United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 10-514**
	)	**Issued: April 12, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Belton, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 14, 2009 appellant's counsel timely appealed the November 3, 2009 merit decision of the Office of Workers' Compensation Programs which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on August 8, 2008.

FACTUAL HISTORY

Appellant, a 41-year-old rural carrier associate, was involved in a motor vehicle accident (MVA) on August 8, 2008. She was driving her work van (LLV) on her assigned route when she rear-ended a pick-up truck that was parked along the right side of the road. As a result of the collision, appellant sustained a right ventricular tear, which required emergency surgery. She remained hospitalized through August 14, 2008.

An August 8, 2008 police accident report noted that Kent Ellis, a witness, who was standing outside and heard the crash, ran over to the accident site and questioned appellant. Appellant reportedly told Mr. Ellis that she had looked down and either hit the vehicle and blacked out or blacked out and then hit the vehicle.

Appellant's prior medical history included surgery in February 2008 to repair a perforated duodenal ulcer. In 2004 she had a lumbar laminectomy at L5. Appellant continued to take pain medication for her low back condition. During the four-week period preceding the August 8, 2008 MVA, she saw her family physician, Dr. Michael D. Simanovsky, on at least three occasions.[1] Each time appellant complained of low back pain. She had been using Duragesic (fentanyl) patches for her back pain, but on July 31, 2008 Dr. Simanavosky prescribed Dilaudid instead. The patches apparently were not controlling appellant's pain and she reported sweating a lot. Appellant previously used Dilaudid when she had surgery for her ulcer. Therefore, Dr. Simanovsky discontinued the 72-hour Duragesic 75 micrograms (mcg) patches and switched appellant to Dilaudid 4 milligrams (mg).

The August 8, 2008 emergency room (ER) treatment records indicated that appellant's then-current medications included fentanyl patch, Ambien, lorazepam and possibly Dilaudid.[2] While she was in the ER she received two 2 mg doses of Narcan, an opioid antagonist.[3] An August 8, 2008 toxicology report was positive for opiates.[4] The report included the notation "H" which indicated an abnormally high level of opiates.

Dr. Simanovsky continued to treat appellant following her release from the hospital. In an August 20, 2008 treatment note, he reviewed the history of her accident. Appellant hit a parked truck, lacerated her pericardium and had open heart surgery. Dr. Simanovsky did not review any hospital reports, but relied on basic information provided by appellant and her husband. He also noted that she used to take Dilaudid for pain control for chronic back pain. Dr. Simanovsky noted that it had been very hard to establish what had actually happened. Appellant reportedly bent over to pick up something from the floor of the truck and then hit the truck and blacked out.[5] According to Dr. Simanovsky, appellant was doing fairly well. He refilled her prescription for Vicodin and advised her to follow up with her cardiologist and pulmonologist.

An investigative report -- "Description of accident" -- from the employing establishment indicated that appellant possibly struck as many as four (4) mailboxes over a two-hour period preceding her August 8, 2008 MVA. Appellant began delivering mail on her route at approximately 11:00 a.m. on August 8, 2008. The investigative report indicated that she struck a

[1] Dr. Simanovsky is a Board-certified family practitioner.

[2] The Dilaudid entry was followed by "?."

[3] The first dose was administered at approximately 3:30 p.m.

[4] The toxicology report indicated that the urine sample was obtained at 1456 (2:56 p.m.). According to the ER nursing records appellant arrived at 2:40 p.m. and a urine sample was obtained approximately one hour later.

[5] Dr. Simanovsky provided a similar history of injury in a September 18, 2008 attending physician's report (Form CA-20).

mailbox at noon, then another at 1:00 p.m., and then two more at 1:45 and 1:50 p.m. Appellant then collided with the parked pick-up truck at approximately 2:00 p.m. The first mailbox incident was witnessed by Barbara Allen, who reported that appellant was looking right at her as she mowed over the mailbox. She also stated that appellant had been driving "too fast." Ms. Allen described appellant as "hyper and agitated." Appellant reportedly left a note for the homeowner with her telephone number and an apology.[6]

With respect to the third mailbox incident, the homeowner, Robert Beaver, was uncertain of the exact time, but indicated it was possibly 2:00 p.m. The investigative report identified the incident as occurring at approximately 1:45 p.m. Appellant delivered the homeowner's mail and then turned back around to make another delivery on the same cul-de-sac. When she passed Mr. Beaver's home a second time she struck his mailbox and snapped the post off at ground level. Mr. Beaver stated that appellant was very apologetic. He was not concerned and did not intend to report the incident or seek any compensation. Mr. Beaver replaced the mailbox within a couple of days of the incident. He did not note any unusual behavior by appellant or observe her as she continued on her route.

