

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

I.A., Appellant)	
)	
and)	Docket No. 15-1913
)	Issued: July 20, 2016
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, City of Industry, CA, Employer)	
)	

Appearances:
Max Guest, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 22, 2015 appellant, through counsel, filed a timely appeal from a June 1, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on December 12, 2014.

FACTUAL HISTORY

On December 18, 2014 appellant, then a 43-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a compound fracture of his left lower leg (at the ankle) on December 12, 2014.³ He indicated that an unmanned Powered Industrial Truck (PIT) rolled backwards, crushing his left lower leg against a pole. On the same form, appellant's immediate supervisor checked a box marked "yes," indicating that appellant's injury was caused by his "willful misconduct, intoxication, or intent to injure another" and added the comment, "Unauthorized use of a [PIT]."

Medical records from December 2014 listed appellant's date of injury as December 12, 2014 and contained the diagnosis of left open ankle fracture/dislocation.⁴ On December 17, 2014 appellant underwent open reduction and internal fixation of his left ankle fracture, and left ankle irrigation and debridement. He underwent additional left ankle surgeries on December 23, 24, 2014, and January 7, 2015. These procedures were not authorized by OWCP.⁵

In a January 5, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence. It provided a questionnaire to be completed by appellant, which asked appellant to clarify whether his use of a PIT on December 12, 2014 was needed to perform his duties. On January 5, 2015 OWCP also requested that the employing establishment submit additional information, including whether appellant was specifically prohibited from using a PIT while on duty.

In a January 22, 2015 statement, appellant responded to the questions posed by OWCP regarding his claim for a work injury on December 12, 2014. He indicated that his job required him to quickly place pallets on the floor and then to place boxes on top of the pallets so that coworkers could place packages into the appropriate boxes. Appellant noted that on December 12, 2014 a PIT was blocking his work area such that he "could not work fast with the machine there." He asserted that he had driven PITs many times in the past (maybe 15 times) and that people, including supervisors, had previously seen him driving them without prohibiting him from doing so. Appellant reported that no one was around to move the PIT, which was running at the time, and that he decided to move it so that he could do his job and not lose time. He indicated that the PIT started going very fast and making jerking movements when he tried to move it to the right in order to avoid other traffic. Appellant noted that these fast, jerking movements made him fall off the PIT and that his left leg became caught between an iron pole

³ Appellant was a temporary employee who was hired to work for the holiday season of December 2014.

⁴ A December 12, 2014 emergency room report noted that appellant reported his "[left lower extremity] being pinned by a fork lift while at work."

⁵ Appellant also submitted records of his physical therapy sessions beginning in December 2014.

and the back left corner of the PIT. He indicated that emergency medical technicians arrived to treat him and that he was taken to the hospital in an ambulance. Appellant noted:

“To do my job that day, the machine needed to be moved. No one was around to move it for me and it was already running. Because I had moved it many times before and people said I did a good job moving it and no one, including supervisors, had stopped me before, I went ahead and tried to move it again so I could get on with my work. I was never told not to move the machine in the past. I did not have malicious intent, I was just trying to do my job properly. I was trying to be a good hard worker and not waste time. No supervisor, and nobody else, had ever told me not to drive the machine or that driving it was ‘unauthorized use.’ I never heard the words ‘unauthorized use’ before.”

Appellant also submitted additional medical evidence in support of his claim. In a form report dated March 10, 2015, an attending physician listed appellant’s period of total disability as December 12, 2014 to June 1, 2015.

In a January 21, 2015 letter, a health and resources official indicated that the employing establishment was contesting appellant’s claim for a work-related injury on December 12, 2014. She noted that on November 18, 2014 appellant received 16 hours of training for newly hired employees, including 4 hours of safety orientation training which specifically covered the use of PITs. The health and resources official reported that two safety specialists advised all new hires, including appellant, that they were not permitted to operate PITs, including mechanized forklifts and electric pallet jacks,⁶ without the proper training and certification. She indicated that from November 24 to 26, 2014 appellant also received one-on-one training from two certified instructors on the subjects of facility orientation, facility specific safety topics, and office duties. The health and resources official noted that, during this training in November 2014, appellant asked one of the instructors whether he was allowed to drive the electric pallet jack. She indicated that the instructor responded “no” and informed appellant that he was not authorized to operate the machinery because he was not a regular employee and only regular employees who were trained and licensed were allowed to operate such machinery.

