United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, North Canton, OH, Employer	)	**Docket No. 22-0173** **Issued: January15, 2025**

Appearances:
Alan J. Shapiro, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On November 15, 2021 appellant, through counsel, filed a timely appeal from an October 28, 2021 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 an injury in the performance of duty on July 7, 2020, as alleged.

FACTUAL HISTORY

On July 8, 2020 appellant, then a 51-year-old compliance inspector and support officer, filed a traumatic injury claim (Form CA-1) alleging that at approximately 6:25 p.m. on July 7, 2020 she sustained a right shoulder injury while in the performance of duty. She asserted that, while she was exiting the north door of the employing establishment on that date, she stepped out the door onto a concrete pad and her foot hit the edge, causing her to fall into the surrounding gravel. Appellant indicated that she reached out to catch herself, injuring her right shoulder. On the reverse side of the claim form, R.S., appellant's immediate supervisor, reported that appellant had fixed hours of work from 12:00 p.m. to 8:30 p.m., Monday through Friday. He contended that she was not in the performance of duty during the July 7, 2020 incident because she was off the clock and was walking to her car.

Appellant submitted a statement dated July 8, 2020 from B.N., a coworker, who indicated that he did not see appellant fall, but did see her hunched over with her hands on her knees and with her bag on the ground. B.N. noted that appellant reported she had fallen on the rocks when exiting the side door of the airport and had landed on both arms. Appellant also submitted medical evidence in support of her claim.

In a November 6, 2020 statement, L.T., an employing establishment official, indicated that appellant's claim was being challenged because appellant was off duty at the time of the July 7, 2020 injury. She indicated that appellant was leaving the airport and walking to her vehicle to go home, when she fell after going through the exit door. L.T. asserted that appellant was at no greater risk than the general public and indicated that the employing establishment did not control, lease, own, or maintain this area. She asserted that the airport authority controlled the area. L.T. noted that the exit door where appellant fell was not exclusive to employing establishment employees as airport employees, vendors, and passengers also transited through it.

In a development letter dated November 13, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim. In a separate development letter of even date, OWCP requested that the employing establishment submit additional information regarding appellant's claim, including comments from a knowledgeable supervisor. It afforded both parties 30 days to respond.

In a November 23, 2020 statement, L.T. indicated that, at the time of the July 7, 2020 incident, appellant was leaving the airport and headed to her car when she fell after stepping onto a concrete pad outside of a public doorway. Photographs of the area where the incident occurred were attached.

In a statement dated November 29, 2020, appellant asserted that she was still on the employing establishment's property when she fell. She noted that she had stepped out of the door of the building and was not yet in the parking lot, but rather was on the concrete pad directly

outside the doorway. Appellant also submitted additional medical evidence in support of her claim.

By decision dated December 16, 2020, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that she sustained an injury on July 7, 2020 while in the performance of her federal duties.

On December 30, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 14, 2021, during which appellant testified that, at some point after July 7, 2020, someone placed an "emergency use only" sign on the door she passed through on July 7, 2020.

By decision dated June 30, 2021, OWCP's hearing representative set aside the December 16, 2020 decision and remanded the case to OWCP for further development. The hearing representative directed OWCP to collect additional information regarding the extent of the employing establishment's premises.

On remand OWCP solicited additional information from the employing establishment regarding the location of appellant's fall.

In an August 12, 2021 letter, L.T. explained that the use of the doorway where appellant fell was not exclusive to employing establishment employees, and that airport and airlines employees and passengers would also transit through that door. She noted that, at the time of the July 7, 2020 incident, that doorway was not designated for emergency use only.[3] LT. asserted that the employing establishment did not lease, own, control, or maintain the area where the fall occurred. She noted that the only areas that were controlled by or exclusive to the employing establishment at the airport were their administrative office space, employee break room, and passenger and baggage checkpoint locations. L.T. contended that appellant was not in her work zone or any other employing establishment controlled or leased space at the time of her July 7, 2020 fall. She further contended that appellant had ended her shift and punched out using the time clock in the employee breakroom. L.T. then walked approximately 400 to 500 feet to the doorway located in the public area of the airport lobby, and then exited out of the airport. She asserted that appellant made a personal choice to use the door that led her to the concrete pad surrounded by unleveled gravel and bypassed two sets of doors (labeled Departures 1 and 2) that would have taken her directly to a sidewalk. The employing establishment included maps depicting the airport premises and the parameters within which employees were allowed to enter and engage in activities incidental to work such as getting a snack/drink or taking assigned breaks. A map entitled Terminal Map # 2 was annotated with arrows to show the path that appellant took when she walked from the employee breakroom to the doorway where she fell.

