United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 16-0507**
	)	**Issued: August 11, 2016**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Newark, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 14, 2016 appellant filed a timely appeal from a July 21, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from July 21, 2015, the date of OWCP's last decision, was January 17, 2016, a Sunday. Consequently, the period for filing the appeal ran to the next business day, Monday, January 18, 2016. Since using January 20, 2016, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 14, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish an injury on January 20, 2013 in the performance of duty.

FACTUAL HISTORY

On January 21, 2013 appellant, then a 44-year-old supervisory transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2013 he injured his left shoulder and neck when he was a passenger in a van that drove over a curb and numerous pot holes. The incident occurred at 7:40 p.m. and his duty shift was from 11:00 a.m. until 7:30 p.m. The employing establishment controverted the claim, contending that appellant was not in the performance of duty as he was taking a shuttle bus to his vehicle and not on its property.

In letters dated January 30, 2013, OWCP requested additional factual and medical information from both appellant and the employing establishment. It requested that the employing establishment provide information relative to parking and transportation options for employees, the distance between the lot and the work station, and whether it owned or controlled the parking area and shuttle bus.

On a form dated January 21, 2013, appellant advised that the injury occurred because the driver of the Spot bus shuttle taking him to the parking lot was "speeding and driving erratically."

Appellant, in a statement dated February 20, 2013, advised that he was taking the Spot bus to a parking lot off the airport premises as employees were not permitted to park at the airport. He asserted that the employing establishment provided the bus service. Appellant noted that the public also used the Spot bus, that the employing establishment only used Spot parking services for employees, and that it paid most of his parking expenses. He indicated that on the bus he was considered at work and could be disciplined for actions on the bus even after his duty hours. Appellant advised that Spot owned the shuttle bus and parking lot and that the employing establishment contracted it out for its employees.

By decision dated March 5, 2013, OWCP denied appellant's claim as the medical evidence was insufficient to establish that he sustained a diagnosed condition causally related to the accepted work incident.

On March 4, 2014 appellant, through counsel, requested reconsideration. In a decision dated May 27, 2014, OWCP modified its prior decision to show that he had not established that his injury occurred in the performance of duty. It found that he was not on the premises of the employing establishment at the time of the alleged incident.

Counsel, on May 21, 2015, again requested reconsideration. He asserted that the employing establishment had control over the parking, intervened in disputes or concerns, and paid for the employee's transportation on the shuttle bus.

In support of his reconsideration request, appellant submitted an approved acquisition plan for a parking assistance program signed January 31, 2011 with a purpose of providing "fee

collection for [employing establishment] employee participating in this program, and contract management with service providers for parking and shuttle service."[3] The plan maintained that contractors should provide a parking facility for a specific number of employees 24 hours per day, be within three miles of the airport, and be maintained in good condition.

Appellant further submitted a memorandum, dated July 28, 2012, from Thomas J. Carter, deputy federal security director at appellant's work location. Mr. Carter advised all employees that beginning April 1, 2012 it would begin using The Parking Spot (TPS) as its parking program. He related that the employing establishment had met with TPS to discuss issues such as parking space, shuttle service, and the conduct of TPS employees. Mr. Carter indicated that it was monitoring TPS's improvements to the pavement in the parking lots. He advised that employees of the employing establishment must act in a professional manner toward TPS employees, noting that the public also rode on the shuttles and that any unprofessional conduct would be "investigated and appropriate action taken."

By decision dated July 21, 2015, OWCP denied modification of its May 27, 2014 decision.

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.[4] 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.[5] 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 master's business, at a place when 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. 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]

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

[3] Appellant also submitted a 2006 acquisition plan.

[4] 5 U.S.C. § 8102(a).

[5] 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).

[6] *Narbik A. Karamian*, 40 ECAB 617, 618 (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).