In her January 21, 2015 letter, the health and resources official further noted that in early December 2014 appellant asked a coworker whether he could drive a PIT and the coworker told him that he could not drive it and that he needed to be certified in order to operate any PIT. She indicated that on many occasions appellant asked a supervisor whether he could operate or ride on a PIT and the supervisor told him that he could not do so under any circumstances. The health and resources official pointed out that none of appellant’s job duties required the use of any type of PIT. She indicated that a coworker reported that on December 12, 2014 she parked a PIT in order to talk to another coworker and that, a few minutes later, she observed appellant crying out in pain next to the PIT which had been moved from the spot where she had left it. The health and resources official noted that another coworker had witnessed appellant shifting the PIT’s acceleration handle downward and that it appeared his left foot slipped off the PIT and became stuck between the PIT and a pole, resulting in him sustaining a broken left ankle. She

⁶ The Board notes that the type of PIT appellant operated in December 12, 2014 was an electric pallet jack.

asserted that appellant was untruthful when he indicated on his December 18, 2014 claim form that he was injured by an unmanned PIT which rolled backwards and noted, “It is clear that he intentionally and maliciously rode the [PIT] to satisfy his own passion, nothing else.”

The employing establishment submitted a copy of a safety guide indicating that it had been provided to appellant prior to December 12, 2014. The safety guide discussed the employing establishment’s safety protocol (EL-814, Section VIII) which provided that operation of PITs was prohibited unless one had the required training and certification. The PIT operating practices handout notes, “Before employees are allowed to operate PITs, they must be trained in accordance with [Occupational Safety and Health Administration] standard 1910.178 and Chapter 7, EL-804, Safe Driver Program. Employees must receive training for each type of PIT they are required to operate. Employees must be evaluated and certified to operate the PIT.”

The employing establishment submitted statements of employees who reported that, prior to December 12, 2014, appellant had been advised to not use a PIT. In a December 12, 2014 statement, a safety specialist for the employing establishment who co-taught a training session for new employees on November 18, 2014 noted that appellant was in attendance when a safety module was conducted. She noted that she had informed appellant and the other employees that they were not authorized to operate any PIT because operation of such machines required specialized training and certification. The safety specialist told the new employees about an instance when an untrained employee injured himself while operating a PIT. In a December 18, 2014 statement, the other safety specialist who taught the training session for new employees on November 18, 2014 indicated that she advised the employees that they were not allowed to operate PITs, mechanized forklifts, or pallet jacks without having undergone proper training for those machines.

In a December 12, 2014 statement, a supervisor noted that appellant “has continuously asked me on several occasions to operate the [PIT]....” He indicated that he informed appellant “many times flat out that he cannot use any operating machinery under any circumstances as per his orientation.” The supervisor noted that he informed appellant that, if mail had to be moved by a PIT, he would have to locate a supervisor and inform him or her of this circumstance.⁷ In a December 12, 2014 statement, a coworker noted that on that day he witnessed appellant shifting a PIT’s acceleration handle downward and that it appeared his left foot slipped off the PIT and became stuck between the PIT and a pole, resulting in him sustaining a broken left ankle.

In a December 18, 2014 statement, a coworker, who was a licensed PIT operator, noted that appellant asked her one to two weeks before December 12, 2014 if he could drive the “ride along” machine. She indicated that she told appellant that “he could not, that he had to be certified to operate any PITs” and that he was unlikely to have the opportunity to undergo PIT training because he was a Christmas season casual employee. The coworker indicated that on December 12, 2014 she parked a PIT in order to talk to another coworker and that, a few minutes

⁷ In a February 27, 2015 statement, this supervisor indicated that, due to appellant’s continuous requests to operate a PIT, he gave him a direct order to cease requests to use a PIT. He noted that he had never seen appellant operate a PIT and that, to do so, would violate the union contract given that carrying out this task was restricted to regular employees (rather than temporary casual employees, such as appellant).

later, she observed appellant crying out in pain next to the PIT which had been moved from the spot where she had left it.⁸

In a January 15, 2015 statement, a certified instructor indicated that, during the training session held on November 24, 2014, appellant had asked whether he could learn to operate the electric pallet jack machine and she had responded that it could only be operated by a regular-status employee with the appropriate license. She believed that appellant understood the content of the training session. In a January 15, 2015 statement, a supervisor advised that appellant was not required to operate electric or powered industrial equipment to perform his job duties. On January 27, 2015 a DVD containing surveillance video of appellant's December 12, 2014 accident was added to the record.

