



## FACTUAL HISTORY

On November 30, 1981 appellant, then a 27-year-old warehousemen, filed a claim alleging that on November 16, 1981 he slipped on steps in front of the employing establishment and twisted his left knee. The Office accepted appellant's claim for left medial meniscus tear, dislocation of the left knee, osteoarthritis of the lower left leg and authorized an arthrotomy, tibial osteotomy and a total left knee replacement. Appellant stopped work on November 16, 1981 and resigned on September 30, 1993. Appropriate compensation benefits were paid.<sup>1</sup>

Appellant's physician, Dr. Stephen R. Skinner, a Board-certified orthopedic surgeon, noted treating appellant for the November 16, 1981 injury. On December 30, 1981 he performed an arthroscopy, arthrotomy and a left medial meniscectomy and diagnosed torn medial meniscus of the left knee. Thereafter, on December 3, 1982, Dr. H. Yates Dunaway, a Board-certified orthopedic surgeon, noted performing an arthroscopic partial meniscectomy of the posterior horn of the left medial meniscus and diagnosed internal derangement of the left knee. In a report dated December 15, 1982, Dr. Skinner opined that the tear of the posterior portion of the medial meniscus corrected by Dr. Dunaway was a residual of the November 16, 1981 work injury.<sup>2</sup>

On August 23, 1993 appellant filed a claim for a schedule award.

Appellant came under the treatment of Dr. Robert R. Dahmus, a Board-certified orthopedic surgeon, who noted appellant's history in an attending physician's report dated August 26, 1993 and diagnosed a left knee internal derangement. On August 30, 1993 he noted performing arthroscopic surgery on the left knee and diagnosed significant degenerative joint disease of the patellofemoral joint with Grade 2 and 3 chondromalacia. He advised that appellant had reached maximum medical improvement.

In June 1994, appellant was referred to a second opinion physician for evaluation.

In a report dated June 6, 1994, Dr. Bruce Goodman, a Board-certified orthopedic surgeon, noted a history of injury and advised that appellant developed significant degenerative changes in both knees. He noted that appellant had reached maximum medical improvement and could return to work subject to various restrictions. On June 30, 1994 the Office referred Dr. Goodman's report and the case record to the Office's medical adviser for evaluation as to the extent of permanent impairment pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> (A.M.A., *Guides*). The medical adviser found that appellant had 41 percent permanent impairment of the left leg.

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<sup>1</sup> Appellant filed a claim for a right knee and left hip injury, which was accepted by the Office, file number A03-0201182. This claim is not before the Board.

<sup>2</sup> Appellant filed several Form CA-2a's, notices of recurrence of disability, dated March 23 and November 9, 1982 and January 10, 1989, which were accepted by the Office.

<sup>3</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

In a decision dated July 12, 1994, the Office granted appellant a schedule award for 41 percent permanent impairment of the left leg. The award was for the period June 9, 1994 to November 20, 1996.

Appellant submitted a report from Dr. Dahmus dated August 1, 1995, who noted that an x-ray of the right hip revealed degenerative joint disease with marked loss of joint space. Appellant was seen in consultation with Dr. Bernard I. Zeligler, an osteopath, on August 26, 1996, who noted findings upon physical examination of flexion of 100 degrees and a total loss of joint and medial joint space. He opined that appellant sustained a 46 percent impairment of the left leg in accordance with the A.M.A., *Guides*.

In a memorandum dated October 1, 1996, the Office referred Dr. Zeligler's report and the case record to the Office's medical adviser for evaluation as to the extent of permanent impairment of the left leg in accordance with the A.M.A., *Guides*.<sup>4</sup> The medical adviser determined that appellant sustained a 55 percent permanent impairment of the left leg.<sup>5</sup> He noted that appellant sustained a loss of joint space for 50 percent impairment<sup>6</sup> and that flexion measured 100 degrees for 10 percent impairment.<sup>7</sup> The medical adviser noted that, using the Combined Values Chart of the A.M.A., *Guides*, appellant had 55 percent impairment of the left leg.

