

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

V.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Orange, CA, Employer**

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**Docket No. 07-1684
Issued: May 2, 2008**

Appearances:
Linda Temple, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2007 appellant filed a timely appeal of a February 16, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for a September 11, 2004 injury to his low back and right wrist. Pursuant to 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 sustained an injury in the performance of duty on September 11, 2004.

FACTUAL HISTORY

On September 11, 2004 appellant, then a 45-year-old letter carrier, filed a claim for a traumatic injury to his low back and right wrist when he slipped and fell on water that overflowed from a urinal. He received medical care the same day and returned to modified work on September 15, 2004. The employing establishment noted that appellant was in the performance of duty but disputed that the floor was wet.

In a September 22, 2004 letter, the Office advised appellant that additional factual and medical evidence was needed. The Office asked that he address the factual circumstances of the incident and submit a physician's opinion on causal relationship.

In response, appellant disagreed with his employer's statement that there was no water on the floor of the men's restroom which caused him to fall. He stated that, after he fell, he stayed on the floor for a bit while trying to get up. When appellant found he could not get up off the floor, he used his cellular telephone to call for help. While he was making the call, Craig Follett, an employee, came into the restroom and told appellant to stay down until a supervisor came. Appellant advised that water was going down a drain beneath the urinal and that it took several minutes for the paramedics to arrive. Mr. Follett gave him paper towels to wipe the water and soot that was on his shoes. He noted that the urinal in question leaked periodically. A copy of a September 30, 2004 Safety and Health Deficiency Report noted that the men's restroom in question had plumbing connection leaks at Faucet Number 2 and Flush Valve Number 3.

In an October 6, 2004 statement, Mr. Follett stated that, just before 1:00 p.m. on September 11, 2004, he entered the men's restroom and found appellant on the floor, in considerable pain and unable to get to his feet. Appellant told him of attempting to stop a defective urinal from overflowing and that he slipped and fell on the wet floor. Mr. Follett stated that the floor was very wet in the area of the urinals and he had assisted appellant by giving him some dry paper towels to dry off his shoes. He stated that appellant was unable to get up by himself and required assistance from the paramedics.

A copy of the Orange County Emergency Medical Service report indicated that an alarm was sounded at 12:49 p.m. for a slip and fall in a restroom. They arrived at 12:55 p.m. Conditions of right wrist, tailbone and lower back pain were reported.

In a September 20, 2004 Form CA-16, Dr. Aaron Gloskowski, a family practitioner, noted that appellant was in a restroom at work, where he slipped and fell on water, landing on his buttocks and right hand. He diagnosed lumbosacral joint disorder, lumbar radiculitis, wrist sprain/strain and right wrist tenosynovitis. Dr. Gloskowski noted, with a checkmark "yes," that the conditions were caused or aggravated by the employment activity described. He opined that appellant was able to perform modified work with restrictions. In a September 20, 2004 duty status report, Dr. Gloskowski noted that appellant's left foot slipped on a wet floor in a men's restroom. Appellant fell backwards while doing the splits and braced himself with his right hand while landing on the floor with his right wrist and buttocks. Dr. Gloskowski provided findings on examination. He opined that appellant's injuries were caused or aggravated by his employment as there clearly was a fall at work and appellant's injuries were consistent with the mechanism of injury. Dr. Gloskowski stated that appellant sustained an acute traumatic contusion to the right wrist which hyperextended and the dorsal compartment and the tendons in that area became inflamed. With regard to the lumbar spine, he noted that appellant landed on his tailbone, which generated a vertical force vector and created compression to the entire spine, most severe in the lumbar area as that was the area of contact with the floor. Dr. Gloskowski also opined that appellant sustained a cervical sprain as it incorporated some of the horizontal force vectors. He noted that appellant's complaints were common to this mechanism of annular-type injury. Dr. Gloskowski provided additional duty status reports of September 30, October 1 and November 2, 2004, noting appellant's restrictions.

