DOE-Flex Bulletin

The information contained in this Bulletin is intended for DOE-Flex Advisors and Coordinators in responding to questions. The information supplements the guidance in the ***Handbook on DOE-Flex*** *and will be incorporated in the handbook in the near future, at which time this Bulletin will expire and be removed from the* ***DOE-Flex*** *web site.*

No. 2 May 2000

Subject: Worker Injury While on a DOE-Flex Arrangement

This Bulletin responds to questions that have surfaced regarding DOE's liability for an injury to an employee while working at an alternative workplace, particularly at home. It is the position of the DOE Office of General Counsel that the case decision cited below should be relied upon as the prevailing administrative law at this time.

The Office of Workers' Compensation Programs (OWCP), Department of Labor (DOL) is responsible for determining whether an injury should be covered by the Federal Employees Compensation Act (FECA). The criteria for making that determination is found in Part 2 of the FECA Procedure Manual, which is available at http://www.dol.gov/dol/esa/public/regs/compliance/owcp/owcpcomp.htm. Click on the "The FECA Procedure Manual -- Part 2, Claims," then click on Chapter "2-0804 Performance of Duty," and, finally, click on Paragraph "5, Off Premises."

To date, DOL has issued one decision on a worker's claim for an injury sustained while working at home. That case decision is summarized as follows. The full decision is attached.

> A person with a flexiplace arrangement was working at home when the heater failed, making the house cold. She got hurt in the process of going to fix it. She filed a FECA claim. The hearing examiner found that the injury was in the course of employment.
>
> The Board reversed, upholding a preliminary ruling that:
>
> ...a home work environment is different from the traditional employment premises over which an employer may exercise complete control of the work environment and maintain safety to reduce the likelihood of workplace injury. As an outgrowth of the employer's control over the premises, the Personal Comfort Doctrine evolved to provide coverage to employees while injured on the premises when ministering to their personal comfort. The Assistant Branch Chief noted that while at home, the employee is responsible for maintaining his or her home in a safe manner, over which the employer has no control of hazards. For this reason the OWCP determined that only those injuries which occur while an employee is "actually performing his or her work at home" are considered to arise in the course

of employment. The Board notes that this policy determination conforms with the provisions of the Office's procedure manual of 1992 that the protection of the Act will not extend to an employee's home, unless injury is sustained while the employee is "performing official duties." '(Emphasis added)

Attachment

Attachment 1

U.S. DEPARTMENT OF LABOR
Employees Compensation Appeals Board

In the Matter of JULIETTA M. REYNOLDS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

1999 ECAB LEXIS 1614

Docket No. 97-695

CORE TERMS: flexiplace, furnace, duties, performing, workplace, comfort, Personal Comfort Doctrine, performance of duty, establishment, employing, work environment, right leg, coverage, erroneously, repair, manual, claimant, safe, time of injury, incidental, hematoma, stairway, Federal Employees' Compensation Act, complete control, provide coverage, reconsideration, ministering, industrial, reopened, evolved

August 13, 1999 Issued

PANEL: DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

OPINION:
DECISION and ORDER

The issue is whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's claim for hematoma of the right leg.

On January 16, 1996 appellant, then a 54-year-old revenue officer, filed a claim alleging that she sustained an injury on January 12, 1996. On that date, appellant was working at home when it started to get cold and the heat failed to come on when she adjusted the thermostat. Appellant contacted her husband, who advised her to telephone the oil company. She then telephoned the oil company and received instructions from a service agent on how to trip the furnace. Appellant indicated that she went to the basement where the furnace was located and, upon returning upstairs, fell on the stairway sustaining injury to her right leg and left foot.

Appellant submitted a Form CA-16, completed January 16, 1996 and authorizing her treatment by Dr. Linda Kormon, an internist. Dr. Kormon examined appellant that date and diagnosed contusions of the right leg and left toes and a hematoma of the right leg. She indicated that appellant was totally disabled [*2] pending referral for examination by Dr. C. Loy.

