

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elkhart, IN, Employer**

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**Docket No. 16-0875
Issued: December 12, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 23, 2016 appellant, through counsel, filed a timely appeal from a December 15, 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.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on January 8, 2015.

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.*

On appeal counsel argues that appellant's injury occurred in the performance of duty, because she had ended any deviation and was *en route* to the employing establishment at the time of the incident on January 8, 2015.

FACTUAL HISTORY

On January 9, 2015 appellant, then a 55-year-old rural mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on Thursday, January 8, 2015 at 5:45 p.m., she sustained injuries to her head, legs, pelvis, and arms in a motor vehicle incident. Her regular work hours were listed as from 6:30 a.m. through 3:00 p.m. on Mondays, Tuesdays, Thursdays, Fridays, and Saturdays. A supervisor checked a box marked "yes" indicating that appellant had been injured in the performance of duty and that appellant was disabled from work.

By letter dated January 15, 2015, a health and resource manager for the employing establishment noted that appellant had been transported from the scene of the incident *via* ambulance, and that she had sustained cranial injuries and a fractured pelvis as a result of the incident.

In a report dated January 9, 2015, Dr. Mark Thompson, a Board-certified surgeon, diagnosed polytrauma, a lateral compression pelvic ring injury, a head contusion with intracranial injury, contusions to the knees without obvious fracture, and a possible ankle sprain. He stated that she had been involved in a motor vehicle incident, but that the details were unclear. In a follow-up report dated January 19, 2015, Dr. Thompson noted that appellant had been involved in a motor vehicle incident, and that she was amnesiac to the events of the incident. He diagnosed a mild closed-head injury and a nondisplaced pelvic fracture.

In a record of a telephone conversation dated January 21, 2015, an OWCP representative contacted the employing establishment to determine whether appellant was in the performance of duty at the time of the incident. The employing establishment verified that appellant was in her postal vehicle at the time of the incident, but that she had deviated from her route. The supervisor noted that appellant's last delivery was between 4:30 p.m. and 4:40 p.m., while the motor vehicle incident occurred at 5:45 p.m. It contended that appellant was not in the performance of duty at the time of the incident.

In a police report dated January 8, 2015, a police officer stated that appellant was westbound on State Road 120 on an icy roadway when she ran off the north side of the roadway and into a yard. Appellant then traveled back onto the roadway, crossed into the oncoming eastbound lane, and collided head-on with another vehicle. She was ejected from the vehicle and suffered head bleeds and a pelvic fracture. Appellant stated that she did not remember the events leading up to the crash. The driver of the other vehicle stated that he was traveling eastbound on State Road 120 when appellant's vehicle suddenly crossed into his lane and collided head-on with his vehicle. The driver of the other vehicle stated that he could not avoid the collision. A witness stated that he was traveling eastbound behind the driver of the other vehicle when he observed appellant's vehicle slide into a yard and then back onto the roadway. The witness noted that appellant's vehicle had then crossed into the eastbound lane and collided with the other vehicle. The police had been informed of the accident at 5:18 p.m. on January 8, 2015 of the incident, and arrived at the scene at 5:45 p.m. The police officer on the scene issued a warning to appellant for driving too fast given the weather conditions.

By letter dated January 21, 2015, OWCP requested that appellant submit additional factual evidence in support of her claim. It noted that the employing establishment contended that she had deviated from her route and that the incident had occurred more than two hours after the end of her regularly-scheduled tour of duty. OWCP requested that appellant respond to its inquiries regarding whether she was performing regularly-assigned duties on the date of the incident and to provide other information regarding the motor vehicle incident. It also requested that the employing establishment provide information regarding whether appellant was in the performance of duty at the time of the incident.

By letter dated January 26, 2015, appellant stated that she was involved in a motor vehicle incident on January 8, 2015. She noted that she was driving a mail truck and that the incident occurred due to adverse weather conditions. Appellant noted that she was on the clock when the incident occurred.

