United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 17-0756**
	)	**Issued: July 11, 2018**
DEPARTMENT OF VETERANS AFFAIRS, NEW BEDFORD VETERANS CENTER, New Bedford, MA, Employer	)	

Appearances:
Robyn G. March, 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 February 17, 2017 appellant, through counsel, filed a timely appeal from an August 23, 2016 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 appellant met her burden of proof to establish that she sustained an employment-related injury in the performance of duty on January 30, 2014.

On appeal counsel asserts that OWCP erred in its application of the proximity rule in determining that the January 30, 2014 injury did not occur on the employing establishment premises. He maintains that the injury occurred on employing establishment premises and, therefore, occurred in the performance of duty.

FACTUAL HISTORY

On February 18, 2014 appellant, then a 58-year-old psychologist, filed a traumatic injury claim (Form CA-1) alleging that at 4:30 p.m. on January 30, 2014 she sustained a head injury with concussion, cuts on her hand and right ear, and painful left knee and right hip, when she slipped on ice in front of the employing establishment's door. The claim form indicated that appellant's regular work hours were 8:00 a.m. to 4:30 p.m.

The employing establishment controverted the claim. I.M., an employing establishment benefits specialist, indicated that the employing establishment center was in leased space and asserted that the sidewalk where appellant fell was not maintained by the employing establishment. D.S., an employing establishment supervisor, provided an incident report dated February 21, 2014. He related that at about 5:00 p.m. on Thursday, January 30, 2014, as appellant walked out the door leaving work, she turned right, walked about four steps, and slipped on ice, falling to the ground. Appellant was found by another employee who was also leaving work and saw her sitting on the ground. The employee then informed D.S. who walked out and found appellant still sitting. Appellant remained there for several minutes before being helped up. D.S. commented that appellant still seemed a little dazed, went back into work to clean up and discovered she was bleeding from her right ear. Appellant informed him she was going to a walk-in clinic on the way home and called him around 7:00 p.m., indicating that the clinic believed she had some head trauma and she was taking the next day off. D.S. indicated that the building gutters and drain were not fixed and caused ice to form, and that he called the employing establishment landlord who had workers sand the area.

An authorization for examination and/or treatment form (Form CA-16), signed by I.M. was also submitted. In a statement on the form, apparently written by appellant, indicated that a drain pipe from the roof was cracked and spilling water in front of the door, and this created a five foot ice sheet outside the door which caused her to slip and fall, hitting her head.

In correspondence dated April 2, 2014, OWCP requested that the employing establishment provide information regarding the circumstances of the January 30, 2014 fall. It specifically asked whether the injury occurred on a public sidewalk or whether it was a sidewalk on property belonging to the employing establishment or used exclusively or principally by employees or clients of the employing establishment. It asked that the employing establishment provide a diagram showing the boundaries of the center, the exact location of the injury site, and whether it had contracted for exclusive use of the area. OWCP also asked whether appellant was in a paid work status and engaged in official duties just prior to having departed the premises on January 30,

2014, and was asked to provide the name and address of the building owner as third-party liability could exist.

By development letter dated April 2, 2014, OWCP informed appellant that when her claim was received, because it appeared to be a minor injury that resulted in minimal or no lost time from work, a limited amount of medical expenses were administratively approved, but the merits of her claim were not formally considered. It noted that the employing establishment had now challenged the claim, and asked her to submit further information regarding the location of the January 30, 2014 fall, and further information regarding her claimed injuries, noting that the employing establishment maintained that she was not in the performance of duty when injured. Appellant was afforded 30 days to respond.[3]

On April 3, 2014 the employing establishment informed OWCP that the building where appellant fell on January 30, 2014 was owned by a private entity. On April 11, 2014 it forwarded information regarding the location of appellant's fall. The employing establishment explained that the center property was leased, and the lessor provided snow removal and was responsible for maintenance of the area. It continued that appellant's January 30, 2014 fall occurred in an area was a normal route which employees and clients must travel to gain access to the employing establishment, but that the sidewalk was not exclusively used by the employing establishment. The employing establishment concluded that appellant's tour of duty ended at 4:30 p.m. and noted that the fall occurred at approximately 5:02 p.m. OWCP attached documentation from the General Services Administration (GSA) in which L.M., a leasing contracting officer, indicated that the leased property was a full service lease which required the lessor to provide all snow removal from the premises. She continued that the employing establishment was in no way responsible for shoveling or removing ice. A copy of the lease agreement was attached. It indicated that the lessor provided snow removal and was responsible for maintenance. Attached photographs indicated that the sidewalk was shared by an adjacent business, a restaurant.

