

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, SEVEN OAKS
STATION, Detroit, MI, Employer**

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**Docket No. 13-535
Issued: June 6, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 7, 2013 appellant, through her representative, filed a timely appeal from a November 28, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied her 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 this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on February 28, 2008.

On appeal, appellant's attorney asserts that the November 28, 2012 decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 9, 2008 appellant, then a 53-year-old sales service associate, filed a traumatic injury claim, alleging that on February 28, 2008 she injured her right shoulder and elbow when she fell on ice in an alley. In a statement dated February 28, 2008, she noted that she parked in an alley next to a parking lot. As she was walking down the alley toward the employing establishment at 7:19 a.m., appellant slipped and fell. On the claim form the employing establishment advised that she had regular work hours from 8:00 a.m. to 4:30 p.m. The employing establishment authorized medical treatment on an OWCP CA-16 form.

In reports dated February 28 and 29, 2008, Dr. Donald Speyer, an osteopath at an urgent care center, reported a history that appellant slipped and fell on ice injuring her right arm and shoulder. He noted decreased range of motion and an equivocal rotator cuff test. A shoulder x-ray was negative for fracture. Dr. Speyer diagnosed shoulder strain and recommended no use of the right upper extremity. Appellant began working modified duty. She submitted additional reports dated March 3 to 11, 2008 from Dr. Stephen D. Daly, a Board-certified osteopath specializing in family medicine and Dr. Michael Burke, an emergency medicine specialist. Appellant was diagnosed with a shoulder contusion and strain and placed on limited use of the right upper extremity. A March 14, 2008 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated a full-thickness tear of the supraspinatus tendon, a partial tear of the head of the biceps tendon, mild infraspinatus tendinosis and mild acromioclavicular osteoarthritis. In a March 17, 2008 report, Dr. Daley referred appellant for an orthopedic consultation. On March 28, 2008 Dr. Matthew Steffes, Board-certified in orthopedic surgery, reviewed the MRI scan study and diagnosed right full-thickness supraspinatus tear. He submitted additional reports describing appellant's condition and advising that she should not use her right arm.

On April 2, 2008 OWCP noted that the claim had been in "quick closed" status but would be reopened for review and formal adjudication. In correspondence dated April 14, 2008, it asked the employing establishment whether the parking lot or alley described by appellant were on federal property and whether the parking lot was owned or operated by the employing establishment. OWCP also informed appellant of the evidence needed to support her claim.

On April 28, 2008 appellant filed two claims, stating that she sustained recurrences of disability on April 21 and 25, 2008 when she experienced extreme pain. The employing establishment controverted her claims. In an attached statement, appellant noted that she had severe pain in both arms and her back. She had been working for two months with no use of the right hand and was now having problems with the left hand and arm. Appellant also had stomach problems due to medication. In an April 29, 2008 statement, she noted that the alley in which she fell was not federal property and that the parking lot was either owned or operated by the employing establishment. Appellant reiterated that she injured her right arm and shoulder when she slipped and fell on February 28, 2008.

On May 14, 2008 the employing establishment advised OWCP that the alley where appellant fell was not owned by the Federal Government and that there were two doors to access the post office building.

By decision dated May 14, 2008, OWCP denied the claim, finding that appellant was not injured while in the performance of duty because her fall in an alley on February 28, 2008 did not occur on the industrial premises.

Appellant submitted three additional claims, alleging that she sustained recurrences on April 28, 30 and May 1, 2008 due to pain in both arms and shoulders and her back. The employing establishment controverted the claims. On June 2, 2008 OWCP informed appellant that, as her claim for injury on February 28, 2008 had been denied, she was not entitled to benefits and her recurrence claims would not be processed.

On June 2, 2008 appellant requested a hearing.

In an undated statement, submitted to OWCP on November 12, 2008, appellant contended that the parking lot was owned by the employing establishment but would not accommodate all employees. On February 28, 2008 the parking lot was full. The alley was owned by the city. Appellant stated that she had to walk in the alley to access the employee entrance. She provided a map that showed the locations of the employing establishment, the parking lot, the alley and where she parked on February 28, 2008. The map notes that the alley was perpendicular to and across the street from the employing establishment and showed that businesses and houses backed up to the alley. Appellant also submitted a City of Detroit ordinance regarding property maintenance of snow, ice and a contract for snow removal from the employing establishment parking lots for employees and postal vehicles that expired on April 30, 2006.

Appellant retired effective December 31, 2008. She submitted a claim for compensation for the period May 1 to December 31, 2008. On July 16, 2009 appellant, through her attorney, requested reconsideration.

In a merit decision dated August 17, 2010, OWCP denied modification of the May 14, 2008 decision.

