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

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| **T.F., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1256** |
| | ) | **Issued: November 12, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Lavernia, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On March 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 18, 2007 and March 5, 2008 merit decisions denying her claim for an October 23, 2007 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant sustained an injury in the performance of duty on October 23, 2007.

### ***FACTUAL HISTORY***

On November 1, 2007 appellant, then a 38-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury due to a motor vehicle accident at 4:15 p.m. on October 23, 2007. Regarding the cause of the injury, appellant stated, "hit an embankment of gravel in which caused my vehicle to hydroplane onto the other side of road and through a fence

causing vehicle to overturn, broke spine and there's no feeling in both legs."[1] Appellant stopped work on October 23, 2007 and has not returned. On the claim form, Sharon Meyer, the postmaster at the employing establishment, checked a box indicating that appellant was in the performance of duty at the time of the accident. She noted that the employing establishment was contesting continuation of pay based on willful misconduct evidenced by the fact that a citation was issued.[2]

Appellant filed another Form CA-1 on November 5, 2007 and submitted a statement. On October 23, 2007 she was traveling 30 to 35 miles per hour on northbound County Road 321 (a gravel road) when a white truck traveling south proceeded towards her. Appellant stated that she moved to the right to make room for the truck to pass and hit an excess of gravel. Her vehicle veered to the left, hit a barbed-wire fence and rolled over two or three times.[3]

On November 16, 2007 the Office requested that appellant submit additional factual and medical evidence in support of her claim. Appellant submitted medical reports concerning treatment of the injuries she sustained on October 23, 2007, including paraplegia and lack of sensation from the T11 disc level down. On October 29, 2007 she underwent surgery at disc sites T11 through L1. The record contains a report of drug testing of appellant's urine performed on October 25, 2007.[4] Appellant tested positive for cannabinoids (marijuana) above 50 milliliters and opiates above 300 milliliters.[5] The report indicated beneath a list of the drugs tested, "[a]ll are unconfirmed" and noted that no chain of custody was maintained on the specimens received.

In the October 23, 2007 state police accident report, Trooper Anthony Flores stated that he arrived at the accident scene at 4:50 p.m. on that date. He stated that appellant was traveling too fast on County Road 321 for the gravel surface and then veered left and left the roadway.

[1] In an undated motor vehicle accident report submitted in November 2007, appellant indicated that she was traveling 30 to 35 miles per hour at the time of the accident. In an undated statement submitted in December 2007, appellant stated that there was an embankment of sand/gravel to her right and that after she hit the embankment her vehicle "hydroplaned" to the left.

[2] Ms. Meyer checked a box indicating that the injury was caused by appellant's willful conduct, intoxication or intent to injure herself or another and stated that appellant was driving 55 to 57 miles per hour in a 30-mile-per-hour zone and had tested positive for marijuana. A cover sheet was attached to the November 1, 2007 Form CA-1 which stated, "controvert/challenge, willful misconduct." Appellant was terminated from the employing establishment effective November 14, 2007.

[3] In this form, appellant indicated that the accident occurred at 4:26 p.m. on October 23, 2007. Ms. Meyer contended that appellant did not mention a white truck on the date of the accident. She acknowledged that the road where the accident occurred was a gravel road with piles of sand and gravel on both sides. Ms. Meyer asserted that appellant told her that she was not directly behind the wheel of her left-drive vehicle at the time of the accident. The record contains documents which indicate that postal employees have the discretion to employ such a driving technique when they feel it is safe.

[4] It appears that the testing was performed at 11:38 a.m. on October 25, 2007.

[5] The word "final" appears to the right of each of these positive results. Appellant tested negative for amphetamines, cocaine, barbiturates, benzodiazepines, phencyclidine and tricyclic antidepressants.

Appellant's vehicle traveled through a fence, went up an embankment and turned over. Trooper Flores issued appellant a citation for failure to control speed.

