United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 14-1517**
	)	**Issued: November 24, 2014**
U.S. POSTAL SERVICE, INTERNATIONAL BULK MAIL CENTER, Jersey City, NJ, Employer	)	

Appearances:
James D. Muirhead, 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 June 24, 2014 appellant, through her attorney, filed a timely appeal from a March 31, 2014 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 she sustained an injury in the performance of duty on November 3, 2012.

On appeal, appellant's attorney contends that appellant's early arrival to work on November 3, 2012 should be considered a reasonable amount of time before work to arrive and within the performance of duty based on circumstances created by Hurricane Sandy.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 27, 2012 appellant, then a 64-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained a broken right kneecap on November 3, 2012 due to stepping on unseen debris on a footpath.[2] A supervisor checked a box indicating that appellant's injury did not occur in the performance of duty, noting that she alleged that the incident occurred on a day she had already called out from work in the attendance system. He noted that her regular work hours were from 2:00 a.m. through 10:30 a.m. The supervisor further noted that a third party had brought in her Form CA-1 after appellant received a letter of availability for her absence.

On November 27, 2012 a supervisor controverted appellant's claim. He stated that, after she called in 104 hours of sick leave on November 4, 2012, appellant was sent a letter of availability. Appellant's husband brought the supervisor a letter on November 15, 2012 stating that there had been an incident on the property of the employing establishment on November 3, 2012. The supervisor noted that, before the alleged incident, appellant had called in for 16 hours of leave without pay from November 2 to 3, 2012, and called in for 104 hours of sick leave on November 4, 2012 at 10:01 a.m. He stated that the alleged incident actually occurred on Sunday, November 4, 2012 at 12:50 a.m. In a letter dated November 29, 2012, the employing establishment further explained its reasons for challenging appellant's claim. It stated that she failed to report her injury for 12 days after the alleged incident, failed to describe what occurred and had not submitted supporting medical documentation.

By letter dated December 4, 2012, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It also sent a letter to the employing establishment requesting information regarding the exact time of her alleged injury, whether she was on the premises of the employing establishment at the time of the injury, and whether she was performing duties incidental to her employment at the time of injury.

In a statement dated November 13, 2012, appellant described the circumstances surrounding her alleged injury. On Saturday, November 3, 2012 at approximately 12:50 a.m., while walking toward the facility of the employing establishment, she fell on a footpath approaching the property. Appellant was using a flashlight, but stepped on debris, which caused her to fall onto her right knee. She stated that she could not get help because she was too far away from the facility and could not stand up. Appellant called her husband, who took her to a nearby emergency room. The physician at the emergency room confirmed that she had broken her right kneecap. He sent her home with a brace and a referral to an orthopedic physician. Appellant was seen by an orthopedic physician, who performed surgery on her knee.

On December 6, 2012 appellant responded further to OWCP's inquiries. Her injury occurred before the beginning of her shift on November 3, 2012, and that she was on her way into work at approximately 12:50 a.m. for a shift starting at 2:00 a.m. Appellant described falling on a footpath to the employing establishment after stepping on debris and landing on her

[2] There are two Forms CA-1 of record reporting this traumatic injury. In a handwritten Form CA-1 dated November 13, 2012, appellant alleged that her injury occurred on November 3, 2012 at 12:50 a.m. In an undated and typed Form CA-1 that was unsigned by appellant, the time of her injury is listed as 12:50 p.m.

right knee. She stated that she was not performing assigned duties at the time of her injury but was on her way to the facility. Appellant attached a statement from her husband. On the morning of November 3, 2012 at approximately 1:00 a.m., appellant's husband received a call from appellant that she had fallen on a footpath in the Veterans Memorial Park section of the property of the employing establishment and he took her to an emergency room.

