

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA McKIBBEN claiming as widow of JIMMY McKIBBEN and  
TENNESSEE VALLEY AUTHORITY, Chattanooga, TN

*Docket No. 00-452; Submitted on the Record;*  
*Issued June 9, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's claim that her husband's death was employment related.

On July 28, 1993 the Office accepted that the employee's death on July 27, 1993 was employment related. The employee, who had been a 48-year-old manager of construction contracts, had been involved in a one-car motor vehicle accident at approximately 1:10 p.m. on July 26, 1993 when he was traveling to an employment-related meeting. On August 23, 1993 appellant, filed a Form CA-5, claim for compensation by widow. By letter dated July 20, 1998, the employing establishment requested that the Office review the case and rescind its acceptance based on the grounds that the employee had been intoxicated at the time of the July 26, 1993 motor vehicle accident,<sup>1</sup> and submitted a "[r]eport of [a]dministrative [i]nquiry" prepared by its Office of the Inspector General. Following further correspondence between the Office and the employing establishment, by decision dated January 27, 1999, the Office rescinded acceptance of appellant's claim for death benefits on the grounds that the employee was not in the performance of duty at the time of the July 26, 1993 motor vehicle accident because he was intoxicated. Appellant timely requested a hearing that was held on May 21, 1999. At the hearing she testified that the employee was not feeling well on the morning of the accident and went to the Veterans Administration Clinic. Her attorney argued that, as the employee was diabetic, this could have contributed to the accident.<sup>2</sup> By decision dated August 6, 1999 and finalized on August 12, 1999, an Office hearing representative affirmed the prior decision. The instant appeal follows.

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<sup>1</sup> The Board notes that the employing establishment initially informed the Office on July 29, 1993 not to accept the claim because there was an ongoing investigation and, by letter dated September 27, 1993, advised that the July 26, 1993 motor vehicle accident had been caused by the employee's intoxication. The employing establishment submitted a certificate of death which indicated that the cause of death was multiple injuries, a police report of the accident, and hospital records which included a blood alcohol test taken on the day of the accident which revealed a blood alcohol level of 299 mg/dl.

<sup>2</sup> Appellant submitted a report dated April 19, 1999 from Dr. Joseph S. Atkinson, a Board-certified internist, who confirmed that the employee was an insulin-dependent diabetic and opined that it "is very possible that a diabetic

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's claim.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.<sup>3</sup> Rather, Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."<sup>4</sup>

"In the course of employment" deals with the work setting, the locale and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.<sup>5</sup> In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place, (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto, and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.<sup>6</sup>

In the instant case, the record indicates that the employee was in travel status on employing establishment business at the time of the fatal motor vehicle accident. The Office, after initially accepting the death benefits claim on July 28, 1993, invoked the affirmative defense of intoxication in its January 27, 1999 decision in which the acceptance of appellant's claim for death benefits was rescinded.

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reaction could have caused an impairment in his ability to maintain control of the vehicle."

<sup>3</sup> *George A. Fenske*, 11 ECAB 471 (1960).

<sup>4</sup> *Timothy K. Burns*, 44 ECAB 291 (1992).

<sup>5</sup> *Larry J. Thomas*, 44 ECAB 291 (1992).

<sup>6</sup> See *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

Compensation for an injury or death occurring during the course of employment can only be denied if barred by the affirmative defenses found in section 8102(a) of the Federal Employees' Compensation Act<sup>7</sup> which provides in pertinent part:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is--

(3) proximately caused by the intoxication of the injured employee.”<sup>8</sup>

In reviewing claims under section 8102, the Board has held that allegations under section 8102(a) of the Act can be invoked only as an affirmative defense and that the Office's use of an affirmative defense must be invoked in the original adjudication of the claim.<sup>9</sup> It is not a remedy that can be preserved for future use in adjudicating a claim.<sup>10</sup> In this case, when the claim was initially adjudicated on July 28, 1993, the Office accepted that the employee's death was employment related. Thus, as the Office did not invoke this affirmative defense in its original adjudication of the claim, it was precluded from doing so in the January 27, 1999 decision,<sup>11</sup> and it was therefore improper for the Office to rescind acceptance of the claim.<sup>12</sup> The employee's death occurred in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated August 6, 1999 and finalized on August 12, 1999 is hereby reversed.

Dated, Washington, D.C.  
June 9, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8102(a)(3).

<sup>9</sup> *Gayle M. Petty*, 46 ECAB 996 (1995); *Paul Raymond Kuyoth*, 27 ECAB 498 (1976).

<sup>10</sup> *Bruce Wright*, 43 ECAB 284 (1991).

<sup>11</sup> *See Allan B. Moses*, 42 ECAB 575 (1991).

<sup>12</sup> *See Gayle M. Petty*, *supra* note 9.