

RECEIVED JUN -5 2006

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JUN 28 2006

Date of Injury: 7/8/05
Employee: JOEY DAVIS

JOEY DAVIS
206 SHELL DR
CRESTVIEW, FL 32536

Dear Mr. Davis:

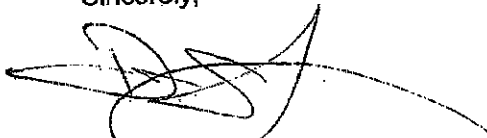
This is in reference to your workers' compensation claim. Pursuant to your request for a Hearing, the case file was transferred to the Branch of hearings and Review.

A Hearing was held on March 31, 2006. As a result of your Hearing, it has been determined that the decision issued by the District Office should be set aside, and the case remanded to the District Office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6
LONDON, KY 40742-8300

Sincerely,



David Leach
HEARING REPRESENTATIVE

US DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
PERSONNEL OFFICER
FEDERAL PRISON CAMP
EGLIN AFB, FL 32542

PAUL FELSER, ESQ
7 EAST CONGRESS ST, SUITE 400
PO BOX 10267
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of Joey J. Davis, Claimant; Employed by the US Department of Justice, Bureau of Prisons, at Eglin Air Force Base in Florida; Case number 062145273.

Hearing was held on March 31, 2006 in Atlanta, GA. Based on this Hearing; the Decision of the District Office dated October 24, 2005 is hereby set aside, and the case remanded for further action, for the reasons set forth below:

The issue for determination is whether the claimant sustained a work-related injury in the performance of duty, as alleged.

The claimant is employed as Maintenance Worker Foreman for the Bureau of Prisons. On July 8, 2005, the claimant filed a timely form CA-1 "Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation" alleging that he injured his back earlier that day when he pushed some equipment at work. The claimant stopped working at that time. The employer did not dispute the claim, but indicated there were no eyewitnesses to the alleged event.

The initial medical documentation of record received by the District Office in support of the claim consisted of a note from C. W. Koullisis, MD, dated July 18, 2005, with an indication that the claimant could return to light duty at that time.

On September 12, 2005, the Office sent a letter to the claimant requesting that he supply medical evidence from a qualified physician supporting that he had sustained a medical condition as a result of his federal employment duties on July 8, 2005. This letter also requested that the claimant supply a written statement with additional details concerning the facts surrounding the claim. The claimant was asked to supply a description of any prior similar medical conditions, and statements from witnesses who may have witnessed his injury. The claimant was afforded 30 days to supply the requested evidence.

The Office received a report from Dr. Koullisis dated August 17, 2005, which indicated that the claimant was suffering from degenerative lumbar disk disease L4-5, status post L5-S1 posterior fusion. It also indicated the claimant had undergone an awake lumbar discogram on August 11, 2005. Dr. Koullisis indicated that the claimant had been scheduled for an L4-5 anterior discectomy interbody fusion.

On October 24, 2005, the Office issued a formal denial of the claim, which included a Notice of Decision explaining the basis for this action. The Office made a finding that, although the claimant had established that the incident at work had occurred, and that he was suffering from a back injury, the medical documentation of record did not

support a relationship between the claimant's federal work and the injury identified by his physician.

The claimant disagreed with this decision and requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. Accordingly, an Oral Hearing was scheduled for March 31, 2006. At the Hearing, the claimant was represented by Attorney Paul Felser. The claimant's wife and mother were present at the hearing as well. The employer did not send a representative to observe.

At the Hearing, Attorney Felser argued that the claimant had suffered a work-related aggravation of his pre-existing condition. He indicated that the claimant had sustained several back injuries at work, and that the work performed by the claimant is "heavy duty" work. There is no light duty available at the claimant's workplace. Attorney Felser indicated that he would be supplying additional medical documentation, post-hearing, from the claimant's physicians, which support the claim.

The claimant testified that he began his career as a Correctional Officer. He then moved into a training position, and finally, into maintenance. He noted that basically, no matter what position he held, they all essentially included the duties of a Correctional Officer, which involved restraining prisoners. The claimant described his work as very physically demanding, including digging ditches, cleaning, lifting and moving heavy equipment. The claimant was also a member of the Special Operations Response Team (SORT) which the claimant described as kind of like a SWAT team. The claimant was required to do physical training, firearms training and self-defense training, which involved tumbling, tossing, blocking, handholds, and martial arts movements. The claimant also trained in CPR and first aid. He had to be physically fit and ready to respond to an emergency situation at a moment's notice.

