United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 18-0812**
	)	**Issued: February 22, 2019**
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Atlanta, GA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2018 appellant, through counsel, filed a timely appeal from a January 31, 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 that she sustained a traumatic injury in the performance of duty on April 5, 2017, as alleged.

FACTUAL HISTORY

On April 10, 2017 appellant, then a 56-year-old safety and health clerk, filed a traumatic injury claim (Form CA-1) alleging that, while leaving work at 4:33 p.m. on April 5, 2017, she sustained injuries to her lower back, groin, right leg, ankle, knee, and buttocks when she slipped and fell on wet concrete in the parking garage. She stopped work on April 7, 2017. Appellant's regular work hours were 8:00 a.m. to 4:30 p.m.

On the reverse side of the claim form, the employing establishment checked a box marked "No" indicating that appellant was not injured in the performance of duty as the parking lot was not government property. It explained that the parking lot was "not agency owned, maintained, or controlled."

Appellant was initially treated by Dr. Jim D. Pruitt, a Board-certified family practitioner, who related in an April 7, 2017 report that appellant had a history of a fall and sustained a lumbar muscle strain.[3]

By development letter dated April 21, 2017, OWCP acknowledged receipt of appellant's claim and informed her that additional evidence was needed to establish her claim. It specifically noted that the evidence indicated that appellant was injured off the premises of her employing establishment and requested that appellant respond to the attached factual questionnaire in order to determine whether the alleged injury occurred in the performance of duty. OWCP also requested medical evidence in support of her claim. It afforded appellant 30 days to submit the requested information. OWCP sent a similar letter of even date to the employing establishment requesting that it answer a series of questions including whether the alleged injury occurred on employing establishment premises and whether the parking facilities were owned, controlled, or managed by the employing establishment.

OWCP received a May 2, 2017 report from Dr. Louise Sheffield, Board-certified in preventive and occupational medicine, who provided examination findings and diagnosed lumbar strain and right Achilles tendon strain.

On May 8, 2017 OWCP received the employing establishment's response to its April 21, 2017 development letter. It explained that the parking lot was a commercial lot and was not owned, controlled, or managed by the employing establishment. The employing establishment further indicated that appellant was not required to park in this lot, was not assigned a specific parking space, was not required to pay for parking as the parking lot was free, and was not reimbursed for travel to and from the parking lot. It further indicated that the public was permitted to use this lot.

[3] The record only contains the first page of the report.

The employing establishment also noted that it did not know whether the parking lot was monitored to prevent unauthorized cars from parking in the lot.

In a May 15, 2017 completed factual questionnaire, appellant related that the April 5, 2017 injury occurred in the parking facility of the building in which the employing establishment leased space. She indicated that it was "an extension of the premises" and was designated as where to park. Appellant explained that the parking lot was a benefit to the tenants who occupied or leased space in the building and was adjoined to the building. She noted that the parking structure was owned by CMK Property Services, LLC and managed by a third party.

OWCP also received a picture of the commercial building with the parking structure and the area surrounding it.

Appellant continued to receive medical treatment and submitted additional reports, including April 12, May 8, and 11, 2017 reports by Dr. Savitha Elam-Kootil, a Board-certified internist. Dr. Elam-Kootil related appellant's complaints of low back pain, provided examination findings, and diagnosed low back strain and small external hemorrhoid.

By decision dated May 26, 2017, OWCP denied appellant's claim. It accepted that the April 5, 2017 incident occurred as alleged and that appellant sustained diagnosed medical conditions, but denied her claim, finding that the claimed April 5, 2017 incident did not occur in the performance of duty, as alleged. OWCP noted that the evidence of record confirmed that the parking facility where appellant fell was not owned, controlled, or managed by the employing establishment, and accordingly, appellant was not injured on the employing establishment's premises.

Appellant, through counsel, timely requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 17, 2017. OWCP received additional medical evidence, including reports from Dr. Sheffield dated May 16, 23, and 30, 2017.

By decision dated January 31, 2018, an OWCP hearing representative affirmed the May 26, 2017 decision. She determined that the evidence of record established that the alleged April 5, 2017 injury did not occur in the performance of duty as the parking lot where the incident occurred was not owned, controlled, or managed by the employing establishment.

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] 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, namely, arising out of and in the course of employment.[5]

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

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

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 when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[6]

It is well established as a 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.[7] The Board has previously found that the term "premises" as it is generally used in workers' compensation law, is not synonymous with "property" because it does not depend solely on ownership. The term "premises" may include all the property owned by the employing establishment. In other instances, even if the employer does not have ownership and control of the place of injury, the place may nevertheless still be considered part of the "premises."[8]

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 employer 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 authorized 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 not sufficient 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.[9]

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

[6] *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Eugene G. Chin*, 39 ECAB 598 (1988).

[7] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989); *Eileen R. Gibbons*, 52 ECAB 209 (2001).

[8] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[9] *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).

the official superior's response is affirmative and consistent with the other evidence."[10]

ANALYSIS

Appellant alleged lower back, groin, right leg, ankle, knee, and buttocks injuries when she slipped and fell in the parking lot while leaving work on April 5, 2017. OWCP denied her claim, finding that appellant was not in the performance of duty at the time of the alleged injury because the parking lot where she sustained her injuries was not part of the employing establishment's premises.