The fourth mailbox incident was on the same cul-de-sac. The homeowner, Barbara Hobeck, looked out her front window and saw her carrier strike the mailbox. When interviewed on August 12, 2008, Ms. Hobeck advised that she suffered from dementia and admittedly could not remember the exact date of the incident, but she said it occurred within the past few days. She was also unsure of the time the incident occurred. The investigative report surmised that this incident possibly occurred immediately following the incident at Mr. Beaver's resident; approximately 1:50 p.m. The report also noted the possibility that appellant struck this particular mailbox before August 8, 2008.

Appellant struck the parked pick-up truck at approximately 2:00 p.m. The investigative report noted that her actual speed was unknown, but unidentified witnesses reported that she was not "traveling excessively" and the posted speed limit was 25 miles per hour. A nearby resident, Anthony Jarvis, was at home when he heard the collision. He looked out the window and saw the pick-up truck rolling down the street. Mr. Jarvis went outside and saw appellant's LLV in the yard. Appellant was conscious, but not completely oriented and sweating profusely. When Mr. Jarvis asked her what happened she stated "'I don't know how I got here." He stated that appellant then lost consciousness and stopped breathing. Mr. Jarvis and another neighbor, Grayson Heaton Jr., removed appellant from the LLV and laid her on the driveway. He was able to detect a pulse and soon afterwards the ambulance arrived and appellant regained consciousness.

Although Mr. Heaton did not witness the collision, he was in his yard and saw appellant immediately prior to impact. This was the second time appellant had driven down the street. Mr. Heaton noted that she had delivered his mail a half hour earlier. When he previously saw appellant, another neighbor with a red truck had stopped her for some reason. The driver of the red truck was identified as Robert Olson who reportedly had stopped appellant to return a piece

[6] No specific details were provided with respect to the second mailbox incident which allegedly occurred at 1:00 p.m. A customer reportedly contacted the employing establishment on August 12, 2008 stating that "a neighbor had seen the mail carrier on Friday August 8th, run into their box and knock it loose."

of mail that she mistakenly delivered. Mr. Olson reported that shortly after returning the mail to appellant he witnessed her abruptly stop at a controlled intersection.

On August 27, 2008 appellant responded to questions posed by the Office. The first question was what caused her to hit the parked vehicle. Appellant stated that she did not recall anything about the accident. She had been told she said she bent over for a package, but appellant did not recall talking to anyone and she had not seen the accident report. As to the details of the accident and whether appellant struck anything inside the vehicle or was ejected from the vehicle, she replied that she must have hit something inside the vehicle because of her bumps and bruises. She had not seen the vehicle to know if or what the inside looked like. Appellant was only certain that she had been wearing a seat belt. As to whether she was conscious at the time she hit the parked vehicle or had any medical conditions that would impede her ability to drive; she responded that she had medical conditions that warranted prescription medication, but she did not recall how she felt that day to know if she was having trouble from any previous illnesses.

The Office prepared a statement of accepted facts (SOAF) and forwarded the case to a district medical adviser (DMA) for an opinion on whether appellant's various medications, either alone or in combination, could have impeded her ability to operate a motor vehicle. It inquired whether appellant should have been operating a motor vehicle. The DMA was also requested to provide an opinion on the proximate cause of the August 8, 2008 accident.

The September 25, 2008 SOAF noted that appellant was employed as a rural carrier and was involved in a MVA while delivering mail on her route on August 8, 2008. It described the employer's investigative report as revealing that appellant "struck four separate mailboxes while delivering on her route" in the hours prior to the accident. The SOAF noted that a witness reported that appellant appeared "hyper and agitated," and two witnesses stated that she had delivered mail to the wrong address. Also, one witness reported that appellant was driving "too fast." It was further noted that appellant had deviated from her normal route, returning to a street where she had already delivered mail. The SOAF also provided a brief description of appellant's prior medical history that included ulcer surgery and treatment for chronic back pain. It listed her medications including Dilaudid, fentanyl, Ambien and lorazepam.

In a report dated September 28, 2008, Dr. David D. Zimmerman, the DMA, stated that "[b]ased on the SOAF, having not been able to actually review any records in iFECS, it is reasonable medically to accept that this claimant's medications inclusive of Dilaudid, fentanyl, Ambien [and] lorazepam caused her to be excessively medicated when driving a postal vehicle." He further stated that appellant should not have been allowed to drive a postal vehicle "which seems to be amply illustrated by the input of postal inspector interviews which indicate that the claimant hit four mailboxes, drove too fast, [and] according to witnesses, as discussed in the SOAF, appeared "hyper and agitated." Dr. Zimmerman concluded that the proximate cause of the motor vehicle accident was "drug medicated -- *i.e.*, the combination of Dilaudid, fentanyl, Ambien and lorazepam."

