

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

K.P., Appellant)
)
and)
)
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION)
MEDICAL CENTER, Albuquerque, NM,)
Employer)

Docket No. 12-1033
Issued: December 6, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 PATRICIA HOWARD FITZGERALD, Judge
 ALEC J. KOROMILAS, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2012 appellant filed a timely appeal from a December 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a traumatic injury. 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 met her burden of proof to establish that she sustained an injury in the performance of duty on December 20, 2010.

On appeal, appellant contends that she was in the performance of duty at the time of the injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 11, 2011 appellant, then a 58-year-old nurse, filed a traumatic injury claim Form CA-1 alleging that she tripped and fell at approximately 7:15 p.m. in Bullhead Park city lot after her shift ended at 7:00 p.m. on Monday, December 20, 2010. She noted that the lot was dark, the street light was not lit and she tripped on a tree trunk stump injuring her hands, right knee and neck. Appellant's regular tour of duty was 8:30 a.m. to 7:00 p.m. on Mondays. She submitted medical evidence, including a duty status report dated January 10, 2011 and chiropractic notes.

In a June 16, 2011 narrative statement, appellant indicated that on the date of the employment incident she parked behind the employing establishment in the Bullhead Park city lot. She stated that she did not park in that lot by choice, but since the San Pedro employee parking lot was full by 8:30 a.m. she had no choice but to park in the city lot. Appellant explained that employees who go to work at 8:30 a.m. have two options for parking: they can park in the Bullhead Park city lot; or park far from the front entrance in "Woody's Woods" where their cars are subjected to tree sap and bird droppings.

In a June 30, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It afforded 30 days for the submission of additional evidence.

Appellant submitted three photographs of the parking lot and a July 22, 2011 narrative statement indicating that at the time of her fall there was a problem with cars not bearing employing establishment decals parking in the employee lot and taking up spaces reserved for employees in the San Pedro employee lot. After her injury, she drove around looking for an employing establishment police officer and found none. Appellant reported that she does not pay for parking in the Bullhead Park city lot. She submitted a map and a diagram of the area where the incident occurred. Appellant also submitted a page from the employee handbook referring to parking areas, which indicated that staff members would park their privately owned vehicles in designated employee parking lots. It indicated that any staff member may park in the Bullhead Park city lot, which was owned by the City of Albuquerque and leased to the Department of the Air Force, Monday through Friday, 6:00 a.m. to 5:30 p.m. The handbook noted that the employing establishment police had no jurisdictional authority over the area.

By decision dated August 11, 2011, OWCP denied appellant's claim finding that her injury on December 20, 2010 was not sustained while in the performance of duty.

On September 1, 2011 appellant requested a review of the written record by an OWCP hearing representative. Along with her request, she submitted a time sheet, two maps, 15 photographs and a petition signed by her coworkers indicating that the employee parking lot was full by 7:30 a.m. causing them to seek parking in the Bullhead Park city lot which was not monitored and poorly lit after dark.

In a September 1, 2011 narrative statement, appellant indicated that the Bullhead Park city lot contained signs which used verbiage such as "Staff Overflow," "Patients" and "Visitors." She argued that it is reasonable to surmise that the signs are specifically oriented toward

informing employees of the employing establishment where to park and that the employing establishment had some degree or level of control over the parking lot.

By decision dated December 22, 2011, OWCP's hearing representative affirmed the August 11, 2011 decision, finding that appellant's injury did not arise in the performance of duty. He noted that the injury did not occur on the employing establishment premises and that the parking lot was open to the general public and free of charge.

LEGAL PRECEDENT

As a general rule under FECA off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of or in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.² This is in accord with the weight of authority under workers' compensation statutes that such injuries do not occur in the course of employment.³

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 at a time when the employee may reasonably be said to be engaged in her master's business, at a place when she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.⁴

However, exceptions to the rule have been declared by courts and workers' compensation agencies. One such exception, almost universally recognized, is the premises rule: an employee driving to or coming from work is covered under workers' compensation while on the premises of the employing establishment. As to what constitutes the premises of the employing establishment, the Board has stated that the term "premises" 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.⁵

The Board has pointed out 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 employer 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

² See *Randi H. Goldin*, 47 ECAB 708 (1996); *Conrad F. Vogel*, 47 ECAB 358 (1996).

³ See *William L. McKenney*, 31 ECAB 861 (1980).

⁴ See *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

⁵ See *id.* at 424. See also *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

not sufficient to bring the parking lot within the premises of the employer. 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.⁶

ANALYSIS

Appellant alleged that she sustained bilateral hand, right knee and neck injuries at 7:00 p.m. on December 20, 2010 due to a fall in a parking lot located near the employing establishment. Her regular work schedule was Mondays from 8:30 a.m. to 7:00 p.m. Appellant had clocked out from work at the regular end of her workday and was walking to her vehicle in order to leave work just prior to her fall, which occurred when she tripped over a tree stump in the Bullhead Park city lot. The record establishes that she had fixed hours and place of work and that her injury occurred while she was leaving work that evening. Appellant's status at the time of injury was that of a fixed premises employee with fixed hours of work coming to work. Her injury therefore is subject to the going and coming rule generally applicable to such employees. Unless it occurred on the actual or constructive premises of the employing establishment, appellant's injury cannot be considered as sustained in the performance of duty.⁷

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on December 20, 2010.

