United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 17-0378**
	)	**Issued: December 22, 2017**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Horseheads, NY, Employer	)	

Appearances:
Stephanie N. Leet, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2016[2] appellant, through counsel, filed a timely appeal from a June 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to

[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] 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(f). One hundred and eighty days from June 16, 2016, the date of OWCP's last decision was December 13, 2016. Since using December 14, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the postmark is considered the date of filing. The date of the U.S. Postal Service is December 9, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

the Federal Employees' Compensation Act[3] (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 a traumatic injury in the performance of duty on October 15, 2014.

FACTUAL HISTORY

On October 16, 2014 appellant, then a 46-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that at 4:50 p.m. on October 15, 2014 she broke her left fifth metatarsal bone, injured her back and right hip, and twisted her right knee when she fell into a hole while walking on uneven pavement. She stopped work on October 15, 2014. On the reverse side of the claim form the employing establishment noted that appellant informed them that she went out to retrieve some items from her car while on break and was planning on walking to the mailbox in front of the terminal to mail some items. It noted that appellant had fixed hours of work from 9:15 a.m. to 5:15 p.m.

In an October 15, 2014 emergency room report, Dr. Marc Immerman, an examining physician Board-certified in emergency and family medicine, noted that appellant was seen that day for a foot and ankle injury sustained at work. Appellant described the injury as occurring when her foot rolled in a parking lot pothole at around 5:00 p.m. Dr. Immerman provided physical examination findings and diagnosed a left fifth metatarsal fracture.

Progress notes dated October 16, 2014 from Dr. Jeffrey Alwine, an osteopathic physician, noted that appellant was seen for a foot injury which had occurred on October 15, 2014. The report noted that the injury occurred when she stepped into a parking lot hole, her foot rolled, and she twisted her left ankle. Physical examinations findings and restrictions were provided. A review of an x-ray interpretation revealed a left foot fracture. Diagnoses included right knee contusion and left fifth avulsion metatarsal proximal fracture. OWCP also received an October 17, 2014 report by James McAllister, a certified physician assistant, who noted a left fifth metatarsal fracture.

Appellant submitted progress notes dated December 30, 2014, February 6, March 20, and April 17, 2015, signed by Dr. Joel McClurg, a Board-certified orthopedic surgeon. Dr. McClurg noted that she was seen for a follow-up visit for her left fifth metatarsal fracture. He observed that the diagnosed condition was consistent with appellant's history of injury. An x-ray interpretation showed a left metatarsal fracture with no obvious healing since the last visit.

By letter dated May 15, 2015, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It noted that at the time her claim was received that her injury appeared to be minor so her claim was not considered on the merits nor did her employing establishment controvert or challenge the merits of the claim. OWCP informed appellant that, as her claim had not been adjudicated, the employing establishment controverted her claim on the

[3] 5 U.S.C. § 8101 *et seq.*

basis that she had not been in the performance of duty at the time of the incident as she had been on break. It advised her of the type of evidence required and requested that she complete the attached questionnaire. The attached development questionnaire asked a series of questions including whether the alleged injury occurred on employing establishment premises and, if not, whether the parking lot was controlled or maintained by the employing establishment. Appellant was afforded 30 days to submit the requested information.

On June 2, 2015 OWCP received appellant's undated response to the questions it had posed. Appellant noted that there were four parking lots attached to the airport where she worked. According to appellant none of the parking lots were owned by the employing establishment. On the day in question she was on an assigned break when she went out to her car to retrieve some papers and to place her purse and lunch materials into her car. Appellant also planned on going to the mailbox to mail something. She noted that the employing establishment allowed employees to leave their offices while on assigned breaks. The parking lot where the incident occurred was the closest lot in front of the airport and provided hourly parking. Appellant noted that she paid for her parking in that lot. She related that free parking was provided at a Chemung County parking lot and the employing establishment paid rent to the County. Appellant stated that she avoided the free parking lot because the lot was next to a deicing pad, was a gravel lot, was the farthest lot from the airport, and she had been attacked by birds when parking in the free parking lot. She related that the employing establishment was aware of the problems with the free parking lot, but had not corrected the problems. They did not require her to park in the free parking lot.

In a statement dated May 24, 2015, M.S., a coworker, provided information regarding the location of what he called the "employee parking lot" and its problems due to its proximity to deicing activity. He stated that he suggested to appellant that she pay to park in the hourly parking lot which was located closer to the airport than the one where the employees parked for free.

OWCP received progress notes dated June 3, 2015 from Dr. McClurg reiterating findings from prior reports.