The record contains statements from employing establishment officials indicating that appellant's October 23, 2007 accident occurred at a spot on her delivery route. Appellant had delivered mail to a mailbox shortly before the accident occurred. In a November 13, 2007 memorandum, officials for the Rio Grande District of the employing establishment, including Ms. Meyers, detailed the findings of their investigation. An employing establishment safety officer indicated that law enforcement officials told him that the ruts in the gravel created by the tires of appellant's vehicle, and other physical evidence, suggested that she was traveling 55 miles per hour at the time of the accident.[6]

In a December 9, 2007 report, investigators from the Office of the Inspector General of the employing establishment summarized the findings of their investigation of the October 23, 2007 accident. The investigators indicated that they received conflicting opinions on the speed limit of County Road 321 and indicated that these opinions ranged from a low speed of 30 miles per hour to a high speed of 65 miles per hour. They stated that an official from the state accident reconstruction team determined that evidence from the accident scene suggested that appellant was traveling between 45 and 50 miles per hour at the time of the accident. The investigators indicated that during an interview appellant denied smoking marijuana around the time of the accident and asserted that she had not used marijuana since she was 25 or 30 years old. Appellant indicated that she went to a party for teenagers on October 20, 2007 and she believed people were smoking marijuana at the party although she did not witness such actions.

In a November 15, 2007 interview with a postal inspector, Trooper Flores stated that he did not see any indication that appellant was under the influence of drugs or alcohol when he spoke to her on October 23, 2007. Therefore, he did not administer any test for intoxication. Trooper Flores did not find any drugs or drug paraphernalia in appellant's vehicle although he did not inventory the contents until after the employing establishment had removed mail and personal items. In a November 21, 2007 follow-up interview, Trooper Flores stated that he issued a citation to appellant "for failure to control speed" on October 23, 2007 but noted that he did not file it because she was paralyzed. He stated that there was no speed limit posted on County Road 321 but posited that a safe speed for the road would have been about 30 miles per hour. In a November 21, 2007 interview with a postal inspector, Deputy C.J. Shirley indicated that he was dispatched to the scene of the October 23, 2007 accident to help Trooper Flores gather information and control traffic. He noted that he did not see any indication that appellant was under the influence of drugs or alcohol when he spoke to her. Deputy Shirley indicated that there was no posted speed limit on County Road 321.

In a December 18, 2007 statement, the Office denied appellant's claim that she sustained an injury in the performance of duty on October 23, 2007. It found, as follows:

> "The evidence was not sufficient to establish that your injury occurred in the performance of duty because medical evidence of record established that you tested positive for an illegal substance ([m]arijuana), and that the toxicology

[6] The report indicated that the weather was clear and dry at the time of the accident.

> results which were performed on October 25, 2007 two days after the incident at the University Hospital. The Drug Abuse Screen Urine documented that you were tested positive for [c]annabinoids ([m]arijuana) at somewhere over 50 [milliters]. In [Federal Employees' Compensation Act] Part 2.0800.13, Affirmative Defense: The law states that an injury caused by the claimant's intoxication, willful misconduct, or intent to injure self or another is not compensable."

Appellant requested reconsideration of the Office's December 18, 2007 decision. She submitted several witness statements in which friends and family members stated that they had no reason to believe that she had used marijuana. In a March 5, 2008 decision, the Office affirmed its December 18, 2007 decision.

## ***LEGAL PRECEDENT***

Congress, in providing for a compensation program for federal employees, 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. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee/employer relationship.[7] Rather, Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[8]

"In the course of employment" deals with the work setting, the locale and the 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.[9] In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place, (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while she is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.[10]

[7] *George A. Fenske*, 11 ECAB 471 (1960).

[8] *Timothy K. Burns*, 44 ECAB 291 (1992).

[9] *Larry J. Thomas*, 44 ECAB 291 (1992).

[10] *See Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

In the instant case, the Office invoked the affirmative defense of intoxication as codified at section 8102(a) of the Act which provides in pertinent part:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is --"
>
> * * *
>
> "(3) proximately caused by the intoxication of the injured employee."[11]

In reviewing claims under section 8102, the Board has held that allegations under section 8102(a) of the Act can be invoked only as an affirmative defense and that the Office's use of an affirmative defense must be invoked in the original adjudication of the claim.[12] The Board has further determined that, in order to correctly invoke section 8102(a)(3), the Office must establish by reliable, probative and substantial evidence that intoxication was the proximate cause of injury or death.[13]

## ***ANALYSIS***

Appellant filed a claim alleging that she sustained injury due to a motor vehicle accident on October 23, 2007 while she was delivering mail on her regular delivery route. The Office determined that her injury did not arise in the performance of duty on October 23, 2007. It raised the affirmative defense of intoxication to deny her claim because she had tested positive for marijuana.

