

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

S.R., Appellant)	
)	
and)	Docket No. 17-1051
)	Issued: August 14, 2019
U.S. POSTAL SERVICE, JACKSON)	
PERFORMANCE & DISTRIBUTION CENTER,)	
Jackson, MS, Employer)	
)	

Appearances:
John R. Reeves, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 21, 2017 appellant, through counsel, filed a timely appeal from a December 28, 2016 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 the 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 was an employee of the United States under 5 U.S.C. § 8101(1) at the time of her alleged injury on April 4, 2011.

FACTUAL HISTORY

On February 4, 2012 appellant, then a 26-year-old contract driver, filed a traumatic injury claim (Form CA-1) alleging that, on April 4, 2011, she lost control and overturned the truck she was using to transport mail. She sustained left arm injuries, including a left arm amputation. The back of the form was not completed.

Evidence submitted with the claim indicated that appellant worked for private contractor Triple J. Enterprises, a private contractor. On April 29, 2009 the employing establishment had awarded this private contractor with Highway Contract Route No. 396A5, a set route from Jackson Postal and Distribution Center, MS to Oak Vale, MS, for the term from May 2, 2009 through March 31, 2012. Under the terms of the contract, Triple J. Enterprises was responsible for supplying the vehicles used to transport the mail, maintaining liability insurance for all vehicles used under the contract, and for employing suitable individuals to perform under the contract, and for paying the drivers hired under the contract. Under section B.3(d) of the contract, the private contractor could either use a sign that read "United States Mail," or, dependent on the color the vehicle was painted, have inscribed on the doors the words "United States Mail Contractor."

On PS Form 2081, Contractor Employee Assignment Notification, V.L. of Triple J. Enterprises indicated that, effective January 5, 2010, appellant, an employee with the contractor, was permanently assigned to contract number 396A5. She also indicated that appellant required access to mail or postal premises under the contract with the employing establishment.

Pursuant to the terms of the contract, appellant underwent screening and identification requirements. She completed a Contract Personnel Questionnaire, PS Form 2025, and was issued a Non Postal Service temporary employee photo identification badge. Appellant was required to wear and display the identification badge while on the employing establishment's postal property. She did not wear an employing establishment uniform.

On the PS Form 2025, appellant indicated that she was a contractor/contractor's employee. She also completed a PS Form 2181-C, an "Authorization and Release -- Background Investigation (USPS Contractors and Employees of Contractors).

Under section B.1(4) of the contract, appellant was required to sort, load, and unload all classes of mail at the headout, enroute, and destination postal offices as directed by an employing establishment official. The contract indicated that employing establishment personnel could assist with loading and unloading in order to maintain a schedule. However, the contractor (appellant) was responsible to ensure the truck was loaded correctly. The contractor (appellant) was required to spot loads, where applicable, upon arrival at destinations and required to pick up outbound loads at locations(s) as directed by an employing establishment official. The contract also indicated that the contractor (appellant) could be assigned lobby/vestibule keys and/or a scanning device to be

used in the delivery and collection of mail along the contract route, which had to be signed out prior to the start of the designated route and turned in at the end of the trip(s).

In a February 16, 2012 letter, the employing establishment advised that, although appellant was “an affiliate” of the postal service *via* the transportation and delivery of mail, she was not a federal employee. Rather, she was employed by Triple J. Enterprises, an independent contractor.

In a November 16, 2015 letter, counsel argued that appellant was an employee of the employing establishment for purposes of workers’ compensation benefits. He contended that the postmaster maintained control over appellant’s job duties, including when she reported to duty and the route she drove on a daily basis.

In a development letter dated November 24, 2015, OWCP informed appellant that the evidence submitted was insufficient to support that she was a federal employee. Also, no medical evidence had been received which contained a physician’s diagnosis and opinion regarding the cause of a diagnosed condition. Appellant was afforded 30 days to submit the requested evidence, including evidence which established that she was working as a federal civil employee as defined by 5 U.S.C. § 8101(a).

Appellant submitted a signed statement of certification dated November 30, 2015 along with medical reports from Simpson General Hospital dated April 28, 2011 through November 2, 2015 and reports from The University Hospitals and Clinics dated April 28, May 26, and June 28, 2011, which discussed her left arm condition.