By letter dated January 23, 2015, the employing establishment responded to OWCP's inquiries. It noted that conditions on the day of the incident included snow-covered roads. Appellant's supervisor had instructed her to return by 5:00 p.m., which was later than her route evaluation time, due to the inclement weather conditions. Appellant was instructed to notify her supervisor prior to 2:00 p.m. if she did not think she could return to the employing establishment by 5:00 p.m. The employing establishment noted that it had a global positioning system (GPS) that tracked carriers' locations in real time, along with their speed. Using this system, it learned that, on the date of the incident she had delivered her mail in reverse order, as the last delivery normally on her route was the first delivery. The employing establishment stated that it assumed that this deviation was due to its instruction to carriers that, if a road was not plowed for snow, they should skip that location and come back at a later time to see if the road had been plowed. However, a carrier is to call the employing establishment when they discover that a road is impassable, or notify the employing establishment upon returning to the post office facility that they had deviated from their normal route. The employing establishment stated that employees were required to request deviation from their route prior to the deviation, and could not choose to deviate from their line of travel without advance permission from their supervisor.

It was further noted that on January 8, 2015 appellant delivered her last parcel at 4:37 p.m. and at 4:50 p.m. she was at the intersection of County Road 19 and State Road 120 and began traveling westbound on State Road 120. The employing establishment noted that had appellant continued driving straight west on State Road 120 she would have arrived at the post office facility by 5:00 p.m. The employing establishment noted that at no time during the day did appellant indicate to her supervisor that she could not make it back to the post office by 5:00 p.m. nor did she call to inform her supervisor that she had deviated from her route. It stated, however, that at 4:52 p.m. appellant turned north onto County Road 17 instead of continuing west on State Road 120. The employing establishment noted that this was not on appellant's line of travel and that she had already made her last delivery and finished her route. Appellant continued north on County Road 17 and at 4:55 p.m. turned west onto County Road 6. She continued on County Road 6 until she reached County Road 15, at which time she turned around in a driveway. Appellant continued on County Road 6 and followed it until turning north on County Road 21 to County Road 8, and followed County Road 8 back to County Road 17. She followed County Road 17 back to State Road 120. Between 5:16 and 5:17 p.m. she had returned to State Road 120 and had turned westbound. The accident occurred at 5:18 p.m. westbound on State Road 120. Appellant was traveling at a speed of 30 miles per hour. The employing

establishment noted that, had appellant continued on State Road 120 after her last delivery, she could have avoided the accident and would have returned to the post office facility by 5:00 p.m. as directed. The employing establishment concluded that, despite the fact that appellant had turned back onto her employment line of travel, her 45-minute deviation took her outside the performance of duty.

In a letter dated February 19, 2015, appellant responded to OWCP's inquiries. She noted that on January 8, 2015, she was involved in a motor vehicle incident while driving her mail truck back to the employing establishment on her assigned route. She stated that she had no memory of the incident but had never deviated from her assigned route, which was on State Road 120. Appellant noted that white-out conditions had kept her out later than her evaluated time, and that the weather conditions had caused the incident.

By decision dated February 23, 2015, OWCP denied appellant's claim. It found that she was not in the performance of duty at the time of the incident. OWCP found that the evidence indicated that appellant had last performed an assigned duty approximately 45 minutes prior to the time of the accident. OWCP noted that it had provided an opportunity for appellant to explain the circumstances surrounding the deviation but she simply denied that she had deviated from this route.

On March 13, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a neuropsychological evaluation report dated April 29, 2015, Dr. Paul Macellari, a clinical neuropsychologist, noted that appellant exhibited some mild impairments in appellant's cognitive and memory functioning.

