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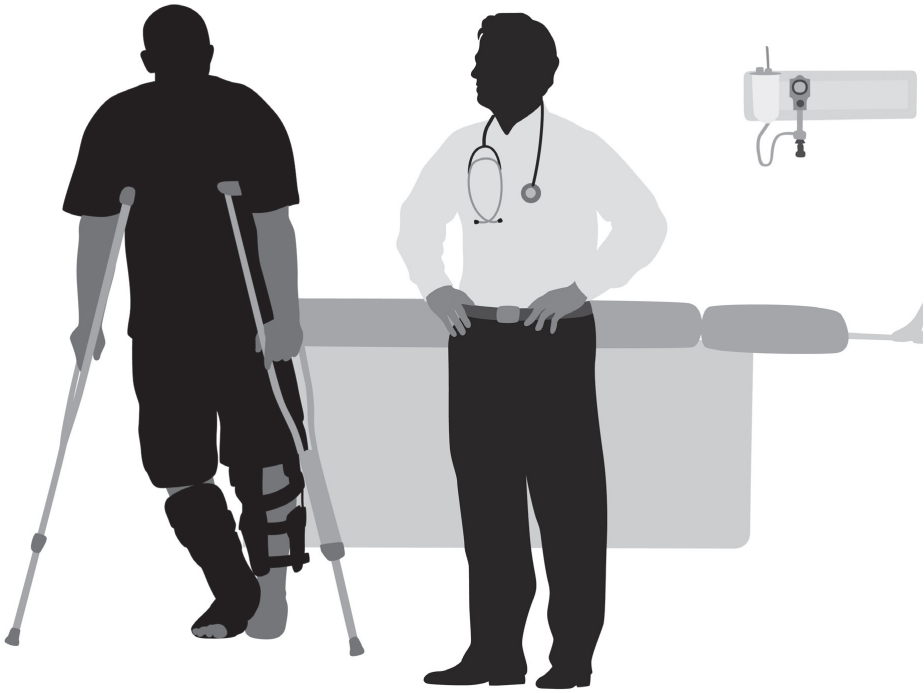
NALC Activist

A NEWSLETTER FOR BRANCH LEADERS OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS

Grieving management's OWCP mistakes revisited



Twenty years ago, the entire Spring 2004 *NALC Activist* was dedicated to grieving management's OWCP mistakes. Before this publication, many NALC local leaders and shop stewards held the misperception that the union could not grieve issues involving the Postal Service's handling of OWCP cases. Thanks to the *Activist*, filing grievances on management's mishandling of OWCP cases has become a routine part of many shop stewards' arsenals. And now it's time for an update.

"The greatness of a nation and its moral progress can be judged by the way it treats its weakest members,"—attributed to Mahatma Gandhi. This quote emphasizes that the most vulnerable amongst us should receive the greatest protection. However, in recent decades, the Postal Service has shamefully sought to abandon its commitments and obligations to its employees who have been injured in the line of duty while serving their fellow citizens. The NALC—more than any other federal union or employee organization—has dedicated substantial resources to aiding its injured members.

Helping injured members is fundamental to our identity as members of the NALC. Section 7 of the National Labor Relations Act gives us, as union members, the right to engage in concerted activities for mutual aid and protection. The Supreme Court based our Weingarten rights on this language: "mutual aid and protection." There are also no better words than these to describe the work we do when we help our injured members; it lies at the core of who we are as a union.

While providing mutual aid and protection involves assisting our members with filing and maintaining OWCP claims, it also involves filing grievances to protect them from management's abuses, especially its failures to follow its legal and contractual obligations toward its injured employees.

It should be pointed out here that while shop stewards have an obligation to represent both members and non-members in grieving management's OWCP violations, NALC activists, stewards and local leaders have no obligation to assist non-members with OWCP's processing of their claims. If non-members want help with their claim itself, they must join the union. Providing OWCP assistance can be a great organizing tool.

The first part of this issue of the *Activist* will bring stewards and local leaders up to date on how to identify and grieve management's most common OWCP mistakes. The second part focuses on limited duty grievances.

On-the-job injuries and the law

Letter carriers suffering on-the-job injuries are protected by federal law, which is known as the Federal Employees' Compensation Act (FECA). The FECA is codified at 5 United States Code 81 (5 USC 81), and its implementing regulations are found at 20 Code of Federal Regulations Part 10 (20 CFR 10).

The FECA established the Office of Workers' Compensation Programs (OWCP) in the Department of Labor (DOL) and tasks that agency with deciding all matters relating to claims for on-the-job injuries by federal employees. OWCP decides, for example, whether an injury is job-related, whether compensation is payable and, if so, how much, and whether a limited-duty job offer is medically suitable.

The FECA was intended to protect federal employees by providing compensation when they suffer a job-related injury or illness. The law places the burden on the injured worker to prove that the injury is work-related. While the OWCP claims process is designed to operate efficiently and to result in fair, accurate decisions, the procedures required to meet that burden are often complex and difficult to navigate.

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For many, the OWCP claims process fails to deliver the benefits intended by FECA. Letter carriers know that too many legitimate claims are challenged by management or become unnecessarily complicated due to management's mistakes in handling claims.

As a result, some letter carriers suffer on-the-job injuries but fail to obtain the protections of FECA. Management's mistakes lead to some of the worst injustices to injured letter carriers who seek workers' compensation benefits. The FECA requires management to process claims in accordance with regulations, but frequently supervisors do not.

Supervisors' mistakes often result in legitimate claims being delayed or even denied. Their mistakes also violate the law, as well as postal regulations, and the National Agreement.

Not in our house!

USPS has many statutory, regulatory, policy and procedural rules that it must follow in handling OWCP claims. Most of these rules are mandatory, and some of them even contain significant penalties if they are violated. For example, 20 CFR § 10.117(b) states "The employer may not use a disagreement with an aspect of the claimant's report to delay forwarding the claim to OWCP or to compel or induce the claimant to change or withdraw the claim."

And 18 USC § 1922 even establishes a significant penalty:

> *Whoever, being an officer or employee of the United States charged with the responsibility for making the reports of the immediate superior specified by section 8120 of title 5 (U.S. code), willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter 1 of chapter 81 of title 5 (US. code) or any extension or application thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter or any extension or application thereof, or regulations prescribed thereunder,* ***shall be fined under this title or imprisoned, not more than 1 year, or both.*** *(Emphasis added.)*

The union at the national level has come across many examples of this sort of violation over the years, and we have never seen that penalty imposed, or any penalty imposed. The problem is that many of the rules have no enforcement mechanism and those that do have nobody tasked with enforcing them.

So, who is going to police the violations? It's going to have to be us. And we're going to have to do it in the place where we know the rules and have effective tools to hold USPS management accountable. We're going to do it in our house and through the process we understand best: grievances!

"Management's mistakes lead to some of the worst injustices to injured letter carriers who seek workers' compensation benefits."

OWCP in the grievance process

Before beginning any OWCP grievance, shop stewards should understand both the contractual and legal foundations that underlie these grievances. An article in the Winter 2024 NALC *Activist*, "Compensation: The foundation of OWCP-related grievances," provides a thorough grounding in this. Shop stewards should review and become familiar with the 2024 article before beginning any OWCP grievance. This issue of the *Activist* builds on that article, and some of its salient points will also be discussed here.

Initially, the addition of city carrier assistants (CCAs) to the letter carrier craft created some confusion when stewards assist members in OWCP representation. From their first minute on the job, CCAs have the same Federal Employees' Compensation Act (FECA) rights and benefits for on-the-job injuries afforded to career letter carriers.