On December 12, 2012 John H. McTigue, a senior manager for the employing establishment, responded to OWCP's inquiries. He noted that appellant fell on "the memorial portion of the sidewalk," an area controlled by the employing establishment. Appellant claimed that her injury occurred on November 3, 2012, which was actually November 4, 2012 because she claimed it occurred at 12:50 a.m. Mr. McTigue stated that there was no reason, to the best of his knowledge, for appellant to be reporting to the facility an hour and a half before her scheduled starting time. He advised that, at the time of injury, appellant was not engaged in any official duties but was in the process of walking to the postal facility from a bus stop. Appellant had not reported to the building or started her tour of duty at the time of injury.

By decision dated January 15, 2013, OWCP denied appellant's claim. It noted that the course of employment for an employee having a fixed time and place of work embraced a reasonable time interval before official working hours while the employee was on the premises engaged in actual duties, activities incidental to the job or an accepted practice of employment. OWCP found that appellant's injury did not occur within a reasonable time interval before her official working hours while performing acts incidental to her employment.

On January 29, 2013 appellant requested an oral hearing before an OWCP hearing representative.

In a statement dated January 29, 2013, appellant contended that she was injured in the performance of duty. She stated that she walked to work every day, noting that buses in the area ran until midnight and started again at 3:30 a.m., and that it was a long walk on the property itself. Appellant noted that it was always less than an hour before her start time when she entered the facility. She further noted that she had difficulty in obtaining and returning paperwork related to her claim.

An oral hearing was held on May 13, 2013. Appellant testified that her injury occurred on her first shift back to work after Hurricane Sandy, which hit on or about October 28, 2012. She noted that the employing establishment's facility was extremely large, and that there was a long walk-in before arriving at a building. Appellant usually arrived a little bit early to go to the cafeteria and get tea or coffee because she could not do so on a 15-minute break. On the day of her injury, she stated that two major sections of the plant still did not have electricity in the aftermath of Hurricane Sandy, and that everyone had to report to the cafeteria to sign in. Appellant's husband, who also worked at the facility on a different shift, told her that she should get there early. Appellant took a flashlight with her and used a footpath leading from a street through an area called Memorial Park, which was on the property of the employing establishment. She stepped on a piece of debris and fell down on her right knee about 25 to 30 feet onto the property of the employing establishment. Appellant called her husband, who took her to the nearest available medical facility. She went to work early because she did not know what she was going to encounter on the way there or what to expect when she got there.

Appellant's husband testified that the employing establishment was the largest mail facility in the country, and that on the date of injury there were several areas without electricity. Counsel contended that appellant went beyond the scope of her employment in the sense that she was performing her duties to an extraordinary degree, in attempting to arrive at work early in the aftermath of a major storm and injuring herself on the property of the employing establishment.

By decision dated July 8, 2013, the hearing representative affirmed the January 15, 2013 decision. She found that appellant was on the premises of the employing establishment when she fell and sustained a right distal patellar fracture. The hearing representative further found that appellant's arrival to work more than an hour prior to the start of her scheduled work shift was not sufficiently work related to bring her injury within the performance of duty, despite her testimony regarding the unusual circumstances of that day. Appellant testified that she had taken a bus to work and that she had arrived early due to her bus schedule and to get coffee before her shift.

On February 3, 2014 appellant, through her attorney, requested reconsideration of the July 8, 2013 decision. He stated that appellant's claim should be accepted as occurring within the performance of duty as she was attempting to arrive early due to severe crisis conditions. Counsel noted that appellant usually walked to work and that she did so on November 3, 2012. Appellant contended that the July 8, 2013 decision incorrectly stated that she took a bus to work and that the reason she reported early was to get coffee. She stated that there was a severe power outage after Hurricane Sandy and that the plant was temporarily closed. Appellant's husband had reported to work two days before November 3, 2012 and advised her that it was chaotic at work. Her shift on November 3, 2012 began at 2:00 a.m. and she stated that she arrived early so that she could report to the cafeteria to sign in and to get through the flooding and other issues.