In a December 15, 2015 letter, counsel contended that the employing establishment was appellant’s “statutory employer” since Triple J. Enterprises did not have the required workers’ compensation insurance under state law. He indicated that the Fifth Circuit in *Chaline v. U.S.*³ held that when a postal service contractor’s employee was injured from work that was part of the postal service’s “trade, business, or occupation,” it was deemed to be the “statutory employer” of the injured employee. Further counsel contended that because Triple J. Enterprises contracted with the employing establishment to deliver mail, the employing establishment was considered the principal/contractor and Triple J. Enterprises was the subcontractor. As appellant’s injury occurred from work that was part of the employing establishment’s “trade, business, or occupation,” counsel argued that she qualified for federal workers’ compensation as Triple J. Enterprises did not have the required workers’ compensation insurance under state law.

By decision dated January 4, 2016, OWCP denied appellant’s claim finding that the evidence of record failed to establish that she was a federal employee under FECA. It found that an employee/employer relationship did not exist between appellant and the employing establishment at the time of the claimed injury. Rather, she was employed by an individual contractor, Triple J. Enterprises, at the time of the claimed injury.

On January 18, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the September 13, 2016 telephonic hearing, appellant testified that she worked for Triple J. Enterprises and transported mail for the employing establishment.

³ 887 F.2d 505, 506 (5th Cir. 1989).

She stated that she took mail from the Jackson Post Office and delivered it to the smaller post offices in Sontag, Monticello, and Oakville. Appellant checked in with the postmaster at the Jackson Post Office to pick-up keys for the other offices. She stated that she had to sign for the keys. Appellant would then sort through the mail on the deck, load her truck, and deliver the mail to the other post offices. She testified that she had identification issued by the employing establishment. Appellant also stated that Triple J. Enterprises had hired her and that she had worked for the contractor for approximately two years prior to the time of the injury.

Appellant testified that, at the time of injury, her truck fishtailed because of the wind and flipped over onto her arm. She indicated that her arm was amputated at the hospital above her elbow. Appellant testified that a several of the employing establishment's employees had helped her load the truck. She did not believe that the vehicle had been loaded correctly as it had too much weight on one side and that the contents were moving around as she was driving. Appellant stated that she informed V.L. of Triple J. Enterprises about her injury and went to the hospital. When she later tried to discuss her injuries with V.L., she was told that they were not responsible and that the company did not have workers' compensation insurance to cover her loss. Counsel indicated that the lack of insurance was confirmed by the Workers' Compensation Special Commission.

Counsel asserted that appellant was a statutory employee of the employing establishment and that the employing establishment was the statutory employer since the contractor, Triple J. Enterprises, did not have workers' compensation insurance.

Appellant testified that the postmaster of the employing establishment provided instructions on the assignment destinations and gave her the keys to postal facilities. She also picked up money bags from the smaller post offices and returned them to the postmaster in Jackson, Mississippi. Appellant stated that she had keys to the offices and was trusted to get the money and deliver it back to the postmaster. She advised that both parties signed off on the transaction. Appellant also stated that the employing establishment instructed her regarding the times to pick up the mail and have it delivered and that she had a set schedule to return to the Jackson postal facility in the afternoon.

Appellant testified that V.L. had hired her and that her paychecks were from V.L. She indicated that she had to complete an employment form for the employing establishment. Appellant stated that she did not have a supervisor at the employing establishment and had picked up the keys directly from the postmaster. She testified that she had the same route daily and used a vehicle provided by Triple J. Enterprises. Appellant advised that the truck insurance had provided \$5,000.00 in medical expense. She stated that she did not have to present the contractor with any type of insurance or bond information before she was hired. Appellant also stated that she did not have a written contract of employment with Triple J. Enterprises.

Counsel indicated that a workers' compensation claim had been filed against both V.L. and the employing establishment. He explained that the state Workers' Compensation Commission had determined that they could not rule in a federal matter. Counsel argued that Triple J. Enterprises was required under state law to have insurance coverage. Since it did not have the

required insurance, under state law, the employing establishment would be deemed the statutory employer. Counsel again cited to the case of *Chaline v. U.S.*⁴ In support of his argument.

Counsel argued that the employing establishment controlled appellant's daily work duties through the contractor, Triple J. Enterprises, and that appellant was in the course and scope of her employment when injured. Appellant testified that she was issued a 1099 tax form from Triple J. Enterprises. Counsel argued that Triple J. Enterprises was skirting the tax law as appellant was its employee.

In a September 16, 2016 letter, counsel submitted additional legal documentation which supported his legal position that the employing establishment was the statutory employer of appellant and which indicated that contractor Triple J. Enterprises did not have the required workers' compensation insurance.