The employing establishment controverted the claim. On October 8, 2004 Jon Brennan, supervisor of customer service, stated that on September 11, 2004 at approximately 1:15 p.m. he received a call from appellant advising that he was in the men's restroom and could not get up. He immediately went to the restroom and observed appellant lying on the floor. Mr. Brennan called "911." When he asked appellant what happened, appellant stated that he slipped and fell on some water. Mr. Brennan looked around, but could not see any dampness. He stated that the urinal was not overflowing, the floor was not wet and appellant's clothing was not wet. After the paramedics left with appellant, Mr. Brennan took pictures showing that there was no water on the floor. Pictures to support his statement were submitted into the record.

In an October 6, 2004 statement, Victoria I. Lopez, the postmaster's secretary, stated that on September 11, 2004 at approximately 1:15 p.m. paramedics were called. She went back to the restroom to see what happened. Ms. Lopez stated that appellant called Mr. Brennan from the men's restroom stating that he was lying on the restroom floor and could not move. She stated that she saw appellant lying on the floor and, when she asked the paramedics what happened, she was told that appellant slipped on the floor and they were going to take him to the hospital. When the paramedics picked appellant up, she did not see anything wet on his shorts. After the paramedics left, she and Mr. Brennan looked at the floor, which was not wet, but the urinal was. She stated that Mr. Brennan took pictures of the floor.

By decision dated December 2, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established. It stated that the evidence submitted was insufficient to establish that he slipped on a wet floor, as alleged.

On November 21, 2005 appellant requested reconsideration. He stated that Mr. Brennan came to the restroom but never went to the area in question to see if it was wet. Appellant denied seeing Ms. Lopez in the restroom. He stated that Jose Santa Maria, a coworker, came into the restroom while the paramedics were working on him and later told him that the floor was wet around the urinal. In describing the incident, appellant had jiggled the handle of the urinal to stop it from overflowing and his feet slipped when he stepped back from it. He noted that his shorts would not have been wet as the water did not reach where he landed. Pictures of the urinal area were provided together with a copy of appellant's cellular telephone record of September 11, 2004, which indicated a 12:43 p.m. call to the employee call line.

Mr. Maria advised that on September 11, 2004 he went into the restroom and saw paramedics working on appellant. He noticed that the floor was damp around the next urinal like it had just been mopped. Mr. Maria stated that the urinal would overflow at times after flushing as it had not been "fixed."

In an undated statement, Mr. Follett advised that appellant was on his cellular telephone when he found him in the restroom. Mr. Brennan came into the restroom approximately one minute later. He stated that Mr. Brennan insisted on calling an ambulance and asked that he stay with appellant until help arrived. Mr. Follett stated that Mr. Brennan never came back into the restroom or viewed the area where the water would overflow from the urinal. He noted that Ms. Lopez never entered the restroom while he was there.

In a September 15, 2004 report, Dr. Dennis N. Phan, an employing establishment physician, noted that appellant stated that he fell at work on Saturday, landing on his right buttock/lower lumbar area and broke his fall with his right hand/wrist. He provided findings on examination and diagnosed contusion of the buttocks and lumbar strain. Dr. Phan indicated that appellant should be on modified activity. In form reports dated December 5 and 28, 2004 and January 6, 2005, he attached a copy of his September 15, 2004 report and opined, with a checkmark yes, that the findings and diagnosis were consistent with appellant's account of injury.

By decision dated January 23, 2006, the Office denied modification of its December 2, 2004 decision. It found that appellant had not established that he was injured in the manner alleged as the statements of Mr. Brennan and Ms. Lopez negated his version of how the incident occurred.

On November 22, 2006 appellant requested reconsideration. His representative argued that appellant's evidence was more persuasive than the conflicting negative statements. In an undated statement, Mr. Follett stated that he wiped water and wet pieces of paper towels from appellant's shoes on September 11, 2004.

In a November 4, 2006 statement, Kevin McMillan, a union safety officer, advised that on November 1, 2006 he went with appellant and Supervisor Brennan to the restroom and had appellant recount how he fell. He stated that appellant approached the first urinal and was attempting to hit the flush value because it was running and leaking on the ground. Mr. McMillan also asked Mr. Brennan to explain why appellant stated he slipped on a wet floor if he did not see any water. Mr. Brennan stated that his focus was not on any water on the ground but in getting appellant medical help. He also stated that there was a drain right next to where appellant claimed to have slipped and acknowledged that maybe the water went down the drain. Mr. Brennan acknowledged that he was aware of urinals leaking, but not the one in question.

