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

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| **S.L., claiming as widow of M.L., Appellant** | ) | |
| **and** | ) | **Docket No. 14-123** |
| | ) | **Issued: July 15, 2014** |
| **DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Philadelphia, PA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On October 14, 2013 appellant, through her attorney, filed a timely appeal from the April 19, 2013 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 her burden of proof to establish that her husband's death on January 14, 2012 occurred as a result of injuries sustained on January 12, 2012.

On appeal, appellant, through counsel, contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On January 13, 2012 a traumatic injury claim was filed on behalf of the employee, who was a 61-year-old safety and occupational health specialist. On January 12, 2012 the employee sustained a blunt force trauma to head and body when, while crossing the Liberty Avenue intersection at Grant Street, he was struck by a car. He died on January 14, 2012. The cause of death listed on the death certificate was blunt force trauma to the head and trunk. On April 18, 2012 appellant filed a claim for compensation by a widow, Form CA-5.[2]

In a letter dated February 2, 2012, a workers' compensation coordinator for the employing establishment stated that to the best of her knowledge the employee was not on premises that were owned, leased, controlled, or maintained by the employing establishment when the accident occurred. The employee was on a smoke break at the time of the accident and was either crossing the street on his way to or from a sidewalk plaza where he smoked. He was not required to cross the street to smoke because smoking areas were available on the sidewalks and sides of the federal building in which he worked. The coordinator submitted a diagram showing the location of the William S. Moorhead Federal Office Building, the building where appellant worked, and the surrounding streets illustrating the boundaries, entrances, exit and sidewalks. To the best of her knowledge, the employee was not engaged in official duties that required him to be off the premises.

In a statement dated January 25, 2012, Christopher Robinson, the Assistant Area Director of Safety, stated that on January 12, 2012 at approximately 4:15 p.m., the employee came to his office and requested permission to have a smoke. He stated that that was fine. Mr. Robinson noted that it was the last time he talked to the employee. On January 27, 2012 he submitted responses to queries from OWCP and noted that to the best of his knowledge, the employee was not on premises that were owned, leased, controlled or maintained by the employing establishment when the accident occurred. To the best of his knowledge, the employee was not engaged in official duties that required him to be off the premises nor was he performing assigned duties or any activity that, by its nature, was considered reasonably incidental to assigned duties. Mr. Robinson submitted a map of the intersection of Liberty Avenue and Grant Street.

By decision dated June 7, 2012, OWCP denied appellant's claim. It found that the employee's death did not arise during the course of his employment or within the scope of a compensable employment factor.

On July 6, 2012 appellant, through her attorney, filed a timely request for a telephonic hearing before an OWCP hearing representative.

In a November 5, 2012 statement, Witness Lauren Fortnoff noted that on January 12, 2012 at approximately 4:20 p.m., she was on her way home from work and traveling as a motorist on Liberty Avenue and waiting for a traffic light. She noticed a male individual crossing Liberty Avenue and walking towards her carrying a cup of coffee and walking at a

[2] The record reflects that the employee works Monday through Friday from 8:00 a.m. to 4:30 p.m. as a safety and occupational health specialist.

leisurely pace. When the male was approximately three-quarters of the way across the street, she saw a grey Cadillac sedan turn onto Liberty Avenue at a high rate of speed and struck the man in the crosswalk. He flew into the air, hit the hood of the vehicle and landed in the street on his back. Ms. Fortnoff left her vehicle to provide assistance. In an accompanying letter, appellant's attorney argued that the statement supported appellant's position that the employee was merely grabbing a cup of coffee during the course of his workday to assist with his focus in the performance of his job for the rest of the day.

At the telephone hearing held on November 19, 2012, Mr. Robinson testified that he was the assistant area director supervising the safety staff and the employee's supervisor. He stated that, at approximately 4:00 p.m. on January 12, 2012, the employee asked if he could step outside to take a cigarette break. Mr. Robinson noted that until that point of time, appellant had worked all day. He granted the employee permission to take the break, and that there was an expectation that he would return to the office after his break. Mr. Robinson noted that the employee provided him his cell phone number in case he needed to reach him. He left to go home shortly after talking to the employee. Appellant testified that she spoke with her husband (the employee) in the late afternoon of January 12, 2012 by cell phone. She testified that his normal routine would to be work until 6:00 p.m. or sometimes 7:00 p.m. The employee generally did not take lunch, and it was his normal routine in the afternoon to go get a cup of coffee, smoke a cigarette and reenergize for the rest of the day. Counsel contended that the employee was in the performance of duty because, at the time of the accident, he was still at work. He argued that the employee was essentially on call as he had his cell phone with him and could have been called back to work. Therefore, the employee's situation was no different from an individual sitting at their desk working and having a cup of coffee when something occurred. Counsel argued that even when an employee steps outside, he or she was still performing the duties of his or her job as he or she was just a phone call away. He noted that the accident occurred outside of the entrance to the federal building.

