

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

D.A., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Indianapolis, IN, Employer)

Docket No. 13-794
Issued: August 28, 2013

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 19, 2013 appellant timely appealed the September 25, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty.

FACTUAL HISTORY

On June 22, 2012 appellant, then a 49-year-old nurse, fell while walking to work. The claim form (CA-1) indicated that she was injured on the "sidewalk" outside the Indianapolis (Richard L. Roudebush) Veterans Affairs Medical Center (VAMC). Appellant reportedly fell

¹ 5 U.S.C. §§ 8101-8193.

coming up the sidewalk from W. Michigan St. to N. Porto Alegre St. She had parked her personal vehicle on a nearby public street and walked the remaining distance to work.²

As a result of the fall, appellant sustained injuries to her left elbow and both knees. Later that same day, she was treated at the VAMC emergency department for multiple minor abrasions and was released without restrictions. On July 2, 2012 appellant experienced swelling and pain in both knees, right greater than left. She had previously undergone knee surgery secondary to arthritis. July 5, 2012 x-rays of both knees were negative for fracture, effusion, malalignment or significant degenerative changes. Appellant was advised to perform sedentary work for one week. She continued to experience pain and swelling and was later restricted to no more than two hours of standing per day. A subsequent magnetic resonance imaging scan of both knees revealed bilateral chondromalacia of the patellae. Appellant was prescribed anti-inflammatory medication and referred for physical therapy which she began on July 31, 2012.

The employing establishment challenged appellant's claim on the basis that she was off-premises and not on duty at the time of her injury. In an August 27, 2012 memorandum, it indicated that appellant's June 22, 2012 injury occurred prior to her arrival at work. Appellant's normal tour of duty was 8:00 a.m. to 4:30 p.m. On Friday, June 22, 2012 she requested a few hours of sick leave for that morning.³ Appellant fell at 11:00 a.m. while walking into work. The employing establishment provided a map of the Indianapolis VAMC facility highlighting the area where she had reportedly fallen. According to the map, appellant fell on the sidewalk along N. Porto Alegre St. just north of the intersection at W. Michigan St. The City of Indianapolis reportedly owned and maintained the sidewalk along N. Porto Alegre St. However, the city had granted police jurisdiction over the area to the employing establishment.

By decision dated September 25, 2012, OWCP denied appellant's claim because she was not in the performance of duty at the time of her June 22, 2012 injury. The claim was essentially denied because her "injury did not occur on federal property." OWCP found that the place where the incident occurred was not on property owned, leased, controlled or maintained by the Federal Government.

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."⁴ In order to be covered, 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 where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her

² Appellant parked on N. White River Parkway West Dr. and walked across the bridge at W. Michigan St. The location where she parked was reportedly a third (.33) of a mile from the employing establishment. Her employer provided off-site parking with shuttle service; however, that particular day appellant chose not to avail herself of the VAMC-sponsored off-site parking/shuttle service.

³ Appellant took leave from 8:00 a.m. until 11:15 a.m.

⁴ 5 U.S.C. § 8102(a).

employment or engaged in doing something incidental thereto.⁵ For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time, is compensable.⁶ However, that same employee with fixed hours and a fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.⁷ The reason for the distinction is that the latter injury is often merely a consequence of the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.⁸

The employing establishment premises may include all the property owned by the employer.⁹ Although an employer does not have ownership and control of the place where an injury occurred, the locale may nevertheless be considered part of the premises.¹⁰ The proximity exception to the premises rule states that under certain circumstances the industrial premises are constructively extended to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employing establishment.¹¹ Underlying the proximity exception is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.¹² The most common ground of extension is that the off-premises location where the injury occurred lies on the only route or at least on the normal route that employees must traverse to reach their employer, and as such, the particular hazards of that route become the hazards of employment.¹³ Relevant factors to be considered include whether the employer contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.¹⁴

ANALYSIS

Appellant has challenged OWCP's finding that her injury occurred off-premises. She noted that, while the City of Indianapolis reportedly owned the sidewalk where she fell, her employer admittedly had police jurisdiction over the area in question. Appellant also noted that she and her fellow employees believed the surrounding area was part of the Indianapolis VAMC

⁵ *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

⁶ *Id.*; *Denise A. Curry*, 51 ECAB 158, 160 (1999); *Narbik A. Karamian*, 40 ECAB 617, 618-19 (1989).

⁷ *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

⁸ *Id.*

⁹ *Denise A. Curry*, *supra* note 6.

¹⁰ *Id.*

¹¹ *D.M.*, Docket No. 13-535 (issued June 6, 2013).

¹² *F.S.*, Docket No. 09-1573 (issued April 6, 2010).

¹³ *Id.*

¹⁴ *Id.*

facility because employees were not allowed to park there without a special permit. In response, the Director argued, *inter alia*, that appellant fell on a public sidewalk that was not owned or controlled by the employing establishment.

The Board finds that the case is not in posture for decision.

The employing establishment's map identified appellant as having fallen on the sidewalk adjacent to N. Porto Alegre St. just inside what appears to be the south entrance to the Indianapolis VAMC facility off W. Michigan St.¹⁵ N. Porto Alegre St. runs north/south and represents the western boundary of the facility. The sidewalk where appellant reportedly fell is located on the west side of N. Porto Alegre St., and just beyond the sidewalk is parkland bordering White River. The facility map identified N. Porto Alegre St. as an access road to the Indianapolis VAMC and also a restricted-access parking location. There are designated curbside parallel parking spaces along both sides of N. Porto Alegre St., as well as clearly defined patient/visitor parking lots abutting the east side of the roadway. The area where appellant fell was also adjacent to the old employee parking garage.¹⁶

The employing establishment advised OWCP that the City of Indianapolis granted it police jurisdiction over the N. Porto Alegre St. area and the adjacent sidewalk but the city owned and maintained the sidewalk area.

Appellant claims her employer controlled parking access along N. Porto Alegre St., but that information is not otherwise substantiated in the record. The city reportedly granted the employing establishment police jurisdiction over the area; however, the full extent of its jurisdiction/control is not evident from the current record. Accordingly, the Board finds that the case is not in posture for decision. On remand, OWCP should obtain additional information regarding the employing establishment's jurisdiction/control over N. Porto Alegre St. and the adjacent sidewalk. After it has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

¹⁵ The employing establishment's mailing address is 1481 West 10th Street, Indianapolis, IN. The facility map identifies West 10th Street as its northern boundary. N. Porto Alegre St. intersects with West 10th Street at the northwestern corner of the Indianapolis VAMC facility, and it intersects with W. Michigan St. at the southwestern corner of the property.

¹⁶ Construction of a new parking garage began in May 2011. As a result, the employing establishment provided alternate off-site parking with shuttle service between two remote parking lots and the Indianapolis VAMC. The off-site parking lots were approximately two and one-half miles from the employing establishment.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: August 28, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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