

**United States Department of Labor  
Employees' Compensation Appeals Board**

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CATHERINE NDEGE-GRAHAM, claiming as  
widow of ALAN T. GRAHAM, Appellant

and

DEPARTMENT OF HEALTH & HUMAN  
SERVICES, CENTERS FOR DISEASE  
CONTROL & PREVENTION,  
Kampala, Uganda, Employer

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Docket No. 06-372  
Issued: June 19, 2006

*Appearances:*  
*Catherine Ndege-Graham, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 2, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 9, 2005 merit decision, denying her claim for survivor's benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly denied appellant's claim for survivor's benefits on the grounds that the deceased was not an employee within the meaning of the Federal Employees' Compensation Act at the time of his death.

## **FACTUAL HISTORY**

This is the second appeal in this case. The Board issued a decision on June 13, 2005, setting aside the Office's July 27, 2004 decision denying appellant's claim for survivor's benefits and remanding the case to the Office for further development.<sup>1</sup>

On April 15, 2004 appellant filed a claim alleging that she was entitled to receive survivor's benefits from the Office due to the July 16, 2003 death of her husband, the employee, Alan T. Graham, while he was employed in Uganda with the Centers for Disease Control and Prevention (CDC).<sup>2</sup> A July 17, 2003 death certificate indicated that the deceased was involved in a traffic accident at about 1:30 p.m. on July 16, 2003 and passed away at about 2:15 p.m. due to hemorrhagic shock caused by a ruptured spleen sustained in the accident. The record contained a February 24, 2003 invoice from the "Alan Graham, Globetrotter, Ltd."<sup>3</sup> To request payments of \$4,250.00 per month for "consulting services of Alan Graham" provided to the CDC-Uganda between November 8, 2002 and February 8, 2003, under "Contract No. SUG-500-3-M-0078, Dated: November 14, 2002." The record also contained similar invoices covering periods between February 8 and July 16, 2003 and documents, dated in March and May 2003, which were entitled "purchase order, receiving report and voucher" and detailed the cost of services provided by the deceased under the same contract.<sup>4</sup>

The Board remanded the case to the Office because there was insufficient documentation in the record to make a reasoned determination regarding whether the deceased was an employee within the meaning of the Act at the time of his death. The Board noted that the record did not contain a copy of the referenced contract or any other documents explaining the employment relationship between the deceased and the CDC, including the nature of the work performed by the deceased and the amount of control he had over the work and employees of the CDC. The Board directed that after the Office conducted further factual development it should issue an

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<sup>1</sup> Docket No. 05-412 (issued June 13, 2005).

<sup>2</sup> The record contains documents indicating that appellant is authorized to administer the estate of the deceased. She asserted that the deceased was treated like an employee by the CDC-Uganda while he worked to build and renovate hospitals and other buildings to help fight acquired immunodeficiency syndrome (AIDS) in Uganda.

<sup>3</sup> The invoice indicated that the company was registered in Dominica, West Indies and the full heading of the invoice was "Alan Graham, Globetrotter, Ltd., Technical Consultancy Agents, Design and Development Services."

<sup>4</sup> The March 2003 document indicated that the deceased was to provide lead administrative, management and technical consultant duties to the CDC; provide administrative and technical support to the home-based AIDS care study in Tororo, including advising, logistical and monitoring activities; provide supervision and advice for quality control oversight of renovation and building activities; oversee the completion of three ongoing construction projects; work with architects to develop formal plans and assist CDC-Uganda with technical reviews and awarding of contracts for a new laboratory, office building and maintenance building; review documents and provide advice regarding procurement of radiological equipment; work with the CDC-Uganda maintenance staff and an electrical engineer to establish procedures for monitoring and evaluating of electrical and other systems at the CDC-Uganda; and perform any other business as assigned by Dr. Jonathan Mermin, the Director of the CDC-Uganda or the assistant director of operations. The March 2003 document indicated that the deceased would be paid \$4,250.00 per month or \$25,500.00 for a six-month period. The May 2003 document indicated that an option was being exercised, per the original contract, to extend the deceased's provision of services under the same contract for an additional six months from May 9 to November 9, 2003.

appropriate decision. The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

By letter dated June 21, 2005 and addressed to the CDC's main office in Atlanta and the CDC-Uganda, the Office requested that information be provided regarding the nature of the work relationship between the CDC-Uganda and the deceased. The letter inquired as to whether the deceased performed services or offered services to the public generally as a contractor or was permitted to do so by the reporting agency; whether the deceased was required to furnish any tools or equipment; the period of time the work relationship was to exist; whether the reporting agency had the right to discharge the deceased at any time; whether the reporting agency had any right to control or direct how the work was to be performed; the manner in which payment for the deceased's services was determined; and whether the activity in which the worker was engaged was a regular and continuing activity of the reporting agency.<sup>5</sup> The Office also requested a discussion of the employing establishment's understanding of the deceased's status either as an employee or as a contractor and the submission of copies of "any documents, contracts, agreements or similar documents, relating to [the deceased's] working relationship with your organization."