Dr. Zimmerman also provided an October 4, 2008 report in which he referenced his September 28, 2008 "critique." He stated that the medications referenced in his previous critique "would impede the ability to operate a motor vehicle." Dr. Zimmerman further noted that the

"Description of accident" showed that appellant's operation of the postal vehicle was erratic before she hit another vehicle traveling at a "rapid speed rate." He stated that appellant should not have been operating any motor vehicle and the proximate cause of the August 8, 2008 MVA was her impaired state as a consequence of using the multiple medications listed in the September 28, 2008 critique.

By decision dated October 17, 2008, the Office denied appellant's traumatic injury claim. Based in part on the positive toxicology report, it found that appellant was impaired on August 8, 2008 due to medication intoxication, which was the proximate cause of her injury.

On May 14, 2009 appellant's counsel requested reconsideration based on an October 23, 2008 report from Dr. Simanovsky.[7] On that date, appellant had a follow-up visit with Dr. Simanovsky and complained of chronic back pain. He noted a history of bulging disc in lumbar spine and a more recent history of an MVA and subsequent surgery to repair a laceration of the pericardium. As to the latter injury, Dr. Simanovsky noted that appellant was slowly improving and she remained off work. With respect to appellant's back condition, he noted that she had been on different pain medicine including Dilaudid, Vicodin, Percocet and fentanyl patches 75 mcg, which worked best. Dr. Simanovsky also noted that appellant ideally wanted to get rid of taking pain medicine, but her back pain continued to bother her almost daily. Appellant was basically there to discuss her current situation and pain management. Dr. Simanovsky diagnosed a history of chronic low back pain secondary to bulging disc and eight-week-old MVA with laceration of the pericardium and cardiothoracic surgery, normal postoperative. He also noted a history of addiction to painkillers. Dr. Simanovsky recommended a follow-up with a pain clinic specialist to slowly transition appellant off painkillers. He also refilled her prescription for fentanyl patches 75 mcg, 10 patches every 72 hours.

The Office reviewed the claim on the merits, but denied modification by decision dated November 3, 2009.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, 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. It is not sufficient under the general principles of workers compensation law to predicate liability merely upon the existence of an employee/employer relationship.[8] Rather, Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase while in the performance

[7] Subsequent to the October 17, 2008 decision, the Office also received other treatment records from Dr. Simanovsky dated July 11, July 31, August 20, September 16, October 3 and October 18, 2008. These reports document appellant's ongoing treatment for chronic low back pain and her various prescription medications.

[8] *Gerorge A. Fenske*, 11 ECAB 471 (1960).

of duty to be the equivalent of the commonly found prerequisite in workers compensation law of arising out of and in the course of employment.[9]

In the course of employment deals with the work setting, the locale and the 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.[10] In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place, (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while she is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.[11]

Section 8102(a) of the Act provides in pertinent part, as follows:

> "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.
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> (2) caused by the employee's intention to bring about the injury or death of himself or of another; or
>
> (3) proximately caused by the intoxication of the injured employee..."

When intoxication is invoked as an affirmative defense, the Board has explained that the statutory test under the Act is "proximate cause" therefore, the Office must show that the employee was in fact intoxicated when the injury occurred, and that such intoxication was the proximate cause of such injury. A mere showing that intoxication existed concurrently with the injury is insufficient.[12]

The Act does not intend that compensation shall be denied where intoxication is one cause of injury or death, on the theory that if an employee is intoxicated he is not in the performance of duty. Intoxication as a cause does not *ipso facto* take the case out of the

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[9] *Timothy K. Burns*, 44 ECAB 125 (1992).

[10] *Larry J. Thomas*, 44 ECAB 291 (1992).

[11] *See Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954).

[12] In the Matter of *Alice Marjorie Harris*, claiming as widow of *Roy Lee Harris*, 6 ECAB 55 (1953); *see also Ruth Bubier*, surviving widow of *Sylvester B. Bubier*, 2 ECAB 60 (1948); The Federal (FECA) Procedure Manual at Chapter 2.804.14(c) explains: "(1) Where intoxication may be the proximate cause of the injury, the record must contain all available evidence showing: (a) the extent to which the employee was intoxicated at the time of the injury; and (b) the particular manner in which the intoxication caused the injury. It is not enough merely to show that the employee was intoxicated. It is also the Office's burden to show that the intoxication caused the injury. An intoxicant may be alcohol or any other drug."

performance of duty. In *Ruth Bubier (Sylvester C. Bubier)*, the Board considered whether intoxication was the proximate cause of the employee's injury and death. It noted that under the Act, intoxication comes into picture as destroying the right to compensation in situations, otherwise within the performance of duty, only if intoxication is the proximate cause of the injury. In defining what is meant by proximate cause the Board stated:

> "[I]ntoxication does not bring the case within the statutory language under which benefits may be denied, unless injury was occasioned solely by or was proximately caused by intoxication (depending upon the particular act). Something more is necessary than a mere showing that intoxication existed concurrently with injury. If the injury was occasioned solely by … intoxication then the statute requires denial of benefits, *but this test can only be applied where the injury is one arising out of and in the course of employment* from other aspects, as the fundamental prerequisite must be satisfied first before applying such secondary test. If the first test is not met, then there is no need to apply the second test."[13] (Emphasis in the original.)

