



## ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on February 21, 2014, as alleged.

## FACTUAL HISTORY

The case has previously been before the Board.<sup>3</sup> The facts and the circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 21, 2014 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that at 5:55 a.m. on that date she tripped and fell on uneven sidewalk in front of the employing establishment's building, injuring her right wrist and knee. The employing establishment challenged the claim as she was going to work and thus not in the performance of duty. It provided appellant work hours as 6:00 a.m. until 2:30 p.m.

Appellant, in a statement received May 23, 2014, advised that she tripped and fell on a sidewalk while walking to the employing establishment. She submitted medical evidence in support of her claim.

In a decision dated June 4, 2014, OWCP denied appellant's claim after finding that the medical evidence was insufficient to establish a diagnosed condition as a result of the accepted February 21, 2014 employment incident.

On June 27, 2014 appellant requested reconsideration and submitted additional medical evidence. OWCP, by decision dated September 29, 2014, denied modification of its June 4, 2014 decision. It determined that appellant had not submitted a reasoned medical opinion attributing a diagnosed condition to the accepted work incident.

Appellant, through counsel, requested reconsideration on December 30, 2014 and submitted supporting medical evidence.

In a decision dated March 26, 2015, OWCP again denied modification of the June 4, 2014 decision after finding that appellant had not submitted sufficient medical evidence to show that she sustained an injury on February 21, 2014.

Appellant appealed to the Board. In a decision dated October 2, 2015, the Board set aside the March 26, 2015 decision. The Board found that OWCP had not developed the issue of whether appellant was on the premises of the employing establishment at the time of her February 21, 2014 fall. The Board remanded the case for OWCP to determine whether she was in the performance of duty at the time of the February 21, 2014 incident.

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<sup>3</sup> Docket No. 15-1172 (issued October 2, 2015).

OWCP, in letters dated October 21 and December 14, 2015, requested that the employing establishment provide information as to whether appellant was on its premises at the time of her fall and provide a diagram of the boundaries of the premises.

In a February 1, 2016 response, a representative of the employing establishment advised that appellant was not on its premises, but instead “on property owned by the State of Missouri.” She advised that the employing establishment did not own, control, or operate the property, that appellant was injured at 5:55 a.m., that her duty hours began between 6:00 a.m. and 6:30 a.m., and that she was “close to walking on [employing establishment] property in order to enter the [employing establishment] building.”

By decision dated February 2, 2016, OWCP again denied appellant’s claim. It found that she was not in the performance of duty at the time of her fall as she was not on the premises of the employing establishment.

On February 8, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. Appellant submitted computer search results showing that the Federal Government owned her work building.

At the telephone hearing, held on October 11, 2016, appellant related that at the time of her injury she was walking from public transportation to her work building. She advised that she was “crossing the street and walking on the opposite side of the street to get into the building.” Appellant related that she was heading to the employing establishment’s main building entrance. There was another entrance on the side of the building. Appellant asserted that she was five to seven steps from the front door when she fell on an uneven sidewalk. Counsel noted that the employing establishment was the only building tenant.

In a decision dated December 7, 2016, an OWCP hearing representative affirmed the February 2, 2016 decision. She found that appellant was not on the premises of the employing establishment at the time of her fall and there was no evidence supporting the premises should constructively extend to the sidewalk.

On appeal counsel asserts that the evidence conflicts regarding ownership of the property.

### **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.<sup>4</sup> The phrase sustained while in the performance of duty in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of arising out of and in the course of employment.<sup>5</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> See *Valerie C. Boward*, 50 ECAB 126 (1998).

In order to be covered under FECA, 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 connection with her employment, and while she was reasonably fulfilling the duties of employment, or engaged in something incidental thereto.<sup>6</sup>

The Board has recognized a general principle, called the premises doctrine, 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, subject to certain exceptions.<sup>7</sup>

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,<sup>8</sup> or which are in the nature of necessary personal comfort or ministrations.<sup>9</sup> 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.<sup>10</sup> This exception has 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.<sup>11</sup> The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.<sup>12</sup>

### ANALYSIS

Appellant alleged that she injured her right knee and right wrist when she fell on a sidewalk in front of the employing establishment's building, while walking from public transportation to work. OWCP denied her claim, finding that she was not in the performance of duty at the time of her fall.

The facts considered in determining whether an employee arriving at work is in the performance of duty are whether the injury occurred on the premises of the employing establishment, the time interval before the work shift, and the activity at the time of injury.<sup>13</sup> The

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<sup>6</sup> *B.P.*, Docket No. 14-0411 (issued July 17, 2014); *David P. Sawchuck*, 57 ECAB 316 (2006).

