

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

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P.S., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Las Vegas, NV, Employer )

**Docket No. 13-370  
Issued: November 12, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 6, 2012 appellant filed a timely appeal from the August 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and the October 19, 2012 nonmerit decision of OWCP. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to rescind its acceptance of appellant's claim; and (2) whether it properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On May 1, 2003 appellant, then a 39-year-old transportation security screener, filed a Form CA-1, traumatic injury claim, alleging that he sustained an injury on Thursday, May 1, 2003 at 11:35 a.m., when he twisted his right ankle and fell while exiting his car in the remote parking lot of McCarran International Airport. Traci Kudron, appellant's supervisor, stated that his regular work tour was from 1:00 p.m. to 9:30 p.m., Monday through Thursday, as directed. She stated that appellant's claimed injury did not occur in the performance of duty because it occurred while he was in an airport parking lot on his way to work.

OWCP initially accepted appellant's claim for lumbar disc herniation at L4-5. On September 2, 2004 appellant underwent OWCP-authorized surgery, including a lumbar discography at L3-4, L4-5 and L5-S1. OWCP expanded its acceptance of his claim to include lumbar disc displacement at L4-5 without myelopathy, lumbar spinal stenosis, thoracic and lumbar neuritis/radiculitis, postlaminectomy syndrome, disruption of internal operative wound, pulmonary insufficiency following surgery, other disorder of penis, other psychogenic pain, acute renal failure, acidosis and chronic airway obstruction. Appellant stopped work on the date of injury and returned to work later in 2003. He sustained a recurrence of disability on May 14, 2006 and did not return to work. Appellant received total disability compensation on the periodic rolls.

On January 4, 2011 appellant underwent a dural repair of a presumed cerebrospinal leak, posterior exploration and fusion at L4-5 and L5-S1 and posterior hardware removal at L5-S1. The procedures were authorized by OWCP.

In a statement dated April 7, 2011, Michael Cylke, a workers' compensation program manager for the employing establishment, requested that OWCP cease paying compensation to appellant. He noted that the employing establishment had recently received new information that the parking lot where appellant was injured on May 1, 2003 was not owned, leased, managed, operated, supervised, controlled or maintained by the employing establishment. Mr. Cylke pointed out that appellant was hurt at 11:35 a.m. on May 1, 2003, but that his shift did not begin until 1:00 p.m. Therefore, the employing establishment concluded that appellant was not on-duty at the time of May 1, 2003 accident and he did not sustain an injury in the course of employment.

Mr. Cylke attached an e-mail he received on April 4, 2011 from Dan Busch, the airport parking manager for the Clark County Department of Aviation at McCarran International Airport, who had reviewed old e-mails and found that in 2003 employing establishment screeners were parking on the east side of the "old" economy parking lot that was located on Russell Road. The public also used this parking lot but the areas used by the public and by screeners were separated by a row of concrete barriers. Mr. Busch stated that in April 2002 Larson's Van Service performed shuttle services from the parking lot for the benefit of the employing establishment and that by April 2003 or sooner Bell Trans was performing this service.

On May 20, 2011 OWCP requested additional evidence, including proof that the parking lot where appellant fell on May 1, 2003 was not owned or managed by the employing

establishment and evidence showing what entity or entities owned and managed it. The employing establishment was asked to submit, if available, maps or diagrams showing the boundaries of the premises and the location of the injury site in relation to the premises. OWCP requested that appellant's supervisor explain the reason for appellant's presence at the parking lot at 11:35 a.m. on May 1, 2003, instead of his starting time of 1:00 p.m.