To grieve or not to grieve

Decisions made by OWCP are <u>not</u> grievable:

5 USC § 8128(b)

> *The action of (OWCP) in allowing or denying a payment under this subchapter is-*
>
> *(1) final and conclusive for purposes and with respect to all questions of law and fact; and*
>
> *(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.*

20 CFR § 10.1

> *[OWCP has exclusive authority to administer, interpret and enforce the provisions of the Act.*

OWCP decisions that are not grievable include:

- Whether a claim is accepted as work-related.
- Whether compensation for wage loss is payable.
- The medical suitability of a job offer.

When representing injured workers, shop stewards should be aware of the difference between representation for OWCP claims, and a grievance of management's violations of contract and law. Stewards do not have a right to represent or assist injured workers on the clock when dealing with issues involving OWCP's adjudication of a claim. When investigating and grieving management violations related to on-the-job injuries, however, shop stewards do have a right to time on the clock.

Postal management is obligated by the National Agreement, its own regulations, and the FECA to follow certain procedures when employees report on-the-job injuries. Management's violations of those procedures are eminently and entirely grievable, as is its mishandling of OWCP claims.

Postal supervisors typically do not understand the distinction between OWCP decisions and Postal Service violations related to OWCP matters. They are often coached to argue that such violations are not grievable. They may tell union representatives that OWCP is the only agency that can provide a remedy for such violations.

Stewards should be ready for management's non-grievable arguments and be prepared to argue that violations of the law are grievable.

Many of the FECA implementing regulations found in 20 CFR 10 are echoed in

Postal Service handbooks and manuals. This is because Article 21.4 of the National Agreement requires the Postal Service to promulgate regulations that comply with OWCP regulations. The Postal Service regulations sometimes restate the CFR's provisions word for word. In other cases, they paraphrase them or contain implementing language for use within the Postal Service.

When management violates provisions found in the Postal Service's handbooks or manuals relating to on-the-job injuries, cite Article 19 of the National Agreement. It requires management to comply with its own handbooks and manuals.

Also, cite the Article 15.1 definition of a grievance, as noted at *Joint Contract Administration Manual (JCAM)* page 15-1. Article 15 states that alleged violations of postal handbooks or manuals may be handled within the grievance procedure.

Even when there is no echoing Postal Service handbook or manual language, management's violations of the FECA, 20 CFR 10, and other OWCP regulations are grievable. In such cases, start by arguing Articles 3, 5 and 21 of the National Agreement. Article 3 limits management's exclusive rights by requiring consistency with applicable laws and regulations.

Article 5 prohibits management from actions that are inconsistent with its obligations under law. The FECA (at 5 USC 81) and its implementing regulations (at 20 CFR 10) are applicable law and regulations. Article 21.4 specifically requires the Postal Service to comply with applicable regulations of OWCP.

Thus, the National Agreement clearly requires the Postal Service to comply with OWCP law and regulations. Again, cite the broad grievance definition in Article 15.1 (*JCAM* page 15-1), where the parties agreed that disputes involving alleged violations of law that may be handled within the grievance procedure.

To succeed, any grievance filing should contain certain well-established elements:

- documented, proven facts
- accurate citations of contract and law
- appropriate requested remedies

The same elements must be present in a grievance protesting management's violations of on-the-job injury procedures.

Management is required to provide stewards information to investigate a grievance in accordance with Articles 15, 17 and 31 of the National Agreement. *USPS handbook, AS-353: Guide to Privacy, the Freedom of Information Act, and Records Management,* lists disclosure of OWCP records to labor unions as a routine use.

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The DOL's own guidance found in *Privacy Act Systems – DOL/GOVT-1, governing disclosure of OWCP and FECA files,* also lists disclosures to labor unions as a routine use. However, the DOL has clarified that labor unions' routine use is limited to representing claimants before OWCP. In order to use OWCP documents in the grievance procedure, shop stewards should have the injured letter carrier sign a USPS/OWCP Privacy Act Authorization and Waiver. This form specifically authorizes the NALC to review information from the DOL and OWCP to investigate and/or process a grievance. This form is included in each OWCP Grievance Starter found in the Members Only portal at nalc.org. Completing this form and including it in the grievance file will strengthen the case and dispatch complicated technical arguments about medical privacy.

Let's take a look at some of most common violations.

Part 1: Grieving management's OWCP mistakes, The New Top 10

Since the 2004 *Activist*, there have been major changes not only in OWCP's policies, but also in how claims are processed both by OWCP and the Postal Service. Many of the most common management mistakes in claim processing in the 2004 *Activist* are now much less common, while other mistakes and problems have become more prevalent. What hasn't changed is that postal management routinely mishandles claims. And those mistakes result in delays and claim denials that harm our most vulnerable members.

Five of the top 10 violations that the 2004 *Activist* addressed involved management's handling and processing of paper OWCP forms. They were:

- Providing the wrong form, such as a Notice of Recurrence (CA-2a) instead of a Federal Employee's Notice of Traumatic Injury and Claim for Continuations of Pay/Compensation (CA-1) or Notice of Occupational Disease and Claim for Compensation (CA-2)
- Failing to provide a receipt for a submitted CA-1 or CA-2
- Delaying forwarding of CA-1 or CA-2 to OWCP
- Failing to provide completed copy of CA-1 or CA-2
- Delaying forwarding of Claim for Compensation (CA-7) to OWCP

Now that almost all OWCP claims and forms are filed online by injured workers themselves in ECOMP, these violations are uncommon. While letter carriers still have the right to file paper claims, the NALC strongly advises against it, if at all possible, for many reasons including that it prevents the above violations. And given that Postal Service managers now rarely see paper forms, the chances of them mishandling the forms have only increased.

There are letter carriers, however, who aren't comfortable using computers or the internet and they may still file paper claims. Postal occupational health processing specialists (OHPS) in some parts of the country have erroneously instructed injured letter carriers that they cannot file paper forms. If this happens, it should be grieved. *FECA Circular* 22-09 (available online)[1] makes clear that the federal employer must "retain the option for physical submission for claimants who cannot otherwise submit them."

Claimants who file paper forms should also know that current OWCP procedures do not permit employing agencies to

1 www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECAcirculars#CIRCULAR202209

submit the paper form itself. Once the postal OHPS receives a paper form, they are required to take the information on the form and input it into an electronic form in ECOMP, filing on behalf of the injured worker. It should come as no surprise that they do not always accurately or completely input the information from the paper form. In addition, according to *FECA Circular* 22-09, they are not required to retain a copy of the original form. For this reason, the injured worker should make a copy of the original paper form before submitting it to management and scan a copy of it into ECOMP once they have been assigned a claim number. They should also point out to their claims examiner any errors or omissions made by the OHPS. These errors or omissions, of course, should be grieved.

Shop stewards should refer to the Spring 2004 *NALC Activist* for grievances involving management's mishandling of paper forms. When using the 2004 *Activist*, stewards should verify the citations with current versions of the *Employee and Labor Relations Manual (ELM)*, *Handbook EL-505, Injury Compensation*, 5 USC 81, and 20 CFR 10 since some of the citations have shifted around slightly.

1. Failure to provide Authorization for Examination And/or Treatment (Form CA-16)

When letter carriers suffer a traumatic on-the-job injury, paying the medical bills should be the last thing they need to worry about. Unfortunately, many letter carriers are unclear as to how the federal workers' compensation system works and are hesitant to file claims, fearing a mountain of debt from medical bills. This should never happen.

In traumatic injury cases, the Postal Service is required by federal law and postal regulations to provide a CA-16, Authorization for Examination and/or Treatment, within four hours of a worker reporting a traumatic injury and seeking medical treatment.

