated April 27, 2005 the Office contacted Ms. Pat Haase, appellant's supervisor, who confirmed that the employing establishment did not own or maintain the parking lot where appellant fell.

In a May 23, 2005 statement, appellant related that on January 11, 2005 she was on her way into work from the parking lot, when she slipped on the ice. She alleged that she fell between her car and an adjacent car and injured her right knee, thigh and buttock. Appellant indicated that since the fall, she did not miss work, with the exception of appointments for treatment but that she had pain and was not improving.

By decision dated June 2, 2005, the Office denied appellant's claim, finding that the evidence was insufficient to establish that the injury arose out of and in the course of federal employment because the injury did not occur on the premises of the employing establishment. The Office noted that the parking lot was not federally owned or maintained by the employing establishment.

Appellant requested reconsideration on June 7, 2005, alleging that, although the parking lot was not owned by the employing establishment, it was leased by it. She also alleged that

[1] The traumatic injury claim form was not filled out completely; however, subsequent documentation from appellant indicated that she slipped in the parking lot.

[2] It appears that appellant did not stop work but sought treatment for pain management.

[3] Appellant's occupational disease claim is not presently before the board.

three employees also had claims due to accidental falls in the parking lot, which were accepted. Appellant alleged that she was only seeking continuation of care for her pain management and treatment.

By letter dated July 7, 2005, the Office requested additional information from the employing establishment regarding whether the parking lot was contracted for the exclusive use of the employing establishment employees, whether parking spaces were assigned, whether the employing establishment provided security patrols to ensure that no unauthorized vehicles were parked in the lot, whether use of the lot was provided to its employees without cost, whether the public was permitted to use the lot and whether there was other parking available to the employees.

In a July 21, 2005 response, Larry Gruetier, the clinic manager, stated that the parking lot was available to all who chose to use it, that there were no assigned spaces, no authorized security patrols, no cost to employees to use the lot, no restrictions as to who could use the lot and that there was also parking on the street.

In an addendum dated August 1, 2005, Shelly Hendryx, a human resources specialist, indicated that the building and parking lot were owned by Brant Construction and that the grounds and parking lot were maintained by "[t]he lawn ranger," which was contracted out by Brant Corporation. She also provided contact information for the companies.

By decision dated August 5, 2005, the Office denied modification of its June 2, 2005 decision. The Office found that the fall on January 11, 2005 did not arise in the performance of duty.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[4] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment." "In the course of employment" relates to the elements of time, place or circumstance. To arise in the course of employment, an injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where she may reasonably be expected to be in connection with the employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[6] The employee must also establish an injury "arising out of the employment." To arise out of employment the injury must have a casual

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Mona M. Tates*, 55 ECAB ___ Docket No. 03-892 (issued October 6, 2003); *Timothy K. Burns*, 44 ECAB 125 (1992).

connection to the employment, either by precipitation, aggravation or acceleration.[7] The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time are compensable.[8]

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.[9] 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.[10]

The factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's "premises" include 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, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot and whether other parking was available to the employees. Mere use of a parking facility, alone is not sufficient to bring the parking lot within the "premises" of the 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 parking for its employees.[11]

ANALYSIS

Appellant was in the process of coming to work for her tour of duty from 8:00 a.m. to 4:30 p.m. She sustained injury at 8:05 a.m., before commencing her employment duties, in a parking lot which is adjacent to the employing establishment. It is well established that, as to employees having fixed hours and place of work, injuries occurring on the premises while they

[7] *John B. Shutack*, 54 ECAB 336 (2003); *see also Bettina M. Graf*, 47 ECAB 687 (1996).

[8] *Diane Bensmiller*, 48 ECAB 675 (1997).

