United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 06-1472**
	)	**Issued: April 25, 2007**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Long Beach, CA, Employer	)	

Appearances:
Thomas Martin, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2006 appellant filed a timely appeal of the March 16, 2006 merit decision of the Office of Workers' Compensation Programs in which an Office hearing representative denied her claim for a traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that she sustained a right arm injury on March 3, 2005 in the performance of duty.

FACTUAL HISTORY

On March 14, 2006 appellant, then a 53-year-old supervisory management specialist, filed a traumatic injury claim alleging that she fractured her right arm on March 3, 2005. The injury happened at approximately 7:02 a.m. while appellant was on her way to work. Appellant was walking on the sidewalk outside the federal building where she worked when a bicyclist

approaching from behind blew his horn and, in an attempt to avoid a collision with the bicyclist, she jumped to the side, lost her footing and fell. The employing establishment indicated that appellant's regular work hours were 7:00 a.m. to 4:00 p.m. Appellant stopped work on March 3, 2005 and returned to work approximately three months later.[1]

The record indicates that appellant was taken by ambulance to a nearby hospital where she was treated for a fractured right humerus. In a Form CA-16 dated March 8, 2005, Dr. Alan Beyer, a Board-certified orthopedic surgeon, indicated with a check mark in the appropriate box that appellant's fractured right humerus was caused or aggravated by her employment activity. He opined that she was totally disabled from March 3 through April 15, 2005.

In an April 26, 2005 letter, the Office informed appellant that the information submitted was insufficient to establish her claim. The Office asked her to submit within 30 days detailed information regarding the exact location where the injury occurred and whether she was on federal property.

During a May 4, 2005 telephone conference with an Office claims examiner, appellant indicated that a Government Services Administration (GSA) official told her that the sidewalk where the fall occurred was considered federal property. Appellant was informed that this information needed to be confirmed by the employing establishment.

In a June 15, 2005 statement, Marcus Jordan, property manager for the Glenn M. Anderson Federal Building, stated that the sidewalk alongside Magnolia Avenue where appellant was injured was 17 feet wide and jointly owned by the Federal Government and the city of Long Beach. Mr. Jordan indicated that the Federal Government's jurisdiction extended from the edge of the building to eight feet onto the sidewalk and the city of Long Beach jurisdiction extended from the eight feet away from the building onto the street. He stated that, when he arrived on the scene after appellant's fall, she was 15 feet south of the loading docket area for the building. Based on appellant's account of the accident, Mr. Jordan concluded that she was startled while on City property and fell onto federal property.

Appellant also submitted a May 18, 2005 letter in which she described the circumstances surrounding her accident and diagramed the accident scene, a copy of the employing establishment's incident report of March 3, 2005 and filed CA-7 forms requesting compensation for total disability for the period April 17 to May 28, 2005.

By decision dated June 17, 2005, the Office denied appellant's claim, finding that the evidence failed to establish that the alleged injury occurred in the performance of duty. The Office determined that the injury did not occur on the premises of the employing establishment, as her injury originated while she was walking on city property.

On July 6, 2005 appellant requested an oral hearing, which was held on January 26, 2006. At the hearing and in a subsequent statement of February 22, 2006, she stated that at the time of

[1] The exact date appellant returned to work is not of record. However, as appellant's claim for total disability compensation ended May 28, 2005, it is presumed that she returned sometime on or after May 29, 2005.

the accident, she was reporting to work and transporting some work-related materials back to the office, which she had worked on at home the night before. Appellant indicated that, although her position did not require her to take work home, it was not unusual for her to do so in her position. She further indicated that it was not uncommon for her to bring work home at the end of her workday and return an updated product back to the office the next morning and stated that such was the case on March 3, 2005. Appellant additionally argued that the accident was the result of the GSA's failure to enforce a city ordinance and noted that, after her accident, the GSA issued a new policy for building employees who rode bikes to work.

By decision dated March 16, 2006, the Office hearing representative affirmed the June 17, 2005 decision finding that there was insufficient evidence to support that the injury was sustained in the performance of duty.

On appeal, appellant's attorney argued that appellant was in the performance of her duty as she was in a place where she was reasonably expected to be and was meeting her master's needs by reporting directly to work with work that she had taken home with her the previous night. He further argued that appellant had not deviated from her employment as she was walking directly to her job site within the time she was to start her workday.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[2] provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[3] The phrase sustained while in the performance of duty in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[4] The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place 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. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5]

The premises of the employer, as the 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. 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 premises may include all the property owned by the employer; in other cases even though the employer does not have

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8102(a).

[4] *Valerie C. Boward*, 50 ECAB 126 (1998).

[5] *See P.S.*, 57 ECAB ___ (Docket No. 06-114, February 8, 2006); *Gabe Brooks*, 51 ECAB 184 (1999).

ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[6]

The Board has also recognized the proximity rule which states that, under special circumstances, injuries occurring off the premises due to hazardous conditions proximate to the premises may be considered as hazards of the employing establishment.[7] The most common example 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.[8] The main consideration in applying this exception is whether the conditions giving rise to the injury are causally connected to the employment.[9]

Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer.[10]

There are additional exceptions to the general coming and going rule. Among these are the special errand rule which Larson describes as "When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey; or the special inconvenience, hazard; or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."[11]

ANALYSIS -- ISSUE 1

Appellant had fixed hours of work from 7:00 a.m. to 4:00 p.m. and was injured when she fell on a sidewalk outside of the federal building where she worked at 7:02 a.m. before commencing her employment duties. The Federal Government jointly owned, with the City of Long Beach, the sidewalk where the injury occurred. Statements from appellant and the property manager for the Glenn M. Anderson Federal Building confirmed that the portion of the sidewalk onto which appellant fell was owned by the Federal Government. However, the term "premises"

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[6] *See Denise A. Curry*, 51 ECAB 158 (1999).

[7] *Jimmie Brooks*, 54 ECAB 248 (2002); *see Linda D. Williams*, 52 ECAB 300 (2001); *Michael K. Gallagher*, 48 ECAB 610 (1997).

[8] *See id.*

[9] *Denise A. Curry*, *supra* note 6; *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[10] *Melvin Silver*, 45 ECAB 677 (1994); *Estelle M. Kasprzak, supra* note 9.

[11] A. Larson, *The Law of Workers' Compensation* § 14.05(1) (2000).

as it is generally used in workers' compensation law is not solely dependent upon ownership.[12] The sidewalk where appellant was injured was a public sidewalk. There is no evidence to support that the use of the sidewalk was restricted to the employees of the employing establishment. Appellant's statement that the accident was the result of GSA's failure to enforce a city ordinance, confirms that the sidewalk was not exclusively used by employing establishment personnel and was open to the public. The Board finds that, in this case, appellant has not shown that the sidewalk on which she fell was used exclusively or principally by employees of the employing establishment for the convenience of the employer.[13] Thus, appellant's injury is considered to be an ordinary, nonemployment hazard of the journey itself, shared by all travelers.[14] Appellant, therefore, did not establish that she was injured on the premises of the employing establishment.[15]

The proximity rule does not apply as the hazard causing the injury, an encounter with a bicyclist on a public sidewalk, is a hazard common to all travelers on the sidewalk and is not causally related to the employment. The accident was caused by the act of avoiding a bicyclist, which is an ordinary, nonemployment hazard of the journey to work itself which is shared by all travelers.[16] Even if the sidewalk on which appellant fell was the customary means of access to the employing establishment for its employees, this would not alter the public nature of this sidewalk or render it part of the employing establishment's premises as the accident was caused by the act of avoiding a bicyclist.[17]

Appellant argued that she had work materials in her possession and was walking directly to work at a time she was supposed to start work. In considering application of the "special errand" exception to the going and coming rule, noted above, the Board has noted that the essence of the exception is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[18]

Despite the fact that appellant had work materials in her possession, there is no indication that the employing establishment expressly or impliedly agreed that employment service should begin when appellant left home on March 3, 2005, nor has appellant established any special degree of inconvenience or urgency or shown that the trip, in and of itself, constituted a

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[12] *See Denise A. Curry*, *supra* note 6.

[13] *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004); *Mary Keszler,* 38 ECAB 735 (1987).

[14] *Shirley Borgos*, 31 ECAB 222 (1979).

[15] *See Mark Love*, 52 ECAB 490 (2001).

[16] *Jimmie Brooks*, *supra* note 7; *Denise A. Curry, supra* note 6.

[17] *Id.*

[18] *Connie J. Higgins* (*Charles H. Higgins*), 53 ECAB 451 (2002).

substantial part of any service for which she was employed.[19] The record does not establish that appellant was in a travel status at the time of injury; she was merely commuting to work at her customary time and was no different from the other employees with regular hours at the assigned workstation. Another exception, often related to the "special errand" situation, occurs when a claimant performs work at home with the knowledge and consent of the employer or where there is an essential continuity of the work done at home and that performed at the regular place of employment.[20] It is clear that it does not mean that an employee who carries home business papers or tools of her trade is by that fact covered by the workers' compensation law during her journey to and from work.[21] Although appellant indicated that she had performed work activity at home and was bringing the completed materials to work on March 3, 2005, she did not provide any details regarding the nature and extent of the activity performed at home. She also did not provide any evidence showing that the employing establishment's had knowledge of and consent to work at home.

Thus, the Board finds that the evidence of record does not establish that an exception to the coming and going rule is applicable in this case. Appellant was not in the performance of duty at the time of the March 3, 2005 incident and the Office properly denied the claim.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury on March 3, 2005 arising in the performance of duty.

[19] *Id*. at § 14.05(3). There is less difficulty when the trip is one which is made everyday, is not in itself unusually long or burdensome and is not made for the performance of some such brief service as throwing a switch or unlocking a door.

[20] *See Connie J. Higgins* (*Charles H. Higgins*), *supra* note 18; *Melvin Silver, supra* note 10.

[21] *Connie J. Higgins* (*Charles H. Higgins*), *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2006 decision of the Office of Workers' Compensation Program is affirmed.

Issued: April 25, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board