United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 12-165**
	)	**Issued: July 26, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 2, 2011 appellant, through his attorney, filed a timely appeal from an August 22, 2011 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 November 29, 2010.

FACTUAL HISTORY

On December 11, 2010 appellant, then a 29-year-old letter carrier, filed a traumatic injury claim Form CA-1 alleging that on November 29, 2010 at approximately 5:00 p.m. his left kneecap dislocated as he walked towards his car, causing him to fall. Winnie Acord, appellant's

[1] 5 U.S.C. § 8101 *et seq.*

supervisor, noted on the claim form that the injury did not occur in the performance of duty as it occurred after work, as appellant was walking to his car in an offsite lot. Appellant's work hours were noted as 7:00 a.m. until 5:00 p.m.

In a January 6, 2011 letter, OWCP notified appellant of the deficiencies of his claim and provided him an opportunity to submit additional evidence.

David Mast, the employing establishment's Health and Resource Manager controverted appellant's claim by letter dated January 11, 2011 on the grounds that the alleged injury did not occur on premises during work hours. He stated that appellant was "off the clock, having concluded his [workday] and was in an off-site parking lot" when injured.

Mr. Acord related in a January 11, 2011 statement that the incident occurred at approximately 5:45 p.m. after appellant ended his tour of duty. He also stated "As [appellant] walke[d] to his car in the lot next door to [employing establishment], his left kneecap dislocated. [Appellant] was off the clock and off the premises."

OWCP denied appellant's claim in a February 10, 2011 decision on the grounds that he failed to establish that he was in performance of duty when he sustained his alleged injury.

Appellant requested reconsideration on March 23, 2011. Along with the request, he submitted a statement dated March 15, 2011 in which he related that he was in fact on the postal property at the time of incident and attached a map of the property survey, on which he identified the location of his fall. The scanned copy of the map is illegible.

OWCP also received a witness statement from Robert Paskute, a coworker, who stated that although he did not see appellant fall, he was the first person to respond to his call for help. Mr. Paskute noted that when he arrived, appellant "was about 15 to 20 feet away from the back of the building in the parking lot along the fence line." He stated that he had enclosed a map wherein he circled where he believed appellant's injury occurred. The scanned copy of this map is also illegible.

In a letter dated April 8, 2011, Mr. Mast indicated that Mr. Acord, the station manager, provided a statement in which he related that although he did not witness the incident, when he went out to see what had happened, he found appellant in the parking lot next door to the employing establishment. He explained that the parking lot next door was owned by the Lithuanian club and was open to members of the club, their customers, as well as postal employees. In addition, Mr. Mast opined that "if [appellant] was in that much pain he could not or would not have [gone] out of the [employing establishment] with his injury at the time."

By decision dated April 20, 2011, OWCP affirmed the denial of appellant's claim. Appellant again requested reconsideration on May 25, 2011.

In support of this request for reconsideration, appellant submitted a May 17, 2011 statement from Mr. Acord that "from where [appellant] has shown that he was injured, it is on [p]ostal property."

The employing establishment submitted a June 28, 2011 letter, wherein Mr. Mast related that he had spoken with Mr. Acord again and that he had related that a carrier came into the building and told him that appellant had hurt his knee and was in the lot next door of the employing establishment. When Mr. Mast went out, appellant was in the adjacent lot sitting on the ground. Appellant popped his knee back into place and then got to his car with a carrier's help and went home. Mr. Mast opined that from this account, if appellant was sitting on the ground with his knee out of place, it was unlikely that he would have been able to move from a different location. Furthermore, he contended that, if appellant's knee had been injured on postal property, he should have returned to the employing establishment to report his injury rather than continue on to another location and he would have had no reason to be in the parking lot where he was found.

