United States Department of Labor
Employees' Compensation Appeals Board

N.P., Appellant	)	
and	)	**Docket No. 10-952**
	)	**Issued: July 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Marietta, GA, Employer	)	

Appearances:
Greg Dixon, 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 February 23, 2010 appellant filed a timely appeal from a January 12, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] 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 sustained an injury in the performance of duty on October 27, 2008.

FACTUAL HISTORY

Appellant, a 28-year-old letter carrier, filed a traumatic injury claim on October 27, 2008, alleging that she injured the left side of her head, broke her left elbow and scraped her left knee when she fell at 2:00 p.m. after making a delivery. In a statement accompanying the claim, she

[1] 5 U.S.C. § 8101 *et seq.*

stated that she fell when her right foot turned over on the edge of the driveway and grass which caused her to fall. The employing establishment controverted the claim, asserting that appellant was intoxicated at the time of the incident due to her consumption of narcotic medication and therefore did not sustain the injury in the performance of duty. It stated that she tested positive for opiates on October 27, 2008.

The employing establishment submitted an October 29, 2008 statement from Barry Gray, appellant's manager, who decided to observe appellant while she was performing her deliveries after speaking with Russell Abernathy, her supervisor, on Monday, October 27, 2008, prior to her work shift. Mr. Abernathy informed Mr. Gray that he had told her about four times that she was scheduled to work an eight-hour day. He told Mr. Gray that he had taken about two hours off her route but appellant complained that she did not think she could complete it within eight hours. Based on these facts, Mr. Gray concluded that this was a performance issue. He drove out to find appellant on her route and spotted her delivering mail at a mailbox, he then waited at an intersection about 100 feet from her. Mr. Gray stated that she lingered at the box for an inordinate amount of time, approximately two and one half minutes, while fumbling with a bundle of mail. He noted that appellant needed three passes to the box before inserting and retrieving mail. Mr. Gray observed her delivering mail to four more boxes, which took approximately 10 minutes as this behavior was repeated. He noted that this activity normally took less than 30 seconds per box to accomplish. Following appellant's accident Mr. Gray approached her and asked her what happened.[2] Appellant told Mr. Gray that she had tripped and fallen at the sidewalk/driveway area and that her left elbow hurt. Mr. Gray drove to Kennestone Hospital to check on her condition, where an attending nurse told him that she appeared to be intoxicated and recommended a drug and alcohol screening. The nurse advised him that appellant had not been given any medication; the hospital then administered a drug test to her. While sitting with appellant at the hospital, Mr. Gray observed her speech slurring, falling in and out of consciousness, mumbling and responding with nonrelated, bizarre information. He concluded that she was extremely impaired. Mr. Gray alleged that a patient sitting about 10 feet from appellant asked her whether she had been operating a vehicle, as she also believed that appellant was extremely impaired. Subsequently, the attending nurse informed Mr. Gray that appellant had tested positive for opiates.

A hospital report dated October 27, 2008 provided a summary of how appellant's injury occurred, findings on examination, diagnoses of left elbow fracture and soft tissue injuries to her head and left knee and a summary of her condition and behavior in the hours after she arrived at the hospital. When appellant arrived at 2:41 p.m., she was described as alert, oriented, speech was clear and that she responded appropriately to commands. The nurse's notes at 2:53 p.m., following appellant's transfer from the ambulance shortly after her arrival at the hospital, stated that while being interviewed appellant continued to fall asleep for short intervals, would wake up crying and had slurred speech. A toxicology screen performed at 4:00 p.m., showed that she was presumptive positive for opiates. Appellant's mood and affect were recorded as normal on examination at 4:44 p.m. She did not receive any medication at the hospital other than antibiotic

[2] Mr. Gray did not witness the incident in which appellant fell and struck her head, left knee and left elbow on the pavement. After observing appellant deliver mail he drove on ahead and, while waiting for her to approach, heard sirens in the area. When she did not appear at the next section of her route Mr. Gray drove back to the intersection and saw emergency vehicles near her vehicle.

ointment at 5:15 p.m. The report also contained the results of diagnostic tests, dated November 17, 2008, which indicated that appellant had oxycodone, morphine and hydromorphone in her system on October 27, 2008.

