United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 14-411**
	)	**Issued: July 17, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Titusville, FL, Employer	)	

Appearances:
Molly J. Durso, 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 December 16, 2013 appellant, through her attorney, filed a timely appeal from a July 31, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying 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 appellant has established that she sustained an injury in the performance of duty on August 30, 2012, as alleged.

On appeal counsel contends that appellant's injury occurred on premises controlled by the employing establishment as shown by the photographs submitted to OWCP and that appellant was on an authorized break.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 30, 2012 appellant, then a 55-year-old mail processing clerk, filed a traumatic injury claim alleging that she injured her right knee and arm on that date when she stepped into a weed covered pothole while outside on break. The employing establishment authorized medical treatment for right elbow fracture on an OWCP CA-16 form.

In correspondence dated September 4, 2012, OWCP informed appellant that the evidence of record was insufficient to establish her claim. She was advised as to the medical and factual evidence required and provided 30 days to submit this information.

On September 6, 2012 a conference was held to discuss appellant's claim. Appellant started work at 3:00 a.m. on August 30, 2012 and the injury occurred at 4:08 a.m. She stated that at the time of the injury she was not on an authorized break as she was not entitled to take a break until she had worked two hours. The reason appellant went outside was to watch a rocket launch. She related that her injury occurred in a parking lot not used by the employing establishment and the area was dark and unlit.

In an August 31, 2012 report, Dr. James D. Glenn, a treating, Board-certified orthopedic surgeon, diagnosed a radial head facture. He obtained a history that the injury occurred on August 30, 2012 when she fell in a pothole while at work.

In a September 25, 2012 letter, appellant's counsel contended that appellant was on an authorized break at the time of the August 30, 2012 incident. Appellant had previously taken a 15-minute break at 4:00 a.m. when starting work at 3:00 a.m. She also alleged that the parking lot was under the control of the employing establishment. Appellant submitted a statement from Ricky Edward, a coworker, who related that appellant went on break a little after 4:00 a.m. on August 22, 2012 to watch the Atlas rocket launch.

By decision dated October 11, 2012, OWCP denied appellant's claim. It found that the injury did not arise in the performance of duty or within the scope of her employment.

On December 3, 2012 appellant's counsel requested reconsideration. She argued that it had been past practice for the employing establishment to allow employees to watch a space launch. Counsel contended that appellant was on an authorized break as employees were allowed one break before lunch and one break after lunch.

By decision dated February 11, 2013, OWCP denied modification of the October 11, 2012 decision. It found that appellant's injury did not arise within the performance of duty.

In a letter dated April 24, 2013, appellant's counsel requested reconsideration and submitted additional medical and factual evidence. Counsel argued that the enclosed maps showed that the parking area was not open to the public and was exclusively for the use of employees of the employing establishment. She noted that, while the public records suggest that the property was not owned by the employing establishment, "the facts and circumstances" prove control and management of the premises by the employing establishment. Counsel also argued that appellant's break was authorized as she was on the clock at the time of the injury.

In an undated statement, appellant related that at the time of her injury she was on an authorized 10-minute break. She contended that the area where she was injured was employing establishment property as there were no barriers or signs prohibiting anyone from being in the area.

By decision dated July 31, 2013, OWCP denied modification of the February 11, 2013 decision.[2] It found that she was not in the performance of duty at the time of the injury as going to watch a space launch was for her personal convenience and not incidental to her employment.

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 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 his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[5] 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.[6]

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

[2] The Board notes that, following the July 13, 2013 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[3] 5 U.S.C. § 8102(a). *See also P.S.*, Docket No. 08-2216 (issued September 25, 2009).

[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). *See also M.A.*, Docket No. 08-2510 (issued July 16, 2009); *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[5] *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[6] *R.M.*, Docket No. 07-1066 (issued February 6, 2009); *Narbik A. Karamian*, 40 ECAB 617 (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).

[7] *Mary Keszler*, 38 ECAB 735, 739 (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.[8] 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[9] or which are in the nature of necessary personal comfort or ministration.[10]

ANALYSIS

Appellant filed a traumatic injury claim alleging that she sustained a right elbow fracture on August 30, 2012 in the performance of duty. OWCP denied her claim finding that her injury was not sustained in the performance of duty.

To be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with his or her employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[11] In the instant case, appellant injured her right knee and arm when she stepped into a weed covered pothole while outside on break. She related that at the time of the injury she had gone to watch a rocket launch from a parking lot not used by the employing establishment and the area was dark and unlit.