By decision dated January 29, 2013, an OWCP hearing representative affirmed the January 29, 2013 decision.

On March 12, 2013 appellant, through counsel, requested reconsideration of the January 29, 2013 decision. Counsel contended that the employing establishment prohibited smoking and therefore employees who wished to smoke must cross a street. The employee was struck by a car on January 12, 2012 while crossing Liberty Avenue at Grant Street. The accident occurred during the employee's workday, his supervisor was aware that the employee was taking a smoke break and he carried his cell phone in case he needed to be reached. Counsel argued that the incident occurred on the premises of the employing establishment as employees who smoke were compelled to cross the street to do so. By banning smoking on its property, the employing establishment expanded coverage to those areas immediately frequented by employees who smoke. In the alternative, counsel argued that there should be an exception as the normal route where an employee smoked required him or her to cross an extremely dangerous intersection, so it was a special hazard on a route closely associated with the premises.

By letter dated April 10, 2013, the employing establishment's workers' compensation coordinator documented that the William Moorhead Federal Building allowed smoking on the federally-owned premises and that the smoking area was 25 feet away from the building,

between the flagpole and the street side of the plaza. The plaza was situated on federal property surrounded by a sidewalk and employees were not required to cross any street or intersection to smoke. The coordinator forwarded a memorandum from the Acting Construction Services Manager for the Pittsburgh Field Office who sent a diagram of the smoking area, and an article about the smoking location. In a Moorhead Memo newsletter for Fall 2012, there was a published notice as to the location of the designated smoking area. The services manager also wrote an e-mail to the coordinator on February 1, 2012 advising that the Moorhead Federal Building owned the plaza but did not own the sidewalks, which were owned by the city. The federal building did maintain the sidewalks.

By decision dated April 19, 2013, OWCP found that the evidence submitted was not sufficient to find that the employee's death arose in the performance of duty.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation period of FECA, than an injury was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[3]

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] 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 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.[6]

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.[7] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their

[3] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8102(a).

[5] *See Valerie C. Boward*, 50 ECAB 126 (1998).

[6] *See R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

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

employment.[8] However, the same employee with fixed hours and fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.[9] The reason for the distinction is that the later injury is merely a consequence of the ordinary, nonemployment hazard of the journey itself, which are shared by all travelers.[10]

The employing establishment premises may include all the property owned by the employer.[11] The premises of the employer, as the term is used in workers compensation law, are not necessarily coterminous with the property owned by the employer;[12] they may be broader or narrow and are dependent more on the relationship of the property to the employment than on the status or extent of the legal title.[13] In some cases, premises may include all the property owned by the employer; in other cases, though the employee does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[14]

The Board recognizes exceptions to the premises rule. Underlying some of these exceptions 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.[15] 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.[16] This exception contains two components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned.[17] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[18]

[8] *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[9] *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

[10] *Id.*

[11] *Denise A. Curry*, 51 ECAB 158, 160 (1999).

[12] *Jimmie Brooks*, 22 ECAB 318, 321 (1971); *see also D.C.*, Docket No. 08-1782 (issued January 16, 2009).

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

[14] *See Denise A. Curry*, *supra* note 11.

[15] *See R.O.*, Docket No. 08-2088 (issued February 18, 2011).

[16] *See Shirley Borgos*, 31 ECAB 222, 223 (1979).

[17] *See M.L.*, Docket No. 12-286 (issued June 4, 2012).

[18] *Id.; see also Jimmie Brooks*, *supra* note 12.

## ***ANALYSIS***

To be covered, 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 where 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.[19] In the instant case, the deceased employee was on an authorized break. He was crossing a busy intersection when he was struck by a motor vehicle and sustained injuries that caused his death two days later. At the time of the accident, appellant had been given permission by his supervisor to take a smoke break. The evidence also establishes that he got a cup of coffee during the break.