In a June 9, 2011 statement, Mr. Cylke noted that he was attaching e-mails which demonstrated that all parking lots at McCarran International Airport belonged to the Clark County Department of Aviation. This had been the case since the employing establishment was established at the airport in 2002. Mr. Cylke further noted that the Clark County Department of Aviation clearly explained that the employing establishment never owned, leased, managed, operated, supervised, controlled or maintained any parking lot at the airport. Maps showing the parking lot where appellant fell on May 1, 2003 were not available as it no longer existed due to the construction of a new airport terminal. Mr. Cylke noted that appellant's immediate supervisor at the time of the May 1, 2003 accident no longer worked at the airport for the employing establishment. Appellant contacted him on June 7, 2011 and advised that he volunteered "off the clock" to come to work early on May 1, 2003 in order to gather documents for his shift, including sick call lists and sign-in forms and to deliver them to his worksite. He advised that he did so in order to show his motivation to advance in the employing establishment and asserted that he was an unofficial "lead" screener. Mr. Cylke noted that an attached copy of a sign-in document showed that appellant did not sign in early on May 1, 2003.

In an attached June 3, 2011 e-mail, Mark Habersack, senior risk management analyst for the Clark County Department of Aviation, responded to a request from Mr. Cylke to submit a map or other evidence showing what entity owned the parking lot where appellant fell on May 1, 2003. He stated, "I would not have anything from back in 2003 that I can give you, however, all our parking lots at McCarran International Airport were and are still owned and operated by the Clark County Department of Aviation .... As you are aware the Clark County [Department of Airport] is not affiliated with the [employing establishment] and the [employing establishment] does not operate, own or maintain any parking lots here at McCarran International Airport." An attached document entitled "daily manning" for May 1, 2003 contains appellant's signature and indicates that his regular work hours were from 1:00 p.m. to 9:30 p.m. Four coworkers were listed as lead screeners, but appellant was not listed as a lead screener.

In a September 26, 2011 letter, OWCP proposed to rescind its acceptance of appellant's claim and terminate his wage-loss compensation and medical benefits. It noted that new evidence established that he did not sustain an injury in the performance of duty on May 1, 2003. The evidence showed that the parking lot where appellant fell was not owned or controlled by the employing establishment and that he was neither required nor authorized to come to work early on May 1, 2003 to perform additional duties as an unofficial lead screener. OWCP stated that it was unreasonable to assume that appellant was performing his federal employment duties an hour and a half prior to the beginning of his work shift on May 1, 2003. Appellant was allowed 30 days to submit additional evidence or argument.

In an October 24, 2011 letter, counsel contended that appellant was injured in the performance of duty on May 1, 2003. Appellant was working as a standards, operations and procedures (SOP) trainer and acting lead screener at the time of injury and the parking lot where

he fell was where all the employing establishment employees were told to park. In an attached October 4, 2011 statement, he noted that he regularly arrived at work early because his supervisors allowed him to act as an SOP trainer. Appellant would stop at the office to retrieve shift paperwork, such as attendance sheets, management summaries and absentee and call-out sheets and take these materials to the shift supervisor's office. He used the time prior to his regular shift to read SOP manuals that he would in turn teach to coworkers after 1:00 p.m. Appellant also had the responsibility to read about sexual harassment rules and to ensure that coworkers on his shift understood and signed off on these rules. He stated, "This is what I performed every day." Appellant noted that he was not allowed to sign in early unless management approved of overtime and that his supervisors told him that coming in early was "strictly volunteer." His supervisors also told him they would advise upper management of the extra responsibilities he accepted in hopes that he would advance within the employing establishment as a result. Appellant stated that the "other volunteer jobs" he performed as an acting lead screener included taking charge of multiple screening lines, calibrating explosives trace detection machines, rebooting x-rays machines and calculating walkthrough numbers for security lanes. Regarding the parking lot where he fell on May 1, 2003, he stated that all the employing establishment employees (except perhaps management) were assigned to park at the remote parking lot on Russell Road and then shuttled to the airport. Appellant identified several of the supervisors with whom he had worked.<sup>2</sup>

In a February 10, 2012 decision, OWCP rescinded its acceptance of appellant's claim and terminated his entitlement to wage-loss compensation and medical benefits effective February 10, 2012. It found that he was not performing required work duties when he was injured on May 1, 2003. OWCP stated, "The evidence of record fails to establish that the claimant was in fact performing his [employing establishment] screener duties at the time he was injured. Therefore, the claimant has failed to establish that he was in the performance of duty when he was injured."

