United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 13-510**
	)	**Issued: June 10, 2013**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Tampa, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2013 appellant filed a timely appeal from the September 5, 2012 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 met his burden of proof to establish that he sustained an injury in the performance of duty on April 27, 2012.

FACTUAL HISTORY

On April 27, 2012 appellant, then a 21-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging a left hand injury in the performance of duty on that

[1] 5 U.S.C. §§ 8101-8193.

day. While he was waiting for an elevator at 9:30 a.m., a cart full of bins being transported by a skycap tipped over and landed on his left hand, causing a small laceration and swelling. Appellant noted that the injury occurred at "red elevators, baggage claim, Tampa [International] Airport." On the CA-1 form, Deborah Dempsey, a supervisor, controverted the claim, stating that he was not on duty or on the employing establishment premises when the incident occurred. She noted that the incident occurred in an airport public area. Appellant's regular work hours were 10:00 a.m. to 3:00 p.m., Tuesday through Saturday.[2]

In a May 7, 2012 letter, OWCP advised appellant of the deficiencies in his claim. It provided him the opportunity to submit additional factual and medical evidence. Appellant was provided 30 days to submit the requested information. The employing establishment was also requested to provide additional comments.

In response, appellant submitted medical and factual evidence. In an undated statement, he noted that the injury occurred at around 9:30 a.m. on April 27, 2012. Appellant had just gotten off of an employee bus on the first floor (baggage claim area) of the Tampa International Airport. While waiting for the elevator in order to go the third floor of the building where he worked, an airport employee with a high stack of large bins was also waiting next to him. As the elevator doors opened, the airport employee pulled the cart and the stack of bins started leaning and falling towards appellant. Appellant extended his left hand in order to move the bins out of the way so that they would not fall on top of him. As a result, the bins crushed his left hand against the wall by the entrance of the elevator, causing small lacerations with a small amount of blood. Appellant immediately reported the incident to Ms. Dempsey and he was taken to the hospital for evaluation and treatment. He noted that he was initially released to light-duty work and, on May 8, 2012, returned to full-duty work with no restrictions.

In a May 17, 2012 statement, William McClung, an official with the employing establishment, indicated that, at the time of the claimed April 27, 2012 injury in the Landside Terminal Building,[3] appellant was not on any premises which were owned, operated or controlled by the employing establishment. The time of the claimed injury was 9:20 a.m. (the time the original injury was called into the employing establishment's Coordination Center) and occurred 40 minutes prior to the start of appellant's shift. Mr. McClung stated that appellant was conducting personal business prior to work hours in a different building other than the one where his assigned work area was located.

In a June 11, 2012 decision, OWCP denied appellant's claim finding that his claimed April 27, 2012 injury did not arise in the performance of duty. It noted that the claimed injury occurred off the premises of the employing establishment about 40 minutes before the start of his scheduled work shift. Further, appellant was not performing any work duties at the time of the April 27, 2012 accident.

[2] The claimed date of injury, April 27, 2012, fell on a Friday.

[3] This building is sometimes referred to in the documents or record as the Main Terminal Building or the Main Landside Terminal Building.

In a June 14, 2012 letter, appellant requested reconsideration of his claim. He stated that the areas owned by the employing establishment were the federal security checkpoints on concourses A, C, E and F, which were on the third floor of the Airside Terminal Building. Appellant indicated that, when on the third floor, a shuttle must be taken across from the Landside Terminal Building to the Airside Terminal Building in order to reach the employing establishment security checkpoints. He stated that the only way to access those areas was by taking the elevator or escalator up to the third floor and noted that the employee bus took the employees from the employee parking lot to the first floor of the airport. Appellant explained that he usually arrived at his job 30 to 40 minutes before duty everyday because he lived about 45 minutes to an hour away from his job and, since he had been late on multiple occasions because of traffic delays, he must leave early enough to arrive on time.

On July 2, 2012 Mr. McClung responded to appellant's statement. He noted that appellant was in the Landside Terminal Building about 40 minutes prior to his work shift when the accident occurred and that it occurred in an entirely different building from the one where his assigned work area was located.

In an undated statement received by OWCP on July 23, 2012, appellant acknowledged that he was not on the premises of the employing establishment when the claimed injury occurred on April 27, 2012. He reiterated that he had to pass through that area in order to reach the employing establishment-owned area in which he worked. Appellant stated that there was no other way to reach his work area. He arrived approximately 40 minutes before his shift as did a majority of his coworkers in order to avoid getting written up for being late. One of the other reasons appellant arrived early to work was that the employing establishment did not provide an adequate amount of training time in order to complete mandatory online learning courses. He noted that he and some of his coworkers chose to complete some of the courses before work and off the clock.

