

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

D.M., Appellant

and

**FEDERAL DEPOSIT INSURANCE
CORPORATION, OFFICE OF THE
INSPECTOR GENERAL, Atlanta, GA, Employer**

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**Docket No. 08-2353
Issued: July 9, 2009**

Appearances:

Lawrence Berger, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument March 18, 2009

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2008 appellant filed a timely appeal of a July 24, 2008 decision of the Office of Workers' Compensation Programs' rescinding its acceptance of his claim for a left leg injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to rescind its December 20, 2007 acceptance of appellant's claim for a left leg injury on November 3, 2007.

FACTUAL HISTORY

On November 29, 2007 appellant, then a 34-year-old special agent (criminal investigator) filed a claim for a traumatic injury alleging that he sustained a left leg injury on November 3, 2007. On that date he was in a restaurant with a friend when he observed what appeared to be a theft in progress. Appellant witnessed an individual remove a purse from the

back of a chair and injured his left leg while apprehending the suspect.¹ On December 20, 2007 the Office accepted his claim for a left acromioclavicular (AC) tear, chondromalacia of the left patella, and a loose body in the knee.

By letter dated January 15, 2008, Brian Yellin, Esq., Assistant Director of the Facilities Operations Section at the Federal Deposit Insurance Corporation (FDIC) stated that appellant was not in the performance of duty on November 3, 2007 when he sustained his left leg injury. He stated, under section 4(a)(5) of Appendix 3 of the Inspector General Act (IG Act),² the criminal jurisdiction of an Office of the Inspector General (OIG) criminal investigator is specifically limited to “the administration of programs and operations administered or financed by such establishment....”

In appellant’s case the employing establishment is the FDIC OIG and he was authorized in section 6(e)(1) of the IG Act, to carry firearms and to make warrantless arrests of persons committing a federal offense in his presence. Appellant had these law enforcement duties and powers while engaged in official duties as authorized under the IG Act or another statute, or as expressly authorized by the Attorney General.

An IG special agent may also seek and execute warrants for arrest, search of a premises or seizure of evidence issued under the authority of the United States upon probable cause that a violation has been committed. Mr. Yellin stated that the IG Act does not confer any authority on an OIG special agent to enforce the criminal laws of a state or the District of Columbia, even if on official duty.

Mr. Yellin noted that the Federal Law Enforcement Officer’s Good Samaritan Act of 1998 which amended the Federal Tort Claims Act to expand the circumstances under which the Federal Government may allow itself to be substituted as a defendant in place of a federal law enforcement officer. The Good Samaritan Act does not expand the authority of OIG special agents to cover the enforcement of nonfederal criminal law nor does it expand the definition of work relatedness for purposes of claims under the Federal Employees’ Compensation Act. Mr. Yellin noted that appellant’s job description did not indicate that FDIC OIG criminal investigators would be considered to be acting within the scope of their employment under the Federal Employees’ Compensation Act if they perform good samaritan acts on or off duty.

On February 15, 2008 a telephonic conference was held in which an Office claims examiner and representatives of the employing establishment and appellant participated. Issues regarding the November 3, 2007 incident and performance of duty were discussed. The claims examiner allowed time for appellant and the employing establishment to provide additional evidence.

In a March 4, 2008 letter, Michael Cosgrove, Esq., Associate Counsel to the Inspector General of the employing establishment, advised the Office that criminal investigators employed

¹ The record shows that the theft appellant observed was staged by a television network and the “suspect” was an actor.

² See 28 U.S.C. § 2671 (Federal Tort Claims Act), Appendix 3.

by various federal OIGs do not have general criminal law enforcement authority even regarding federal crimes. As a criminal investigator for the FDIC, appellant is statutorily limited to investigating federal crimes in which the FDIC is a victim or in which financial institutions insured by the FDIC are victimized. Typically these crimes involve fraud, theft or embezzlement. On November 3, 2007 appellant was off duty and attempting to make a warrantless arrest of an individual he believed to be a thief who had stolen a purse from a member of the public.

Mr. Cosgrove noted that appellant had submitted a portion of the FDIC OIG Policies and Procedures Manual which mentioned the Good Samaritan Act. He reinforced the position of the employing establishment that the language of the Good Samaritan Act did not expand upon the investigative or enforcement authority created by the IG Act.

On March 28, 2008 the Office issued a proposed notice to rescind its acceptance of appellant's claim for a left leg injury on November 3, 2007. The additional evidence received by the Office established that appellant was not in the performance of duty on November 3, 2007 when he injured his left leg while apprehending a suspected thief. Appellant was off duty, not at his normal workplace, and was on personal business. The employing establishment advised that his authority as an FDIC criminal investigator was limited to the investigation and arrest of individuals committing a crime against the FDIC or an FDIC insured financial institution. The Office determined that the Good Samaritan Act was enacted to shield a law enforcement officer from litigation not to expand the statutory jurisdiction of a law enforcement officer.