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.[7]

Underlying the proximity exception to the premises rule 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.[8] 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.[9] Factors that generally determine whether an off-premises point used by employees may be considered part of the premises include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[10]

OWCP's procedures provide:

> "If the employee has a fixed place of work, the CE [claims examiner] must ascertain whether the employee was on the premises when the injury occurred. The answers to the appropriate sections of Forms CA-1, CA-2 and CA-6 contain information on this point. If clarification is needed, it should be secured from the official superior in the form of a statement which describes the boundaries of the premises and shows whether the employee was within those boundaries when the injury occurred. Where indicated, the clarification should include a diagram showing the boundaries of the industrial premises and the location of the injury site in relation to the premises."[11]

ANALYSIS

Appellant alleged that he injured his left shoulder and neck on January 20, 2013 while riding a shuttle bus between the airport where he worked and an off-site parking lot. At the time of his injury, he had fixed hours and place of work and was traveling from his work location to the parking lot on a shuttle bus that served both employees of the employing establishment and the general public. Barring an exception to the general rule, appellant's injury was an ordinary, nonemployment hazard of the journey shared by all travelers.[12] The issue, thus, is whether the shuttle bus between his work station and the parking lot should be considered part of the premises.

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

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

[9] A. Larson, The Law of Workers' Compensation § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

[10] *Linda D. Williams*, 52 ECAB 300 (2001).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(b) (August 1992); *see also D.D.*, Docket No. 15-0837 (issued July 10, 2015).

[12] *See R.B.*, Docket No. 11-1320 (issued September 5, 2012); *Denise A. Curry*, 51 ECAB 158 (1999).

The premises of the employer are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employer.[13] Appellant, consequently, may be covered under an exception to the general rule if the employing establishment exercised sufficient control over the shuttle bus for it to be considered part of the premises, or over the parking lot that he was traveling to at the time of his injury.

The Board finds that this case is not in posture for decision as the record is insufficient to determine whether appellant was on the premises of the employing establishment at the time of the alleged January 20, 2013 work incident. As noted, in determining whether the parking lot should be considered part of the employing establishment's premises, the Board must consider such factors as whether the employing establishment contracted for its exclusive use by its employees, whether spaces were assigned by the employing establishment, whether the area was checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees.[14]

In response to OWCP's request for additional information, appellant related that the employing establishment provided the bus service; however, it was also used by the general public. He also maintained that it did not permit employees to park at the airport and partially paid for his use of the parking lot. Appellant additionally indicated that the employing establishment considered him on duty while riding the bus and subject to discipline for misconduct. He submitted a letter dated July 28, 2012 from Mr. Carter advising employees of a change in parking programs to TSP and that it was monitoring issues such as space, shuttle service, and the conduct of employees.

OWCP requested that the employing establishment provide factual information, including whether it owned or controlled the shuttle bus and parking area and the various transportation options for employees. It did not, however, respond to the request. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.[15] Its procedures further provide that it should request that an official superior relate whether the parking facilities are owned, controlled, or managed by the employing establishment.[16] OWCP, however, failed to obtain a statement from the employing establishment in accordance with its procedures prior to finding that appellant had not shown that he was on the premises of the employing establishment when injured.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the

[13] *See R.B., id.*

[14] *Id.*

[15] *See supra* note 12.

[16] *See supra* note 13.

character normally obtained from the employing establishment or other governmental source.[17] The Board finds that OWCP did not sufficiently develop the evidence regarding whether appellant was on the premises of the employing establishment at the time of injury.[18]

On remand OWCP should obtain information from the employing establishment and determine whether the parking lot or shuttle bus was owned, managed, or controlled by the employing establishment and thus part of the premises. It should then determine whether appellant was in the performance of duty and under any control by the employing establishment at the time of the incident and, if so, adjudicate whether the factual and medical evidence establishes that he sustained an injury as alleged. Following such further development as deemed necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 11, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *See L.L.*, Docket No. 12-194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

[18] *See Rosie P. Colmer*, Docket No. 03-116 (issued May 2, 2003).