

FACTUAL HISTORY

On July 21, 2014 appellant, then a 54-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging that she was walking on her break by a food truck outside the employing establishment's building in which she worked when she fell on her left side and sustained injuries to her left shoulder and left arm. The employing establishment controverted appellant's claim alleging that she was on her break and off-premises when she fell. It indicated that she stated to witnesses that she was walking to a Wawa convenience store, which was a block away, not to the food truck at the time of her fall. The employing establishment also noted that witnesses stated that appellant's shoes were not strapped properly and that she changed her shoes before reporting to the employee health unit.

On August 18, 2014 appellant responded to questions from OWCP. She indicated that she went on her break on July 16, 2014 around 10:30 a.m., and as she was walking in front of the food truck along with her coworker, and passing other coworkers, she fell down, striking the pavement and injuring her left side. Appellant noted that the pavement was not level where she fell. She indicated that she bruised the left side of her elbow and she suffered a swollen left hand and extreme pain in her shoulder which was jarred from the brunt of the fall.

The record contains multiple witness statements. In an August 18, 2014 statement, L.G. stated that on July 16, 2014 at 10:30 a.m., while on a break, she was walking with appellant outside towards the truck in front of the employing establishment, and as they were walking, appellant fell on her left side in front of the food truck. She noted that appellant was assisted to her feet by herself and two men.

D.P. noted that he was a police corporal who was assigned to the visitor's entrance when he saw a lady, later identified as appellant, being assisted to her feet. He noted that appellant was lying on the ground in front of the food truck that is located on the pavement at the left of the entrance to the medical center. D.P. stated that he did not see her fall, but he was notified² that the location of the fall was not on the property of the employing establishment.

In an August 19, 2014 statement, J.K. indicated that at 10:20 a.m. on July 16, 2014 he was outside of the employing establishment waiting in line at the food truck when he observed appellant fall to the ground while walking past the food truck. He also noticed that the strap on appellant's shoe was not strapped correctly holding on her shoe at the time she fell.

In an August 18, 2014 statement, appellant's secondary supervisor stated that appellant called from her cubicle to report the incident. He walked with her to employee health and she walked on her own without support. The supervisor noted that appellant told him that she was walking on the city sidewalk in front of the hospital when she suddenly fell down and landed on her left side.

² The record of evidence does not establish who notified D.P. that the location of the fall was not on the premises of the employing establishment.

By decision dated September 8, 2014, OWCP denied appellant's claim because the evidence of record did not establish that appellant was in the performance of duty at the time of her injury.

On September 22, 2014 appellant requested a telephone hearing. In a statement received by OWCP on September 30, 2014, she indicated that she had no knowledge as to who owned the sidewalk where she fell. Appellant noted that routinely she would take a 15-minute break and walk the premises and that, while on break at around 10:30 a.m., she tripped and fell on the left side directly in front of the food truck which was on the premises outside the employing establishment. She stated that she noticed that the pavement was a little bit higher on one side than the other. Appellant described the location of the food truck as follows:

“In other words, you have your medical facility, you have your grass, your gates and when you walk outside there's a vendor truck which serves employees. It serves the public, a lot of employees who actually work for the [employing establishment] and, you know, I guess any passer byes. But it's on the grounds.”

Counsel argued that the sidewalk was on the employing establishment grounds, noting that the employing establishment sweeps the sidewalk and cleans the sidewalk and salts the sidewalk. He noted that the food truck was 20 yards from the gate.

Appellant submitted a letter to staff from the medical center director dated March 10, 2015 expressing thanks for the job well done during last week's snow storm clearing parking lots, salting sidewalks, and assisting veterans. She also submitted an October 2014 memorandum from the employing establishment with regard to snow removal procedures. This letter noted that the facility management support has the responsibility for the removal of ice and snow within the boundaries of the medical center. The memorandum also detailed the order in which the sidewalks would be cleaned. Appellant also submitted a March 2012 memorandum with regard to maintenance of facilities and equipment, noting that the service chief of facility management is responsible for the maintenance and repair of all buildings and grounds on the site.

By decision dated July 7, 2015, the hearing representative affirmed the denial of the claim as appellant was not in the performance of duty at the time of the injury.

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.³ In order to be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place where she may reasonably be expected to be in

³ This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. See *Bernard D. Blum*, 1 ECAB 1 (1947).

connection with her employment,⁴ and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.⁵

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.⁶

Exceptions to the premises doctrine have been made to protect activities that are so closely related to the employment itself as to be incidental thereto,⁷ or which are in the nature of necessary personal comfort or ministrations.⁸ The Board has also found that the 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.⁹ 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. The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.¹⁰

OWCP's procedures provide:

If the employee has a fixed place of work, the 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

⁴ *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). With regard to what constitutes the premises, the Board has held that the term premises, as it is generally used in workers' 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 employing establishment; in other cases even though it does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the premises. *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

⁵ See *Thomas E. Keplinger*, 46 ECAB 699 (1995); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6 (August 1992).

⁶ See *John M. Byrd*, 53 ECAB 684 (2002); see also *Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

⁷ See *Maryann Battista*, 50 ECAB 343 (1999) (activities such as delivering a bad check list and checking on a customer's telephone were incidental to employee's listed duties).

⁸ *J.L.*, Docket No. 14-0368 (issued August 22, 2014).

⁹ *R.O.*, Docket No. 08-2088 (issued February 18, 2011).

¹⁰ *Shirley Borgos*, 31 ECAB 222 (1979).

showing the boundaries of the industrial premises and the location of the injury site in relation to the premises.¹¹

ANALYSIS

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 her July 16, 2014 fall and injury.

The Board notes that the primary issue for resolution on appeal is whether she was on the premises and therefore in the performance of duty at the time she fell and was injured. The claimant has alleged that she was on the premises of the employing establishment at the time of her fall and that the employing establishment has control over and maintains the area where the fall occurred. The employing establishment controverted the claim and relied upon statements of L.G., D.P., and J.K. However, none of the statements were made by witnesses to the actual fall and its location. Despite the dispute over the exact location of the fall and the boundaries of the premises, OWCP did not undertake development of these factual aspects of the claim. There was no request from the official superior in the form of a statement describing the boundaries of the premises showing whether the employee was within those boundaries when the injury occurred, nor does the record of evidence contain a diagram showing the boundaries of the industrial premises and the location of the injury site in relation to the premises.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.¹² 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.¹³

On remand OWCP should obtain information from the employing establishment and determine where appellant fell on July 16, 2014 and whether that location was owned, managed, or controlled by the employing establishment and thus a part of its premises. It should then determine whether appellant was in the performance of duty. Following such further development as deemed necessary, OWCP should issue a *de novo* decision.

CONCLUSION

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

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

¹³ See *Rosie P. Colmer*, Docket No. 03-116 (issued May 2, 2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2015 is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: October 7, 2016
Washington, D.C.

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board