In an August 3, 2005 statement, Janie L. Oddy, a supervisory human resources specialist for the CDC in Atlanta, responded to the Office. She stated that the CDC-Uganda established an employment contract (No. SUG-500-3-M-0078) with the deceased, a citizen of the United Kingdom, for consulting services and noted that invoices were submitted by and paid to "Alan Graham, Globetrotter Ltd., Technical Consultancy Agents, Design and Development Services," a corporation registered in Dominica, West Indies. She indicated that under the document entitled "justification and approval for other than full and open competition," the deceased had previously provided services to CDC-Uganda "in the three years prior to the contract in question." Ms. Oddy indicated that the deceased's consulting duties appeared to constitute a full-time position but that a formal time commitment was not specified in the personnel documents. She stated that there was no language in the employment contract that would have barred the deceased from providing services to others and noted that the CDC-Uganda did not prohibit the deceased from working with and for others during the period of the contract. Ms. Oddy asserted that the deceased worked for others, both U.S. Government entities and non-U.S. Government entities, during the contract period.

Ms. Oddy stated that the deceased was provided with office space, a computer and a cellular telephone to perform his duties and noted that he received CDC transport from his duty station to other project sites. She indicated that, at the time of his death, the deceased was traveling in a U.S. Government vehicle from Entebbe to the general service office of the U.S. Embassy to meet with officials regarding ongoing CDC-Uganda construction projects. Ms. Oddy asserted that the deceased used his own vehicle 80 to 90 percent of the time and paid for all of his expenses when using his own vehicle. She noted that the deceased would occasionally ride with someone from the CDC-Uganda when his vehicle was in the repair shop. Ms. Oddy noted that the deceased was not on government orders when he traveled, that his travel expenses to Tororo were covered

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<sup>5</sup> The Office appears to have made reference to its own procedure in determining which types of information to request from the employing establishment. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.6(a) (August 1995).

for an earlier visit and that provisions were being made at the time of his death to reimburse him for a later visit.

Ms Oddy stated that the deceased's services were contracted for a six-month period beginning November 8, 2002, with the option to extend the contract for an additional six months. She noted that the deceased exercised the option in May 2003 and continued to perform services until his death in 2003.<sup>6</sup> The contract would have been completed in November 2003 and "no provision was requested for authorization for further extension." Prior to this contract, the deceased had provided services for CDC-Uganda and the U.S. Embassy in Kampala for three years. Ms. Oddy stated that the contract did not address the terms of separation or termination, but that at a minimum CDC-Uganda had the right not to renew the contract after the initial six-month period. She noted that presumably the deceased's contract could have been terminated for default or convenience of the government. The deceased was contracted to provide lead administrative, management and technical services for a variety of renovation projects. She asserted that the value of the deceased's experience was emphasized in a document entitled "justification and approval for other than full and open competition." Consequently, he was provided the general objectives for projects and was independently responsible for implementing an action plan to achieve them. Ms. Oddy stated that the deceased had weekly meetings with the contracting officer's representative, Deputy Director Harold Rasmussen and that the deceased would present his plans to Mr. Rasmussen, who would approve or disapprove of the submitted plans and that the deceased would undertake the work which was approved.

Ms. Oddy stated that the payments for the deceased's services were negotiated up front in the contract on a project level and were not defined in terms of time spent or materials used. The invoices submitted by the deceased made no reference to the types of tasks or the amount of work performed during the applicable periods and contained no requests for materials or work-related expenses. Ms. Oddy asserted that appellant's consulting services were not regular and continuing activities for CDC-Uganda. She claimed that upon the completion of construction projects the deceased's services would no longer have been required and, although some renovations were ongoing, the deceased's services would not have been needed after November 2003. She indicated that the deceased's other responsibilities, including the development of formal architectural plans, awarding a building contract and establishing procedures for monitoring of electrical systems at CDC-Uganda, were not regular and continuing activities of the agency. Ms. Oddy stated that the administrative and technical support activities for the home-based AIDS study would continue but would be handled by other staff members.