<sup>7</sup> *V.P.*, Docket No. 13-74 (issued July 1, 2013); *M.L.*, Docket No. 12-286 (issued June 4, 2012); *John M. Byrd*, 53 ECAB 684 (2002).

<sup>8</sup> 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).

<sup>9</sup> See *J.L.*, Docket No. 14-368 (issued August 22, 2014).

<sup>10</sup> *R.O.* Docket No. 08-2088 (issued February 18, 2011).

<sup>11</sup> See *C.B.*, Docket No. 15-1881 (issued October 7, 2016).

<sup>12</sup> See *Shirley Borgos*, 31 ECAB 222 (1979).

<sup>13</sup> See *E.V.*, Docket No. 16-1356 (issued December 6, 2016); *George E. Franks*, 52 ECAB 474 (2001).

Board finds that appellant was not in the performance of duty as she was not on the employing establishment's premises at the time of the claimed fall on February 21, 2014.

Appellant related that she tripped on an uneven sidewalk at 5:55 a.m. five to seven steps from the front of the employing establishment's building. The employing establishment provided that her duty shift began between 6:00 a.m. and 6:30 a.m. The employing establishment indicated that it did not own, operate, or control the sidewalk on which appellant fell. It advised that the State of Missouri owned the property.

In *Idalaine L. Hollins-Williamson*,<sup>14</sup> the employee fell and injured her left side while walking from a parking lot to the employing establishment building on a snow-covered public sidewalk. The Board found that the employee had not shown that the sidewalk on which she fell was used exclusively or principally by employees of the employing establishment for the convenience of the employer. The evidence of record supported that the sidewalk where the incident occurred was not owned, operated or maintained by the employing establishment and was open to the public. The Board found that the employee's injury was not in the performance of duty. In *M.L.*,<sup>15</sup> the employee fell while walking across the street from a train station to work. The Board found that the employee fell while commuting to work on a public sidewalk and was not in the performance of duty.

Even if a public sidewalk is the customary means of access to the employing establishment for its employees, this does not alter the public nature of the sidewalk or render it a part of the employing establishment's premises.<sup>16</sup> There is no evidence that the sidewalk on which appellant fell was restricted to the employees of the employing establishment or that it owned, operated, or maintained the area where the incident occurred. The area was open to the general public. Appellant, consequently, was not on the premises of the employing establishment at the time of her fall.

As noted above, off-premises injuries that occur while an employee is going to or coming from work or during a lunch period, are generally not compensable.<sup>17</sup> The Board finds that the exceptions to the rule are not applicable in this case. Appellant was not engaged on any special errand when she left her home to commute to her place of employment and was not exposed to a special hazard that became a hazard of employment. Rather, her travel on that date conformed to her regular work schedule and her normal morning commute in going to work. While appellant maintained that the sidewalk on which she fell was uneven, this was not a special hazard of the route but a hazard shared by all commuters.<sup>18</sup> The Board finds that she was not in the

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<sup>14</sup> 55 ECAB 655 (2004).

<sup>15</sup> Docket No. 12-0286 (issued June 4, 2012).

<sup>16</sup> *Supra* note 10.

<sup>17</sup> *See J.K.*, Docket No. 15-0198 (issued March 10, 2015); *J.E.*, Docket No. 59 ECAB 119 (2007).

<sup>18</sup> *See M.L.*, *supra* note 15; *R.O.*, *supra* note 10. In *M.L.*, the Board found that a rock on a sidewalk where the employee fell was a hazard commonly faced by pedestrians and thus not a special hazard at the off-premises point. In *R.O.*, the Board found that the employee's off-premises slip and fall on an icy public sidewalk did not arise in the performance of duty as it was not a special hazard of the route but a hazard shared by all commuters.

performance of duty on February 21, 2014 as the injury occurred while she was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.<sup>19</sup>

While appellant's employment gave rise to her journey between home and the employing establishment, workers' compensation was not intended to protect her from all the perils of such journey.<sup>20</sup> The Board finds that the established exceptions mentioned above do not apply to her case. Appellant was not reasonably fulfilling the duties of her employment or doing something incidental to the fulfillment of her job duties. She had not yet begun her tour of duty and was walking on a public sidewalk going to her building. As appellant was not in the course of employment at the time of the February 21, 2014 incident, she has failed to meet her burden of proof.

On appeal counsel contends that there is conflicting evidence regarding who owns the property. The employing establishment, however, provided that the sidewalk was owned by the State of Missouri and that it did not own, operate, or control the area.

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 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not established that she sustained an injury in the performance of duty on February 21, 2014, as alleged.

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<sup>19</sup> See *supra* note 7.

<sup>20</sup> See *Asia Lynn Doster*, 50 ECAB 351 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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