In a May 15, 2008 letter, appellant through his representative, appellant alleged that he was in the performance of duty pursuant to *United States of America v. Daniel Reid and Theodore Thomas*, 517 F.2d 953 (1975).³ In *Reid* a federal DEA agent was off duty getting a haircut when he observed a robbery in process at a liquor store. Appellant asserted that he acted in a similar manner when he apprehended the suspected thief on November 3, 2007 and therefore he was in the performance of duty for purposes of under the Federal Employees' Compensation Act coverage.

In a July 10, 2008 letter, Mr. Cosgrove stated that the facts in the *Reid* case were distinguishable from the facts in appellant's case because the DEA policy manual imposed a duty to take reasonable action to respond to state law violations involving felonies or violent misdemeanors whether on or off duty. Under the IG Act and as FDIC OIG special agent, appellant was limited to investigating crimes in which the FDIC or a financial institution insured by the FDIC was a victim. Unlike the DEA policy manual, the FDIC OIG manual does not expand the more limited authority of OIG agents. Appellant is not authorized to enforce state laws against theft of individual personal property.

³ This Second Circuit Opinion does not address the application of the Federal Employees' Compensation Act to the off-duty actions of an OIG special agent. It affirms the criminal convictions of two defendants who were convicted of assaulting a federal officer with a deadly weapon when they shot an off-duty Drug Enforcement Administration (DEA) special agent during a hold-up. The agent was attempting to arrest the defendants when he was shot and the defendants were accused of violating 18 U.S.C. S 111 which made it a federal offense to assault a federal agent "while engaged in or on account of the performance of his official duties." On appeal, defendants argued that the DEA agent had been off duty and was attempting to enforce the laws of the city and State of New York rather than any federal statute. The Appeals Court held that the assault fell within the federal offense charged.

On July 24, 2008 the Office made final its rescission of its December 20, 2007 acceptance of appellant's claim for a left leg injury on the grounds that the injury on November 3, 2007 was not sustained in the performance of duty.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation on his or her own motion or on application.⁴ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ 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.⁶ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.⁷

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁸ The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers compensation laws, namely, "arising out of and in the course of employment."⁹ "In the course of employment" relates to the elements of time, place and work activity. 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 his employer's business, at a place when he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. As to the phrase "in the course of employment," the Board has accepted the general rule of workers compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours or at lunch time, are compensable.¹⁰

⁴ 5 U.S.C. § 8128.

⁵ V.C., 59 ECAB ____ (Docket No. 07-642, issued October 18, 2007); *Shelby J. Rycroft*, 44 ECAB 795, 803 (1993); see *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

⁶ V.C., *supra* note 5; *Kevin J. McGrath*, 42 ECAB 109, 120 (1990).

⁷ V.C., *supra* note 5; *John W. Graves*, 52 ECAB 160, 161 (2000).

⁸ 5 U.S.C. § 8102(a).

⁹ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

¹⁰ *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

ANALYSIS

On March 28, 2008 the Office advised appellant that it proposed to rescind the acceptance of his claim for a left leg injury because, following acceptance of the claim, it learned from the FDIC, that on November 3, 2007 he was not on duty, was not at his workplace and was not performing any duty of his employment or doing something incidental thereto. The record shows that appellant was in a restaurant when he witnessed what he believed to be a theft of a purse, chased the suspect and injured his leg while apprehending the suspect.

Appellant did not challenge the factual information provided by the FDIC that appellant's law enforcement authority was limited by statute to crimes against the FDIC or FDIC insured financial institutions. He did not dispute that the incident on November 3, 2007 did not involve a crime pertaining to the FDIC. On July 24, 2008 the Office made final its rescission its December 20, 2007 acceptance of appellant's claim for a left leg injury on November 3, 2007.

The Office concluded that the Good Samaritan Act, upon which appellant relied, did not establish that he was in the performance of duty under the Federal Employees' Compensation Act. The standards under the Federal Employees' Compensation Act differ from other federal statutes and the Office is not bound by the laws governing (or determinations of) other agencies.¹¹

Appellant also cited the opinion in the *Reid* case and argued that his position was like that of the DEA agent shot while trying to prevent a robbery and apprehend the perpetrators. The statute involved in the *Reid* case created a specific federal criminal offense for the act of assaulting a federal officer performing his, or her, duties. The purpose and effect of the Federal Employees' Compensation Act at issue here is far different. The analogy is tenuous, at best. The record of this case demonstrates that the scope of law enforcement authority vested in DEA agents is more general than that provided by the FDIC to its IG agents. This difference makes the *Reid* opinion even less apposite as a guide for the Board in determining appellant's eligibility for benefits under the Federal Employees' Compensation Act.

The Office's rationale for the rescission of its acceptance of appellant's claim for a left leg injury was that the acceptance was erroneously based on his assertion that his left leg injury on November 3, 2007 was sustained while he was in the performance of duty. In establishing that its prior acceptance was erroneous, it met its burden to provide a clear explanation of its rationale for rescission.

CONCLUSION

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's claim for a left leg injury on November 3, 2007.

¹¹ *James Robinson, Jr.*, 53 ECAB 417 (2002), *Michael A. Deas*, 53 ECAB 208 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2008 is affirmed.

Issued: July 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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