In a decision dated December 19, 1996, the Office granted appellant an additional schedule award for 14 percent impairment, for a total award of 55 percent permanent impairment of the left lower extremity. The schedule award was granted for the period August 26, 1996 to June 4, 1997.

On June 3, 1997 appellant was referred to Dr. Steven E. Morganstein, a Board-certified orthopedic surgeon, for an updated impairment rating. In a report of the same date, he determined that appellant sustained a 42 percent permanent impairment of the left leg. In a letter dated August 13, 1997, the Office advised appellant that he was not entitled to an additional award over the 55 percent permanent impairment of the left leg previously granted.

Appellant came under the treatment of Dr. Rex Herbert, an osteopath, who noted treating appellant from April 15, 2002 to November 6, 2003, for advanced post-traumatic osteoarthritis of the left knee. He eventually recommended a total left knee replacement. In an operative report dated October 23, 2002, Dr. Herbert performed a left total knee replacement arthroplasty and diagnosed post-traumatic degenerative joint disease of the left knee. He noted that appellant was progressing post surgery and returned him to work on December 9, 2002 without restrictions. Dr. Herbert noted in a report dated November 6, 2003, that a bone scan revealed increased uptake of the proximal tibia and recommended that appellant undergo a cemented tibial component. In a report dated December 10, 2003, he noted performing a revision of the tibial

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<sup>4</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

<sup>5</sup> *Id.*

<sup>6</sup> See Table 62, page 83, A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

<sup>7</sup> See Table 41, page 78, A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

component, left total knee and diagnosed loosening of the tibial component, left total knee replacement.

On April 12, 2004 appellant requested an additional schedule award. By a letter dated April 15, 2004, the Office requested that Dr. Herbert provide an evaluation as to the extent of permanent impairment of the left leg in accordance with the fifth edition of the A.M.A., *Guides*.<sup>8</sup> In a letter dated April 21, 2004, he noted that he did not perform impairment ratings and referred appellant to Dr. Morganstein.

In a report dated May 28, 2004, Dr. Morganstein determined that in accordance with the fifth edition of the A.M.A., *Guides*<sup>9</sup> appellant sustained a 50 percent impairment of the left leg for a total knee replacement.<sup>10</sup>

On June 3, 2004 appellant was referred to a second opinion physician for evaluation. In a report dated July 12, 2004, Dr. Perry A. Eagle, a Board-certified orthopedist, noted a history of injury and diagnosed postoperative total knee replacement and a revision of that replacement. He noted that appellant had reached maximum medical improvement and could return to work subject to various restrictions. Dr. Eagle opined that, in accordance with the A.M.A., *Guides*, appellant had 50 percent impairment of the left leg for a total knee replacement.<sup>11</sup>

In a memorandum dated June 14, 2004, the Office referred Dr. Eagle's report and the case record to the Office's medical adviser for evaluation as to the extent of permanent impairment of the left leg in accordance with the fifth edition of the A.M.A., *Guides*. The medical adviser noted in a report dated October 13, 2004, that appellant underwent a medial meniscectomy of the left knee, a left tibial osteotomy, left total knee replacement and a left total knee replacement revision. He determined that appellant sustained a 50 percent permanent impairment of the left leg for a total left knee replacement with fair results.<sup>12</sup> The medical adviser further noted a schedule award of "five percent left lower extremity" and advised that appellant reached maximum medical improvement on May 28, 2004.

In a decision dated November 23, 2004, the Office granted appellant an additional schedule award for 5 percent permanent impairment of the left leg, or a total of 60 percent permanent impairment of the left leg. The schedule award was granted for the period May 28 to September 5, 2004.

