

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM V. GREGORY and DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE, Fort Tilden, NY

*Docket No. 02-1094; Submitted on the Record;  
Issued November 1, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusing an offer of suitable work.

On September 24, 1992 appellant, then a 21-year-old maintenance/automotive mechanic, filed a traumatic injury claim alleging that on September 23, 1992 he injured his shoulder and back after working under a vehicle.<sup>1</sup> The Office accepted the claim for cervical sprain.

Appellant filed a traumatic injury claim on September 2, 1993 for an injury to his right hand. The Office accepted the claim for a fractured right hand.

On October 3, 1994 the accepted his claim for a right hand sprain.

On June 30, 1995 appellant filed a traumatic injury claim (Form CA-1) alleging that he injured his left hand when it got caught between the generator and a truck.<sup>2</sup> This claim was initially denied by the Office by decision dated September 19, 1995 on the basis that appellant failed to establish fact of injury. Subsequently, the Office accepted the claim for chip fracture of the thumb distal phalanx and partial amputation of the left thumb.

On January 12, 1997 appellant filed a claim for a traumatic injury sustained on November 11, 1996 when he landed on his left shoulder when he slipped off the generator he was fueling up.<sup>3</sup> The Office accepted the claim for a traumatic injury to his left shoulder.

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<sup>1</sup> This was assigned claim number 02-0653002.

<sup>2</sup> This was assigned claim number 02-0699675.

<sup>3</sup> This was assigned claim number 02-0710230.

On September 24, 1997 appellant filed a traumatic injury claim alleging that he injured his right hand while pulling out pay loader steering wheel.<sup>4</sup> Appellant stopped work on this date and did not return. The Office accepted the claim for tendinitis of the right hand.

Appellant was placed on the automatic rolls for temporary total disability by letter dated April 23, 1998.

By letter dated August 31, 2000, the Office referred appellant along with medical records, a statement of accepted facts and list of specific questions to Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. Phillip C. Pollen, a Board-certified physiatrist, who concluded that appellant was totally disabled and Dr. Salvatore R. Lenzo, a Board-certified orthopedic surgeon, who concluded that appellant was capable of performing light-duty work.

In a report dated September 13, 2000, Dr. Strouse diagnosed carpal tunnel syndrome in the right hand, “crush injury right hand with reflex sympathy dystrophy” and partial left thumb amputation. Regarding appellant’s work capability, Dr. Strouse opined that appellant was capable of working, but that he could not perform his job as a mechanic and recommended vocational rehabilitation for another position. He opined that appellant “should not perform an occupation with any type of danger to his hand with the use of any type of heavy equipment or dangerous machinery” and that appellant “could do many other occupations.” Dr. Strouse concluded that appellant had “residual disabling residuals in his right hand caused by both the reflex sympathetic dystrophy and the blockage of the medial nerve in the carpal tunnel” as well as residuals from his 1997 employment injuries including “the residual reflex sympathetic dystrophy and the carpal tunnel syndrome.” He concluded that appellant no longer had any residual disability from his accepted conditions of residual tendinitis, left shoulder condition, cervical sprain or cervical nerve compression in the upper extremities, cervical radiculitis and that he “made a complete recovery from his left thumb partial amputation.” In an October 19, 2000 work capacity evaluation (Form OWCP-5c), Dr. Strouse concluded that appellant was capable of working eight hours per day with restrictions on pushing, lifting, pulling and climbing. Specifically, appellant could push and pull up to 50 pounds and lift up to 40 pounds while working an 8-hour day. As to climbing, appellant could climb for one-half hour.

By letter dated January 24, 2001, the Office determined that the position of modified automotive mechanic was medically suitable and complied with the physical restrictions set by Dr. Strouse. The Office advised appellant that he had 30 days in which to accept the position or to provide an explanation of the reasons for refusing the job and informed him of the penalty provision of 5 U.S.C. § 8106(c).

On January 25, 2001 the employing establishment offered appellant the position of modified automotive mechanic based upon the restrictions issued by Dr. Strouse. Duties of the position included rebuilding components; maintaining repair records; assisting in snow removal; testing components by electronic and sensory equipment; and breaking down, repairing and installing automotive components. The restrictions of the position included

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<sup>4</sup> This was assigned claim number 02-0734975. On March 9, 1998 the Office doubled claim numbers 02-0699675 and 02-0634975 with the latter as the master number.

walking/standing/sitting continuously for eight hours, occasional use of the right upper extremity for reaching above the shoulder and operating a motor vehicle, repetitive movements of up to one hour for the right wrist and elbow, pulling/pushing up to 50 pounds and lifting up to 40 pounds through 8 hours and climbing 30 minutes during an 8-hour period.

On January 26, 2001 the Office advised appellant that he had 30 days in which to accept the position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office informed appellant that the January 26, 2001 offer amended the January 22, 2001 offer sent with a letter dated January 24, 2001.

By letter dated February 21, 2001, appellant refused the job offer. In support of his refusal, he noted that the description of modified automotive mechanic was the same as his old job description. He also stated that Dr. Strouse opined that appellant could not perform the job of automotive mechanic and that the physician recommended vocational rehabilitation.

In a letter dated February 28, 2001, the Office informed appellant he had an additional 15 days in which to accept the position. Appellant was advised as to the penalty provision of 5 U.S.C. § 8106(c) and that his compensation would be terminated within 15 days if he failed to report for work.

By decision dated March 26, 2001, the Office terminated appellant's compensation benefits as he had refused an offer of suitable work.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.<sup>5</sup> This burden of proof is applicable when the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. To justify such a termination, the Office must show that the work offered was suitable.<sup>6</sup> Under this section of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.<sup>7</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.<sup>8</sup>

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<sup>5</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>6</sup> *Barbara L. Chien*, 53 ECAB \_\_\_\_ (Docket No. 00-1646, issued June 7, 2002); *Alfred Gomez*, 53 ECAB \_\_\_\_ (Docket No. 00-1817, issued October 9, 2001).

<sup>7</sup> 5 U.S.C. § 8106(c)(2).

<sup>8</sup> *Anna M. Delaney*, 53 ECAB \_\_\_\_ (Docket No. 00-2090, issued February 22, 2002); *Dale K. Nunner*, 53 ECAB \_\_\_\_ (Docket No. 01-1374, issued February 14, 2002).

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.<sup>9</sup> In the instant case, the Office determined that the position was medically suitable on the grounds that it was within the physical restrictions set by Dr. Strouse. The Board finds that the Office failed to consider the entirety of the impartial medical examiner's report. While the job offer comports with the physical restrictions noted by Dr. Strouse on an October 19, 2000 OWCP-5c form, it failed to consider Dr. Strouse's conclusion that appellant was disabled from performing duties as an automotive mechanic as stated in his September 13, 2000 report. Furthermore, the Board notes that this statement that appellant was incapable of working as a mechanic, including the physician's recommendation for vocational rehabilitation, do not support that appellant was capable of returning to work at the employing establishment in the position of modified automotive mechanic. More, Dr. Strouse specifically set a restriction that appellant not work with heavy equipment or dangerous equipment, which the Office appears to have failed to consider when it found the modified automotive mechanic position suitable. There is no medical evidence of record establishing that appellant could perform the position of modified automotive mechanic. It is the Office's burden of proof to establish the suitability of the position and it has not met its burden in this case.

The March 26, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.<sup>10</sup>

Dated, Washington, DC  
November 1, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Anna M. Delaney, id.*

<sup>10</sup> The Board notes that subsequent to the Office's termination decision and with his appeal to the Board, appellant submitted new evidence. However, the Board may not consider new evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).