In a February 25, 2015 letter, OWCP requested that the employing establishment respond to appellant's claim that he had driven PITs many times in the past (maybe 15 times) and that people, including supervisors, had previously seen him driving them without prohibiting him from doing so. In response, the employing establishment submitted statements from more than 30 employees, including supervisors, who indicated that they had not witnessed or heard of appellant operating a PIT.

In a March 11, 2015 statement, the employing establishment further discussed its reasons for controverting appellant's claim for a December 12, 2014 work injury, noting that the witness statements of record showed that, on numerous occasions prior to December 12, 2014, appellant had been advised to not operate the PITs.

In an undated statement received on March 19, 2015, appellant's immediate supervisor indicated that he regularly advises all new employees, including temporary seasonal employees such as appellant, that they are not to touch any powered equipment. He indicated that appellant never asked him to operate a PIT. The supervisor noted that he had not seen or heard of appellant operating a PIT and asserted that, if he had in fact operated a PIT, disciplinary action would have been taken.

In an April 24, 2015 letter, counsel asserted that the evidence of record was sufficient to establish appellant's claim for a compound fracture of his left leg.

In a May 20, 2015 statement, appellant asserted that the employing establishment placed a great deal of pressure on him to complete his work tasks as quickly as possible. He indicated that, due to this pressure, he moved the PIT on December 12, 2014 to allow him and his coworkers to carry out their work tasks. Appellant acknowledged that he did not know how to use the PIT to move pallets or boxes, but that he only operated the PIT to move it out of the way. He indicated, "The PIT was running. It was in a place where it was a danger to other people. It was blocking my ability to do my work. Therefore, after no one responded to [a supervisor's] request, I simply tried to move the PIT to be able to do my work." Appellant asserted that his supervisor did not see him move PITs prior to December 12, 2014 because the supervisor worked in another area. He noted that no supervisor ever told him not to move a PIT and that he

⁸ In a February 26, 2015 statement, the coworker indicated that she had not seen appellant operate a PIT prior to December 12, 2014.

never asked a supervisor whether he could operate a PIT.⁹ Appellant indicated that he did attend training, but that he struggled to hear and understand two full days of fast-talking lectures. He asserted that his English language skills were very limited and noted, “I occasionally attempted to get clarification concerning written items which I did not understand or statements made by supervisors and trainers which I did not understand. But the subject of use of machines was never made clear to me.” Appellant indicated that he tried to ask questions during the training, but that the instructors said that they did not have time to explain things to the trainees, and they told them to sign some documents. He noted that he signed the documents as instructed but that he “did not know what some of the documents actually said.” Appellant asserted that he would never knowingly violate rules of the employing establishment.

In a May 22, 2015 letter, counsel asserted that appellant’s actions on December 12, 2014 did not take him out of the performance of duty because he did not engage in willful misconduct which resulted in his injury. He argued that the case of *L.R.*¹⁰ supported a finding that appellant had not engaged in willful misconduct on December 12, 2014 when he operated the PIT, but rather was carrying out his work duties in the performance of duty at the time of his accident. In *L.R.*, the employee suffered injury while operating a postal vehicle without wearing a seat belt and with the driver’s side door of his vehicle open.¹¹ The Board found that the employee’s actions of not wearing a seat belt and leaving the door open constituted lapses in judgment, not deliberate acts of wanton or reckless disregard of probable injurious consequences. Counsel also argued that the case of *Karen Cepec*¹² supported a finding that appellant had not engaged in willful misconduct on December 12, 2014. In *Karen Cepec*, the employee sustained injury while violating a conduct rule, *i.e.*, deviating from her mail delivery route, but the Board found that the employee’s actions did not constitute willful misconduct as her conduct did not show wanton or reckless disregard for probable injurious consequences. Counsel argued that OWCP had not made a showing that appellant knew that his conduct was likely to result in serious injury or that he wantonly or recklessly disregarded probable injurious consequences. He asserted, rather, that appellant was simply attempting to do his job to the best of his ability.

In a June 1, 2015 decision, OWCP denied appellant’s claim for a work-related injury on December 12, 2014. It noted that he had established the occurrence of an accident on December 12, 2014 which caused a diagnosed medical condition, but found that this injury was not shown to have occurred in the performance of duty. OWCP found that appellant’s operation

⁹ Appellant acknowledged that, as a means of exploring opportunities for career advancement, he did talk to a coworker about getting training and certification to operate a PIT. He asserted that he did not ask this coworker for permission to operate a PIT and noted that he understood he could not undergo PIT training while he was in temporary employee status.

