United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 09-1573**
	)	**Issued: April 6, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Erlanger, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Miriam D. Ozur, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2009 appellant, through her representative, filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated October 21, 2008 and May 6, 2009 denying her 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 met her burden of proof to establish that she sustained an injury in the performance of duty on August 28, 2008.

FACTUAL HISTORY

On September 4, 2008 appellant, then a 40-year-old lead security screener, filed a traumatic injury claim alleging that on August 28, 2008 she sustained injuries to her hand, elbow, shoulder, head and knee when she fell in a crosswalk on her way to work. At the time of the

incident, she was walking from the short-term parking lot, where she had parked her vehicle, and the employing establishment terminal, where she was scheduled to work.

On September 11, 2008 the Office asked the employing establishment to provide: additional information as to where the incident occurred; whether the area was owned, maintained or controlled by the employing establishment; whether the short-term lot in which appellant parked her vehicle was available to the general public; whether other parking was available to employees; and whether parking was provided without cost to its employees. It also asked appellant to provide details of the alleged event, including when and where the incident occurred, and additional evidence, including a physician's report with a diagnosis and an opinion as to the cause of any diagnosed conditions.

On September 17, 2008 appellant stated that she fell on her way to work on August 28, 2008, as she was walking from the parking lot to the terminal. Her left foot allegedly twisted when she stepped into a hole in the roadway, causing her to fall.

On September 18, 2008 Sarah Roberts, an employing establishment representative, stated that the crosswalk in which the August 28, 2008 incident occurred was on a public roadway between the terminal and a public parking lot. The short-term lot in which appellant was parked prior to the incident was not owned, leased, controlled by, or for the exclusive use of, the employing establishment or its employees. Rather, the lot was open to the public. Ms. Roberts indicated that all airport employees, including those of the employing establishment, were provided with free parking on a secured lot at a separate location, but that appellant was not parked in the employee lot on the date of the alleged injury.

Appellant submitted medical evidence, including reports from Dr. Sergio Mezcua, a Board-certified internist, reflecting that she had sustained a right shoulder strain and hand contusions when she fell on August 28, 2008. The record also contain notes from Dr. Michael Haggerty, a chiropractor, and reports of diagnostic tests.

By decision dated October 21, 2008, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained an injury on August 28, 2008 in the performance of duty. It found that the incident was an off-premises injury and was not compensable because it did not arise out of the course of employment. On October 29, 2008 appellant, through counsel, requested a telephonic hearing.

In an undated statement, appellant indicated that airport employees who have not purchased parking passes, park in the employee lot, from which they are then transported to the airport terminals by bus. She stated that the process usually takes 15 to 20 minutes. Appellant explained that both employees and passengers are allowed to park in the short-term lot, which is located across from the terminals, and that employees are given a discount and encouraged to buy a parking pass. She further stated that on August 28, 2008 she parked in the short-term parking lot because she was having problems with her knees and repairs in the employee parking lot had created dangerous walking conditions due to uneven pavement.

During the February 10, 2009 telephonic hearing, appellant testified that although she typically parked in the "free" employee lot, she chose to park in the short-term lot on August 28,

2008 because she was having problems with her knees and the ground in the employee parking lot was uneven due to construction. She stated that the short-term lot was used by airport employees, as well as the general public, but that employees received a discount rate by swiping their identification badges upon entry and were asked to park in a designated location. Appellant indicated that she fell after exiting the lot because she stepped in a hole in the roadway.

Counsel argued that the circumstances of this case qualify for an exception to the general "going and coming rule." He contended that, although the incident did not occur on the employing establishment's premises, the employing establishment controlled the employees' access to, and use of, the short-term lot by providing a special ticket for appellant and similarly situated employees, negotiating a reduced-ticket price and by designating a special area for employee parking. Counsel argued that the fact that the incident occurred in the roadway between the lot and the terminal did not end the employment relationship, as one would be expected to go from the lot into the building.

In a March 16, 2009 letter, Linda Henry of the employing establishment responded to issues raised in the February 9, 2010 telephonic hearing. She stated that all security identification display area (SIDA) badged personnel located at the airport were provided with free parking in the employee lot, as well as shuttle service from the parking lot to scheduled stops at the terminals, depositing them curbside. Ms. Henry indicated that construction in the employee lot was limited to maintenance resurfacing, and that the area affected was cordoned off with pylons and flagging to prevent its use by employees.

Ms. Henry stated that the employing establishment did not negotiate any reduced rates on behalf of its employees for the use of the short-term lot. She reported that SIDA badges were not issued by the employing establishment, but rather were issued by the airport board, which extends the courtesy of a reduced rate for parking in the short-term lot to SIDA badged personnel. Ms. Henry indicated that the lot is considered public parking for short-term use, where anyone paying a daily fee can park; that there are no designated parking slots for this daily use; and that the lot is not owned, leased or controlled by the employing establishment.

In an undated statement, appellant claimed that managers encouraged screening officers to use the short-term lot in bad weather or if they were running late and to purchase employee parking passes. She also stated that employees were directed to park in the "farthest area," so as not to impede the public from parking. Appellant also contended that the construction in the employee lot involved "tearing the road surface and concrete" and that "it was a walking hazard with the uneven pavement."

