

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

A.P., Appellant)	
)	
and)	Docket No. 18-0886
)	Issued: November 16, 2018
U.S. POSTAL SERVICE, LOS ANGELES)	
PROCESSING & DISTRIBUTION CENTER,)	
Los Angeles, CA, Employer)	
)	

Appearances:
Brett Blumstein, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 21, 2018 appellant, through counsel, filed a timely appeal from a January 29, 2018 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 has met her burden of proof to establish a traumatic injury in the performance of duty on March 16, 2017, as alleged.

FACTUAL HISTORY

On March 23, 2017 appellant, then a 67-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that, while working, she was pinned by a tractor-trailer truck at approximately 8:20 a.m. on March 16, 2017 and sustained bilateral pelvic fractures. She stopped work on the date of injury. On the claim form, A.H., manager of maintenance operations support, indicated that appellant was not in the performance of duty, as she was in a nondesignated break area, taking an unauthorized break, attempting to get cellular service for a personal call. He maintained that appellant's willful misconduct caused the injury because she entered a parking stall in the dock area.

In correspondence dated March 22, 2017, M.C., maintenance manager lead, also maintained that appellant was on an unauthorized break and entered an unauthorized area on the ground level of the employing establishment loading dock, where she did not maintain awareness of her surroundings, turned her back to potential oncoming traffic, and entered a blind spot where she was subsequently struck by a tractor-trailer that was backing up. He related that appellant was transported to a local hospital and remained hospitalized.

In an unsigned statement, appellant related that at about 8:10 a.m. on March 16, 2017, while on break, she went outside to call her aunt. She indicated that she was questioned by several people, gave them directions, and then turned and walked into the bay with an empty parking space, got her coffee and telephone and began to call her aunt, and then she saw the shadow of a truck backing up towards her. Appellant related that the truck pinned her, but moved and allowed her to fall free. Several employees, including the employing establishment nurse, came to assist her, and she was then transported to the hospital.

Hospital reports on March 16, 2017 included a pelvic x-ray that demonstrated fracture of the left and right superior and inferior public rami and marked degenerative changes. A computerized tomography (CT) scan of the abdomen and pelvis demonstrated a fracture through the central sacrum, through the left lateral aspect of the partially sacralized L5, and of the left and right superior and inferior public rami. Dr. Gary Chen, a Board-certified orthopedic surgeon, reported the history of injury and examination findings. He diagnosed bilateral pubic rami fractures, sacral fracture, and crush injury. Dr. Chen recommended nonoperative management and pain control. A March 18, 2017 magnetic resonance imaging (MRI) scan of the pelvis demonstrated pelvic and sacral fractures.

By development letter dated April 4, 2017, OWCP informed appellant of the type of evidence needed to establish her claim. It noted that the employing establishment had controverted her claim, and asked her to further explain exactly what she was doing when the injury occurred. In a separate letter, OWCP asked the employing establishment whether, at the time of the injury, appellant was assigned to duties that required her to be in the loading dock area, and to furnish

further information regarding the premises where the injury occurred. It afforded 30 days for submission of additional evidence.

In an undated statement, appellant indicated that, on the morning of March 16, 2017, after arriving at work around 6:00 a.m., she began her break at around 8:10 a.m., and that 10 minutes into her 15-minute break, she stepped outside to make a daily call to check up on her aunt who had dementia. She maintained that other employees and management also went outside to make telephone calls, to take smoke breaks, *etc.*, and nothing was done to stop them. Appellant indicated that there was no reception in the breakroom so there was nowhere else she could make the call. She related that she had just spoken with the driver that hit her and directed him to another area, but he chose to backup. Appellant noted that there were no audible back-up signals. She submitted statements from six coworkers who indicated that they witnessed employees smoke outside, in the stalls, and around the employing establishment.

In an April 4, 2017 letter, L.H., a human resources management specialist at the employing establishment, maintained that appellant willfully ignored an enforced policy regarding the use of cellular telephones. She noted that appellant was not on the dock, but was in an actual stall where semi-trailers back in to unload mail and had her back to oncoming trucks, and that this was not a designated area for telephone calls, which were only to be made during break and lunch periods. L.H. attached employing establishment cellular/mobile telephone policy which indicated that the use of cellular telephones was prohibited while on duty. On April 13, 2017 she reiterated that appellant was not in the performance of duty when injured on March 16, 2017, and noted that signs were posted throughout the employing establishment that clearly prohibited cellular telephone usage. L.H. submitted attachments including a map of the workroom area, a picture of the door appellant exited to the truck unloading area, and outside dock area for trucks unloading mail. On May 11, 2017 she contended that appellant knew she was in an unauthorized break area when injured and failed to follow the mobile telephone policies, indicating that there were two telephones available for employees to make emergency calls. L.H. indicated that the door appellant used to access the outside was not an employee entrance or exit, and that she had to prop the door open so that she could reenter the building. She noted that this exit was into a strict loading/unloading zone, and appellant therefore jeopardized her safety.³

By decision dated May 11, 2017, OWCP found that appellant was not in the performance of duty when injured on May 16, 2017 and denied her claim. It found her action to go outside to obtain a better cellular signal was not reasonably incidental to her employment and was a personal mission that could not be likened to incidental acts recognized as for personal comfort.

On June 6, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative. Counsel subsequently changed the request to a review of the written record.

In an October 10, 2017 statement, appellant indicated that she went outside during her scheduled break to try to call her aunt whom she called on a regular basis. She noted that she could

³ The employing establishment noted that there was also evidence that a third party could be liable for the injury and requested that counsel submit information in that regard.

not make telephone calls from within the building and had to go outside, maintaining that her supervisor who had seen her outside had not told her this was not allowed.

