United States Department of Labor
Employees' Compensation Appeals Board

S.V., Appellant	)	
and	)	**Docket No. 20-1586**
	)	**Issued: February 24, 2022**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Charlotte, NC, Employer	)	

Appearances:
Eric B. Blowers, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 9, 2020 appellant, through counsel, filed a timely appeal from an August 12, 2020 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 a traumatic injury in the performance of duty on January 27, 2017, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 21, 2017 appellant, then a 46-year-old master transportation security officer-behavioral detection analyst/officer (TSO-BDO) filed a traumatic injury claim (Form CA-1) alleging that on January 27, 2017 at approximately 2:40 p.m. she sustained neck, arm, and back sprains/strains when she was a passenger on employee airport shuttle bus #108 traveling to the employee parking lot. She explained that the bus driver slammed on the brakes to avoid hitting another bus. Appellant also alleged that the bus driver was speeding and tailgating. On the reverse side of the claim form, the employing establishment noted that appellant's regular shift was from 6:00 a.m. to 2:30 p.m. It indicated that she was not injured in the performance of duty as appellant was injured on an employee bus in transit to the employee parking lot, which was off of the employing establishment's premises, and she was not involved in official "off premises" duties at the time of her injury. Appellant did not stop work.

In a development letter dated March 6, 2017, OWCP advised appellant that additional information was needed to establish her claim. It advised of the type of factual and medical information necessary to establish the claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested evidence.

In a development letter to the employing establishment dated March 6, 2017, OWCP requested additional information regarding appellant's claim, including information regarding: parking and transportation at appellant's duty station; whether appellant was injured while on the employee bus #108; whether the bus and parking lots were owned, controlled, or managed by the employing establishment; whether appellant was required to use/park in the "employee lot;" whether other parking was available; whether the public was permitted to use the "employee lot;" whether the parking area was monitored; whether parking spaces were assigned; and whether appellant had to pay for parking and travel to and from the "employee lot." It provided 30 days for the employing establishment to submit the requested evidence.

On March 6, 2017 the employing establishment controverted the claim. It argued that appellant was not in the performance of duty at the time of injury because she was "not on shift when the injury occurred, she was not inside the airport at a work location, and she was not actually in the performance of duty, screening passengers."

In a narrative statement dated January 27, 2017, appellant indicated that at approximately 2:40 p.m. on that date she was waiting for the employee bus, which was delayed, to transport her

[3] Docket No. 18-1299 (issued November 5, 2019).

to the employee parking lot. Eventually, three employee buses arrived at the same time and she boarded the first bus, #108, along with her coworkers E.P. and C.B., as well as other airport employees. After the bus passed the upper and lower level merger and the hourly parking garage and was half-way to the employee parking lots, the driver slammed on the brakes while driving on the main road. Appellant asserted that the driver was speeding and tailgating another bus. She reported that everyone on the bus was screaming and yelling at the driver asking, "Why are you speeding?" Appellant held onto a railing so that she would not fall on the floor and moved forward and backwards while still hanging onto the railing. E.P. was in the front of the bus holding onto the railing and was thrown forward after the driver suddenly braked and hit the windshield and the front inside panel of the bus. Appellant exited the bus in the employee lot 1. She got into her car and started driving, but could not turn her neck to the left and experienced pain in her left arm and shoulder. Appellant returned to work on January 28, 2017, the following day, and reported the incident to her manager.

Appellant went to an urgent care facility on January 28, 2017 and continued to seek medical treatment.

In a March 9, 2017 report, Tony Connot, a certified physician assistant, diagnosed left shoulder pain and indicated that appellant sustained a left shoulder injury on January 27, 2017 when a bus she was riding at work stopped suddenly.

A March 14, 2017 magnetic resonance arthrogram (MRA) scan of appellant's left shoulder interpreted by Dr. Thomas Zban, Board-certified in radiology, demonstrated mild acromioclavicular degenerative joint disease and minimal subacromial/subdeltoid bursitis.

In a statement dated March 14, 2017, the employing establishment indicated: (1) appellant did suffer an injury while riding on the employee bus #108; (2) the bus and parking lot was not owned, controlled, or managed by the Transportation Security Agency (TSA), but the City of Charlotte; (3) the lot was available for all airport employees to use, including airline employees, concession employees, and TSA employees, but the general public did not have access to the parking lot; (4) appellant was not required to park in this parking lot and there was a parking lot available directly across from the terminal, within walking distance, however, there was a fee to park in that lot; (5) parking spaces in the airport employee lot were not assigned by the agency; (6) the parking lot was monitored on occasion to ensure that cars in that lot had airport issued hang tags; (7) TSA uniformed employees did not pay for parking as TSA paid the airport directly for their parking hang tags; and (8) appellant was not entitled to reimbursement for travel to and from the parking lot or for parking expenses, but employees did not pay for parking expenses.

