

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

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N.B., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Columbus, OH, Employer )

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**Docket No. 14-1092  
Issued: February 26, 2015**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 10, 2014 appellant, through her attorney, filed a timely appeal from a February 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 sustained an injury on November 19, 2012 while in the performance of duty.

**FACTUAL HISTORY**

On November 19, 2012 appellant, then a 45-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that same date she sustained a head, neck, and shoulder injury when she was using the restroom at a McDonald's restaurant and was hit in the head by an

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

unfastened metal door of a toilet paper dispenser. The CA-1 form noted the time of injury as 11:00 a.m. Appellant submitted various medical reports in support of her claim.

In a January 13, 2013 U.S. Postal Service (USPS) Notice of Potential Third Party Claim, appellant stated that on November 19, 2012 she entered the restroom at a McDonald's restaurant and pulled the toilet paper, which caused the steel dispenser to fall and hit her on her head, resulting in a sprained neck injury. The injury occurred at the McDonald's restaurant located on Dublin Granville Road. Appellant's title was noted as a city carrier (transitional employee) and her employing establishment was located at 5700 Maple Canyon Avenue, Columbus, OH 43229.

By letter dated March 1, 2013, the employing establishment controverted the claim challenging fact of injury. It provided a picture of the restroom stall where the accident allegedly occurred. The employing establishment further noted that appellant's appointment as a transitional carrier expired on January 16, 2013 and was no longer employed by USPS.

By letter dated June 4, 2013, OWCP informed appellant that the employing establishment controverted the merits of her claim. It noted that the evidence received failed to establish that the November 19, 2012 injury occurred as alleged and that she was in the performance of duty at the time of injury. OWCP further stated that the medical evidence failed to provide a firm medical diagnosis with an opinion that the injury was caused by the work incident. It informed appellant that the evidence was insufficient to support her claim and requested additional factual and medical evidence. Appellant was provided a questionnaire and asked to respond to the provided questions within 30 days.

In support of her claim, appellant submitted medical reports dated June 14, 2013 from Dr. Brian C. Woo, Board-certified in family medicine.

In a June 28, 2013, OWCP telephone call memorandum, the employing establishment reported that appellant deviated from her assigned route because the McDonald's restaurant was not on her route or a stop that she was permitted to frequent while on duty.

By decision dated July 8, 2013, OWCP denied appellant's claim on the grounds that the evidence submitted was not sufficient to establish that she was injured in the performance of duty. It found that she deviated from her assigned route to use the McDonald's restroom. OWCP noted that the evidence of record failed to establish that the injury occurred during the course of employment and within the scope of compensable work factors because the location of the claimed injury was not on appellant's assigned route or designated as a permitted destination for personal relaxation or comfort.

On July 11, 2013 appellant, through counsel, requested a hearing before the Branch of Hearings and Review.

In a July 2, 2013 narrative statement, appellant responded to OWCP questionnaire. She stated that she sustained her injury at the McDonald's restaurant located at 2091 E. Dublin Granville Road where she stopped to use the restroom. While she was in the stall, she yanked on the toilet paper dispenser and the steel door fell on to her head. Appellant noted that she was not sitting on the toilet at the time of the injury but was kneeling over the seat to get the toilet paper

and had her head in front of the dispenser. She further stated that she sustained a head and neck injury and immediately informed her supervisor and the McDonald's staff of the incident.

Appellant provided maps showing the location of her assigned routes, the location of the McDonald's restaurant, the location of the employing establishment and the travel paths used. The maps indicated that appellant's route beginning at 2122 Hampstead Drive, Columbus OH 43229 was .5 miles from the post office located at 5700 Maple Canyon Avenue, Columbus, OH 43229. The maps further reflected that the McDonald's restaurant at 2091 E. Dublin Granville Road, Columbus, OH 43229 was located 686 feet from the post office.

A telephone hearing was held on November 25, 2013. At the hearing, appellant testified that her city carrier duties entailed driving an employing establishment vehicle to her route, dismounting and walking to deliver the mail. She stated that she was assigned different routes and that the employing establishment would provide her route assignment on the morning of her shift. On November 19, 2012 appellant was assigned one hour on Route 32 which was off Hampstead Drive and Maple Canyon Avenue and five hours on Route 60, which was off Tamarack Circle and Maple Canyon Avenue. She stated that, after finishing the one hour of mail delivery assigned for Route 32, she stopped at the McDonald's restaurant to use the restroom before heading out to deliver mail on Route 60. Appellant purchased a drink and then used the restroom where she sustained her injury. She noted that the McDonald's restaurant was an authorized rest area and in between her two assigned routes. Appellant stated that she would have to pass the McDonald's to get from Route 32 to Route 60. She stated that she informed her supervisor, Pamela Howell, immediately following the incident. Appellant further explained the incident that caused her injury and subsequent medical treatment.

