United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 09-2275**
	)	**Issued: September 23, 2010**
U.S. POSTAL SERVICE, SCOTTSDALE HOPI STATION, Scottsdale, AZ, Employer	)	

Appearances:
Gordon Reiselt, 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 September 4, 2009 appellant filed a timely appeal from the March 11, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for a February 22, 2006 injury. 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 met her burden of proof to establish that she sustained an injury in the performance of duty on February 22, 2006.

FACTUAL HISTORY

On August 16, 2006 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that she sustained injury on February 22, 2006 at 11:15 a.m. due to a motor vehicle accident that occurred in the performance of duty. The portion of the claim

form to be completed by the supervisor was completed and signed by Tony Pierce, the acting station manager.[1] Appellant stopped work on February 22, 2006.

The record contains a February 22, 2006 accident report completed by a police officer from Scottsdale, AZ advising that appellant's vehicle ran into the rear of a vehicle stopped for a red light shortly before 11:00 a.m. Appellant was traveling at a speed of 40 to 50 miles per hour on Frank Lloyd Wright Boulevard near its intersection with the Greenway Hayden Loop in Scottsdale and failed to apply the brakes of her vehicle.[2] In an August 16, 2006 letter, Jane Bermijo, an injury compensation specialist, controverted the claim contending that appellant's injury did not occur in the performance of duty. She noted that Mr. Pierce had advised that appellant suffered a nonwork-related medical condition on the morning of February 22, 2006. Mr. Pierce instructed appellant to wait for her husband to take her home but she chose to leave the worksite before her husband arrived and drove home on her own. Appellant was not performing any assigned duties or engaged in any activity related to her employment at the time of the accident.

In an August 22, 2006 letter, the Office requested that appellant submit additional evidence in support of her claim.

In an undated statement, Susan Service, a customer service supervisor, noted that appellant was not feeling well on February 22, 2006 and Mr. Pierce took her to his office to call her husband to pick her up and take her home for the day. Mr. Pierce instructed appellant to stay seated in his office until her husband arrived. After he left for a 10:30 a.m. meeting, appellant left his office and walked around the workroom floor. Ms. Service had a conversation with appellant at about 10:45 a.m. in the restroom. Appellant then left the premises in her privately-owned vehicle, leaving her cell phone and purse behind and missing her husband by 10 to 15 minutes. Ms. Service stated that management was not aware that appellant had left or driven her vehicle to leave. Appellant's husband arrived at about 11:00 a.m. and she assisted him in looking for appellant in the building and parking lot but it was observed that her vehicle was gone. He left the premises to look for appellant. At approximately 9:00 p.m., the police called to advise that appellant had been located at a hospital in Mesa, AZ. She had been injured in a motor vehicle accident that occurred on route to her home within a few miles of her residence.

In a September 29, 2006 decision, the Office denied appellant's claim, finding that she did not sustain a work-related injury on February 22, 2006 as the accident did not occur in the performance of duty. It noted that appellant left her work premises due to a nonwork-related medical condition and thereafter was involved in a motor vehicle accident. The evidence failed to establish that she was engaged in any activity reasonably associated with her employment at the time of the accident.

[1] Appellant indicated that she sustained multiple right ankle and foot fractures which necessitated surgical repair. She also had to undergo a splenectomy and partial liver removal. Appellant noted that various people had an opportunity to observe her on February 22, 2006 between 8:00 a.m. and 11:00 a.m. including Mr. Pierce, Donna McClellan, Gary Murphy, Demetri Stoits, Craig Anderson, Tom Clay, Denise Kolock and Kris Hubarth.

[2] Other evidence of record indicates that the accident occurred about seven miles from appellant's workplace.