The claimant described an approximate 12-year history of back injuries. He alleged that he was first injured in 1994 as a member of the SORT running and obstacle course. The claimant had a strenuous day of physical training, including a three-mile run and prisoner restraint exercises. After he had run the course, the claimant was doing exercises and noticed he had injured his back. He alleged that this injury was a herniated disc L4/5 that resulted in surgery in late 1994. The claimant eventually got back to full duty, but still had residual aches and pain in his back. The claimant indicated that there is no light duty at his workplace. He had to perform full duty if he was to work. The claimant described another occupational back injury in February of 1995. When he bent over to pick up a stack of trays, he twisted, and felt a pop in his back. The claimant was out of work for a few days, but then went back to full duty again. The claimant indicated that he filed a claim for this injury, which was accepted. He had nagging aches and pains, but had to put up with it. He had another injury in 1997 when he was moving a crate full of printer paper from beneath a desk at work and felt a pop in his back. Again, the claimant took a few days off work and went back to full duty. At this time, he began to control his back pain with prescription pain medication, which he had not been doing prior to that time. He filed a claim, which was accepted. By 2000, the claimant was taking 100 mg of Oxycodone per day to control his pain. He was in horrendous pain, so he sought another medical opinion. Additional surgery was recommended, and undertaken. He underwent an L4/5 fusion and permanent insertion of rods in his back. The claimant did not file a claim for that because he felt it was too much of a hassle. The claimant then weaned himself off the pain medication for the

most part and returned to full duty. From that point on, the claimant worked at the Prison as a Landscape Foreman, which still included his Correctional Officer duties. He was in charge of plumbing. He had to keep up his physical training. The claimant's pain got worse again and he started back on the pain medication. On July 8, 2005, the claimant was at work preparing for a hurricane, moving equipment. He felt pain in his back after pushing an "easy go" which he described as a big golf cart, on wheels, weighing about 1200 pounds. The claimant pushed this equipment up a hill. Afterward, he knew he'd done something to his back, so he went into the office to lie down, and called his supervisor. He then filed a CA-1 for a traumatic work injury. The claimant testified that since that date, his back is such that he is unable to perform the heavy duties required by his position. He has been unable to work since and has been under the regular care of Dr. Kunis.

Attorney Felser argued that this progression of work-related injuries caused a permanent worsening of the claimant's pre-existing spinal condition. He indicated that, after the Hearing, he would submit qualified medical evidence in support of this.

On the record, the claimant's mother testified that, following the injury, the claimant was home, out of work, barely functioning, and on narcotic medications. She spent days trying to find a physician that would treat his as a workers' compensation patient. She testified that the claimant is truly disabled and unable to do anything physical, or even enjoy time with his family.

In closing, Attorney Felser argued that the claimant's need for surgery was also due to his work-related injury, and that the claimant was also suffering from significant emotional difficulties due to the effects of his work injury. The claimant is having difficulty coping with his physical disability, and the medication he is on contributes to his depressed state.

At the end of the Hearing, Attorney Felser requested that the record be held open to give him an opportunity to submit additional medical reports in support of the claim, as he had described. His request was granted, and the record held open for 30 days. Following the Hearing, both the claimant and his employer received a copy of the official transcript, and their comments were invited.

After the Hearing, additional materials were received to the record. A letter from Attorney Felser dated May 31, 2006, restated his arguments for acceptance of the claim as he had presented at the Hearing. Also, medical reports from Dr. C. W. Kunis dated November 18, 2005 and February 16, 2006 were received, along with a report from Anthony Mork, MD, dated January 18, 2006.

In these recent reports, Dr. Kunis opined that the claimant's work incident of July 8, 2005 apparently aggravated his ongoing spinal condition, which had waxed and waned in the previous years. Dr. Kunis described the work-related aggravation as a more permanent and non-temporary in nature, aggravation of a prior non-surgical intervention level at L3-4 and post operative L4-5 disc (degenerative discs.) Dr. Kunis also noted radicular symptoms to the right leg, and indicated that the claimant had been disabled from work since the injury occurred. In his report, he offered a very detailed and accurate history of the claimant's injury and progression of his back condition from 1994 to the present, including prior surgery.

Upon review of the evidence of file, I find that the case is not in posture for a decision at this time with regard to the issue of whether the claimant sustained a work injury in the performance of duty, as alleged. The evidence provided by the claimant is not sufficient to meet his burden of proof; however, it is sufficient to warrant further development of the claim on the part of the Office before a final decision on this issue can be reached.

A person who claims benefits under the FECA has the burden of establishing the essential elements of his or her claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specified conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence based upon a complete factual and medical background showing causal relationship. The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relationship between the two. Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.¹

In this instance, the claimant has identified an injury to his back having occurred at work on July 8, 2005 that has been established as factual according to the evidence of record. The claimant reported this injury right away and there is no evidence of record refute his claim that this incident occurred in the time, place and manner alleged. The injury described by the claimant is certainly competent to cause a back injury, was clearly within the performance of his regular assigned work duties, and his symptoms following this incident were noted to be acute and severe. The claimant has been out of work since the incident. The claimant has admitted that he had a pre-existing back injury, but has also alleged that his back condition was periodically aggravated by incidents sustained in the course of his federal employment from 1994 to the present, and that his back was asymptomatic prior to that time. Numerous medical reports of record support the claimant had a pre-existing back injury to the July 8, 2005 incident, which necessitated spinal surgery that was not authorized as work-related. At this time, however, the claimant has asserted that his prior work injuries and heavy physical labor at work precipitated his need for surgery.