By decision dated March 31, 2014, OWCP denied modification of its July 8, 2013 decision. It found that she was injured over an hour before her shift was scheduled to begin, an unreasonable amount of time before her scheduled workday.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relationship. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "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." The phrase "course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance.[4]

[3] *See* 5 U.S.C. § 8102(a).

[4] *See Annie L. Ivey*, 55 ECAB 480 (2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

In a workers' compensation claim, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in her employer's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[5]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[6] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in preparatory or incidental acts. However, presence at the employing establishment's premises during work hours or a reasonable period before or after a duty shift is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury arising out of the employment. This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[7]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was aimed at reaching some specific personal objective.[8]

The Board has excluded coverage for employees on the employer's premises when the claimed injury occurred during a reasonable time before or after work or, in the case of injuries occurring far outside regular work hours, when the employee was acting in service of the employer.[9] In *John F. Castro*,[10] an employee was injured in an automobile accident at a naval station five minutes after the end of his shift.[11] The Board found that such a short time period

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[5] *Id.*

[6] *See James P. Schilling*, 54 ECAB 641 (2000). *See also Narbik A. Karamian*, 40 ECAB 617 (1989).

[7] *See Eileen R. Gibbons*, 52 ECAB 209 (2001). *See also Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[8] *See Rebecca LeMaster*, 50 ECAB 254 (1999).

[9] *See William W. Knispel*, 56 ECAB 639 (2005).

[10] Docket No. 03-1653 (issued May 14, 2004).

[11] *Id.*

fell within the scope of a reasonable interval before going to or leaving from work. In *Catherine Callen*,[12] the employee was found to be in the performance of duty under FECA for an injury sustained on the employer's premises six hours after the end of her regular shift, because she remained on the premises to complete a project at the request of her employer.[13] In *Nona J. Noel*,[14] the employee arrived one and one-half hours prior to the start of her workday to avoid heavy traffic and to eat breakfast at the Noncommissioned Officer's (NCO) Club where she sustained an injury. The Board found that the act of having breakfast, coupled with the length of time appellant arrived at her employer's premises prior to her official starting time to avoid heavy traffic, placed her outside the scope of her employment. In *T.F.*,[15] the employee sustained an injury when she tripped on a loose floor tile 25 minutes before her work shift began at 6:00 a.m. She was on the premises of her employer in the vicinity of her work cubicle. The Board affirmed the denial of compensability under FECA, noting that finding a good parking place, drinking coffee, having breakfast and putting her lunch away were personal activities and not reasonably incidental to the work of her employer. The Board found that her presence at the premises some 25 minutes prior to the commencement of her work shift did not constitute a reasonable interval under the circumstances.

ANALYSIS

The Board finds that appellant's injury was not sustained in the performance of duty.

Although the November 3, 2012[16] incident occurred on the employing establishment's premises, it did not occur during appellant's regular work shift or during a lunch or recreation period as a regular incident of her employment. In order for an injury to be considered as arising out of employment under these circumstances, the facts of the case must show some substantial employer benefit or requirement which gave rise to the injury.[17] It is incumbent upon appellant to establish that it arose out of her employment.

Appellant has not established that her presence at the employing establishment on November 4, 2012 at 12:50 a.m. was a reasonable interval before her scheduled work. Her usual work shift began at 2:00 a.m. Appellant's presence on the employer's premises, is not, alone,

[12] 47 ECAB 192 (1995).

[13] The Board found that, although the employee had been cautioned about unauthorized overtime and did not request it on the date of injury, there was not an express prohibition concerning her overtime work. Rather, the support staff was routinely requested by attorneys to work overtime and management was generally aware that they were on the premises after regular duty tour hours. *See id.*

[14] 36 ECAB 329 (1984).

[15] Docket No. 09-154 (issued July 16, 2009).