Appellant requested reconsideration of her claim. Counsel argued that her injury occurred in the performance of duty because the employing establishment failed to render adequate assistance under the "human instincts" doctrine. He asserted that the employing establishment had been aware since 2004 that appellant had been diagnosed with diabetes and new onset seizure disorder. Appellant suffered a seizure at about 8:00 a.m. on February 22, 2006 but nobody called 911 and she was left alone when Mr. Pierce went to a meeting. She forgot that she had a seizure and walked around in an apparently confused state. Appellant took her car keys (leaving her purse and other personnel items behind) and drove away from the employing establishment. Her confused state contributed to the accident. Counsel argued that people with seizure disorder may experience confusion, loss of consciousness, loss of memory and may suffer a subsequent seizure shortly after an initial seizure. He contended that the human instincts doctrine, recognized in a line of cases starting with *Mildred Drisdel*,[3] established a duty for the employer to provide reasonable medical care or other assistance as an emergency may require so that an affected employee may have her life saved or avoid further bodily harm to herself or others. Counsel argued that it was unreasonable for Mr. Pierce not to call 911 and to leave appellant alone after she suffered a seizure, particularly since the safety plan had been followed on prior occasions when appellant had a seizure. He discussed a case, *Marianne Eick (George E. Eick)*,[4] in which the Board evaluated the facts of the case under the human instincts doctrine and found that an injury had not occurred in the performance of duty. Counsel asserted that the facts of *Eick* were distinguishable from those of the present case because in *Eick* the manager had taken adequate steps to determine that the employee was coherent and capable of driving and making decisions about medical care. In the present case, there was evidence that appellant was incoherent and the employing establishment failed to carry out a safety plan which had been devised to deal with her particular medical condition. Counsel argued that appellant's February 22, 2006 seizure was directly related to her employment because it was brought on by stress related to the fact that the employing establishment constantly changed her work shifts and work duties.

In a February 26, 2006 statement, Pam Baker, a supervisor, stated that on February 22, 2006 at about 7:45 a.m. she heard a weird noise and looked to see three carriers standing around appellant who was having a seizure. She told appellant to take some deep breaths and she kept saying, "I'm okay." Ms. Baker gave appellant a banana because she thought she might be "crashing" due to a low sugar level given that she was diabetic. She advised that the seizure lasted about 30 seconds and that after it stopped Mr. Pierce escorted appellant to his office.[5] Ms. Baker called appellant's son who indicated that he would call his father and see if he could get appellant home. Appellant's son called Ms. Baker back after he was unable to contact his father and asked if someone could "just bring her home." He stated that no one would be home when appellant arrived but noted that whenever she had a seizure she slept for many hours. Ms. Baker told appellant's son that she would try to get appellant home and that he stated, "Okay, I have to go to school." She saw appellant walk by her desk and go to the bathroom at

[3] 32 ECAB 82 (1980).

[4] 40 ECAB 1056 (1989).

[5] Ms. Baker stated that she stood next to appellant "with my hand on the phone waiting to call 911." She indicated that about three or four weeks prior appellant had suffered a seizure which lasted longer.

about 10:30 a.m. and assumed she was going to lie down on a couch until her husband picked her up. Someone told Ms. Baker that appellant had spoken to her husband and that he was meeting appellant on the dock and taking her home. She saw appellant's husband walking to the back office at about 11:10 a.m. and she left work about 10 minutes later. Ms. Baker called appellant's home at about 1:30 p.m. and her son stated that appellant was not yet home. She learned that appellant might have left to drive herself home and that her husband arrived at the worksite after she left. Ms. Baker was subsequently advised that appellant had been in an accident in Scottsdale.[6]

In a July 16, 2006 statement, Donna McClellan, a coworker, advised that she was present on February 22, 2006 when appellant had a seizure at work. Several coworkers who were assisting appellant asked management to call 911 but management did not do so. A management official helped appellant to an office in order to wait for a family member. Ms. McClellan stated:

> "[Appellant] came back out of the office by herself with no one with her to keep an eye on her. I [saw] her wandering around and went to management to say that [appellant] was wandering around on her own and should not be left alone, let alone walking around because she was stumbling along. [Appellant] had stopped at a few carrier cases and wandered to the dock doors. I repeated again to two supervisors [that appellant] was wandering around and should not be left on her own. I was ignored while they were making plans to go to lunch to make their schedules for the carriers. I walked away as [appellant] was still wandering around and went out the dock doors.
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> "Later that day as we were coming in from the street, management was asking the carriers if we [have] seen [appellant]. She had left and no one had seen her. We later found out she was in an accident and was seriously hurt….