ANALYSIS

Appellant filed a claim alleging that she sustained injury due to a motor vehicle accident on August 8, 2008 while she was delivering mail on her route. The Office determined that her injury did not arise in the performance of duty. It raised the affirmative defense of intoxication to deny her claim because, *inter alia*, she tested positive for opiates. The Board finds that the Office did not meet its burden of proof to deny appellant's claim by raising the affirmative defense of intoxication. As noted, the Office's use of an affirmative defense must be invoked in the original adjudication of the claim and the Office has the burden to prove such a defense. The evidence to establish this defense must be reliable, probative and substantial.[14]

The record indicated that appellant had previously been prescribed at least two opiate-class narcotic analgesics, Dilaudid and fentanyl, for chronic lumbar pain. The August 8, 2008 emergency room records indicated that appellant received two 2 mg doses of Narcan, an opioid antagonist. While the August 8, 2008 toxicology report was positive for an abnormally high level of opiates, it is unclear what effect, if any, the Narcan may have had on the test results. Furthermore, the record is devoid of a medical opinion from anyone who treated appellant on August 8, 2008 regarding the possible intoxicating effects of her prescription medications.[15] Dr. Zimmerman, who found that appellant's medication was the proximate cause of the MVA, based his September 28, 2008 opinion entirely on the statement of accepted facts. His October 4, 2008 report did not identify any particular medical evidence to support his opinion on proximate cause. Dr. Zimmerman merely referred to his previous "critique" and the "Description of

[13] *Ruth Bubier (Sylvester Bubier), id.*

[14] *T.F., supra* note 9.

[15] The procedure manual provides that a statement should be obtained from the physician and the hospital where the employee was examined which describes the extent of intoxication and the manner the intoxication affected the employee's activities. *See supra* note 12 at Chapter 2.804.14(c)(3).

accident" provided by the employer. He also mischaracterized appellant's speed at the time of the accident. Dr. Zimmerman stated that appellant was "traveling at a rapid speed rate." However, the "Description of accident" noted that appellant's speed was unknown, but witnesses reportedly stated that she was not "traveling excessively" and the posted speed limit was 25 miles per hour.

The "Description of accident" found that appellant ran down four mailboxes in a two-hour span just prior to the August 8, 2008 motor vehicle accident; however, upon close inspection this report only documented two confirmed incidents. The witness who saw appellant just prior to her motor vehicle accident did not report any unusual behavior. Another factor the Office neglected to address was the various reports that appellant had either looked down or bent over to pick up something from the truck floor just before striking the parked vehicle. Based on this information, it is quite possible that the accident was a result of inattention.

While the August 8, 2008 toxicology results indicated that appellant had an abnormally high level of opiates in her system when she was in the emergency room, there was no clear evidence indicating that she was intoxicated at the time of the August 8, 2008 motor vehicle accident. Assuming *arguendo* the toxicology results are indicative of intoxication, there is still no reliable medical evidence indicating that intoxication was the proximate cause of appellant's August 8, 2008 motor vehicle accident. As previously noted, it is not enough merely to show that the employee was intoxicated.[16] The Office must show that the intoxicant caused the injury. The district medical adviser's September 28 and October 4, 2008 reports are insufficient to satisfy the Office's burden. Dr. Zimmerman essentially surmised from the "Description of accident" and the statement of accepted facts that appellant's use of Dilaudid, fentanyl, Ambien, and lorazepam was the proximate cause of the August 8, 2008 MVA.

The Board finds that the Office did not meet its burden to establish the affirmative defense of intoxication. The evidence establishes that at the time of her injury appellant was delivering mail on her assigned route.[17] Her August 8, 2008 accident arose out of and in the course of her employment as it occurred within the period of employment, at a place where she was reasonably expected to be for her work, and while she was fulfilling her job duties and incurring risks incidental to her work. For these reasons, appellant sustained an injury in the performance of duty on August 8, 2008. The case will be remanded to the Office for evaluation of the medical evidence and a determination of any periods of disability.

CONCLUSION

The Board finds that appellant sustained an injury in the performance of duty on August 8, 2008. The case is remanded to the Office for determination of the nature of the injury and any resultant disability.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance Of Duty*, Chapter 2.804.14c(1) (September 1995).

[17] In order to be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place when she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2009 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further action consistent with this decision.

Issued: April 12, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board