On December 21, 2004 appellant requested a review of the written record. He submitted reports from Dr. Herbert dated December 9 and 23, 2004, noting recurrent left knee pain. Appellant noted that x-rays of the left knee revealed loosening of the tibial component and

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<sup>8</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>9</sup> *Id.*

<sup>10</sup> See Table 17-33, page 546-47, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>11</sup> *Id.*

<sup>12</sup> See Table 17-33, 17-35, page 546, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

recommended additional surgical intervention. He submitted an operative report dated January 21, 2005, which Dr. Scott King, an osteopath, noted performing a revision of the left knee and tibia and diagnosed left knee loose tibia.<sup>13</sup>

In a decision dated May 23, 2005, the hearing representative set aside the November 23, 2004 decision and remanded the case for further development. The hearing representative noted that the Office incorrectly interpreted the medical adviser's report of October 13, 2004 and granted appellant an additional award for five percent permanent impairment of the left leg and failed to consider the previous schedule awards granted for impairment of the left leg.

In a memorandum dated June 15, 2005, the Office referred the case record to an Office medical adviser for evaluation. In a June 20, 2005 report, the medical adviser indicated that his prior report of October 13, 2004 provided for a 50 percent impairment to the lower extremity as a result of the left total knee replacement. He indicated that his notation of an additional award of "5 percent left lower extremity" was incorrect and should have stated 50 percent impairment of the left lower extremity.<sup>14</sup>

On June 23, 2005 the Office issued a preliminary overpayment determination, finding that appellant was erroneously paid an additional five percent impairment for the period May 28 to September 5, 2004, in the amount of \$6,944.69. The Office determined that appellant was not at fault in the creation of the overpayment. The Office advised appellant that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

In a decision dated June 23, 2005, the Office denied appellant's claim for an additional schedule award on the grounds that the medical evidence did not establish impairment greater than the 55 percent permanent impairment of the left leg previously granted.

On July 29, 2005 the Office finalized the overpayment determination, finding that appellant was overpaid compensation benefits in the amount of \$6,944.69, for which he was without fault. The Office noted that appellant was previously granted schedule awards for 55 percent permanent impairment of the left leg. The Office noted that, on November 23, 2004, the Office erroneously issued a schedule award which granted him an additional 5 percent impairment of the left leg where current medical evidence supported a total of 50 percent impairment based on the left knee replacement. As appellant had already received awards for 55 percent impairment of the left leg, he was not entitled to the additional 5 percent. The Office requested that appellant either pay the full amount of the overpayment or contact the Office within 30 days to make arrangements for repayment.

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<sup>13</sup> On January 20, 2005 appellant filed a Form CA-2a, notice of recurrence of disability noting that he sustained a recurrence of left knee pain on December 23, 2004 causally related to his work injury of November 16, 1981.

<sup>14</sup> See Table 17-33, 17-35, page 546, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

## LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act<sup>15</sup> and its implementing regulation<sup>16</sup> sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>17</sup>

## ANALYSIS -- ISSUE 1

On appeal, appellant argues that he has more than 60 percent permanent impairment of the left leg. The Office accepted appellant's claim for left medial meniscus tear, dislocation of the left knee, osteoarthritis of the local prim lower left leg and authorized an arthrotomy, tibial osteotomy and total left knee replacement.

Appellant submitted a report from Dr. Morganstein dated May 28, 2004, who determined that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant sustained a 50 percent impairment of the left leg for a total knee replacement.<sup>18</sup>

Thereafter, the Office referred appellant for a second opinion to Dr. Eagle, who issued a report dated July 12, 2004. In his report, Dr. Eagle noted that appellant had reached maximum medical improvement and could return to work subject to various restrictions. He concurred with Dr. Morganstein and opined that in accordance with the fifth edition of the A.M.A., *Guides*<sup>19</sup> appellant sustained a 50 percent impairment of the left leg for a total knee replacement.<sup>20</sup>

In reports dated October 13, 2004 and June 20, 2005, the medical adviser properly applied the A.M.A., *Guides* to the information provided in Drs. Morganstein and Eagle's reports and reached an impairment rating of 50 percent permanent impairment of the left leg for a total left knee replacement with fair results.<sup>21</sup> The medical adviser noted that appellant underwent a medial meniscectomy of the left knee, a left tibial osteotomy, left total knee replacement and a left total knee replacement revision and advised that appellant reached maximum medical improvement on May 28, 2004. The Board notes that, although the medical adviser made a

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<sup>15</sup> 5 U.S.C. § 8107.