Appellant participated in a telephone conference on August 16, 2012 with an OWCP senior claims examiner. The record contains a memorandum summarizing the conference. On August 17, 2012 a copy of the conference memorandum was provided to the employing establishment. On August 22, 2012 Mr. McClung responded that appellant improperly asserted that he was injured at the only entrance to his duty station in concourse C of the Airside Terminal Building. He noted that there were 38 individual entrances on the Landside Terminal Building's four sides and, given the multiple escalators and stairway, there were literally dozens of ways to move through the building. Mr. McClung noted that appellant's clock-in location was at the Airside Terminal Building, not at the Landside Terminal Building. The Airside Terminal Building was served by automated shuttle trains and was located 300 to 500 yards away from the Landside Terminal Building. At the time of the April 27, 2012 accident, appellant was not on any premises owned, operated or controlled in any way by the employing establishment as the Landside Terminal Building was owned and controlled by Tampa International Airport. At the time of the injury, he was not clocked in or engaged in any official duties. Mr. McClung noted that passengers and persons employed by the airport were subject to security screening after arriving at the Airside Terminal Building. He stated that the employing establishment scheduled adequate time for all computer-based training to be accomplished during working hours and that the employing establishment policy was to schedule time during the workday to complete computer-based training modules. Mr. McClung noted that the employing establishment never

required employees to conduct required business, such as training, without pay or on their own time and that training actually occurred at a Marriott Hotel, which was located about a 15- to 20-minute walk from the Airside Terminal Building.[4] He denied appellant's assertion that he was not given adequate time to complete training courses during work hours and noted that there was no evidence that he engaged in computer-based training on the morning of April 27, 2012. The employing establishment submitted schematic drawings of the Tampa International Airport, including areas at Baggage Claim, Ticketing Level and Transfer Level. The drawings were annotated to point out numerous entrances to each of these areas.

In a September 5, 2012 decision, OWCP found that appellant did not sustain an injury in the performance of duty on April 27, 2012. It determined that the claimed injury occurred off premises at a time when he was not on the clock or performing any work duties.

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."[5] The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[6] The phrase "in the course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated 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."[7] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[8]

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.[9] When an employee has a definite place and time for work and the time for work does not include the

[4] The record contains an August 17, 2012 e-mail communication in which Edward Disla, a supervisor, stated that appellant had never been required or advised to come in early to work to complete training outside of his shift. Mr. Disla noted that training time was allotted during regular work hours under a set schedule.

[5] 5 U.S.C. § 8102(a).

[6] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

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

[8] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

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

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.[10] 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[11] or which are in the nature of necessary personal comfort or ministration.[12]

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.'"[13]

ANALYSIS

Appellant alleged that he sustained a left hand injury in the performance of duty on April 27, 2012 at about 9:30 a.m. It occurred when a cart full of bins being transported by a skycap tipped over and landed on his left hand, causing a small laceration and swelling. The Board finds that appellant has not established that he sustained an injury in the performance of duty.

The evidence shows that the claimed injury occurred off the premises of the employing establishment when appellant had not yet clocked in for work on April 27, 2012. Appellant's regular work hours were 10:00 a.m. to 3:00 p.m., Tuesday through Saturday. The claimed injury

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

[11] 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 (1989); *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[12] *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).

[13] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "The 'premises' of the employer, as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of legal title." *Dollie J. Braxton*, 37 ECAB 186, 188-89 (1985). The proximity rule dictates 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. *See William L. McKenney*, 31 ECAB 861 (1980).

occurred around 9:20 or 9:30 a.m., on Friday, April 27, 2012.[14] The record reflects that the claimed injury occurred in the Landside Terminal Building at Tampa International Airport, a different building from where appellant's duty station was located in the Airside Terminal Building. The site where the claimed injury occurred was not owned, maintained or controlled by the employing establishment or on the premises of the employing establishment. Moreover, no special circumstances exist through the proximity rule, under which the industrial premises would be constructively extended to hazardous conditions which were proximately located to the premises and therefore would be considered as hazards of the employing establishment.[15] The record reveals that there were multiple ways that appellant could access his workplace. He did not establish, within the meaning of FECA, that there were hazardous conditions proximately located to the premises which would establish such constructive extension.

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.[16] Appellant has not contended or established that he was performing work duties or activities incidental to his work at the time of the April 27, 2012 accident. He has not shown that the accident should be covered as an exception to the general rule regarding noncoverage of off-premises injuries occurring while traveling to work.[17] Appellant noted that he tended to arrive early at work because he feared being late, but this practice does not constitute the performance of a work duty or something incidental thereto and does not bring his claimed injury within coverage under FECA. He also noted that he sometimes arrived early to work in order to complete computer-based training. However, appellant did not claim or provide evidence that he was performing such training at the time of the April 27, 2012 incident and the employing establishment advised that adequate time was provided to complete computer-based training during normal work hours.

The Board finds that appellant did not establish that his claimed injury on April 27, 2012 occurred within the performance of duty. OWCP properly denied his claim.

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 April 27, 2012.

[14] The employing establishment indicated that records showed that the injury was logged in at 9:20 a.m. on April 27, 2012.

[15] *See supra* note 13.

[16] *See supra* note 9.

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

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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