By letter dated February 1, 1996, the employing establishment controverted appellant's claim, contending that she was not in the performance of duty at the time of injury. The employing establishment noted that appellant worked at home under a flexiplace contract and that she had failed to immediately notify her manager that her flexiplace day had become interrupted by an emergency which impacted her ability to perform her official duties. The employing establishment noted that appellant was not directed to effect repairs to her furnace and that furnace repairs did not pertain to her official duties or serve the mission of the employing establishment.

In a March 20, 1996 response, appellant contended that she was not in violation of the flexiplace agreement and noted that if she had been working in her office at the time of the incident there would be no question as to coverage.

By decision dated April 1, 1996, the Office denied appellant's claim, finding that the January 12, 1996 injury did not arise in the performance of duty. The Office found that appellant had left her workstation to repair her furnace, thus deviating from the course [*3] of her employment for purely personal reasons which were not incidental to her employment.

On April 29, 1996 appellant requested an oral hearing before an Office hearing representative.

Upon review of the case record prior to scheduling a hearing, the Office hearing representative issued a July 17, 1996 decision which found that appellant sustained injury while in the performance of duty. The hearing representative determined that appellant was working at home under a flexiplace agreement and fell while ascending stairs to restore heat to her work environment. She found that appellant's injury was covered under the personal comfort doctrine in that she sustained injury while attempting to raise the temperature in her workplace to a comfortable level. n1 The hearing representative directed the Office, on return of the record, to accept appellant's claim for hematoma of the right leg and contusions.

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n1 Citing Conrad R. Debski, 44 ECAB 381 (1993)

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On October 30, 1996 the Office Assistant Branch Chief reopened appellant's [*4] claim for reconsideration under *5 U.S.C. 8128*(a) and vacated the July 18, 1996 decision of the Office hearing representative. He found that the hearing representative had erroneously accepted appellant's claim under an incorrect legal theory, noting that the personal comfort case relied upon by the hearing representative pertained to an injury which took place on the employing establishment's industrial premises. The Office distinguished the circumstances of appellant's injury, which took place on a day she was working at home under a flexiplace agreement. The Assistant Branch Chief stated:

"In the traditional type of workplace situation where work is only performed on the employer's premises, the employer can exercise complete control of the work environment and can maintain it in a safe manner so as to reduce the likelihood of workplace injuries. One of the legal consequences of providing employment under these circumstances is the 'personal comfort doctrine,' which has evolved to provide coverage under workers' compensation statutes for injuries that occur on the employer's premises while the employee is ministering to his or her personal comfort [*5] instead of engaging in activities that further the employer's business.

"However, some modern workplace situations, such as the flexiplace agreement by which the claimant in this case performed at least some of her work at home, are so radically different from the traditional workplace situation described above that legal concepts like the 'personal comfort doctrine' cannot be fairly applied to find coverage for injuries that occur under these circumstances due to the fact that it is the employee, not the employer, who is directly responsible for maintaining the work environment in a safe manner. As such, an injury sustained while the employee is maintaining the workplace environment at home instead of performing his or her actual work duties should not be considered the responsibility of the employer.

"As Professor Larson notes in his discussion of this topic at 18.31-34 of his treatise, 'it is no light matter to thrust upon an employer a new employment premises for whose hazards he is expected to be liable....' 1 A. Larson, The Law of Workmen's Compensation, 18.31 at p.4-[414] (1996). Therefore, the majority rule in the states is that only those injuries which occur while an employee [*6] is actually performing his or her work at home will be found to occur 'in the course of' the employment. See id. at 18.34 Accordingly, there is no flexiplace equivalent to the 'personal comfort doctrine' that can be used to extend coverage under the Federal Employees' Compensation Act to the claimant's January 12, 1996 injury sustained as a result of repairing her furnace at home." (Emphasis in the original.)

