

England. The injury occurred at approximately 1:30 a.m. on May 20, 2012, when he was struck by a motor vehicle while crossing a street. The nature of the injury was described as a broken left arm, as well as a sore left knee and hip. An employing establishment incident investigation report advised that appellant was struck while attempting to hail a taxi. OWCP accepted the claim for a closed left arm fracture of the distal radius and a left knee sprain.

In letters dated June 4 and 13, 2012, an employing establishment workers' compensation manager controverted the claim, contending that appellant was not in the performance of duty when injured. Appellant left Dallas, Texas on Friday, May 18, 2012 and performed his duties as an air marshal, arriving at London Heathrow airport at 10:45 a.m. on Saturday, May 19, 2012. From the airport, he travelled by taxi to The Crown Plaza Hotel and slept for several hours. At approximately 7:45 p.m., he left the hotel with coworkers and travelled by taxi to The Pheasant Inn, located approximately about two miles away, for dinner at 8:00 p.m. Appellant left The Pheasant Inn at approximately 12:30 a.m. and walked approximately one-half mile south to a local McDonald's with a coworker where he ate, departing at 1:30 a.m.

Appellant walked along Bath Road in search of a taxi and crossed into the center median in an attempt to flag an eastbound traveling taxi. The taxi did not stop and he was attempting to return from the median when he was struck by a westbound automobile. Appellant was subsequently transported to a local hospital at 2:30 a.m. and released at 6:20 a.m. Rather than departing Heathrow airport as scheduled at 3:15 p.m. that afternoon on a return flight to Dallas, he stayed in London at the hotel for an additional 24 hours before departing on Monday, May 21, 2012.²

The employer contended that appellant was not performing any duties incidental to his employment when injured on May 20, 2012. It was noted that the hotel at which he was staying had facilities available for meals. Further, appellant and his coworkers were at The Pheasant Inn for food and drinks for 4 and one-half hours, prior to his departure to go eat at McDonalds at 12:30 a.m. He and a colleague stopped at multiple restaurants and bars, which constituted a deviation from his travel status and that he had not returned to a work-related route. The Metropolitan Police Service Collision Report of May 24, 2012 was submitted. The employer reiterated that appellant and his colleagues had stopped at multiple restaurants and/or bars and that sightseeing and drinks were not incidental to travel. While appellant did not violate any employing establishment rules, he was not in the performance of duty as he and his coworkers had sufficient time to have dinner prior to the deviation.

In a letter dated June 5, 2012, OWCP requested additional information regarding the injury. In a statement received on June 13, 2012, appellant advised that he had flown to London as part of his air marshal duties and was assigned to stay at a London hotel with other members of the air marshal team. He and three other coworkers went to dinner at approximately 8:00 p.m. on May 19, 2012, to a restaurant that was two miles from the hotel. At The Pheasant Inn appellant ate dinner, watched a soccer match and socialized with other air marshals. At 12:30

² On May 22, 2012 appellant's supervisor issued a CA-16 authorization for examination and/or treatment authorizing medical services by Texas Institute of Orthopedic Surgery & Sports Medicine. On May 30, 2012 appellant underwent surgery for a left distal radius fracture with intraarticular comminution and volar displacement and a left ulnar styloid base fracture.

a.m., he left the restaurant and walked 10 minutes to a McDonald's restaurant that was approximately one-half mile away. After eating and visiting with a coworker, they left McDonald's at 1:30 a.m. Appellant observed a taxi that was heading eastbound. He crossed to the middle of the street in an attempt to flag down the taxi, but it did not stop. When appellant attempted to return to the side walk, he was struck by a motor vehicle. He stated that he was not intoxicated at any time. A witness statement from the coworker who accompanied appellant to McDonald's confirmed that he was hit by a motor vehicle after trying to hail a taxi.

The collision report of the Metropolitan Police identified the location of the pedestrian accident as Bath Road, Harlington, an A4 carriageway, crossing elsewhere. It was observed that appellant may have crossed into the carriageway where no crossing facilities were available "climbing over railing that divid[e] the carriageway, the pedestrian had been drinking." It was noted that he was from the United States and may have looked the wrong way before crossing. At the site of the accident, there was no pedestrian crossing facility within 50 meters. The driver of the automobile that struck appellant, Abdul Zahed, was interviewed by the police and stated "I just remember [appellant] jumped in front of me and I braked." The collision was not characterized as a hit and run.³

By letter dated September 21, 2012, OWCP notified appellant that it proposed to rescind acceptance of his claim and terminate benefits. It found that he was engaged in activities of a personal and recreational nature when injured. By letter dated October 15, 2012, appellant's representative argued that appellant was in the performance of duty at the time of the injury.

In a decision dated November 26, 2012, OWCP rescinded acceptance of the claim and terminated compensation. It found that appellant was not in the performance of duty when injured.

LEGAL PRECEDENT

The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁴ 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.⁵ It is well established that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁶

³ The statement of appellant's coworker originally advised the employer that appellant was struck by a Chrysler Grand Voyager traveling at a high rate of speed that stopped on the road and then sped off on Bath Road.

⁴ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁵ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁶ *Alice M. Roberts*, 42 ECAB 747 (1991).