¹⁰ Docket No. 08-0084 (issued April 23, 2008).

¹¹ The accident occurred when the employee lost control of his vehicle while swerving to avoid collision with another motorist and an investigating police officer attributed the employee’s accident to inattention. The Board noted that the employee’s safety violations did not cause the accident.

¹² 52 ECAB 156 (2000).

of a PIT on December 12, 2014 constituted willful misconduct which took him out of the performance of duty at the time of his accident and noted:

“Our office finds that on [December 12, 2014], your injury occurred out of your performance of duties because the operation of a PIT was not part of your duties on that day and you willfully operated it and knowing that a safety protocol was being violated. Therefore, it appears that your injury was a result of your willful misconduct. [FECA] states that an injury caused by the claimant’s willful misconduct is not compensable and not in the performance of duty.”

LEGAL PRECEDENT

Section 8102(a)(1) of FECA states:

“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 --

(1) caused by willful misconduct of the employee....”¹³

The Board has defined willful misconduct as deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.¹⁴ The allegation of willful misconduct is an affirmative defense which OWCP must invoke in the original adjudication of the claim and OWCP has the burden to prove such a defense.¹⁵

With respect to the affirmative defense of willful misconduct, OWCP procedures provide:

“The question of willful misconduct arises where at the time of the injury the employee was violating a safety rule, disobeying other orders of the employer, or violating a law. Safety rules have been promulgated for the protection of the worker -- not the employer -- and, for this reason, simple negligent disregard of such rules is not enough to deprive a worker or the worker’s dependents of any compensation rights. All employees are subject to the orders and directives of their employers in respect to what they may do, how they may do certain things, the place or places where they may work or go, or when they may or shall do certain things. Disobedience of such orders may destroy the right to

¹³ 5 U.S.C. § 8102(a)(1).

¹⁴ W.S., Docket No. 15-1271 (issued October 5, 2015).

¹⁵ *Bruce Wright*, 43 ECAB 284, 295 (1991).

compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless.”¹⁶

ANALYSIS

On December 18, 2014 appellant filed a traumatic injury claim alleging that he sustained a compound fracture of his left lower leg (at the ankle) on December 12, 2014.¹⁷ He indicated on the form that an unmanned PIT rolled backwards, crushing his left lower leg against a pole. However, appellant later acknowledged that he had in fact, operated the PIT on December 12, 2014. A coworker indicated that he witnessed appellant shifting the PIT’s acceleration handle downward and that it appeared his left foot slipped off the PIT and became stuck between the PIT and a pole. The employing establishment controverted appellant’s claim by asserting that appellant willfully disobeyed instructions not to operate a PIT. It raised the affirmative defense of willful misconduct in the original adjudication of the claim and, in its June 1, 2015 decision, OWCP found that this willful misconduct took appellant out of the performance of duty on December 12, 2014.

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on December 12, 2014.

The employing establishment presented substantial evidence, including numerous witness statements, showing that appellant was informed on multiple occasions, by training instructors, supervisors, and coworkers, that he could not operate a PIT without proper training and certification. It noted that no one had ever seen appellant operate a PIT before December 12, 2014 and confirmed that, in the event a supervisor had seen appellant operating a PIT, he or she would have taken disciplinary action against him. Appellant asserted that he did not understand the prohibition against operating a PIT because his English language skills were limited. However, the Board has reviewed the evidence of record, including appellant’s communications with OWCP, and finds that there is no indication that language problems prevented appellant from understanding the prohibition against operating a PIT, particularly given the numerous times he was advised of this fact. For example, on November 18, 2014 appellant received 16 hours of training for newly hired employees, including 4 hours of safety orientation training which specifically covered the use of PITs. Two safety specialists advised all new hires, including appellant, that they were not permitted to operate PITs, including mechanized forklifts and electric pallet jacks, without the proper training and certification. From November 24 to 26, 2014 appellant also received one-on-one training from two certified instructors on the subjects of facility orientation, facility specific safety topics, and office duties. During this training in November 2014, appellant asked one of the instructors whether he was allowed to drive the electric pallet jack. The instructor responded “no” and informed appellant that he was not authorized to operate this type of machinery because he was not a regular employee and only

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 8.804.14 (September 1995).