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

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

[11] *Rosa M. Thomas Hunter*, 42 ECAB 500, 504 (1991*); Edythe Erdman*, 36 ECAB 597 (1985).

are going to and coming from work before or after working hours or at lunchtime are compensable; but, if the injury occurs off the premises, it is not compensable.[12]

The Board finds that the evidence submitted is insufficient to establish that the parking lot was part of the premises of the employing establishment. The Board notes that appellant's injury occurred on her way to work when she slipped and fell on ice while exiting her vehicle in a parking lot, which was not coterminous with that of the employing establishment. In order to ascertain whether the parking lot should be considered part of the employing establishment's premises, the Office contacted the employing establishment. The Office determined that the parking lot was owned by Brandt Construction, which contracted out the maintenance of the grounds and parking lot to Lawn Ranger. The employing establishment also indicated that, although their employees utilized this lot, they did not pay anything for its use and the employing establishment also confirmed that it did not maintain the lot.[13] Mr. Gruetier advised that there were no assigned parking spaces on the lot and that the employing establishment did not police the lot to see that unauthorized cars were not parked in the facility.[14] He indicated that anyone could park in the lot and employees were also free to park elsewhere, including on the street. The evidence submitted by appellant does not establish that the employing establishment's premises extended to the parking lot. Therefore, there was insufficient connection with the employing establishment or her duties and the exception regarding employing establishment parking lots does not directly apply.[15] The Board finds that the evidence is insufficient to find that the parking lot, which was owned by Brandt Construction, should be considered part of the premises of the employing establishment.[16]

Under the facts of this case, it also cannot be said that appellant's injury occurred within the special hazard exception to the premises rule. The Board has determined that under special circumstances the "premises rule" is extended to hazardous conditions which are proximately located to the premises and, therefore, may be considered as hazards of the employing establishment. The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route or at least on the normal route, which employees must traverse to reach the plant and that the special hazards of that route become the hazards of the employment. Factors that generally determine whether an off-premises point used by employees may be considered part of the "premises" include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[17] As noted above, the employing establishment did not have contracts

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

[13] *See Rosa M. Thomas-Hunter*, 42 ECAB 500, 504-05 (1991) (mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment).

[14] *Id.*

[15] 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. *See Edythe Erdman*, 36 ECAB 597, 599 (1985).

[16] *Id.*

[17] *Idalaine L. Hollins-Williamson*, 55 ECAB ___ (Docket No. 04-1147, issued August 23, 2004).

for the exclusive use of the parking lot in the area where appellant was injured and the parking lot was not an exclusive location in which she could park her vehicle, as there were other options with regard to where she could park. The public also used the parking lot. Therefore, this exception does not apply.

Appellant's slip and fall on ice in the parking lot did not occur in the performance of duty. It did not occur on the employing establishment's premises as the parking lot was a public lot and not under the exclusive control of the employing establishment as noted above. At the time of her injury, she had fixed hours and place of work and had not yet reported to work.[18] Appellant's injury was an ordinary, nonemployment hazard of the journey to work itself, which is shared by all travelers. The ice was a hazard common to all travelers and was not a hazard related to the employment.[19]

The Board also finds that the special hazard exception to the premises rule also does not apply as the route to appellant's car that day was personal to her, depending upon which space she parked in and the ice hazard had no connection with her employment and as access to the parking lot had not been proven to be limited to employing establishment personnel.

CONCLUSION

Appellant has failed to establish that she sustained an injury in the performance of duty, as she was off duty as appellant was on her way to work, as she was not performing any function for the employing establishment and as the parking lot where she fell had no specific relationship to the employing establishment.

[18] As appellant had not reported for work and begun her duties, it is not necessary to consider whether her injury may be considered in the course of employment because she was involved in an activity similar to those activities generally related to personal comfort or ministration. *See Roma A. Mortenson-Kindschi*, 57 ECAB ___ (Docket No. 05-977, issued February 10, 2006); *Helen L. Gunderson*, 7 ECAB 288 (1954), *reaff'd on recon.*, 7 ECAB 707 (1955).

[19] *See Jimmie Brooks*, 54 ECAB 248 (2002).

ORDER

IT IS HEREBY ORDERED THAT the August 5 and June 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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