Appellant responded in a July 20, 2011 statement that Mr. Mast's June 28, 2011 letter contained many factual inaccuracies. He related that when Mr. Acord saw him, his knee had already popped back in place and he was walking around to test its stability, instead of sitting down with it dislocated. Appellant also claimed that he had asked Mr. Acord whether the employing establishment's June 28, 2011 letter accurately reflected Mr. Acord's statements, he responded "no, that is [not] what I had told him." He maintained in the statement that he was on postal property when he fell and dislocated his knee.

In an August 22, 2011 reconsideration decision, OWCP affirmed its prior decision, finding that appellant fell outside of postal property and as such his injury did not occur in the performance of duty.

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.

[2] *Id.* at § 8102(a).

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

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

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]

An injury does not have to be confirmed by eyewitness in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she had established a *prima facie* claim for compensation. However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[9]

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. The Board has held that if the employee has fixed hours of work, injuries occurring on the premises of the employing establishment while the employee is going to or from work and for a reasonable time before or after working hours are generally compensable. If the injury occurs outside of regular work hours, the employee's presence on premises must be incidental to work activity.[10] Appellant related that the injury occurred at approximately 5:00 p.m., just as he was leaving work following his shift. His supervisor's statement dated January 11, 2011 indicated that the incident occurred at approximately 5:45 p.m., just after appellant finished his shift, as he was leaving

[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).

[8] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[9] *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[10] *A.C.*, Docket No. 11-952 (issued March 9, 2012); *see also L.K.*, 59 ECAB 465 (2008).

work. There is no dispute but that the injury occurred shortly after appellant finished his shift on November 29, 2010. The Board finds that his alleged injury occurred within a reasonable interval after his work shift.

As noted, an employee who is going from 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 mere use of a parking lot by employees does not itself bring the lot within the premises of the employing establishment.[11] The employing establishment claimed, and appellant did not dispute, that when his supervisor came to investigate his injury, he was found in the adjacent parking lot. It stated that the adjacent parking lot was owned by Lithuanian club and the parking lot was open to club members as well as postal employees. Based on the evidence of record, the club's parking lot could have been used by an employee or the general public, and it was not owned, maintained or controlled by the employing establishment. The Board finds that the Lithuanian club's parking lot was not within the premises of the employing establishment.

The Board also finds that appellant has not met his burden of proof to establish that he fell on postal establishment premises. The evidence of record remains unclear as to whether his injury occurred in the postal establishment parking lot. According to appellant's March 15, 2011 statement, his injury occurred on postal property. A witness statement indicated that he did not witness appellant's fall and that when he found appellant, he "was about 15 to 20 feet away from the back of the building in the parking lot along the fence line." This statement remains unclear as to whether the parking lot referred to was the postal lot or the club lot next door. Also while the witness enclosed a map, which circled the location of the alleged injury, the map is illegible.

Mr. Acord, initially noted in a January 11, 2011 statement that appellant's injury occurred off premises. In a May 17, 2011 statement, he advised that if appellant's injury occurred where he said it did, it was on premises.

The employing establishment, however, controverted this claim by pointing out that appellant was found by Mr. Acord on the day of incident in the Lithuanian club's parking lot. It further claimed that Mr. Acord reported that appellant was found sitting on the ground, with his knee dislocated. The employing establishment argued that it was very unlikely that appellant would have been able to move from the postal property where he claimed he was injured to the club's parking lot, where he was found.

In his July 20, 2011 statement, appellant disputed the employing establishment's argument, alleging that Mr. Acord later denied having made the statement that he had found appellant sitting on the ground. Appellant alleged that he was found standing and his knee was in place. He further claimed that he was walking in order to test whether his knee condition had stabilized. Appellant did not however submit a statement from Mr. Acord corroborating these statements. While there are no witnesses to his account, the Board has held, as noted above, that an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence. In the

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

present case, however, appellant did not submit sufficient evidence to resolve the discrepencies in the evidence of record as to where his fall occurred. The Board also notes that while his alleged injury occurred on November 29, 2010, he waited until December 11, 2010 to file his claim.

Appellant did not meet his burden of proof to establish that his fall occurred on November 29, 2010 in the performance of duty. He may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on November 29, 2010 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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