At the hearing, counsel noted that appellant had limited memory of what occurred on the date of the motor vehicle incident. Appellant testified that the last thing she remembered on January 8, 2015 was heading back towards the employing establishment, and that there had been a white-out. She recalled that she looked down at her speedometer and noted that she was going between 20 and 25 miles per hour and that she took her foot off the accelerator and then checked to make sure her seatbelt was on, as they tended to slip off. The next thing appellant recalled was waking up in the hospital. Appellant stated that she traveled the same route every day, unless she had to deliver an extra piece of mail. She noted that she did not recall turning onto County Road 17, and acknowledged that this was not part of her delivery route. Appellant also did not recall driving on County Road 6 or County Road 15, turning around in a driveway, or driving on County Road 21. She stated that she did not know why she would have driven on this route. Appellant stated that the route as described by counsel indicated that she had been back-tracking or turning around. She noted that she could not have been lost, because she was familiar with these roads.

The hearing representative asked appellant if she could have been making deliveries on these roads, and appellant stated that she could have been making deliveries, but that she did not recall. Appellant contended that she never used her postal delivery vehicle for personal errands, because she could not do that without asking permission. She stated that she did not remember anything from the date of the incident, including her last delivery, except the white-out conditions.

Counsel argued that, while appellant's route was circuitous, she appeared to be heading back towards the employing establishment at the time of the incident. He stated that due to her traumatic brain injury, it was difficult for her to recall exactly what had occurred, but that this gap in memory should not be used as a presumption to deny her benefits. The hearing representative asked if appellant was in the course of traveling back to the employing establishment at the time of the incident and appellant believed that she was *en route* back to the employing establishment at the time of the incident.

By decision dated December 15, 2015, the hearing representative affirmed OWCP's prior decision of February 23, 2015. He stated that appellant had clearly diverted from the performance of duty with regard to both time and distance. The hearing representative found that appellant had completed her employment duties at 4:37 pm but did not make it back to the office because of an accident at 5:18 p.m., 45 minutes later. He found that, despite the fact that she had returned to her route for one minute prior to the incident, she was outside the scope of her employment. The hearing representative found no evidence that the 45-minute diversion was to pursue any benefit for the employing establishment and thus would have to be characterized as a personal mission.

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.³

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 an 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.⁴

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

³ See 5 U.S.C. § 8102(a).

⁴ *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

employment who are sent on errands or special missions by the employer; and (4) workers who perform services at home for their employer.⁵

ANALYSIS

Appellant filed a claim alleging that she sustained injuries to her head, legs, pelvis, and arms in a motor vehicle incident on January 8, 2015. By decision dated December 15, 2015, a hearing representative affirmed OWCP's February 23, 2015 denial of her claim as appellant had substantially deviated from her route, both in time and distance, prior to the accident and was thus not in the performance of duty at the time of the incident.

In the present case, the record establishes that on January 8, 2015 appellant was delivering mail on snowy roads, during white-out inclement weather. While appellant's regular work hours were from 6:30 a.m. to 3:00 p.m., there is no factual dispute that appellant's supervisor had allowed additional time for appellant complete her route and was told to return to the employing establishment by 5:00 p.m., due to the inclement weather conditions. The employing establishment noted that appellant delivered her last parcel at 4:37 p.m., and the motor vehicle collision occurred at 5:18 pm, approximately 45 minutes. However, the Board finds that appellant's deviation was not for 45 minutes but rather only a 26-minute diversion. The diversion did not begin until 4:52 p.m., when she turned north off County Road 120 and onto County Road 17. The accident occurred 26 minutes later at 5:18 p.m., pursuant to the police report.

It is well established that "an identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he or she returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial."⁶ The initial question, therefore, is whether appellant deviated from a business trip for "personal reasons" when she turned onto County Road 17 after delivering her last parcel.

In determining the purpose of a deviation, the Board must look to the evidence presented to determine whether the errand furthers the employer's business.⁷ Given the paucity of evidence explaining appellant's deviation from her route as furthering the business of the employing establishment, her acknowledgement that she would not have been delivering mail on Route 17, and given that she had already delivered her last parcel for the day before deviating from her assigned route, the Board finds that the deviation was personal in nature.

