United States Department of Labor
Employees' Compensation Appeals Board

S.W., claiming as widow of R.W., Appellant	)	
and	)	**Docket No. 05-1398**
	)	**Issued: August 5, 2009**
DEPARTMENT OF DEFENSE, NATIONAL IMAGERY & MAPPING AGENCY, Arnold, MO, Employer	)	

Appearances:
Charles L. Wiest, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 21, 2005 appellant filed a timely appeal from a July 1, 2004 merit decision of the Office of Workers' Compensation Programs denying her claim for death benefits.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she is entitled to death benefits under 5 U.S.C. § 8133.

FACTUAL HISTORY

On November 11, 2002 appellant, widow of the deceased employee, filed a claim for death benefits. She asserted that the employing establishment committed malpractice responding to the employee's heart attack.

[1] The appeal was originally dismissed by order dated November 1, 2005. The appeal was later reinstated by order of the Board.

In an accompanying statement, appellant related that at 9:45 a.m. on November 13, 2000 a contractor who worked for the employing establishment, Russ Coleman, found the employee lying on the ground of the parking lot. Bill Brown, an employee, joined them. She related:

> "[The employee] was bloody from his fall, had urinated on himself and had difficulty standing. Mr. Brown went to a nearby building and asked secretary Eileen Sinnwell to call the guards. She did so and the guard to whom she spoke stated that help was on the way. When the guard arrived, Mr. Brown told him that [the employee] showed the signs of having suffered a heart attack and 911 EMS [emergency medical services] should be called. The guard said that Security had been notified and that a nurse from the dispensary had to authorize EMS help.
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> "While all waited for the nurses to arrive, [the employee's] condition worsened. When the nurses arrived, they failed to provide proper medical assistance. For example the oxygen apparatus did not work, the tank was essentially empty. The nurses did not note that the air in a second oxygen tank was exhausted. IV [intravenous] equipment was left in the dispensary and when one of the nurses went to retrieve it, she could not locate all components. One of the nurses attempted CPR [cardiopulmonary resuscitation] but was unable to perform it. A tracheal tube was improperly inserted. A bystander took this function over. The nurses did not promptly initiate defibrillator action. When it was started the nurse failed to note when an AED [automated external defibrillator] shock was advised.
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> "Even after the nurses authorized the calling of an EMS unit, the request was not promptly communicated to St. Louis dispatch. The EMS unit arrived about 45 minutes after [the employee] was found in the parking lot suffering from an apparent heart attack."

Appellant noted that the employee was alive when EMS arrived on the scene at 10:31 a.m. but died at 10:54 a.m. when he reached the hospital.

An incident/complaint form report dated November 14, 2000 noted that David P. Boyet, a shift supervisor, called 911 for appellant at 10:15 a.m.

In a statement received on December 20, 2002, appellant alleged that the actions of the employing establishment constituted negligence. She related:

> "There was and is a public policy by federal agencies, in light of the correlation between rapid intervention in cardiac incidents and the probability of survival, to timely summon EMS systems, while implementing available interventions. The [investigation] states that at the time of the [employee's] cardiac incident [the employing establishment] purportedly had a 'policy' that nurses had to call 911 when they were on duty. The documents produced by [the employing establishment] under FOIA [Freedom of Information Act] do not support this. A document called 'Cardiac Emergencies,' in fact advises that 911 should immediately be transported to the hospital."

Appellant asserted that security was informed of the employee's condition at 9:45 a.m. but that the nurse "did not authorize the calling of an ambulance until 10:05 a.m."

A November 28, 2000 death certificate indicated that the employee died on November 13, 2000 of arteriosclerotic heart disease.

On December 29, 2000 the employing establishment performed an internal assessment of the November 13, 2000 death of the employee. Christopher S. Azar and James L. Akers stated:

> "911 was requested early in the process, at approximately 10:04 hours, by a Security Officer on the scene, via radio to the Security Control Room in Building 36. [Employing establishment] policy requires a nurse to approve 911 requests, if a nurse is on duty at the time of an emergency. This information, and the fact that a nurse was on the way to the scene, was communicated to the scene. The nurse did request 911 within seconds of her arrival; however, it appears that the initial call to 911 was not made and had to be requested again at approximately 10:15 hours."