By letter dated December 20, 2013, the employing establishment controverted the claim and argued that appellant deviated from her route when using the McDonald's restroom. It provided a December 17, 2013 e-mail correspondence from appellant's supervisor, Ms. Howell, who stated that the McDonald's restaurant was an assigned lunch location but not an authorized break location. Ms. Howell further stated that the injury occurred early in the day and it was not yet time for lunch. She stated that, though the McDonald's restaurant was between appellant's two assigned routes, appellant could have stopped at the employing establishment to use the restroom, which was at least the same distance as the McDonald's. Ms. Howell noted that immediately after the injury, appellant was complaining of neck and head pain and was instructed to seek emergency medical treatment.

By decision dated February 10, 2014, the Branch of Hearings and Review affirmed the July 8, 2013 OWCP decision finding that appellant was not in the performance of duty on November 19, 2012. It noted that her stop constituted a personal mission and could not be characterized under the personal comfort physician.

### **LEGAL PRECEDENT**

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress

provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup>

The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, the locale and time of injury whereas, arising out of the employment, encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury. In addressing this issue, the Board has stated that in the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.<sup>3</sup>

It is well established that employees who, within the time and space limits of their employment, engage in acts which minister to their personal comfort do not leave the course of employment.<sup>4</sup> Activities encompassing personal acts for the employee's comfort, convenience and relaxation; eating meals and snacks on the premises, including established coffee breaks; and the employee's presence on the premises for a reasonable time before or after specific working hours, are reasonably incidental to employment and are, therefore, in the course of employment.<sup>5</sup> Even if the activity cannot be said in any sense to advance the employer's interest, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.<sup>6</sup>

There are four categories of "off-premises" employees recognized by OWCP in its procedure manual: (1) Messengers, letter carriers and chauffeurs who, by the nature of their work, perform service away from the employer's premises; (2) traveling auditors and inspectors whose work requires them to be in a travel status; (3) workers having a fixed place of employment who are sent on errands or special missions by the employer; and (4) workers who perform services at home for their employer.<sup>7</sup>

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<sup>2</sup> See 5 U.S.C. § 8102(a).

<sup>3</sup> *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

<sup>4</sup> A. Larson, *The Law of Workers' Compensation* § 21 (2007).

<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.7(b) (August 1992).

<sup>6</sup> *Conrad R. Debski*, 44 ECAB 381 (1993).

<sup>7</sup> See *Thomas E. Keplinger*, Docket No. 93-2359 (issued April 12, 1995). Federal (FECA) Procedure Manual, see *supra* note 5 at Chapter 2.804.5(a)(1) (August 1992). *Donna K. Schuler*, 38 ECAB 273, 275 (1986).

Once an employee establishes that he sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation is causally related to the accepted injury.<sup>8</sup>

### ANALYSIS

Appellant filed a claim alleging that she sustained a traumatic injury on November 19, 2012 when she was hit in the head by a toilet paper dispenser in a McDonald's restroom. By decision dated February 10, 2014, OWCP determined that her injury did not arise in the performance of duty. The Board finds that the case is not in posture for decision regarding whether appellant was in the performance of duty on November 19, 2012 when she sustained an alleged injury.<sup>9</sup>

OWCP's decision determined that appellant's injury did not arise in the course of employment because her stop at a McDonald's restaurant constituted a personal mission. It noted that, while the McDonald's restaurant was an assigned lunch location on her route; it was not an assigned break location and she failed to counter the employing establishment contention that she could have stopped at the employing establishment to use the restroom.

In the present case, there is no factual dispute that appellant's injury took place within the period of her employment, *i.e.*, while she was away from the employing establishment premises on her assigned mail delivery route. The issue presented, therefore, is whether she deviated from the course of her employment by engaging in activities not incidental to her employment as a letter carrier.<sup>10</sup>

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity, in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or whether it represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.<sup>11</sup> The standard to be used in determining whether an employee has deviated is that, if an employee took a "somewhat roundabout route" or did not take the most direct route between the place of origin and the point of destination, it must be shown that the deviation was "aimed at reaching some specific personal objective."<sup>12</sup>

In *Donna Margretta*, the Board found that appellant deviated from her mail delivery route when she traveled to a convenience store located over two miles from her route. Appellant's personal preference for the more distant convenience store made the trip there a

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<sup>8</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>9</sup> *Colleen A. Murphy*, Docket No. 01-1319 (issued November 6, 2002).

<sup>10</sup> *Lonnie B. Anderson*, Docket No. 94-1842 (issued July 5, 1996).

<sup>11</sup> *Thomas E. Keplinger*, *supra* note 7.

<sup>12</sup> *Ronda J. Zabala*, 36 ECAB 166, 171 (1984).

personal mission, rather than an activity incidental to her employment and placed her, at the time of the accident, at a place where she would not reasonably be expected in connection with her employment. Thus, the Board found that she was not in the performance of duty.<sup>13</sup>

In *Katina D. Edwards*, the Board found that appellant was not in the performance of duty when she traveled to a restaurant away from the route designated by the employing establishment for her lunch break. Her personal preference for the more distant restaurant made the trip there a personal mission, rather than an activity incidental to her employment and placed her, at the time of the accident, at a place where she would not reasonably be expected to be in connection with her employment.<sup>14</sup>

In *Dannie G. Frezzell*, a mail carrier injured in an automobile accident was found to be in the performance of duty as she was no more than four blocks from her assigned route, heading in the direction of the employing establishment, and there was no evidence that the deviation was taken for personal benefit.<sup>15</sup> The Board noted that appellant's deviation was no less direct than the assigned route and as such, she was in the performance of duty during the time of the employment incident.