The Board has previously recognized that Larson, in his treatise, *The Law of Workers' Compensation*, sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments as follows:

“Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.”⁷

To determine whether an injury occurs during a distinct departure on a personal errand, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee’s work assignment or represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.⁸ The Board has recognized that there are limitations to coverage of employees in travel status. When the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of FECA and any injury occurring during such deviation is not compensable.⁹

ANALYSIS

Appellant, an air marshal based in Dallas, Texas, travelled to London, England in the performance of duty. On the morning of Sunday, May 20, 2012 at approximately 1:40 a.m., he sustained multiple fractures to his left arm when struck in a motorway after attempting to hail a taxi. OWCP accepted that appellant sustained an injury arising in the performance of duty; but subsequently rescinded acceptance of the claim based on additional evidence submitted to the record that established he was not in the performance of duty at the time of injury. The Board finds that he was not in the performance of duty when injured.

As an air marshal, the employer authorized appellant’s travel from Dallas to London on Friday, May 18, 2012 to perform his duties of deterring any hijackings or other hostile acts against commercial aircraft. Appellant arrived at Heathrow airport on Saturday, May 19, 2012 at 10:45 a.m., disembarked, cleared customs and took a taxi to the hotel to which he and his colleagues were assigned. That evening, at 7:45 p.m., he and three coworkers left the hotel and took a taxi to a restaurant/pub located some two miles to the southeast.

The Board recognized that for employees whose work entails travel away from the employer’s premises, the majority of jurisdictions hold that they are within the course of their

⁷ 1 A. Larson, *The Law of Workers' Compensation* § 25.01 (2000); see also Lawrence J. Kolodzi, 44 ECAB 818, 822 (1993).

⁸ See S.C., Docket No. 10-1706 (issued May 9, 2011); Thomas E. Keplinger, 46 ECAB 699 (1995); Dannie G. Frezzell, 40 ECAB 1291 (1989).

⁹ See Jose H. Pico, 46 ECAB 750 (1995); Evelyn S. Ibarra, 45 ECAB 840 (1994).

employment continuously during the trip except for when a distinct departure or personal errand is established. Injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.¹⁰ This is demonstrated in Board case law. In *William K. O'Connor*,¹¹ the employee went to dinner and sustained injury while on a walk back to his hotel when hit by a car. The Board found that the injury arose in the performance of duty as no evidence of a distinct departure or personal errand was shown in the record.¹² In *S.C.*,¹³ the employee was on travel status to Arlington, Virginia. She alleged injury at 8:30 p.m. when she slipped and fell while crossing a median at an intersection while returning to her hotel. The Board noted, however, that evidence from the emergency medical responders established that her injury was sustained at approximately 12:45 a.m., some four hours later than alleged. Further, the medical reports from the local hospital reflected a history that she had been drinking prior to sustaining injury. The Board noted that the employee did not explain the basis for a seven-hour departure from her hotel or the circumstances accounting for her alcohol consumption prior to the injury. The employee was found engaged in an identifiable deviation.

The Board notes that appellant and three coworkers had dinner at The Pheasant Inn on the evening of Saturday, May 19, 2012. The evidence reflects that they travelled two miles to the restaurant/public house and ate dinner at approximately 8:00 p.m. Thereafter, they watched a soccer match and socialized. The record reflects that at 12:30 a.m. the group broke up. Appellant and one coworker left The Pheasant Inn and walked on a route that took them further south, away from their hotel, approximately half a mile to a McDonald's restaurant. They left the McDonald's at 1:30 a.m. and again proceeded south along Bath Road. The collision report of the Metropolitan Police reflects that appellant entered the roadway at a location where no crossing facilities were available. Appellant apparently climbed over a railing onto the divided highway, into traffic to hail a taxi that was proceeding eastward. It appears he attempted to return to the sidewalk, but was struck by a car in the westward lanes of traffic. The police report noted that appellant had been drinking and, as he was from the United States, may have looked in the wrong direction.

The Board finds that appellant deviated from his travel status at 12:30 a.m. on the morning of May 20, 2012. Rather than returning to the hotel following dinner at The Pheasant Inn, he engaged in a personal errand with a coworker. They ended up at a McDonald's restaurant located a half mile south and further away from the location of their hotel. The time and location elements of the injury remove appellant from the performance of duty. Appellant had a reasonable opportunity to enjoy dinner at 8:00 p.m. and to socialize after his meal. His injury at approximately 1:40 a.m. was some five and a half hours after dinner. The location of the injury was on a busy divided road, at a place where the employer would not reasonably

¹⁰ See *supra* note 6.

¹¹ 4 ECAB 21 (1950).

¹² See also *Kenneth B. Briggs*, 54 ECAB 411 (2003). (The employee sustained injury at 12:30 a.m. while walking back to his hotel after a late dinner. Coverage was found as there was no evidence that three hours spent at dinner were unreasonable or of a distinct departure on a personal errand. The restaurant was one-tenth of a mile from the hotel).

¹³ *Supra* note 7 and cases cited therein.

expect him to be while on travel status or while he was performing any act incidental to his employment. Appellant gained access to the roadway by disregarding public safety barriers and entering at a location some 50 meters from the nearest public crossing facility. His deviation for personal reasons at 12:30 a.m. took him outside of the coverage of FECA. Appellant's injury did not arise out of the necessity to eat dinner at The Pheasant Inn. Sufficient time had passed from 8:00 p.m. to 12:30 a.m. for him to finish his meal and return to his hotel. For this reason, the Board finds that OWCP properly determined that appellant's injury did not arise in the performance of duty and rescinded acceptance of his traumatic injury claim.

CONCLUSION

The Board finds that OWCP met its burden of proof to rescind acceptance of the claim. Appellant's injury of May 20, 2012 was not sustained while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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