



*Workers' Compensation &
Employee Relations
Presented by Mary Forseth*



Workers' Compensation & Employee Relations

Issues to Consider:

- The Case
- Last Chance Agreement (LCA)
- Fact of Injury
- Witness Statements
- Bargaining Unit (Union Representation)
- Players Involved
- Pulling the Pieces Together
- OWCP Adjudication
- Best Practices
- Lessons Learned



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The Case:

- Employee received a “Notice of Decision to Remove” (Tested positive for cocaine use) – May 11, 2005
- Decision held in abeyance in lieu of Last Chance Agreement (LCA).
- Unannounced Urine Analysis (UA) conducted – Jan 3, 2006
- Medical Review Office (MRO) – leaves message for employee on Jan 6 at home and, Jan 7 at work requesting he contact MRO – (same contact process used in May 2005)
- Saturday, Jan 8 – Employee calls supervisor and says he’s tested positive again



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The Case Cont'd:

- Monday, Jan 10 – Employee arrives at work early (no witnesses)
- Tuesday, Jan 11- Employee no show for work. Contacts Admin inquiring about injury claim forms
- Jan 18 – Employee notifies supervisor that he was injured on Jan. 10
- Jan 18 – MRO notifies agency employee positive for cocaine
- Jan 19 – Employee submits CA-1 to Supervisor



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Agency's Position in this Case:

- Probable cause - (reasonable doubt incident occurred)
- Insufficient Medical Documentation (medical does not state that an injury was sustained as a result of a factor of employment)
- Statement of witnesses (lead agency to believe incident was staged).
- Mechanism of Injury (highly improbable the vehicle could brake with the force to propel someone)



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Last Chance Agreement

- A settlement agreement in which the agency agrees to forego a planned adverse action in return for the employee's agreement to meet certain conduct or performance requirements. (e.g., ceasing all use of illegal drug use).
- In most cases, the employee also agrees to forego any right to appeal to the MSPB any subsequent adverse action based on his failure to comply with the terms of the agreement.



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Last Chance Agreement

Williams v. U.S. Postal Service, (Fed. Cir. 03/07/03)

➤ When an employee enters into a last-chance agreement that waives his right to appeal if he violates the LCA, the employee can overcome the waiver only if he shows he did not violate the LCA, he did not voluntarily and knowingly enter into the LCA, or the agency breached the LCA.



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Fact of Injury

Occurrence of Event. Whether the employee actually experienced the accident, event, or employment factor which is alleged to have occurred. This is resolved on the basis of factual evidence, including statements from the employee, the supervisor, and any witnesses. An injury need not be witnessed in order to be compensable. A supervisor who believes, however, that the employee's testimony is contrary to the facts should supply pertinent information to support this belief.



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Fact of Injury

Medical Condition. Whether the accident or employment factor resulted in an injury or disease; this is determined on the basis of the attending physician's statement that a medical condition is present which may be related to the incident.



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Fact of Injury

Mechanism of Injury - Employee claims that while he was driving the Self Propelled Vehicle (SPV), it jerked forward and his foot slipped propelling him to the floor.



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Witness Statements

Supervisor:

➤ Indicates that employee called him on Saturday, Jan 8 stating he was positive for drugs and asking should he report to work on Monday Jan 10 – employee was told to report.

➤ Admin Asst: Employee contacted Admin Asst. requesting sick leave on Jan 11. Tells Admin Asst he had an “accident” on Monday. Admin asked employee if this has anything to do with call he made to supervisor on Saturday – employee says “he already has that covered.”



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Witness Statements:

Manufacturer:

- Safety Officer for manufacturer of SPV states vehicle maximum braking force is .18 Gs of force
- Braking will not occur unless applied by operator and not with sufficient force to eject operator
- Vehicle had 43,800+ hours of operation time without any reported accident of any type



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Witness Statements

Medical Review Office:

- Records indicate phone calls were placed to employee to give employee opportunity to dispute findings or to provide a reason(s) why he tested positive for cocaine.
- Same process was used to contact employee the first time he tested positive
- Employee did not answer or return calls from MRO, yet informed Supervisor Saturday he was positive for drug use.