Form CA-16 is the form used in traumatic injuries to authorize medical treatment and provide an initial medical report. It is extremely important to injured workers. The front of the form is completed by management and guarantees payment by OWCP to the medical provider. The reverse is completed by the treating physician, ensuring that OWCP immediately receives and reviews an initial medical report.

Yet most letter carriers have never heard of a CA-16. When a CA-16 is issued, the injured worker's medical bills will be paid for up to 60 days, even if the claim is denied. The Postal Service avoids those costs when an injured worker never gets a CA-16 in the first place, so CA-16s are tightly controlled.

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CA-16s can only be approved and provided by a postal supervisor, manager or OHPS. A properly issued CA-16 must have the name, title and signature of the authorizing official. CA-16s are not available online—for a very good reason. Only the authorizing agency has the authority to provide the CA-16. Letter carriers should never attempt to fill out a CA-16 that has not been properly provided by, and filled out by, the appropriate postal official.

In far too many cases, postal management does not issue a CA-16 or fails to complete it properly. Thus, OWCP receives the initial medical report late or not at all. This results in delays in acceptance of claims, or even denial of claims. And in the age of ECOMP, there is no excuse for this. When a claim is filed using ECOMP, the letter carrier's supervisor is required to complete the claim form electronically. At the end of the supervisor's section, ECOMP directs the supervisor to complete and print a CA-16 with the following instructions:

- If the injured employee requires medical treatment for the injury, you may obtain Form CA-16, Authorization for Examination and/or Treatment, by clicking the button "Issue CA-16." A copy of the form will be generated as a PDF, which may be printed and completed to authorize the employee to be treated for the claimed injury.
- Please note that the completed CA-16 must be submitted to OWCP by mail or fax and may not be uploaded in ECOMP.

ELM 545.21 states in part:

The control office or control point must promptly authorize medical treatment by issuing the employee a properly executed Form CA-16 within 4 hours of the claimed injury.

The NALC has recently found that in some places management has been issuing blank CA-16s and fails to complete and sign its portion of the document. This violates OWCP's implementing regulations as well as the *ELM*.

20 CFR § 10.300(c):

(c) Form CA–16 must contain the full name and address of the qualified physician or qualified medical facility authorized to provide service. The authorizing official must sign and date the form and must state his or her title. Form CA–16 authorizes treatment for 60 days from the date of injury, unless OWCP terminates the authorization sooner.

And in fact, the agency instructions on page 3 of the CA-16 form itself mandate: "Part A shall be completed in full by the authorizing official."

The CA-16 is for traumatic injuries only. It is not used for occupational disease or injury. It must be issued by management in most cases where a CA-1 is submitted, and the employee seeks medical attention. Only in the very limited circumstance where the injured employee first seeks medical attention more than one week after the injury, or in cases where the injured employee accepts treatment from the Post Office contract physician and the injury is only a first aid injury, may management not issue a CA-16.

The definition of a job-related first aid injury is found in the instructions for PS Form 1769/301, Accident Report. A first aid injury is a minor injury that requires no more than two medical visits, the second of which is to confirm full recovery.

Any injury that involves work restrictions, disability and/or limited duty is not considered a first aid case.

Thus, even if an employee agreed to be treated by a Postal Service contract physician, if, at the initial visit, the physician placed a restriction (e.g., a weight limit of 30 pounds.), management would have to then immediately issue a CA-16 for the follow-up visit.

Also, if an employee seeks medical attention from their own physician, even in a first aid case, the CA-16 must be provided.

The NALC has found in recent years that the Postal Service in certain parts of the country have been issuing a form in lieu of a CA-16 that it purports serves the same purpose. Federal regulations expressly prohibit management from using a substitute form or modifying the existing CA-16 (see 20 CFR § 10.7).

Management normally must issue Form CA-16 within four hours of the claimed injury. If management gives oral authorization for medical care, then the CA-16 must be issued within 48 hours. The completed CA-16 must be submitted directly to OWCP as soon as possible after medical treatment, either by the employee or the physician.

If the employee needs to be off work as a result of the injury, it is normally in the employee's interest that management promptly receive a copy of the completed CA-16 to support Continuation of Pay (COP) of the employee's wages.

When a CA-16 is properly issued, completed, and sent directly to OWCP, the injured worker will have met their initial burden of proof, because the CA-16 includes a comprehensive initial medical report. When a CA-16 is not properly issued or completed, the necessary medical report needed to meet the burden of proof may or may not be sent to OWCP.

Nothing in 20 CFR 10, or relevant postal manuals, requires an employee to request a CA-16 from the supervisor. The issuance of CA-16 by the supervisor is mandatory. Nevertheless, employees should specifically request it from the supervisor whenever they submit a CA-1 and seek medical attention.

Timely requesting the CA-16 is crucial. Stewards and fellow union members should always inquire whether or not a CA-16 has been issued when learning of a traumatic injury. While the language found in the implementing regulations for the FECA at 20 CFR §10.300(b) is couched in mandatory terms, unfortunately this language is in place for only seven days:

> *The employer shall issue Form CA–16 within four hours of the claimed injury. If the employer gives verbal authorization for such care, he or she should issue a Form CA–16 within 48 hours. The employer is not required to issue a Form CA–16 more than one week after the occurrence of the claimed injury.*

For this reason, the injured worker and/or their representative should request the CA-16 within a seven-day period and document that request.

Form CA-16 has always been critically important to injured workers. For injured CCAs, it has taken on even more importance. When OWCP denies claims of career letter carriers, their Postal Service Health Benefits (PSHB) plan will cover the medical costs of their injuries if no CA-16 has been issued. CCAs do not have that safety net. Even if they have health insurance (and many don't), they face large deductibles and out-of-pocket expenses.

Management is required to provide the CA-16 in almost every traumatic injury. However, management routinely fails to provide it. This often causes problems for injured workers. Their claims are delayed or even denied. Medical bills go unpaid. Shop stewards should enforce the regulations regarding CA-16 and hold managers accountable for their failures.

2. Failure to pay Continuation of Pay (COP)/COP mistakes

Most on-the-job injuries are resolved within a relatively short period of time. When amending the FECA in 1974, Congress created COP to prevent employ-

USPS BY THE NUMBERS

USPS Operations End of FY 2025	Number	Chg. from SPLY*
Total mail volume (Billions of pieces)	108.7	1.8%
Mail volume by class (in billions)		
First Class	42.0	-5.0%
Marketing mail	56.8	-1.3%
Shipping and packages	6.8	-5.7%
Periodicals	2.4	-11.0%
International	0.25	-13.5%

USPS Finances End of FY 2025 (billions)	Number	Chg. from SPLY*
Operating revenue	$80.5	1.2%
Operating expenses	$89.8	0.4%
Controllable operating income	-$2.7	49.3%
Workers' comp adjustments	$0.972	-55.1%
Net operating income	-$9.0	-5.7%

Employment End of FY 2025	Number	Chg. from SPLY*
City carrier employment	177,972	-0.3%
Full time	164,596	-1.3%
PT regular	341	-4.7%
PTF	13,035	14.5%
City carrier assistants	23,242	-20.5%
Total city carrier craft	**201,223**	**-3.1%**
City carriers per delivery supervisor	7.4	-2.8%
Career USPS employment	492,482	-0.3%
Non-career USPS employment	84,165	-11.4%

*SPLY=Same Period Last Year
This information compiled by the NALC Research Department from USPS reports.

ees' income loss while their claim was being adjudicated. COP acts as a financial bridge so that injured workers can heal and get back to work with minimal complications, providing savings to both injured workers and the Postal Service.

Properly paying COP is a perennial problem at USPS and there are always grievances out there. While most get resolved at Step B or earlier, every year we take COP cases to arbitration.