[16] The Board notes that there is inconsistency in the case record regarding whether appellant's injury occurred on November 3 or 4, 2012. Appellant consistently alleged that the injury occurred on November 3, 2012. The employing establishment noted that as appellant alleged that her injury occurred at 12:50 a.m., her injury actually occurred on November 4, 2012. As the date of injury of November 3, 2012 is the date accepted by OWCP in its decisions, the Board will also treat November 3, 2012 as the date of injury.

[17] *See Dwight D. Henderson*, 46 ECAB 441 (1995).

sufficient to establish compensability. She arrived to work one hour and ten minutes before the start of her shift. The Board has held that what constitutes a reasonable interval before a work shift begins depends not only on the length of time involved but also on the circumstances for the time interval and nature of the employment activity.[18] There is no evidence of record establishing that the employing establishment expressly or impliedly required appellant's presence on the premises prior to her regular work hours. There is no evidence that appellant sought approval by her supervisor to be on the premises prior to her regular duty hours in order to sign in or prepare for her daily activities. The only statement of record appellant received regarding arriving early to work came from her husband, who had returned to work at the employing establishment two days earlier and found that it was chaotic. While the circumstances at the employing establishment and surrounding areas in the aftermath of Hurricane Sandy, such as the partial lack of electricity or signing in at a cafeteria rather than at her usual location, are relevant to the issue of the reasonableness of appellant's arriving at work one hour and ten minutes before the start of her usual work shift; the Board finds that they are not sufficient, in the absence of any directive from the employing establishment, to establish that her presence on the premises an hour prior to her work shift was reasonable.[19] Appellant was not in the performance of any actual or incidental duty related to her work as a mail handler at the time of injury.

Appellant's arrival at the employing establishment prior to her official starting time does not automatically place her activities outside the scope of her employment.[20] She stated that she arrived early to work at 12:50 a.m. because she did not know what she was going to encounter on the way there or what to expect when she got there. Appellant also stated that she arrived early in order to report to the cafeteria to sign in and so that she could get through the flooding and other issues. However, unlike *Catherine Callen*,[21] there is no evidence of record that the employer expressly or impliedly required appellant's presence on the premises outside of her regular duty hours. There is no evidence that her supervisor was ever made aware that she would be present on the premises before her regular duty hours.[22] Appellant did not submit sufficient evidence to establish that the employing establishment condoned or encouraged employees to come into work early in the aftermath of Hurricane Sandy in order to complete their sign-in

[18] *See Maryann Battista*, 50 ECAB 343 (1999). *See also Narbik A. Karamian, supra* note 6 at 618; (citing *Clayton Varner*, 37 ECAB 248 (1985)).

[19] *See Howard M. Faverman*, 57 ECAB 151 (2005). *Cf. Cemeish E. Williams*, 57 ECAB 509 (2006) (finding that where claimant arrived for duty 15 or 30 minutes prior to her scheduled shift and was adjusting her uniform tie and reaching for her bag when the injury occurred on the escalator on the way to sign in for her afternoon shift, appellant was on the premises for a reasonable time before her specific working hours in preparation for her shift, thereby providing the employing establishment some substantial benefit from the activity involved).

[20] *See James E. Chadden, Sr.*, 40 ECAB 312, 315 (1988) (stating that claimant's arrival at the employing establishment a half hour prior to his official starting time was not so early as to place claimant's activity outside the scope of employment).

[21] *See supra* note 12.

[22] *See supra* note 13. *See also S.D.*, Docket No. 10-1391 (issued August 24, 2011) (finding that the employee was not in the performance of duty when she was injured in the lobby while assisting a coworker to gain entry through the handicap door before her work shift began. She arrived early in order to secure a desired parking space close to her employment).

procedures in a timely manner or due to obstacles on the way to and from the premises of the employing establishment. Without evidence of such an express or implied direction from the employing establishment, the Board finds that her arrival one hour and ten minutes prior to the start of her regularly-scheduled shift on November 3, 2012 was a matter of personal convenience, and not a matter from which the employer derived a substantial benefit.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on November 3, 2012 while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 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