Ms. Oddy stated that the deceased was viewed as a foreign national contractor to provide consultative and management oversight to various CDC renovation projects and posited that he provided a level of expertise that CDC staff did not have. She noted that the deceased's purchase order was issued by a Department of State official rather than the CDC and that both the Department of State and the CDC restricted the use of purchase orders for services when there was no defined deliverable service and no employer-employee relationship. Ms. Oddy stated that an email transmission between Robert S. Morris, a CDC official in Atlanta and U.S. Embassy staff in

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<sup>6</sup> The record contains a document, initialed in late March 2003, requesting that the deceased's contract be extended for six months starting May 8, 2003 such that the "terms and conditions remain as indicated in the above purchase order."

July 2003 indicated that the deceased worked under a valid nonpersonal contract without an employer-employee relationship. She indicated that CDC policy prohibited the use of nonpersonal services contracts to engage any individual to perform services when the individual is supervised by government employments and stated that the deceased was not supervised by government employees.<sup>7</sup> Ms. Oddy stated that the deceased did not receive any benefits of being a government employee in the local compensation plan and that he did not receive meal money or earn leave or sick time.

Ms. Oddy also submitted a number of documents in connection with her statement, including an undated document entitled “justification and approval for other than full and open competition,” in which Dr. Mermin recommended that the U.S. Embassy in Kampala “use other than full and open competition” to acquire lead administrative, management and technical consultant duties from the deceased.<sup>8</sup> Dr. Mermin stated that “the contractor, Alan Graham, is an electrical engineer who has already worked on contract with CDC-Uganda and the U.S. Embassy in Kampala during the past three years.” He noted that in his prior work the deceased had shown “an exceptional ability to perform a wide range of duties, including not only construction and engineering work, but also the development and monitoring of contracts for programmatic activities, ranging from pediatric HIV/AIDS handbooks to organizing administrative issues for travel conferences.” Dr. Mermin indicated that the deceased would earn \$25,500.00 for six months of service with an option of earning another \$25,500.00 for an additional six months of service. He provided a description of the services to be provided which was similar to that contained in the above-described March 2003 document entitled, “purchase order, receiving report and voucher.”<sup>9</sup> Dr. Mermin indicated that it was necessary to fill a void left by the six-week absence of the associate director of operations of the CDC-Uganda and asserted that taking the time to train and familiarize another person with CDC programs and Department of State procedures would unacceptably delay several important projects and waste thousands of dollars. He stated that the contract was “a one time emergency requirement” and that “all future procurements of these services will be competitive.”<sup>10</sup>

Ms. Oddy also submitted an undated email transmission in which Mr. Morris stated: “I am really sorry to hear that one of our employees has been killed in Uganda” and discussed the benefits available to the beneficiaries of “locally employed staff paid under the local compensation plan.”

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<sup>7</sup> The record contains a document concerning nonpersonal services contracts, which indicated that nonpersonal services contractors “are not [U.S. Government] employees,” that nonpersonal services contracts “may not be used to engage any individual to perform services when the individual is supervised by [g]overnment employees,” and that nonpersonal services contracts “are not intended for and may not be used to employ CDC staff or to act as or replace (even temporarily) CDC staff unless there is a temporary services firm with which to contract covered by [Office of Personnel Management] regulations.”

<sup>8</sup> The document was approved as accurate by “Lawrence P. Johnston, contracting officer” and “Jacqueline Holland-Craly, competition advocate.”

<sup>9</sup> See *supra* note 4.

<sup>10</sup> Ms. Oddy also submitted another “purchase order, receiving report and voucher” dated in March 2003, which detailed the cost of services provided by the deceased.

In a July 22, 2003 email transmission bearing the subject line, “copy of contract for Alan Graham,” Mr. Morris stated:

“Thank you for sending the contract. Unfortunately, when our procurement guru reviewed it her view was that this was intended to be a valid nonpersonal services contract without an employee-employer relationship. Thus, regrettably, I do not believe that there is a basis on which to file a claim with the Department of Labor for death benefits.”

In a February 27, 2004 memorandum, Beth Schlachter, an employee in the human resources office of CDC-Uganda, stated to Dr. Mermin:

“Per CDC Atlanta and State’s Office of Legal Affairs we have been advised that [appellant’s] claim must be adjudicated by [w]ork[ers’] [c]ompensation (WC) in the U.S. to give post a legal basis for paying any claim. [Mr.] Morris concurred with the Embassy’s lawyer, Andrew Kasirye, that even though the contract between CDC and Mr. Graham was for services and not for employment per se, he was for all intents and purposes a true employee of CDC (he was given a desk and [tele]phone, reported to work every day, attended staff meetings). WC will make a determination and then decide of U.S. or Ugandan labor laws apply. Post is not to negotiate a settlement with [appellant’s] attorney, Mr. Katongole, at this time.”