Some cases solely involve COP. Others, however, have a COP issue as a component of a larger issue such as USPS falsification of dates, providing the wrong form, delaying the processing of forms etc.

In looking at COP cases over the years, it has become clear that supervisors and USPS OHPS do not understand how COP works, and even some local NALC OWCP specialists do not fully understand COP. So, we will begin our discussion of COP with a brief primer.

Some COP basics:

- COP is only available in CA-1 traumatic injury cases.
- Employee must file a CA-1 within 30 days of date of injury to be eligible for COP
- USPS must advise employees of the right to COP.
- COP is payable for a maximum of 45 days.
- Time loss on day of injury does not count toward COP; absence is paid as administrative leave (unless the injury occurs pre-tour).
- 20 CFR §10.200(c): Postal Service employees are not entitled to COP for the first three days of temporary disability and may use annual, sick or leave without pay during that period, except that if the disability exceeds 14 days or is followed by permanent disability, the Postal Service employee may have that leave restored.
- Partial days of disability count as one day of COP.
- USPS may controvert but not interrupt COP (except in rare cases).
- USPS must advise employees of controversion.

Counting COP

A key concept to keep in mind when counting COP is the distinction between the 45-day COP period and the 45 days of COP entitlement: The injured worker is entitled to up to 45 days (calendar) of COP and the injured worker must begin any period of COP within 45 days (calendar) of the date of injury.[2] For example, if an injured worker begins their first use of COP on the 45th day from the date of injury, they can continue COP up to the 90th day from the date of injury as long as their disability is continuous after Day 45.

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Requesting COP

According to Section 4-15 of the *EL-505*, the manager has an affirmative duty to inform the injured employee of their right to COP, stating in part:

> *Obligation: Informing Injured Employees of Right to COP, Sick, or Annual Leave*
>
> *A traumatically injured employee may elect to have COP for the first 45 calendar days of disability or to use sick or annual leave. This election must be made on the CA-1*
>
> *...If the employee chooses sick or annual leave, ensure that the employee has been made aware of his or her rights and responsibilities.*

On the employee portion of the CA-1, workers must choose between COP and using sick or annual leave. To be eligible for COP, a worker must have a job-related traumatic injury, file a CA-1 within 30 days of the date of injury (DOI), and begin losing time from work due to the injury within 45 days. In most cases, selecting COP makes the most sense.

Postal managers have the responsibility to provide COP, and if they fail to do so when there is entitlement, they are in violation of *ELM* 543.41, Continuation of Regular Pay:

> *For most employees who sustain a traumatic injury, FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability up to a maximum of 45 calendar days...*

One common misperception among postal managers is that COP is only paid once a claim has been accepted. Not only is this wrong, but it subverts the intent of Congress when it enacted COP in 1974 to prevent the injured worker from losing income while OWCP adjudicates their claim.

Another common misperception is that the Postal Service does not have to pay COP if they have controverted the claim. Wrong again. Management can controvert any claim using Box 36 in the management portion of the CA-1. In some parts of the country, the Postal Service controverts almost every claim. If controversion permitted the Postal Service to not pay COP, what would stop it from establishing a blanket policy to controvert every claim?

"Controversion" is a term of art under the FECA that specifically refers to an agency's challenge to the paying of COP. All other challenges are simply "challenges." A controversion does not stop the payment of COP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP. The Postal Service can controvert COP but *must pay COP until OWCP decides entitlement*.

So, under what circumstances does management not have to pay COP? According to implementing regulations of the FECA found at 20 CFR § 10.220 (also mirrored in *ELM* 545.732):

> **When is an employer not required to pay COP?**
>
> *(a) The disability was not caused by a traumatic injury;*
>
> *(b) The employee is not a citizen of the United States or Canada;*

2 There is a rare exception to this, involving recurrences that begin within 45 days of an initial return to work following a period of COP.

(c) No written claim was filed within 30 days from the date of injury;

(d) The injury was not reported until after employment has been terminated;

(e) The injury occurred off the employing agency's premises and was otherwise not within the performance of official duties;

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs; or

(g) Work did not stop until more than 45 days following the injury.

These exceptions are rarely present in most CA-1 cases. This fact is recognized by *ELM* Section 545.733:

In all situations, except as described in 545.732 above, the employer may controvert entitlement to COP, but must continue the employees regular pay pending a final determination by OWCP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP.

There are narrow exceptions to the above. They are found under 20 CFR § 10.222(a). The most common one by far is when an employee fails to provide medical evidence of disability within 10 calendar days of the claim being submitted. If this happens, the employer may terminate COP. In almost every case, however, this is only temporary because 10 CFR § 222 (a)(1) provides that "Where the medical evidence is later provided, however, COP shall be reinstated retroactive to the date of termination."

The other reasons for termination involve common sense. *ELM* Section 545.741 states:

After payment of COP is initiated, it may be stopped only when one of the following circumstances is present:

a. Medical evidence supporting disability due to a work–related injury is not received within 10 calendar days after the claim is submitted (unless the results of the accident investigation shows disability to exist).

b. The medical evidence from the treating physician shows that the employee is not disabled from the date–of–injury position.

c. Medical evidence from the treating physician shows that the employee is not totally disabled and the employee refuses a written job offer that is approved by the attending physician.

d. The employee returns to work with no loss of pay.

e. The employee's period of employment expires or employment is otherwise terminated as established prior to the date of injury (i.e., a casual or other employee with a specific term of employment). (See explanation in 545.743.)

f. Termination of employment is established prior to the date of injury.

g. OWCP directs the employer to stop COP.

h. COP has been paid for 45 calendar days.

Many postal managers also erroneously believe that if, after the date of injury, they issue a disciplinary removal, or a separation in the case of a CCA within their probationary period, that there is no obligation to continue COP. According to 20 CFR § 222(b), however, COP can be terminated under these circumstances only if management had issued a preliminary notice of the removal or separation prior to the date of injury. If not, the COP must continue after the removal or separation.

To sum up, management cannot—with the rare exceptions noted above—unilaterally stop paying COP. If it does, we file grievances!

3. Failure to correctly calculate the CCA COP pay rate

When CCAs entered the craft in 2013, OWCP issued a directive, *FECA Bulletin* 13-03, outlining the proper methods for calculating pay rates for COP and wage-loss compensation (WLC). All *FECA Bulletins* are available on the OWCP/DFEC website. The NALC has discovered that the Postal Service often miscalculates CCA pay rates for both COP and WLC. In most cases, injured CCAs are receiving less than they should. Calculating CCA COP pay rates per *FECA Bulletin* 13-03 will be discussed here.

Shop stewards and branch officers can assist injured CCAs in correcting errors in pay rate calculations. The formula that OWCP requires the Postal Service to use to calculate COP is different from the formula OWCP uses to calculate WLC for employees with no set work hours, such as CCAs.

To calculate CCA COP, the Postal Service must add the total pay earned by the employee during the one-year period prior to the date of injury (excluding overtime), divided by the number of weeks worked by the employee during that one-year period (a partial workweek counts as an entire week).

COP pay rates for part-time flexibles (PTFs) are calculated similar to CCAs except the calculated weekly pay rate is prorated for any partial weeks of eligibility: for each day, an amount equal to the weekly pay, less any regular pay received for the week, divided by the number of days that have not been worked.

To investigate possible errors, injured workers should download a complete copy of their claim file from OWCP. The claim files often have correspondence between the OWCP claims examiner and the postal OHPS regarding pay rate calculations.

To verify whether the calculations are correct, you will need to gather the claimant's pay information for the year prior to the date of injury and the 45 days after the date of injury. CCA hours can be verified through a written request for payroll journals from the Postal Service or getting the CCA's pay stubs. CCAs can also access their pay records via liteblue.usps.gov.