By decision dated February 16, 2007, the Office denied modification of its January 23, 2006 decision. It found that the evidence provided failed to establish that appellant was injured in the manner alleged. The Office noted that there was conflicting statements regarding what in fact happened, including negative statements from appellant's supervisor and a witness which it considered to be strong and persuasive evidence.

LEGAL PRECEDENT

The Federal Employees' Compensation Act¹ provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment." "In the course of employment" relates to the

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

elements of time, place and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.³ The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.⁴

It is well settled that an employee who within the time and space limits of employment engages in an act that ministers to personal comfort, health, or necessity does not leave the course of employment. An injury sustained on the employee's way to, from, or during a period of ministering to such needs is compensable as arising out of and in the course of employment, unless there is a departure so great that an intent to abandon the job temporarily may be inferred, or unless the conduct cannot be considered an incident of the employment.⁵ Accidents occurring while an employee is going to or from toilet facilities, or during the use of toilet facilities, are generally recognized as arising within the course of employment, subject only to the possible question of reasonableness of the means or the place chosen.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁷ 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.⁸

ANALYSIS

In the instant case, appellant fell in a bathroom at the employing establishment on September 11, 2004. His supervisor acknowledged that this incident occurred but disputed whether the bathroom floor was wet. The Office denied the claim on the grounds that fact of injury was not established, noting statements from the supervisor and Ms. Lopez.

³ *Timothy K. Burns*, 44 ECAB 125 (1992).

⁴ *John B. Shutack*, 54 ECAB 336 (2003); *see also Bettina M. Graf*, 47 ECAB 687 (1996).

⁵ *See, e.g., Dorothy F. Huber*, 19 ECAB 147 (1967) (the Board found that a mail carrier who was injured in an automobile accident while driving home to change her wet uniform before resuming duties at the employing establishment was in the performance of duty at the time of injury because the purpose of her travel home was not purely personal in nature, but inured to the benefit of the employing establishment).

⁶ *Sari A. Shapiroholland*, 47 ECAB 682 (1996).

⁷ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

⁸ *See id.* For a definition of the term injury, *see* 20 C.F.R. § 10.5(ee).

The Board finds that the weight of the probative evidence of record establishes that the September 11, 2004 fall occurred in the course of appellant's employment under the personal comfort doctrine. At the time of his fall, appellant was ministering to his personal comfort by using a urinal. There is no evidence of an idiopathic condition or anything to take the activity outside of employment.⁹ There is no evidence that appellant was engaged in any activity that could be deemed an abandonment of his employment at the time he fell. The personal comfort doctrine evolved to provide coverage to employees while injured on the employing establishment premises when ministering to their personal comfort.¹⁰ The issue of whether or not the bathroom floor was wet is not dispositive of appellant's claim. The Board finds that the personal comfort doctrine applies and appellant was in the performance of duty when he fell at work.

The Board notes that the medical evidence of record establishes that the September 11, 2004 employment incident caused an injury. Dr. Gloskowski explained how appellant's fall at work caused injury and he diagnosed lumbosacral joint disorder, lumbar radiculitis, wrist sprain/strain and right wrist tenosynovitis. Dr. Phan diagnosed a contusion of the buttocks and lumbar strain as a result of appellant's slip and fall. The Board finds that the medical evidence establishes that the September 11, 2004 employment incident caused a personal injury. Since the Office did not evaluate the medical evidence of record, the case will be remanded for development as to the nature and extent of appellant's injuries and any resulting periods of disability.

CONCLUSION

The Board finds that appellant has established that he sustained an injury in the performance of duty on September 11, 2004.

⁹ See *Maria G. Marelo*, 52 ECAB 363 (2001).

¹⁰ See *supra* notes 5 and 6.

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2007 decision of the Office of Workers' Compensation Programs be reversed. The case is remanded to the Office for a *de novo* decision on the extent of any disability and medical conditions causally related to the injury.

Issued: May 2, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board