Appellant requested a hearing before an OWCP hearing representative. At the June 4, 2012 hearing, he testified that he regularly arrived at work early because he was an acting lead scanner. Appellant reiterated that he retrieved shift paperwork and call-out sheets, gave these materials to his supervisor, read the SOP manuals and instructed other employees about such matters. He performed such tasks daily in 2003 as a volunteer lead scanner and kept a log of his work activities beginning on April 22, 2003. Appellant asserted that his immediate supervisor was aware of his daily volunteer work, but was never provided with written confirmation of his role as a volunteer lead scanner. He signed in only for the period covering his regular work shift since he was never asked to sign in for his volunteer time by a supervisor and there was no sign-in sheet for that purpose. Appellant was only allowed to sign in for hours outside his regular work shift if management approved overtime work. He testified that he parked in the same remote parking lot each workday because his supervisor told him to park there. There was no other location where appellant could park as an employee. He stated that he did not have to pay for parking in the remote lot and that a shuttle took him from the lot to his worksite.

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<sup>2</sup> In a letter to counsel, appellant indicated that Mr. Cylke advised him that none of these supervisors were still employed by the employing establishment.

After the hearing, counsel submitted a June 27, 2012 brief. He reiterated that appellant was injured in a parking lot controlled by the employing establishment while he was in the course of his employment. In a June 27, 2012 letter, Mr. Cylke again advised that the remote lot where appellant fell on May 1, 2003 was owned and controlled by the Clark County Department of Aviation. He argued there was no evidence to support appellant's assertion that he was an unpaid acting lead screener on May 1, 2003.

In a letter of recommendation dated January 12, 2003, Eugene Lucio, an agency checkpoint supervisor, stated that appellant had worked under his supervision as a screener since November 2002. He noted that appellant "has been assigned by me to take on the role of lead screener on a regular basis" and recommended that he be promoted to the position of lead screener or supervisor. In a January 24, 2003 letter, Don Harand, assistant federal security director of screening at the employing establishment, commended appellant for a compliment made by a passenger about his job performance.

In a June 23, 2003 memorandum, Robyn Kauffman, a supervisor, nominated appellant for screener of the month noting that he had taken the lead position on his lane several days a week. In a January 10, 2004 memorandum, Mark C. Schay provided a recommendation for appellant's promotion to the position of lead screener. He had worked with appellant for the prior six months and noted that appellant had volunteered himself every day for the position of acting lead screener.

In a memorandum dated January 21, 2004, Mr. Callen recommended that appellant be considered for the position of screener supervisor. He noted that he had supervised appellant on a number of different shifts since September 2003 and noted that appellant accepted temporary lead screener and supervisor assignments and performed his duties in an outstanding manner.

Appellant submitted a handwritten daily log for various dates between April 22 and June 26, 2003. The entries included that he read the SOP manuals on April 29, 2003, taught the SOP manuals on April 30, 2003 and read the SOP manuals on May 4, 2003. In the entry for May 1, 2003, appellant indicated that he twisted his ankle in the remote parking lot and that, after going to the first aid station, he was sent home at 1:00 p.m.

In an August 6, 2012 decision, OWCP's hearing representative affirmed the rescission of appellant's claim and the termination of his compensation benefits effective February 10, 2010. Although the parking lot where appellant fell on May 1, 2003 belonged to the Clark County Department of Aviation, the use of the lot by employees pursuant to the employing establishment management placed it within the employment premises. Appellant, however, did not establish that his presence on the premises at 11:35 a.m. was incidental to his work. The hearing representative modified and affirmed the February 10, 2012 decision to reflect that appellant was on the employing establishment's premises at the time of the May 1, 2003 injury, but that the rescission of the acceptance of his claim was proper because he was not on the clock or performing work duties incidental to his employment at the time of the accident.

On September 26, 2012 appellant requested reconsideration of his claim. In an undated statement, he contended that he was working as an unpaid volunteer lead screener on the morning of May 1, 2003. Appellant advised that workers who were on the premises prior to the

start of their shift only needed to sign in if overtime work was approved. He stated that he never asked for compensation for his volunteer work.