In an undated statement, Ms. Service noted that on February 22, 2006 she arrived at work at about 10:25 a.m. and as she walked toward her office, noticed that Mr. Pierce was not in his office. After checking some paperwork in her office, she walked onto the workroom floor and saw appellant there. As the two walked together to the restroom, a coworker stated "you're still here" to appellant and she responded "yes, I'm waiting to go home." Ms. Service asked appellant if she was leaving early and she responded "yes, tough day." In the restroom, she asked appellant how her fitness-for-duty examination went the prior day and appellant responded that the examination never occurred because she got lost on the way. Ms. Service last saw appellant at about 10:40 a.m. when they had a brief exchange about the filing of a report. At about 11:15 a.m., appellant's husband came to her office looking for appellant and the two

[6] In an undated statement received by the Office on October 3, 2006, Ms. Baker stated that she spoke to appellant's son on February 23, 2006 and he indicated that, at the time of the accident, appellant was driving on a road that she would not ordinarily use to get home. When asked whether appellant had a seizure while driving, he responded that he did not know. In a brief February 23, 2006 statement, a coworker named Denise indicated that she spoke to appellant on February 22, 2006 at about 10:30 to 10:45 a.m. regarding the fact that her husband was picking her up and taking her home. The coworker stated that appellant stepped out of the office and walked toward the back of the building.

searched the building before they noticed that her vehicle was gone. Ms. Service was then advised by Ms. Baker that appellant had suffered a seizure that morning and had been instructed to stay in Mr. Pierce's office until her husband came to pick her up. She did not see Mr. Pierce or ever have a conversation with him about appellant the morning of February 22, 2006. Ms. Service stated, "In my conversations with [appellant] she seemed coherent; I would not have guessed that she had a seizure that morning. She was walking and talking fine."

Appellant submitted several reports from April 2006 in which Dr. Guillermo M. Estrada, an attending Board-certified neurologist, advised that she had a history of diabetes and epilepsy. The epilepsy condition, which began three years prior, caused generalized tonic-clonic seizures without warning signs. Dr. Estrada noted that appellant had six seizures in the prior three years. He stated that appellant had a seizure at work on February 22, 2006 and might have had another seizure when she was driving home on that date. On July 5, 2006 Dr. Carolyn Barlow, an attending osteopath and Board-certified family practitioner, stated that appellant had a history of seizure disorder that was not problematic until she had a seizure while driving and had a motor vehicle accident from which she sustained a right ankle fracture and surgery, partial liver resection and splenectomy. Appellant was in a coma in the intensive care unit for six days and, after extensive rehabilitation in an extended care facility, she was released to go home on March 31, 2006. She submitted additional treatment records for the injuries she sustained on February 22, 2006, including a right talus and fibula surgical repair, splenectomy and partial liver resection. The emergency room reports from February 22, 2006 noted that appellant was unable to provide any history secondary to her confusion. She was able to answer some questions but appeared to be in a post-seizure state.[7]

Appellant requested reconsideration of her claim. In a September 25, 2007 letter, counsel reiterated that appellant's accident would not have occurred if management had called 911 or ensured that she was escorted home by a family member. The fact that appellant left the worksite without her purse or identification and that the accident occurred on a road that she did not ordinarily use to go home showed that she was in a confused state at the time.

On December 11, 2007 the Office requested that the employer submit additional evidence concerning appellant's health records, medical accommodation requests and emergency medical plans filed with her supervisors. It also asked for a response to a series of questions regarding

[7] The report indicated, "The patient, while unreliable, states that she stopped her Dilantin on her own."

the handling of appellant's medical situation on February 22, 2006, the nature of any emergency medical plans in place and the handling of prior instances of medical distress.[8]

In a December 19, 2007 letter, counsel took issue with whether appellant had stopped taking Dilantin of her own volition. He noted that it was reported that appellant made a statement to that effect in the emergency room on February 22, 2006 but the emergency room report advised that appellant was found to be unreliable, confused and unable to answer questions appropriately on that date.

Linda Hartshorn, a health manager for the employing establishment, responded to the Office's questions. On February 22, 2006 an employee reported that there was something wrong with appellant and her managers responded immediately because they were aware that she had a medical condition that predisposed her to seizures.[9] Ms. Hartshorn stated that the employer had instructed employees to call 911 in case of a medical emergency and that this procedure would have been followed if the employees present had any reason to believe that appellant was having a medical emergency. Appellant told employees that she was okay and both her husband and son were contacted but they gave no indication that she needed to be transported to a hospital. Therefore, arrangements were made to have appellant's husband pick her up and take her home. He arrived to take appellant home but it was discovered that she had left the worksite by that time.