They noted that it was not known what caused the employee to fall. Messrs. Azar and Akers concluded that the treatment provided by the nurses was adequate for a workplace environment and that they brought sufficient medical supplies to the site. They further related:

> "The request by the nurse for an ambulance via 911, and the results, are less apparent. The nurse is certain she requested an ambulance within seconds of her arrival on the scene of the accident. She also recalls the Security Officer stating over the radio that the nurse was requesting an ambulance. The Supervisory Guard in Building 36 monitoring the overall situation states he did not receive a call from the scene for 911, other than the original call prior to the nurses arrival. He called 911 at approximately 1015 hours, after hearing radio traffic about the expectations of an ambulance arrival.
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> "The assessment can only conclude that the chaos of the moment, and the highly charged emotional atmosphere of the emergency, resulted in unclear communication. It appears this call for an ambulance, authorized by the nurse, was made by radio but not received or confirmed."

Messrs. Azar and Akers recommended that the employing establishment "immediately change the procedure to allow the guard force, or the workforce, the discretion to call 911 in an emergency at any time of the day, whether nurses are available or not."[2]

By decision dated March 11, 2003, the Office denied appellant's claim on the grounds that she did not establish that the employee's death was due to his federal employment. It noted that there was no evidence that the employee was engaged in an activity connected to his

[2] In a report dated March 3, 2003, Dr. Enique F. Toro, a Board-certified internist, related that he had been treating the employee since 1991. He attributed the employee's death to "coronary arteriosclerosis as per his autopsy report which could produce sudden death."

employment at the time he was ill. The Office further determined that he was not covered under the human instincts doctrine.

On April 8, 2003 appellant, through her attorney, requested an oral hearing.[3] At the hearing, held on December 10, 2003, the attorney argued that the matter should be considered under the Federal Tort Claims Act. He noted that he had filed a tort claim to preserve appellant's appeal rights.

On January 30, 2004 appellant's attorney submitted a memorandum asserting that the Federal Employees' Compensation Act did not apply "to the circumstances of [the employee's] death." He further contended that the Office failed to consider that the employing establishment's policy prohibiting any employee or security personnel to contact 911 unless authorized by a nurse constituted a condition of employment and thus brought the employee within the scope of coverage. The attorney stated:

> "[The employing establishment's] enactment and enforcement of a policy which delays the calling of needed 911 personnel with certifications to perform EMS services and procedures until authorized by a nurse was a condition of employment, presumably promulgated to further some perceived [employing establishment] business purpose, under which [the employee] was required to work. As such this prohibition is no different than the coal miner whose employment terms and conditions limited his prompt access to the proper level of emergency care or the worker who could not receive help because communications and transportation between the work site and the source of emergency care were destroyed for a reason related to employment. The delay in calling effective 911 emergency services for [the employee] was because of the regulation, obviously a reason related to his employment…. The regulation caused [the employing establishment] to withhold medical treatment from [the employee] by not timely calling 911, even though it was patent that he needed immediate transport to the hospital."

The attorney noted that the Board's initial application of the human instincts doctrine occurred in *Mildred Drisel*,[4] which cited a New Jersey case, *Dudley v. Victor Lynn Lines, Inc.*[5] In *Dudley*, the Board noted that the court found that, if conditions of employment contributed to a condition otherwise unrelated to employment, the injury could be found to arise out of employment. The attorney contended that appellant did not have to show negligence on behalf of the employing establishment as the delay in calling 911 resulted from a condition of employment. He also argued that the requirement that a nurse rather than an employee or guard telephone 911 was negligence *per se*.

[3] In a statement dated March 17, 2003, the employing establishment related that it was a normal practice for employees to walk on their break.

[4] 32 ECAB 82 (1980).

[5] 32 N.J. 479, 161 A. 2d 479 (N.J. 1960).

In a report dated January 30, 2004, Dr. Arthur S. Leon, a Board-certified internist, reviewed the factual and medical evidence of record. He stated:

> "My opinion remains that failure of his employer to promptly contact the EMT [Emergency Medical Technicians] to provide medical support and transportation to a major medical center diminished his opportunity to survive a heart attack. The employee was observed by a fellow employee and a security guard to be experiencing symptoms clearly recognized by even these lay individuals to be strongly suggestive of a heart attack at about 9:45 a.m., about a half hour before there is any documentation that the EMT was successfully contacted (*i.e.*, 10:17 a.m.). Part of this delay was due to an [employing establishment] policy that only allows a[n] agency nurse to authorize a call for a[n] EMT, such as requested by a security guard at 9:50 a.m. Thus, a window of opportunity was lost for definitive medical care to be provided that might have saved his life."

