U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA E. HORAN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Denver, CO

Docket No. 02-1283; Oral Argument Held July 2, 2003;
Issued July 30, 2003

Appearances: *John S. Evangelisti, Esq.*, for appellant; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding its acceptance of appellant's claim on the grounds that she was not in the performance of duty when she was injured on January 5, 1995.

On January 14, 1995 appellant, then a 37-year-old senior trial attorney, filed a claim alleging that she sustained an injury on January 5, 1995 while in the performance of duty: "[w]hile returning to my hotel from dinner, while in authorized travel status, I had a car accident in my rental car. I bumped my head and hurt my neck after impact with [a] semi truck." A supervisor indicated on the back of the claim form that appellant was injured in the performance of duty. A neurological report, dated January 30, 1995, stated that appellant had significant post-concussion syndrome and traumatic encephalopathy.

On February 3, 1995 the Office notified appellant that it had accepted her claim for the condition of post-concussion syndrome. The Office requested that she complete and return a questionnaire on whether she had instituted an action against the third party who might be responsible for her injury. Also on February 3, 1995 the Office requested that the employing establishment complete and return, by March 3, 1995, a questionnaire on the details of the accident.

Appellant completed her questionnaire on March 3, 1995. She explained that she had not presented a claim against the third party: It was unclear to her who was at fault, she had a head injury and she was just unable to think about it. The employing establishment does not appear to have completed its questionnaire.

On March 14, 1995 the Office notified appellant that her claim, again, was accepted for post-concussion syndrome and that compensation for wage loss was authorized through

March 4, 1995. Appellant thereafter filed claims for wage loss and received compensation for periods of disability. In April 1996 the Office placed her on the periodic compensation rolls.

On July 31, 1996 appellant entered into a settlement agreement with the party involved in her accident. She continued to receive compensation through November 9, 1996. The Office notified her what portion of her recovery needed to be offset by additional medical expenses or disability before any further payments could be made on account of the injury.

On or about June 2, 2000 appellant requested that the Office calculate her entitlement to compensation because her third-party recovery was likely absorbed. On June 5, 2000 the Office notified the employing establishment that it was reviewing its acceptance of appellant's claim and requested additional information on the details of the accident. On June 6, 2000 the Office notified appellant that it was reviewing her claim and that she needed to submit a statement explaining the circumstances of her accident, including where she ate that evening and where she went after dinner and for what purpose.

When appellant received the June 6, 2000 development letter, she telephoned the Office and learned that her claim was accepted with what the senior claims examiner believed to be insufficient factual information. The senior claims examiner reported the following telephone conversation:

> "[Appellant] went on to explain to me that she had left her temporary duty assignment at about 5 [p.][m.]. She then met [sic] an old friend at a restaurant for dinner. After dinner, [appellant] went to the friend's house to visit and look at pictures. As it became late, she left the friend's house to return to her hotel. The restaurant and friend's house were both away from the hotel and temporary duty assignment. [Appellant] was involved in the accident while returning to the hotel."

On September 27, 2000 appellant submitted the following statement on the circumstances of her January 5, 1995 injury:

> "I am not certain of the name of the hotel in which I was staying, but I believe it to have been a Holiday Inn Express in Addison, Texas, on Belt Line Road. I do not know the exact time I reported to the Regional Office on June [sic] 5, 1995, but I believe it would have been between 8:00 and 8:30 in the morning. The Regional Office for the [employing establishment] is located at 4050 Alpha Road, 14th Floor, Dallas, Texas, 75244. I am not certain of the time I left the Regional Office, but it may have been between 5:30 and 6:00 in the evening. I ate at 2250 Walnut Hill Lane in Irving, Texas. I believe I arrived sometime between 6:30 p.m. and 7:00 p.m.
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> "I do not remember the routes we took from and to each location, but my friend and coworker, Cathy (Christensen) Horn, told me the probable routes we took. When I left the Regional Office, I followed [Ms. Horn] in my rental car. We drove on Alpha Road west to MacArthur. We took a right and followed MacArthur to Cimarron Trail. We took a left at Cimarron Trail and went to 633

Cimarron Trail. This is the home of [Ms. Horn]. We left my car there and after a brief stay we continued on to the restaurant in [Ms. Horn's] car. To get there, we went east on Cimarron Trail and took a right on MacArthur, traveled to Walnut Hill Lane where we took a right and continued to the restaurant at 2250 Walnut Hill Lane, where we [were] joined by [Ms. Horn's] then-husband, Larry Christensen, also an employee of the [employing establishment]. We ate dinner and discussed personal and work-related matters.

