United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 07-1066**
	)	**Issued: February 6, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Philadelphia, PA	)	

Appearances:
Stephen W. Bruccoleri, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 19, 2006 and March 1, 2007 merit decisions rescinding acceptance of his claim and finding an overpayment of compensation which was not subject to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.[1]

ISSUES

The issues are: (1) whether the Office met its burden of proof to rescind its acceptance of appellant's claim for a concussion, cervical strain with radiculopathy, aggravation of degenerative disc disease and bilateral rotator cuff tear with tendinitis; (2) whether appellant

[1] On August 13, 2008 the Board issued an order which had the effect of vacating a prior Board order dismissing appellant's appeal before the Board.

received a $79,019.75 overpayment of compensation; and (3) whether the Office abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

On December 7, 2002 appellant, then a 54-year-old transportation security screener, filed a traumatic injury claim alleging that he sustained back and head injuries on that date due to an accident which occurred while riding a shuttle bus from the parking lot to the airport terminal he was assigned to at the Philadelphia International Airport.[2] The Office accepted appellant's claim for a concussion, cervical strain with radiculopathy, aggravation of degenerative disc disease and bilateral rotator cuff tear with tendinitis. Appellant underwent authorized left and right rotator cuff repairs in 2004 and the Office paid him compensation for periods of disability.

In a February 16, 2006 letter, Lisa Eckl, assistant field counsel for the employing establishment, provided additional information regarding the circumstances of appellant's injury. Ms. Eckl indicated that appellant worked at the Philadelphia International Airport screening passengers at security screening checkpoints and stated that his injury occurred on the morning of December 7, 2002, not while he was at work, but rather while he was on his way to work, riding the airport's employee shuttle bus from the employee parking lot to the airport terminal. The shuffle bus was driven by an employee of First Transit, a company contracted by the City of Philadelphia, and the accident occurred at an intersection located at the exit of the airport's employee parking lot as the bus was exiting the lot. Ms. Eckl stated that this area was not part of the premises of the employing establishment as it was neither owned nor operated by the employing establishment. She indicated that the employing establishment did not contract with the City of Philadelphia or Philadelphia International Airport to provide any shuffle bus service for its employees. The airport employee bus, bus driver, parking lot and adjacent area where the accident occurred were all controlled by the City of Philadelphia and not the employing establishment. Ms. Eckl stated that all airport employees, whether federal employees or not, were able to use the airport employee shuttle bus and the airport employee parking lot. She indicated that appellant was pursuing a third-party claim against the City of Philadelphia and the shuttle bus driver.

In a May 18, 2006 notice, the Office advised appellant that it proposed to rescind its acceptance of his claim because the evidence did not support that he sustained an injury in the performance of duty on December 7, 2002. The Office noted that the evidence provided by the employing establishment established that appellant was on his way to work at the time of the injury and the accident occurred while the shuttle bus was leaving a parking lot which was not owned, operated or maintained by the Federal Government. The parking lot and adjacent area were owned and controlled by the City of Philadelphia and all employees of the airport were allowed to park there. The employing establishment did not have responsibility for maintenance of the parking lot. The Office further found that the shuttle bus on which appellant was riding was owned and operated by the City of Philadelphia and the driver was also paid by the City of

[2] The shuttle bus went over an island and caused appellant to fall off his seat, hit his head on the seat in front of him and fall to the floor.

Philadelphia. The shuttle bus and the parking lot were not solely for the use of federal employees. The Office found that appellant was not engaged in employment-related business at the time of the accident and concluded that the injury did not occur within the performance of his duties. It cited Board precedent regarding the premises rule and exceptions to the premises rule.[3]

In a June 5, 2006 letter, appellant's attorney argued that appellant was required to access his site of employment, Terminal A, *via* shuttle bus transportation from the parking lot. He noted that appellant used a swipe card issued by the employing establishment to enter and exit the parking lot in his vehicle. On June 8, 2006 the employing establishment responded that there was no requirement for appellant to arrive at the terminal *via* the shuttle bus and that he was free to arrive at work by any method of transportation he chose. Appellant had the option to use other methods to get to the terminal, including using public transportation *via* train or bus, riding and being dropped off and picked up, and driving and parking at Cargo City employee lot or any of the other Philadelphia International Airport lots. The employing establishment advised that the general public could also use the shuttle bus to travel from one terminal to another.

In a July 19, 2006 decision, the Office rescinded its acceptance of appellant's claim for a concussion, cervical strain with radiculopathy, aggravation of degenerative disc disease and bilateral rotator cuff tear with tendinitis.[4]

Appellant requested a hearing before an Office hearing representative.

In an August 31, 2006 notice, the Office issued a preliminary determination that appellant received a $79,019.75 overpayment of compensation for the period December 7, 2002 to August 6, 2006.[5] It found that appellant was without fault in the creation of the overpayment and advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. The Office informed appellant that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that he complete and return an enclosed financial information questionnaire within 30 days. Appellant timely requested a prerecoupment hearing with an Office hearing representative regarding the claimed overpayment. He completed the financial information questionnaire on September 18, 2006 and submitted some supporting documents such as bills and bank statements.[6]

[3] The Office cited *Diane Bensmiller*, 48 ECAB 675 (1997), a case which dealt with accidents occurring in nonfederally-owned parking lots and adjacent areas.

