

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

ANNA M. JOHNSON, Appellant

and

**DEPARTMENT OF COMMERCE, El Segundo,
CA, Employer**

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**Docket No. 03-2159
Issued: February 12, 2004**

Appearances:
Anna M. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 5, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 5, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant's July 6, 1999 leg injury occurred as a consequence of her accepted employment injury of aggravation of Madelung's deformity and resultant surgical corrections; and (2) whether the Office properly determined that under 5 U.S.C. § 8132, the \$38,816.12 surplus of the third-party recovery received by appellant must be credited against her future compensation payments for both her July 6, 1999 consequential injury and her original injury of aggravation of Madelung's deformity.

FACTUAL HISTORY

On April 16, 1999 appellant, then a 43-year-old export compliance specialist, filed a notice of occupational disease alleging that she developed Madelung's deformity with chronic

wrist pain due to factors of her federal employment. She first became aware of her condition in January 1997 and first related this condition to her employment on July 30, 1997.

On July 6, 1999, while at home, appellant slipped and fell on steps breaking her left leg. She attributed her injury to the condition of her right hand, noting that weakness and the splint she was wearing due to her Madelung's deformity prevented her from grasping the stair railing on her right. Appellant then reached with her left hand in hopes of grabbing a railing on her left side, but there was no railing available. She fell down 15 cement steps resulting in a complicated fracture of her left leg and numerous bruises and abrasions on her left side. Appellant submitted medical evidence attributing her fall to her right-hand condition and splint as a result of her Madelung's deformity.

The Office accepted appellant's claim for aggravation of Madelung's deformity and surgical correction on August 3, 1999. On September 28, 1999 the Office accepted that her tibial fracture was a consequence of her wrist condition of Madelung's deformity. The Office paid \$5,701.32 in gross compensation from May 26, 1999 to May 3, 2000 and medical benefits in the amount of \$22,554.82 to October 30, 2000.

The Office granted appellant a schedule award for a 12 percent permanent impairment of her left lower extremity to run from May 4 to December 31, 2000 in the amount of \$20,019.23.¹

The record indicates that appellant's third-party law suit was settled for the gross total of \$128,000.00 on April 24, 2001. A statement of recovery shows that after all of the applicable deductions were made, including attorney's fees of \$42,666.67, court costs of \$1,493.00, appellant's 20 percent recovery of \$16,768.07 and refund to the Office of \$18,837.43, appellant retained a surplus of \$38,816.12.²

In a letter dated July 16, 2001, the Office advised appellant that pursuant to section 8132 of the Federal Employees' Compensation Act,³ no further medical expenses or disability benefits would be paid on account of her injury until the \$38,816.12 surplus had been absorbed. She disagreed with the Office's determination that the third-party surplus should be applied against her original injury of Madelung's deformity, arguing that either the Office should not have accepted her leg injury as a consequential injury or that the third-party recovery due to a consequential injury did not entitle the Office to require her to exhaust the surplus of that recovery prior to receiving benefits for her initial preexisting injury. Appellant alleged that the theory of recovery in the third-party settlement was a violation of the building code, not a consequential injury and that the third-party settlement agreement should determine whether her initial employment injury was properly included by the Office in absorbing her third-party settlement.

¹ The Office has not issued a final decision regarding the extent, if any, of appellant's permanent impairment due to her accepted bilateral wrist condition. The Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

² The amount of the surplus of the third-party recovery is not in dispute.

³ 5 U.S.C. §§ 8101-8193, 8132.

By decision dated January 25, 2002, the Office found that the July 6, 1999 injury was as a consequence of the initially accepted condition and that therefore there was a third-party surplus which should be recovered prior to appellant receiving additional compensation benefits for either the initial condition or the consequential injury.

Appellant requested an oral hearing on January 30, 2002. She testified at her oral hearing held on September 17, 2002 and again asserted that the Office was not entitled to recovery of the third-party settlement in regard to her initial employment injury of Madelung's deformity. Appellant argued that her wrists were not injured on July 6, 1999 and that she should not have to "take money from a third party to pay off an injury that the Labor Department would have had to pay for whether I fell or not."

By decision dated and finalized June 5, 2003, the hearing representative concluded that appellant's July 6, 1999 leg injury occurred as a consequence of her accepted condition of aggravation of Madelung's deformity. The hearing representative found that there was no evidence that the amount of the surplus was in error and concluded that as the conditions of aggravation of Madelung's deformity and her consequential leg injury were the "same injury" legally, the Office was entitled to suspend appellant's compensation and medical benefits for both conditions until the third-party surplus was exhausted.

LEGAL PRECEDENT -- ISSUE I

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁴ In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, the Board has found that if a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury.⁵

ANALYSIS

In this case, the Office accepted that appellant sustained an aggravation of her preexisting Madelung's deformity due to factors of her federal employment. As a result of her Madelung's deformity, she had undergone surgeries and was wearing a brace on her right hand. Appellant stated that on July 6, 1999 she reached for the hand rail with her right hand, but "due to the two previous surgeries and the hand splint I was wearing, my hand slipped down the railing." She stated that she tried to catch herself but was unable to hold on. Appellant then reached in hopes of grabbing a railing on her left side with her left hand, but there was no railing available. She fell down 15 cement steps resulting in a complicated fracture of her left leg and numerous bruises and abrasions on her left side.