In an e-mailed report dated November 14, 2008, Dr. Bruce N. Butler, Board-certified in occupational medicine and the employing establishment's associate area medical director, stated that he had reviewed the October 27, 2008 hospital toxicology report. Based on the tests and on tests run by Quest Lab on November 5, 2008, appellant had tested positive for both oxycodone and morphine. Dr. Butler stated that based on absolute medical certainty appellant took at least two different types of narcotics within hours of being tested on October 27, 2008. The test results from the confirmatory gas chromatography/mass spectrometry (GC-MS) testing provided the definitive results identifying the substances that caused the initial test to be positive and revealed the presence of an extremely high concentration of morphine and a significantly elevated level of oxycodone. Dr. Butler stated:

> "[The test] results clearly confirm that [appellant] ingested, injected or otherwise took a morphine-based compound within hours prior to her testing. Exactly, how many hours would be difficult to extrapolate but it can be said with confidence that she took the morphine[-]based substance within the previous [two to four] hours prior to testing. This approximation is based on the very high concentration of morphine detected. The presence of a small concentration of hydromorphone is related to the high presence of morphine. Hydromorphone is a metabolite of morphine and may be detectable when morphine is present.
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> "Additionally, the concentration of oxycodone (found in OxyContin) which has a different molecular configuration and metabolic pathway was present in a significantly elevated concentration. This confirms that [appellant] also ingested this substance in addition to the morphine[-]based substance. As stated above, it would be difficult to estimate the time she ingested this substance but with a reasonable degree of certainty this was also taken within the previous [two to four] hours prior to testing.
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> "It is important to understand the degree of impairment associated with this concentration of narcotics in the blood. [Ten thousand] ng/mL is extremely high. So much so, that a person with this much narcotic present in her system would be at significant risk of injury just attempting to walk. Definitely, a person with this concentration should not attempt to operate any motor vehicle, any potentially dangerous machinery or even a bicycle. It can be said with a significant degree of medical certainty that [appellant] definitely experienced drowsiness, probably confusion, impaired neuromuscular responsiveness and lack of alertness. In addition to this extremely high concentration ulniorphine, she also had a significantly high level of oxycodone in her system. Combined, the two narcotics amplify the pharmacologic effects of each individual drug.
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> "Individually, each drug at the concentration identified by GC[-]MS would have impaired [appellant] sufficiently to have rendered her at very high risk of injury in

any situation. In this case, [she] was experiencing the combined effects of both high concentrations of the oxycodone and morphine at the same time."

The employing establishment submitted an October 31, 2008 investigative report from the Office of the Inspector General (OIG). Special Agents Coral Williams and Rodricaus Bowman questioned appellant on October 29, 2008 regarding the October 27, 2008 work incident. Appellant provided her account of how the injury occurred and denied taking Percocet on the day of her injury, either before or after the work incident. She stated that she took Percocet for a pancreatis condition when she was in pain, but not on a daily or regular basis. Appellant asserted that she would never take Percocet before she went to work, especially when she knew she would be driving her mail vehicle. She asserted that she was not in pain on October 27, 2008 until she fell and hit the pavement.

In a statement received by the Office on December 1, 2008, the employing establishment stated that, although appellant alleged that she slipped while walking, the sidewalk, street surface and steps at the accident site were free from any objects which would have caused her to slip, trip or fall. It asserted that her accident could have been a result of the use of opiate drugs.

By letter dated December 4, 2008, the Office asked appellant to submit additional factual and medical evidence in support of her claim. It requested a statement that included a full account of activities during the hours immediately preceding the injury; an assertion as to whether she used or consumed any intoxicants (including prescription medications) during that time and, if so, the precise nature and amount consumed and an assertion of whether or not she believed intoxication was the proximate cause of her injury. The Office also requested a detailed description as to how appellant's injury occurred and asked her to comment on and explain Mr. Gray's observations of her behavior in the hospital waiting area following her fall. In addition, it asked her to have her physician review the October 27, 2008 toxicology report and Dr. Butler's November 14, 2008 report and indicates whether or not her fall was caused by the level of drugs in her system. The Office stated that appellant had 30 days to submit the requested evidence. Appellant did not submit any additional evidence.