Appellant contended that the employee was in the performance of duty as he was attending to a matter of personal ministration. The Board has held that certain injuries that arise on the employing establishment's premises may be accepted as compensable if the employee was engaged in activity reasonably incidental to the employment, such as personal acts for the employee's comfort, convenience and relaxation.[20] The Board has found that this doctrine applies in such cases as using the restroom facilities,[21] clearing snow off a claimant's car that is parked in the employing establishment's parking lot[22] and moving a car within the parking lot of the employing establishment.[23] The Board has also found claimants to be in the performance of duty in certain instances when the injury occurred off the premises of the employing establishment. The Board has held that appellant was in the course of employment in cases where he was on a paid break on a brief errand and acted with the consent of the employer. These circumstances included going off premises to get coffee when no coffee was available in the building,[24] taking a smoke break adjacent to the office building,[25] or taking a walk when the employing establishment encouraged the word processing employees to take regular breaks for walking.[26]

However, the Board finds that the employee was not in the performance of duty at the time of his injury. The employee left the premises of the employing establishment to attend to personal needs.

In *R.R.*,[27] the employee was injured when he fell on a wheelchair ramp located about 15 feet away from the west door of the building where he worked. He was on his way to retrieve

[19] *V.O.*, 59 ECAB 500 (2008).

[20] *J.O.*, Docket No. 09-1432 (issued April 20, 2011).

[21] *V.O., supra* note 19.

[22] *J.O., supra* note 20.

[23] *Cheryl Bean-Welch*, Docket No. 03-0714 (issued June 12, 2003).

[24] *Helen Gundersen*, 7 ECAB 288 (1954).

[25] *Supra* note 7.

[26] *Lola M. Thomas*, 34 ECAB 525 (1983).

[27] Docket No. 07-1929 (issued October 22, 2008).

his lunch from the parking lot used by the employing establishment. The Board found that the wheelchair ramp was not part of the employing establishment premises, noting that the ramp was on property owned by the airport and was not exclusively used by the employing establishment personnel and was open to the public. The employing establishment did not contract for exclusive use of the area, nor did the employing establishment maintain the area to see who might gain access to the premises.

In *D.K.*,[28] the employee was injured while using her 15-minute break to move her car from the employing establishment's parking lot to the main campus lot while it was still daylight, as she contended was common practice. The Board noted that she had to walk on public streets or through the bus terminal to reach the parking lot. The employee's activities were for a matter of personal convenience that did not relate to personal ministration while on the premises. Accordingly, the Board found that her injury was not sustained in the performance of duty.

This case is distinguished from *Roma A. Mortenson-Kindschi*.[29] The Board allowed coverage when the claimant was injured when taking a smoking break off-premises. However, in *Mortenson*, employees were not authorized to smoke while on the employing establishment premises. In the present case, the employing establishment provided an area in the plaza for smoking breaks that did not require employees to cross any streets.

There were no employment factors involved in appellant's absence from the employment premises at the time his injury occurred. Although the injury occurred during his tour of duty, the act of leaving the employment premises to get coffee was not an incident of his employment. Rather it was a matter of personal convenience.[30] Counsel contended that the employing establishment did not allow any smoking on the premises; but the evidence proves otherwise. The employing establishment submitted evidence of a location on the premises for smoke breaks. The statements of the workers' compensation coordinator and the acting construction services manager, as well as a published item from the building's newsletter, establish that the employing establishment provided a smoking area in a plaza about 25 feet from the building between the flagpole and the street side of the plaza. Although appellant was given permission to take a break to smoke a cigarette, he chose to depart from the premises and cross a busy intersection despite the fact that a smoking area was provided for his convenience. The reason for his departure appears to be for the purchase of coffee. Appellant provided no evidence that coffee was not available to him on the premises of the employing establishment.

The Board finds that the intersection where the accident occurred does not constitute a special hazard or an access route closely associated with the employing establishment. The accident occurred on a public street. The Board finds that appellant has not established that the intersection where the accident occurred was used exclusively or principally by employees of the employing establishment for the convenience of the employer.[31] There is no evidence that the

[28] Docket No. 11-1029 (issued February 1, 2012).

[29] *Supra* note 7.

[30] *James G. Pimenta*, Docket No. 06-598 (issued June 15, 2006).

[31] *See supra* note 9; *Mary Keszler*, *supra* note 6.

roadway was restricted to the employees of the employing establishment. The evidence reflects that the injury occurred on a public street. The Board finds that appellant's injury occurred while he was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.[32]

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof to establish that her husband's death on January 14, 2012 occurred as a result of injuries sustained in the performance of duty on January 12, 2012.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 19, 2013 is affirmed.

Issued: July 15, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[32] *Shirley Borgos, supra* note 16.