Having established that the employee was engaged in a personal errand, the next question is whether the deviation may be "insubstantial," and therefore not remove the employee from the course of employment. Insubstantial deviations are "largely the kind of momentary diversions which, if undertaken by an inside employee working under fixed time and place limitations, would be compensable under the personal comfort doctrine."⁸

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5a (August 1992).

⁶ A. Larson, *The Law of Workers' Compensation* § 19.00.

⁷ *Amy Ureel (Michael Ureel)*, 51 ECAB 260 (1999).

⁸ *Id.* at 262.

Appellant's deviation from her usual route was both circuitous and lengthy. On January 8, 2015 appellant delivered her last parcel at 4:37 p.m. At that time, she should have taken State Road 120 directly to the employing establishment, where she would have arrived by 5:00 p.m. Appellant was at the intersection of County Road 19 and State Road 120 at 4:50 pm and turned to travel westbound toward the employing establishment on her normal route to return to the employing establishment. At 4:52 p.m., however, rather than continuing westbound on State Road 120, she turned north onto County Road 17. She continued north on County Road 17 and at 4:55 p.m. turned west onto County Road 6. Appellant continued on County Road 6 until she reached County Road 15, at which time she turned around in a driveway. She continued on County Road 6 and followed it until turning north on County Road 21 to County Road 8, and followed County Road 8 back to County Road 17. Appellant followed County Road 17 back to State Road 120. At 5:17 she had reached State Road 120 and had turned westbound, back on the route to the post office facility. The accident occurred at 5:18 while she was traveling westbound on State Road 120. Given the length of time, approximately 25 minutes and the circuitous route she traveled, the Board finds that the deviation was significant, but not so substantial a deviation as to find that appellant had abandoned her employment duties and that any employment character of the travel would have ceased.⁹

The last step in the analysis is to determine at what point the personal deviation occurred and whether, at the time of the accident, the employee had completed the personal errand and resumed her business route. In *Amy Ureel (Michael Ureel)*,¹⁰ the Board found that while the deceased appellant had deviated from his usual route to return to his apartment to retrieve a personal item, he had returned from the personal deviation at the time of the incident and resumed his usual route back to the employing establishment. The Board noted, "The general rule is that, once a personal deviation has been completed and the main business route is resumed, an employee is once again in the performance of duty."¹¹

The incident in the present case occurred on State Road 120, the normal route that appellant would have been taken when she was returning from her carrier duties. The Board finds that, as appellant had regained the work-related route after the personal deviation, she had returned to the performance of duty. Accordingly, the motor vehicle incident of January 8, 2015 occurred within the performance of duty.

Appellant did submit medical evidence to the record from Dr. Thompson which diagnosed several medical conditions. As OWCP has not yet evaluated the medical evidence, the case will be remanded to OWCP for evaluation of the medical evidence to determine whether she sustained a medical condition and/or disability due to the January 8, 2015 employment

⁹ *Supra* note 7; *cf. W.F.*, Docket No. 14-0015 (issued June 4, 2014) (where the employee's injury occurred after he had rebooked his travel flights for personal reasons); *Barbara Stamey* (Roy C. Stamey), 32 ECAB 1767 (1981) (where the employee's attendance at a prayer breakfast was considered a substantial deviation); *S.C.*, Docket No. 10-1706 (issued May 9, 2011) (where the employee slipped and fell at midnight seven hours after her work ended with no explanation as to why she was away from the hotel at that time); and *Janice K. Matsumura*, 38 ECAB 262 (1986) (where the employee had taken a sightseeing excursion around Manila when the accident occurred).

¹⁰ *Supra* note 7.

¹¹ *But see Katherine A. Kirtos*, 42 ECAB 160 (1990) (where the employee had not returned to her authorized route at the time of the accident).

incident.¹² After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant was within the performance of duty at the time of the January 8, 2015 incident. The Board further finds that this case is not in posture for decision regarding any resulting injury or disability, as further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.¹³

Issued: December 12, 2017
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² *J.C.*, Docket No. 16-1206 (issued November 17, 2016).

¹³ Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.