

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-214205**DATE:** July 17, 1984**MATTER OF:** Robert J. Michels - Environmental
Differential Pay**DIGEST:**

An elevator mechanic at the National Park Service's Carlsbad Caverns is not entitled to 50 percent environmental differential pay for working on elevator cars, under the provisions of Category 15 of Appendix J, Federal Personnel Manual Supplement 532-1. The agency decision denying a 50 percent environmental differential found that an unsure footing or unstable structure did not exist in the work area because there were no slippery substances thereon and because the car swayed no more than 1 inch while the mechanic was operating the car in a fixed position. We will not overrule the agency's decision absent clear and convincing evidence negating the information in the agency report or indicating that the agency determination was arbitrary or capricious and no such evidence is presented here.

We have been asked to overrule a decision of the Department of the Interior under its internal grievance procedure which denied a claim for 50 percent environmental differential pay. Since in environmental differential cases our Office will not substitute its judgment for that of the agency absent clear and convincing evidence negating the information in the agency report or indicating that the agency determination was arbitrary or capricious, we deny the claim for 50 percent environmental differential pay.

BACKGROUND

Ms. Diane O. Marshall, West Coast Counsel, National Association of Government Employees, has submitted the claim of Mr. Robert J. Michels, an elevator mechanic at Carlsbad Caverns National Park, National Park Service, Department of the Interior. Mr. Michels presently receives the 25 percent

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differential for work performed at heights above 100 feet in accordance with Federal Personnel Manual Supp. No. 532-1, Appendix J, Category 2 (Inst. 17, April 14, 1980). Mr. Michels grieved through his agency's internal grievance procedure claiming that he was entitled to a 50 percent environmental differential under FPM Supp. 532-1, Appendix J, Category 15.

A hearing was held on the grievance and an administrative law judge issued a recommended decision in favor of Mr. Michels. After review of this recommended decision, Mr. Michels' claim was subsequently denied by the Director of Personnel, Department of the Interior, in a final decision on his grievance by his agency. Ms. Marshall now appeals that decision to this Office.

Mr. Michels' work involves repairing or maintaining the elevator cars at Carlsbad Caverns and this requires him to work on top of the elevator cars. For this work Mr. Michels receives a 25 percent environmental differential under FPM Supp. 532-1 Appendix J, Category 2 which reads as follows:

"2. High work.

"a. Working on any structure at least 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit. * * *"

The Carlsbad Cavern elevator shaft is 750 feet deep and Mr. Michels claims he is accordingly covered by Category 15 of Appendix J which provides for working at extreme heights as follows:

"15. Work at extreme heights.

"Working at heights 100 feet or more above the ground, deck, floor or roof, or from the bottom of a tank or pit on such open structures as towers, girders, smokestacks and similar structures:

"(1) If the footing is unsure or the structure is unstable; or

"(2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, or a similar support); or

"(3) If adverse conditions such as darkness, steady rain, high wind, icing, lightning, or similar environmental factors render working at such height(s) hazardous."

In her recommended grievance decision, the administrative law judge found that Mr. Michels performed work at heights of 100 feet or more and the footing on his work area, the top of the elevator car, was unsure. She did not make a finding as to whether the structure, the elevator car, was also unstable.

The Department of the Interior, in rejecting the administrative law judge's recommended decision that Mr. Michels be awarded 50 percent differential under Category 15 of Appendix J, found that while he worked at heights of 100 feet or more, the footing on the elevator car was not unsure. The Department also ruled on the other aspects of Category 15, namely that the structure upon which Mr. Michels worked was not unstable, that he had adequate protective facilities and that adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors were not present.

In her appeal, Ms. Marshall makes essentially two points. The first is that the administrative law judge's closer inspection of Mr. Michels' work situation gives her conclusion, that Mr. Michels' work area provided unsure footing, greater authority than the Department's decision and in any event the Department's decision was wrong on the facts. Ms. Marshall also argues that the Department of the Interior is in error by believing that Mr. Michels must prove that the conditions in all three subsections of Category 15 exist in order that he be entitled to 50 percent environmental differential.

OPINION

We have held that where an agency had declined to authorize an environmental differential for certain employees, our Office would not substitute its judgment for that of the agency absent clear and convincing evidence negating the information in the agency report or indicating that the agency determination was arbitrary or capricious. 58 Comp. Gen. 331 (1979). A claimant, therefore, has a heavy burden to prove his claim in the face of an agency denial.