This case is similar to the case of *M.P.*,⁸ where the employee, a nurse at a VA clinic, slipped and fell in a parking lot located near the employing establishment. Appellant contended that the employing establishment premises should have been construed as extending to the parking lot. However, the Board found that the employing establishment did not own the parking lot and was not responsible for its maintenance. The parking lot was open to the public and owned by the State of Missouri. Although employees of the employing establishment used the lot, they did not pay for use, were not assigned designated areas for their exclusive use and the employing establishment did not check the lot for unauthorized use. The Board found that the parking lot was not so connected with the employing establishment as to be considered part of its premises and held that the employee's fall was an ordinary, nonemployment hazard of appellant's journey to work, which was shared by all travelers.

In the present case, appellant tripped and fell in a parking lot located near the employing establishment on December 20, 2010 while leaving work after the end of her scheduled shift. As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.⁹ Appellant

⁶ 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).

⁷ See *Sallie B. Wynecoff*, 39 ECAB 186 (1987).

⁸ Docket No. 10-54 (issued July 27, 2010).

⁹ See *G.N.*, Docket No. 12-261 (issued July 23, 2012); *Mary Keszler*, 38 ECAB 735, 739-40 (1987).

contended that “Staff Overflow” signs in the parking lot and reference to the parking lot in the employee handbook made it reasonable to assume that the employing establishment maintained a certain amount of control over the parking lot. She submitted portions of the employee handbook which indicated that staff members may park in the south lot west of Bullhead Park city lot, only between the hours of 6:00 a.m. and 5:30 p.m., Monday through Friday. Appellant indicated that she fell at 7:15 p.m. The Board finds this evidence is not sufficient to establish that the premises of the employing establishment should be constructively extended to include the Bullhead Park city lot.

Appellant did not submit sufficient evidence to establish that her claimed injury occurred on the premises of the employing establishment. Although the definition of the employing establishment premises is not solely dependent on the status or extent of legal title or control, she has not established any relationship of the injury site to her employment. The evidence of record is insufficient to establish that the area on which appellant fell was owned, controlled, maintained or leased by the employing establishment. The parking lot was not part of the actual premises of the employing establishment. Under the circumstances in this case, it cannot be stated that appellant’s injury occurred on the constructive premises of the employing establishment.

The Board has held that, under special circumstances, the employment premises are constructively extended to hazardous conditions which are proximately located to the premises and therefore may be considered as hazards of the employing establishment.¹⁰ The primary consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.¹¹

The evidence reveals that the parking lot where appellant fell was not owned, leased, operated or maintained by the employing establishment, but rather was owned, operated and maintained by the City of Albuquerque and leased to the Department of the Air Force, entities distinct from the employing establishment. The record establishes that the employing establishment had no jurisdictional authority over the parking lot area. Although employees of the employing establishment used the lot, they did not pay for use and were not assigned designated areas for their exclusive use nor did the employing establishment check the lot for unauthorized use.¹² The evidence does not establish that the premises should be constructively extended to the parking lot in this case. The Board finds that the parking lot was owned by the City of Albuquerque leased to the Department of the Air Force and also open for use by the general public.

Appellant has not established that any of the exceptions to the general rule regarding off-premises injuries are applicable. As noted above, she was leaving work when she fell on December 20, 2010 and she has not shown that she was performing work duties or actions

¹⁰ See *Randi H. Goldin*, *supra* note 2 at 711.

¹¹ *Id.* See also *William L. McKenney*, *supra* note 3.

¹² See *Roma A. Mortenson-Kindschi*, *supra* note 4. See also *Rosa M. Thomas-Hunter*, *supra* note 6 at 504-05 (1991) (mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises of the employing establishment).

incidental to her work duties at the time of the alleged injury. The evidence indicates that appellant's claimed injury occurred away from her place of employment while she was engaged in nonemployment activities and encountered hazards that were shared by the general public.

Thus, the Board finds that the December 20, 2010 employment incident constitutes an off-premises noncompensable injury that occurred while appellant was going home from work, which is not compensable as it did not arise out of and in the course of her federal employment, but out of the ordinary nonemployment hazards of the journey itself which are shared by all travelers.¹³ Consequently, appellant failed to establish that her injuries were sustained while in the performance of duty.

On appeal, appellant contends that she was in the performance of duty at the time of the injury. For the reasons stated above, the Board finds that her argument is not substantiated.

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 did not meet her burden of proof to establish that she sustained an injury in the performance of duty on December 20, 2010.

¹³ See *Rosa M. Thomas-Hunter*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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