Ms. Hartshorn advised that Donna Fay, the station manager, asserted that there was no emergency medical plan in place to call 911 in the event of a seizure. Management had no reason to believe that appellant was unable to care for herself and it exercised reasoned judgment in asking her to stay in Mr. Pierce's office until her husband arrived. Although Ms. McClellan stated that she observed appellant stumbling and wandering around, there was no indication that she spoke to appellant or that she was in a position to adequately assess her demeanor. Two supervisors, Ms. Baker and Ms. Service, observed appellant acting normally and responding to everyday conversations in an appropriate manner. Ms. Hartshorn stated that, when she had seizures in the past, Ms. Fay took appellant to her office, made her comfortable and made arrangements with a family member to pick her up and drive her home.

[8] The Office asked the employing establishment several questions about appellant's level of coherence on February 22, 2006 and the arrangements to have her taken home, including the following: "It is indicated that the agency called [appellant's] husband to pick her up on February 22, 2006 and told her to wait in the office. Was her husband reached? If so, what did he say? Did he provide the agency with any instructions? Did her husband ever come to pick her up? It is indicated that [appellant's] supervisor left her in the office alone knowing that she had suffered a 'seizure' that morning around 8:00 a.m., and she was seen 'wandering around' and 'stumbling along.' If [appellant] was left in the office, how long was she there alone? Why was she left alone? Did anyone go back into the office to check on her and how often? Did the claimant's supervisor and/or coworkers conclude that [appellant] was capable of driving herself home on February 22, 2006? Was she coherent? Was she conversing intelligibly? Did the claimant tell anyone that she would be leaving and driving herself home? Did anyone see the claimant with car keys visibly on her person?"

[9] Ms. Hartshorn indicated that no medical professionals were present who could have determined with certainty that appellant actually suffered a seizure.

In a February 14, 2008 decision, the Office denied appellant's claim. It found that management acted reasonably on February 22, 2006 given that appellant stated that she was alright and her behavior was observed to be normal.

Appellant requested reconsideration. In a February 9, 2009 letter, counsel again contended that it was typical of appellant to become confused and have memory problems after a seizure. Although appellant stated that she was okay, her prior medical condition dictated that 911 should have been called or that someone stay with her until her husband arrived.

On February 13, 2006 Dr. Jess A. Miller, an attending Board-certified psychiatrist and neurologist, stated that appellant was "neurologically cleared to return to work without restriction."[10] The record contains an undated employing establishment document entitled "Safety, Health and Environment" which noted that recommended procedures for handling medical emergencies included notifying the health services office and notifying security or another designee who in turn would call 911. Another document, entitled "Emergency Action Plan" for the Arrowhead Station in Glendale, AZ, updated on September 10, 2008, indicated that in emergency situations 911 should be called when an employee is unconscious or requests an ambulance.[11]

In statements to the record, appellant contended that her employer should have called 911 when she had a seizure at about 8:00 a.m. on February 22, 2009 because it had prior notice of her diabetes and epilepsy conditions and the emergency action plan required 911 to be called when a medical condition as serious as a seizure occurred.[12] Appellant might have told Ms. Baker that she was okay immediately after her seizure, but such a brief, generic statement did not mean she was not in medical distress or not in need of immediate medical care. No one ever asked her again how she was doing and she did not reassure people that she was okay. She stated that there were no medical personnel present when she had her seizure and management did not contact any such personnel. At about 10:30 a.m. Mr. Pierce first asked her for her husband's cell phone number because he had not been able to get in touch with him.[13] She was in such a confused state that she was not able to recall his number. After several attempts, appellant was able to punch numbers on her cell phone and make contact with her husband. She only told her husband, "I'm sick come and get me." Mr. Pierce did not stay in the room while she made this call. He came back into the office and asked if appellant's husband was coming and left after he got an affirmative response. Appellant stated that Mr. Pierce never spoke to her husband or any

[10] Appellant had previous been considered incapacitated from duty between January 17 and 23, 2006. She could only drive intermittently for up to one hour per day. In a December 15, 2005 report, Dr. Miller indicated that a high level of stress could increase the frequency of appellant's seizures and stated that her last seizure had occurred on October 17, 2006.

[11] The Board notes that it appears from the record that appellant's husband was a manager at the Glendale Arrowhead Station.