By *de novo* decision dated October 28, 2021, OWCP found that appellant had not met her burden of proof to establish an injury in the performance of duty on July 7, 2020, as alleged. It

[3] L.T. indicated that the airport authority later designated the doorway as for emergency use only after the employing establishment notified it of appellant's injury.

determined that appellant's fall occurred off the premises while she off the clock and not performing employment duties.

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" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[5] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. 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 or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[6] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[7]

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.[8] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[9] or which are in the nature of necessary personal comfort or ministration.[10]

Regarding what constitutes the "premises" of an employing establishment, the Board has stated:

> "The term 'premises' as it is generally used in workmen's 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 employer; in other cases even though the employer

[4] 5 U.S.C. § 8102(a).

[5] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[6] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[7] *Cheryl Bowman*, 51 ECAB 519 (2000).

[8] *Mary Keszler*, 38 ECAB 735, 739-40 (1987).

[9] *Betty R. Rutherford*, 40 ECAB 496, 498-99; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[10] *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on July 7, 2020, as alleged.

The facts considered in determining whether an employee leaving work is in the performance of duty are whether the injury occurred on the premises of the employing establishment, the time interval before or after the work shift, and the activity at the time of injury. The course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts.[12]

As noted, the employing establishment is located within the confines an airport. The only areas that were controlled by or exclusive to the employing establishment at the Akron-Canton Airport were their administrative office space, employee break room, and passenger and baggage checkpoint locations. Appellant had fixed hours of work from 12:00 p.m. to 8:30 p.m., Monday through Friday. She was injured after clocking out at approximately 6:25 p.m. on July 7, 2020 as she was leaving work early. Appellant exited through a doorway which was not exclusive to employing establishment employees, as airport employees, vendors, and passengers also transited through it. She stepped out the doorway onto a concrete pad and her foot hit the edge, causing her to fall into the surrounding gravel. Appellant therefore fulfilled the time and place requirement needed to establish fact of injury.[13] However, unless her injury occurred on the actual or constructive premises of the employing establishment, her injury cannot be considered as occurring in the performance of duty.[14]

The evidence of record establishes that the doorway where appellant fell is not owned or controlled by the employing establishment. In *Idalaine L. Hollins-Williamson*,[15] the employee fell and injured her left side while walking from a parking lot to the employing establishment building on a snow-covered public sidewalk. The Board found that the evidence of record was insufficient

[11] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "The 'premises' of the employer, as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of legal title." *Dollie J. Braxton*, 37 ECAB 186, 188-89 (1985). The proximity rule dictates that 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).

[12] *See J.K.*, Docket No. 17-0756 (issued July 11, 2018); *T.L.*, 59 ECAB 537 (2008).

[13] *Id*. *See also Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[14] S*ee J.K., supra* note 12; *Sallie B. Wynecoff*, 39 ECAB 186 (1987).

[15] 55 ECAB 655 (2004).

to establish that the appellant was injured in the performance of duty as the sidewalk where the incident occurred was not owned, operated, or maintained by the employing establishment, and was open to the public. In this case, the evidence establishes that the employees and customers of the Akron-Canton Airport shared the doorway where appellant fell. Thus, appellant has not shown that the doorway was used exclusively or principally by the employees and clients of the employing establishment for the convenience of the employer, either contractually or otherwise.

As noted, the proximity exception to the premises rule indicates that, under special circumstances, the industrial premises are constructively extended to those hazardous conditions, which are proximate to the premises and may, therefore, be considered as hazards of the employing establishment.[16] 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.[17] The hazard that caused appellant's injury, a concrete pad in a public doorway, is commonly faced by all pedestrians; therefore, there was no special hazard at the off-premises point.[18] The Board, therefore, finds that the concrete pad where appellant fell constitutes an ordinary, nonemployment hazard of the journey itself, which is shared by all travelers and the proximity rule does not apply.[19]

Accordingly, as the evidence of record is insufficient to establish that appellant was in the performance of duty when injured, the Board finds that she has not met her burden of proof.

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 an injury in the performance of duty on July 7, 2020, as alleged.

[16] *See J.K., supra* note 12; *Jimmie Brooks,* 54 ECAB 248 (2002).

[17] *See J.K., id.*

[18] *Id.*

[19] *Id., see also D.C.,* Docket No. 08-1872 (issued January 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January15, 2025
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board