On September 22, 2016 a copy of the hearing transcript was sent to the employing establishment for review and comment.

In an October 24, 2016 letter, the employing establishment maintained its position that appellant was not a federal employee at the time of her injury. It advised that the evidence supported that appellant was an independent contractor with Triple J. Enterprises. In the alternative, the employing establishment argued that, if appellant was considered an employee of Triple J. Enterprises, there was no requirement in the contract that Triple J. Enterprises must provide workers' compensation insurance coverage to appellant. Rather, the contract simply provided that Triple J. Enterprises was required to comply with all federal, state, and local law ordinances. It noted that under Mississippi state law, an employer who had less than five employees was not required to provide workers' compensation insurance coverage and there was no evidence that Triple J. Enterprises had five employees. Thus, there was no requirement under state law that Triple J. Enterprises was required to provide appellant with insurance coverage. The employing establishment argued that appellant was an independent contractor and thus she could not be a statutory employee.

The employing establishment advised that appellant's state claim against them had been settled and that the Mississippi State Workers' Compensation Commission had dismissed the claim. However, no information pertaining to such a settlement was provided. A copy of the employing establishment's position statement dated April 12, 2012 was provided along with the referenced contract and personnel data.

By decision dated December 28, 2016, OWCP's hearing representative affirmed the January 4, 2016 decision, finding that the evidence of record failed to establish that appellant was an employee of the United States under FECA. She found that appellant was an independent contractor of Triple J. Enterprises and thus she could not be a statutory employee of the employing establishment.

⁴ *Id.*

LEGAL PRECEDENT

FECA provides that 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 or her duty.⁵ A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that the claimant was an employee within the meaning of FECA.⁶

For purposes of determining entitlement to compensation benefits under FECA, an employee is defined, in relevant part, as:

“(A) a civil officer or employee in any branch of the [g]overnment of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

“(B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service or authorizes payment of travel or other expenses of the individual....”⁷

With regards to whether a claimant is a federal employee for purposes of FECA, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment.⁸ Included among the many factors to be considered are the right of control of the work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job, and the intention of the parties.⁹ Other factors to be considered include whether the claimant has been rendering service similar to the service of a federal employee and whether the employing establishment was authorized by statute to accept such services.¹⁰ The statute does not require that any written form of agreement be entered into by the employing establishment and the individual providing services prior to acceptance of personal services by the employing establishment.¹¹ With regards to the party who paid the wages, the implication that a claimant was a federal

⁵ 5 U.S.C. § 8102(a).

⁶ *T.C.*, Docket No. 19-0227 (issued July 11, 2019); *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

⁷ 5 U.S.C. § 8101(1).

⁸ *A.M.*, Docket No. 16-1038 (issued December 23, 2016); *S.D.*, Docket No. 13-0090 (issued August 22, 2013); *Donald L. Dayment*, Docket No. 01-1846 (issued January 21, 2003).

⁹ *A.M.*, *id.*; *Larry E. Young*, 52 ECAB 264 (2001).

¹⁰ *A.M.*, *id.*; *Sandra Davis*, 50 ECAB 450 (1999).

¹¹ *Jane Doe*, 49 ECAB 646, 649 (1998).

employee cannot be drawn solely from the fact that his or her salary was derived from a fund to which the Federal Government contributed.¹²

Of the aforementioned factors, the Board has held that the right to control the work activities of the person whose status is in dispute is the most important.¹³

OWCP's procedure manual indicates that, when there is a question as to whether appellant is an employee or an independent contractor, the claims examiner should request statements from the worker and the reporting employing establishment to indicate, *inter alia*, whether the worker was required to furnish any tools or equipment, the period of time the work relationship was to exist, whether the reporting employing establishment had the right to control or direct how the work was to be performed with full explanation, the manner in which payment for the worker's services was determined, and whether the activity in which the worker was engaged was a regular and continuing activity of the reporting employing establishment.¹⁴

The procedures for making a determination of whether a claimant is an employee or an independent contractor the claims examiner must be particularly careful to determine whether the worker is an independent contractor or an "employee." Where this issue becomes a factor, the claims examiner should request statements from the worker and the reporting agency on seven factors which must be considered.¹⁵

Specifically regarding Postal Service Mail Messengers, OWCP's procedure manual relates that determinations of whether mail messengers who perform service for the U.S. Postal Service

¹² *David Nivens*, 46 ECAB 926, 934 (1995); *Darlene Menke*, 43 ECAB 173, 178 (1991); *Carl R. Clover*, 41 ECAB 625, 632 (1990) and cases cited therein.