In *Karen Cepec*, a letter carrier was injured two blocks from her assigned route after she had finished her deliveries and decided to check out her future route before returning to the station.<sup>16</sup> The Board noted that however unnecessary or even prohibited her conduct may have been, however poor her judgment, the purpose was unquestionably related to work. The Board stated that appellant's departure from the normal line of travel was not aimed at reaching some specific personal objective, such that she could fairly be said to have engaged in personal activities unrelated to her employment, and found that her injury arose in the course of employment.<sup>17</sup>

In the instant case, appellant was using the restroom at the McDonald's when she was injured in the performance of duty.<sup>18</sup> Under FECA, acts of personal comfort -- eating a snack, using the bathroom or drinking water or other beverages -- are considered to be in the

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<sup>13</sup> 50 ECAB 220 (issued January 8, 1999).

<sup>14</sup> Docket No. 02-64 (issued September 16, 2002).

<sup>15</sup> Docket No. 89-1030 (issued September 28, 1989).

<sup>16</sup> Docket No. 00-346 (issued December 7, 2000).

<sup>17</sup> *Id.*

<sup>18</sup> *D.S.*, Docket No. 09-1445 (issued January 7, 2010).

performance of duty.<sup>19</sup> The record establishes that appellant's first route was off Hampstead Drive and Maple Canyon Avenue. Appellant testified that her second route was off Tamarack Circle and Maple Canyon Avenue. She further stated that she had finished her first route and stopped at the McDonald's restaurant on the way to her second route. Unlike *Margretta and Edwards*, there is no indication that appellant deviated from her travel route to stop at a more distant restaurant.<sup>20</sup> Both appellant and her supervisor, Ms. Howell, stated that the McDonald's restaurant was between her two assigned routes.

Appellant's supervisor, however, stated that the McDonald's restaurant was an authorized lunch location but not an authorized break location, arguing that appellant could have used the restroom at the employing establishment as the two locations were at least equidistant. Review of the maps provided reveal that the McDonald's restaurant was located between appellant's two mail delivery routes. The maps further indicate that the McDonald's restaurant and post office were nearly equidistant from appellant's route on Hampstead Drive, separated by a distance of only 686 feet. Thus, the Board must determine whether appellant's restroom stop at the McDonald's restaurant was a substantial deviation from her employment to place her outside of the performance of duty.<sup>21</sup>

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>22</sup> The Board notes that in this case, there is no indication in the record regarding the degree of control the employing establishment retained over appellant during her break as to distance and activity. Furthermore, the record does not contain the policy of the employing establishment with regard to breaks for letter carriers as off-premises employees.<sup>23</sup> Appellant has testified that the McDonald's restaurant was an authorized rest area. The only other evidence in the record is the December 17, 2013 e-mail correspondence from Ms. Howell which stated that the McDonald's restaurant was not an authorized break location but rather an authorized lunch location. Therefore, the case should be remanded for further development of the evidence regarding whether appellant was in the performance of duty on November 19, 2012 when she sustained an injury.<sup>24</sup>

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<sup>19</sup> Larson, in his treatise on workmen's compensation law, notes a close relationship between the deviation doctrine and the personal comfort doctrine in those cases where the smallness of the deviation is material. Larson indicates that there are "insubstantial" deviations of momentary duration which, if undertaken by an inside employee working under fixed time and place limitations, would be compensable under the personal comfort doctrine. A. Larson, *The Law of Workers' Compensation* § 19.63 (2007). See also *James E. Chadden, Sr.*, 40 ECAB 312 (1988); *Mary M. Martin*, 34 ECAB 525 (1983); *Frank M. Escalante*, 13 ECAB 160 (1961).

<sup>20</sup> *Supra* note 9.

<sup>21</sup> *B.C.*, Docket No. 09-653 (issued December 24, 2009). See also *Michael T. Harris*, Docket No. 95-1957 (issued August 22, 1997) (letter carrier found not in the performance of duty because he was approximately one mile from the places authorized by the employing establishment for lunch); *Dannie G. Frezzell*, *supra* note 15 (mail carrier found to be in the performance of duty with deviation no more than four blocks from assigned route).

<sup>22</sup> *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>23</sup> *Godfrey L. Smith*, Docket No. 92-1502 (issued June 4, 1993).

<sup>24</sup> *Supra* note 9.

On remand, OWCP should request that appellant's supervisor clarify the statements made in her December 17, 2013 e-mail regarding the employing establishment's policy pertaining to breaks. It should request further information from both appellant and the employing establishment pertaining to the policy for off-premises employees using the restroom. After such further development as it deems necessary, OWCP should issue an appropriate decision on this matter.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: February 26, 2015  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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