

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

J.G., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Brecksville, OH, Employer**

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**Docket No. 12-756
Issued: December 21, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2012 appellant, through her attorney, filed a timely appeal from a January 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury on January 3, 2011 in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2011 appellant, then a 63-year-old scheduling clerk, filed a traumatic injury claim alleging that on January 3, 2011 she sustained neck and back pain, severe headaches and blurred vision when she fell on a cracked curb onto the wheel of a metro bus. The incident occurred at 4:45 p.m. in the crosswalk in front of Building 2 on the premises of the employing establishment. Appellant stopped work on January 4, 2011. The employing establishment controverted her claim, noting that the incident occurred one and a quarter hours after her tour ended at 3:30 p.m. It asserted that appellant could have taken a metro bus at 3:50 p.m.²

By letter dated April 4, 2011, the employing establishment maintained that appellant was not in the performance of duty at the time of her injury. It related:

“[T]he incident claimed happened one[-]hour and 15 minutes after [appellant’s] work tour had ended. Her timecard does not show that [she] worked overtime on [January 3,] 2011.... There is no information at this time indicating why the claimant stayed at work after her tour ended, and did not start her journey to go home until she got injured at 4:45 p.m. on [January 3, 2011].”

On April 5, 2011 OWCP requested that appellant explain why she was still at the employing establishment at 4:45 p.m. when she stopped work at 3:30 p.m. It asked which bus she was attempting to catch and whether she was waiting for a late bus.

By decision dated May 12, 2011, OWCP denied appellant’s claim after finding that she did not establish that she was in the performance of duty at the time of the alleged January 3, 2011 incident.³ It noted that she had not responded to its request that she clarify why she remained at work after the end of her duty tour.

On June 7, 2011 appellant’s attorney requested a telephone hearing, held before an OWCP hearing representative on October 14, 2011. Counsel related that appellant used a cane to walk. Appellant regularly caught the 5:00 p.m. bus because of her limitation in mobility and the significant distance between the bus stop and work building. The bus was private and not operated by the employing establishment. A coworker or supervisor usually gave appellant a ride to the bus stop. The closest bus stop was located on the property of the employing establishment in front of Building 2. Appellant worked in Building 5. She originally worked in Building 5 and could drive to the door of the building. After the employing establishment moved appellant to Building 2, she had to take the bus to work and back. On January 3, 2011 appellant’s supervisor authorized a coworker to give her a ride on a scooter to the bus stop. The scooters were used to get from building to building on the premises of the employing establishment. Appellant took the elevator down from the third floor and waited for the designated coworker to give her a ride to the bus stop. After she received the ride to Building 5 on a scooter, she stayed in the building until she saw her bus. Appellant fell on the curb walking

² The employing establishment submitted a schedule showing that a metro bus stopped at the employing establishment at times including 3:50 p.m. and at 5:02 p.m.

³ OWCP indicated in its decision that appellant’s work tour ended at 3:50 p.m. instead of 3:30 p.m.

to the crosswalk. She related that she customarily caught an elevator from the third floor when her shift ended and waited in the lobby for a ride to Building 2 and then waited inside Building 2 for her bus. Counsel asserted that her mobility problems explained the gap in time between her shift ending and catching the bus.

By letter dated November 4, 2011, the employing establishment reiterated that appellant stopped work on January 3, 2011 at 3:30 p.m. It noted that the bus stop, while on the premises of the employing establishment, was public and that most employees drove their own vehicles. The employing establishment had no control over the schedule or route of the bus.

In a November 10, 2011 e-mail message, Jonathan Jackson, appellant's supervisor, related that she received a ride from Building 2 to Building 5 each morning and evening on an electric cart. He stated:

“Once again this was a courtesy to [appellant] so no official agreement was ever made by the [employing establishment] to accommodate this transfer. We only provided it because she had trouble walking and was [not] capable of making the walk which took about [seven minutes] on foot for a typical person, but by widget it would only take [three minutes]. Once the drop off to Building 2 was successful she usually waited in the lobby until her bus came to pick her up.”

By decision dated January 12, 2012, OWCP's hearing representative affirmed the May 12, 2011 decision. He found that appellant had not sufficiently explained why she was on the premises of the employing establishment at 4:45 p.m. but that it appeared to be for her own convenience.

LEGAL PRECEDENT

FECA provides for payment of compensation for 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 duty⁵ 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.⁶ Arising 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: (1) at a time when the employee may reasonably be said to be engaged in her master's business; (2) at a place where she may reasonably be expected to be in connection with her employment; and (3) while she was reasonably fulfilling the duties of her employment or engaged in doing something

⁴ 5 U.S.C. § 8102(a).

⁵ In the course of employment deals with the work setting, the locale and the time of injury, while arising out of the employment encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. *See Larry J. Thomas*, 44 ECAB 291 (1992).