In a July 21, 2004 letter, Dr. Mermin stated:

“Mr. Allan T. Graham was contracted by the CDC-Uganda in November 2002 to provide construction management services for its construction/renovation projects. CDC-Uganda provided him with office space, a computer and a cell[ular] [tele]phone to enable him [to] perform his duties.

“On the day he met his death, he was traveling in a U.S. Government vehicle from Entebbe to the American Embassy’s General Service Office (GSO) in Kampala to meet with GSO officials to discuss ongoing CDC-Uganda construction projects.”

By decision dated September 9, 2005, the Office denied appellant’s claim for survivor’s benefits on the grounds that the deceased was not an employee within the meaning of the Act at the time of his death.

### **LEGAL PRECEDENT**

The Act provides that 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.”<sup>11</sup> A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weight of the reliable, probative

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<sup>11</sup> 5 U.S.C. § 8102(a).

and substantial evidence, including that she or a decedent, as in the present case, was an “employee” within the meaning of the Act.<sup>12</sup>

For purposes of determining entitlement to compensation benefits under the Act, an “employee” is defined, in relevant part, as:

“(A) a civil officer or employee in any branch of the [g]overnment of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

“(B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service or authorizes payment of travel or other expenses of the individual....”<sup>13</sup>

With regard to whether an individual is a federal employee for purposes of the Act, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment.<sup>14</sup> The question of whether a person is an employee of the United States or an independent contractor is ultimately a question of fact to be decided on an individual basis in the particular case. Included among the many factors to be considered are the right of control of the work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job and the intention of the parties.<sup>15</sup> Other factors to be considered include whether the individual has been rendering service similar to the service of a civil employee and whether the employing establishment was authorized by statute to accept such services.<sup>16</sup> The statute does not require that any written form of agreement be entered into by the employer and the individual providing services prior to acceptance of personal services by the employer.<sup>17</sup> With regard to the party

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<sup>12</sup> *Nettie Jackson (Lee F. Jackson)*, 53 ECAB 223, 226 (2001).

<sup>13</sup> 5 U.S.C. § 8101(1).

<sup>14</sup> *Donald L. Dayment*, 54 ECAB 363, 364 (2003).

<sup>15</sup> *Larry E. Young*, 52 ECAB 264, 267 (2001). In particular, the Board has held that the right to control the work activities of the person is an important factor in determining an employer relationship. *Tim S. Baysinger*, 54 ECAB 762, 768 (2003). In Larson, *The Law of Workers' Compensation*, the factors regarding the right of control are discussed, “The traditional test of the employer-employee relation is the right of the employer to control the details of the work. It is the ultimate right of control, under the agreement with the employee, not the overt exercise of that right, which is decisive. If the right of control of details goes no further than is necessary to ensure a satisfactory end result, it does not establish employment. The principle factors showing right of control are[:] (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire.” A. Larson, *The Law of Workers' Compensation* § 61.00. Regarding the nature of the work performed, Larson has stated, “The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business or professional service.” Larson at § 62.00.

<sup>16</sup> *Sandra Davis*, 50 ECAB 450, 454 (1999).

<sup>17</sup> *Jane Doe*, 49 ECAB 646, 649 (1998).

who paid the wages, the implication that a claimant was a federal employee cannot be drawn solely from the fact that his or her salary was derived from a fund to which the federal government contributed.<sup>18</sup>

### ANALYSIS

Appellant filed a claim alleging that she was entitled to receive survivor's benefits from the Office due to the July 16, 2003 death of her husband while he was employed in Uganda with the CDC. The Office denied appellant's claim for survivor's benefits on the grounds that the deceased was a contractor with the CDC rather than an employee within the meaning of the Act at the time of his death. In accordance with the Board's June 13, 2005 decision, the Office conducted further development of the factual evidence. The Office denied appellant's claim for survivor's benefits on the grounds that the deceased was a contractor rather than an employee within the meaning of the Act at the time of his death.

