

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

_____)
T.L., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
LOGISTICS AGENCY, Norfolk, VA, Employer)
_____)

Docket No. 07-1692
Issued: June 2, 2008

Appearances:

Karen M. Rye, Esq., for the appellant

No appearance, for the Director

Oral Argument April 22, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 3, 2007, which found that she did not sustain an injury in the performance of duty. 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 was injured while in the performance of duty on August 27, 2003.

FACTUAL HISTORY

On August 28, 2003 appellant, a 39-year-old transportation assistant, filed a traumatic injury claim alleging that she sustained injuries to her spine and the right side of her body when she was struck by a vehicle in a crosswalk on the employing establishment's premises¹ at 12:30

¹ Appellant worked in the Defense Logistics Agency, Defense Distribution Depot, Building 143, which is located on the Naval Station Norfolk.

p.m. on August 27, 2003, during a lunch break. An August 27, 2003 incident report reflected that appellant had been hit in a crosswalk on the employing establishment premises by Hortense Colander, who had failed to yield to a pedestrian. Appellant stopped work on the date of the alleged incident and returned to work on a part-time basis on October 15, 2003. The case record does not reflect the date she returned to her regular work on a full-time basis.

In an October 19, 2003 letter, the Office informed appellant that the information submitted was insufficient to establish her claim and provided her 30 days to submit additional medical and factual evidence and information. On October 15, 2003 the employing establishment controverted the claim. They conceded that the incident took place on government property, but contended that appellant was not injured in the performance of duty, as she was on her way to her financial institution when she was struck in the crosswalk.

By decision dated November 12, 2003, the Office denied appellant's claim. The Office found that the evidence was insufficient to establish that the claimed event occurred as alleged, and that there was no medical evidence that contained a diagnosis which could be connected to the claimed event.

On November 3, 2004 appellant requested reconsideration of the November 12, 2003 decision. The record contains reports of x-rays, computerized tomography scans and magnetic resonance imaging scans, as well as reports from appellant's treating physicians for the period August 27, 2003 through March 24, 2004, which reflect appellant's medical treatment following the August 27, 2003 accident.

By decision dated February 15, 2006, the Office modified its November 12, 2003 decision, finding that the evidence supported the fact of injury, namely, that appellant had been struck by a vehicle in the crosswalk on the employing establishment's premises during her lunch hour. However, the Office affirmed its denial of the claim on the grounds that appellant was not in the performance of duty when the incident occurred. The claims examiner found that, because appellant was on her way to her bank to attend to personal business when the incident occurred, she had deviated from her employment to engage in a personal activity, which placed her outside the course of her employment.

On February 1, 2007 appellant, through her representative, requested reconsideration. She contended that the injury was compensable, in that she was on the employing establishment's premises, and she was engaged in a personal act for her comfort, convenience and relaxation during her assigned lunch hour. In support of her request, appellant submitted an affidavit dated February 1, 2007. Appellant stated that, at the time the injury occurred, she was on her way to her truck, which was parked on the employing establishment parking lot, to retrieve her debit card, which she needed in order to obtain cash for her lunch. She stated that she intended to return to the building in which she worked, access the automated teller machine (ATM) on the first floor, and then proceed to the employee cafeteria on the sixth floor.

By decision dated April 3, 2007, the Office denied modification of the February 15, 2006 decision. The claims examiner found that appellant was not in the performance of duty when the accident occurred, as she was not eating her lunch or walking to the cafeteria at the time of injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. 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.³

It is a general rule of workers' compensation law that, as to employees having fixed hours and place of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time, are compensable.⁴

The Office procedure manual provides that injuries arising on the premises may be approved if the employee was performing assigned duties, or was engaged in activity reasonably incident to the employment, such as: (a) personal acts for the employee's comfort, convenience and relaxation; (b) eating meals and snacks on the premises; or (c) taking authorized coffee breaks.⁵

Larson, in his *Workers' Compensation Law* treatise, states that "Injuries occurring on the premises during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases."⁶

ANALYSIS

There is no dispute that appellant was on the premises of the employing establishment when the accident occurred, or that she was on her regular lunch hour. These facts are sufficient to establish that her injury was sustained in the performance of duty. The fact that appellant, for her convenience, used a portion of her lunch hour to walk to her personal vehicle, which was

² 5 U.S.C. §§ 8101-8193.

³ *Mona M. Tate*, 55 ECAB 128 (2003).

⁴ *See Annette Stonework*, 35 ECAB 306 (1983) (where the Board held that appellant's use of a portion of her lunch hour to purchase stamps for her personal use from a postal facility on the premises of the employing establishment did not take her injury outside the performance of duty). *See also C.S.*, Docket No. 06-1121 (issued August 22, 2006) (where appellant was injured on the employing establishment premises on her way to a credit union while on her break, the Board found that this personal convenience was reasonably incidental to her employment and, therefore, compensable).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Performance of Duty, *Industrial Premises*, Chapter 2.804.4(a) (October 2005).

⁶ A. Larson, *The Law of Workers' Compensation* § 21.21 (a).

also located on government property, in order to retrieve her ATM card, does not take her injury outside the performance of duty.⁷

The Office procedure manual provides that injuries arising on the premises may be approved if the employee was engaged in activity reasonably incident to the employment, such as personal acts for the employee's comfort, convenience and relaxation; eating meals and snacks on the premises; or taking authorized coffee breaks.⁸ It is certainly reasonable that appellant might walk to her vehicle during her lunch hour for any number of reasons that would not take her activities outside the performance of duty. There is no evidence that employees were prohibited from making such excursions during breaks. The Board finds that appellant's action of walking to her personal vehicle to retrieve her ATM card, while on an authorized break, is within the ambit of what is deemed reasonable, and would have been anticipated by her employer.⁹ Therefore, appellant was engaged in an action reasonably incidental to the duties of her employment at the time of the incident.

In the April 3, 2007 decision, the Office denied appellant's claim, in part, because she was not eating lunch at the time of the accident. However, the law does not require that a claimant be engaged in the act of eating in order to obtain coverage of the Act. Rather, the issue is whether appellant was engaged in an activity reasonably incidental to the employment, which includes many other incidental activities.

Appellant has met her burden of proof to establish that she was in the performance of duty on August 27, 2003 at the time of the accepted incident. The case is remanded to the Office for development of the medical evidence.

CONCLUSION

The Board finds that appellant was injured while in the performance of duty on August 27, 2003.

⁷ See Federal (FECA) Procedure Manual, *supra* note 5.

⁸ *Id.*

⁹ See *Annette Stonework*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2007 decision of the Office of Workers' Compensation Programs is reversed and remanded for development of the medical evidence.

Issued: June 2, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board