[12] Appellant indicated that she wore a medical alert bracelet detailing her medical conditions.

[13] In other parts of her statements, appellant indicated that Mr. Pierce asked for her husband's cell phone number at about 10:00 a.m., but it is clear from the content and context of her statements and other evidence of record that she meant to state that this event occurred at about 10:30 a.m.

other family member to explain her medical condition.[14] Due to her confused state, she forgot that she had called her husband and she took her car keys to drive away.[15] On at least one prior occasion when she had a seizure at work, the employing establishment had called 911. Appellant did not understand why 911 was not called or why she was left alone by Mr. Pierce.[16]

In an undated statement, appellant's husband advised that she contacted him at about 10:30 a.m. on February 22, 2006 and asked him to pick her up at work because she had a seizure. He noted that, when appellant had experienced a previous seizure at work, management officials called 911 and he visited her at the hospital. When he arrived at the worksite at about 11:00 a.m., appellant was not in the building and no one knew where she was located.

In a March 11, 2009 decision, the Office denied appellant's claim. It found that appellant's managers had acted reasonably in handling her medical situation on February 22, 2002. There was no evidence that her motor vehicle accident had a relationship to her medical condition on that date.

LEGAL PRECEDENT

Under the human instincts doctrine, an employer has the duty to make reasonable efforts to procure medical aid or other means of relief to an employee who becomes ill or injured on the job, and who as a result is helpless to provide for her own care. A failure, on the part of the employer, to satisfy this duty may be sufficient to establish a causal connection between an employee's condition and the employment if it is shown that such failure contributed to the condition for which compensation is claimed.[17] In *Marianne Eick (George E. Eick)*,[18] the Board found that the employing establishment acting reasonably when it did not provide medical care to the employee's husband and allowed him to drive away from the premises because, despite the fact that he did not appear well, he was found to be in a coherent state and had refused medical attention.[19] In *Jerry L. Sweeden*,[20] the Board held that the employer acted reasonably in response to the employee's seizures in that coworkers transported him to a hospital in a timely manner.

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[14] Appellant noted that while another person spoke to her son, he was a minor and not in a position to make judgments concerning her medical care.

[15] Appellant stated that her medical condition caused her to stumble and wander around the workroom floor in a confused state. The fact that she did not tell Ms. Service that she had a seizure when she saw her on February 22, 2006 showed that she was suffering from memory loss. Appellant also asserted that she had suffered memory loss during previous seizure episodes.

[16] Appellant asserted that on January 17, 2006 the employing establishment called 911 when she had a medical problem that was related to breathing problems. She had never been taken home by a family member after suffering a seizure at work.

[17] *Marianne Eick (George E. Eick), supra* note 4; *Joseph J. Rotelli*, 40 ECAB 987 (1989).

[18] *See supra* note 4.

[19] The claimant's husband died of a heart attack about a day after his supervisor last spoke to him and offered to provide him with transportation to a medical facility.

[20] 41 ECAB 721 (1990).

It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[21]

ANALYSIS

Appellant claimed that the motor vehicle accident of February 22, 2006 was sustained in the performance of duty within the meaning of the Act. Counsel argued that, under the human instincts doctrine, the fact that the employing establishment did not provide appellant reasonable care on that date contributed to the accident and brought the resulting injuries within coverage. As noted, the human instincts doctrine provides that an employer must make reasonable efforts to procure medical aid or other means of relief to an employee who becomes ill or injured on the job and who as a result is helpless to provide for her own care. If a failure to fulfill this duty contributes to an injury, a causal connection between the claimed condition and the employment may be established.[22] The Office found that the employing establishment provided appellant reasonable care on February 22, 2006 and that she failed to establish a connection between her accident on February 22, 2006 and employment factors.

The record contains witness statements which establish that at about 8:00 a.m. on February 22, 2006 appellant had an incident of medical distress, which a supervisor described as a seizure lasting about 30 seconds. At some point thereafter she was taken to the office of Mr. Pierce, the acting station manager. At approximately 10:30 a.m., appellant contacted her husband to pick her up from the employing establishment premises. Shortly thereafter, Mr. Pierce left appellant alone in his office to attend a meeting. According to witnesses, appellant was last seen on the premises at about 10:40 a.m. She subsequently drove away from the premises before her husband arrived at about 11:00 a.m. Police records reveal that a few minutes before 11:00 a.m., she was involved in an accident some seven miles away from her workplace.