On September 2, 2010 appellant filed an application for review with the Board. In an order dated June 28, 2011, the Board noted that on June 4, 2008 she timely requested an oral hearing from the May 14, 2008 OWCP decision. While appellant also requested reconsideration on July 16, 2009, it was not proper for OWCP to exercise discretion in issuing the August 17, 2010 decision when the case was within the purview of the Branch of Hearings and Review. The Board remanded the case to OWCP to schedule an oral hearing.²

At the October 3, 2012 hearing, counsel asserted that appellant had no option about where to park and had to use the alley to enter the employing establishment. This constituted an exception to the “going and coming” rule because the premises of the employing establishment extended to the alley where she fell. Appellant testified that she parked beside the parking lot on February 28, 2008. The parking lot had snowed and when plowed, some of the excess snow was in the alley. Appellant fell in the alley close to the exit of the parking lot, as shown by an “X” on the map she provided. She stated that she proceeded to the back entrance of the employing

² Docket No. 10-2011 (issued June 28, 2011).

establishment and then sought medical care. Appellant stopped work in May 2008, had shoulder surgery in June 2008 and worked a few days from September to November 2008. She retired in December 2008 and had not received medical treatment since.

By decision dated November 28, 2012, OWCP's hearing representative affirmed the August 12, 2010 decision.³

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 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.⁵ In the compensation field, to occur in the performance of duty, 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 or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto.⁶

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment.⁷ Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.⁸ However, many exceptions to the rule have been declared by courts and workmen's compensation agencies. One such exception almost universally recognized is the premises rule: an employee going to or coming from work is covered under workers' compensation while on the premises of the employing establishment.⁹

The premises of the employing establishment, as the term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employing establishment; 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 the legal title.¹⁰ In some cases,

³ The Board notes that the November 28, 2012 decision contains a typographical error. The decision indicates that a July 15, 2011 decision was affirmed. There is no decision dated July 15, 2011. The proper decision would be OWCP's decision dated May 14, 2008.

⁴ 5 U.S.C. § 8102(a).

⁵ *Bernard Blum*, 1 ECAB 1 (1947).

⁶ *R.A.*, 59 ECAB 581 (2008).

⁷ *J.E.*, 59 ECAB 119 (2007).

⁸ *Id.*

⁹ *T.L.*, 59 ECAB 537 (2008).

¹⁰ *S.F.*, Docket No. 09-2172 (issued August 23, 2010).

premises may include all the property owned by the employing establishment; in other cases, even though the employing establishment does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.¹¹

The employing establishment premises may include all the property owned by the employer,¹² and even though 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.¹³ For example, a parking lot used by employees may be considered a part of the employing establishment premises when the employer contracted for the exclusive use of the facility or where specific parking spaces were assigned by the employing establishment.¹⁴ Other factors to be considered include whether the employing establishment monitored the parking facility to prevent unauthorized use, whether the employing establishment provided parking at no cost to the employee, whether the general public had access to the parking facility and whether there was alternate parking available for the employee.¹⁵ An employee's mere use of an offsite parking lot, by itself, is not sufficient to demonstrate that the parking lot is part of the employing establishment premises.¹⁶

The Board also recognizes the proximity exception to the premises rule, which states that under special 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.¹⁷ 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.¹⁸ 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, which employees must traverse to reach the plant and the special hazards of that route become the hazards of employment.¹⁹ The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.²⁰

¹¹ *M.P.*, Docket No. 10-54 (issued July 27, 2010).

¹² *Denise A. Curry*, 51 ECAB 158 (1999).

¹³ *D.K.*, Docket No. 11-1029 (issued December 1, 2012).

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *F.S.*, Docket No. 09-1573 (issued April 6, 2010).

¹⁹ *Id.*

²⁰ *Supra* note 11.

ANALYSIS

The Board finds that appellant did not sustain an injury in the performance of duty when she slipped and fell on ice in an alley on February 28, 2008.

Appellant had fixed hours of work from 8:00 a.m. to 4:30 p.m. she was injured when she slipped on ice at 7:19 a.m. while walking to work in an alley across the street from the employing establishment. Unless her injury occurred on the actual or constructive premises of the employing establishment, her injury cannot be considered as occurring in the performance of duty. The evidence establishes that the alley where appellant fell is not owned by the employing establishment but by the city of Detroit. Statements from both appellant and the employing establishment confirm that the location where she fell is not owned by the employing establishment but is a public alleyway.

Appellant has not established that the alley was used exclusively or principally by the employees of the employing establishment for the convenience of the employing establishment.²¹ There is no evidence to support that the use of the alley was restricted to the employees of the employing establishment. As noted on the map of record, other private, businesses and houses back up to the alley. The Board therefore finds that appellant's injury constitutes an ordinary, nonemployment hazard of the journey itself, shared by all travelers.²² Appellant has not established that she was injured on the premises of the employing establishment.

The proximity rule does not apply as the hazard causing the injury, an encounter with ice in a public alley is a hazard common to all travelers in the alley and is not causally related to the employment. The injury was caused when appellant slipped on ice, which is an ordinary, nonemployment hazard of the journey from work itself that is shared by all travelers.²³

Appellant has not met her burden to establish that she sustained an injury in the performance of duty because the evidence establishes that her injury did not occur on the premises of the employing establishment, as the injury occurred while she was walking on city property.

The Board notes that where, as in this case, an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.²⁴ The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP.²⁵ The record does not

²¹ *Supra* note 18.

²² *D.C.*, Docket No. 08-1872 (issued January 16, 2009).

²³ *Supra* note 18.

²⁴ *See Tracy P. Spillane*, 54 ECAB 608 (2003).

²⁵ *See* 20 C.F.R. § 10.300(c).

reflect whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an employment-related injury on February 28, 2008.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2013
Washington, DC

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

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

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