United States Department of Labor
Employees' Compensation Appeals Board

G.N., Appellant	)	
and	)	**Docket No. 12-261**
	)	**Issued: July 23, 2012**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Fort Smith, AR, Employer	)	

Appearances:
R. Bobby Devadoss, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2011 appellant, through his attorney, filed a timely appeal from the August 9, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a February 4, 2011 work injury. 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 met his burden of proof to establish that he sustained an injury in the performance of duty on February 4, 2011.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 15, 2011 appellant, then a 60-year-old lead transportation security officer, filed a traumatic injury claim alleging fractured left ankle bones at 1:00 p.m. on February 4, 2011 due to a fall on ice in the employee parking lot at Fort Smith Regional Airport.[2] His regular work schedule was Tuesday through Friday from 4:30 a.m. to 1:00 p.m. Arthur Pruitt, a supervisor, indicated that appellant fell after he had signed out for the day and was headed to his private vehicle to go home. He stated that appellant was next to his private vehicle in the airport employee parking lot when he fell and was not engaged in work duties at the time. Mr. Pruitt indicated that the parking lot was not owned, controlled or maintained by the employing establishment, but rather was owned by the Fort Smith Regional Airport.

In a February 23, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. On February 23, 2011 it also requested that the employing establishment answer various questions about the ownership, control and maintenance of the parking lot where appellant fell on February 4, 2011.

In a March 22, 2011 statement, appellant stated that on February 4, 2011 he had exited the Fort Smith Regional Airport terminal building at the conclusion of his assigned shift at 1:00 p.m. and walked with a coworker to his vehicle while discussing the events of the day. He described the snow and icy conditions that day and stated that airport maintenance staff put a de-icing substance on the sidewalk and walking spaces. Appellant fell on a patch of ice and snow when he arrived at his vehicle. He stated that the fall occurred in the permit-only parking lot at the west side of the Fort Smith Regional Airport terminal building about 50 feet from the entry door of the terminal. Appellant asserted that the parking lot was only for the use of airport personnel. He acknowledged that the parking lot was not owned, controlled or managed by the employing establishment, but stated that it was "under the oversight of the airport, its Commission and the City of Fort Smith, Arkansas." Appellant noted that, through a lease arrangement, the employing establishment paid for space within the airport and that, as part of that arrangement, employees were to park in that lot. He asserted that when he transferred to that airport he was told to park in the lot. Therefore, appellant believed that it was a requirement to park there. He stated that airport maintenance staff swept, de-iced and provided a safe location for its personnel in the lot plus all sidewalks and roads used by the general public, but did not do so for the areas of permit-only parking used by the airlines, vendors and employing establishment personnel.

Appellant submitted two February 5, 2011 statements in which coworkers indicated that they heard or observed appellant fall on ice next to his truck in the airport employee parking lot on February 4, 2011. Medical records from the St. Edward Mercy Hospital detailed the history of injury occurring on February 4, 2011 and diagnosed closed fractures of the shafts of the left fibula and tibia.

In a February 24, 2011 statement, Yvonne Rivera, a program assistant with the employing establishment, advised that the parking lot was not owned, leased, operated or

[2] Appellant submitted medical reports detailing his left leg condition.

maintained by the employing establishment, but rather was owned, operated and maintained by the airport itself, which was a separate entity. She noted that all sidewalks and covered walkways on the airport property including ones in and connecting the terminals to parking lots and loading/waiting areas were not owned, leased, operated or maintained by the employing establishment, but rather were owned, operated and maintained by the airport.

In an April 1, 2011 decision, OWCP found that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on February 4, 2011. It noted that his February 4, 2011 fall occurred off the employing establishment premises in a parking lot that was not owned, leased, operated or maintained by the employing establishment. OWCP indicated that appellant had not supported his assertion that the airport maintenance staff maintained all areas of the parking lot except for the permit-only area used by employing establishment staff. Appellant's activity at the time of his fall leaving work after clocking out at the end of his shift, did not bring him within the performance of duty.

Appellant requested reconsideration of his claim and his counsel provided a May 25, 2011 letter containing arguments in support of his claim. Counsel contended that the evidence supported that appellant was within the performance of duty when he fell on February 4, 2011, noting that the definition of premises does not necessarily depend on ownership. He asserted that the parking lot was on airport property, that it was directly connected to the building where appellant's duty station was located. The parking lot was where the employing establishment required appellant to park and was a gated and patrolled area that could only be accessed with an employing establishment badge.[3] Counsel stated that appellant did not pay for parking and did not request the parking lot access card which allowed entrance to an area of the parking lot exclusively for employees of the employing establishment. He noted that the employing establishment section of the parking lot was not maintained by the airport with regard to snow or ice removal and asserted that the area was monitored to ensure that only employees of the employing establishment parked there.

Counsel further argued that there were recognized exceptions to the premises rule when it came to hazardous conditions which were proximate to the premises and asserted that the hazardous conditions in the present case were ice and snow. He indicated that appellant had to traverse the parking lot to gain access to his workstation and that therefore the hazards of that route become the hazards of his employment. Counsel asserted that, although the injury occurred after work, there was no need to inquire about injuries occurring before or after work unless the interval between the work hours and the injury seemed excessive. He concluded by stating that workers' compensation statutes were to be liberally construed in favor of employees.