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Witness Statements

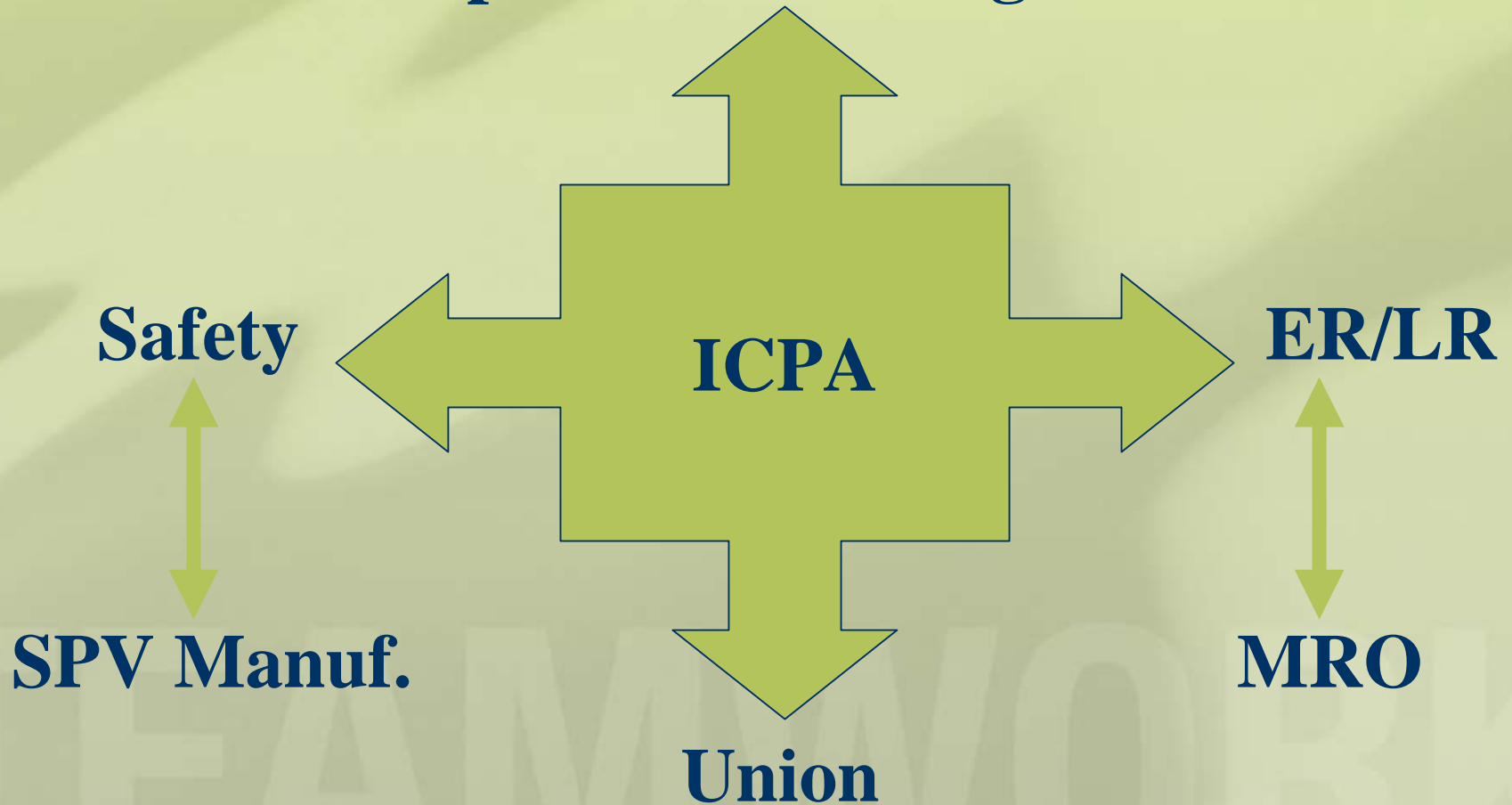
Bargaining Unit (Union Representation):

Discipline - A right reserved to management that the Federal Labor Relations Authority (FLRA) has said includes the right "to investigate to determine whether discipline is justified." It also "encompasses the use of the evidence obtained during the investigation."