By decision dated January 9, 2009, the Office denied the claim, finding that appellant had not sustained an injury in the performance of duty at the time of the incident due to intoxication. It noted that the record contained laboratory test results showing the presence of morphine and oxycodone in her system, the October 29, 2008 OIG investigative report in which she acknowledged having Percocet in her possession but denied having taken it on October 27, 2008; Mr. Gray's October 29, 2008 statement which indicated that he witnessed her unsteady performance delivering mail on October 27, 2008, prior to her accident and her behavior at the hospital following the incident, where she exhibited slurred speech, disconnected thoughts and difficulty staying awake and Dr. Butler's November 14, 2008 report asserting that she ingested heavy, destabilizing amounts of oxycodone and morphine shortly before the October 27, 2008 work incident. The Office noted that she had failed to respond to its December 4, 2008 developmental letter which asked her whether she used or consumed any intoxicants on October 27, 2008 and to provide a physician's report and response to Dr. Butler's report.

On February 3, 2009 appellant requested a written review of the record. By letter dated February 3, 2009, she again denied that the October 27, 2008 accident was caused by her being

intoxicated at the time it occurred and reiterated her account of how the October 27, 2008 accident occurred. Appellant remembered that a man stopped to help her when she was on the ground and that she asked him to retrieve her purse from her truck. She then took two Percocets from her purse which were prescribed for pancreatis. Appellant stated that when she arrived at the hospital an intravenous (I.V.) fluid was inserted and she was given more pain medication. Two days later, on Wednesday, October 29, 2009, Mr. Gray and two OIG agents arrived at her home, at which time she was purportedly on heavy medication and did not understand who they were. Appellant denied telling the agents that she had not taken any drugs before or after the accident; she asserted that she had previously stated to management in another investigative interview that she had taken two Percocets immediately after the accident. She stated that no one ever indicated that she seemed impaired before or immediately after the accident. Appellant asserted that she needed to take the Percocets because she was in so much pain following the accident and only became intoxicated when they took effect a short time later.

In a statement dated February 3, 2009, appellant's union representation, Karen Pruitt, supported appellant's denial that she was intoxicated at the time of her October 27, 2008 accident. She acknowledged that appellant subsequently became heavily impaired while at the hospital; she stated, however, that this was only because appellant had taken two prescription Percocets to dull the pain she was experiencing following her fall onto the pavement. Ms. Pruitt asserted that Mr. Gray never mentioned in his statements that appellant appeared impaired before or immediately after her accident. She stated that she asked him about appellant's demeanor at that time; Mr. Gray purportedly replied that appellant seemed okay, other than being in obvious pain and was able to describe to him in detail what had happened. Ms. Pruitt also asserted that she asked him if appellant appeared impaired during his observation before the accident and he replied that he really could not tell. She also stated that Mr. Abernathy told her that appellant was fine the morning of the accident.

In an April 29, 2009 statement, Mr. Gray refuted several of the assertions appellant made in her February 3, 2009 letter. He stated that she inaccurately described the area and the manner in which she fell on October 27, 2008 and that this description contradicted what she wrote on her Form CA-1, that there were no "uneven areas" on the lawn where she fell. Mr. Gray provided photos of the areas where appellant was injured in support of his statement.

Mr. Gray also noted that appellant's assertion that she took prescription Percocets to reduce the pain following the accident contradicted what she told the OIG investigators on October 29, 2008, that her statement that "an I.V. was inserted and I was given more pain medication at the hospital" was contradicted by the attending nurse's statement to Mr. Gray at the hospital and by the October 27, 2008 hospital records and that her assertion that she was on heavy medication at the time of her October 29, 2008 OIG interview and did not know who the agents were was contradicted by the OIG agents' report.

In a May 5, 2009 statement, OIG Agent Williams rebutted many of the allegations contained in appellant's February 3, 2009 letter. Appellant stated therein that a man who stopped to help her after she regained consciousness following her October 27, 2008 fall retrieved her purse, from which she took two Percocet tablets prescribed for her pancreatis. However, Agent Williams noted that appellant had denied taking medication immediately after her injury during her October 29, 2008 interview. She further stated that she reviewed a

transcript of a 911 emergency recording which indicated that a man named Omar Fernandez had placed the emergency call for appellant on October 27, 2008.[3] Agent Williams and Agent Zadia McKinnon went to Mr. Fernandez' residence and took a statement from him. Mr. Fernandez informed the agents that he was driving home on October 27, 2008 when he saw appellant sitting up in the driveway. He exited his vehicle to assist her and called 911. Mr. Fernandez stated that he remembered appellant asking for her purse so that she could call the employing establishment but did not witness her taking any medication in his presence. He indicated that he remained at the scene until emergency services arrived.[4]

Agent Williams further stated that, while the November 17, 2008 toxicology report showed that there was morphine in appellant's system, appellant did not mention taking morphine in her February 3, 2009 letter. She also denied appellant's assertion that she was heavily intoxicated due to prescription Percocets when she and Agent Bowman arrived with Mr. Gray to interview appellant at her home on October 29, 2008. Agent Williams stated that appellant was able to walk up and down the stairs of her town house and complete a Form CA-1 without assistance. Appellant was able to read and comprehend the form and remembered the date, time and addresses where her injury occurred.