In an August 3, 2012 statement, in which, Mr. Callen stated that appellant frequently came to his shifts early to calibrate equipment and perform other supervisory and administrative duties. He stated that there were many occasions when appellant would manage checkpoints when he was called away or performed other managerial duties. Mr. Callen noted that appellant was not the only person that he trained to be a “temporary lead screener” or “acting supervisor.”

Appellant submitted an undated letter to Senator John McCain that disagreed with OWCP’s August 6, 2012 decision and continued to argue that he worked as an acting lead screener. In an August 20, 2012 letter, Senator McCain requested that OWCP investigate appellant’s claim. Appellant also submitted a number of documents which had been previously submitted and considered by OWCP, including an October 2011 personal statement and several letters of recommendation from prior supervisors.

In an October 19, 2012 decision, OWCP denied appellant’s reconsideration request without merits review of his claim.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>3</sup> The Board has upheld OWCP’s authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>4</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>5</sup>

Workers’ compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, it is required to provide a clear explanation of the rationale for rescission.<sup>6</sup>

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”<sup>7</sup> The

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<sup>3</sup> 5 U.S.C. § 8128.

<sup>4</sup> *John W. Graves*, 52 ECAB 160, 161 (2000).

<sup>5</sup> *See* 20 C.F.R. § 10.610.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> 5 U.S.C. § 8102(a).

phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.”<sup>8</sup> The phrase “in the course of employment” is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master’s business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.<sup>9</sup>

As to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from lunch, before or after working hours or at lunch time, are compensable.<sup>10</sup> The Board notes, however, that the occurrence of an incident on the employing establishment premises which leads to an injury is not sufficient, in itself, to give rise to coverage under FECA as the employee must show not only that the injury encompasses the work setting but also that the employment caused the injury.<sup>11</sup> The course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts and what constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the employee’s activity.<sup>12</sup>

The employing establishment’s premises include property owned by the employing establishment as well as property over which the employing establishment exercises control. The Board has pointed out that factors which determine whether a parking lot used by employees may be considered a part of the employing establishment’s premises include whether it contracted for the exclusive use by its employees of the parking area, whether the parking lot was checked for unauthorized vehicles, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether parking was provided without cost to the employees, whether the public was permitted to use the lot and whether other parking was available to the employees.<sup>13</sup> The premises doctrine is applied to those cases where it is

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<sup>8</sup> *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

<sup>9</sup> *Mary Keszler*, 38 ECAB 735, 739 (1987).

<sup>10</sup> *Robert W. Walulis*, 51 ECAB 122 (1999).

<sup>11</sup> *See Howard M. Faverman*, 57 ECAB 151 (2005).

<sup>12</sup> *See William W. Knispel*, 56 ECAB 639 (2005); *Venicee Howell*, 48 ECAB 414 (1997); *Dwight D. Henderson*, 46 ECAB 441 (1995); *Arthur A. Reid*, 44 ECAB 979 (1993); *Nona J. Noel*, 36 ECAB 329 (1984). *Compare John F. Castro*, Docket No. 03-1653 (issued May 14, 2004) with *George E. Franks*, 52 ECAB 474 (2001). In cases concerning what constitutes a reasonable interval before or after work, the Board has been influenced by the activities engaged in by the employees before or after work. In *Howell*, the Board found coverage when the employee was injured five minutes after work while performing the incidental task of submitting a job bid. However, in *Noel*, the Board denied coverage when the employee was injured 90 minutes before work while engaging in the personal activity of eating breakfast.

<sup>13</sup> *Roma A. Mortensen-Kindschi*, 57 ECAB 418 (2006); *Diane Bensmiller*, 48 ECAB 675 (1997).

affirmatively demonstrated that the employing establishment owned, maintained or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.<sup>14</sup>

In *T.F.*,<sup>15</sup> the employee sustained injury when she tripped on a loose floor tile some 25 minutes before her work shift began at 6:00 a.m. She was on the premises of the employing establishment in the vicinity of her work cubicle. The Board affirmed the denial of compensability under the statute, noting that the reasons given by the employee for her early arrival at work included being able to find a good parking place, drink coffee, eat breakfast and put her lunch away. The activities in which she was engaged at the time of injury were found personal to her and not reasonably incidental to the work of the employing establishment. Moreover, the Board noted that the employee presence at the premises some 25 minutes prior to the commencement of her work shift did not constitute a reasonable interval under the circumstances. The employee's presence was not required by the employing establishment and did not pertain to preparatory activities reasonably incidental to her employment as a tax examiner.

