

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHRIS WELLS and DEPARTMENT OF JUSTICE,  
IMMIGRATION & NATURALIZATION SERVICE, Calexico, CA

*Docket No. 00-38; Submitted on the Record;  
Issued July 12, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an injury while in the performance of his duties; and, if so, (2) whether the Office of Workers' Compensation Programs properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The Board has duly reviewed the record on appeal and finds that the evidence fails to establish that appellant sustained an injury while in the performance of his duties.

It is a general rule of workers' compensation law that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to the general rule.<sup>1</sup> One exception applies to falls in the workplace: When a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of the employment, the injury is not a personal injury while in the performance of duty as it does not arise out of a risk connected with the employment.<sup>2</sup> But when the fall is unexplained and, therefore, attributable neither to the employment nor to the claimant personally, the risk is neutral and an injury arising in the course of employment from a neutral risk is compensable.<sup>3</sup>

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<sup>1</sup> *Martha G. List*, 26 ECAB 200 (1974).

<sup>2</sup> *Edward V. Juare*, 41 ECAB 126 (1989). This is not to say that existence of a personal, nonoccupational pathology settles the issue of entitlement to compensation. 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. *Charles A. Duffy*, 6 ECAB 470 (1954) (aggravation of preexisting disease or defect is as compensable as an original or new injury).

<sup>3</sup> *Martha G. List*, *supra* note 1.

In its October 6, 1998 decision, the Office correctly noted that, according to the evidence of record, appellant's fall was caused by a seizure disorder. Appellant reported during his emergency room evaluation that he had a history of seizure disorder since he was a young child. Medical records diagnosed acute seizure, multiple contusions and abrasions and seizure disorder. The record contains no evidence to suggest that appellant struck any object when he fell.<sup>4</sup> It appears, therefore, that a personal, nonoccupational pathology caused appellant to collapse and to suffer injury upon striking the immediate supporting surface. As there appears to be no intervention or contribution by any hazard or special condition of the employment, appellant's injury did not arise out of a risk connected with the employment.

Although appellant's injury occurred on the industrial premises (or at a place he was expected to be in connection with his employment) and occurred during working hours, the injury is established by the weight of the evidence to fall within a well-recognized exception to the general rule of coverage. The Board will affirm the Office's October 6, 1998 decision denying appellant's claim.

The Board also finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

In a decision dated May 18, 1999, the Office found that appellant abandoned his November 5, 1998 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for April 28, 1999, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.”

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“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”<sup>5</sup>

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<sup>4</sup> The Office specifically developed this point in a September 1, 1998 letter to appellant.

<sup>5</sup> 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.<sup>6</sup> Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”<sup>7</sup>

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on April 28, 1999. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure

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<sup>6</sup> 20 C.F.R. § 10.622(b) (1999).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The May 18, 1999 and October 6, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
July 12, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member