"After dinner we left the restaurant by 8:30 p.m. and drove back to [Ms. Horn's] house on Cimarron Trail. We took Walnut Hill Lane to MacArthur where we took a left and followed MacArthur to Cimarron Trail where we took a left. We returned to [Ms. Horn's] because it was on the way to my hotel and I needed to pick up my car. We continued our dinner conversation at her house and then I left to return to my hotel between 10:00 p.m. and 10:30 p.m. I asked [Ms. Horn] for the most direct route back to my hotel and followed her directions. I took Cimarron Trail to MacArthur where I took a left and followed MacArthur to Belt Line Road where I took a right.

"The accident occurred at the intersection of Belt Line Road and I-35E. From there I was taken to a hospital nearby but do not have any records since my attorney in Texas has retired and has destroyed all the files related to my case since it has been four years since the case was settled.

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"You requested a copy of the police report from the accident. Unfortunately, that report was destroyed by the attorney who handled my lawsuit in Texas. Therefore, I do not have a copy of the report to give you. It is my belief that the accident occurred in Carrollton, Texas."

Ms. Horn submitted the following statement about what she remembered from the night of appellant's automobile accident:

"I have know[n] [appellant] since 1988. I met her in Denver Colorado where I was an appeals officer. We met at work. As an appeals officer I tried to settle docketed tax court cases before trial. As an attorney, [appellant] would try to settle the cases with my assistance if I could not settle them alone or she would try the case. We met each other through working cases together and became friends. As friends and coworkers we would many times discuss our work with each other. Bouncing ideas off each other was a very useful resources [sic] to both of us in our daily work life.

"I moved to Dallas in 1990 where I continued my work with the [employing establishment] as an [a]ppeals [o]fficer. [Appellant] and I no longer worked cases together but we still liked to bounce ideas off of each other. When I saw her at the Dallas office, where she came to work on a [r]egional project, we decided to get together after work instead of at lunch since we were both very busy. We

planned on [appellant] following me home from work before we ate dinner and then to meet my husband at Lubys for dinner. My husband also worked for the [employing establishment].

"After work, probably after 5:30 p.m., we drove around 10 minutes from the office to my home. [Appellant] followed me home. I let my dog out. We waited a short while until it was time to meet my husband and proceeded to Lubys. [Appellant] left her car at my house and I drove approximately another 10 minutes. We had a long conversation with my husband and left Lubys for my house around dark. [Appellant] came to the house where we visited alone for a short while and she proceeded home. She was approximately 10 minutes from her hotel. I was sleeping and got a call from a hospital saying [she] was in an accident. This is where her troubles began.

"I cannot tell you exactly what we talked about that night since it was so long ago, however[,] I know in my gut we talked about the [employing establishment], people we worked with, procedures and case issues. Since my husband worked for the [employing establishment] too, he also joined in the conversation. This was normal conversation for [appellant] and me."

In a decision dated June 25, 2001, the Office rescinded its acceptance of appellant's claim on the grounds that her injury did not occur in the performance of duty. The Office found that after appellant left the restaurant she was on a personal pursuit when she traveled further away from her hotel and workplace to visit a friend and the friend's husband at their home. The fact that appellant was returning to the hotel from the friend's house did not, in the Office's opinion, place her back into a "performance of duty" status. Also, the fact that the friend and her husband were both employing establishment's employees did not make the personal visit to the friend's house within the performance of duty. The Office found that appellant was aimed at reaching a specific personal objective. Additionally, the accident occurred five and a half hours after she left work and an unexplained one-half to one hour after leaving the friend's house. The Office stated:

"[y]ou were distinctly away from performance of duty and certainly pursuing personal matters when the accident occurred.

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The new evidence submitted clearly establishes that [appellant] were in the pursuit of personal matters, long after the termination of the workday and long after what would be reasonable to except [sic] the time needed to eat and return to your hotel."

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on December 5, 2001, appellant testified that she worked in the District Counsel's office, which was not directly under the Commissioner for the employing establishment. She explained that those who developed the cases, such as Ms. Horn, were considered to be the client. Appellant indicated that her employer encouraged the development of inter-professional relationships with the client: "[w]ell, we were sent to classes sometimes to

learn things with the client and to schmooze with them. No one ever said, go out and meet the client in so many words, but we were all encouraged to have cordial relationships and to have informal relationships." Such interaction built rapport and goodwill and encouraged the informal exchange of ideas and advice. She exchanged ideas and advice with Ms. Horn and her husband on the night of the accident and testified in some detail about the nature of their work-related discussions both at dinner and at later at their home.[1]

In a decision dated March 22, 2002, the Office hearing representative affirmed the June 25, 2001 decision to rescind acceptance of appellant's claim: "[t]he facts in this case show that [appellant], who clearly would have been covered by [workers' compensation] had she been injured while returning to her hotel from the restaurant where she had gone for dinner, removed herself from coverage when she decided to take a side trip to visit her friends home. At that point she was engaged in personal business and not that of her employer and I so find."[2]

The Board finds that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim on the grounds that she was not in the performance of duty when she was injured on January 5, 1995.

