

**United States Department of Labor
Employees' Compensation Appeals Board**

S.M., son of J.M., Appellant)	
)	
)	
and)	Docket No. 16-1725
)	Issued: May 11, 2017
)	
U.S. POSTAL SERVICE, BULK MAIL CENTER, Jersey City, NJ, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>James D. Muirhead, Esq., for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 15, 2016 appellant, through counsel, filed a timely appeal from a March 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 the employee's death on December 27, 2010 occurred in the performance of duty.

FACTUAL HISTORY

On March 4, 2011 appellant completed a claim for death benefits (Form CA-5) alleging that the death of his father was related to "exposure" at work that caused a heart attack. A supervisor's report of employee's death (Form CA-6) dated June 5, 2012 indicated that on December 26, 2010 the employee "punched out of work" at 7:00 p.m.³ The supervisor reported that there was a snowstorm, the employee was seen at 4:00 a.m. on December 27, 2010 at the employing establishment cafeteria, and the employee's son was supposed to pick up the employee from work.

In a December 28, 2010 memorandum, an employing establishment supervisor reported that the employee was a clerk and on December 26, 2010 had asked to leave work early due to a snowstorm that occurred earlier in the day. According to the supervisor, the police reported that the employee had called his son at approximately 5:00 a.m. on December 27, 2010 from the Dunkin Donuts franchise, located in the employing establishment cafeteria. The son was supposed to pick up the employee at the intersection of McDermott Drive and County Road, but had not picked up his father. The supervisor reported that the employee's body was found in "Veterans Plaza at the entrance to McDermott Drive."

Appellant submitted an autopsy report dated December 30, 2010. The medical examiner reported the cause of death was arteriosclerotic cardiovascular disease and diabetes mellitus, with "exposure to cold" as a contributory cause.

By decision dated August 27, 2013, OWCP denied the claim for compensation. It found the death did not occur until after the employee left the postal facility.

On May 30, 2014 appellant, through counsel, requested reconsideration and submitted a May 23, 2014 report from Dr. Malcolm Hermele, an internist. Dr. Hermele provided a history that it appeared the employee was waiting on the employing establishment premises for a ride from his son, at an area called Memorial Park, and "essentially froze to death." He wrote that it was his understanding the employee had a massive heart attack and was caught in a blizzard. Dr. Hermele indicated that he had reviewed incident reports and witness statements. He opined that "the cold weather contributed to and was the proximal cause of a fatal arrhythmia and myocardial infarction in [the employee's] already compromised cardiovascular system. This event occurred while he was on the [employing establishment] premises on or about [December 27 to 28, 2010]."

OWCP did not initially address the reconsideration request. On March 25, 2015 additional evidence was submitted. An incident report dated December 28, 2010 from the "inspection postal police force" indicated that the employee's son reported that he talked with his

³ A time sheet indicated that the employee's normal work hours were 1:00 p.m. to 9:50 p.m.

father by phone at 5:00 a.m. on December 27, 2010. The employee was at the Dunkin Donuts and requested to be picked up. The report indicates that the Military Park section of the employing establishment facility was searched adjacent to the County Road entrance, and the employee's body was discovered. A "preliminary serious accident report" indicated that the body was found approximately 50 feet from the McDermott Drive employee entrance.

There were three witness statements submitted to the record. In a December 29, 2010 statement, a coworker reported that at about 7:00 a.m. on December 27, 2010 the employee left the cafeteria and she saw him in the cross walk in front of a stopped truck. The coworker indicated that the employee was "making backward strides" toward the facility entrance. A second coworker submitted an undated statement that at 10:00 p.m. on December 26, 2010 the employee was in the cafeteria trying to contact someone. The witness indicated that at 6:00 a.m. the employee was walking outside to the "guard shack" when he fell. According to the witness, he asked the employee if he was okay, was told yes, and the employee asked him to close the guard shack door. In addition, the witness asked the employee if he wanted a ride home, and was told no. A third witness submitted an undated statement, writing that the employee received a call at approximately 3:00 a.m. The witness wrote that at 6:00 a.m. when "we were going home" the employee fell in snow, was asked if he needed a ride, but he did not. Counsel submitted a June 24, 2015 letter noting that a reconsideration request had previously been submitted.

By decision dated September 23, 2015, OWCP denied modification. It found the employee was not on the clock, and the evidence did not show that his work, or presence in the parking lot, contributed to his death. OWCP noted the death did not occur within a reasonable time frame after he stopped work, and weather events did not constitute a special hazard.

