

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 08-047

ROSEMARY GARDNER,

Claimant – Respondent

v.

D.C. DEPARTMENT OF CORRECTIONS,

Self-Insured Employer – Petitioner

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. PBL 06-055, DCP No. 761032-0003-2006-0050

Rosemary Gardner, for the Petitioner *Pro Se*

Pamela L. Smith, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*

OVERVIEW

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In the Compensation Order, filed on October 30,

2007, the Administrative Law Judge (ALJ) awarded the Claimant-Respondent (Respondent) temporary total disability benefits from December 17, 2005 to July 8, 2006 and causally related medical expenses. On November 29, 2007, the Self-Insured Employer-Petitioner (Petitioner) filed an application requesting review of the Compensation Order. The Respondent filed a Response to the application.

As grounds for this appeal, the Petitioner alleges as error that the decision below is neither in accordance with the law nor based upon substantial evidence. The Respondent asserts that the decision below should be affirmed as it is based upon substantial evidence and the Petitioner's witness gave false testimony. After a review of the record in total, the Compensation Order is remanded for further evidentiary development and findings.

ISSUE

The issue is whether the finding the Respondent's injury occurred in the performance of her duties is supported by substantial evidence and is in accord with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, et seq. at § 1-623.28(a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner asserts that, contrary to the ALJ's findings, the evidence shows the Respondent's injury occurred on a public street and not in an area owned and controlled by the Petitioner or within the "zone and environments" of its premises. Moreover, the Petitioner maintains that when the Petitioner's injury occurred, she was not on duty and was in fact, on leave. In the alternative, the Petitioner argues that if the ALJ's finding that the injury in question is compensable, the Respondent failed to present any evidence of a physical disability beyond March 17, 2006 and, with respect to her psychiatric injury, failed to initially apply for benefits based thereon and further failed to satisfy the test enunciated in *Dailey v. 3M*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988).

The Respondent worked as a correctional officer for the Petitioner. On December 17, 2003, she was reaching for the door handle of her parked vehicle when the vehicle exploded. The

Respondent sustained second and third degree burns on her body. At the time of the injury, the Respondent's vehicle was parked on the street next to the Petitioner's facility. The dominant issue submitted to the ALJ was whether the Respondent's injury arose out of and in the course of her employment. The ALJ, citing LARSON'S WORKERS' COMPENSATION LAW §§ 13.02[2][c] and [2][d] (2002), found that the street where the vehicle was parked when it exploded was within the Petitioner's dominion and control by virtue of ownership and that, therefore the Respondent's injury arose out of and in the course of her employment.

In this jurisdiction, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq.* (2006), each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. D.C. Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Official Code § 2-509; 7 DCMR § 107.13. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. D.C. Department of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King, supra*, 742 A.2d. at 465, basic findings of fact on all material issues are required, for "[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law." *See also Sturgis v. D.C. Department of Employment Services*, 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *See WMATA v. D.C. Department of Employment Services (Juni Browne, Intervenor)*, DCCA No. 06-AA-27 (June 14, 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006). The determination of whether an ALJ's decision complies with the foregoing APA requirements is a determination that is necessarily limited in scope to the four corners of the compensation order under review. Thus, where an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994).

D.C. Official Code § 1-623.02, in pertinent part, states,

The District of Columbia government shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, . . .

While the language "performance of duty" is not defined in the Act itself, it has been interpreted as mandating that an injury both arise out of and in the course of an employee's employment. *See Waters v. D.C. Office of Emergency Preparedness*, Dir. Dkt. No. 26-00, OHA No. PBL 00-004, DCP No. 008906 (April 2, 2003)(citing *Allen v. D.C. Office of Personnel*, ECAB No. 88-33 (December 19, 1990)). Both requirements must be met before an injured employee can be compensated. In order for an injury to arise out of the employment, the employee must be performing an obligation or condition of employment which exposes her to

the danger causing the injury. This jurisdiction uses the positional-risk standard in evaluating whether an injury “arises out of” employment. *See Grayson v. D.C. Department of Employment Services*, 516 A.2d 909 (D.C. 1986). Under the positional-risk test, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of the employment placed claimant in the position where she was injured. *See Grayson*, 516 A.2d at 911 & n.4. In order for the injury to occur in the course of employment, the injury must occur within the time and space limits of the employment. *See Kolson v. D.C. Department of Employment Services*, 699 A.2d 357, 360 (D.C. 1997); *Willis v. Department of Corrections*, Dir. Dkt. No. 14-00, H&AS No. PBL No. 99-59, ODC No. 003268 (January 9, 2001). However, an injury sustained while en route to or from work, does not fall within the category of an injury sustained “in the course of employment”, thus making the injury not compensable. *See Kolson*, 699 A.2d at 359. This rule is often referred to as the “going and coming” rule.