By decision dated August 19, 2015, OWCP denied appellant's claim as it found that her injury did not occur in the performance of duty. It noted that she was injured while on a break in a general airport parking lot owned by the airport and open to the public. The parking lot was not operated, owned, or controlled by the employing establishment.

In a letter dated September 10, 2015, appellant's then counsel requested a telephonic hearing before an OWCP hearing representative, which was held on April 19, 2016. During the hearing, appellant testified that she had just finished with union business and was advised by the employing establishment to take the rest of her shift as a break until signing out. She stated that she took her materials from the union meeting along with other items to place in her car. Appellant stated that she fell when she left her car en route to a mailbox. As a result of her fall and inability to walk, she was unable to return to work to sign out.

By decision dated June 16, 2016, the hearing representative affirmed the denial of appellant's claim. He found that she had not been in the performance of duty at the time of the

October 15, 2014 incident. The hearing representative explained that the parking lot where the incident occurred was not owned, operated, or maintained by the employing establishment and there was no evidence that appellant was required to park there, or that she was provided a subsidy for parking. He further found that she was on an authorized break attending to personal matters when she fell in the public parking lot on October 15, 2014.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.[4] The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers' compensation laws, namely, arising out of and in the course of employment.[5] In the course of employment deals with the work setting, locale, and time of injury whereas, arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.[6]

To arise 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 master'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.[7] 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.[8]

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

> "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 employing establishment; in other cases even though the employing establishment does not have ownership and control of the

[4] *Id*. at § 8102(a). *See also P.S.*, Docket No. 08-2216 (issued September 25, 2009).

[5] This construction makes the statue effective in those situations generally recognized as properly within the scope of workers' compensation law. *See also L.T.*, Docket No. 09-1798 (issued August 5, 2010); *Ricky A. Paylor*, 57 ECAB 568 (2006). *Bernard D. Blum*, 1 ECAB 1 (1947).

[6] *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[7] *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi, id*.

[8] *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).

place where the injury occurred the place is nevertheless considered part of the 'premises.'"[9]

Mere use of a parking facility, alone, is insufficient to bring the parking lot within the premises of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employing establishment owned, maintained, or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.[10]

ANALYSIS

Appellant sustained left fifth metatarsal bone fracture and injuries to her back, right hip, and right knee when she fell into a hole while walking on uneven pavement in a parking lot in front of the airport where she worked. OWCP denied the claim as it found that she was not in the performance of duty at the time of the alleged injury because the parking lot where she sustained her injuries was not part of the employing establishment premises and because she was attending to personal matters at the time of injury.

Applying the principles as set forth above, the Board finds that appellant's fall on October 15, 2014 did not occur in the performance of duty.

The first question to be resolved is whether her injury occurred on the actual or constructive premises of the employing establishment. The evidence of record, including appellant's own statements, substantiates that the parking lot where appellant fell was not owned by the employing establishment, but by Chemung County. Appellant's injury therefore did not occur on actual premises of the employing establishment.

The term premises as it is used in workers' compensation is not exclusively dependent upon ownership, but can be based on constructive ownership.[11] The Board has explained the factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's premises. These factors include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot,

[9] *Wilmar Lewis Prescott*, 22 ECAB 318 (1971). Another exception to the premises rule is the proximity rule which the Board has defined as when, under special circumstances, the industrial premises are constructively extended to hazardous conditions, which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

[10] *Roma A. Mortenson-Kindschi*, *supra* note 6.

[11] *Jimmie Brooks*, 54 ECAB 248 (2002).

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.[12]

Appellant contended that the employing establishment premises should be construed as extending to the parking lot in this case. However, the evidence of record establishes that the parking lot in which appellant fell was an hourly paid lot, open to the public, and that appellant paid to park in this lot. The employing establishment did not contract this lot for the exclusive use of its employees. Furthermore, there is no evidence of record that appellant was assigned a parking space in the lot by the employing establishment or that the employing establishment checked to see if unauthorized cars had parked in the lot. Statements from appellant as well as the employing establishment and a coworker confirm that the parking lot where appellant fell was not owned, leased, controlled, or maintained by the employing establishment. The Board further notes that appellant explained that she avoided the employing establishment's free parking lot, which was open for the employing establishment's employees. Rather, appellant opted to pay to park in a parking lot open to the public. She indicated that employees were not required to park in any specific parking lot by the employing establishment. Based on the facts of this case, the Board finds that the evidence of record is insufficient to establish that the parking garage was part of the employing establishment's premises.

