United States Department of Labor
Employees' Compensation Appeals Board

N.D., Appellant	)	
and	)	**Docket No. 11-1073**
	)	**Issued: December 28, 2011**
U.S. POSTAL SERVICE, DELIVERY DISTRIBUTION CENTER, Fife, WA, Employer	)	

Appearances:
Graham L. Howard, 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 March 25, 2011 appellant filed a timely appeal from a September 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 sustained an injury in the performance of duty on December 13, 2009.

FACTUAL HISTORY

On February 23, 2010 appellant, then a 47-year-old mail processing clerk, filed a traumatic injury claim Form CA-1 alleging that on December 13, 2009 she sustained injuries when she slipped on ice in the employees' parking lot. She stated that the incident occurred at

[1] 5 U.S.C. § 8101 *et seq.*

9:55 p.m. The reverse of the claim form listed appellant's regular work hours as 11:45 p.m. to 7:00 a.m. In a telephone call memorandum (Form CA-110) dated March 29, 2010, OWCP reported that appellant's supervisor stated that on December 13, 2009 her scheduled starting time was 10:30 p.m. The supervisor indicated that appellant was scheduled for "scheme training" to learn addresses for different mail routes.

In a statement dated March 30, 2010, appellant indicated that she came to work at approximately 9:55 p.m. on December 13, 2009 to work on the Combined Federal Campaign (CFC). She again indicated that she slipped on ice in the employees' parking lot.

By decision dated April 19, 2010, OWCP denied the claim for compensation. It found that appellant was not in the performance of duty at the time of the December 13, 2009 incident.

On July 30, 2010 OWCP received appellant's request for reconsideration. Appellant's representative stated that appellant was told by her supervisor to make 100 percent contact with every employee at the work facility for the purposes of the CFC. He asserted that she was "required to be at the facility at times other than her scheduled work hours" in order to fulfill her CFC obligations.

In a statement dated June 7, 2010, a union steward stated that appellant was required to make contact with every employee at the facility to perform her duties as a contact representative for the CFC. He stated that on numerous occasions she had to perform her CFC duties outside scheduled work hours.

The record contains a memorandum of an August 12, 2010 conference between an OWCP claims examiner and Julio Rodriguez, the employing establishment facility manager, who stated that the parking lot was leased by the employing establishment, but not owned or controlled by the employing establishment. Mr. Rodriguez indicated that certain mangers had assigned parking spaces, but employees parked in any unassigned parking space. According to him, the parking lot was easily accessible by the general public and was not monitored by the employing establishment to determine if there was unauthorized use. With respect to CFC duties, Mr. Rodriguez stated that appellant was responsible for only the mail processing employees and was not required to work beyond her scheduled work hours.

In a Form CA-110 dated April 19, 2010, OWCP reported that a supervisor, Mr. Edwards, stated that the parking lot was not owned, controlled or maintained by the employing establishment. According to Mr. Edwards, the building owner maintained the parking lot and the lot was used by the general public for commercial businesses shared by the other facilities.

By decision dated September 29, 2010, OWCP reviewed the merits of the claim for compensation. It denied modification of the prior decision, finding appellant was not in the performance of duty at the time of the December 13, 2009 incident.

LEGAL PRECEDENT

FECA 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."[2] The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[3]

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 the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[4]

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period, 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] This is generally known as the coming and going rule.[6]

The 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 owned, maintained or controlled the parking facility, used the facility with the owner's special permission, or provided parking for its employees.[7]

ANALYSIS

The question of whether an employee is in the course of employment at the time of injury is based on the time, place and activity involved in the alleged incident. Appellant stated that she was injured in a parking lot on December 13, 2009 at approximately 9:55 p.m. Her scheduled

[2] 5 U.S.C. § 8102(a).

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

[4] *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

[5] *See John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[6] *See R.C.*, 59 ECAB 427 (2008).

[7] *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991).

work hours for that shift, according to the employing establishment, began at 10:30 p.m. Therefore the time of the incident was prior to appellant's scheduled work shift when she is coming to work.

As noted, an employee who is coming to work and sustains an injury off the premises of the employing establishment is not considered to be in the course of employment. Therefore it is important to determine whether the place of the incident is considered to be part of the premises of the employing establishment. The evidence of record reflects that the parking lot was leased by the employing establishment for the use of employees. The mere use of a parking lot by employees does not itself bring the lot within the premises of the employing establishment.[8] The evidence did not establish that it was owned, maintained or controlled by the employing establishment. The facility manager Mr. Rodriguez stated that the parking lot was not controlled or monitored for exclusive use by the employing establishment and another supervisor indicated that it was used by the general public as well.

The employing establishment noted that there were limited spaces assigned to managers. There is no evidence that appellant was assigned a specific parking space or that the incident occurred in a space assigned to any employee.[9] Based on the evidence of record, the incident on December 13, 2009 occurred at a location that could have been used by an employee or the general public, in a parking lot that was not owned, maintained or controlled by the employing establishment. Weighing the factors noted above with respect to an employing establishment's premises, the Board finds that the December 13, 2009 incident did not occur on the premises of the employing establishment.

An analysis of the time and place of the December 13, 2009 incident establishes that it falls with the general "coming and going" rule that precludes coverage for an employee injured off premises while coming to work. With respect to the activity involved at the time of the incident, appellant alleged that she arrived at work earlier than her scheduled work shift because she intended to work on duties related to a CFC representative. The Board notes that the evidence from her supervisor did not support the assertion that she was required to work outside of scheduled work hours on CFC duties. Moreover, the "coming and going" rule is not based on the intended activity once the employee arrives on the premises of the employing establishment. Even if appellant were to establish that a job duty required her to be at work by 10:00 p.m. on December 13, 2009, this would not place her in the course of employment. The incident occurred in the parking lot as she was coming to work. Appellant remains within the "coming and going" rule and is not in the course of employment.

The Board finds that appellant was not in the course of employment at the time of the December 13, 2009 incident when she slipped and fell in a parking lot. Any injuries she sustained would not be considered to have occurred while in the performance of duty and she is not entitled to compensation under FECA. Appellant may submit new evidence or argument

[8] *Id.*

[9] *Cf. D.L.* 58 ECAB 667 (2007) (where the claimant had an assigned parking spot in a parking lot used solely by employees).

with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

On appeal, appellant states that the supervisor's statements are not supported by the evidence of record. To the extent she is referring to the statements regarding the parking lot, the supervisor's statements are the evidence of record. If appellant has additional evidence or argument, particularly with respect to the factors noted above to determine the constructed premises of the employing establishment, she may submit such evidence or argument with an application for reconsideration to OWCP. Based on the evidence of record, OWCP properly denied her claim for compensation in this case.

CONCLUSION

The Board finds that appellant was not in the performance of duty at the time of the December 13, 2009 incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 29, 2010 is affirmed.

Issued: December 28, 2011
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