Once you have the payroll records, calculations are made using the formula above. The average of weekly hours should be compared with the weekly COP hours being paid. If there is a discrepancy, grievances should be filed requesting the pay rate be properly calculated citing: Articles 17, 19, 21.4, 31, *ELM* 545 and *EL-505* Section 13-2.

4. Failure to provide written notice of controversion or challenge

OWCP regulations give the employer the authorization to controvert COP. The regulations also allow the employer to contest any of the facts stated by the injured worker in the report of injury.

When the employer does controvert a claim, OWCP requires it to advise the employee of the challenge and its basis (20 CFR 10 § 211(c)).

USPS policy found at *EL-505* Section 8-5 requires the Postal Service to notify the employee in writing in all cases of both **controversions** and **challenges**.

While the agency's obligation to notify the employee regarding controversion of COP is found in the implementing regulations of the FECA at 20 CFR §10.211(c), the obligation to notify the employee of other challenges is found only at *EL-505* § 8-5.

Shop stewards should file grievances if the Postal Service controverts or challenges a claim without providing written notice to the injured employee.

5. Failure to advise the injured worker of the right to choose a physician

Despite the very clear language of the law and contract, supervisors often fail to advise employees of their right to choose a physician. In some cases, supervisors actually coerce employees into treatment from Postal Service contract physicians. There is no excuse for this, since this obligation is found in many places in both the *ELM* and *EL-505*:

- *ELM* 543.3: FECA guarantees the employee the right to an initial choice of physician.
- *ELM* 544.112: In case of a traumatic injury, the supervisor must advise the employee of the following: The right to select a physician of choice.
- *ELM* 545.21: The control office or control point must advise the employee of the right to an initial choice of physician.
- *EL-505* Section 3-2: Immediately ensure that appropriate medical care is provided: Advise the employee of his or her right to treatment by a USPS contract medical provider or by a private physician or hospital of his or her choice.
- *EL-505* Section 3-3: FECA guarantees the employee the right to a free choice of physician.
- *EL-505* Section 3-9: Obligation: Ensuring Right to a Free Choice of Physician—Initial medical examination and treatment must be authorized in accordance with FECA provisions and applicable OWCP regulations and policies governing medical care. FECA guarantees the employee the right to a free choice of physician.

If the Postal Service fails to meet this notification obligation or coerces or requires the injured letter carrier to be treated by Postal Service contract physicians, stewards should file grievances citing the above provisions.

Keep in mind, OWCP regulations do permit the Postal Service to require an injured employee to be examined by a contract physician, but only so long as the examination does not interfere with or delay the employee's appointment with their own chosen physician.

Arbitrator Mittenthal even issued a national level arbitration award on this issue (C-06462) where he held that management may require an employee to be examined by a Postal Service physician only in non-emergency situations where the examination will not interfere with or delay the employee's appointment with their chosen physician.

6. Failure to timely provide pay rate information to OWCP

Delays in getting paid are a huge frustration for our members. In order to receive wage-loss compensation after the COP period has expired in traumatic injury cases (CA-1), and in order to receive wage-loss compensation for any period of disability in occupational disease cases (CA-2), the injured worker must submit a CA-7 form requesting wage-loss compensation. These forms can and should be completed and submitted electronically in ECOMP, if at all possible.

A chief culprit in pay delays is often the Postal Service's failure to timely provide pay-rate information. Whenever the NALC asks OWCP leadership at the national level what the biggest issue they have with the Postal Service in processing claims, almost without exception they respond that their biggest frustration is trying to get pay rate information. OWCP cannot pay the injured employee until they get this information.

The first CA-7 filed under any specific claim is the most important one. When an injured worker first submits a CA-7 for wage-loss compensation, OWCP will contact the Postal Service by letter, phone or email requesting pay rate information. Compensation will not be paid until OWCP receives the pay rate information.

The employer usually provides the pay rate information by completing Sections 8-11 on the reverse side of the CA-7. These sections of the CA-7 are completed only for the first CA-7 filed under any given claim. The Postal Service is not required

to complete these sections for subsequent CA-7s. If OWCP has received the initial CA-7 but still lacks sufficient information to establish the pay rate, this usually means that the Postal Service did not complete or incorrectly completed its portion of the CA-7. This, in effect, is tantamount to delaying the CA-7 and should be grieved as such.

Inexplicably, the requirement to supply pay rate information is not mentioned anywhere in either the *ELM* or *EL-505*. And while the FECA and the implementing regulations of the FECA contain detailed information on how OWCP should calculate pay rate under a variety of circumstances, they don't directly address how the Postal Service provides the pay rate. What they do address is the Postal Service's obligation to timely forward a **completed** CA-7 to OWCP. And a properly completed first CA-7 under any specific claim must contain the pay rate information found in Sections 8-11 on the reverse side of the form. It says so on the form itself:

Employing Agency Portion

For first CA-7 claim sent, complete sections 8 through 15.

For subsequent claims, complete sections 12 through 15 only.

The Postal Service is obligated to provide claim related documents to OWCP in a timely manner. The Postal Service often delays or fails to provide pay rate information, harming the injured worker financially.

ELM 544.12 states in part:

> *Control office and control point supervisors are responsible for reviewing all claims for accuracy and completeness and for forwarding claims and related documents to OWCP within prescribed FECA time frames.*

Both the law and the contract require management to complete and transmit Form CA-7 to OWCP within five working days after receiving it from the employee. And in the case of the first CA-7, this would include the pay rate information.

20 CFR §§ 10.111(c) and 10.112(b) provide:

> *(c) Upon receipt of Form CA–7 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–7 and any accompanying medical report to OWCP.*

ELM 545.82.d states:

> *The control office or control point forwards the completed Form CA-7 and any other accompanying medical reports to OWCP within 5 working days upon receipt from the employee.*

7. Failure to provide correct pay rate information

In addition to timely providing pay rate information to OWCP, whenever an injured worker first applies for wage-loss compensation, USPS must also correctly calculate the pay rate. Among the most important steps the Postal Service must take is verifying the injured letter carrier's pay rate. FECA defines three ways to calculate pay rates based upon the injured worker's pay. The FECA requires the Postal Service to select the highest applicable method. These three methods also apply to establishing the pay rate for schedule awards.

"Both the law and the contract require management to complete and transmit Form CA-7 to OWCP within five working days after receiving it from the employee."

A. Rate on date of injury

In traumatic injury cases, the date of injury is simply the date on which the incident causing the injury occurs. In occupational illness cases, the date of injury is the last day that the injured worker experienced the employment factors that contributed to occupational illness.

B. Rate on date of disability

This is the date that the injured worker becomes incapacitated for work because of injury.

C. Rate on date of recurrence

Monthly pay for recurrence of disability is calculated at the time of the recurrence, as long as the recurrence begins more than six months after the employee resumes regular full-time employment with the employing agency.

The three methods for calculating pay rates are defined in the FECA itself at 5 USC § 8101(4). They are also defined and discussed in the implementing regulations of the FECA at 20 CFR § 10.5(s).

The Postal Service generally has no problem in calculating pay rates for career letter carriers in disability wage-loss compensation cases since usually either the date of injury or the date disability began would apply. The Postal Service, however, will sometimes fail to select the recurrent pay rate if it applies.