In a June 17, 2009 decision, an Office hearing representative affirmed the January 9, 2009 Office decision.

In a letter received by the Office on August 29, 2009, appellant requested reconsideration. She indicated in her letter that her treating physician, Dr. Scott Swayze, a specialist in orthopedic surgery, would explain why there was morphine in her system on October 27, 2008. Appellant submitted an August 29, 2009 statement in which she stated that Dr. Swayze and her pharmacist explained to her that her morphine level on October 27, 2008 indicated that she had ingested it within 24 hours, she stated that she took a morphine pill on Sunday, October 26, 2008 at about 2:00 p.m., which did not seem "to be an issue."

Appellant also submitted a copy of an arbitrator's July 20, 2009 decision supporting a grievance she had filed against management; the employing establishment had issued a notice of removal against her for improper conduct and for making false statements to OIG agents. The decision found that management failed to allow the union to interview the OIG agents after a proper request by the union, which violated her due process rights.

By decision dated January 12, 2010, the Office denied appellant's request for modification.

LEGAL PRECEDENT

Under the Act the Office shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the

[3] *See* copy of 911 transcript, dated October 27, 2008. Exhibit 2

[4] Mr. Fernandez submitted a sworn statement dated May 4, 2009, which accompanied Agent Williams' letter. (See Exhibit 3, sworn statement, Omar Fernandez, May 4, 2009).

injury or death is proximately caused by the intoxication of the injured employee.[5] Intoxication is an affirmative defense and, if invoked, the Office must do so during the initial adjudication of the claim.[6] Moreover, the Office must establish by reliable, probative and substantial evidence that intoxication was the proximate cause of injury or death.[7]

The procedure manual provides that 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 injury; and (b) the particular manner in which the intoxication caused the injury.[8] It is not enough merely to show that the employee was intoxicated.[9] It is also the Office's burden to show that the intoxication caused the injury.[10] An intoxicant may be alcohol or any other drug.[11]

In addition to obtaining statements from the supervisor/official superior, the employee and any coworkers or other witnesses, the procedure manual indicates that a statement should be obtained from the physician and the hospital where the employee was examined following the injury which describes as fully as possible the extent to which the employee was intoxicated and the manner in which the intoxicant was affecting the employee's activities.[12] Moreover, the results of any tests made by the physician or hospital to determine the extent of intoxication should be obtained.[13]

ANALYSIS

On appeal, appellant's representative alleges that the Office has not met its burden of proof to establish intoxication at the time of the injury because appellant should have been taken off the route prior to the incident if in fact she was intoxicated prior to the incident. He further contends that the Office did not meet its burden of proof because it did not obtain statements from all emergency personnel involved in her care following the incident. It is not contested that appellant experienced the alleged work incident in which she fell to the ground on October 27, 2008 while she was delivering mail on her regular delivery route. The employing establishment, however, raised the affirmative defense of intoxication, contending that she was intoxicated by narcotics on the date her work incident occurred and that her intoxication was the proximate

[5] 5 U.S.C. § 8102(a)(3) (2006).

[6] *T.F.*, Docket No. 08-1256 (issued November 12, 2008).

[7] *Id., Elaine Hegstrom*, 51 ECAB 539, 542 (2000).

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

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at Chapter 2.804.14c(3).

[13] *Id.*

cause of her accident. The Office determined that appellant's injury did not arise in the performance of duty on October 27, 2007. The Board, however, finds that the Office did not meet its burden of proof to deny her 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. 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.[14] 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 she is not in the performance of duty. Intoxication as a cause does not *ipso facto* take the case out of the 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:

> "From the statutory scheme and decisions it is clear (a) that intoxication as one cause of an injury does not *ipso facto* destroy the possibility of an injury arising out of and in the course of employment and (b) that intoxication 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 (or as the Federal Employees' Compensation Act says was proximately caused 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."[15] (Emphasis in the original.)