On review, it is not clear to this Panel what standard the ALJ used to find the Respondent’s injury occurred in the performance of her duties before the ALJ applied the “going and coming” rule and an exception to that rule. Indeed, the ALJ did not articulate any standard or principles of law used to resolve this issue. Further, the ALJ failed to make basic findings necessary to resolve the issue of whether the Respondent’s injury occurred in the performance of her duty. Basic facts are necessary for determining whether the Respondent’s injury occurred in the performance of her duty. Without these findings, the Panel cannot properly conduct an appellate review as the Panel cannot “fill the gap” by making its own findings from the record. *See Mack, supra*. A remand is necessary.

The record shows, and the ALJ found, the Respondent worked for the Petitioner as a Senior Correctional Officer and her injury occurred on December 17, 2005. However, there is no express finding on her tour of duty with the Petitioner on the day of the injury. Likewise, there is no express finding on the time her injury occurred. The record discloses the Respondent had multiple work locations. Hearing Transcript (HT) at pp. 36, 38-40, Employer Exhibit No. 3. However, there is no express finding addressing which work location the Respondent was assigned to on December 17, 2005 and addressing whether her injury occurred at the assigned work location. It is possible the Respondent was still en route to her assigned work location and merely stopped at the vehicle while en route. Although the ALJ found the Respondent suffered burns as a result of her vehicle exploding, the ALJ did not find whether the vehicle was the Respondent’s personal vehicle or a government vehicle assigned to her for use while at work. Also, there is no finding addressing the reason why the Respondent approached the vehicle. These findings are crucial as the Petitioner asserts the Respondent’s injury did not arise out of her employment and the Respondent was not at work when her injury occurred.

The Panel, like the ALJ, recognizes there are exceptions to the “going and coming” rule. One such exception is an injury sustained while going or coming by an employee with fixed hours and place of work is compensable if the injury occurs on the employer’s premises. *See Grayson, supra*; *Wright v. D.C. Department of Public Works*, ECAB No. 88-40 (September 13, 1991); LARSON’S WORKERS’ COMPENSATION LAW § 13.01[1] (2002). The term “premises” is not necessarily synonymous with the term “property of the employer, but the premises, could be broader or narrower and [is] more dependent on the relationship of the property to the

employment than on the status or extent of legal title.” *Wright, supra* (quoting *Dollie J. Braxton*, 37 ECAB 186 (1985)). Based upon this definition, the following areas have been found to be part of an employer’s premises in this jurisdiction: the driveway leading to the entrance of an employer’s building, *Epshtyn v. Washington Hospital Center*, Dir. Dkt. No. 89-32. H&AS No. 89-57, OWC No. 0153406 (April 18, 1989), *aff’d Epshtyn v. Washington Hospital Center*, Dir. Dkt. No. 89-32. H&AS No. 89-57, OWC No. 0153406 (March 31, 1992); the entrance of an employer’s building, *Wright, supra*, the steps leading into an employer’s building, *Harding v. Research & Evaluation Association*, Dir. Dkt. No. 91-53, H&AS No. 91-879, OWC No. 0197623 (July 26, 1994); and the parking area within the gates surrounding an employer’s building, *Powell v. D.C. Department of Corrections*, AHD No. PBL 06-054, DCP No. 761032-0003-2006-0044 (January 12, 2007).

In this case, the ALJ expanded the definition of premises to include a public street next to the employer’s facility or building where the employer is the District of Columbia government and where the District of Columbia government owns all of the public space within its jurisdiction. This particular expansion of the definition of premises is one of first impression under the Act. As the instant Act was modeled after the Federal Employees' Compensation Act (FECA) found at 5 USCS §§ 8101 *et seq.*, it is reasonable to accept decisions construing that FECA as persuasive authority in construing the instant Act. *See Safeway Stores, Inc. v. D.C. Department of Employment Services*, 832 A.2d 1267, 1270 (D.C. 2003). Indeed, in *Wright*, the Employees’ Compensation Appeals Board (ECAB), one of the predecessors to the CRB, followed the definition of “premises” and rationale behind the definition used by its federal counterpart, the U.S. Department of Labor’s ECAB, the appellate body for cases filed under FECA.