D. Schedule award pay rates

The Postal Service sometimes provides OWCP with an incorrect pay rate in schedule award cases involving occupational disease cases. Often the correct pay rate should be the pay rate that is in place as of the date of the impairment rating exam. According to the *FECA Procedure Manual* 2-0900.5c:

> *For occupational disease claims where the claimant remains exposed to the work factors claimed, the pay rate is the rate of pay effective the date of the medical examination. If the claimant no longer remains exposed to the work factors claimed and there has been a change in work duties, e.g., limited duty, then the date of last exposure is used. See Patricia K. Cummings, 53 ECAB 623 (2002).*

Somewhat confusingly, OWCP refers to the pay rate that is in effect as of the date of the impairment rating exam as a "date of injury pay rate." It works, however, similarly to a recurrent pay rate. The date of the exam in most cases is also the date of "maximum medical improvement" (MMI). Because the date of the impairment rating may be years or even decades after the original injury date, in occupational disease schedule award cases the difference between the "date of injury" pay rate based on the date of the impairment rating exam and the original date of injury pay rate may be thousands and even tens of thousands of dollars. For this reason, injured letter carriers receiving schedule awards should verify the pay rate method selected by the postal occupational health specialist. And if the method is incorrect, a grievance should be filed to correct this.

ANDROID APP ON Google play

Available on the App Store

Install the free NALC Member App

for your iPhone or Android smartphone

As technology increases our ability to communicate, NALC must stay ahead of the curve. We've now taken the next step with the NALC Member App for iPhone and Android smartphones. The app was developed with the needs of letter carriers in mind.

The app's features include:

- Workplace resources, including the National Agreement, *JCAM*, MRS and CCA resources
- Interactive Non-Scheduled Days calendar
- Legislative tools, including bill tracker, individualized congressional representatives and PAC information
- Instantaneous NALC news with personalized push notifications and social media access
- Much more

Go to the App Store or Google Play and search for "NALC Member App" to install for free

The method used for pay rate calculations will be found in the OWCP case file. Usually, it will be on the first CA-7 requesting wage-loss compensation, or in the case of schedule awards, it will be on CA-7 used to apply for the schedule award. If it is not on a CA-7, it will be found in correspondence between the claims examiner and the Postal Service.

CCA wage-loss compensation pay rate calculations

In contrast to career letter carriers, the Postal Service struggles to correctly calculate the correct pay rate for CCA wage-loss compensation. Sometimes, it will insist that the CCA is only entitled to their two-hour or four-hour guarantee. Other times, it will come up with some arbitrary amount based on the fact that CCAs work variable hours. In most cases, this results in CCAs receiving less than they are entitled to. *FECA Bulletin* 13-03, discussed above in connection with calculating CCA COP, also outlines the proper methods for calculating pay rates for CCA WLC.

The method for calculating wage-loss compensation pay rates for CCAs outlined in *FECA Bulletin* 13-03 depends on how long the CCA has been employed as a CCA. There are two possible methods:

- If the employee has worked 11 months or more in the CCA position, WLC is calculated as follows: Total pay earned by the employee during the one-year period prior to the date of injury (excluding overtime) divided by 52 weeks.
- If the employee has not worked 11 months or more in the CCA position, WLC is calculated as follows: Total pay (excluding overtime) for the year prior to date of injury for an employee in the same (or neighboring) facility who did work 11 months or more as a CCA. If there is more than one such employee, the one who worked the most hours in the year must be used. Divide that total by 52 weeks to calculate weekly wage-loss compensation.

For injured CCAs with less than 11 months of service, pay rates that were not calculated using the hours of a similarly situated CCA often have the greatest discrepancy. Wage-loss compensation for PTFs is calculated in the same manner as CCAs, except that a similarly situated employee in the same or neighboring facility would also be a PTF. Incorrect pay rate calculations for wage-loss compensation should be grieved.

Claimants can also present the information and evidence directly to OWCP and request recalculation.

8. Improper physician contact by the Postal Service

OWCP regulations allow an employer to contact an injured worker's physician, in writing, regarding work limitations and possible job assignments. The same regulations specifically prohibit the employer from contacting the physician by telephone or in person.

20 CFR § 10.506 states:

> *To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. However, the employer shall not contact the physician by telephone or through personal visit.*

Similarly, *ELM* 545.52 states:

> *To aid in returning an injured employee to suitable employment, the control office or control point may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. However, FECA prohibits contacting the physician by telephone or through a personal visit except for administrative purposes such as determining whether a fax has been received or ascertaining the date of a medical appointment.*

The parties have agreed in two national-level settlements (M-01428 and M-01385 in NALC's Materials Reference System) that phone contact initiated by the employer with the physician is prohibited.

Improper requests to the attending physician

In addition, employees need to know promptly if the Postal Service directs inappropriate questions to a physician. Employers are limited to questions about work limitations and possible job assignments. It would be inappropriate, for instance, for the Postal Service to write to a physician demanding medical justification for recommended surgery.

While the Postal Service has a right to monitor the injured worker's medical progress and duty status, OWCP anticipates that the CA-17 is usually sufficient to do this. Again, according to 20 CFR § 10.506: "The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA–17 is usually adequate for this purpose."

And even in cases where the Postal Service limits its inquiries to work limitations and job assignments, the NALC has recently encountered instances where either a postal nurse or the OHPS has requested that the doctor provide a medical rationale or justification for the work limitations the doctor has put on a CA-17. This is almost always improper as it crosses a bright line into the area of claims adjudication which is the sole jurisdiction of OWCP claims examiners.

It would be proper for Postal Service representatives to request clarification of specific work restrictions that may not be clear to them; it would be improper for them to request an explanation as to the reason for the work restrictions. Such requests should be grieved.

9. Failure to provide the injured worker with written notice of contact with physician

When the employer does contact a physician in writing, it must send a copy of the correspondence to the injured worker and to OWCP. In addition, if the physician responds, the employer must send copies of the response to the injured worker and OWCP.

Here are provisions both from the implementing regulations of the FECA and from the *ELM*:

20 CFR § 10.506 states in part:

> *When [written] contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received.*

ELM 544.12 states in part:

> *The control office must provide the employee a copy of the completed CA–1 or CA–2 and all correspondence between the Postal Service and the treating physician.*

In many cases, the Postal Service does not provide the required copies to OWCP and to the employee. Disputes about limited duty and work restrictions are more difficult to resolve when an employee is in the dark about the Postal Service's communications to and from their doctor.

10. Improper job offers

Part 2 of this *Activist* will address the detailed process of filing grievances involving withdrawals of limited duty and failures to provide limited duty. Here we will look at grievances involving the job offer itself.

The ultimate goal of OWCP, like all other workers' compensation programs, is to return injured employees to work. It is OWCP's policy to make every reasonable effort to return the injured worker to the employing federal agency first. As part of the return-to-work process, OWCP regulations found at 20 CFR § 10.507 require the Postal Service to make the limited duty or rehabilitation assignment job offer in writing.

The job offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of their decision to accept or refuse the job offer. The employer must send a complete copy of the job offer to OWCP when it is offered to the employee.

Partially recovered employees refuse such job offers at their peril. In the case of a job offer that OWCP has determined is permanent and "suitable," under 5 USC § 8106(c)(2) a refusal will result in the permanent termination of all future wage-loss compensation and schedule awards. If OWCP deems the job offer temporary, under 20 CFR § 10.500(a) a refusal will result in the suspension of wage-loss compensation for as long as the temporary assignment is available. In both instances, the claim will remain open for medical benefits only as long as the injured employee still suffers residual effects of their accepted conditions.

Ideally, the duties included on the job offer should conform to the work restrictions to which OWCP has given weight of medical evidence. Unfortunately, this is not always the case. Injured letter carriers all too often find themselves in the predicament of receiving a job offer from the Postal Service that exceeds their accepted work restrictions.