The employing establishment responded to counsel's May 25, 2011 letter. On June 22, 2011 Ms. Rivera noted that the badge mentioned by counsel was a Security Identification Display Area Badge, the primary function of which was to gain access to secure areas within the airport, not just to access the parking. The badges are issued and owned by the airport and the employing establishment designation on the badge only identified the agency or company for which a person worked. Ms. Rivera stated that the designation of parking areas was made by the

[3] Counsel indicated that the parking badge was produced by the airport and provided to appellant through the employing establishment.

airport and that the employing establishment did not require staff to park in the parking lot. The parking lot was utilized by all airport employees, not just employing establishment staff, and that the airport was responsible for maintenance of the parking lot. Ms. Rivera reiterated that the parking lot was not in any way owned, leased, operated or maintained by the employing establishment, but rather was owned, operated and maintained by the airport along with all sidewalks and covered walkways on the airport property, including those connecting terminals to parking lots and loading/waiting areas. She asserted that appellant's injury did not occur in the performance of duty but arose from the ordinary, nonwork hazards shared by all travelers going to and from work.

In a July 14, 2011 letter, counsel argued that the employing establishment's statements confirmed that appellant could not gain access to his workstation without the badge. He acknowledged that the parking lot was not exclusively for employing establishment staff, but rather was for employing establishment staff and airport employees combined. Counsel stated that the public could not park in the lot and claimed that using the badge was the only way to access the entrance doors directly connected to the parking lot which constituted the only route to appellant's duty station.

In an August 9, 2011 decision, OWCP affirmed its April 1, 2011 decision finding that appellant did not establish that he sustained an injury in the performance of duty on February 4, 2011. It found that his arguments did not change the fact that the February 4, 2011 fall occurred off the employing establishment premises at a time when he had clocked out and was not performing work duties or activities incidental to his employment. Appellant did not show that the premises were constructively extended to the parking lot where he fell.

LEGAL PRECEDENT

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] 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."[5] "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 his master's business, at a place when he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his 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,

[4] 5 U.S.C. § 8102(a).

[5] 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).

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.[6]

As a general rule, 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 and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[7] When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.[8] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[9] or which are in the nature of necessary personal comfort or ministration.[10]

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.'"[11]

The Board has also pointed out that factors which determine whether a parking lot 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

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[6] *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).

[7] *Mary Keszler*, 38 ECAB 735, 739-40 (1987).

[8] *Donna K. Schuler*, 38 ECAB 273, 274 (1986).

[9] The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: "(1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer." *Betty R. Rutherford*, 40 ECAB 496, 498-99 (1988); *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[10] *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

[11] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

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.[12]

Another exception to the rule is the proximity rule which the Board has defined by stating that, under special circumstances, the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment.[13] The Board has generally held that conditions caused by weather, including snow, ice and rain, are not special hazards. Rather they are dangers inherent to the commuting public.[14]

ANALYSIS

On February 15, 2011 appellant filed a traumatic injury claim alleging that he sustained fractured left ankle bones at 1:00 p.m. on February 4, 2011 due to his fall on ice in a parking lot at Fort Smith Regional Airport. His regular work schedule was Tuesday through Friday from 4:30 a.m. to 1:00 p.m. Appellant had clocked out and was walking to his vehicle in order to leave work just prior to his fall, which occurred on a patch of ice and snow located next to where his vehicle was parked.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on February 4, 2011.

Appellant's claimed injury occurred off the premises of his employing establishment after he had clocked out from work at the regular end of his workday and while he was leaving work. As a general rule, 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 and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[15] The evidence reveals that the parking lot where appellant fell was not owned, leased, operated or maintained by the employer, but rather was owned, operated and maintained by Fort Smith

[12] *Diane Bensmiller*, 48 ECAB 675 (1997); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

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

[14] *See Denise A. Curry*, 51 ECAB 158 (1991); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[15] *See supra* note 7.

Regional Airport, an entity distinct from the employing establishment.[16] Appellant did not present sufficient evidence to establish that his claimed injury occurred on the premises of the employing establishment. Although the definition of the employment premises is not solely dependent on the status or extent of legal title or control, he has not established any relationship of the injury site to his employment.[17] There is no indication that the employing establishment controlled or maintained the parking lot, nor did the employing establishment have exclusive use of the parking lot. The evidence reveals that employees of the airport also used the lot. Appellant and his counsel asserted that the employing establishment directed him to park in the lot, but the employing establishment denied this was the case and no evidence was submitted to support the assertion. Counsel cited Board cases regarding the standards for constructively extending an employing establishment premise to a given nonpremises area, but he did not adequately explain how these cases were relevant to the facts of the present case.

The evidence indicates that appellant's claimed injury occurred away from his place of employment while he was engaged in nonemployment activities and encountered hazards that were shared by the general public. Counsel argued that the industrial premises were constructively extended to the hazardous conditions in the parking lot where appellant fell on February 4, 2011 because these hazards were proximately located next to the premises and therefore should be considered as hazards of the employing establishment. Appellant fell on snow and ice but the Board has generally held that conditions caused by weather, including snow, ice and rain, are dangers inherent to the commuting public and do not constitute special hazards.[18]

Appellant has not established that any of the exceptions to the general rule regarding off-premises injuries are applicable. As noted above, he was off the clock and was leaving work when he fell on February 4, 2011 and he has not shown that he was performing work duties or actions incidental to his work duties at the time of the alleged injury. Appellant has failed to show that the claimed injury was sustained on February 4, 2011 in the performance of duty, because he has failed to establish that it arose out of and in the course of employment.

Appellant may submit new evidence or argument 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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on February 4, 2011.

[16] Before OWCP and on appeal, counsel argued that the airport maintenance staff did not maintain the permit-only area used by employing establishment staff. However, no evidence was submitted to support this claim.

[17] *See supra* notes 11 and 12.

[18] *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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