A medical report and work status reports from March 23, 2017 by Dr. Scott Burbank, a Board-certified orthopedic surgeon, indicated that appellant presented with shoulder pain following injury to her left shoulder on January 20, 2017 while on a bus on her way to work. Dr. Burbank diagnosed a left shoulder sprain.

By decision dated April 10, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that her injury occurred in the performance of duty. It found that the injury occurred after her work shift, on a bus, which was not owned or operated by the employing establishment, and that she was not performing any part of her assigned duties

at the time of the event. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On March 9, 2018 appellant, through counsel, requested reconsideration and argued that the injury occurred on the employing establishment's premises because: (1) the employee parking lot was monitored by the employing establishment; (2) appellant's parking was full subsidized by the TSA; (3) the parking area for employees at the airport was separate and apart from public parking areas and could only be accessed *via* employee parking buses from the terminal area; and (4) the option of enrolling with the prior TSA parking contractor had been cancelled, thus, this was the only parking option available to TSA employees at the airport. In support of her reconsideration request, appellant provided a memorandum dated March 1, 2016 from the employing establishment addressing employee rights and responsibilities as related to parking at Charlotte Douglass International (CLT) Airport. It stated that all employing establishment employees were welcome to enroll in the employee parking assistance program (EPAP), and it indicated that beginning April 1, 2016 screening personnel, including BDOs, were eligible for fully-subsidized parking. The employing establishment related that once enrolled, the employees would receive a card that it would monitor. It further noted that employees could not be enrolled in both transit benefits [Ex: Charlotte area transit system (CATS) bus, light rail] and the parking subsidy program (free airport parking). Nonscreening personnel were not eligible for the fully-subsidized parking benefit and the cost of employee parking at CLT Airport was $25.00 per month.

Appellant provided an affidavit dated March 8, 2018 confirming that she was employed by the employing establishment as a BDO and had been so employed for nine years. She indicated that she worked at the CLT Airport and stated that her work location was inside the terminal at the security checkpoints. Appellant related that she was required to park her vehicle in an employee parking lot and subsequently take a city-owned employee bus to and from the terminal, which was over two miles from the parking lot. She indicated that in 2016 the employing establishment began paying the cost for her parking and directed her as to the rules and procedures regarding her parking location. Appellant stated that access to the parking lot was controlled by key card, and the employing establishment monitored employee use to prevent unauthorized access during nonwork hours. She related that the employing establishment provided the parking at no cost to employees, and that the general public did not have access to the parking lot, as it was solely used by airport employees. Appellant indicated that there was no alternate parking available for employees other than this lot, and that it was on the city bus [going from the terminal to the employee parking lot] that she sustained her injury on January 27, 2017.

Appellant further submitted a copy of an employing establishment document entitled "Fully Subsidized Parking Implementation (EPAP Airports)" that provided details regarding fully subsidized parking for screening personnel, including TSOs and BDOs. The program's start date was targeted for April 1, 2016. Fully subsidized parking was for designated lots only.

By decision dated June 6, 2018, OWCP denied modification of its April 10, 2017 decision.

On June 19, 2018 appellant, through counsel, appealed to the Board.

In an August 8, 2018 letter, the employing establishment related that, although appellant was not required to park in the parking lot designated for airport employees, she was provided with

hang tag to park there for free. It related that there was a parking lot available directly across from the terminal; however, appellant would have to pay $12.00 per day, which was an unreasonable cost.

By decision dated November 5, 2019, the Board set aside OWCP's June 6, 2018 decision, finding that OWCP did not sufficiently develop the evidence regarding whether appellant was on the premises of the employing establishment at the time of her injury.[4] The Board specifically found that the employing establishment mentioned a parking lot closer to the airport facility and the record contained references to a number of parking lots that were available for employees, but failed to elaborate on their location, use, and employing establishment employee access at the time of appellant's injury. The Board additionally found that the employing establishment failed to elaborate on the location, route, and criteria for the use of shuttle bus #108. On remand, the Board directed OWCP to obtain additional information from the employing establishment regarding the aforementioned deficiencies and issue a *de novo* decision.