By decision dated January 29, 2018, an OWCP hearing representative found that appellant was not in the performance of duty when injured. She found that, even though appellant was on the employing establishment premises when injured, she was not engaged in activities which were reasonably incidental to her employment. The hearing representative noted that appellant left the premises of her work area and entered an unauthorized area to make a telephone call when injured on March 16, 2017, and that the evidence did not clearly establish that she was still on her break when injured. She further noted that no reasonable person would consider a truck bay a designated work area, and that the witness statements provided by appellant were vague and did not describe specific areas employees used for break. She concluded that cellular telephone use was not considered part of personal ministrations and, therefore, the personal comfort doctrine would not apply. The hearing representative affirmed the May 11, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.⁷ To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁸ First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰

⁴ *Supra* note 2.

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009).

⁶ S.P., 59 ECAB 184 (2007).

⁷ 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ B.F., Docket No. 09-0060 (issued March 17, 2009).

⁹ D.B., 58 ECAB 464 (2007).

¹⁰ C.B., Docket No. 08-1583 (issued December 9, 2008).

It is the claimant's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether an employment incident occurred as alleged. The evidence must be sufficient to establish whether the claimant was in the course of federal employment at the time of the incident, so that a proper determination may be made as to whether an injury occurred while in the performance of duty.¹¹ An injury is stated to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling employment duties or is engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.¹²

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as: (a) personal acts for the employee's comfort, convenience, and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury on March 16, 2017 while in the performance of duty, as alleged.

The employing establishment controverted the claim alleging an affirmative defense of willful misconduct. OWCP's use of an affirmative defense in denying a claim must be invoked in the original adjudication of the claim, and it has the burden to prove such a defense.¹⁴ It did not adjudicate the claim based upon the affirmative defense, but rather found that appellant had deviated from her employment at the time of the alleged injury.

In determining whether an injury occurs in a place where the employee may reasonably be, or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective."¹⁵

The evidence establishes that appellant was injured on the employing establishment premises at approximately 8:20 a.m. on March 16, 2017. At the time of the injury, appellant, at

¹¹ *T.S.*, Docket No. 09-2184 (issued June 9, 2010).

¹² *B.C.*, Docket No. 09-0653 (issued December 24, 2009).

¹³ *T.L.*, 59 ECAB 537 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 1.804.4a(2) (August 1992).

¹⁴ See *B.P.*, Docket No. 17-0580 (issued March 12, 2018).

¹⁵ *Rebecca LeMaster*, 50 ECAB 254 (1999).

the end of her morning break, had used an unauthorized exit to leave the building where she worked and gone outside to make a personal cellular telephone call. She was injured by a truck backing into a truck bay where she was standing with her back to the entrance. The employing establishment controverted the claim, noting that appellant was in an unauthorized area when injured.

The record establishes that appellant was not in the performance of duty at the time of the March 16, 2017 injury as she had deviated from her duties.¹⁶ This is the type of “specific personal objective” that removes an employee from the performance of duty.¹⁷ In this case, the record supports that the employing establishment designated specific authorized locations for breaks, and the door appellant used to exit the building was not to be used by employees. There is no evidence that she was in an authorized area such as a smoking area or that she was on an authorized break. The coworkers statements submitted are insufficient to establish that appellant was in the performance of duty as they are too general in nature and do not refer to the area where appellant was injured.¹⁸ Appellant acknowledged that, when she exited the building, her intention and sole purpose was to make a personal telephone call. There is no evidence of record that the employing establishment benefited in any way from appellant’s telephone call. The fact that she was struck by a truck while making the call in an area where trucks backed up daily to deliver mail cannot be said to have been in the course of her employment. Appellant’s telephone call in a truck bay, even though on premises, is therefore a deviation that takes her injury out of the performance of duty.¹⁹

The Board further finds that appellant was not engaged in an act of personal comfort at the time of the alleged incident. This doctrine holds that acts of personal comfort, such as eating a snack, using the bathroom, or drinking water or other beverages, are considered to be in the performance of duty.²⁰

The Board has previously noted that in the workers’ compensation treatise, A. Larson, in *The Law of Workers’ Compensation* addresses the close relationship between the deviation doctrine and personal comfort doctrine in those cases where the smallness of the deviation is immaterial.²¹ He relates that there are insubstantial deviations of momentary diversion that, if undertaken by an inside employee working under fixed time and place limitation, would be compensable under the personal comfort doctrine.

Although counsel relied on Board precedent finding getting water, taking a smoking break, or leaving the employing establishment to obtain coffee when none was available at the employing establishment within the personal comfort doctrine, these cases can be distinguished from the facts of the present case. While the Board recognizes that the personal comfort doctrine is an essential

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See B.C.*, *supra* note 12.

¹⁹ *See A.K.*, Docket No. 09-2032 (issued August 3, 2010).

²⁰ *See J.L.*, Docket No. 14-0368 (issued August 22, 2014).

²¹ A. Larson, *The Law of Workers’ Compensation*, Vol. 1, § 19.63.

part of work life, an employing establishment can place reasonable restrictions on this policy.²² Making a personal telephone call on a cellphone outside of the employing establishment building, when telephones are available within the building is not necessary to personal comfort.

For these reasons, the Board concludes that appellant was not in the performance of duty when injured on March 16, 2017.

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 has not met her burden of proof to establish a traumatic injury in the performance of duty on March 16, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²² See *Conrad R. Debski*, 44 ECAB 381 (1993).