The file contains numerous medical reports supporting that the claimant suffers from long-standing significant spinal injuries. Although these conditions appear to be pre-existing, the claimant has alleged that his work duties aggravated these medical conditions, along with the incident of July 8, 2005. The claimant's physician, Dr. Kunis of the Microspine Surgery Center, has submitted an uncontroverted medical opinion that the claimant's federal duties over the course of time, along with several prior work incidents and the injury of July 8, 2005, permanently aggravated the degenerative process in the claimant's spine. Even though Dr. Kunis' statement is largely unrationalized, I find that it, along with the evidence of file, establishes a *prima facie*

¹ Steven R. Piper, 39 ECAB ___ (1987);

claim that requires further development of the medical evidence by the Office.² The Board has held that proceedings under the FECA are not adversarial in nature nor is the Office a disinterested arbiter; that while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence and has the obligation to see that justice is done.³ In this instance, given the strength of the evidence provided by the claimant thus far in support of the claim, including an uncontested medical opinion from a specialist supporting that his medical condition is work-related, it would be appropriate at this time for the Office to seek an opinion from an independent medical examiner specifically addressing the issue of causal relationship, and supplying the medical rationale required by the Office for adjudication of the claim.

In this instance, the claimant has alleged a work-related aggravation of a pre-existing condition, and the burden of proof concerning the medical evidence that must be provided is very specific: the rationalized medical opinion must include a discussion of the nature of the underlying conditions; their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of appellant's underlying conditions caused by factors of his or her employment caused disability during or subsequent to appellant's employment.⁴

Furthermore, it must be noted that it is not necessary for the employment injury, by itself, to have caused appellant's condition, in order for it to be compensable. It needs only to have contributed to it. Where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment related for purposes of compensation under the Act.⁵

In conclusion, the claimant has submitted evidence sufficient to warrant further development of the claim before a decision concerning entitlement can be reached. Upon return of the case record to the District Office, in accordance with established Office procedures, a Statement of Accepted Facts should be prepared, and the claimant referred for a directed examination with a Board-Certified independent medical examiner

² While the testimony of appellant's physician was not sufficient to discharge her burden of proof, this testimony, together with the findings of fact accepted by the Office constituted a sufficient basis to require further development of the evidence. The Board noted that there was no medical evidence of record refuting causal relationship. Appellant's case was therefore remanded for further development. *Udella Billups*, 41 ECAB (Docket No. 89-1561 issued November 29, 1989).

³ *Lawamae Heard*, 42 ECAB (Docket No. 91-0276, issued June 5, 1991).

⁴ *Newton Ky Chung*, 39 ECAB (1988).

⁵ *Arnold Gustafson*, 41 ECAB (Docket No. 89-0438 issued October 30, 1989).

in the appropriate specialty. The Statement of Accepted Facts should contain a factual history of the claimant's work injury on July 8, 2005, along with a physical description of the claimant's various jobs held at the Federal Prison, and descriptions of any prior work-related spinal injuries. The Office should also ensure that, if appropriate, any prior claims for spinal injury are administratively "doubled together" with the present case, in accordance with instructions found in the *FECA Procedure Manual*, Chapter 2, Section 400-8 "Doubling Case Files."

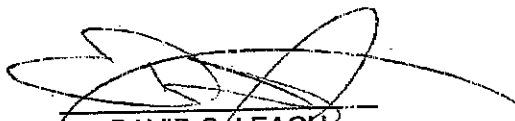
The independent medical examiner should be specifically asked to address whether the claimant's established federal work duties and/or incident of July 8, 2005 aggravated the claimant's pre-existing spinal disease, or caused any other identifiable injury. The examiner should also be asked to address whether the claimant's occupational duties or incidents contributed to the need for surgery. It should be made clear to the independent examiner that it is not necessary for the employment alone to have caused the claimant's medical conditions for them to be work-related. In order for these conditions to be compensable, the work needs only to have contributed to these conditions in some meaningful way. The independent examiner should also be advised that his opinion should include rationale to support any conclusions given, and this must include a discussion of the nature of the underlying conditions; their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon the claimant's removal from the employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of the claimant's underlying conditions caused by factors of his employment caused disability during or subsequent to his employment.

If the independent examiner opines that the claimant is not suffering from a work-related injury, or that the claimant's work duties did not contribute to his medical conditions, then medical rationale should also be supplied to support this opinion.

Once the independent medical examiner's report is received and reviewed, the Office should undertake any other development of the case it deems necessary, and issue a *de novo* decision on the issue of whether the evidence establishes that the claimant sustained a work-related injury due to federal work duties, as alleged.

For the reasons set forth above, the Office's decision of October 24, 2005 is hereby SET ASIDE, and the case file is REMANDED to the District Office for actions consistent with this decision.

Dated: JUN 28 2006
Washington, D.C.


DAVID S. LEACH
Hearing Representative
for
Director, Office of Workers'
Compensation Programs