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.[3] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.[4] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.[5] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[6]

The Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties. When the employee deviates from the

[1] Appellant submitted a December 14, 2001 statement from Mark S. Heroux, an attorney with the Office of Chief Counsel of the employing establishment at the District Office in Denver, Colorado, from September 1987 through October 2000. Mr. Heroux supported that the employing establishment and its employees were considered clients and that the attorneys were always encouraged to develop their relationships with the client to enable an easy exchange of information, to develop trust and goodwill and to take steps that would further the mission of the employing establishment.

[2] The Board has no jurisdiction to review the hearing representative's actions concerning a possible overpayment arising from the decision to rescind acceptance of appellant's claim, as those actions are interlocutory matters and do not represent a final decision on any overpayment. 20 C.F.R. § 501.2(c).

[3] *Eli Jacobs*, 32 ECAB 1147 (1981); *see* 5 U.S.C. § 8128(a).

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

[5] *See* 20 C.F.R. § 10.610 (1999).

[6] *See James C. Bury*, 53 ECAB ___ (Docket No. 03-596, issued April 24, 2003).

normal incidents of the 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 such deviation is not compensable.[7]

The Office did not dispute that appellant was in the performance of duty while eating dinner at the restaurant. Injuries arising out of the necessity of sleeping in hotels and eating in restaurants away from home are usually held compensable.[8] The Office made no finding that the restaurant was unreasonably distant or that it was unreasonable for appellant to carpool with a local resident who knew the way. Instead, both the Office and the hearing representative indicated that appellant left the performance of duty when she left the restaurant to go to Ms. Horn's house. The Office found that she was on a "personal pursuit" when she traveled further away from her hotel and workplace to visit with a friend and her husband at their home.[9] The hearing representative found that when she decided to take a "side trip" to visit her friend's home, she was engaged in personal business and not that of her employer. The facts make clear, however, that it was not a matter of choice for appellant to travel to Ms. Horn's house after dinner: [s]he had to go to that location in order to pick up her rental car and return to the hotel. As she stated on September 27, 2000: "[w]e returned to [Ms. Horn's] because it was on the way to my hotel and I needed to pick up my car." The hearing representative explained that appellant clearly would have been covered by workers' compensation had she been injured while returning to her hotel from the restaurant, but the assumption that appellant could have chosen such a course is erroneous because she had no car at the restaurant.

The Office did not recognize the practical necessity of the trip to Ms. Horn's house and characterized it instead as a personal visit to a friend's house. Without elaboration, the Office found that appellant was aimed at reaching a specific personal objective. The Office's finding does not account for evidence that the employing establishment encouraged appellant to have cordial and informal relationships with clients such as Ms. Horn or evidence that appellant discussed work-related matters with Ms. Horn after dinner. Whether appellant looked at photographs or otherwise socialized with Ms. Horn for a period of time after dinner is ultimately inconsequential. If this were a side trip, as the hearing representative found, it ceased the moment appellant returned to her rental car to go to the hotel. She was in the performance of duty when she dropped off the car and she was in the performance of duty when she picked it up. The accident occurred after that point.

The Office noted that appellant did not account for the gap between the time she left Ms. Horn's house and the time of the accident, but the reliability of these times is not established. The Office developed the evidence more than five years after the fact. In her September 27, 2000 statement, appellant tried to recreate the events of January 5, 1995 but

[7] *Janice K. Matsumura*, 38 ECAB 262 (1986).

[8] 1 *A. Larson, The Law of Workers' Compensation* § 25.00 (1994).

[9] In point of fact, when appellant left the restaurant she was traveling in a direction that brought her closer to her hotel and workplace. Thanks to the specific driving directions and addresses developed in this case and to a large detailed map of the area submitted prior to the December 5, 2001 hearing, appellant's path on the night of the accident is well established, so far as memories allow.

expressed uncertainty about place names, routes and times. She estimated arrivals and departures in half-hour increments, but the nature of her injury and her subsequent medical history make it difficult to trust these guesses completely. The Office cannot discharge its burden without firmer evidence than this. Even if a gap of 30 minutes to an hour existed, the Office has offered no proof that appellant made a distinct departure on a personal errand after leaving Ms. Horn's house to return to the hotel.[10]

In rescinding its acceptance of appellant's claim, the Office has failed to establish by the clear weight of the evidence that appellant, at the time of the accident, was engaged in an activity that was not reasonably incidental to the duties of the assignment contemplated by her employer. The Office has not met its burden of proof.

The March 22, 2002 and June 25, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
July 30, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *Larson, supra* note 8.