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP presented sufficient evidence and argument to support rescission of appellant's claim for a May 1, 2003 work injury. This evidence establishes that appellant was not in the performance of duty at the time of injury.

The evidence reveals that the remote parking lot where the May 1, 2003 injury occurred was part of the employing establishment premises. The employing establishment directed appellant to park in the lot and a part of the lot was separated by concrete barriers for the exclusive use of its employees. Appellant did not have to pay to park in the designated lot and there was a free shuttle van to take the employing establishment employees from the designated lot to their duty stations in the terminals. There was no other parking area at McCarran International Airport where the employing establishment employees were designated to park. Although the parking lot property was owned by the Clark County Department of Aviation, the use of the lot by employing establishment employees pursuant to management instructions placed the lot within the premises of the employing establishment. The facts of the present case are in contrast with cases such as *Roma A. Mortensen-Kindschi*,<sup>16</sup> where the parking lot in which the employee sustained injury was deemed to not be part of the employing establishment premises. In that case, the parking lot where the accident occurred was not exclusively limited to employing establishment employees and there were other places in which the employee could park. Therefore, OWCP properly determined that site of the May 1, 2003 accident was on the employer's premises.

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<sup>14</sup> *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

<sup>15</sup> Docket No. 09-154 (issued July 16, 2009).

<sup>16</sup> See *supra* note 13.



The Board further finds that OWCP relied on evidence which establishes that, despite occurring on the premises, the May 1, 2003 injury did not arise in the performance of duty. As noted, the occurrence of an incident on the employing establishment premises which leads to an injury is not sufficient, in itself, to give rise to coverage under FECA as the employee must show not only that the injury encompasses the work setting but also that the injury occurred a reasonable interval before or after official working hours while he or she was on the premises engaged in preparatory or incidental acts. What constitutes a reasonable interval before work depends on both the length of time involved and the circumstances occasioning the interval and the nature of the employee's activity.<sup>17</sup>

The Board finds that May 1, 2003 accident did not occur at a reasonable interval before the start of work while appellant was engaged in preparatory or incidental acts. Appellant was injured at 11:35 a.m. on May 3, 2003, a time that was 85 minutes prior to the regular start of his work shift which began at 1:00 p.m. In *T.F.*,<sup>18</sup> the employee sustained injury when she tripped on a loose floor tile some 25 minutes before her work shift began at 6:00 a.m. She was on the premises of the employing establishment, but the Board affirmed OWCP's denial of compensability noting that the employee arrived early to work for personal reasons and her presence was not required by the employing establishment and did not pertain to preparatory activities reasonably incidental to her employment. In the present case, appellant's accident occurred at a substantially longer interval prior to the start of the workday than was the case in *T.F.*, and as will be discussed below, the evidence does not show that appellant was performing his regular or specially assigned duties or that he was engaged in preparatory or incidental acts when he sustained his accident.

The Board finds that appellant was not performing his regular or specially assigned work duties or other preparatory or incidental acts at the time of the accident on May 1, 2003, because he did not show that he was working as an unpaid, volunteer lead screener or otherwise carrying out actions incidental to his work on the morning of his injury. Appellant testified that he signed in on May 1, 2003 only for his regular hours but that he was working as a lead screener prior to that time. However, the record does not contain sufficient evidence to establish that he was working as an unpaid, volunteer lead screener on May 1, 2003. The sign-in sheet for May 1, 2003 showed four employing establishment employees designated as "leads," but appellant was not among them.<sup>19</sup> Appellant submitted several statements in which former supervisors noted that he served as an acting lead screener or temporary supervisor under their direction. However, none of these former supervisors indicated that he served as a volunteer lead screener during the hours prior to his regular sign-in time of 1:00 p.m., let alone that he performed such duties on May 1, 2003. For example, Mr. Callen indicated in a January 21, 2004 statement that since September 2003 appellant had accepted temporary lead screener and supervisor assignments. He did not state that these accepted duties involved voluntary actions performed prior to the start of the regular workday. Nor did Mr. Callen identify appellant's actions on May 1, 2003. In fact, the content of the statements of Mr. Callen and the other supervisors suggest that their references

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<sup>17</sup> See *supra* note 12.

