United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 15-1372**
	)	**Issued: September 20, 2016**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Oklahoma City, OK, Employer	)	

Appearances:
Chris Kannady, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 5, 2015 appellant, through counsel, filed a timely appeal from a December 17, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to rescind acceptance of appellant's traumatic injury claim.

FACTUAL HISTORY

On May 11, 2013 appellant, then a 51-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) for injuries to her left hand and wrist sustained when she fell while walking to her employing establishment at 3:26 a.m. Her duty hours were listed as 3:30 a.m. to 12:00 p.m., Tuesday through Saturday. A coworker indicated that she was about 20 feet ahead of appellant, when she heard appellant cry out and she turned around and saw appellant on the pavement. On the claim form, the employing establishment controverted the claim noting that appellant fell between the employee parking lot, which was not controlled or maintained by the employing establishment, and the entrance to the airport terminal.

Appellant submitted a May 11, 2013 emergency department report and a May 22, 2013 report and authorization request from Dr. Robert S. Unsell, a hand surgeon.

In a May 28, 2013 letter, OWCP advised appellant of the deficiencies in her claim and afforded her 30 days to submit the requested factual and medical information. In a separate May 28, 2013 letter, it requested that the employing establishment respond to several questions regarding such matters as the location of appellant's claimed injury relative to her workstation, the ownership of the parking lot facilities, whether parking spaces were assigned, and whether appellant was engaged in official duties at the time of the injury.

In a June 12, 2013 letter, appellant indicated that the injury did not occur in the parking lot.[3] Rather, it occurred in the exit lane of the airport passenger pickup, between the employee parking lot and the entrance to the airport entry terminal. The injury occurred at approximately 3:24 a.m. and her work shift began 3:30 a.m. Appellant indicated that the employing establishment was located inside the airport terminal and, when the injury occurred, she was reporting to work and was close to the entry of the airport terminal.

Appellant submitted several reports pertaining to the nature of her injury, which included work limitation slips of May 24 and June 3, 2013, May 11, 2013 discharge instructions from Health Care, a May 16, 2014 medical confirmation form which indicated that she received medical care from May 11 through 23, 2013, a May 28, 2014 duty status report, a May 22, 2013 report from Dr. Unsell, a May 24, 2013 report from Dr. Joseph A. Blough, a family practitioner, a June 10, 2013 physical therapy prescription, a May 22, 2013 physician prescription/patient agreement, and a June 13, 2013 x-ray request.

In a June 2, 2013 letter, the employing establishment controverted the claim. It noted at the time of the claimed incident, appellant was off duty and walking in a public area that was not owned, operated, controlled, or managed by the employing establishment. The claimed incident

[3] Appellant noted that while the employing establishment required her to park in the parking facilities and issues scan/swipe card and decals for employee's vehicles, it was her responsibility to pay for parking.

occurred at 3:26 a.m., at least four minutes before the beginning of her scheduled work shift of 3:30 a.m. and 10 minutes from her actual duty station. Further, appellant did not sustain the claimed injury in the parking lot, rather she was walking from a parking lot, across a public road, on a path determined by her, to her duty station. It advised that employees were not directed, or required, to walk a certain route and there was no route or path specifically designated for employees to travel. Attached was an aerial photograph of the airport which showed the location of appellant's accident and the location of her work area. The employing establishment noted it controlled the TSA office. All other areas were controlled by the Airport Trust.

On July 1, 2013 OWCP accepted the claim for a left wrist sprain. It noted that the employing establishment had controverted the claim because the injured worker "fell between the parking lot and entering the building." OWCP noted that she fell at approximately "3:24 a.m. while entering the building to report to work." It also noted that appellant's usual work shift began at 3:30 a.m. so she was within 30 minutes of her usual work shift. OWCP concluded that the evidence supported that this employee was a federal employee who sustained a disabling traumatic injury in the performance of duty. It advised the employing establishment to continue appellant's regular pay for the period of disability not to exceed 45 days.

On July 15, 2013 OWCP received the employing establishment July 10, 2013 letter further requesting that the acceptance of the claim be revisited on its merits as it contended that appellant was not in the performance of duty when the injury occurred as she was off duty and off-premises. The employing establishment maintained that appellant fell while walking on a public road on her way to the airport terminal building from the parking lot. At the time of the incident, appellant was walking on a road owned/leased, controlled, and maintained by the Oklahoma City Airport Trust. It contendcd that OWCP had failed to give any weight to what the employing establishment had raised in this claim.

