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

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| **R.K., Appellant** | ) | |
| **and** | ) | **Docket No. 18-1269** |
| | ) | **Issued: February 15, 2019** |
| **SOCIAL SECURITY ADMINISTRATION, New York, NY, Employer** | ) | |

*Appearances:*
*Thomas S. Harkins, 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 June 8, 2018 appellant, through counsel, filed a timely appeal from a May 21, 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 to consider the merits of the 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 his burden of proof to establish a traumatic injury in the performance of duty on December 30, 2016, as alleged.

## ***FACTUAL HISTORY***

On January 6, 2017 appellant, then a 65-year-old claims representative, filed a traumatic injury claim (Form CA-1) alleging that, at 8:00 a.m. on December 30, 2016, he fell on black ice walking from the employing establishment parking lot into the employing establishment building and fractured his right elbow and hip, as well as sustaining right shoulder and leg injuries. Appellant's supervisor indicated that appellant's work hours were from 8:00 a.m. to 4:30 p.m. and checked a box marked "yes" to indicate that he was injured in the performance of duty.

By development letter dated January 18, 2017, OWCP requested that the employing establishment provide information regarding whether appellant was injured in the employing establishment parking lot, whether it owned, controlled, or managed the parking lot where appellant was injured, and whether the public was permitted to use the lot. It also asked whether appellant paid for parking or was entitled to reimbursement for parking expenses.

In a separate January 18, 2017 development letter, OWCP informed appellant that when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Based on these criteria, and because the employing establishment did not controvert his claim, payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. OWCP further advised that it was reopening appellant's claim for consideration of the merits as he had not yet returned to full-time work. It requested additional factual and medical evidence in support of appellant's December 30, 2016 traumatic injury claim and afforded him 30 days to respond.

On January 29, 2017 appellant responded to OWCP and asserted that the parking lot was provided for employees and clients of the employing establishment. He noted that it was located directly behind the building and that the employees' entrance was at the end of the lot. Appellant reported that he was not required to park in the lot, that parking was free, and that the public visiting the employing establishment was allowed to use the parking lot. He described the events of December 30, 2016 as parking his car and walking toward the employee entrance. Appellant noted that he fell before he reached the door due to black ice and landed on his right side. He experienced severe pain in his right shoulder, arm, elbow, and leg. Appellant declined to immediately seek medical treatment and his supervisor drove him home. His wife then took him to the hospital later that day and he reported his treatment to the employing establishment.

On January 26, 2017 the employing establishment responded that appellant was injured in the employing establishment parking lot. It contended that the parking lot was part of his duty station as the employing establishment was a tenant and occupant of the building and grounds. The employing establishment noted that the parking lot was used only for employees and visitors of the employing establishment. It noted that there was no fee for parking.

The record includes a completed authorization for examination and/or treatment (Form CA-16) completed by the employing establishment on December 30, 2016. Dr. Alexander S. Finger, a Board-certified orthopedic surgeon, completed the attending physician's portion of the form on January 10, 2017 and diagnosed right elbow fracture, right hip avulsion fracture, and right shoulder strain.

By decision dated February 27, 2017, OWCP denied appellant's traumatic injury claim, finding that he had not established that his December 30, 2016 traumatic injury occurred in the performance of duty. It found that because the parking lot was open to visitors of the employing establishment and it was not restricted solely to employees, it therefore was not owned, controlled, or managed by the employing establishment such that the parking lot was not considered part of the employing establishment premises.

On February 19, 2018 appellant, through counsel, requested reconsideration of the February 27, 2017 decision. He contended that the employing establishment leased the building and parking lot which consisted of 99 parking spaces and submitted a copy of the lease. This lease indicated that both the employing establishment and the National Oceanic Atmospheric Administration occupied the building and 99 parking spaces, 100 percent of which was leased by the Federal Government. Counsel further provided a copy of the collective bargaining agreement between the employing establishment and its employees which required the employing establishment to provide parking for employees. He asserted that appellant was required to park in the lot as a condition of his employment. Counsel provided copies of signs on the parking lot fence indicating that it was private property for employing establishment visitors and personnel only and that unauthorized vehicles would be ticketed and a fine imposed. He also provided additional medical evidence.

By decision dated May 21, 2018, OWCP denied modification of the February 27, 2017 decision. It found that the parking lot was not owned, controlled, or managed by the employing establishment as the employing establishment rented the parking lot and as the photographs indicated the parking lot was private property and not employing establishment premises.

## ***LEGAL PRECEDENT***

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[4] 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.[5]

[3] 5 U.S.C. § 8102(a); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

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

[5] *See L.P.*, Docket No. 17-1031 (issued January 5, 2018).

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.[6] 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.[7]

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."[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 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.[9]

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

[7] *L.P., supra* note 5; *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).

[8] *L.P., supra* note 5; *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).

[9] *See L.P., supra* note 5; *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."[10]

## ***ANALYSIS***

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 December 30, 2016 work injury.

Appellant was in the process of coming to work for his tour of duty beginning at 8:00 a.m. He sustained an injury at approximately 8:00 a.m., before commencing his employment duties. The Board has included as 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.[11] 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 duties of her employment.[12] As appellant's fall occurred immediately prior to the start of his regular work shift, it occurred within a reasonable interval before work.[13]

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 employees were reimbursed for parking expenses.[14]

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.(4)(f) (August 1992).

[11] *L.P., supra* note 5; *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).

[12] *L.P., supra* note 5.

[13] *Id.*

[14] *Id.*

The employing establishment responded to the questions and affirmed that appellant was injured in its parking lot which was part of appellant's duty station as it was a tenant and occupant of the building and grounds. It noted that the parking lot was used only for employees and visitors of the employing establishment. The employing establishment further provided that there was no fee for parking in its lot.

Appellant submitted a page of the lease agreement between the owners and the federal government which indicated that both the employing establishment and the National Oceanic Atmospheric Administration occupied the building and 99 parking spaces, 100 percent of which was leased by the Federal Government. He also provided copies of signs on the parking lot fence indicating that it was private property for employing establishment visitors and personnel only and that unauthorized vehicles would be ticketed and a fine imposed.

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.[15] 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.[16] OWCP, however, failed to obtain a statement from the employing establishment specifically responding to the questions of whether the parking facilities were owned, controlled, or managed by the employing establishment in accordance with its procedures prior to finding that appellant had not shown that he 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 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.[17] 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.[18]

On remand OWCP should obtain clarifying information from the employing establishment and determine whether the parking lot was 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 he sustained an injury as alleged. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[15] *M.P.*, Docket No. 16-0507 (issued August 11, 2016).

[16] *Id.*

[17] *Id.*, *John J. Carlone*, 41 ECAB 354 (1989).

[18] *M.P.*, *supra* note 15.

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 21, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 15, 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