⁶ 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).

incidental thereto;⁷ and (4) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.⁸

This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement on an injury arising out of the employment must be shown and this encompasses not only the work setting, but also a causal concept that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show that substantial employer benefit is derived or an employment requirement gave rise to the injury.⁹

Under FECA, an injury sustained by an employee having fixed hours and place of work while going to or coming from work is generally not compensable because it does not occur in the performance of duty. However, many exceptions to the rule have been declared by the courts and workers' compensation agencies. One such exception almost universally recognized is the premises rule: an employee going to or coming from work before or after working hours or at lunch, while on the premises of the employer, is compensable.¹⁰ This includes a reasonable interval before and after official working hours while the employee is on the premises engaging in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity. The mere fact that an injury occurs on an industrial premises following a reasonable interval after working hours is not sufficient to bring the injury within the performance of duty. The concomitant requirement of an injury arising out of the employment must also be shown.¹¹

ANALYSIS

Appellant alleged that she sustained an injury on January 3, 2011 when she slipped and fell crossing a street to get on a bus. At the time of her injury, she was on the premises of the employing establishment in the process of leaving work. As a general matter, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunchtime are compensable.¹² What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances surrounding the interval and nature of the employment activity.¹³ The issue is whether appellant's injury occurred at a reasonable interval after the end of her working hours.

⁷ See *R.S.*, 58 ECAB 660 (2007); *Eugene G. Chin*, 39 ECAB 598 (1988).

⁸ See *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

⁹ See *E.S.*, 58 ECAB 340 (2007); *Charles Crawford*, 40 ECAB 474 (1989).

¹⁰ See *D.L.*, 58 ECAB 667 (2007); *Emma Varnerin, M.D.*, 14 ECAB 253 (1963).

¹¹ See *L.K.*, 59 ECAB 465 (2008); *Narbik A. Karamian*, 40 ECAB 617 (1989).

¹² See *Diane Bensmiller*, 48 ECAB 675 (1997).

¹³ See *William W. Knispel*, 56 ECAB 639 (2005).

Appellant's tour of duty was from 7:00 a.m. to 3:30 p.m. She alleged that she sustained an injury at 4:45 p.m., 1 hour and 15 minutes after her tour of duty ended. Board decisions in these types of cases evaluate what caused the time delay for appellant's coming early or leaving late.¹⁴ In *William W. Knispel*, the Board affirmed the denial of coverage for a claimant injured riding a bicycle to a bus stop on the premises of the employing establishment 45 minutes after his work shift ended. It found that he remained on the premises after his work shift for personal reasons relating to his commute home. Similarly, in *Timothy K. Burns*,¹⁵ an employee was injured 20 minutes before his tour of duty. He was on the premises for a personal exercise program. The Board found that the employee's presence was purely for his personal convenience and that he was not engaged in any preparatory or incidental act related to his employment. On the other hand, in *Catherine Callen*, the Board found coverage where a legal secretary sustained an injury six hours after her tour of duty ended when she remained at work to complete a requested project.¹⁶

OWCP denied appellant's claim after finding that she failed to adequately explain why she remained on the premises after her work hours ended. It determined that she could have taken the bus at 3:50 p.m. rather than waiting for the 5:00 p.m. bus. Appellant, however, related that she had difficulty walking and used a cane. After her work hours ended, she took the elevator to the lobby of Building 5, where she worked, and waited for a coworker or supervisor to provide her with a ride on a scooter to Building 2, where the bus stopped. Appellant's supervisor confirmed that he arranged transportation for appellant on a scooter to and from the bus stop daily. Larson, in his treatise on workers' compensation law, provides:

"When there is some legitimate special reason why the employee needs the longer-than-usual interval, the course of employment may be extended to surround the extra time. For example, claimant, following an operation, had difficulty walking, and customarily remained at her desk with her employer's knowledge for one hour after the close of [her workday] until her husband came for her. While leaving, she tripped over a loose wire that had been displaced when the office was cleaned 15 minutes early. Compensation was awarded."¹⁷

Compensation has also been awarded when the employer provides assistance to employees during egress from work. Larson provides:

"The claimant had been rendered immobile by a preexisting condition of rheumatoid arthritis. While being transferred from a secretarial chair to her wheelchair by a fellow employee some 15 minutes after the close of her workday, she fell to the floor and suffered a fracture of the right distal femur. The [employing establishment] appealed an award favorable to the claimant, contending that the worker's injury did not arise out of nor occur in the course of

¹⁴ *Id.*

¹⁵ 44 ECAB 125 (1992).

¹⁶ *Catherine Callen*, 47 ECAB 192 (1995).

¹⁷ A. Larson, *The Law of Workers' Compensation*, § 21.06(b) (2006).

employment. He also alleged that the claimant's injury was not compensable because it did not result from some physical condition of the employer's premises. The court affirmed the award, stating that an employee is deemed to be within the course of employment for a reasonable time while she winds up her affairs and leaves the premises. The court rejected the employer's other contention by noting that the conduct and aid of the fellow employee was the beginning step in the egress of the claimant from the employer's premises, and as such, the resulting injury was compensable just as though the injury had resulted from any other condition of the employer's premises."¹⁸

The Board finds that appellant was in the performance of duty at the time of the January 3, 2011 incident. Appellant remained on the premises after her work shift because she required additional time to get to the bus transportation due to mobility issues. Further, the time that she traveled from Building 5 to Building 2, where the bus stop was located, was outside of her control as she waited on the employing establishment to shuttle her between the buildings as occurred on a daily basis during the workweek. Consequently, the Board will remand the case for OWCP to adjudicate whether appellant sustained an injury due to the January 3, 2011 incident and, if so, the extent of any disability. After such development as is deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

¹⁸ *Id.* § 21.06(1)(a) n. 12.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2012 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: December 21, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board