At the time of her injury, appellant was performing her duties as a letter carrier on her postal route during her shift and at a place she was reasonably expected to be. She described her injury as her right foot turning over the edge of a driveway and grass. Appellant's account of

[14] In the Matter of *Alice Marjorie Harris*, claiming as widow of *Roy Lee Harris*, 6 ECAB 55 (1953); *see also Ruth Bubier (Sylvester B. Bubier)*, 2 ECAB 60 (1948). The Federal (FECA) Procedure Manual, *supra* note 8 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."

[15] *Ruth Bubier (Sylvester Bubier)*, *supra* note 14 at 65 (1948).

injury is consistent with that provided to her manager that day and to postal inspectors on October 29, 2008.[16] Her injury is one arising out of and in the course of employment.

While Dr. Butler's November 14, 2008 review of the hospital records and toxicology reports indicated that appellant had an extremely high concentration of morphine and a significantly elevated level of oxycodone in her system within hours of being tested on October 27, 2008, there was no clear evidence showing that she was intoxicated at the time of the October 27, 2008 work accident. Even if the toxicology reports were indicative of intoxication, there is still no reliable medical evidence to establish intoxication as the proximate cause of appellant's accident. As noted, it is not enough merely to show that the employee was intoxicated.[17] Dr. Butler asserted that appellant experienced drowsiness, probably confusion, impaired neuromuscular responsiveness and a lack of alertness at the time of her October 27, 2008 fall. He opined that a person with this concentration of morphine should not attempt to operate any motor vehicle, any potentially dangerous machinery or even a bicycle. Dr. Butler, however, was not present at the hospital immediately following the injury nor did he provide any opinion as to whether appellant's intoxication had proximately caused her accident. The evidence from the hospital is not fully consistent as to appellant's manner upon admission. When appellant arrived at 2:41 p.m., she was described as alert, oriented, speaking clearly and responding appropriately to commands. A subsequent note advised that, while interviewed at 2:53 p.m., she fell asleep for short intervals, would wake up crying and had slurred speech. Appellant's mood and affect were reported normal again at 4:44 p.m.

Prior to the injury, appellant had been observed on her route by a manager, Mr. Gray, who drove to her route and provided a statement describing that she lingered at a postbox for about two and a half minutes and fumbled with a bundle of mail. She needed three passes to a box before inserting and retrieving mail. Mr. Gray observed appellant for four more boxes which took approximately 10 minutes. Appellant's behavior was apparently not of such a nature at that time that warranted intervention by her supervisor. Mr. Gray left the area to proceed to the next street. As he waited for appellant to start work on this portion of her route, he heard sirens and returned to where she was being attended by emergency personnel. When Mr. Gray inquired as to what had happened, appellant stated that she fell at the sidewalk-driveway area.

The evidence establishes only the possibility that appellant was intoxicated by ingestion of medication at the time of injury.[18] The record is insufficient to establish that intoxication was the proximate cause of her injury. Appellant noted that her right foot twisted on the edge of a driveway and grass after making a delivery. The absence of any uneven areas or other objects does not rule out that she lost her balance while performing her duties as a letter carrier. The

[16] Appellant noted that at 2:00 p.m., after attempting to deliver a piece of mail, her foot became wedged between a dip in the sidewalk and driveway.

[17] *Supra* note 8.

[18] As noted, 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. Federal (FECA) Procedure Manual, *see supra* note 8 at Chapter 2.804.14c(3). The report of Dr. Butler was obtained one month after the incident. Commentary from a nurse or a supervisor of the employee present at the hospital is not sufficient to meet this requirement.

Board therefore 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.[19] Appellant's October 27, 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, she sustained an injury in the performance of duty on October 27, 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 October 27, 2008. The case is remanded to the Office for determination of the nature of the injury and any resultant disability.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2010 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this decision.

Issued: July 26, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[19] 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).

Michael E. Groom, Alternate Judge, concurring:

When the affirmative defense of intoxication is raised, it is not enough merely to show that an employee was intoxicated at the time of injury or death. Rather, the Office has the burden of proof to establish that the injury was proximately caused by such intoxication.