[4] Appellant did not receive any more compensation benefits after August 6, 2006.

[5] The record contains payout records showing that appellant received $79,019.75 in compensation from the Office during this period.

[6] Appellant indicated that he had a dependent wife and a 20-year-old son in college.

On December 12, 2006 a hearing was held before an Office hearing representative regarding both the rescission and overpayment matters. Appellant testified that, during his training, the employing establishment instructed him to park in the parking lot near where the injury occurred and gave him a Federal Government identification swipe card to access the parking lot. He did not pay for parking and never went to work by any other means of transportation. Appellant used the shuttle to get to and from Terminal A and asserted that, to his knowledge, he could only access the parking lot by using his identification swipe card. He also provided updated information concerning his monthly income and expenses.[7] George Knapp, an employing establishment worker who periodically supervised appellant, testified that he drove to the same employee parking lot as appellant and took the shuttle to Terminal A. Mr. Knapp asserted that he was unaware of any other way to access Terminal A and that he did not pay for his parking.

In a January 17, 2007 statement, Bernard Spence, a security officer for the employing establishment, indicated that the employing establishment did not pay its employees to park in the Philadelphia International Airport employee parking lot or to use the Philadelphia International Airport employee shuttle bus. In a January 17, 2007 statement, John Mosser, a financial analyst for the employing establishment, stated that subsidies were available for employees who wished to take public transport to the airport and noted that appellant's identification swipe card was issued by the Philadelphia International Airport rather than the employing establishment. On January 22, 2007 Ms. Eckl stated that appellant failed to disclose that on August 31, 2006 he received a $150,000.00 award and his wife received a $5,000.00 award as a result of an arbitration proceeding involving the company responsible for operating the shuttle bus on December 7, 2002.

In a March 1, 2007 decision, the Office hearing representative affirmed the July 19, 2006 decision rescinding its acceptance of appellant's claim. She found that appellant was not injured on the employing establishment premises because the area where he was injured and the shuttle bus he rode in were not owned, operated, controlled or managed by the employing establishment. The Office hearing representative also determined that appellant received a $79,019.75 overpayment of compensation. Although he was not at fault in the creation of the overpayment, the Office hearing representative found that it was not subject to waiver as his current monthly income of $3,756.00[8] exceeded his current monthly expenses of $3,409.47 by $346.53. She only included reported monthly expenses which she felt were adequately documented and eliminated or reduced the amounts of reported monthly expenses which she felt were not adequately

[7] Appellant indicated that he now had about $3,000.00 in assets, comprised of checking and saving account balances, whereas he had noted on his September 18, 2006 financial information questionnaire that he had about $6,800.00 in assets.

[8] This income was comprised of social security benefits, police officer pension benefits and his wife's earnings. The Office hearing representative indicated that at the hearing appellant reported gross monthly income of $1,600.00 for his wife and posited that her net income would have been $1,120.00 per month.

documented.[9] The Office hearing representative determined that the $79,019.75 overpayment was due in full.[10]

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[11] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[12] 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.[13]

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.[14]

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[15] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[16] "In the course of employment" relates to the elements of time, place

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[9] The Office hearing representative concluded that appellant's monthly expenses were comprised of minimum credit card payments of $475.00, car payment of $379.46, mortgage payment of $764.00, utilities payments of $309.77, telephone bill of $148.15, car insurance of $136.00, cable television payment of $148.84, college loan payment of $115.00, life insurance payment of $17.25, bank loan payment of $216.00, food expenses of $600.00 and clothing expenses of $100.00.

[10] As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the Office's determination regarding the manner in which the overpayment should be recovered. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

[11] 5 U.S.C. § 8128.

[12] *John W. Graves*, 52 ECAB 160, 161 (2000).

[13] *See* 20 C.F.R. § 10.610.

[14] *John W. Graves*, *supra* note 12.

[15] 5 U.S.C. § 8102(a).

[16] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

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 his master's business, at a place when he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time, are compensable.[17]

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 does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[18]

Underlying the proximity exception to the premises rule is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[19] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that therefore the special hazards of that route become the hazards of the employment.[20] Factors that generally determine whether an off-premises point used by employees may be considered part of the premises include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[21]

The Board has also 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 employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized cars were

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[17] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

[18] *Denise A. Curry*, 51 ECAB 158 (1999).

[19] *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

[20] A. Larson, *The Law of Workers' Compensation* § 13.01(3) (2006); *Michael K. Gallagher*, 48 ECAB 610 (1997).

[21] *Linda D. Williams*, 52 ECAB 300 (2001).

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 not sufficient to bring the parking lot within the "premises" of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained or controlled the parking facility, used the facility with the owner's special permission, or provided parking for its employees.[22]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a concussion, cervical strain with radiculopathy, aggravation of degenerative disc disease and bilateral rotator cuff tear with tendinitis. The Office detailed how the evidence of record showed that appellant did not sustain an injury in the performance of duty on December 7, 2002.