<sup>18</sup> See *supra* note 15.

<sup>19</sup> The sheet showed that appellant signed in for his regular shift from 1:00 p.m. to 9:30 pm.

to lead screener activities related to activities that occurred during appellant's regular work shift.<sup>20</sup> Appellant submitted personal logs in which he recorded instances that he either read the employing establishment's SOP manuals or instructed coworkers in the use of the manuals, but the logs do not provide any indication that he served as a volunteer lead screener on the morning of May 1, 2003.

The evidence does not show that appellant's presence on the employing establishment's premises on May 1, 2003 at 11:35 a.m., *i.e.*, 85 minutes prior to his regular starting time of 1:00 p.m., was incidental to his employment. On appeal, appellant continued to argue that he was working as a volunteer lead screener on the morning of May 1, 2003, but the evidence of record does not support this assertion. For these reasons, the injury that occurred on May 1, 2003 did not occur at a reasonable interval before and after his official working hours while he was engaged in preparatory or incidental acts.

Therefore, OWCP explained how the evidence showed that any injury appellant sustained on May 1, 2003 did not occur in the performance of duty. It properly rescinded its acceptance of his claim and terminated wage-loss compensation and medical benefits effective February 10, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>21</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>22</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>23</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>24</sup> The Board has held that the submission of evidence

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<sup>20</sup> In a January 10, 2004 memorandum, Mr. Schay stated that he had worked with appellant for the last six months and noted that appellant had volunteered himself every day for the position of acting lead screener. He did not indicate that appellant performed such work prior to the start of his regular work shift or that he did so on May 1, 2003.

<sup>21</sup> Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.606(b)(2).

<sup>23</sup> *Id.* at § 10.607(a).

<sup>24</sup> *Id.* at C.F.R. § 10.608(b).

or argument which repeats or duplicates evidence or argument already in the case record<sup>25</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>26</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>27</sup>

### ANALYSIS -- ISSUE 2

OWCP issued a decision on August 6, 2012 rescinding its acceptance of appellant's claim and terminating his wage-loss compensation and medical benefits. Appellant requested reconsideration of this decision on September 26, 2012.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. In a statement supporting his reconsideration request, he continued to argue that he was working as an unpaid volunteer lead screener on the morning of May 1, 2003. However, this statement was similar to previously submitted statements which were considered by OWCP. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>28</sup> A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence in this case. Appellant submitted an August 3, 2012 statement in which Mr. Callen stated that he frequently came to his shifts early to calibrate equipment and perform other supervisory and administrative duties.<sup>29</sup> While this evidence is new, it is not relevant to the main issue of the present case, *i.e.*, whether OWCP properly determined that appellant was not in the performance of duty when he fell on May 1, 2003 such that rescission of acceptance of his claim was justified. Mr. Callen's statement is not relevant because he did not provide any comment on appellant's activities on the morning of May 1, 2003 when he fell in a parking lot 85 minutes prior to the start of his regular shift at 1:00 p.m. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.

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<sup>25</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>26</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>27</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>28</sup> *See supra* note 25. Appellant also submitted an October 2011 personal statement and several letters of recommendation from prior supervisors, but these documents had been previously submitted and considered by OWCP.

<sup>29</sup> Mr. Callen indicated that there were many occasions when appellant would manage checkpoints when he was called away or performed other managerial duties and that he was not the only person that he trained to be a "temporary lead screener" or "acting supervisor."

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim. The Board further finds that it properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 19 and August 6, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 12, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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