United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 11-1320**
	)	**Issued: September 5, 2012**
DEPARTMENT OF HONMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Egg Harbor Township, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2011 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' (OWCP) December 27, 2010 merit decision rescinding its acceptance of her traumatic injury claim. 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 OWCP met its burden of proof to rescind acceptance of appellant's traumatic injury claim on the grounds that she was not in the performance of duty when injured on June 28, 2003.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 8, 2003 appellant, then a 47-year-old transportation screener, filed a traumatic injury claim alleging that on June 28, 2003 she sustained injuries to her hands and knees when she stepped into a hole and fell on her way to work. At the time of the incident, she was walking up the back walkway of the airport with a coworker. Appellant's claim was accepted for contusions of the knees and hands bilaterally, bilateral carpal tunnel syndrome and right knee medial meniscus tear and she was placed on the periodic rolls.

On February 16, 2010 the employing establishment asked OWCP to review appellant's claim, contending that it had been accepted in error. It stated that appellant's injury had occurred off-premises on a walkway between two parking lots, neither of which was owned or maintained by the employing establishment. Rather, the parking lot in which appellant had parked was owned and operated by the South Jersey Transit Authority (SJTA) and was available to all airport employees.

On April 7, 2010 OWCP issued a proposed notice of rescission of appellant's claim on the grounds that her injury had not occurred in the performance of duty. Appellant was given 30 days to provide evidence or argument in response to OWCP's notice.

In a letter dated April 16, 2010, appellant's representative objected to the proposed rescission. He contended that OWCP had not conducted a sufficient investigation to determine whether the employing establishment exercised control over the parking facility. Counsel asked that OWCP obtain evidence from the employing establishment to confirm that the injury did not occur in the course of employment, on the premises or in the parking lot assigned to its employees. Specifically, he requested information relative to whether or not the employing establishment instructed employees to use the parking area, whether or not specific spaces were assigned by the employing establishment, whether or not the employees required a parking sticker to park there, whether or not the parking areas were checked to make sure that no unauthorized cars were parked in the lot and whether or not the parking was provided at no cost to the employees.

In a May 10, 2010 letter, the employing establishment indicated that SJTA owns the Atlantic City International Airport and maintains all parking lots, grassy areas, *etc*. New employees are shown the two employee parking lots, both of which are available, free of charge, on a first-come, first-serve basis to all airport employees, including transportation security administration (TSA) employees, airline employees and restaurant workers. To get to the terminal building, employees must walk from one parking lot to another lot in front of Midlantic. At the end of the first parking lot, there is a grassy area on which appellant walked to go to the terminal building and also the sidewalk on which she was supposed to walk. The parking lot and sidewalk to the terminal building are lit, but the grassy area where she fell is not.[2]

By decision dated May 14, 2011, OWCP finalized its determination to rescind its acceptance of appellant's claim. It found that her injury occurred off premises, prior to her tour of duty, and in an area that was not owned, maintained or controlled by the employing

[2] The employing establishment provided an illegible map of the airport and parking facilities.

establishment. OWCP further found that appellant was not engaged in any employment-related activity at the time of the injury.

On May 21, 2011 appellant requested an oral hearing. On August 12, 2010 she submitted four photographs of the parking area at issue in this case. One of the photos showed a sign containing the following words: "EMPLOYEE PARKING BY PERMIT ONLY. OTHERS WILL BE TOWED." Another photo showed a fence perpendicular to a building. The remaining two photos were not legible.

At the September 8, 2010 hearing, appellant testified that she was given a parking permit by the employing establishment entitling her to park in an employee lot at no cost. Only employees were permitted to park in the lot, and all others would be towed away at their own expense. The employing establishment forbade her from parking in the lot closest to the terminal building. In order to get from the permit lot to the employing establishment, appellant had to walk through another lot and a grassy area located in the back of the airport. At approximately 4:00 a.m. on date in question, she was walking in the grass on a direct route from the lot to the airport to begin her shift when she stepped in a hole and fell. Appellant could have walked on the road, but rather chose to walk on the grass for safety reasons. She testified that she was unfamiliar with the grassy area and could not see the hole because the area was not lit.

On October 5, 2010 the employing establishment stated that employees were not required to park in the lots owned and operated by SJTA, although parking was made available to them at no cost. Employees always had the option of riding public transportation or being driven to work. Appellant was injured on a public walkway and was not performing a task that was incidental to her employment at the time of the injury.

By decision dated December 27, 2010, OWCP's hearing representative affirmed the May 14, 2010 decision, finding that OWCP had met its burden to justify the rescission of its acceptance of appellant's claim. The representative found that appellant was not in the performance of duty at the time of the June 28, 2003 incident, which occurred off-premises, during nonwork hours. Accordingly, the premises doctrine was not applicable in this case.