Counsel argued that the employing establishment did not respond reasonably after appellant sustained what appeared to be a seizure at about 8:00 a.m. on February 22, 2006. It failed to call 911 and Mr. Pierce left appellant alone to wait for her husband. Counsel stated that the employing establishment had prior knowledge that appellant had diabetes and epilepsy which rendered her susceptible to seizures and that safety plans dictated that 911 be called when an employee had a medical emergency.[23] Appellant claimed that her seizure caused her to be in a confused state and to suffer memory loss such that she could not provide for her care. She drove from the premises because she forgot that her husband was coming to pick her up and that her confused state contributed to her vehicular accident.

[21] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[22] *See supra* note 20.

[23] Counsel asserted that the employing establishment acted appropriately on prior occasions by calling 911 when appellant was in medical distress.

The Board finds that additional development of the evidence is necessary to determine if appellant sustained an injury in the performance of duty on February 22, 2006. The case will be remanded to the Office for this purpose.

In December 2007, the Office requested that the employer provide information about the events of February 22, 2006, including appellant's level of coherence on that date and the arrangements to have her taken home. The employing establishment was asked a series of detailed questions about these matters. While the employer provided some responses to the questions, there is a need for additional clarification. The record contains little evidence from the time appellant had her initial seizure at about 8:00 a.m. on February 22, 2006 to when she was observed from 10:30 and 10:40 a.m. Gaining additional information about appellant's condition and circumstances throughout the relevant portion of the day on February 22, 2006 is necessary to determine whether the employing establishment acted reasonably in providing her care. Ms. Baker, a supervisor, indicated that appellant told her she was okay immediately after she suffered a seizure but noted that she did not see her again until about 10:30 a.m. when she saw her walk by her desk. Ms. Service, another supervisor, stated that she spoke to appellant at about 10:30 a.m. and again at about 10:40 a.m. and found her to be coherent and "walking and talking fine."[24] However, Ms. McClellan, a coworker, indicated that on the morning of February 22, 2006 appellant was "wandering around on her own" and "stumbling along" on the workroom floor. She asserted that she asked supervisors to call 911 but that she was ignored.

The employing establishment was asked questions about the length of time appellant stayed with Mr. Pierce or other personnel, the level of her coherence while she was in the care of Mr. Pierce or others, and the rationale for why she apparently was left alone by Mr. Pierce at about 10:30 a.m. In responding to these questions, the employing establishment essentially reviewed the evidence already in the record, particularly the witness statements, and concluded that it had responded reasonably under the circumstances.[25] There is no indication in the record that Mr. Pierce has provided any statement regarding the events of February 22, 2006 or that attempts were made to gain additional information from other managers or coworker in order to address the matters that the Office felt were in need of clarification. As acting station manager, Mr. Pierce would have been in a position of authority to make decisions about the provision of care for appellant.[26] The question of why appellant apparently was left alone at about 10:30 a.m. on February 22, 2006 has not been adequately developed. There is little evidence clearly addressing what appellant's level of coherence was for a large portion of time she was at the employing establishment premises on February 22, 2006. Appellant provided a list of

[24] In a brief statement, a coworker named Denise indicated that she spoke to appellant on February 22, 2006 at about 10:30 to 10:45 a.m. regarding the fact that her husband was picking her up and taking her home.

[25] The employing establishment highlighted the statements of Ms. Baker and Ms. Service and discounted the statement of Ms. McClellan.

[26] Ms. Service indicated that Mr. Pierce contacted appellant's husband and arranged for him to pick appellant up at work. However, other evidence of record suggests that appellant contacted her husband and that Mr. Pierce did not speak with her husband.

individuals who would have been in a position to witness her condition on February 22, 2006 but it remains unclear whether the Office made sufficient attempts to obtain statements from them.[27]

For these reasons, the case is remanded to the Office to further clarify these matters, particularly in the context of appellant's assertion that her claimed injuries were covered under the human instincts doctrine. After such development as it deems necessary, the Office shall issue an appropriate decision regarding whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on February 22, 2006.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on February 22, 2006. The case is remanded to the Office for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 11, 2009 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 23, 2010
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

[27] It is also noted that limited information was obtained about any safety plans that might have been in place and about the handling of the prior circumstances that appellant was in medical distress.