In examining the facts of this case the dispute basically centers on item 1 of Category 15 of Appendix J, as to whether the "footing was unsure" on the surface of the elevator roof or whether the "structure was unstable." The administrative law judge found and Ms. Marshall argues that the footing was unsure as there were various tripping hazards created by pieces of equipment on the top of the elevator. Thus, it is argued, since there were tripping hazards on the elevator roof, the footing was unsure and the facts in Mr. Michels' case met the requirement in Category 15 of Appendix J for receipt of 50 percent environmental differential pay.

Ms. Marshall argues further that the very fact the elevator must be tested at varying speeds while Mr. Michels is on the roof makes it unstable. Further, the possibility that the "suicide circuit" of the elevator could fail while Mr. Michels is on it makes the structure unstable.

The Department of the Interior, decided that Mr. Michels did not meet any of the requirements of Category 15 of Appendix J and reasoned as follows:

"* * * there are three categories for which work at extreme heights on an open structure justifies a differential rate of 50 percent. The employee needs to qualify for only one of these categories in order to warrant the 50 percent rate. Evidence brought out in the hearing confirms that proper safety equipment is available (namely, a safety belt, the wearing of which is mandatory). This rules out Category No. 2. Since adverse weather is not a factor here, Category 3 is also eliminated. This leaves Category 1 (unsure footing or an unstable structure).

"Evidence presented at the hearing indicates that the elevator car is not an unstable structure, moving only an inch or less when being repaired. This leaves 'unsure footing' as the remaining stipulation to be met. The Administrative Law Judge has determined that the footing atop the elevator car is 'unsure,' based on the presence of a tripping hazard.

"In our judgment, the tripping hazard is no greater than is present in any confined work space. The surface of the roof of the elevator car is dry and firm. It is not

subject to weather conditions so that no moisture or ice is present. There is no grease, oil or other substances which would make the surface slippery. There are a number of items of equipment which are fastened to the roof of the elevator. However, these can be avoided by an individual using the normal amount of caution. Moreover, when the elevator car is moving with the employee on the roof (as for example, when he is inspecting the operation of the elevator cables) the employee is standing stationary near the control switches and is not moving about. We do not agree, therefore, that the footing on top of the elevator car can be considered 'unsure.'"

Initially, we note that as the Department's decision properly observes, meeting any of the conditions in Category 15 would require that an employee be paid an environmental differential. Thus, the Department correctly dealt with each item of Category 15 and applied the facts of Mr. Michels' case to each condition before arriving at its decision.

The fact that the Department of the Interior, in discussing item 1 of Category 15, unsure footing, mentions that an item 3 factor, weather conditions, does not also adversely affect the surface of the elevator does not mean that the agency was improperly requiring that all items or conditions of Category 15 be simultaneously met. The Department found independent of weather conditions, that no slippery substances such as grease or oil were present on the elevator car and that the surface on which Mr. Michels worked was dry and firm. That the agency again included its findings on the lack of adverse weather conditions when discussing item 1, unsure footing, may have been redundant but is not fatal to its decision since it had other adequate reasons to find that the footing was not unsure under item 1. We do not think, therefore, especially in light of the Department's own statement to the contrary, that the Department mistakenly required that all of the Category 15 conditions be met in order for Mr. Michels to be entitled to the differential under that category.

Moreover, under our standards of review of this type of case as set out in 58 Comp. Gen. 331 above, we cannot say that the Department's decision that Mr. Michels is not entitled to environmental differential under Category 15 of Appendix J is wrong.

The Department essentially bases its decision that the footing on the elevator roof is not unsure on the fact that the surface of the elevator car is not slippery and it is dry and firm. It discounts the tripping hazard which Mr. Michels raises by stating that tripping is avoidable by an individual using the normal amount of caution. There is therefore a difference of opinion between Mr. Michels and the Department as to whether the tripping hazard is such as to provide an unsure footing.

We find that the Department's assessment and its finding that the elevator car is stable when being worked on is not unreasonable. We recognize that there is an inherent danger in working on the roof of an elevator car such as this. However, we cannot overrule the Department of the Interior's decision that the hazard does not meet the requirements for a 50 percent differential under Category 15 as we have not been presented with clear and convincing evidence negating the Department's report or indicating that the Department's determination was arbitrary and capricious. Therefore, this Office cannot authorize a raise in the environmental differential for Mr. Michels' elevator work from the 25 percent which he presently receives to the 50 percent which he claims.

Accordingly, Mr. Michels' claim is denied.

Milton J. Fowler
for Comptroller General
of the United States