On October 15, 2015 counsel again requested reconsideration. The evidence submitted included a statement from appellant, who asserted that his father called him at 2:00 a.m. on December 27, 2010 and reported that the parking lot was not plowed and he could not leave because of the snow. Appellant indicated that the employee stated that his car was stuck in the parking lot, and appellant told his father that he could pick him up at 7:00 a.m. because the roads were not clear. According to appellant, he tried to call his father at the Dunkin Donuts at 5:30 a.m. to tell him the roads still were not clear, but the employee could not be located and did not have a cell phone. Appellant wrote that the parking lot was not cleared until 4:00 p.m. on December 27, 2010, and he felt the employee's death was the result of his being stuck at the employing establishment due to the snow storm.

By decision dated March 10, 2016, OWCP denied modification. It found the employee's death did not arise out of his work duties and he was not in the performance of duty. OWCP found that "although the [employee] was witnessed as being on the premises, the [employee] did not pass away on the premises of the [employing establishment] but rather the day after his shift ended and in Veteran's Plaza which is not owned by the [employing establishment]. Accordingly, he was not performing any duties or assigned work at the time of his death."

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.”⁴ In order to be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in their master’s business, at a place where they may reasonably be expected to be in connection with their employment, and while they were reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.⁵ For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time, is compensable.⁶ However, that same employee with fixed hours and a fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.⁷ The reason for the distinction is that the latter injury is often merely a consequence of the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.⁸

ANALYSIS

In the present case, appellant has claimed that the death of the employee on December 27, 2010 was causally related to cold exposure at work during a snowstorm. The record indicated that the employee normally worked from 1:00 p.m. to 9:50 p.m. On December 26, 2010 he worked until 7:00 p.m. then he spent time in the employing establishment cafeteria. Appellant asserted that the employee had his car in the parking lot but was unable to drive due to the snowstorm. The employee was outside at times during the morning hours, going to the “guard shack” and then at 7:00 a.m. was walking to meet his son for a ride home when he collapsed.

As noted above, a critical question with respect to whether the employee was in the performance of duty while outside is whether he remained on the employing establishment premises. OWCP did not develop the record on this issue and its findings are incomplete and unsubstantiated. It found the employee did not pass away on the premises as “Veterans Plaza” was not owned or controlled by the employing establishment. The Board notes that the claim in this case was not based solely on exposure where the employee collapsed. Moreover, it is not clear from the record what constituted the employing establishment’s premises. The report from the employing establishment police indicated that they only searched the military park section of the “facility” without further explanation.

⁴ 5 U.S.C. § 8102(a).

⁵ *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

⁶ *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

⁷ *Id.*

⁸ *R.C.*, 59 ECAB 427, 430 (2008).

The employing establishment was never asked to provide information with respect to the premises. OWCP makes a finding, without further explanation, that the Veterans Plaza was not owned by the employing establishment. It is not clear what evidence they relied on to make such a finding. Moreover, the “premises” is not determined solely by ownership. 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.⁹

OWCP did not properly develop the evidence with respect to premises. 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 walking to the guard shack or to meet his son, nor does the record of evidence contain a diagram showing the boundaries of the industrial premises.¹⁰ OWCP must properly make a finding as to premises in this case.¹¹

Once the issue of premises is properly resolved, then OWCP can then make proper findings on the other relevant issues presented in this case. As noted above, an employee going from work while on the premises may remain in the course of employment. The Board has held the course of employment can embrace a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved but also on the circumstances occasioning the interval and the nature of the employee’s activity.¹²

OWCP did not make adequate findings as to the circumstances related to the snowstorm in this case. It did not request any information from the employing establishment as to the condition of the parking lot on December 26 and 27, 2010, or other relevant information. It is not clear whether the employing establishment was aware that the employee had remained at work, or had expressly or impliedly required employees to remain.¹³ The Board notes there was no indication that the employing establishment expressly prohibited remaining at work.¹⁴ To properly determine a “reasonable interval” after work hours in this case, OWCP must have adequate information regarding the circumstances surrounding the employee’s remaining at work after his work shift ended.

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.

⁹ *Denise A. Curry*, 51 ECAB 158 (1999).

¹⁰ *See C.B.*, Docket No. 15-1881 (issued October 7, 2016).

¹¹ *See L.M.*, Docket No. 11-0373 (issued September 22, 2011).

¹² *J.O.*, Docket No. 09-1432 (issued February 3, 2010); *see also J.D.*, Docket No. 16-0104 (issued April 5, 2016).

¹³ *See B.R.*, Docket No. 11-0153 (issued September 30, 2011).

¹⁴ *See Suzanne Eyssi*, Docket No. 84-0989 (issued July 19, 1985).

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.¹⁵ The Board finds that OWCP did not sufficiently develop the evidence regarding the issues in this case.¹⁶

The case will be remanded to OWCP for further development. OWCP should secure the necessary evidence to make a proper determination as to premises and the issue of a reasonable interval after work based on the circumstances of this case. After such further development as is necessary, it should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2016 is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: May 11, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *L.L.*, Docket No. 12-194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

¹⁶ *Supra* note 11; *see also supra* note 10.