In a development letter to the employing establishment dated December 9, 2019, OWCP requested additional information regarding appellant's claim. It asked if on January 27, 2017 it contracted for parking services exclusively for its employees, assigned parking spaces for its employees, monitored the lot for unauthorized vehicles, and whether it provided parking without cost to its employees. OWCP additionally asked if the public was allowed to use the parking lot, whether other parking was available to its employees. It additionally asked whether the shuttle bus #108 was considered part of the premises of the employing establishment.

In a December 16, 2019 letter, counsel noted that OWCP failed to ask the employing establishment if the place where appellant's injury occurred was the only route or the normal route where employees must travel to reach the work premises. He additionally argued that once that criteria was satisfied, it was obvious that the January 27, 2017 bus was a special hazard because travel on the employee bus was the access route from the employee parking lot to the terminal.

In a December 16, 2019 affidavit, appellant further explained that all employees of the airport, including employing establishment employees, airline employees, and City of Charlotte employees, accessed the employee parking lot through key cards issued by their respective employers. She stated that the City of Charlotte monitored the parking lot through the airport police department, which was staffed by Charlotte Mecklenburg Police (CMPD) Officers. Appellant related that the employee parking lot was 1.5 miles away from the terminal and only accessible *via* the airport shuttle bus. She stated that the airport shuttle buses ran back and forth from the employee parking lot to the terminal all day and had no other routes, and that airport employees are the only people allowed onto the employee shuttle bus. Appellant additionally related that there was a parking lot directly across the street from the terminal that cost $20.00 per day.

An undated google map search showed that a parking lot titled "Parking Long Term 4" was a 1.5 mile drive and a 0.8 mile walk to the CLT Airport terminal.

[4] *Supra* note 3.

In a December 13, 2019 response to OWCP's development letter, the employing establishment indicated that at the time of appellant's injury it contracted with the airport to provide free parking for its employees, however, it related that it did not assign parking spaces and the airport also assigned the same parking lot to employees of the airport and the airlines. It stated that the airport authority had jurisdiction over who could park in the parking lot. The employing establishment indicated that the public was not permitted to use the employee lot, and only those with an airport-issued badge could gain access to it. It further indicated that there were several parking lots and parking decks on the airport property where its employees could park, however, they could only park for free in the employee parking lot. The employing establishment related that it would be unreasonable for employees to pay to park at the parking lot across from the terminal. It indicated that it does not own the property where appellant worked or parked, as it was owned and managed by the City of Charlotte. The employing establishment related that Shuttle bus #108 was owned and operated by the City of Charlotte; however, the only way for employees to travel from the only free employee parking lot to the terminal, was to ride the employee shuttle bus #108.

Attached was a map of CLT Airport which displayed a parking lot closer to the terminal titled "daily parking" and had writing superimposed on it indicating it cost $12.00 per day. A further lot had writing superimposed on it indicating that it was the employee parking lot, and multiple other parking sites were indicated. A superimposed star that represented the location of the bus incident was drawn on a road from the terminal to the employee parking lot.

By decision dated April 9, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that her injury occurred in the performance of duty, as alleged. It found that while the employing establishment contracted with the airport to provide parking for employing establishment employees, it did not monitor, own, or control the lot or assign parking spots in the lot, and the airport assigned the same parking lot to airport and airline employees. OWCP also found that there were several parking lots on the airport property and employing establishment employees could park at any of them, but could only park for free at the employee parking lot. It additionally found that the employing establishment did not own any property where appellant worked or parked, and that shuttle bus #108 was owned and operated by the City of Charlotte.

In an April 16, 2020 affidavit, appellant indicated that the employing establishment did not have a separate parking lot for its employees, as segregating employing establishment vehicles could cause a security risk. She explained that hostility existed from other airport employees, towards employing establishment employees, who were required to conduct random bag and body searches.

On April 20, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held on July 9, 2020. Counsel argued that evidence submitted was not acknowledged in OWCP's April 9, 2020 decision. Appellant testified that the employee parking lot was the only place employing establishment employees could park because the public did not have enough space to park at the airport, which was under construction. She stated that as there was not enough parking at CLT Airport, the employing establishment wanted its employees to

park in the employee lot and provided daily reminders to do so. Appellant related that the lack of parking due to ongoing construction was such a big issue that the airport actually cordoned off a part of the employee parking lot and provided it to the public. She stated that the terminal was two to three miles away from the employee parking lot, and she indicated that she would get from one location to the other by bus.