The Office noted that the employing establishment submitted evidence establishing that appellant was on his way to work at the time of the December 7, 2002 accident and had not started work when the accident occurred. It found that the accident happened when the shuttle bus was leaving a parking lot which was not owned, operated or maintained by the Federal Government and noted that the parking lot and adjacent area were owned and controlled by the City of Philadelphia and that all employees of the airport (including nonfederal employees) were allowed to park there. The Office further indicated that the evidence submitted by the employing establishment showed that the shuttle bus appellant was riding on was owned and operated by the City of Philadelphia and the driver was paid by the City of Philadelphia. It also explained that the employing establishment noted that there was no requirement for appellant to arrive at the terminal *via* the shuttle bus and that he was free to arrive at work by any method of transportation he chose. Appellant had the option to use other methods to get to the terminal, including using public transportation *via* train or bus, riding and being dropped off and picked up, and driving and parking at Cargo City employee lot or any of the other Philadelphia International Airport lots. The Office indicated that appellant was not engaged in employment-related business at the time of the accident and concluded that the injury did not occur within the performance of his duties.

In justifying its rescission, the Office extensively cited relevant Board precedent, including precedent regarding the premises rule and exceptions to the premises rule, and explained how application of this precedent to the facts of the case showed that appellant did not sustain an injury in the performance of duty on December 7, 2002.[23] It emphasized that the

[22] *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 1841 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

[23] The Board notes that the Office cited and discussed much of the precedent contained in the analysis section of this decision. *See supra* notes 11 through 22 and accompanying text. The premises were not extended to the area of appellant's injury as he was not exposed to any special hazard. The risks of vehicular travel are generally shared by all travelers on roads. *See supra* notes 19 through 21 and accompanying text.

evidence of file demonstrated that neither the parking lot, nor the shuttle bus, was owned, operated or maintained by the employing establishment for the use of its employees, that appellant had other options for parking, and that the parking lot and adjacent area were not only used by federal employees.[24] The Office properly argued that, therefore, appellant was not injured on the employing establishment premises or an extension of such premises and that he was not performing employment-related work at the time of the accident. It properly determined that appellant was not injured in the performance of duty on December 7, 2002 and provided justification for the rescission of its acceptance of his claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[25] Section 8129(a) of the Act provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[26]

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.[27] The Office may, with appropriate justification, rescind its acceptance of a claimant's claim and declare that such a claimant is not entitled to compensation for certain periods.[28]

ANALYSIS -- ISSUE 2

The Board finds that appellant received a $79,019.75 overpayment of compensation for the period December 7, 2002 to August 6, 2006. The record contains payout records showing that appellant received $79,019.75 in compensation from the Office during this period. Appellant received this compensation despite the fact that it was later found that he was not entitled to receive compensation for the period December 7, 2002 to August 6, 2006. For the

[24] It should also be noted that the evidence shows that the employing establishment did not pay for appellant's parking and that his identification swipe card for entering and exiting the lot was issued by the City of Philadelphia rather than the employing establishment. The Office properly considered and rejected appellant's argument that he was required by the employing establishment to park in the parking lot near the site of the accident.

[25] 5 U.S.C. § 8102(a).

[26] *Id*. at § 8129(a).

[27] *Id*. at § 8116(a).

[28] *See supra* notes 12 through 15 and accompanying text.

reasons described above, the Office properly rescinded its acceptance of appellant's claim because his December 7, 2002 injury did not occur in the performance of duty.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.[29] These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[30] If the Office finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.[31] According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.[32] To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.[33]

ANALYSIS -- ISSUE 3

The Board finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his

[29] *See Robert Atchison*, 41 ECAB 83, 87 (1989).

[30] 5 U.S.C. § 8129(b).

[31] 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than $50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

[32] 20 C.F.R. § 10.437(a), (b).

[33] 20 C.F.R. § 10.437(b)(1).

current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The evidence shows that appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately $350.00. The Office carefully considered the financial information submitted by appellant and properly included figures for monthly income and monthly expenses which were adequately documented.[34] As appellant's current income exceeds his current ordinary and necessary living expenses by more than $50.00, appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.[35] Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.[36]

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.[37]

Because appellant has failed to establish that recovery of the $79,019.75 overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive recovery of the overpayment.

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for concussion, cervical strain, aggravation of degenerative disc disease and bilateral rotator cuff sprain. The Board further finds that appellant received a $79,019.75 overpayment of compensation and that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

[34] The Office determined that appellant had monthly income of $3,756.00 and monthly expenses of $3,409.47.

[35] *See supra* note 31 and accompanying text.

[36] The Board notes, however, that appellant might have considerable assets due to a third-party recovery proceeding. The record contains a portion of an August 31, 2006 decision suggesting that appellant received a $150,000.00 award and his wife received a $5,000.00 award as a result of an arbitration proceeding involving the company responsible for operating the shuttle bus on December 7, 2002.

[37] *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 1, 2007 and July 19, 2006 decisions are affirmed.

Issued: February 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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