U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN M. FAVA, claiming as conservator of the person and estate of JOHN F. MALLEY and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, NORTH ISLAND, San Diego, Calif.

Docket No. 95-268; Submitted on the Record;
Issued May 18, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of the employee's claim.

On November 11, 1993 the employee, then a 38-year-old aircraft electrician, was on temporary duty when he fell from a retaining wall, sustained a closed head injury and slipped into a coma. The employing establishment did not controvert the claim filed on the employee's behalf. On December 28, 1993 the Office determined that the employee was injured while in the performance of duty and accepted his claim for the conditions of hematoma and coma.

The Office subsequently received new evidence detailing the circumstances of the injury. The Office reopened the claim under 5 U.S.C. § 8128(a) for a determination of whether the employee was, in fact, injured while in the performance of duty. The new evidence consisted of statements obtained from Keith Wills and Matthew Douglass, who were with appellant when he fell; from David E. Stasen, who witnessed events after the injury; and from Corporal Victoria M. Sellgren, who responded to the call for medical assistance. These statements indicated that at approximately 4:30 p.m. on November 11, 1993, after completion of a field team event, the employee and two companions, Mr. Wills and Mr. Douglass, all of whom were on a temporary-duty assignment at the Marine Corps Air Station (MCAS) at Beaufort, South Carolina, decided to go sightseeing and have dinner.[1] The three men were scheduled to return to their regular places of employment the following day. After spending about an hour browsing through the shops at the Riverfront shopping mall, they spent an hour to an hour and a half playing pool and drinking beer at the Riverfront area sports bar. They then had dinner at Steamers, a restaurant about a half mile from the shopping complex. After dinner the group returned to the sports bar, where they played pool for approximately two hours and drank more

[1] The record indicates that appellant was assigned temporary duty from November 7 through November 12, 1993 to install video recorder systems on aircraft.

beer. At approximately 11:00 p.m. they decided it was time to leave. The men crossed a dark, grassy area of the waterfront park to go to their van. At the end of the grassy area was a retaining wall with a three-foot drop off to an asphalt parking lot. The record indicates that Mr. Douglass first reached the van and waited for the employee and Mr. Wills to arrive. As the employee walked toward the end of this grassy area, he turned his head to say something to Mr. Wills. He unknowingly reached the edge of the grassy area and fell from the retaining wall to the pavement three feet below, striking his head. Appellant was not responsive and was bleeding from the head and nose.

Mr. Wills and Mr. Douglass placed the employee in the van and returned to the MCAS, where medical attention was eventually summoned. Medical records showed that appellant's blood alcohol content was 0.166 mg/dl at 6:00 a.m. the following morning. The employee was found to be comatose and in critical condition with a closed head injury. He underwent a left central craniotomy for evacuation of a large transhemispheric subdural hematoma. The employee remained in a coma and eventually succumbed to his injury in March 1995.

In a decision dated June 13, 1994, the Office rescinded its acceptance of the employee's claim on the grounds that his injury did not arise in the performance of duty. The Office found that the employee's injury would probably have been covered if the men had simply gone into town to eat dinner, but that once the evening had progressed beyond that to drinking and playing pool, the activities could no longer be considered as "reasonably incidental" to the mission for which he was in a travel status.

In a decision dated September 29, 1994, the Office denied a request for reconsideration. On appeal, the Office concedes that it abused its discretion in refusing to reopen the employee's claim for further development of the record and a merit review.

The Board finds that the Office properly rescinded its acceptance of the employee's claim.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, to 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] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[4] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of

[2] *Eli Jacobs*, 32 ECAB 1147 (1981).

[3] *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[4] *See Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[5]

The new evidence in this case – statements from Mr. Wills, Mr. Douglass, Mr. Stasen and Corporal Sellgren -- establishes that the employee had deviated from the normal incidents of his trip when he fell from the retaining wall to the pavement below, and that his injury therefore did not arise in the course of his employment.

In his treatise on workers' compensation law, Larson explains:

> "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."[6]

The Board has held that the Act covers an employee 24 hours a day when he or she is on travel status or on a temporary-duty assignment or a special mission and engaged in activities essential or incidental to such duties; however, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, that are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[7]

At the time of his fall from the retaining wall, the employee had engaged in activities which, the Board finds, were not reasonably incidental to his temporary-duty assignment.[8] The trip to the sports bar after dinner to play more pool and consume more beer was not made pursuant to an activity directed by the employing establishment nor did it arise out of the necessity of his employment. This was instead a distinct departure for a personal diversion. Based on the new evidence submitted to the record, the Office properly rescinded its acceptance of the employee's claim on these grounds. The Board will therefore affirm the Office's June 13, 1994 decision.

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[5] *See Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683 (1990); *Roseanna Brennan*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990); *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

[6] 1A A. Larson, *The Law of Workers' Compensation* § 25.00 (1993).

[7] *Richard Michael Landry*, 39 ECAB 232, 236-37 (1987) and cases cited therein.