By decision dated May 7, 2014, OWCP denied appellant's claim. It found that the claimed January 30, 2014 incident did not occur in the performance of duty because appellant was not

[3] Appellant submitted numerous medical reports to the record dating from January 30, 2014. Dr. Olivier Gherardi, a Board-certified osteopath specializing in family practitioner, diagnosed head injury and ear laceration. Dr. David B. Burns, a Board-certified osteopath specializing in orthopedic surgery, diagnosed left meniscus tear and primary osteoarthritis in a report dated February 7, 2014. He performed left knee arthroscopic surgery with partial medial and lateral meniscectomies, synovectomy, and plica excision on July 10, 2014. Dr. Keith R. Brecher, a Board-certified neurologist, examined appellant on February 21, 2014 and diagnosed postconcussion syndrome. Appellant continued to be seen by Dr. Brecher, Dr. Burns, Dr. Gherardi, and Dr. Carolyn McGrath, a primary care physician. In reports dated June 5 to July 31, 2014, Dr. Richard P. Millman, Board-certified in internal medicine, pulmonary disease, and sleep medicine, diagnosed concussion with loss of consciousness of unspecified duration, obstructive sleep apnea, insomnia, and vertigo. On August 7, 2014 Dr. Michelle Mellion, Board-certified in neurology and neurophysiology, diagnosed postconcussion syndrome. Dr. Mark P. Andreozzi, an osteopath specializing in allergy and otolaryngology, noted treating appellant since February 12, 2014. He noted a history of head trauma with concussive symptomatology and bilateral symmetrical high frequency sensorineural hearing loss. In a May 24, 2016 report, Dr. Albert J. Marano, a Board-certified neurologist, noted seeing appellant on March 31 and May 25, 2016. He diagnosed postconcussive syndrome and advised that this was a direct result of the January 30, 2014 injury, based on a detailed history, clinical examination, and diagnostic workup. Dr. Marano noted that appellant had recently been terminated at work due to her inability to perform work duties.

injured on employing establishment property, and the fall did not occur during regular work hours. OWCP also noted that she had not responded to the April 2, 2014 development letter.

In an undated statement, received by OWCP on June 10, 2014, appellant indicated that on January 30, 2014 her last counseling session concluded at about 4:30 p.m. and, as was her practice, she then spent 15 to 30 minutes completing her work for the day including finalizing notes, checking e-mails, etc., and likely left her office between 4:45 and 5:00 p.m. She related that, as she walked out the front door of the employing establishment and walked one or two steps, she fell on a large patch of ice that had accumulated beside the doorway, noting that a drain pipe had broken allowing water to spill directly onto the walkway, which then iced over. Appellant indicated that she did not remember the fall or the landing and believed she could have been unconscious for a few minutes, first becoming aware of lying on her back turned towards the right. She did not know how long she was there and recognized D.N. standing over her, then D.S. Appellant got up, at some point, called her husband, and noted blood on her hand and coming from her right ear. She indicated that the doorway was the main entrance to the employing establishment and was used by all employees and clients, noting only one other door, an emergency exit at the rear of the building. Appellant indicated that, as a result of the fall, she sustained a traumatic brain injury and postconcussion syndrome, two meniscal tears of the left knee, and also injured her tailbone, right shoulder, and cut her right hand, as noted in medical evidence submitted.

In correspondence dated and received by OWCP on May 7, 2015 appellant, through counsel, requested reconsideration. She submitted evidence previously of record including her statement, the incident report, and one of the photographs of the walkway where her fall occurred. Counsel also submitted additional medical evidence including treatment notes from Dr. Gherardi and Dr. Brecher.

By decision dated July 28, 2015, OWCP modified its prior decision to find that, while it was reasonable for appellant to be leaving work a half hour later when she slipped and fell on January 30, 2014, however, the fall did not occur in the performance of duty. It explained that the fall occurred on a sidewalk not maintained by the employing establishment and which was used by the general public in addition to clients and employees of the employing establishment.

On July 25, 2016 appellant, through counsel, requested reconsideration. Counsel asserted that the injury occurred in the performance of duty.

By decision dated August 23, 2016, OWCP denied modification of its prior decision. It explained that, as appellant was leaving work when she fell on a public sidewalk, her injury did not occur in the performance of duty.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers'

[4] 5 U.S.C. § 8102(a).

compensation laws, namely, arising out of and in the course of performance.[5] 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 employer'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 her employment or engaged in doing something incidental thereto.[6]

As to an employee having fixed hours and a fixed place of work, an injury occurring on the premises while the employee is going to and from work before or after working hours or at lunch time is compensable, but if the injury occurs off the premises, it is not compensable, subject to certain exceptions. Underlying some of these exceptions 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.[7] 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.[8] This exception contains 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.[9]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty when she slipped and fell on ice on January 30, 2014.