By decision dated May 6, 2009, an Office hearing representative affirmed the October 21, 2008 decision on the grounds that the incident did not occur in the performance of duty. The representative found that the incident did not occur on the employing establishment's premises, and that there was no special hazard at the off-premises point.

On appeal, appellant's representative argues that the May 6, 2009 decision is contrary to fact and law. The Director contends that the August 28, 2008 injury did not occur in the performance of duty, as neither the short-term parking lot nor the crosswalk was owned, operated

or maintained by the employing establishment for use by its employees, and that there was no special hazard of the route which employees were required to traverse.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] 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.[2] In the course of employment relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place when she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. As to the phrase in the course of employment, 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 employees are going to or from work, before or after working hours, or at lunch time, are compensable.[3]

Regarding what constitutes the premises of an employing establishment, the Board has stated:

> "The term 'premises' as it is generally used in workmen's 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 ownership and control of the place where the injury occurred, the place is nevertheless considered part of the 'premises.'"[4]

Underlying the proximity exception to the premises rule is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[5] 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 premises, and that therefore the special

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[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

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

[5] *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

hazards of that route become the hazards of the employment.[6] 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.[7]

The Board has also pointed out that factors which determine whether a parking area 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.[8]

ANALYSIS

Appellant fell in a public crosswalk between a short-term parking lot and the airport terminal on her way to work. As the incident did not occur on the employing establishment's premises, the general "coming and going" rule would preclude coverage under the Act for this injury, unless appellant establishes an applicable exception.[9] The Board finds that the evidence does not establish that appellant sustained an injury in the performance of duty.

There is no dispute that the crosswalk in which appellant fell was on a public roadway, which was not within the ownership, control or management of the employing establishment. Appellant's contention is that the employing establishment's premises should be constructively extended to include the short-term lot in which she was parked the day the incident occurred. She argues that, as the crosswalk was a necessary route which she was required to traverse to reach the premises, the special hazards of that route became the hazards of the employment and that, therefore, her accident occurred in the performance of duty. The Board finds appellant's argument to be without merit.

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

[6] A. Larson, *The Law of Workers' Compensation* § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

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

[8] *R.M.*, 60 ECAB ___ (Docket No. 07-1066, issued February 6, 2009); *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 1841 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

[9] A. Larson, *The Law of Workers' Compensation* § 13.00 (2007).

facility, used the facility with the owner's special permission, or provided parking for its employees.[10] In the instant case, the evidence reflects that, while the employing establishment provided free parking for its employees at a separate location, as well as a shuttle service to the employment premises, the short-term lot was not controlled by, or for the exclusive use of, the employing establishment or its employees. Rather, the lot was open to the general public. Although employees were given a discounted rate by the airport board, the employing establishment did not negotiate reduced rates on behalf of its employees, issue badges entitling them to discounts, or designate parking slots. On August 28, 2008 appellant elected not to avail herself of the free employee parking facility and shuttle service provided by her employer. Her decision to park in the short-term public lot, which was located across from her terminal, does not convert the lot to the premises of the employing establishment.

Appellant's representative also argued that the premises should be constructively extended in this case to include the crosswalk, as it was the only route from the short-term lot to the terminal. As noted, underlying the proximity exception is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment,[11] such as on the only route available to employees to reach the premises, and that therefore the special hazards of that route become the hazards of the employment.[12] The proximity exception cannot be applied to the facts of this case. The crosswalk was not the only route available to appellant in order to reach the employing establishment premises. Had she taken the shuttle bus from the free employee parking lot, which would have deposited her at the curb, she would not have been in the crosswalk when she was injured. Although the crosswalk may have been the normal route in order to reach the terminal from the short-term lot, appellant was not required to park in the short-term lot and, by extension, was not required to use the crosswalk. Rather, her act of stepping in a hole on a public walkway was a hazard common to all travelers on the crosswalk and was not causally related to the employment.[13] Thus, appellant's injury constitutes an ordinary, nonemployment hazard of the journey itself, shared by all travelers.[14]

As the record fails to support the application of an exception to the off-premises rule, the Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on August 28, 2008.[15]

On appeal, appellant's representative argues that the May 6, 2009 decision is contrary to fact and law. For reasons noted, the Board finds counsel's argument to be without merit.

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[10] *Supra* note 8.

[11] *Idalaine L. Hollins-Williamson*, *supra* note 5.

[12] *Supra* note 6.

[13] *Jimmie Brooks*, 54 ECAB 248, 249 (2002).

[14] *Shirley Borgos*, 31 ECAB 222, 223 (1979).

[15] *See Jon Louis Van Alstine*, 56 ECAB 136 (2004). (Finding that employment did not fall within any exception to the general rule, the Board denied coverage where appellant sustained an off-premises injury while riding his motorcycle to work.) *See also Linda S. Jackson*, 49 ECAB 486 (1998).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on August 28, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 6, 2009 and October 21, 2008 are affirmed.

Issued: April 6, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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