The Board notes that there still is insufficient documentation in the record to make a reasoned determination regarding whether the deceased was an employee within the meaning of the Act at the time of his death. As noted above, the question of whether a person is an employee of the United States or an independent contractor is ultimately a question of fact to be decided on an individual basis to include consideration of such factors, *inter alia*, as the right of control of the work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job and the intention of the parties.<sup>19</sup>

The Board notes that the record still does not contain a copy of the contract between the deceased and the CDC-Uganda, which governed the nature of the work performed by the deceased and the nature of the work relationship between the deceased and the CDC-Uganda. The record was supplemented to include a document entitled "justification and approval for other than full and open competition" and, while this document sheds some further light on the hiring of the deceased, a copy of the actual contract would provide an important source for obtaining an adequate understanding of the nature of the work performed by the deceased and the nature of the work relationship between the deceased and the CDC-Uganda. The contract could help to clarify such important matters as whether the CDC-Uganda had any right to control or direct how the work was to be performed, whether the deceased was allowed to offer services to the public during the contract period, whether the CDC-Uganda had the right to discharge the deceased at any time and how the CDC-Uganda determined the manner of payment for the deceased's services. Although the record contains documents which provide a suggestion of the types of

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<sup>18</sup> *Dennis G. Nivens*, 46 ECAB 926, 934 (1995).

<sup>19</sup> *See supra* notes 14 through 18 and accompanying text.



duties performed by the deceased, it would be helpful to have an accurate description of these duties so that it might be considered whether they are an integral part of the regular work of the CDC-Uganda.<sup>20</sup>

Moreover, the record does not contain any statements or information submitted by CDC-Uganda officials in connection with the Office's further development of the factual evidence after the case was remanded by the Board. Although a useful statement was submitted by Ms. Oddy, a supervisory human resources specialist for the CDC in Atlanta, the officials at CDC-Uganda were the officials, who developed the work relationship with the deceased and worked in conjunction with the deceased and therefore they would be in the best position to comment on the nature of his work and his work relationship with the CDC-Uganda. In particular, Dr. Mermin, the Director of the CDC-Uganda and Mr. Rasmussen, the Deputy Director of the CDC-Uganda, would likely have important information to provide about these matters, particularly with regard to the nature of the work to be performed and the extent to which CDC-Uganda officials had the right to control how the work was performed.<sup>21</sup> The record contains several ambiguous statements from CDC officials regarding whether the deceased was intended to be a contractor or an employee and it would be helpful to obtain further statements from CDC-Uganda officials in this regard.

In addition, Ms. Oddy raised some matters in her August 3, 2005 statement, which require further clarification. For example, she asserted the deceased had weekly meetings with Mr. Rasmussen at which the deceased would present his plans and Mr. Rasmussen would approve or disapprove of the submitted plans. Without further details regarding these ostensive meetings, it is difficult to obtain a clear picture of the relative extent to which the deceased and CDC-Uganda officials had control over work-related decisions. Ms. Oddy suggested that the deceased's work contract for the CDC-Uganda would not have been extended if he had survived beyond the expiration of the contract. However, given the apparent extensive nature of the deceased's activities, it is unclear whether the CDC-Uganda intended to retain the deceased beyond the expiration of his contract. Ms. Oddy asserted that the deceased worked for other U.S. Government and non-U.S. Government entities during the contract period, but she did not provide further details regarding this statement and the source of her assertion remains unclear.<sup>22</sup>

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<sup>20</sup> See *supra* note 15. The record contains a March 2003 purchase order, which provides some indication of the deceased's work including such duties as providing administrative and technical support to a home-based AIDS care study, providing supervision and advice for quality control oversight of renovation and building activities, overseeing the completion of three ongoing construction projects, providing advice regarding procurement of radiological equipment and helping to establish procedures for monitoring and evaluating electrical and other systems. The March 2003 purchase order also indicated that the deceased was to perform other tasks as assigned by Dr. Mermin and the assistant director of operations and it would be helpful to obtain additional information regarding this matter as it would be relevant to the question of the extent to which the CDC-Uganda retained control over the deceased's work.

<sup>21</sup> The Office generally addressed its June 21, 2005 development letter to the CDC-Uganda and the extent of its attempts to obtain information from CDC-Uganda officials is unclear.

<sup>22</sup> Ms. Oddy did not explain how this assertion comported with her comment that the deceased's consulting duties appeared to "constitute a full-time position."

Under the Act, although it is the burden of an employee to establish his or her claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>23</sup> Therefore, the case should be remanded to the Office for further development of the factual evidence regarding the question of whether the deceased was an employee within the meaning of the Act at the time of his death. After such development it deems necessary, the Office should issue an appropriate decision regarding the deceased's employment status and the validity of appellant's claim for survivor benefits in accordance with the relevant standards for such determinations.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether the Office properly denied appellant's claim for survivor benefits on the grounds that the deceased was not an employee within the meaning of the Act at the time of his death. The case should be remanded to the Office for further factual development to be followed by an appropriate decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 9, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: June 19, 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

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<sup>23</sup> *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).