The facts considered in determining whether an employee leaving 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. The course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts.[10] Appellant had fixed hours of work from 8:00 a.m. to 4:30 p.m. and was injured at about 5:00 p.m. on January 30, 2014 as she was leaving work. She explained that, after her workday, she spent 15 to 30 minutes completing her work for the day including finalizing notes, checking e-mails, etc. Appellant therefore fulfilled the time and place

[5] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[6] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[7] *Jimmie Brooks*, 54 ECAB 248 (2002); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[8] 1 Arthur & Lex Larson, *The Law of Workers' Compensation* § 13.01(3) (2006). *See also R.O.*, Docket No. 08-2088 (issued May 18, 2009).

[9] *Id*. at § 13.01(3)(b).

[10] *T.L.*, 59 ECAB 537 (2008).

requirement needed to establish fact of injury.[11] However, unless her injury occurred on the actual or constructive premises of the employing establishment, her injury cannot be considered as occurring in the performance of duty.[12]

The evidence of record establishes that the sidewalk where appellant fell is not owned by the employing establishment which leased the property from a private owner. L.M., a leasing contracting officer with GSA, indicated that the leased property was a full-service lease, which required the lessor to provide all snow removal on the premises. She continued that the employing establishment was in no way responsible for shoveling or removing ice. The record contains a copy of the lease, which indicates that the lessor is responsible for maintenance.

In *Idalaine L. Hollins-Williamson*,[13] 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.*,[14] 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.

As noted, the employing establishment is located in a strip mall. Photographic evidence of record shows that it adjoins a restaurant.[15] It is reasonable to assume that the employees and customers of the restaurant would share the sidewalk where appellant fell. Thus, appellant has not shown that the sidewalk was used exclusively or principally by the employees and clients of the employing establishment for the convenience of the employer, either contractually or otherwise.

Counsel asserted on appeal that OWCP did not properly apply the proximity rule. As noted, the proximity exception to the premises rule indicates that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions, which are proximate to the premises and may, therefore, be considered as hazards of the employing establishment.[16] This exception contains two components. The first is the presence of a special hazard at the

[11] *Supra* note 6.

[12] *See Sallie B. Wynecoff*, 39 ECAB 186 (1987).

[13] 55 ECAB 655 (2004).

[14] Docket No. 12-1286 (issued June 4, 2012).

[15] A photograph of the street view on Google Maps show that there are four small businesses plus the employing establishment in the strip mall. Available at https://google.com.maps.

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

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.[17]

The Board has generally held that conditions caused by weather, including snow, ice and rain, are not special hazards. Rather they are dangers inherent to the commuting public.[18] As the Board noted in the case *C.P.*, a fall on an icy sidewalk used as a customary means of ingress and egress to the employing establishment does not establish that the injury occurred in the performance of duty.[19] The hazard that caused appellant's injury, ice or snow on a public sidewalk, is a hazard commonly faced by all pedestrians in a northeastern city and; therefore, there was no special hazard at the off-premises point.[20] Therefore, while appellant fell just steps after exiting the employing establishment, in her normal route of egress from the employing establishment, the proximity rule does not apply in this case.

The site where the claimed injury occurred was not owned, maintained, or controlled by the employing establishment or on the premises of the employing establishment. The area was open to and used by the general public.[21] No special circumstances exist through the proximity rule, under which the industrial premises would be constructively extended to hazardous conditions which were proximately located to the premises and, therefore, would be considered as hazards of the employing establishment.[22] The Board, therefore, finds that appellant's injury constitutes an ordinary, nonemployment hazard of the journey itself, a fall on an icy sidewalk, which is shared by all travelers and the proximity rule does not apply.[23]

Thus, contrary to counsel's assertion on appeal, appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty because the evidence establishes that her injury did not occur on the premises of the employing establishment. Rather, the injury was caused by the act of slipping on ice on a public sidewalk, which is an ordinary, nonemployment hazard of the journey from work itself that was shared by all travelers.[24]

[17] *Supra* note 9.

[18] *See Denise A. Curry*, 51 ECAB 158 (1991); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[19] *C.P.*, Docket No. 11-1432 (issued January 23, 2012).

[20] *Id.*; *see also R.O.*, *supra* note 8.

[21] *See F.L.*, Docket No. 17-0528 (issued June 6, 2017).

[22] *See D.B.*, Docket No. 13-0510 (issued June 10, 2013).

[23] *D.C.*, Docket No. 08-1872 (issued January 16, 2009).

[24] *See D.M.*, Docket No. 13-0535 (issued June 6, 2013).

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.[25]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an employment-related injury in the performance of duty on January 30, 2014.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2018
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

[25] Where, as in this case, an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).