By decision dated August 12, 2020, an OWCP hearing representative affirmed OWCP's April 8, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[6] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[7] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

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.[9] 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.[10] 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 the master's business, at a place where he may reasonably be expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[11]

For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time is compensable.[12] The premises of the employer, as the term is

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[5] *Supra* note 2.

[6] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] 5 U.S.C. § 8102(a).

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

[11] *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

[12] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

used in workers' compensation law, are not necessarily coterminous with the property owned by the employer;[13] they may be broader or narrow and are dependent more on the relationship of the property to the employment than on the status or extent of the legal title.[14] In some cases, premises may include all the property owned by the employer; in other cases, though the employer does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[15]

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 in the garage 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 garage, whether parking was provided without cost to the employees, whether the public was permitted to use the garage, and whether other parking was available to the employees. Mere use of a parking facility alone is insufficient to bring the parking garage 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.[16]

The Board recognizes exceptions to the premises rule. 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.[17] 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.[18] 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.[19] The main consideration in applying

[13] *Jimmie Brooks*, 22 ECAB 318, 321 (1971); *see also D.C.*, Docket No. 08-1782 (issued January 16, 2009).

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

[15] *S.W.*, Docket No. 20-0547 (issued December 11, 2020); *Denise A. Curry*, 51 ECAB 158 (1999).

[16] *S.S.,* Docket No. 20-1349 (issued February 16, 2021); *R.M.*, Docket No. 07-1066 (issued February 6, 2009); *Diane Bensmiller,* 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter,* 2 ECAB 500 (1991); *Edythe Erdman,* 36 ECAB 597 (1985); *Karen A. Patton,* 33 ECAB 487 (1982).

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

[18] *See F.S.*, Docket No. 09-1573 (issued April 6, 2010); *Shirley Borgos*, 31 ECAB 222, 223 (1979).

[19] *M.L.*, Docket No. 12-0286 (issued June 4, 2012).

this rule is whether the conditions giving rise to the injury are causally connected to the employment.[20]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that her alleged injury occurred in the performance of duty on January 27, 2017.

In order to find that appellant has met her burden of proof to establish a traumatic injury in the performance of duty on January 27, 2017, as alleged, the Board must find that the employee parking lot is the premises of the employing establishment and that the off-premises point at which appellant's injury occurred, namely travel on employee bus #108, 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.[21]

The Board finds that the employee parking lot was a constructive premise of the employing establishment. The employing establishment leased parking for its employees in the airport employee lot, parking was free employing establishment employees in that lot, and the employing establishment admitted that it was unreasonable for its employees to pay the high cost for daily parking at other available parking lots. The employee parking lot was not open to the public, but it was shared with other airport employees. Employing establishment employees did not have specifically assigned parking spots, however, they were issued hang tags and security guards monitored the lot for unauthorized vehicles. Given these factors, the Board finds that the employee parking lot constituted employing establishment's premises.

The premises of the employer are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employer.[22] The Board also finds that the employee buses which ran between the free employee parking lot and the terminal, including bus #108, were the only way employing establishment employees could travel to the terminal from the employee parking lot. Therefore, the special hazards of that route became the hazards of the employment premises.[23] Thus, the Board finds that appellant has proven an exception to the premises rule and has, therefore, established that her January 27, 2017 injury occurred in the performance of duty.[24]

Consequently, the issue remains as to whether the accepted incident caused appellant's injury. OWCP did not adjudicate this aspect of the case, as it found that the incident did not occur in the performance of duty. The case will, therefore, be remanded for OWCP to consider whether

[20] *Id.*

[21] *Supra* note 18.

[22] *M.P.*, Docket No. 16-0507 (issued August 11, 2016); *see R.B.*, Docket No. 11-1320 (issued September 5, 2012); *Denise A. Curry, supra* note 15.

[23] *See K.D.* Docket No. 18-0617 (issued February 13, 2019); *M.P.*, *id.*; *D.M.* Docket No. 10-1723 (issued August 23, 2011).

[24] *G.E.*, Docket No. 14-0843 (issued September 23, 2014).

the medical evidence establishes that appellant sustained a diagnosed condition due to the January 27, 2017 bus injury. Following this and other such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that her alleged injury occurred in the performance of duty on January 27, 2017.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 24, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board