United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	**Docket No. 07-302**
	)	**Issued: April 26, 2007**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Columbus, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2006 appellant filed a timely appeal from the May 15, 2006 merit decision of the Office of Workers' Compensation Programs, which denied compensation for a fractured right radius. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's decision. The Board also has jurisdiction to review the Office's August 14, 2006 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether the fractured right radius appellant sustained on November 26, 2005 was a compensable consequence of her accepted employment injury; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On March 29, 2003 appellant, then a 31-year-old supervisory transportation security screener, filed a claim alleging that her right wrist condition was a result of her federal

employment: "Handling luggage, right wrist swelling has lasted [two] weeks with limited mobility." The Office accepted her claim for right wrist tenosynovitis, right joint derangement, enthesopathy of the right wrist/carpus and enthesopathy unspecified. The Office authorized surgical repair. On March 29, 2005 appellant underwent an extensor carpi ulnaris debridement of the right wrist and reconstruction of the distal radial ulnar joint with the insertion of four pins. The Office accepted a postoperative infection. Appellant received compensation for temporary total disability and was placed on the periodic rolls.

On December 5, 2005 appellant called the Office to advise that she was in a motor vehicle accident on November 26, 2005. The Office's memorandum noted:

> "The Saturday after Thanksgiving she had an accident in a store parking lot and the airbag opened and rebroke her wrist completely. [Appellant] stated that the surgeon at the ER set her wrist but would n[o]t do surgery because he said it would n[o]t have broken if it were n[o]t for the work injury and pins."

On November 30, 2005 Dr. Gary Millard, appellant's attending family practitioner, reported that x-rays of the distal radius showed some continued slight osteoarthritic changes with an oblique fracture at the metaphyseal/diaphyseal junction of the radius with the fracture extending through one of the previous pin sites. He addressed the relationship of this fracture to appellant's previous injury:

> "[Appellant] is concerned about the positioning of the fracture that did occur at the site of one of her pin sites and wants to know if this would have happened if she had not had a previous surgery there. I think that the fact that she has had the previous surgery and the fact that this does extend through one of the pin sites, would suggest that there certainly is some relationship between the previous injury to her wrist and this injury that she incurred today. [sic]"

On December 1, 2005 appellant underwent an open reduction and internal fixation of the right radial shaft. X-rays showed an oblique fracture to the mid distal third of the radius extending through one of the pin sites from her previous reconstruction surgery. X-rays also showed some fairly significant osteopenia with the distal radius.

In a decision dated May 15, 2006, the Office denied appellant's claim that her fractured radius was due to her accepted work injury. The Office noted that the circumstances of the motor vehicle accident were personal and had nothing to do with her federal employment. Appellant was in a private vehicle on private property and was hit head-on by another vehicle.

On June 9, 2006 appellant requested reconsideration. She submitted a May 24, 2006 report from Dr. Millard:

> "To help out with this claim and further explanation and to help explain further why I thought this fracture did occur and was directly related to her previous injury, the fracture did occur through one of the pin sites. A pin site is a hole through the bone that is an area of weakened bone. The fracture did go through the pin site and the areas of weakened bone and this means that there is still some weakness within the bone secondary to the patient's first procedure. The fact that

the fracture did go through the pin site indicates again that the bone was weakened in this area and I think this is a direct relationship to earlier work claim and earlier work[-]related injury."

In a decision dated August 14, 2006, the Office denied appellant's request for reconsideration. The Office found that the request was untimely and failed to present clear evidence of error. This appeal to the Board followed.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] While the initial employment injury must arise out of and in the course of the claimant's federal employment,[2] later nonindustrial injuries may also be compensable.

Thus, it is an accepted principle of workers' compensation law that a second, nonindustrial injury is compensable if it is the direct and natural result of an earlier compensable injury. Where a claimant sustains an accident as a consequence of a condition residual to a previous industrial injury, it is deemed because of the chain of causation to arise out of and in the course of employment.[3] Once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances.[4]

[1] 5 U.S.C. § 8102(a).