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's claim.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. Under such circumstances, the Office must establish either that its original determination was erroneous or that the employment-related disability has ceased. n2

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n2 Shelby J. Rycroft, 44 ECAB 795 (1993)

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In Eli Jacobs, n3 the Board upheld the Office's authority to reopen a claim at any time under the review power granted by section 8128(a) of the Federal Employees' Compensation Act. [*7] This section vests the Office with the discretionary authority to review a claim at any time on its own motion. The Board held that the Office's review power under section 8128(a) was not limited to reconsideration of final decisions which awarded, terminated, increased or decreased compensation. The Board stated, in relevant part, as follows: "Whether the claim resulted in an award of compensation or involves a final decision on a preliminary issue -- such as whether the claim was timely filed -- is irrelevant; no claim is immune from review under section 8128." n4 The Board held that under section 8128(a), the Office may at any time on its own motion open a claimant's case for review and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. n5

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n3 32 ECAB 1147 (1981)

n4 Id. at 1151

n5 Id

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The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in the manner provided by the compensation [*8] statute. n6 This holds true where, as here, the Office later decides that is has erroneously accepted a claim for compensation. To justify rescission of acceptance of a claim, the Office must establish that its prior acceptance was erroneously based on new or different evidence or through new legal argument and/or rationale. n7

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n6 See Elizabeth Pinero, 46 ECAB 123 (1994)

n7 See Carolyn F. Allen, 47 ECAB 240 (1995); Albert O. Gonzales, 46 ECAB 684 (1995); Laura H. Hoexter (Nicholas P Hoexter), 44 ECAB 987 (1993); Beth A. Quimby, 41 ECAB 683 (1990); Daniel E. Phillips, 40 ECAB 1111 (1989), petition for recon. denied, 41 ECAB 201 (1990)

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There is no factual dispute as to appellant's injury on January 12, 1996, sustained while she was ascending the basement stairway at her home after attempting to fix her furnace. The issue in dispute is a legal question concerning whether appellant was in the performance of duty at the time of injury.

The Office initially rejected appellant's claim for compensation on April 1, [*9] 1996 on the grounds that since she had left her home workstation to repair her furnace, she had deviated from the course of her employment for personal reasons not incidental to her federal employment. The April 1, 1996 decision of the Office was reversed on July 17, 1996 when an Office hearing representative determined that appellant's work at home under the flexiplace program included activities incidental to the ministration of personal comfort. On October 30, 1996 the Office reopened the claim for review and set aside the April 1, 1996 hearing representative's decision. The Office determined that the Personal Comfort Doctrine was erroneously applied by the hearing representative to the home workplace setting. The Office found that the Personal Comfort Doctrine extends only to the employing establishment premises and not the home environment when work is performed under a flexiplace program.

The Board notes that, under the standard set forth in Roseanna Brennan, n8 the Office has presented new legal rationale in support of its decision to reopen appellant's case and to justify rescinding acceptance of her claim based on its finding that the injury of January 12, 1996 did not arise [*10] in the performance of duty. In so doing, the Office adopted the position that the "Personal Comfort Doctrine," usually associated with an employer's industrial or business premises, will not extend to an employee's home under a flexiplace program. It is well established that in construing the Act, the Office has exclusive jurisdiction in the cases before it to decide all questions arising under the Act subject to review and final decision by the Board. n9 As the only limitation on the Office's authority is reasonableness, the Board in this case must determine whether the Office abused its discretion in making the policy determination that the Personal Comfort Doctrine does not apply to work at home under a flexiplace program. n10

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n8 41 ECAB 92 (1989), petetion for recon. denied, 41 ECAB 371 (1990)

n9 See Anneliese Ross, 42 ECAB 371 (1991). The Director of the Office is the designated representative of the Secretary of Labor with respect to the administration of the Act. Pursuant to *5 U.S.C. 8145* the Secretary of Labor has delegated responsibility for administering the provisions of the Act, except for *5 U.S.C. 8149* which pertains to the Employees' Compensation Appeals Board, to the Director and his or her designees: see 20 C.F.R. 10.2; see also Kenneth L. Pless, 45 ECAB 175 (1993)

n10 Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts; see Daniel J. Perea, 42 ECAB 214 (1990)