Further medical evidence pertaining to appellant's claim was submitted.

In a telephone conversation dated December 17, 2013, OWCP advised Randy Baker (a Human Resources Specialist from the employing establishment) that OWCP had reviewed the file again and noted that a statement from appellant indicated that employees were allowed to park in the employee parking lot and given a swipe card and identification for the vehicles. Appellant claimed that she was in the posture of crossing the walk toward the entry way of the building to report for duty and pointed out that OWCP found that this case should be accepted.

The employing establishment, in its January 31, 2014 letter, reiterated that appellant was off duty when the accident occurred, that her work hours were 3:30 a.m. to 12:00 p.m., that the injury occurred at 3:26 a.m., that she was at least 10 minutes away from her assigned duty station within the airport terminal, and that she was therefore late for work. It disputed the contention that the employing establishment paid for appellant's parking permit. It clarified that the employing establishment had no control over the parking lots, roads, walkways, sidewalks, and easements as they are owned/leased, controlled and maintained by the Oklahoma City Airport Trust, that everyone including airport employees, airport contractors, airline carrier employees, employing establishment employees, and airport police, fire and rescue professionals are all equally subject to the ordinary nonemployment hazards of the journey. It cited to *Bettie J.*

Broadway, 44 ECAB 265 (1992), and *Sallie B. Wynecoff*, 39 ECAB 186 (1997) to support the proposition that appellant was not in the performance of duty.

OWCP advised the employing establishment, by letter dated February 19, 2014, that it apologized that its arguments had not previously been addressed and advised that the file would be re-reviewed and a formal response would be issued.

By decision dated March 5, 2014, OWCP proposed to rescind the acceptance of the claim as the issue of whether appellant was in the performance of duty at the time of the incident had not been properly developed. Accordingly, it concluded that a notice to rescind acceptance of the claim was to be issued to establish whether the wrist sprain arose in the course of employment and whether the diagnosed condition was causally related to the May 11, 2013 incident.[4]

Following that decision, OWCP provided appellant, by letter dated March 7, 2015, a copy of the information submitted by the employing establishment in support of its challenge/controversion. It provided appellant 30 days within which to submit a detailed statement in support of her claim or in response to the challenge.

In a letter dated March 28, 2014, addressed to OWCP's Branch of Hearings and Review, appellant stated: "Please accept the notices as a request for an appeal." She provided OWCP with additional supporting documentation refuting the employing establishment's claims and assumptions surrounding the incident and its decision to rescind acceptance of the claim. She asserted that at the time of the incident, she was on premises and in uniform. Appellant was at the airport to report to work and was less than two minutes from clocking in at the main office. She indicated that she took an oath of commitment and, as a sworn officer for the employing establishment, it was her responsibility to maintain and provide security for the traveling public when she was on airport grounds regardless of her duty status. Appellant further indicated that the employing establishment authorized the use of Operational Playbook applications, which described additional duties of TSA officers during the advent of a potential breech in security, and advised that playbook calls covered additional areas through the flight line, airport ramp areas, pedestrian curb sides and crosswalks, public parking lots (hourly/extended), rental car parking lot, all general airport grounds, and passenger gate areas for all airlines. She contended that while none of those areas were owned, leased, operated or maintained by the employing establishment, TSA officers were required to work in those various areas during a Playbook call. Appellant contended that she was in uniform and in a designated work area at the time of the incident. After her fall, she walked from the curbside area of the grounds and into the employing establishment offices and clocked in within two minutes. Appellant stated that she was in the performance of duty in all areas she walked as she patrolled those areas and answer questions and assists the public on those same premises. Additional evidence submitted showed appellant clocked in at 3:28 a.m. May 12, 2013. Additional maps of where the incident occurred was submitted along with additional medical evidence.

[4] Although this decision was set out as a "proposal" to rescind, appellant rights were attached to that decision and no further decision rescinding the claim was issued.

A hearing was held telephonically before a hearing representative on October 14, 2014. At the hearing, appellant testified that on May 11, 2013 she and a coworker left the parking lot area and were walking toward the building. They were in the passenger pick-up lane, when she fell at 3:26 a.m. Appellant came into work and clocked in at 3:28 a.m. and worked for approximately six hours, with her hand swollen. She eventually reported the injury, filled out the required paperwork, and went to the emergency room. Appellant indicated that she did not know who owns the passenger pickup lane where the incident occurred, but stated she patrols that area and it was incidental to her work duties when she does playbook duties, which involved patrolling and determining whether any type of security breaches exist.