Appellant contends that she was in the performance of duty when she went outside to watch a rocket launch at approximately 4:00 a.m. on August 30, 2012. The Board has held that certain injuries that arise on the employer's premises may be compensable if the employee was engaged in an activity reasonably incidental to the employment, such as personal acts for the employee's comfort, convenience and relaxation.[12] The Board has found that this doctrine applies in such cases as using the restroom facilities,[13] clearing snow off a claimant's car that is parked in the employing establishment's parking lot[14] and moving a car within the parking lot of

[8] *Cheryl Bowman*, 51 ECAB 519 (2000); *Donna K. Schuler*, 38 ECAB 273, 274 (1986); A. Larson, *The Law of Workers' Compensation* § 13.05 (2004).

[9] The Board has stated that these exceptions 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; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[10] *See Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[11] *V.H.*, Docket No. 10-1053 (issued April 20, 2011); *David P. Sawchuk*, 57 ECAB 316 (2006).

[12] *J.O.*, Docket No. 09-1432 (issued February 3, 2010); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[13] *V.O.*, 59 ECAB 500 (2008); *James P. Schilling*, 54 ECAB 641 (2003).

[14] *J.O.*, *supra* note 12 (where the Board held that using a portion of appellant's lunch hour to clean the snow off her vehicle that was parked on government property did not take the injury out of the performance of duty); *see also Annette Stonework*, 35 ECAB 306 (1983).

the employing establishment.[15] The Board has also found a claimant to be in the performance of duty in certain instances when the injury occurred off-premises of the employing establishment. The Board has held that an injury was sustained in the course of employment in cases where the employee was on a paid break, on a brief errand and acted with the consent of the employing establishment. These circumstances included going off-premises to get coffee when no coffee was available in the building,[16] taking a smoke break adjacent to the office building,[17] or taking a walk when the employing establishment encouraged the word processing employees to take regular breaks for walking.[18]

The Board finds that appellant was not in the performance of duty at the time of her injury. This case is similar to *Mary Keszler*,[19] where the employee was injured while feeding parking meters on a public street for herself and other employees. In *Keszler*, the employee was on her lunch break when she went outside to put money in parking meters for herself and for two other employees. She was struck by a motor vehicle and sustained injury. The employee contended that her injury was compensable even though it occurred off-premises on a public street because her conduct was condoned or supported by her supervisors and that different staff members were assigned to feed the meters on a rotating basis. The administrative law judge in charge of the office stated that the practice of rotating employees to put money in meters was done with his knowledge. It was a voluntary duty employees were not required to perform. The Board found, however, that the employee's injury did not arise in the performance of duty as the practice constituted an informal arrangement among the employees who drove their private vehicles to work and was a personal convenience for the employees. Although there was no question that appellant's supervisor and the judge in charge of the office knew of and condoned this practice, no employment factors were involved in appellant's absence from the employer's premises at the time her injury occurred. The Board noted that the mere knowledge of the practice itself by the employee's supervisors was not sufficient to make an informal office practice an activity incidental to her employment.[20]

In this case, appellant testified that she went out on a break to watch a rocket launch and the employing establishment was aware of this practice. The Board notes that no employment factors were involved in appellant's absence from her work premises at the time of injury. As in *Keszler*, appellant's injury was sustained while she was engaged in a matter of a personal convenience, *i.e.*, going outside to watch a rocket launch. Her activity did not relate to her work as a mail processing clerk or to personal ministration while on the premises of the employing establishment. The Board finds that appellant's injury was not in the performance of duty.

[15] *Cheryl Bean-Welch*, Docket No. 03-714 (issued June 12, 2003).

[16] *Helen Gunderson*, 7 ECAB 288 (1954).

[17] *Roma A. Mortenson-Kindschi*, *supra* note 12.

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

[19] 38 ECAB 735 (1987).

[20] *Id.*

Accordingly, appellant has not met her burden of proving that she sustained an injury in the performance of duty.

On appeal appellant's counsel argues that her claim should be covered under FECA as the parking lot where appellant fell was under the control of the employing establishment. Furthermore, appellant was on an authorized break at the time of the incident. The evidence submitted is not sufficient to establish these contentions. As noted, the Board finds that the activity of going outside to watch a space launch was not incidental to her federal employment. Appellant was not in the performance of duty at the time of the injury.

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 failed to establish that she sustained an injury in the performance of duty on August 30, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 31, 2013 is affirmed.

Issued: July 17, 2014
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