On appeal, counsel argues that appellant's injury should be covered by the proximity rule, as the employing establishment created the hazard that caused her injury by forcing her to walk in the grassy area; that it is against equity and good conscience to declare an overpayment because the employing establishment failed to provide relevant evidence prior to acceptance of the claim; and that further development of the evidence is necessary.

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.[3] 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

[3] 5 U.S.C. § 8102(a).

employment.[4] 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.[5]

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."[6]

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.[7] 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 hazards of that route become the hazards of the employment.[8] 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.[9]

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

[4] 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).

[5] *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).

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

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

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

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

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.[10]

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application.[11] The Board has upheld OWCP's authority to reopen a claim at anytime on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.[12]

ANALYSIS

OWCP rescinded acceptance of appellant's claim on the grounds that she was not in the performance of duty at the time of the June 28, 2003 injury, as the injury occurred while she was on her way into work, in an off-premises location that was not restricted to federal employees and was not owned, maintained or controlled by the employing establishment. As noted, it has the burden to justifying its termination of her compensation, providing a clear explanation of its rationale for rescission.[13] Based on the evidence of record, the Board is unable to determine whether appellant's injury occurred in the performance of duty. The Board finds, therefore, that the case is not in posture for decision.

Appellant alleged that employees had to walk from the employee parking lot across the area where the accident occurred in order to reach the employing establishment. There is no evidence of record indicating that the employing establishment owned or was responsible for the maintenance of the grassy area or adjacent sidewalk/road. At the time of his injury, appellant had fixed hours and place of work, and was traveling from the employee parking lot to the employing establishment. Barring an exception to the general rule, the injury was an ordinary, nonemployment hazard of the journey to work itself which is shared by all travelers.[14] The issue, then, becomes whether the path between the two parking lots should be considered part of the premises.

[10] *R.M.*, 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).

[11] 5 U.S.C. § 8128.

[12] *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[13] *Id.*

[14] *Denise A. Curry*, *supra* note 6; *Jacqueline Nunnally-Dunford*, 36 ECAB 217 (1984).

The premises of the employer are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employer.[15] In order to determine, however, whether the grassy area between the two lots is part of the premises, the Board must first determine whether the parking lot in which appellant was parked is considered to be part of the employing establishment premises.

As noted, in determining whether the parking lot should be considered to be a part of the employing establishment's premises, the Board must consider such factors as whether the employing establishment contracted for its exclusive use by its employees, whether spaces were assigned by the employing establishment, whether the area was 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. The evidence of record is conflicting and inconclusive. The employing establishment stated that the parking lot in which appellant parked, as well as the grassy area on which she fell, was owned and operated by the SJTA and that both employee parking lots were available, free of charge, on a first-come, first-serve basis to all airport employees. Appellant, on the other hand, stated that she was given a parking permit by the employing establishment entitling her to park at no cost in an employee lot at the far end of the airport. She was allegedly forbidden to park in the lot closest to the terminal building. Appellant testified and presented a photograph of a sign reflecting that employees only were permitted to park in the lot, and all others would be towed away at their own expense.

The Board has held that a parking lot may be considered part of the employment premises where it has been established that the employer owned, maintained or controlled the parking facility or provided the parking for its employees.[16] Counsel requested an investigation by OWCP to obtain information relative to whether or not the employing establishment had instructed employees to use the parking area, whether or not the employees required a parking sticker to park there and whether or not the parking areas were checked to make sure that no unauthorized cars were parked in the lot. OWCP, however, did not sufficiently develop the evidence. Without answers to these questions, the Board is unable to determine whether the lot in which appellant parked is considered part of the employing establishment premises. By extension, it is not possible to determine whether the area on which appellant fell between the two parking lots can be considered part of the employing establishment premises.

The Board finds that the factual evidence of record was not sufficiently developed by OWCP to permit a fully informed adjudication of the premises issue. Therefore, the case is not in posture for a decision as to whether OWCP properly rescinded its acceptance of appellant's claim. The Board will set aside OWCP's December 27, 2010 decision and remand the case for

[15] As noted by A. Larson, in his work, *The Law of Workers' Compensation* § 13.04(4)(a) compensation is generally awarded when an injury occurs as an employee travels along or across a public road between two portions of the employer's premises, whether coming and going or pursuing active duties. Section 13.04(4)(b) states, "[M]ost courts hold that an injury in a public street or other off-premises place between the plant and parking lot is in the course of employment, being on a necessary route between the two portions of the premises."

[16] *Gladys W. Hansen*, 8 ECAB 603 (1956). The Board does not consider absence of direct control over a parking lot by an employer to be an absolute bar to compensation. *Id.*

further development of the evidence. After such development as it deems necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly rescinded its acceptance of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development in accordance with the terms of this decision.

Issued: September 5, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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