Following the hearing the employing establishment asserted, in a November 17, 2014 letter, that appellant was not in the performance of duty at the time of the incident. It noted that contrary to appellant's assertion she was "a few yards" away from the entrance, she was "1,350 feet or 45.3.33 yards" away from the entry to her duty station. The employing establishment further rejected appellant's assertion that the injury occurred in an area that was incidental to her work area as the incident occurred on a public road and she was never tasked to perform playbook activities on a public road. Further, at the time of injury, appellant was not clocked in or performing her duties.

By decision dated December 17, 2014, an OWCP hearing representative affirmed OWCP's March 5, 2014 rescission decision, finding that appellant was not in the performance of duty when injured. The hearing representative recounted the testimony at the hearing and the argument from the employing establishment and found that "[t]o this reviewer, it was clear, even to [appellant], that she was not on [the employing establishment] property when she was injured. She thus encountered 'the ordinary, nonemployment hazards of the journey itself … shared by all travelers. Given this, [OWCP]'s March 5, 2014 rescission decision is **AFFIRMED**, as [appellant] was not in the performance of duty when injured." (Emphasis in the original.)

LEGAL PRECEDENT

The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[5] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[6] It is well established that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.[7]

OWCP's procedures note that "a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why [OWCP] finds that the decision should be rescinded. The evidence used to rescind the claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated, and why the original decision is now being invalidated."[8]

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[9] 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.[10] 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 her master's business, at a place when she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of her 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.[11]

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[5] *Eli Jacobs*, 32 ECAB 1147 (1981).

[6] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[7] *Alice M. Roberts*, 42 ECAB 747 (1991). *See also A.V.*, Docket No. 13-643 (issued January 14, 2014).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400(d) (February 2013).

[9] 5 U.S.C. § 8102(a).

[10] 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).

[11] *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).

Regarding what constitutes the premises of an employing establishment, the Board has stated:

> "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 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."[12]

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.[13] 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.[14] 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.[15]

ANALYSIS

Once OWCP accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, OWCP later decides that it has erroneously accepted a claim.[16]

The Board finds that OWCP did not meet its burden of proof to rescind acceptance of appellant's traumatic injury claim. On July 1, 2013 OWCP accepted the traumatic injury claim for a left wrist sprain as the evidence of record supported that appellant was a federal employee who sustained a disabling, traumatic injury in the performance of duty. In its March 5, 2014 decision, it rescinded acceptance of the claim finding that appellant had not met the fourth element, performance of duty as defined by FECA, and that the claim should have been further developed for this element of the claim. OWCP began the process of further developing the

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

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

[14] A. Larson, *The Law of Workers' Compensation*, Chapter 13.01(3) (December 2013) explains that the most common ground of extension of the premises doctrine 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 employing establishment, and that therefore the special hazards of that route become the hazards of the employment. Larson has also explained in § 13.02(2) (December 2013) that the zone of danger concept has been extended for slips and falls on ice which occur to public sidewalks immediately in front of the employer's place of business. *Michael K. Gallagher*, 48 ECAB 610 (1997); *J.D.*, Docket No. 16-0104 (issued April 5, 2016).

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

[16] *Walter Asberry, Jr.*, 36 ECAB 686 (1985).

claim, but prior to the completion of that process, appellant requested a hearing from the March 5, 2014 decision.

In the December 17, 2014 decision, the hearing representative determined that the issue before her was whether appellant had suffered a traumatic injury in the course of her employment. She found that the traumatic injury occurred off-premises and that appellant encountered "the ordinary, nonemployment hazards of the journey itself … shared by all travelers" and was thus not in the performance of duty when injured. The issue before the hearing representative, however, was whether OWCP had properly met its burden of proof to rescind acceptance of the claim.

The Board finds that the March 5, 2014 decision rescinding acceptance of the claim failed to provide a clear explanation or its rationale for rescission. Rather, this decision provided only a conclusory finding citing to general legal precedent concerning the going and coming rule. As noted above, a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded. The evidence used to rescind the claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated, and why the original decision is now being invalidated.[17] OWCP has not complied with its own procedures and, thus, has not met its burden of proof to rescind acceptance of appellant's claim.

As the Board has determined that OWCP has not met its burden of proof to rescind acceptance of the claim, it is unnecessary to adjudicate the issue of whether the injury occurred in the performance of duty. The Board will therefore reverse the December 17, 2014 decision.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to rescind acceptance of appellant's traumatic injury claim.

[17] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 20, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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