¹³ *S.D.*, *supra* note 8; *Nettie Jackson (Lee F. Jackson)*, Docket No. 01-0498 (issued November 21, 2001); *Kenneth W. Grant*, 39 ECAB 208 (1987); *Wendy S. Warner*, 38 ECAB 103, 105 (1986); *Funnia F. Hightower*, 28 ECAB 83 (1976).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.6(a) (June 1995).

¹⁵ *Id.* at Chapter 2.802.6. The worker and the reporting agency, should be instructed to show:

- (1) *Whether the worker performs services* or offers services to the public generally as a contractor or is permitted to do so by the reporting agency and, if so, a full explanation;
- (2) *Whether the worker is required to furnish* any tools or equipment and, if so, a full explanation;
- (3) *The period of time* the work relationship is to exist;
- (4) *Whether the reporting agency* has the right to discharge the worker at any time and, if so, when and under what circumstances;
- (5) *Whether the reporting agency* has any right to control or direct how the work is to be performed and, if so, a full explanation;
- (6) *The manner in which payment* for the worker's services is determined; and
- (7) *Whether the activity* in which the worker was engaged was a regular and continuing activity of the reporting agency and, if not, a full explanation.

are considered civil employees are made on a case-by-case basis. Cases involving determinations of postal service mail messengers should be referred to a senior claims examiner.¹⁶

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant transported mail as a driver for contractor Triple J. Enterprises. She alleged that her status should be considered that of a federal employee at the time of her April 14, 2011 accident. OWCP's hearing representative found that appellant was an independent contractor of Triple J. Enterprises and thus she could not be a statutory employee of the employing establishment.

In determining whether an employer-employee relationship was created at the time of appellant's injury, the Board has applied both the right of control analysis and looked at the nature of the work performed.¹⁷ Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁸

¹⁶ *Id.* at Chapter 2.802.7. Before referral, the claims examiner should ask the reporting agency for copies of any written agreement or work contract executed by the mail messenger or the postal service when the injured individual began working or at any later date, and of any oath executed by the worker. Absent a written contract, the postmaster and the mail messenger should be asked to submit statements showing in full detail the terms of the oral agreement and the precise manner in which it was reached.

The reporting agency should also be asked to submit a statement showing:

- a. *The manner in which the worker qualified* and was selected to act as mail messenger;
- b. *The distance* the mail was carried;
- c. *The kind of equipment* used and by whom it was furnished;
- d. *Whether the mail messenger was required* to personally perform the service or whether assistants or substitutes were permitted and, if so, under what conditions and circumstances;
- e. *Whether the mail messenger had any other employment* or performed or offered like or similar services to the public as an independent business service and, if so, this should be explained fully;
- f. *The manner and circumstances* under which the relationship could be terminated;
- g. *The manner in which the pay was determined*;
- h. *Who determined how, when, and in what manner* the mail would be carried; and
- i. *What right, if any, the postmaster had to direct* or supervise the work performed by the mail messenger and to what extent the postmaster exercised this right.

¹⁷ *See supra* note 8.

¹⁸ *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

The Board finds that the case should be remanded to OWCP for further development of the factual evidence regarding the question of whether appellant was an employee within the meaning of FECA at the time of her injury on December 12, 2011. FECA regulation 20 C.F.R. § 10.118(a) provides that the employing establishment is responsible for submitting to OWCP all relevant and probative factual evidence in its possession or which it may acquire through investigation or other means.¹⁹ OWCP procedures require development of the claim by inquiry with the employing establishment regarding the employment relationship, if any, with a claimant.²⁰ The procedures further provide separate and distinct inquiries with regard to mail messengers.²¹

On remand OWCP shall determine which inquiries are appropriate to determine appellant's employment status and then obtain all necessary information from the employing establishment in accordance with its appropriate procedures. If the determination is made that appellant is a mail messenger, pursuant to Chapter 2.802.7 of the FECA Procedure Manual,²² the claim shall be referred to a senior claims examiner. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's employment status and the validity of her claim for benefits in accordance with the relevant standards for such determinations.²³

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁹ 20 C.F.R. § 10.118(a) (2012).

²⁰ *Supra* note 15.

²¹ *Supra* note 16.

²² *Id.*

²³ *See Harry H. Holzem*, Docket No. 03-0588 (issued June 19, 2003).

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 14, 2019
Washington, DC

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

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

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