The Board also finds that the parking lot where the accident occurred does not constitute a special hazard or an access route closely associated with the employing establishment. The accident occurred in a paid public parking lot. The Board finds that appellant has not established that parking lot where the accident occurred was used exclusively or principally by employees of the employing establishment for the convenience of the employing establishment.[13] There is no evidence that the parking lot was restricted to the employees of the employing establishment. The evidence reflects that the injury occurred in a public parking lot in front of the terminal. The Board finds that appellant's injury occurred while she was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.[14] The Board, therefore, finds that the parking lot in which appellant sustained her alleged injury was not part of the employing establishment's actual or constructive premises.

Even if the injury occurred off premises, the Board has found an employee to be in the performance of duty in certain circumstances such as when he or she completed a brief errand while on a paid break, and acted with the consent of the employing establishment. These

[12] But see, *M.D.*, Docket No. 17-0086 (issued August 3, 2017) (based on the facts of the case, the Board found the evidence sufficient to establish that the garage was part of the employing establishment's premises. The Board based its determination on the evidence of record which showed that the underground parking area was leased along with the office building by the employing establishment and the employing establishment maintained the facility through a contract with a building management firm); *G.E.*, Docket No. 14-0843 (issued September 23, 2014) (the Board determined that the parking garage was leased by the employing establishment for the use of its employees, that appellant had a parking decal which the security guards checked to ensure that only authorized spaces were used, and that the employing establishment recommended that employees park there for their safety and convenience as there was limited on-street parking which was considered unsafe. Accordingly, the Board found that the parking garage was part of the employing establishment premises).

[13] *See Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004); *Mary Keszler*, 38 ECAB 735 (1987).

[14] *Shirley Borgos*, 31 ECAB 222 (1979).

circumstances included going off premises to get coffee when no coffee was available in the building,[15] taking a smoke break adjacent to the office building,[16] or taking a walk when the employing establishment encouraged the employees to take regular breaks for walking.[17]

The Board finds that appellant was not in the performance of duty at the time of her injury. Appellant left the premises of the employing establishment to attend to personal needs, without evidence of consent by the employing establishment to leave the employing establishment premises.

In *B.H.*,[18] the Board summarized a number of cases wherein an employee left the employing establishment's premises during a break period. The Board concluded that these cases make clear that an employee's journey away from the employing establishment premises to seek personal comfort and ministration would be covered under FECA if it could be determined that the employing establishment gave consent to such action. While the record supports a finding that appellant was on an authorized break period, she has not alleged and there is no evidence of record that the employing establishment consented to her leaving the employing establishment premises to attend to such personal matters.

There were no employment factors involved in appellant's absence from the employment premises at the time her injury occurred. Although the injury occurred during her tour of duty, the act of leaving the employing establishment premises to go to her car in the parking lot to retrieve items was not incidental to her employment duties. Rather, it was a matter of personal convenience.[19] Counsel contended that the employing establishment maintained control over appellant as air traffic controllers could be recalled from their break if deemed needed by the employing establishment. However, appellant testified that she had been involved in a union meeting, went to her car to drop off materials accumulated during that meeting, and had been instructed to take the rest of her time as a break since it was close to the end of her shift. Although she was given permission to take a break following the end of her union meeting, she chose to depart from the premises to drop off materials from the union meeting and mail a personal item at a mailbox in front of the terminal.

On appeal counsel contends that appellant was in the performance of duty as she was encouraged by her supervisor to take a break. She further argues that the facts of this case are similar to *Lola M. Thomas*.[20] Contrary to counsel's contention the facts of *Thomas* are not similar to the instant case. As noted above, appellant was performing union work prior to being told to use the time remaining on her shift as her break. While employees may be subject to recall from breaks, her break was at the end of her shift and following a union meeting.

[15] *Helen Gundersen*, 7 ECAB 288 (1954).

[16] *Supra* note 5.

[17] *Mary M. Martin*, 34 ECAB 525 (1983).

[18] Docket No. 14-0829 (issued July 8, 2015).

[19] *James G. Pimenta*, Docket No. 06-0598 (issued June 15, 2006).

[20] 37 ECAB 572 (1986).

Appellant was told to use the remaining time on her shift as her break as the union meeting she attended had ended near the end of her shift. She was not performing any duties as an air traffic controller when she was told to go on break. Most significantly, there is also no evidence that employees were encouraged to leave the airport when taking breaks as was the case in *Thomas*. For these reasons and as discussed above, appellant was not in the performance of duty at the time of her 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 has not met her burden of proof to establish a traumatic injury in the performance of duty on October 15, 2014.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 16, 2016 is affirmed.

Issued: December 22, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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