

On November 18, 2002 appellant, a 33-year-old patient services assistant, filed a traumatic injury claim alleging that on November 15, 2002 she injured her back and left arm while in the performance of duty. Appellant's regular tour of duty is 7:30 a.m. until 4:00 p.m.

On December 27, 2002 the Office accepted the claim for left scapula strain, left scapula contusion and thoracic strain when struck by an office door in her upper back. The Office advised appellant that her allegation that her injury was the result of an assault had not been accepted.

In a letter dated January 23, 2003, the employing establishment controverted the claim, contending that appellant was not in the performance of duty at the time she was injured. The employing establishment contended that appellant “was working outside the scope of her duties as a union representative” when injured. It referenced section 7114(a)(2)(B) of the Federal Services Labor Management Relations Statute to state that the meeting in question involved a performance appraisal, not an investigation and did not require appellant’s attendance. Therefore, her presence at the performance appraisal meeting was outside the scope of her duties as a union steward. The employing establishment alleged that Article 26, *Performance Appraisal System*, Section 4D, from the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees (A.F.G.E.) stated that appellant’s presence at the performance appraisal meeting was unnecessary and, therefore, she was not in the performance of duty when injured. The employing establishment submitted a copy of the Master Agreement between the Department of Veterans Affairs and the A.F.G.E.

On February 26, 2003 the Office received appellant’s response to its January 28, 2003 letter requesting additional information regarding official union time. Appellant stated that she had requested and received authorization for official time prior to attending the meeting of November 15, 2002. She was previously authorized official union time for mid-term evaluations.

In a March 3, 2003 letter, the employing establishment noted that appellant had been granted official time on November 15, 2002 to go to the union office and attend to union matters. It again contended that she was not authorized official union time to attend mid-term performance evaluations.

On March 21, 2003 the Office received a letter dated February 21, 2003 from Doris M. Randleman, President, of the local union. She stated that appellant had given her supervisor two days’ notice that she was attending the meeting. Ms. Randleman indicated that management agreed to let appellant use official time for Mondays, Thursdays and Friday of each week and this agreement had been in place since June 2002.

In an April 21, 2003 letter, the employing establishment responded that it had agreed to appellant’s use of “official time in the union office” on Mondays, Thursdays and Fridays, but that she had not been authorized to use official time to attend the November 15, 2002 mid-term performance evaluation. The employing establishment again contended that union stewards were not authorized to attend a mid-term evaluation meeting in a representative capacity, as it “was a routine meeting that involved no grievance, no policy or practice or any change in the employee’s condition of employment.” It contended that appellant was outside the scope of her duties when she attempted “to insert herself in this meeting.”

On July 15, 2003 the Office issued a proposed rescission of the December 27, 2002 acceptance decision. It found that appellant was not involved in official union time on

November 15, 2002 when she went to attend the mid-term evaluation. The Office noted that, although she was on official union time during the morning of November 15, 2002, the factual evidence was insufficient to support that she was on official union time at the time she sustained injury. The evidence supported that appellant was struck by a door, but that she was not assaulted by Dr. Arthur Aaronson and her inaction had contributed to the door striking her. In a decision dated August 29, 2003, the Office finalized the rescission of its acceptance of appellant's claim for traumatic injury.

On August 11, 2003 the Office received the February 18, 2003 statement of Dennis Mike McKee regarding the November 15, 2002 meeting. Mr. McKee stated that he had requested union representation at the meeting and that appellant was the assigned union representative for the meeting. He had requested the presence of a union representative at the mid-term performance evaluation because he had filed a complaint regarding an unfair labor practice regarding Dr. Aaronson. Mr. McKee stated that appellant and another union representative appeared for the meeting, which was objected to by his supervisor. Two telephone calls were placed with human resources and the union to confirm that Mr. McKee "was allowed to have union representation" during his mid-term performance evaluation. Dr. Aaronson asked appellant to enter his office, which had one chair in which to sit. When asked if they could meet in the solarium where all could sit down, he responded that the parties could stand as the evaluation would not take long. Mr. McKee indicated that appellant was standing in the doorway of the office and that Dr. Aaronson attempted to close the door and push appellant out of the way. After this incident, Mr. McKee stated that his supervisor was informed that he had the right to have the union present for his evaluation.

In a letter dated September 14, 2003, appellant's counsel requested an oral hearing before an Office hearing representative. On October 21, 2003 he submitted the September 26, 2003 decision by an Equal Employment Opportunity Commission administrative law judge, who found that "[t]he [a]gency assertions that Dr. Aaronson did not intend to strike [appellant] are not worthy of belief. Most, if not all, of the eye witnesses stated that Dr. Aaronson intended to strike the complainant." The administrative law judge noted that corrective action had been taken in that Dr. Aaronson had been demoted and appellant was awarded back pay and \$7,500.00 in compensatory damages.