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Supervisor - Management





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Players

Supervisor (responsible for the accuracy of the CA-1)

- Contacts ER concerning (LCA Violation)
- Confers with Mgmt
- Accepts CA-1
- Gathers facts concerning injury
- Request accident report from Safety Officer
- Sends CA-1 to ICPA (notifies ICPA of LCA)



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Players

ICPA – (spurred into action!)

- Examines facts of the claim (includes medical)
- Reviews Witness Statements
- Confers with ER (supervisor knew about LCA)
- Ensures receipt of Accident Report
- Controverses Claim (solicit help of DoD Liaison)



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Players

Employee Relations

- Withholds affecting decision until OWCP final adjudication
- Confers with Supervisor and ICPA
- Confers with Union
- Confers with MRO
- Advises supervisor



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Players

Union - Weingarten Right (Title 5, USC, Sec 114(a)(2)(b))
Bargaining unit employees have a statutory right to union representation in:

- Interview/questioning
- In connection with an investigation
- Employee reasonably believes interview will result in discipline
- Employee requests representation

***Ask Labor Relations to check collective bargaining agreement for further rights**



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Players

Union

- Advises employee of rights
- Provides representation during investigation conducted by agency



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Pulling the Pieces Together

Basic test for coverage is, did a incident arise out and occur in the course of employment.

- Did event occur? (probable cause for suspicion event occurred)
- Facts of Injury (disputable)
- Timing – (incident occurred after employee tested for drugs)
- Medical – (does not state employee experienced a work related injury)
- Employee told Admin his positive UA test not a problem he “had it covered”



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Filing the Claim

- CA- 1 Entered into EDI (immediately upon receipt)
- Hard copy to OWCP (after all documents are collected)
 - CA-1
 - Controvesion Letter
 - Witness Statements
 - Medical Documentation
 - MRO results
 - Copy of LCA



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OWCP Adjudication

“Evidence submitted is insufficient to support that the event(s) occurred as alleged” – Denied based on Fact of Injury Test.

➤ Employee did not establish by weight of reliable, probative, and substantive evidence the occurrence of an injury resulted in a specific event - that is that an injury occurred at the time, place and manner alleged.

Daniel J. Overfield, 42 ECAB 718, Docket No. 91-0321, issued June 25, 1991



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OWCP Adjudication

- All COP charged to leave or declared an overpayment
- Medical treatment not authorized and prior authorization terminated
- Employee requested an oral hearing (did not appear)
- OWCP gave employee opportunity to provide additional evidence
- Employee submitted written statement of what happened and two doctors statements



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Lessons Learned:

- Key player is the Supervisor
- Training provided to Supervisor can be critical
- Communication between entities may be necessary
- Cooperation on all levels is paramount
- Collaboration with entities outside the organization (e.g. MRO) may be necessary
- ICPA may not be aware of extenuating circumstances involved in a claim



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Best Practices (intoxication impairment)

- The possible involvement of intoxication or drug-related impairment in a job-related injury immediately raises the question of disciplinary action and it is one of the statutory exclusions to **workers' compensation** under the **FECA**. **Immediate documentation is essential.**



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Best Practices

- Record must establish both the extent to which the employee was intoxicated and the particular manner in which the intoxication caused the injury.
- Level of evidence of intoxication need not reach *judicial legal standards* in order to be actionable or to pose a bar to FECA coverage.
- Administrative standard - means that the use, and, in fact, sometimes the mere presence, of alcohol or other intoxicants were involved in whatever infraction or injury occurred



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Q & A SESSION

Mary Forseth

Mary.forseth@cpms.osd.mil

703-696-1990

TEAMWORK