The Board initially notes that the April 5, 2017 employment incident occurred while appellant was leaving the employing establishment after work. It is well established that within the performance of duty includes 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.[11] In this case, appellant's regular work hours were 8:00 a.m. to 4:30 p.m. On the Form CA-1, appellant noted a time of injury as 4:33 p.m. As appellant's fall occurred three minutes after the end of her regular work shift, the Board finds that it happened within a reasonable interval after work and within the course of employment.[12]

The Board further finds, however, that appellant's April 5, 2017 fall while leaving work did not occur in the performance of duty as the parking lot where the alleged injury occurred was not part of the employing establishment's premises.

The term "premises" as generally used in worker's compensation law does not depend solely on ownership.[13] The factors which the Board consider to determine whether a parking facility used by employees may be considered a part of the employing establishment's premises include whether the employer 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 authorized 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 not sufficient to bring the parking lot within the premises of the employing establishment.[14]

In this case, OWCP issued a development letter to the employing establishment in accordance with its procedures and requested that the employing establishment respond to specific questions about the parking lot where the alleged April 5, 2017 injury occurred. The employing

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) (August 1992).

[11] *See James P. Schilling*, 54 ECAB 641 (2000); *see also Narbik A. Karamian*, 40 ECAB 617 (1989).

[12] *See John F. Castro*, Docket No. 03-1653 (issued May 14, 2004).

[13] *Supra* note 8.

[14] *Supra* note 9.

establishment responded to OWCP's letter and related that the parking lot was a commercial lot that was not owned, controlled, or managed by the employing establishment. It further indicated that its employees were not required to park in this lot, were not assigned a specific parking space, did not have to pay for parking, and were not reimbursed for travel to and from the parking lot.

The facts in the current case are similar to the Board's decision in *J.B.* In that case, the claimant alleged that she sustained injuries to her left foot, left knee, back, and right hip when she stepped into a parking lot pothole, twisted her foot, and fell down. The Board affirmed OWCP's decision denying the employee's claim, finding that the alleged injury did not occur in the performance of duty. It noted that the parking lot where the employee fell was an hourly paid lot open to the public that was not owned, controlled, or maintained by the employing establishment. Accordingly, the Board found that the parking lot was not part of the employing establishment's premises.[15]

Additional evidence in the record also confirms that the parking garage where the alleged April 5, 2017 injury occurred was not on employing establishment's premises. In appellant's response to OWCP's development letter, she noted that the parking structure was owned by CMK Property Services, LLC and managed by a third party. Appellant further explained that the parking lot was available as a benefit to the tenants who occupied leased space in the building and to the public. The parking lot was not controlled or maintained by the employing establishment for the exclusive use of its employees. Accordingly, based on the facts of this case, the Board finds that the evidence of record is insufficient to establish that the parking garage where the alleged April 5, 2017 injury occurred was part of the employing establishment's premises.

The Board also finds that the parking garage where appellant's fall occurred does not constitute a special hazard or an access route closely associated with the employing establishment. The Board has determined that under special circumstances the "premises rule" is extended to hazardous conditions which are proximately located to the premises and therefore may be considered as hazards of the employing establishment. This exception to the premises rule contains two components. The first is the presence of a special hazard at the particular off-premises route. The second is the close association of the access route to the employing establishment, such that ingress and egress from the employing establishment must be made from this route.[16] Appellant and counsel have contended that the parking garage was an "extension of the premises" and was the only designated area for employees to park. The facts of this case, however, show that the parking garage was not exclusively contracted for use by the employing establishment and that it was available for public use at no cost. Appellant was not required to park in the parking garage and did not have an assigned space. The Board also finds that appellant's injury occurred while she was exposed to an ordinary, off-premises nonemployment

[15] *See J.B.*, Docket No. 17-378 (issued December 22, 2017); *Cf. M.D.* Docket No. 17-0086 (issued August 3, 2017) in which the Board determined that a parking garage where appellant tripped and fell was part of the employing establishment's premises when the employing establishment noted that the underground parking area was part of the office building leased by the employing establishment, that it contracted with a management firm to maintain the parking facility, and that it assigned parking spaces based on seniority and availability

[16] *See Jimmie D. Harris, Sr.*, 44 ECAB 997 (1993).

hazard of the journey itself, specifically slipping on water, which is shared by all travelers.[17] The Board finds, therefore, that the "premises rule" does not extend to the parking lot in which appellant fell.

For these reasons, the Board finds that appellant's slip and fall on April 5, 2017 did not occur on the premises of the employing establishment and no special circumstance existed which would require the extension of the premises rule. Appellant, therefore, has not met her burden of proof to establish that she sustained an injury in the performance of duty.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on April 5, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2019
Washington, DC

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

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

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

[17] The Board has generally held that conditions caused by weather, including snow, ice, and rain, are not special hazards. *C.P.*, Docket No. 11-1432 (issued January 23, 2012); *Shirley Borgos*, 31 ECAB 222 (1979).