A hearing was held on April 21, 2004. Appellant testified that she clocked into work at 7:30 a.m. and informed her supervisor that she was going to perform union work and attend the meeting with Mr. McGee and Dr. Aaronson. She also testified that she had informed her supervisor, both orally and in writing, that she was using official time for representational reasons to attend the November 15, 2002 meeting.

By decision dated June 4, 2004, the Office hearing representative affirmed the August 29, 2003 rescission decision.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own

motion or on application.”¹ The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under section 8128 of Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.³

Workers’ compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.⁴

With regard to representational functions and when a person is considered to be on official time, the Office’s procedure manual provides:

“When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted ‘official time’ or in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty.”⁵

With respect to whether injuries arising in the course of union activities are related to the employment, the general rule is that union activities are personal, that attendance at a union meeting, for example is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit.⁶ Under the procedure manual, the Office has recognized that certain representational functions performed by employee representatives benefit both the employee and the employing establishment.⁷

ANALYSIS

The Board finds that appellant was injured while in the performance of duty on November 15, 2002 such that the rescission of the acceptance of her claim was error by the

¹ 5 U.S.C. § 8128.

² *John W. Graves*, 52 ECAB 160 (2000).

³ *Id.*

⁴ *John W. Graves*, *supra* note 2.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

⁶ *Bernard Redmond*, 45 ECAB 298, 304 (1994).

⁷ *See supra* note 5.

Office. It was accepted that appellant sustained a left scapula strain, left scapula contusion and thoracic strain after being struck by an office door in her upper back on November 15, 2002. The Office found that subsequent evidence submitted in this case established that appellant was not in the performance of duty at the time of the incident. The Office noted that, although appellant was on official union time during the morning of November 15, 2002, she was not on official union time at the time she sustained the injury and rescinded acceptance of her claim. The Office noted that appellant had not been assaulted by Dr. Aaronson and her inaction contributed to her being struck by the door.

The Act provides for payment of compensation for disability or death resulting from a personal injury sustained while in the performance of duty.⁸ 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 where she may reasonably be expected to be in connection with her employment and while reasonably engaged in fulfilling the duties of her employment or something incidental thereto.⁹ The incident of November 15, 2002 occurred on the premises of the employing establishment during the regular workday. At the time of injury, appellant was engaged in a representational function while on official time. Although the employing establishment contested appellant's presence at the meeting, contending that it involved a performance appraisal and was outside the scope of her responsibilities as a union steward; the evidence of record establishes that appellant had given advance notice to her immediate supervisor of Mr. McKee's request that she attend the meeting and that several telephone calls were made to human resources in order to confirm that Mr. McKee was allowed representation at the meeting. The nature of the activity in which appellant was engaged was not a purely personal union matter; rather, she was performing a representational function with mutual benefit to the union and her employer.

The manner in which appellant's injury was sustained is not factually in dispute. As noted, Dr. Aaronson stated his objection to appellant's presence at the meeting and then asked that Mr. McKee meet in his office. Mr. McKee entered and sat in the available chair and stated that appellant was standing in the doorway to the office. At this time, Dr. Aaronson attempted to close the door causing it to strike appellant in the back. It is not necessary for the adjudication of this claim to divine the intent of Dr. Aaronson while attempting to close the door.¹⁰ The facts in evidence establish the time, place and manner of appellant's injury on November 15, 2002.

The Board finds that the Office failed to meet its burden of proof to rescind acceptance of appellant's claim. The record contains evidence from the employing establishment acknowledging that appellant was granted official time for Mondays, Thursdays and Fridays. When she sustained injury on Friday, November 15, 2002, she was on the premises during a time in which she was performing a representational function of mutual benefit to the union and her employer. Appellant had previously informed her immediate supervisor, both orally and in

⁸ 5 U.S.C. § 8102(a). See *Dwight D. Henderson*, 46 ECAB 441 (1995).

⁹ *Id.* at 443-44.

¹⁰ Although the factual findings of other federal administrative agencies or courts are not dispositive of proceedings brought under the Act, which is administered by the Office and the Board, such decisions may be instructive. See *Pamela I. Holmes*, 49 ECAB 581 (1998).

writing, that she would be performing representational duties on November 15, 2002 and attending the meeting. Mr. McKee, the coworker, stated that he had requested the presence of a union representative at his mid-term evaluation due several outstanding issues with Dr. Aaronson regarding conditions of his employment. In addition, two telephone calls were placed with human resources and the union to verify that he was entitled to have union representation present at the meeting and that Dr. Aaronson was subsequently told of his entitlement to representation at this meeting. The evidence of record establishes that appellant sustained injury while in the performance of duty and the Office improperly rescinded acceptance of her claim.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's claim on the grounds that she was not in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated June 4, 2004 is reversed.

Issued: October 26, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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