⁴ A. Larson, *The Law of Worker's Compensation* §§ 10.01, 10.06 (2002); Melissa M. Fredrickson, 50 ECAB 170, 171 (1988).

⁵ *Id.*

The medical evidence of record supports that appellant's July 6, 1999 leg injury was a result of the weakness of her right hand and brace she was wearing. She submitted a report dated July 6, 1999 from Dr. Charles Turek, a Board-certified orthopedic surgeon, opining that her fall on July 6, 1999 was due to her right hand splint slipping on the railing. On September 20, 1999 Dr. David J. Slutsky, a Board-certified orthopedic surgeon, stated: "[I]t is my opinion that because of [appellant's] right wrist pain, weakness and continued need for a wrist splint, [she] was unable to adequately hold on to a railing with her right hand when she stumbled. This was the cause of [appellant's] fall down the stairs at home. In this regard, I believe that the industrial injury to her right arm directly contributed to her fall, which resulted in a left tibial plateau fracture." On August 21, 2000 Dr. Ronald D. Farran, a Board-certified neurologist, stated, "[appellant] fell down a number of stairs in a slip and fall that occurred on July 6, 1999. This was due to the impaired grip of the right hand which was related to her original injuries back in July 1997."

Appellant's initial statement to the Office and all of the medical evidence of record support that appellant's July 6, 1999 leg injury was a consequence of her Madelung's deformity which impaired her grip both due to weakness and to the medically required brace and that this condition resulted in her inability to prevent the fall which resulted in her leg injury. Therefore, appellant, through the submission of a narrative statement and reasoned medical evidence, has established that she sustained a leg injury on July 6, 1999 as a consequence of her accepted employment-related condition of aggravation of Madelung's deformity.

LEGAL PRECEDENT -- ISSUE 2

Section 8132 of the Act provides:

"If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by her or on her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation payable to him for the same injury. No court, insurer, attorney or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an

amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.”⁶

The Board has defined “the same injury” as used in the above section to include an injury which is suffered as a consequential effect of a primary employment-related injury,⁷ finding that a consequential injury “does not constitute a new, separate, or independent injury.”⁸

LEGAL ANALYSIS -- ISSUE 2

As noted above, appellant's claim was initially accepted for aggravation of bilateral Madelung's deformity alleged to have begun in January 1997 as well as resultant surgery. She slipped and fell on July 6, 1999 as a result of weakness and the use of a splint due to her employment-related aggravation of her Madelung's deformity, injuring her left leg. Although these conditions were not sustained on the same date, they bear such a relation to each other as to constitute the same injury within the meaning of the Act. The condition that appellant sustained on July 6, 1999 was a consequence of her employment-related aggravation of Madelung's deformity and the Board does not consider appellant to have sustained more than one “injury” within the meaning of the term injury under the Act.⁹ Her claim for compensation, due to her various conditions, was developed under a single claim number and all were part of the series of events which gave rise to her third-party recovery. Therefore, the condition that appellant sustained on July 6, 1999 constituted the “same injury” within the meaning of 5 U.S.C. § 8132 as those sustained in January 1997.

Appellant disagreed that she had legally sustained the “same injury” and argued that the Office should have considered the terms of the settlement agreement as determinative, regarding this issue. She cited to *Edward S.J. Atwood*, 40 ECAB 748 (1989) in which the Board remanded the claim for the Office to evaluate whether the settlement agreement included only asbestosis or all effects of appellant's exposure to asbestos on appellant's lungs. However, the Board notes that the case is not determinative as Mr. Atwood sustained two separate and distinct injuries to the same part of the body as a result of employment exposures rather than a single injury consisting of an accepted employment injury and a resultant consequential injury, as is found in this case. The terms of the settlement agreement therefore are not determinative of whether appellant's initial employment injury caused or contributed to her consequential injury such that the consequential injury is subsumed in the initial claim, the finding made by the Board *infra*. Furthermore, the legal theory of recovery for appellant's third-party suit, violation of the building code, does not preclude the finding under the Act that appellant's accepted employment injury caused or contributed to her broken leg.

Appellant also argued that but for the consequential injury, the Office would have been responsible for her continuing compensation for disability and medical benefits due to her initial

⁶ 5 U.S.C. § 8132.

⁷ *Ruey J. Yu*, 49 ECAB 256, 259 (1997).

⁸ *Id.*

⁹ *Id.*

aggravation of Madelung's deformity and that exhaustion of the third-party settlement due to the initial aspect of her claim resulted in an inappropriate gain for the Office. The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.¹⁰ The Office properly determined that appellant received a third-party settlement as a result of the "same injury" occurring on July 6, 1999 and January 1997 and, therefore, under the terms of the Act was required to suspend appellant's compensation benefits for that injury until the excess of the third-party recovery was exhausted.

As appellant has received a third-party settlement as the result of the "same injury" as defined by the Board, the Office properly suspended appellant's compensation and medical benefits for both appellant's initial employment injury and the resultant consequential injury until the surplus of the third-party recovery was exhausted.

CONCLUSION

The Board finds that appellant sustained an injury of July 6, 1999 as a consequence of her January 1997 accepted employment injury of aggravation of Madelung's deformity. The Board further finds that a consequential injury is the "same injury" as the initial injury as required by section 8132 of the Act and that therefore the Office was required to suspend appellant's compensation and medical benefits for her entire claim until the excess of the third-party settlement was exhausted.

¹⁰ *Peggy R. Thompson*, 52 ECAB 393, 394 (2001).

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member