Dr. Leon described emergency treatment for heart attacks and asserted that "[t]hese potentially life saving procedures would have been administered about 10:12 a.m. when [the employee's] heart was still functioning if he had been promptly transported to the Medical Center." He reiterated his conclusion from a prior report that with prompt care the employee would have had "at least a 50 percent chance of surviving...."

By decision dated July 1, 2004, a hearing representative affirmed the March 11, 2003 decision. He found that there was no evidence that the employing establishment acted negligently in providing assistance to the employee.

LEGAL PRECEDENT

The United States shall pay compensation for the death of an employee resulting from personal injury sustained while in the performance of duty.[6] An appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his or her federal employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based on a proper factual and medical background.

An injury or death arises out of employment if it is causally related to the employment. The fact that a contributing cause of the injury or death was unrelated to the employment is not sufficient to exclude coverage if the employment was also a contributing factor.[7]

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.[8]

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[6] 5 U.S.C. § 8102(a).

[7] *Allern M. Winters*, 16 ECAB 551 (1965).

[8] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

ANALYSIS

The employee died at work on November 13, 2000 as a result of a nonemployment-related heart condition. His spouse filed a claim for death benefits alleging that the employing establishment acted negligently in aiding the employee at the time of his myocardial infarction. The Office denied the claim after finding that the employing establishment did not act negligently under the human instincts doctrine. Under the "human instincts" doctrine, adopted by the Board in *Mildred Drisdel*,[9] an employing establishment's negligence in rendering or procuring assistance for an employee may constitute a factor of employment, and if the employee establishes that any such negligence caused or aggravated the condition or which compensation is claimed, he may establish entitlement to compensation.[10]

The Board finds that the case does not need to be analyzed under the human instincts doctrine as the rule requiring a nurse to contact 911 rather than allowing security or coworkers to seek emergency assistance constituted a factor of employment, which contributed to the employee's death. In *Allern M. Winters*, the Board held:

> "An injury or death 'arises out of the employment if it is causally connected to the employment. It does not matter that one of the contributing causes of the injury or death was a disease or condition unrelated to the employment as long as the employment was also a contributing factor,' and 'whenever conditions attached to the place of employment or otherwise incidental to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment.'"[11]

The Board finds that the employing establishment's policy that a nurse must approve any 911 request constituted a condition of employment, which resulted in a delay in the employee's obtaining needed medical treatment. On November 13, 2000 at 9:45 a.m. Mr. Coleman, a contractor, and Mr. Brown, a coworker, found the employee lying in the parking lot in distress. Mr. Brown sought assistance from a guard and requested that he contact 911. The guard responded that he had notified security but that a nurse had to authorize a call for emergency medical services. A nurse authorized a 911 call that was dispatched at approximately 10:15 a.m. During this period of time the employee's condition deteriorated. An internal assessment conducted by the employing establishment on December 29, 2000 recommended that the employing establishment "immediately change the procedure to allow the guard force, or the workforce, the discretion to call 911 in an emergency at any time of the day, whether nurses are available or not."

The remaining issue is whether the delay in obtaining medical treatment contributed to the employee's death. In a report dated January 30, 2004, Dr. Leon found that the employing establishment's delay in contacting emergency medical technicians reduced the employee's chance of surviving. He noted that a security guard requested an EMT at 9:50 a.m. but that the

[9] 33 ECAB 409 (1982).

[10] *Id*.; *see also Jerry L. Sweeden*, 41 ECAB 721 (1990).

[11] *Allern M. Winters*, *supra* note 6 (citing *Dudley v. Victor Lynn Lines, Inc.*, 32 N.J. 479 , 161 A.2d 479 (1960)).

call was not made until 10:12 a.m. It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and that, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[12] Although Dr. Leon's opinion does not provide sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that the employee's death resulted from factors of his federal employment, his opinion raises an uncontroverted inference of causal relationship sufficient to require further development by the Office.[13] The case will, therefore, be remanded to the Office for further development of the medical evidence to determine whether factors of employment caused or contributed to the employee's death. After such further development as the Office deems necessary, it shall issue a *de novo* decision.[14]

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 1, 2004 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 5, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[12] *Allen C. Hundley*, 53 ECAB 551 (2002)

[13] *Phillip L. Barnes*, 55 ECAB 426 (2004); *John J. Carlone*, 41 ECAB 354 (1989).

[14] In view of the Board's disposition of the merits, it need not address the arguments of appellant's attorney on appeal that the employing establishment violated the human instincts doctrine in failing to provide adequate and timely treatment to the employee.