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

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| **M.P., Appellant** | ) | |
| **and** | ) | **Docket No. 10-54** |
| | ) | **Issued: July 27, 2010** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On October 7, 2009 appellant, through her attorney, filed a timely appeal from a September 15, 2009 decision of the Office of Workers' Compensation Programs 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's injury of December 8, 2008 was sustained while in the performance of duty.

### *FACTUAL HISTORY*

On December 9, 2008 appellant, then a 48-year-old practical nurse, filed a traumatic injury claim alleging that at 7:30 a.m. on December 8, 2008 she slipped and fell while exiting her truck in the parking lot of the Missouri State Veterans Home. She noted that ice had not been removed and she fell on her buttocks and back. Appellant submitted medical evidence, including

a Veterans Administration Heartland-East Hospital medical report, x-ray studies and duty status reports. She claimed injury to her neck and back, right hip and ankle. The employer advised that appellant was on her way to work but had not reached the clinic facility. Appellant's regular tour of duty was 7:30 a.m. to 4:00 p.m. Monday through Friday.

On January 2, 2009 the Office requested that the employer provide additional information concerning the location where the injury occurred, whether the parking lot was owned, maintained or controlled by the employer; whether the 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 the agency's employees. The Office also requested that appellant provide additional details of the incident, including when and where it occurred and a physician's report with a diagnosis and opinion as to the cause of any diagnosed conditions.

On January 26, 2009 Edwina Miller, a compensation specialist, stated that appellant's December 8, 2008 injury occurred in a parking lot on Missouri state property. She noted that appellant was not in the performance of duty at the time of the injury as she had not started her duties for the day and was not on the agency premises. In response to specific questions by the Office, Ms. Miller stated that the parking lot was not maintained, controlled or leased by the employer. Rather, the State of Missouri was responsible for maintenance of the parking lot, spaces were not checked for unauthorized use and was open for the public to park in the lot and not used exclusively by federal employees. There were no assigned parking spaces or designated areas for agency employees and other parking was not available to employees.

In a February 2, 2009 decision, the Office denied appellant's claim finding that her injury on December 8, 2008 was not sustained while in the performance of duty. The injury occurred at a location off-premises and did not arise in of the course of her federal employment. The parking lot was not leased or maintained by the employer, the Missouri State Veterans home staff was responsible for maintaining the parking lot, it was open for public use and there were no parking spaces assigned or designated for federal employees.

On February 18, 2008 appellant, through counsel, requested a hearing that was held on June 15, 2009. She stated that she worked at the VA clinic located adjacent to the Missouri State Veterans home at the time of the injury and fell at 7:30 a.m. when her tour of duty began. She testified that the State of Missouri owned both the parking lot and the Missouri State Veterans home. Appellant did not have to park in the parking lot but stated that all clinic employees parked in it as there was nowhere else to park and parking was not allowed on the street. Counsel contended that the circumstances of the case established that, while the parking lot was owned by the State of Missouri, appellant's job duties were performed on the premises which should constructively extend to the lot. Although appellant's injury did not occur on the employer's premises, the parking lot was used exclusively by its employees. Following the hearing, she submitted additional medical evidence.

In a September 15, 2009 decision, an Office hearing representative affirmed the February 2, 2009 decision, finding that appellant's injury did not arise in the performance of duty. She noted that the injury did not occur on the employing establishment premises and that the parking lot was open to the public and used by anyone who had business at the state facility.

## ***LEGAL PRECEDENT***

As a general rule under the Federal Employees' Compensation Act off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of or in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[1] This is in accord with the weight of authority under workers' compensation statutes that such injuries do not occur 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.[3]

However, exceptions to the rule have been declared by courts and workers' compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee driving to or coming from work is covered under worker's compensation while on the premises of the employer. As to what constitutes the premises of the employer, 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]

The Board has 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 employer contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employer 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 employer. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer

[1] *Randi H. Goldin*, 47 ECAB 708 (1996); *Conrad F. Vogel*, 47 ECAB 358 (1996).

[2] *William L. McKenney*, 31 ECAB 861 (1980).

[3] *T.F.*, 60 ECAB ___ (Docket No. 08-1256, issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[4] *Roma A. Mortenson-Kindschi*, *supra* note 3 at 424. *See also Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

owned, maintained or controlled the parking facility, used the facility with the owner's special permission, or provided parking for its employees.[5]

## ***ANALYSIS***

On December 8, 2008 appellant slipped and fell while exiting from her truck in a parking lot located near the employing establishment. The record establishes that she had fixed hours and place of work and that her injury occurred while she was coming to work that morning. Her status at the time of injury was that of a "fixed premises" employee with fixed hours of work coming to work. Her injury therefore is subject to the "going and coming" rule generally applicable to such employees. Unless it occurred on the actual or constructive premises of the employer, her injury cannot be considered as sustained in the performance of duty.[6]

At the time of injury, appellant had arrived at the public parking lot but had not yet begun her tour of duty on the premises of the employer. Although appellant contended that the employing establishment premises should be construed as extending to the parking lot in this case, the evidence of record is insufficient to establish that the area on which appellant fell was owned, controlled, maintained or leased by her employer. The parking lot was not part of the actual premises of the employer for whom she works. Under the circumstances in this case, it cannot be said that appellant's injury occurred on the constructive premises of her employer. The Board has held that, under special circumstances, the employment premises are constructively extended to hazardous conditions which are proximately located to the premises and therefore may be considered as hazards of the employing establishment.[7] The primary consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[8] Appellant has not established that the parking lot where her injury occurred was used exclusively or principally by staff employees of the employing establishment for the convenience of the employer. The employer did not own the parking lot and was not responsible for its maintenance. The record reflects that it was owned as a public lot by the State of Missouri. Although employees of the VA clinic used the lot, they did not pay for use, were not assigned designated areas for their exclusive use nor did the employer check the lot for unauthorized use.[9] The employing establishment 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. The evidence does not establish that the employer's premises should be constructively extended to the parking lot in this case. The Board finds that the parking lot was owned by the State of Missouri and open for use by the public.

[5] *R.M.*, 60 ECAB ___ (Docket No. 07-1066, issued February 6, 2009); *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

[6] *Sallie B. Wynecoff*, 39 ECAB 186 (1987).

[7] *See Randi H. Goldin*, *supra* note 1 at 711.

[8] *Id*. *See also William L. McKenney*, *supra* note 2.

[9] *See Roma A. Mortenson-Kindschi*, *supra* note 3. See also *Rosa M. Thomas-Hunter*, *supra* note 5 at 504-05 (1991) (mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises of the employer).

Appellant's December 8, 2008 fall on ice and injury must be considered an ordinary, nonemployment hazard of her journey that morning to work, which was shared by all travelers. The parking lot was not so connected with the employer as to be considered part of the premises of the employing establishment clinic.

## ***CONCLUSION***

The Board finds that appellant failed to establish that her December 8, 2008 injury was sustained while in the performance of duty.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 15, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 27, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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