The Board finds that the Office did not meet its burden of proof to deny appellant's claim by raising the affirmative defense of intoxication. As noted, the Office's use of an affirmative defense must be invoked in the original adjudication of the claim and the Office has the burden to prove such a defense. The evidence to establish this defense must be reliable, probative and substantial.[14]

The evidence of record is not sufficient to establish that appellant was intoxicated through the use of marijuana at the time of the October 23, 2007 accident. The record contains a report of drug testing of appellant's urine performed on October 25, 2007 which indicated that she tested positive for cannabinoids (marijuana) above 50 milliliters and opiates above 300 milliliters.[15] This test, however, was administered almost two full days after the October 23,

[11] 5 U.S.C. § 8102(a)(3).

[12] *Gayle M. Petty*, 46 ECAB 996 (1995); *Paul Raymond Kuyoth*, 27 ECAB 498 (1976).

[13] *See Ruth Perras*, 33 ECAB 1646 (1982). Intoxication would not be the proximate cause of a given accident when there are other intervening factors that could be implicated as causing the accident. *See Hope J. Kahler*, 39 ECAB 588 (1988).

[14] *See supra* notes 12 and 13 and accompanying text.

[15] It is unclear why the Office did not raise the issue of the positive test for opiates. There is some indication in the record that appellant received opiates in the form of pain medication shortly after her accident.

2007 accident.[16] There is also some question about the validity of the test results as the report indicated beneath a list of the drugs tested, "[a]ll are unconfirmed" and noted that no chain of custody was maintained on the specimens received.[17] The testing did not quantify the precise amount of marijuana found as it only indicated whether the 50 milliliter threshold of the drug in the urine had been met. Therefore, it does not clearly establish that appellant was intoxicated by marijuana on the date of the accident. Moreover, Trooper Flores and Deputy Shirley, two early responders to the accident scene on October 23, 2007, both testified that they did not see any indication that appellant was under the influence of drugs or alcohol when they spoke to her on October 23, 2007. Trooper Flores indicated that he had no basis to administer a test for intoxicants.[18]

The Office must also present reliable, probative and substantial evidence showing that appellant's intoxication was the proximate cause of the October 23, 2007 accident.[19] The Office did not provide any discussion of why intoxication was the proximate cause of the accident. It did not address other factors concerning the accident, such as the gravel surface of the road or the embankment of gravel/sand on the right side of the road.

The Board finds that the Office did not meet its burden to establish the affirmative defense of intoxication. The evidence establishes that at the time of her injury appellant was delivering mail on her usual mail delivery route.[20] Her October 23, 2007 accident arose out of and in the course of her employment as it occurred within the period of employment, at a place where she was reasonably expected to be for her work, and while she was fulfilling her job duties and incurring risks incidental to her work. For these reasons, appellant sustained an injury in the performance of duty on October 23, 2007. The case will be remanded to the Office for evaluation of the medical evidence and a determination of any periods of disability.

## ***CONCLUSION***

The Board finds that appellant sustained an injury in the performance of duty on October 23, 2007. The case is remanded to the Office for determination of the nature of the injury and any resultant disability.

[16] The Board notes that in cases where intoxication has been found to be the proximate cause of the accident, the tests for intoxication were generally taken shortly after the accident. *See generally Elaine Hegstrom*, 51 ECAB 539 (2000); *Ruth Perras*, 33 ECAB 1646 (1982).

[17] The word "final" appears to the right of each of the positive results but it is unclear from the report whether this means the results were confirmed. The Office did not have a physician evaluate the test results.

[18] Trooper Flores stated that he did not find any drugs or drug paraphernalia in appellant's vehicle although he did not inventory the vehicle's contents until after the employing establishment had removed mail and personal items. The employing establishment did not indicate that it found drugs or drug paraphernalia.

[19] *See supra* note 13 and accompanying text.

[20] Appellant had delivered mail to a mailbox shortly before the accident occurred.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' March 5, 2008 and December 18, 2007 decisions are reversed. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: November 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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