[2] *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *Howard S. Wiley*, 7 ECAB 126 (1954).

[4] *Robert W. Meeson*, 44 ECAB 834 (1993). Unreasonable exertion is not an issue. The Office made no finding that appellant engaged in activity that was unreasonable or rash under the circumstances. *See Robert J. Wescoe,* 54 ECAB 162 (2002) (finding that it was unreasonable for the claimant to play volleyball while on medical restrictions after he had been advised that he was prone to further shoulder dislocations); *Clement Jay After Buffalo*, 45 ECAB 707 (1994) (in which the claimant reinjured his knee playing basketball directly against medical advice only 24 hours after obtaining that advice); *John R. Knox*, 42 ECAB 193 (1990) (finding that basketball was not a reasonable activity, given the claimant's knowledge of the left knee condition). In these cases, the Board held that because the triggering activity for the second injury was itself rash in light of the claimant's knowledge of his condition, the second injury could not be deemed to have arisen out of the employment, but rather was the result of an independent intervening cause attributable to the claimant's own intentional conduct.

ANALYSIS -- ISSUE 1

Appellant did not allege that her employment injury caused the November 26, 2005 motor vehicle accident or that her fractured radius was the natural progression of her tenosynovitis, joint derangement or enthesopathies or a medical complication of such conditions. Clearly, an independent nonindustrial cause intervened to produce the subsequent injury. The real operative factor here was the motor vehicle accident and release of the airbag, not the progression of the compensable injury. That the force of the airbag acted upon a previously weakened site does not turn the fracture into a direct and natural result of the accepted employment injury. The fracture instead remains a direct and natural result of the motor vehicle accident. That one of the pin sites offered a path of least resistance to the fracture should not obscure the fact that an independent nonindustrial cause intervened in appellant's life to trigger the subsequent injury.

The Board finds that the fractured right radius appellant sustained on November 26, 2005 is not a compensable consequence of her accepted employment injury. This is not a medical determination. This is a legal determination based on the facts of the case that an independent nonindustrial cause intervened to break the chain of causation. Because an intervening factor arising independent of her federal employment caused the subsequent injury, the Board will affirm the Office's May 15, 2006 decision denying compensation.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[5]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[6]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[7] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these three standards. If reconsideration is granted, the case is reopened and the case is

[5] 20 C.F.R. § 10.605 (1999).

[6] *Id*. at § 10.606.

[7] *Id*. at § 10.607(a).

reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[9]

ANALYSIS -- ISSUE 2

Appellant's June 9, 2006 request for reconsideration is timely. She made this request only three weeks after the Office's May 15, 2006 decision to deny compensation for her fractured right radius. The Office, therefore, should have determined whether appellant presented evidence or argument that meets at least one of the three standards noted above. The Office instead applied the standard reserved for untimely requests, namely, whether appellant's application presented clear evidence of error in the Office's May 15, 2006 decision. This is a higher standard of review not warranted by the circumstances of the case.

The Board will, therefore, set aside the Office's August 14, 2006 decision denying reconsideration and will remand the case to the Office for application of the proper standard of review and for an appropriate final decision on appellant's June 9, 2006 request for reconsideration.[10]

CONCLUSION

The Board finds that the fractured right radius appellant sustained on November 26, 2005 was not a compensable consequence of her accepted employment injury. An independent nonindustrial cause intervened to produce the fracture, thereby breaking the chain of causation. The Board also finds that the Office applied the wrong standard of review in denying appellant's June 9, 2006 request for reconsideration.

[8] *Id*. at § 10.608.

[9] *Id*. at § 10.607.

[10] After appellant filed her appeal with the Board on November 14, 2006, the Office issued a decision on the merits of her case on November 20, 2006. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990) the Office's November 20, 2006 decision, issued while the Board had jurisdiction over the same issue, is null and void.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The Office's August 14, 2006 decision is set aside and the case remanded for further action consistent with this opinion.

Issued: April 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board