Regrettably, OWCP relies on USPS to accurately describe the work duties on the job offer and it is OWCP's practice to accept at face value the USPS's assertion that the work duties fall within the accepted restrictions. Because of this, it is very hard for the injured worker to correct an inaccurate job offer through OWCP, either during an initial suitability determination or through OWCP's appellate process after a permanent sanction or temporary suspension has been imposed.

Inaccurate or improper job offers should be corrected through the grievance process.

- A job offer is improper if the work duties fall outside of the injured letter carrier's medical restrictions.
- A job offer is improper if the Postal Service misrepresents the work duties to OWCP and erroneously claims that they fall within the injured letter carrier's medical restrictions.

In almost every case, because of the severe sanctions involved in a refusal, the injured letter carrier should accept the job offer. But they should also immediately file a grievance if the duties exceed the work restrictions that OWCP has accepted. Employees have the right to both accept suitable limited duty and grieve its contractual violation.

Every grievance should both document the accepted work restrictions and provide detailed evidence and explanation as to how the duties offered do not conform to or exceed the restrictions. The remedy should include retraction of the job offer and a letter from the Postal Service to OWCP explaining that the offered duties, in fact, fall outside the injured worker's accepted limitations.

Finally, an important caveat:

Page 21-5 of the *Joint Contract Administration Manual (JCAM)* states:

> *The Office of Workers' Compensation Programs has the exclusive authority to adjudicate compensation claims and to determine the medical suitability of proposed limited duty work.*

This language has led to the misconception on the part of some NALC stewards that they cannot file grievances over job offers. The term "suitability" regarding limited duty in the *JCAM* is a "term of art" within OWCP. Whether or not a job offer is "suitable" is a formal determination made by OWCP that the work in the offer (as described by the employing agency) conforms with the work restrictions to which OWCP has given weight of medical evidence and that it is available within the local commuting area.

While the union cannot file a grievance over OWCP's determination that a limited-duty job offer is "suitable," the union should always file a grievance if the Postal Service's job offer is improper because it misrepresents the work duties or violates the pecking order. When making their case, stewards and advocates should avoid using the terms "suitable" and "suitability." Instead, the issue should be whether or not the job offer improperly misrepresented the nature of the listed duties.

Finally, note that OWCP does not take into consideration the *ELM* 546.142 pecking order in determining whether or not a job offer is suitable. In fact, most OWCP claims examiners don't even know what it is. As discussed in the limited-duty section below, the pecking order is a contractual obligation that the Postal Service assumed under a national-level grievance settlement with the NALC in 1979. If OWCP has determined that a job offer is suitable and that job offer doesn't follow the pecking order, the injured worker should still accept the job offer and then grieve the Postal Services violation of the pecking order separately.

Article 21.4 and *JCAM* page 21-6 acknowledges this:

> *An employee could be offered a limited-duty assignment that meets OWCP's requirements, but fails to meet the requirements of the* ELM*:*
>
> > *Section 546.142. Carriers refusing such disputed assignments could risk termination of compensation benefits. These situations are addressed in the Memorandum of Understanding, January 29, 1993 (M-01120), which allows a partially recovered employee to accept a limited duty job offer "under protest" and still pursue a grievance concerning the assignment. The memorandum provides that:*
> >
> > > *1. By accepting a limited duty assignment, an employee does not waive the opportunity to contest the propriety of that assignment*

through the grievance procedure, whether the assignment is within or out of his/her craft.

2. An employee whose craft designation is changed as a result of accepting a limited duty assignment and who protests the propriety of the assignment through the grievance procedure shall be represented during the processing of the grievance, including in arbitration, if necessary, by the union that represents his/her original craft.

Remedies for management's OWCP mistakes

Crafting an appropriate remedy is an important element in every grievance, including those involving management's OWCP violations. The general principles to consider in the formation of a requested remedy include:

- The remedy should fit the violation;
- The grievant should be made whole; and
- The remedy should fix the underlying problem.

For instance, management improperly refused to provide a CA-16 and later claimed the supervisor did not know he was required to do so. An appropriate remedy might include an order requiring the postmaster to instruct all the supervisors and 204b's, in writing, to comply with the regulations regarding Form CA-16.

In most cases involving management errors in handling on-the-job injuries, no monetary make-whole remedy will be appropriate. The FECA provides that the benefits provided by OWCP are the sole remedies available to compensate employees who suffer on-the-job injuries.

However, in some cases, a monetary make-whole remedy will be appropriate. For instance, in one recent case the Postal Service failed to advise an injured letter carrier of his right to elect continuation of pay (COP). By the time the carrier found out about his rights, it was too late and OWCP denied his request for COP, so a monetary remedy was necessary to make the carrier whole.

Another example where a monetary remedy might be entirely appropriate are cases involving the failure to provide a CA-16, especially in cases involving CCAs. While career employees can always have their PSHB carrier cover these costs after an initial denial, many CCAs do not have this option. Given the enormous medical bills some CCAs are facing, we need to educate our members and local activists to file CA-16 grievances and demand as a remedy that USPS pay those bills! Undoubtedly, cases asking for large monetary remedies will land in front of arbitrators, allowing us to build important precedent on this issue.

"Some remedies might be unpleasant for the offending supervisors, but all parties benefit from solutions that fix underlying problems. The benefits include fewer grievances, greater contract compliance, less resources spent on grievance processing, and in the case of grievances concerning on-the-job injury procedures, more OWCP claims accepted without delay."

Stewards, however, should never request that OWCP accept a claim and pay benefits as a remedy. OWCP has exclusive authority to make decisions regarding a claim. Those decisions are not subject to review by an arbitrator, or anyone else.

Stewards arguing for a make-whole remedy should be prepared to show a direct link between the contractual violation and the demonstrable loss to the employee. Sometimes a simple cease-and-desist agreement by management will fix an underlying problem. Often it will not. Local stewards are in the best position to determine this.

If management admits to a mistake, try to determine why it was made. If the reason was lack of training, a good remedy might include a requirement that the supervisor receive training in OWCP procedures, and that management provide a copy of the training records to the union.

If the violations continue by other supervisors, consider a remedy that requires training for all office supervisors and 204b's. If the same supervisor continues the violations, request written acknowledgement indicating their action violated a specific provision of the *ELM*, CFR, *EL-505*, etc., and they have been instructed to cease such violations, with a copy to the union.

Some remedies might be unpleasant for the offending supervisors, but all parties benefit from solutions that fix underlying problems. The benefits include fewer grievances, greater contract compliance, less resources spent on grievance processing, and in the case of grievances concerning on-the-job injury procedures, more OWCP claims accepted without delay.

Part 2: Limited-duty grievances

Understanding the Postal Service's obligations

The Postal Service is both legally and contractually obligated to make every effort to assign limited-duty[3] work to employees who have not fully recovered from an on-the-job injury. In order to understand limited-duty grievances, it is important to understand the historical context and development of the Postal Service's obligations to injured employees.

It should be pointed out here that limited-duty grievances do not involve anything OWCP has or hasn't done with regard to the grievant. They involve the Postal Service's statutory, regulatory and contractual obligations toward the injured worker to provide limited-duty work. These obligations originate in the FECA.

The FECA, 5 USC § 8101 et seq., has been around since 1916 and has its roots in an earlier law passed in 1908 under the progressive administration of Theodore

3 Note that where this issue of *The Activist* uses the term "limited duty," the intention is to include modified work provided to employees with permanent work restrictions as well as those with temporary work restrictions. See the *JCAM* under Article 21.4: "Limited duty work is work provided for an employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a compensable illness or injury."