¹⁷ Appellant was a temporary employee who was hired to work for the holiday season of December 2014.

regular employees who were trained and licensed were allowed to operate such machinery.¹⁸ Appellant was also advised by supervisors and coworkers on several other occasions prior to December 12, 2014 that he could not operate a PIT. He indicated that he operated the PIT because it was in the way and prevented him from performing his work duties. However, a witness statement reveals that appellant's immediate supervisor advised him prior to December 12, 2014 that he was not to operate a PIT under any circumstances and that, if he felt that the use of a PIT was necessary, he needed to contact a supervisor and advise him or her of such a circumstance.

By operating the PIT without the proper authorization, training, and certification, appellant engaged in an action which wantonly or recklessly disregarded probable injurious consequences.¹⁹ During his training on November 18, 2014, he was informed of the serious consequences that could occur if an unauthorized and untrained person operated a PIT. For example, appellant was advised about an instance when an untrained employee injured himself while operating a PIT. The Board finds that it is reasonable to conclude that operating a heavy, moving machine such as a PIT without any training carries with it a significant risk of injury and appellant was reasonably aware of such risk when he deliberately chose to violate numerous clearly expressed prohibitions against operating a PIT. Under these circumstances, appellant's disobedience of safety orders was deliberate and intentional as distinguished from careless and heedless.²⁰ Because he engaged in willful misconduct by operating a PIT on December 12, 2014 and this willful misconduct led to his injury on that date, OWCP properly found that appellant's actions took him out of the performance of duty at the time of his accident on December 12, 2014.²¹

On appeal, counsel argued that several cases, including *L.R.*,²² supported a finding that appellant was carrying out his work duties in the performance of duty when he operated the PIT on December 12, 2014. He noted that the Board found that OWCP had not shown that the employee in *L.R.* knew that his conduct was likely to result in serious injury or that he wantonly or recklessly disregarded probable injurious consequences. However, the facts of this case can be easily distinguished. In *L.R.*, the employee was deemed to have engaged in a momentary lapse of judgment when he failed to follow safety regulations (to close the door of his vehicle and to wear his seat belt) and this failure was not considered to have caused the injury.²³ In the present case, appellant knowingly and willfully engaged in an activity, operating a PIT, which he

¹⁸ In a May 20, 2015 statement, appellant acknowledged that he understood he could not undergo PIT training while he was in temporary employee status. He also acknowledged that he did not know how to use the PIT to move pallets or boxes.

¹⁹ See *supra* note 13.

²⁰ See *supra* note 15.

²¹ See *supra* note 12.

²² See *supra* note 9.

²³ The accident in *L.R.* occurred when the employee lost control of his vehicle while swerving to avoid collision with another motorist and an investigating police officer attributed the employee's accident to inattention. The Board noted that the employee's safety violations did not cause the accident.

was explicitly told not to operate on numerous occasions. This action goes well beyond the simple action of inadvertently failing to follow a safety rule. Appellant understood or reasonably should have understood the possible injurious consequences of operating a form of machinery, even for a brief period, for which he did not have proper approval, training, and certification. On appeal, counsel also argued that the case of *Karen Cepec*²⁴ supported a finding that appellant did not engage in willful misconduct on December 12, 2014. In *Karen Cepec*, the employee sustained injury while violating a conduct rule, *i.e.*, deviating from her mail delivery route, but the Board found that the employee's actions did not constitute willful misconduct as the actions did not show wanton or reckless disregard for probable injurious consequences. However, the employee's actions in *Karen Cepec* bear little resemblance to appellant's actions in the present case as the employee's mere deviation from her mail delivery route in *Karen Cepec*, a rule violation which does not involve safety matters, is not the type of action which would show wanton or reckless disregard for probable injurious consequences.

On appeal, counsel cites several other cases in which the Board found that OWCP had not established willful misconduct, but these cases involved negligent actions by employees rather than willful and deliberate actions. On appeal, he asserts that the case of *D.T.*²⁵ contains facts and findings which show that appellant's actions on December 12, 2014 did not constitute willful misconduct. In this case, the Board remanded the case to OWCP to gather more information regarding whether the employee's injury while taking a postal vehicle to a repair shop occurred while carrying out an off-premises special errand authorized by the employing establishment. However, neither OWCP nor the Board carried out a willful misconduct analysis in this case and counsel's citing of the case is not relevant to the disposition of the present case.

For these reasons, appellant did not meet his burden of proof to establish an injury in the performance of duty on December 12, 2014.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on December 12, 2014.

²⁴ See *supra* note 12.

²⁵ Docket No. 11-0751 (issued March 12, 2012).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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