United States Department of Labor
Employees' Compensation Appeals Board

S.O., Appellant	)	
and	)	**Docket No. 18-0773**
	)	**Issued: September 11, 2018**
DEPARTMENT OF JUSTICE, FEDERAL PRISONS INDUSTRIES, Washington, DC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ABCHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 28, 2018 appellant, through counsel, filed a timely appeal from a January 19, 2018 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 has met her burden of proof to establish right shoulder, right hand, and right knee injuries in the performance of duty on April 25, 2017.

FACTUAL HISTORY

On May 19, 2017 appellant, then a 45-year-old contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on April 25, 2017 she injured her right shoulder, right hand, and right knee when she fell at lunch trying to cross a street. The employing establishment controverted the claim, contending that she was "at lunch and off premises when she fell on the public sidewalk." The incident occurred at 12:05 p.m. and appellant's regular work hours were from 6:30 a.m. until 3:00 p.m.

By letter dated May 24, 2017, OWCP requested that the employing establishment address whether appellant was on the premises that it owned, operated, or controlled at the time of her fall and, if so, to include a diagram showing the premises boundaries and the location of the work incident. It further asked whether she was performing work duties or duties reasonably incidental to employment at the time of the incident.

OWCP, in a May 24, 2017 development letter, informed appellant that she needed to provide additional factual and medical information in support of her claim, including a description of where she was at the time of the alleged incident, whether she was on the premises of the employing establishment, and whether she was performing her assigned work duties.

L.D., a supervisor, in response to OWCP's request for information, responded "no" to the question of whether appellant was on premises owned, controlled, or operated by the employing establishment at the time of injury. She provided a hand-drawn diagram indicating that the injury occurred on the northwest corner of D and First Streets, NW, Washington, DC. L.D. also submitted an image from a computer mapping service. She further responded "no" to the question of whether appellant was performing any assigned duties or activities reasonably incidental to her employment at the time of the incident.

By decision dated June 29, 2017, OWCP denied appellant's traumatic injury claim. It found that she was not in the performance of duty at the time of her alleged fall on April 25, 2017 as she was at lunch and not on the premises of the employing establishment.

Counsel, on July 18, 2017, requested a telephone hearing before an OWCP hearing representative.

In an October 18, 2017 statement, appellant indicated that around 12:05 p.m. on April 25, 2017 she exited the front door of her building to pick up lunch. She related: "I turned right onto the sidewalk in front of the building; I walked to the corner of the building and began to attempt to cross the street toward the Hyatt Hotel located in front of the building. As I stepped off the sidewalk onto the street in front of the building, I tripped and fell." Appellant questioned how L.D. knew the location of her fall and advised that the "location of First [Street] and D Street as listed by [L.D.] in the denial letter is not accurate. In order for me to be headed in the direction

listed by [L.D.], I would have taken a left onto the sidewalk." She submitted an image from a computerized mapping service showing a picture of a corner at 101 D Street NW.

During the telephone hearing, held on December 18, 2017, appellant related that at the time of her fall she had exited her work building located at 400 First Street NW, turned right onto the sidewalk, and walked to the corner of the building to cross to D Street NW. She stated that she fell on 401 First Street NW when she stepped off the sidewalk and onto the street. Appellant underwent surgery on her shoulder on July 24, 2017. She related that she worked in a federal building without a cafeteria. Employees commonly got breakfast and lunch from outside the building. Appellant explained that a pedestrian assisted her after she fell. She returned to her building and reported her injury to L.D. Subsequently, a workers' compensation specialist with the employing establishment informed appellant that she was off the premises and not working and so her accident was not related to her employment. She described her medical treatment subsequent to her injury. Appellant noted that the sidewalk where she fell was cracked and that she fell forward into the street. Counsel asserted that Board case law provided that the premises of the employing establishment could extend beyond the area it owned depending on its relationship to the property. He asserted that appellant had to go out of the building to get lunch and that the employing establishment did not prohibit employees from getting food at lunch outside the building.

By decision dated January 19, 2018, OWCP's hearing representative affirmed the June 29, 2017 decision. He found that appellant was not in the performance of duty at the time of her April 25, 2017 fall as she was off premises and at lunch. The hearing representative further found that she had not shown that the premises should be extended due to special circumstances.

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.[3] 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.[4]

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 his or her master's business, at a place where he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment, or engaged in something incidental thereto.[5]

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

[3] 5 U.S.C. § 8102(a).

[4] *See Valerie C. Boward*, 50 ECAB 126 (1998).

[5] *B.P.*, Docket No. 14-0411 (issued July 17, 2014); *David P. Sawchuck*, 57 ECAB 316 (2006).

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.[6]

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,[7] or which are in the nature of necessary personal comfort or ministration.[8] 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.[9] 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.[10] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[11]

ANALYSIS

The Board finds that appellant was not in the performance of duty on April 25, 2017 as she was at lunch and not on the premises of the employing establishment at the time of the claimed fall on April 25, 2017. Appellant fell when stepping off a sidewalk and onto the street. The employing establishment indicated that it did not own, operate, or control the sidewalk. While appellant maintains that she fell on a different corner than indicated by L.D., noting that she turned right out of the building door rather than left, she has not submitted any evidence challenging the employing establishment's assertion that it did not own, operate, or control the sidewalk.

In *Idalaine L. Hollins-Williamson*,[12] the employee fell and was injured 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.*,[13] the employee fell while walking across the street from a train station to work. The Board found that

[6] *V.P.*, Docket No. 13-0074 (issued July 1, 2013); *M.L.*, Docket No. 12-0286 (issued June 4, 2012); *John M. Byrd*, 53 ECAB 684 (2002).

[7] *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).

[8] *See J.L.*, Docket No. 14-0368 (issued August 22, 2014).

[9] *R.O.*, Docket No. 08-2088 (issued February 18, 2011).

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

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

[12] 55 ECAB 655 (2004).

[13] *M.L.*, *supra* note 6.

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.[14] 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.[15]

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.[16] 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 building to obtain lunch and was not exposed to a special hazard that became a hazard of employment. 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 travelers.[17]

Appellant's alleged fall on April 25, 2017 occurred during lunch, not at a time when she may reasonably be said to be engaged in her employer's business, and on a public sidewalk, not at a place where she may reasonably be expected to be in connection with her employment. While having lunch may be considered incidental to one's employment under the personal comfort doctrine,[18] the premises rule explicitly excludes off-premises lunches from course of employment.[19]

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 met her burden of proof to establish right shoulder, right hand, and right knee injuries on April 25, 2017 in the performance of duty.

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[14] *See supra* note 9.

[15] *Id*; *see also Sallie B. Wynecoff*, 39 ECAB 186 (1987).

[16] *See J.K.*, Docket No. 15-0198 (issued March 10, 2015); *J.E.*, Docket No. 59 ECAB 119 (2007).

[17] *See M.L., supra* note 6; *R.O., supra* note 9. 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.

[18] *See Nancy E. Barron*, 36 ECAB 428 (1985) (where an employee broke a tooth while eating breakfast at her desk).

[19] *See supra* note 9; *see also D.S.*, Docket No. 16-1252 (issued December 1, 2016).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 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