The question of whether an employer’s premises includes a public street next to the employer’s facility or building where the employer is the Federal Government and where the Federal Government owns the public space has been addressed by the federal ECAB. In *Dollie J. Braxton v. U.S. Postal Service, supra*, the employee slipped and fell on an icy sidewalk in front of the General Post Office building. The employing establishment, the U.S. Postal Service, admitted that it owned the area where the employee was injured. However, the federal ECAB held her injury did not occur on the employer’s premises because there was no showing the sidewalk was used “exclusively or principally by employees of the Morgan General Mail Facility for the convenience of the employer” nor a showing the sidewalk was so interrelated with the employer that it could be treated as part of its actual premises.”

In defining “premises” for cases involving public space, the federal ECAB separates the “employing establishment” *i.e.*, agency, from federal government and does not impute the federal government’s ownership to the agency and requires the space be used exclusively or principally by employees of the “employing establishment” for the convenience of the employer. *See A.M.*, ECAB Docket No. 06-1472 (April 25, 2007) (a noncompensable fall on a sidewalk adjacent to the employing establishment building); *Melvin Silver*, 45 ECAB 677 (1994)(a noncompensable fall on a sidewalk immediately adjacent to the Federal building in which the employee worked); *Anne R. Rebeck*, 32 ECAB 316 (1980) (a noncompensable injury when the employee tripped over a cobblestone sidewalk adjacent to the employing establishment premises); *Gloria C. Adalain*, 26 ECAB 131 (1974) (a noncompensable fall on a sidewalk

immediately adjacent to the Federal building in which the employee worked). As the ECAB stated in *Dollie J. Braxton*,

The fact that the property was owned by the U.S. Postal Service is not sufficient to consider the sidewalk as part of the employing establishment's premises. The U.S. Postal Service cannot be expected to assume responsibility for every injury to its employees as they cross Postal Service property on their way to and from work. In this case, the crossing on property owned by the Postal Service was merely fortuitous and did not confer any special convenience or benefit on the employing establishment. Such activity did not arise out of or in the course of employment. There must exist a closer nexus between the property on which an injury occurs and the use made and benefit received by the employing establishment from that particular piece of property before it can be considered to be part of the employing establishment's premises.

The Panel finds the federal ECAB's analysis of "premises" sound in cases where an employee's injury occurs in public space next to the employer's facility or building and where the employer is the Federal government and owns, in total or in part, the public space. Therefore, the Panel adopts the federal analysis of the term "premises" for determining whether an employee's injury occurred in the performance of duty. The Panel holds the "employing establishment" *i.e.*, agency, is separate from the District of Columbia government and the government's ownership of the public space is not imputed to the employing establishment for workers' compensation purposes. To be considered part of the employing establishment's premises, the public space in which the injury occurred must be used exclusively or principally used by the employees for the convenience of the employing establishment.

On remand, if the ALJ finds the "going and coming" rule applicable but must examine the "premises" exception, the ALJ must apply the above interpretation of law to this case. Of course, before applying the law, the ALJ must make an express finding on the ownership of the public space. Is the space owned by the District of Columbia Government or is it owned by the Petitioner, D.C. Department of Corrections, who is the employing establishment?

The Panel recognizes the ALJ found the public space where the Respondent's injury occurred was owned by the Petitioner based upon the testimony of Sgt. Aviles. However, a review of Sgt. Aviles' testimony reveals ambiguity and confusion. *See* HT at pp. 52-54. Was Sgt. Aviles agreeing with the ALJ's statement that the public space where the Respondent's injury occurred was not a parking lot owned by the Petitioner or was he testifying the public sidewalk/street was owned by the District of Columbia government or was he testifying the public sidewalk/street was owned by the Petitioner, D.C. Department of Corrections, who is the employing establishment? Further, Sgt. Aviles later testified the injury occurred on a private street. *See* HT at 54. The ambiguity must be resolved to make a definitive finding of fact supportable by substantial evidence.

CONCLUSION

The Compensation Order of October 30, 2007 finding the Respondent's injury occurred in the performance of her duties is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of October 30, 2007 is VACATED AND REMANDED.

This matter is remanded for further evidentiary proceedings as necessary to make findings of fact and conclusions of law, consistent with the above discussion, on whether the Respondent's injury occurred in the performance of her duties.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 23, 2008
DATE