

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

G.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Ninety Six, SC, Employer**

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**Docket No. 08-1499
Issued: January 26, 2009**

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 28, 2008 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 8, 2008. Pursuant to 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 must refund \$87,905.37 from her third-party settlement.

FACTUAL HISTORY

On August 12, 2004 appellant, then a 42-year-old letter carrier, sustained injury to her arms and legs in the performance of duty. She stated that while "walking down sidewalk stepped onto edge of manhole cover and cover flipped up. I then fell into hole catching myself with arms." The Office accepted appellant's claim for multiple contusions and on November 18, 2004 a cervical disc displacement. It authorized a C6-7 anterior cervical discectomy on March 2, 2005 and appellant underwent surgery on March 22, 2005. The Office entered appellant on the

periodic rolls on May 10, 2005. On December 6, 2007 it accepted that appellant developed a major depressive disorder due to her employment injuries.

On January 4, 2007 appellant's attorney informed the Office that she had a third-party claim pending and that she was awaiting a report of disbursements in order to resolve the third-party obligations. He explained that the third party was a city which placed a cap on recovery. On January 8, 2008 the Office provided appellant with a list of disbursements totaling \$424,707.27.

Appellant, through her attorney, responded on January 22, 2008 contending that recovery of the third-party settlement of \$275,000.00 was not applicable because the settlement was with the town of Ninety Six, a political subdivision of South Carolina with limited liability under the doctrine of sovereign immunity and not included with the definition of a "person" under the Federal Employees' Compensation Act. He noted that the amount of the recovery was \$275,000.00, that attorney's fees were \$91,665.75; that court costs were \$18,512.51; that appellant was entitled to retain 20 percent of this or \$32,964.35 which resulted in \$131,857.39 and a government allowance for attorney fee's of \$43,948.07¹ which resulted in a refund to the Office of \$87,905.37.

By decision dated April 8, 2008, the Office found that appellant was obliged to refund \$87,905.37 of her third-party recovery. It noted that the gross recovery was \$275,000.00 and that appellant had received disbursements in the amount of \$424,707.27.

LEGAL PRECEDENT

Section 8132 of the Act provides in pertinent part:

"If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or on his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury."²

The purpose underlying this obligation is to prevent a double recovery by the employee. Under this section of the Act, a claimant is obligated to reimburse the United States out of any third-party recovery for any disbursements made by the Office.³

¹ The Office determined that this sum was \$43,952.02, a greater amount.

² 5 U.S.C. § 8132. See *Alvin Collins*, 54 ECAB 752 (2003). See *Richard J. Maher*, 42 ECAB 902 (1991).

³ See *Benjamin S. Purser, Jr.*, 42 ECAB 204 (1990) (in which a claimant shot by a police officer in the course of his duties was required to refund an appropriate portion of his third-party recovery).

The South Carolina Tort Claims Act (SCTCA) Statute⁴ provides a limited waiver of the State's sovereign immunity. It states, in part, as follows:

The General Assembly in this chapter intends to grant the State, its political subdivisions and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees.

The SCTCA caps the tort recovery under South Carolina law to \$300,000.00.⁵

ANALYSIS

While the term "person" for purposes of sections 8131 and 8132 is not defined in the Act or Office regulations and procedures, the Board notes that the United States Supreme Court has found the term "persons" to include municipalities when interpreting other federal statutes and will follow this precedent.⁶ The Board notes that under the SCTCA a limited waiver of the state's sovereign immunity has been granted and appellant received a third-party settlement in the amount of \$275,000.00 from a municipality, the city of Ninety Six, arising from her August 12, 2004 employment injury. Appellant must reimburse the Office in accordance with section 8132 of the Act in the amount of \$87,905.37 after deducting costs such as attorney fees and her entitlement to one fifth of the net amount.⁷

CONCLUSION

The Board finds that appellant received a third-party settlement due to her accepted injury and must refund the amount of \$87,905.37 to the Office.

⁴ S.C. Code Ann. § 15-78-10, *et al.*

⁵ *See id.* at § 15-78-120(a)(1).

⁶ *See Cook County, Illinois v. United States ex ret Chandler*, 538 U.S. 119, 125 (2003) (municipal corporations and private ones were simply two species of "body politic and corporate," treated alike in terms of their legal status as persons capable of suing and being sued). *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 687-688 (1978) (corporation is deemed to be a person capable of being treated as a citizen of that state, as much as a natural person; this has been extended to municipal corporations).

⁷ As an administrative body, the Board does not review constitutional claims and will therefore not consider appellant's contention that section 8132 of the Act is unconstitutional. Congressional enactments are administered under a presumption of constitutionality and the Board accepts the presumption of constitutionality of this provision. *Vittorio Pittelli*, 49 ECAB 181, 186 (1997).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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