Over the years, Board case precedent has given meaning to the statutory term of proximate cause in application of the affirmative defense: a term that has been variously interpreted as "sole" or "but for" causation (finding an injury would not have occurred but for an employee's intoxication) or as the "substantial" or "more probable" cause (if intoxication was a substantial or more probable factor in bringing about an injury, the employee's claim may be defeated by the statutory affirmative defense).[1]

The significance of these competing interpretations of proximate cause is best illustrated by *Alice Marjorie Harris (Roy Lee Harris)*.[2] In construing whether intoxication was the proximate cause of the employee's fatal injury by drowning, the majority applied a "but for" standard of review. It noted that there were three distinct possibilities giving rise to the employee's death: by a heart attack sustained after returning to ship; meeting with foul play once onboard the ship; or that his fall overboard was due to intoxication. The majority found that each inference as to causation was sufficiently equal as to cancel each other out, such that to conclude death was from intoxication constituted mere speculation.[3] The dissent found that the record on appeal established the fact of the employee's intoxication; therefore, the inference that his fall was due to intoxication was the most reasonable inference from the evidence.[4]

On a petition for reconsideration it was contended that, with respect to intoxication as the proximate cause of the employee's death, the majority erred in the application of the law to the facts in evidence.[5] The majority reiterated that as an affirmative defense, the Office had the burden of proof to establish that intoxication was the proximate cause of death, not just by inference.[6] The majority presented a review of legal authority and stated:

> "The inference to be drawn may not depend upon a prior inference adduced from a fact. In order to discharge its burden, therefore, the [Office] must establish by reliable, probative and substantial evidence, facts warranting and supporting a

[1] *See Ruth Bubier (Sylvester C. Bubier)*, 2 ECAB 60 (1948).

[2] 6 ECAB 55 (1953), *reaff'd on recon*., 6 ECAB 231 (1953).

[3] *Id.* at 6 ECAB 58-59.

[4] *Id*. at 61-62.

[5] *Id.* at 6 ECAB 232.

[6] *Id.*

reasonable and logical deduction from such facts, that *but for* intoxication the deceased employee would not have drowned."[7] (Emphasis added)

The majority upheld the finding that the Office failed to discharge its burden of proof to establish that the employee's death was proximately caused by his intoxication due to the equivocal nature of the evidence of record. The dissent contended again that the "more probable inference in this case is that the employee was at the time of his death intoxicated and that such intoxication was the proximate cause of his death."[8]

The difference in opinion between the majority and minority in *Harris* as to the meaning of the term "proximate cause" is more than mere semantics. It goes to the nature of the burden of proof when the Office applies the statutory affirmative defense of intoxication. Interpreting proximate cause as "but for" or "sole" cause, as represented by *Harris* and *Bubier*, reflects the imposition of a higher standard of review to the evidence of intoxication before a compensable claim may be denied. Equating proximate cause as the "more probable" or "most reasonable" inference reflects a lesser standard of review applied to the evidence of intoxication, making claims of injured employees more susceptible to denial under the affirmative defense in situations where there is evidence of blood alcohol or other drug use sufficient to cause intoxication.

The Federal Employees' Compensation Act is a remedial statute which should be broadly construed but not so as to distort the purpose of the statute and not in derogation of an employee's rights.[9] In my reading of Board case law, the minority position in *Harris* lends itself to the denial of a compensable claim merely upon a showing of the fact of intoxication at the time of injury or death under a "more probable than not" standard of review. I join in the decision of the majority in this case in reversing the application of the affirmative defense of intoxication: the Office has not established that "but for" intoxication, appellant would not have fallen while on her postal route and sustained a left elbow fracture. The evidence of record does not clearly establish intoxication as the proximate cause of her injury on October 27, 2008.

[7] *Id*. at 233. The majority noted that, if two equally probable but inconsistent inferences could be drawn from the same proven facts, the evidence was equivocal and neither inference established. "[J]udgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other. This party is the [Office]." *Id*.

[8] *Id*. at 241. The minority noted that the requirement imposed by the majority could constitute an intolerable burden upon the Office, potentially making the statutory defense "utterly meaningless." *Id*. at 244.

[9] *Erlin J. Belue*, 13 ECAB 88 (1961); *Stanley F. Stuczynski*, 12 ECAB 159 (1960); *Neoma J. Castleberry (Samuel Lamar Castleberry)*, 9 ECAB 546 (1957).

It is the policy of the Office to emphasize the return of injured federal employees to suitable employment, either with the employing agency or a new employer.[10] In such situations, it is foreseeable that injured employees will manage through their workday with use of medications prescribed by attending physicians. In certain situations, it is also foreseeable that an individual might self-overmedicate. A "but for" or "sole" analysis under the proximate cause standard in intoxication cases preserves invocation of the statutory affirmative defense in appropriate circumstances but not in derogation of the rights of civil employees under the Act.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (December 1993).