[8] *See id*. (wherein the employee, together with two companions, went into the adjoining local community on the weekend to have a few beers, maybe see a local band, and to check out the night life; he later sustained a basilar skull fracture and a closed head injury on the way back to his quarters when he was thrown from the back of a pickup truck traveling at high speed around 4:00 a.m.).

Once the Office properly discharges its burden of proof to justify rescinding its acceptance of a claim, the burden of proof shifts back to the employee to establish that he sustained an injury while in the performance of duty and is therefore entitled to compensation benefits.[9]

A claimant seeking benefits under the Act has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[10] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[11] The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury, and must explain from a medical perspective how the current condition is related to the injury.[12]

The incidents occurring after the employee's fall from the retaining wall, as revealed by the new evidence submitted to the record, raise the issue of whether the employee sustained a later injury while in the performance of duty. After Mr. Wills and Mr. Douglass returned the employee in the van to the Bachelor Officer's Quarters (BOQ) at the MCAS, the record indicates the employee sustained additional blows to the head.

Mr. Stasen, a witness from the BOQ, stated that he was asleep when, at about 11:30 a.m., Mr. Wills came to his room to announce that the employee had been hurt. Mr. Stasen stated that Mr. Wills and Mr. Douglass appeared intoxicated. When he arrived at the van, Mr. Stasen noticed that the employee's breathing was heavy and labored, that his face was puffy and bloody, and that blood was coming out his nose. Mr. Wills grabbed the employee's feet and began to pull the employee out of the van. Mr. Stasen stated: "[the employee's] head hit the running board then hit the blacktop hard." They tried to carry the employee inside, but when they attempted to open the door they dropped the employee to the floor. Thus, having already sustained a serious head trauma in his fall from the retaining wall, the employee sustained at least two additional blows to the head while at the MCAS. Although the circumstances of the employee's fall outside the sports bar placed the initial injury outside the course of his employment, the circumstances of the later incidents raise an issue of potential coverage under the Act.

These later incidents at the BOQ occurred on the premises of the facility to which the employee was assigned and while the employee could no longer be said to be engaged in personal or recreational activities. Although the employee had earlier deviated from the course

[9] *See Gary R. Sieber*, 46 ECAB 215 (1994) (relating to termination or modification of compensation benefits).

[10] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[11] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[12] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

of his employment by going to a sports bar to play pool and drink beer, this deviation ceased by the time he was returned to the BOQ.[13]

The Board finds that, under the general rule governing traveling employees or employees on a temporary-duty assignment, the incidents that occurred at the BOQ following the deviation to the sports bar arose in the course of the employee's employment.[14]

To what extent these later incidents contributed to the employee's diagnosed condition or death, however, is not apparent from the medical evidence and was not developed by the Office. It is well established that when a factor of employment aggravates, accelerates or otherwise combines with a preexisting, nonoccupational pathology, the employee is entitled to compensation.[15] Further, it is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship.[16]

Although the burden of proof has shifted to the employee to establish entitlement to compensation, the Office shares responsibility in the development of the evidence: It has the obligation to see that justice is done.[17] As the new evidence submitted to the record raises the question whether the employee sustained an injury while in the performance of duty as a result of the additional blows to the head that occurred at the BOQ, the Board finds that further development of the medical evidence is warranted.

On remand, the Office shall prepare an appropriate statement of accepted facts and shall further develop the medical evidence to determine whether the incidents that arose in the course of employment at the BOQ caused or contributed to the employee's diagnosed condition or death. After such further development as may be warranted, the Office shall issue an appropriate final decision on the employee's entitlement to compensation.

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[13] *See Conchita A. Elefano*, 15 ECAB 373 (1964) (holding that the claimant was not engaged in a reasonable activity incidental to his employment within the principles applicable to travel status employees under the Act where he left the base at 11:30 p.m., visited a couple of night clubs until 4:00 a.m., had breakfast at a restaurant, got in a taxi at 4:50 a.m. to return to the base, stopped near the base, and was hit with a stray bullet from an argument that arose between the taxi driver and the claimant's companion); *Lydia Muse Shields*, 2 ECAB 162 (1949) (where the claimant alighted from a taxi at 3:00 a.m., started to cross the street to his hotel, then stiffened and fell backwards, striking his head against the curb with a terrific blow, the Board held that it is not possible to infer that the return to the hotel at the hour of 3:00 a.m. was one of the normal incidents of the mission as the record contained no indication of the reason for the deceased's return at such a late hour). *Cf. Katherine A. Kirtos*, 42 ECAB 160 (1990) (an identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so insubstantial that it may be disregarded).

[14] *See* notes 6 and 7 *supra.*

[15] *E.g., Charles A. Duffy*, 6 ECAB 470 (1954) (aggravation of preexisting disease or defect is as compensable as an original or new injury).

[16] *Beth P. Chaput*, 37 ECAB 158 (1985).

[17] *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

The June 13, 1994 decision of the Office of Workers' Compensation Programs is affirmed. The September 29, 1994 Office decision is set aside and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
May 18, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member