

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on March 1, 2016.

FACTUAL HISTORY

On May 12, 2016 appellant, then a 62-year-old supervisory accountant, filed a traumatic injury claim (Form CA-1) alleging that, at 6:10 a.m. on March 1, 2016, she injured her left leg, back, and stomach when she slipped and fell after exiting her car on an oil spill in the parking garage. On the reverse side of the claim form, the employing establishment noted that appellant's regular tour of duty was from 6:30 a.m. to 3:00 p.m. Appellant's supervisor wrote that appellant did not notify him of the incident on the day it occurred.

By development letter dated June 1, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her as to the medical and factual evidence required. Appellant was afforded 30 days to submit the necessary information. OWCP did not request that the employing establishment provide any factual information relevant to her claim. It limited the request for information regarding any medical treatment that appellant may have received in its medical facility.

In response to OWCP's development letter, appellant submitted an April 28, 2016 progress report from Dr. Thomas R. Dempsey,³ a Board-certified orthopedic surgeon. Dr. Dempsey noted that appellant injured herself on March 1, 2016 when she slipped and fell in the parking lot on her way to work. Review of appellant's x-ray revealed narrowing of the L5-S1 disc space. Appellant's physical examination revealed normal cervical and thoracic lumbar range of motion, full hip, knees, and ankles range of motion, moderate tenderness over the lumbar spine, and moderate resting lumbar spasm. Dr. Dempsey diagnosed low back pain and lumbar disc disease with radiculopathy.

By decision dated July 5, 2016, OWCP denied appellant's claim finding that she had not established that she was in the performance of duty at the time of the alleged employment injury. It noted that the record contained no evidence that the incident occurred due to appellant's employment duties.

In a form dated July 13, 2016, appellant timely requested a review of the written record by an OWCP hearing representative.

OWCP received appellant's June 28, 2016 statement responding to questions it had posed in its initial development letter. Appellant related that she had reported the injury to her Branch Chief D.Y. and to J.G., the safety and health point of contact. She pointed out that she was "required by the employing agency to park in this parking lot, that on the date of the alleged employment injury she parked on the first level of the parking garage, that part of the parking is free and the "other parking is paid," and that she parked in a free space. Appellant provided the

³ This report was electronically signed by the physician on June 1, 2016.

names of witnesses, noted her tour of duty was from 6:30 a.m. to 3:00 p.m., and that the incident occurred at 6:15 a.m.

Dr. Dempsey, in progress notes dated July 5, 2016, noted that appellant had a slip and fall injury on March 1, 2016 and was seen for a follow-up visit regarding ongoing back problems. Physical examination findings were provided. Diagnoses included lumbosacral spondylosis and low back pain.

On November 14, 2016 L.B., appellant's supervisor, stated that appellant did not notify him about the incident on March 1, 2016. He further stated that "per sticky note" the employing establishment did not own or control the parking garage where the incident occurred. L.B. noted that the employing establishment leased space from the parking garage, but the owners of the building were responsible for the parking garage.

In a November 21, 2016 report, Dr. Dempsey noted that appellant was seen for low back pain complaints due to a March 1, 2016 work injury. He performed a physical examination, reviewed x-ray interpretations, and diagnosed low back pain, lumbosacral osteoarthritis, lumbar paraspinal muscle spasm, and lumbosacral intervertebral disc disorder with radiculopathy.

By decision dated December 19, 2016, the hearing representative affirmed the denial of appellant's claim. She noted that appellant failed to provide evidence that she was required to park in the garage and that "she was in an area designated specifically for her employing [establishment]." Based on information from the employing establishment, the hearing representative found that the evidence of record failed to establish that the parking garage was controlled, owned, or managed by the employing establishment or that employees were required to park in a specific spot in the parking garage. Thus, appellant had failed to establish that she sustained an injury in the performance of duty.

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 pertains to 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

⁴ 5 U.S.C. § 8102(a). See also *P.S.*, Docket No. 08-2216 (issued September 25, 2009).

⁵ 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); see also *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *Ricky A. Paylor*, 57 ECAB 568 (2006).

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).

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 the master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or 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 [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 the employing establishment does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the premises."⁹

The Board has also held that factors which determine whether a parking area used by employees may be considered a part of the employing establishment's premises 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, 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. 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

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

⁸ *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).