<sup>16</sup> 20 C.F.R. § 10.404 (1999).

<sup>17</sup> *Id.*

<sup>18</sup> See Table 17-33, page 546-47, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>19</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>20</sup> See Table 17-33, page 546-47, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>21</sup> See *id.*

notation indicating a schedule award of “5 percent left lower extremity,” which the claims examiner interpreted as an additional 5 percent impairment, he clarified his opinion and advised that this notation was incorrect and should have been 50 percent impairment of the left lower extremity.<sup>22</sup> The Board finds that the medical adviser properly utilized the findings in Dr. Morganstein’s May 28, 2004 report and Dr. Eagle’s July 12, 2004 report and correlated them to specific provisions in the A.M.A., *Guides* (fifth edition) to determine the impairment rating. The medical adviser concurred with Drs. Morganstein and Eagle’s findings that appellant sustained a 50 percent impairment of the lower extremity as a result of the left total knee replacement.<sup>23</sup> Appellant had previously received a schedule award for 55 percent impairment based on loss of medial joint space and loss of range of motion. Although the Office medical adviser’s determination contains the notational error described above, the medical adviser clarified that appellant’s left leg impairment was 50 percent based on the total knee replacement rating. The Board notes that there is no other medical evidence, conforming to the A.M.A., *Guides*, establishing greater than the 55 percent impairment previously awarded.

Appellant received schedule awards totaling 60 percent for the left leg. By decision dated July 12, 1994, he was granted a schedule award for 41 percent for the left leg. On December 19, 1996 he was granted an additional schedule award for 14 percent for a total award of 55 percent of the left leg.<sup>24</sup> By decision dated November 23, 2004, the Office granted appellant an additional award of five percent of the left leg or a total award of 60 percent impairment of the left leg. The Board finds that appellant has not established that he has more than 55 percent permanent impairment of the left leg. As he has received schedule awards totaling 60 percent of the left leg, he is not entitled to any further compensation for permanent impairment of his left leg.

### **LEGAL PRECEDENT -- ISSUE 2**

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.<sup>25</sup> When the Office makes a determination that an overpayment of compensation has occurred because the claimant received a schedule award, the Office must properly resolve the schedule award issue. Before the amount of the overpayment of compensation can be determined, the evidence must properly establish the appropriate degree of permanent impairment.<sup>26</sup>

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<sup>22</sup> See Table 17-33, 17-35, page 546, A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>23</sup> See *id.*

<sup>24</sup> The Board notes that, on November 23, 2004, the Office granted appellant an additional schedule award for five percent permanent impairment of the left leg. However, the hearing representative indicated in a decision dated May 23, 2005 that the medical adviser’s report of October 13, 2004 was misinterpreted and that appellant was not entitled to an additional schedule award of five percent.

<sup>25</sup> See *Michael Reed*, Docket No. 04-734 (issued October 5, 2004).

<sup>26</sup> See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

## ANALYSIS -- ISSUE 2

As noted above, the evidence establishes that appellant has no more than 55 percent permanent impairment of his left leg. However, the Office erroneously awarded compensation for 60 percent impairment.

The record reflects that, by decision dated July 12, 1994, appellant was granted a schedule award for 41 percent for the left leg. On December 19, 1996 appellant was granted an additional schedule award for 14 percent for a total award of 55 percent of the left leg.<sup>27</sup> These ratings were calculated under the fourth edition of the A.M.A., *Guides*<sup>28</sup> and were based on a combination of loss of range of motion with joint space loss.