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The Office's procedure manual includes a discussion of off-premises injuries sustained by workers who perform service at home. n11 The procedure manual states:

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n11 Federal (FECA) Procedure Manual, Part 2 -- Claims, Performance of Duty, Chapter 2.804.5(f) (August 1992)

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"Ordinarily the protection of the Act does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations of this sort, the critical problem is to ascertain whether at the time of injury the employee was, in fact, doing something for the employer. The official superior should be requested to submit a relevant statement showing:

(a) What directives were given to or what arrangements had been made with the employee for performing work at home or outside usual working hours;

(b) The particular work the employee was performing when injured; and

(c) Whether the official superior is of the opinion the employee was performing official duties at the time of the [*12] injury, with appropriate explanation for such opinion." n12

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n12 Id.

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The procedure manual section was supplemented on June 5, 1998 when the Office issued FECA Bulletin No. 98-9 pertaining to the performance of duty at alternative work sites. While not applicable in this case, the Bulletin acknowledges that various federal agencies have experimented with programs which allow employees to perform work from locations other than the federal agency's premises. Such locations include "satellite" offices as well as the individual employee's home. The Bulletin provides:

"1. Employees who are directly engaged in performing the duties of their jobs are covered by the FECA, regardless of whether the work is performed on the agency's premises or at an alternative work site. There is no statement (such as a 'safety checklist') that can be signed by the employee to negate this coverage. As always, any affirmative defense of 'willful misconduct' must be substantiated by evidence that the employee disobeyed an order that was [*13] routinely enforced.

"2. However, when an employee is on property under his or her own control, activities which are not immediately directed towards the actual performance of regular duties do not arise out of employment. An employee who works at a desk at home removes himself or herself from the performance of regular duties as soon he or she walks away from that desk to use the bathroom, get a cup of coffee, or seek fresh air. The 'Personal Comfort Doctrine' does not apply and coverage cannot be extended for injuries which result from such activities."

The Bulletin notes that the environment in an employee's home is not under the employer's control and that the premises rule that applies when the employee is on property owned or maintained by the employer is not relevant to such conditions.

The Board finds that the Office's exercise of discretion in this case, to exclude the Personal Comfort Doctrine from situations in which an employee is performing work at home, does not conflict with the intent of the statute. In the October 30, 1996 memorandum, the Office Assistant Branch Chief explained that a home work environment is different from the traditional employment premises over which [*14] an employer may exercise complete control of the work environment and maintain safety to reduce the likelihood of workplace injury. As an outgrowth of the employer's control over the premises, the Personal Comfort Doctrine evolved to provide coverage to employees while injured on the premises when ministering to their personal comfort. The Assistant Branch Chief noted that while at home, the employee is responsible for maintaining his or her home in a safe manner, over which the employer has no control of hazards. For this reason the Office determined that only those injuries which occur while an employee is "actually performing his or her work at home" are considered to arise in the course of employment. The Board notes that this policy determination conforms with the provisions of the Office's procedure manual of 1992 that the protection of the Act will not extend to an employee's home, unless injury is sustained while the employee is "performing official duties." This exercise of discretion was subsequently elaborated upon in the 1998 FECA Bulletin.

The Board finds that the Director did not abuse his discretion in this case in reopening appellant's claim under section 8128(a) and [*15] rescinding acceptance of appellant's claim for an injury sustained January 12, 1996 when appellant fell on her stairway at home while attempting to fix her furnace.

The October 30, 1996 decision of the Office of Workers' Compensation Programs is affirmed.Dated,Washington, D.C.

August 13, 1999
David S. Gerson
Member
Willie T.C. Thomas
Alternate Member
Michael E. Groom