⁹ *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). Another exception to the rule is the proximity rule which the Board has defined by as where, 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 See *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

OWCP's procedures provide:

"The industrial premises include the parking facilities owned, controlled, or managed by the employing establishment. An employee is in the performance of duty when injured while on such parking facilities unless engaged in an activity sufficient for removal from the scope of employment. In such cases the official superior should be requested to state whether the parking facilities are owned, controlled, or managed by the employing establishment, and whether the injury did in fact occur in the parking area. The [claims examiner] may approve the case when the official superior's response is affirmative and consistent with the other evidence."¹¹

ANALYSIS

Appellant alleged left leg, back, and stomach injuries when she slipped and fell after exiting her car in the parking garage when she arrived at work. OWCP denied the claim by decision dated July 5, 2016 as it found she was not in the performance of duty. By decision dated December 19, 2016, the hearing representative affirmed the denial of appellant's claim, finding that the parking lot where the alleged injury occurred was not part of the employing establishment's premises.

The Board finds this case is not in posture for a decision as the evidence of record is insufficient to determine whether appellant was on the premises of the employing establishment at the time of the alleged March 1, 2016 work injury.

Appellant was in the process of coming to work for her tour of duty beginning at 6:30 a.m. She sustained an injury at approximately 6:15 a.m., before commencing her employment duties. The Board has included within the performance of duty a reasonable time before and after work to allow for coming and going, as well as personal ministrations, such as lunch or bathroom breaks, engaged in for the benefit of the employing establishment.¹² If the injury does not take place during those periods or on employing establishment premises, the Board will place special emphasis on whether the employee was engaged in an activity related to fulfilling the

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) (August 1992). See also Chapter 2.804.4(b); "If the employee has a fixed place of work, the CE 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 showing the boundaries of the industrial premises and the location of the injury site in relation to the premises"; see also *D.D.*, Docket No. 15-0837 (issued July 10, 2015).

¹² See *Cemeish E. Williams*, 57 ECAB 509 (2006) wherein the Board explained that the fact that the claimant arrived for duty 15 or 30 minutes prior to her scheduled shift would reasonably allow her time to sign in, put away her belongings, and start her shift on time, thereby providing the employing establishment some substantial benefit from the activity involved.

duties of her employment.¹³ As appellant's fall occurred 15 to 20 minutes prior to the start of her regular work shift, it occurred within a reasonable interval before work.¹⁴

As noted above, in determining whether the parking lot should be considered part of the employing establishment's premises, the Board must consider such factors as whether the employing establishment contracted for its exclusive use by its employees, whether the employing establishment assigned spaces, whether the area was checked to see that no unauthorized cars were parked in the lot, whether the public was permitted to use the lot, whether parking was provided without cost to the employees, and whether other parking was available for use by the employees.¹⁵

The record contains no evidence that OWCP requested the employing establishment to provide factual information regarding the parking garage, whether parking was subsidized for the employees, whether there were other parking options, and whether the employees were assigned specific places to park. While appellant's supervisor stated that the parking garage was not owned or controlled by the employing establishment, he did not provide information as to whether it managed the parking spaces used by the employees. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.¹⁶ Its procedures further provide that it should request that an official superior relate whether the parking facilities are owned, controlled, or managed by the employing establishment.¹⁷ OWCP, however, failed to obtain a statement from the employing establishment in accordance with its procedures prior to finding that appellant had not shown that she was on the premises of the employing establishment when injured.

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.¹⁸ 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.¹⁹

¹³ See *A.H.*, Docket No. 16-888 (issued August 4, 2016).

¹⁴ *Supra* note 12.

¹⁵ See *R.B.*, Docket No. 11-1320 (issued September 5, 2012).

¹⁶ See *supra* note 11.

¹⁷ See *id.*

¹⁸ See *L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008); *Richard Kendall*, 43 ECAB 790 (1992).

¹⁹ See *Rosie P. Colmer*, Docket No. 03-0116 (issued May 2, 2003).

On remand OWCP should obtain information from the employing establishment and determine whether the parking lot was owned, managed, or controlled by the employing establishment and thus part of the premises. It should then determine whether appellant was in the performance of duty and under any control by the employing establishment at the time of the incident and, if so, adjudicate whether the factual and medical evidence establishes that she sustained an injury as alleged. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2016 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 5, 2018
Washington, DC

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

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

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