On November 23, 2004 the Office granted appellant an additional award of five percent of the left leg, for a total award of 60 percent permanent impairment of the left leg. This rating was calculated under the fifth edition of the A.M.A., *Guides*,<sup>29</sup> and was based on the evaluation method for a total knee replacement. The Board notes that the Office is not seeking to recover the difference between the 50 percent and 55 percent impairment rating granted on December 19, 1996.<sup>30</sup> The Office is seeking to recover the overpayment created by the decision dated November 23, 2004, in which it granted appellant an additional five percent award. The record contains evidence showing that the additional five percent schedule award issued on November 23, 2004, amounted to \$6,944.69 in compensation, for the period May 28 to September 5, 2004. The Board finds that appellant is not entitled to the additional five percent permanent impairment of the left leg granted on November 23, 2004, since, as noted above, the medical evidence supports no more than 55 percent permanent impairment for which he has already received schedule awards. As noted by the hearing representative, the claims examiner misinterpreted a medical adviser's report and incorrectly paid appellant an additional five percent permanent impairment of the left leg, for which he was not entitled to receive.

Therefore, the Board finds that this amount constitutes an overpayment of compensation in the amount of \$6,944.69. The Office calculated that the additional five percent that appellant received, to which he was not entitled, amounts to \$6,944.69. Appellant did not allege or submit

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<sup>27</sup> The Board notes that, on November 23, 2004, the Office granted appellant an additional schedule award for five percent permanent impairment of the left leg. However, the hearing representative indicated in a decision dated May 23, 2005 that the medical adviser's report of October 13, 2004 was misinterpreted and that appellant was not entitled to an additional schedule award of five percent.

<sup>28</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

<sup>29</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>30</sup> See FECA Bulletin No. 01-05 (issued January 29, 2001) (provides that a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* may later make a claim for an increased award that is calculated according to the fifth edition but that, if the calculation under the fifth edition results in a percentage that is lower than the original award, the Office should make the finding that the claimant has no more than the percentage of impairment originally awarded, and should not declare an overpayment based on amounts calculated under previous editions of the A.M.A., *Guides*). Here, the Office is only seeking to recover amounts erroneously paid pursuant to calculations under the fifth edition of the A.M.A., *Guides*.

evidence to show that he did not receive a \$6,944.69 overpayment for this period and the Office properly found that he received such an overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>31</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."<sup>32</sup> Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulation<sup>33</sup> provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined [by the Office] from data furnished by the Bureau of Labor Statistics.<sup>34</sup> An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>35</sup>

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>36</sup>

Section 10.438 of the regulations provides that "[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience."

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<sup>31</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>32</sup> See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>33</sup> 20 C.F.R. § 10.436.

<sup>34</sup> An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>35</sup> See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>36</sup> 20 C.F.R. § 10.437.

Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>37</sup>

### **ANALYSIS -- ISSUE 3**

On June 23, 2005 the Office requested that appellant provide necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if he desired waiver of the overpayment in question. Appellant did not submit a completed OWCP-20 form or otherwise submit financial information supporting his income and expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.<sup>38</sup>

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulations,<sup>39</sup> which was necessary to determine eligibility for waiver, the Office properly denied waiver of recovery of the overpayment. Inasmuch as appellant has not shown that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of recovery of the overpayment of compensation.<sup>40</sup>

### **CONCLUSION**

The Board finds that appellant has no more than a 55 percent permanent impairment of the left leg. The Board finds that appellant received an overpayment of \$6,944.69 in compensation from May 28 to September 5, 2004. The Board also finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

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<sup>37</sup> 20 C.F.R. § 10.438.

<sup>38</sup> See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>39</sup> *Supra* note 33.

<sup>40</sup> As the Office has not issued a final decision on the method of recovery of the overpayment, this is not before the Board on the present appeal. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 29 and June 23, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 18, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board