Roosevelt. The FECA was groundbreaking social legislation at the time of its passage and represented a commitment by the federal government to take care of its employees who had been injured on-the-job. FECA establishes a comprehensive and exclusive workers' compensation program administered by the Office of Workers' Compensation Programs (OWCP) under the Department of Labor (DOL), which pays medical benefits and compensation for the disability or death of a federal employee resulting from personal injury sustained while in the performance of duty.

The FECA is remedial and humanitarian legislation. One of its major purposes is to prevent federal employees, who are without income because of job-related injuries, from sinking into poverty. It represents a social contract between the injured worker and the federal government/federal employer. This is especially important since the FECA represents the sole remedy available to injured federal workers—a federal employee or surviving dependent is not entitled to sue the United States or federal agency, or recover damages for injury or death under any other law.

Because workers cannot sue the federal government, it is well established that the FECA is to be broadly and liberally construed to accomplish this purpose and not in derogation of the injured employee's rights. The intent of the Act was to create a non-adversarial system that would provide federal employers with a predictable future liability that they could incorporate into their overhead, while providing injured federal workers with swift sure recovery of their benefits without having to litigate.

One of the major goals of the FECA is to return the injured federal worker to productive employment. The FECA does not provide retirement benefits. Employees who fully or partially recover from their injuries are expected to return to work.[4] This policy not only benefits the federal agency that retains the labor of the injured worker, but also improves morale for both the injured worker and the remainder of the workforce.

4 20 CFR § 10.500(b): "Each disabled employee is obligated to perform such work as he or she can. OWCP's goal is to return each disabled employee to work as soon as he or she is medically able."

To accomplish its return-to-work goals, OWCP first emphasizes finding suitable employment within the original employing agency. If that is not successful, they may require the injured employee to seek work in the private sector through OWCP's vocational rehabilitation program. With rare exceptions, most partially disabled letter carriers are better off returning to limited duty with the Postal Service, especially since the success rate of OWCP's vocational rehabilitation program in most years hovers around 10 percent.

The USPS's legal obligations

The Postal Service's regulations outlining its legal and contractual obligations for providing limited-duty work are found in *ELM* 546, "Reassignment or Reemployment of Employees Injured on Duty." This section of the *ELM* begins by recognizing at 546.11 that "[t]he Postal Service has legal responsibilities to employees with job-related disabilities under 5 U.S.C. 8151 and the OPM regulations..."

5 USC § 8151 (Civil Service Retention Rights) authorizes the Office of Personnel Management (OPM) to issue the specific regulations for restoration to duty following an on-the-job injury that imposes a strong obligation on federal agencies to return injured workers to limited duty. These can be found at 5 CFR Part 353 "Restoration to Duty from Uniformed Service or Compensable Injury."

The regulations in 5 CFR 353 grant varying restoration rights to injured workers depending upon the timing and extent of recovery following the injury. Naturally, some employees will fully recover following an on-the-job injury, while others will not. Management's limited-duty obligations apply to the latter—employees who have not fully recovered but who have partially recovered and are able to work limited duty. The obligation applies regardless of whether the partial disability is temporary or permanent.

These employees are grouped into two categories by 5 CFR 353, based on whether or not the injured worker is expected to fully recover some time in the future. "Partially recovered" employees are not yet fully recovered but are expected to at some point, while "physically disqualified" employees are considered to have little likelihood of doing so. The restoration rights of both types of injured workers are in 5 CFR § 353.301(c) & (d):

(c) Physically disqualified.

An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agencywide and applies for a period of 1 year from the date eligibility for compensation begins. After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable .

(d) Partially recovered.

*Agencies must make every effort to restore in the local commuting area, according to the circumstance in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973***.**

Two points here:

1) The phrase "must make every effort" provides strong protection. The law requires the Postal Service to make more than some effort. It must do more than make a lot of effort or even reasonable effort. It must make **every** effort to restore injured workers to limited duty.

2) The law gives the Postal Service an example of the bare minimum way that injured workers must be treated—The Rehabilitation Act of 1973 (note that it does not require the injured worker to be "handicapped," only that they be treated "substantially the same as other handicapped individuals").

The regulations for the Rehabilitation Act and the standards which constitute a violation of the Act are within the Code of Federal Regulations located in Title 29, Section 1614.203:

29 CFR § 1614.203 Rehabilitation Act.

(b) ***Nondiscrimination.*** *Federal agencies shall not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The standards used to*

determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under the ADA.

(c) ***Model employer.*** *The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, advancement, and retention of qualified individuals with disabilities in the federal workforce. Agencies shall also take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce.*

Two more points:

1) The Postal Service must act as a "model employer" and give "full consideration" to the placement of injured workers—not some consideration or even reasonable consideration, but full consideration.

2) The Rehabilitation Act defines the standards by which it can be determined if it has been violated as the same standards found in the Americans with Disabilities Act (ADA).

ADA regulations:

29 CFR § 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

It is clear that federal law requires the Postal Service to make every effort to restore injured workers to limited duty. It must also act as a model employer and provide reasonable accommodation for injured workers.

As explained in the *NALC Activist,* Vol. 31, No. 1, Winter 2024 "Compensation: the foundation of OWCP-related grievances," the National Agreement requires the Postal Service to comply with the law. Compliance with federal regulations therefore may be enforced through the grievance procedure including its legal obligations to provide limited duty work.

"In addition to the Postal Service's strong legal obligations to provide limited-duty work, it has even stronger contractual obligations to do so under our collective-bargaining agreement."

USPS contractual obligations

In addition to the Postal Service's strong legal obligations to provide limited-duty work, it has even stronger contractual obligations to do so under our collective-bargaining agreement.

In 1979, the *ELM* language regarding limited duty was changed to its current format as a result of National Step 4 grievance settlement with the NALC (M-01010). The current language in *ELM* 546.142 is identical to that found in the 1979 settlement.

ELM 546.142 states in part:

When an employee has partially overcome the injury or disability, the Postal Service has the following obligation:

a. Current Employees. When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

1. To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

2. If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

3. If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

4. An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

For the past 46 years, since this settlement was signed, the parties have interpreted the "make every effort" language to mean that the Postal Service would offer adequate work (work within the injured employees' medical limitations) to injured workers without regard to the work's operational necessity. It should also be noted that while the

Priority of Choice	Regular Craft	Regular Tour	Regular Facility
1st	Within	Within	Within
2nd	Outside	Within	Within
3rd	Within	Outside	Within
4th	Outside	Outside	Within
5th	Within	Within	Outside
6th	Outside	Within	Outside
7th	Within	Outside	Outside
8th	Outside	Outside	Outside

Postal Service implements 5 CFR 353 through *ELM* 546.14, the *ELM* language itself constitutes an additional contractual obligation for the Postal Service. Moreover, because the Service's obligations under *ELM* 546.14, including the pecking order, go beyond those found in 5 CFR 353, these obligations can only be enforced through the grievance/arbitration process.

The pecking order

M-01010 established the pecking outlined above that is now found at *ELM* 546.142. The Postal Service's handbook for its injury compensation specialists, the *EL-505*, on page 146 contains a handy chart that lays out the eight levels of the pecking order (see above).

Under M-01010, the Postal Service assumed the contractual obligation now enshrined in the *ELM* to follow this pecking order. And while the FECA itself imposes strong legal obligations on the Postal Service to provide limited duty, it does not contain a pecking order. Failure to follow the pecking order is a violation of the Postal Service's contractual obligation when providing limited duty work, not its legal obligation.

The continuing nature of the *ELM* 546.142 obligation

The "make every effort" obligation is a continuous one. This principle was established in a national-level arbitration in 1987 and as such is binding on the parties. Arbitrator Bernstein ruled in case # H1N-1J-C 23247 (C-07233):

> *The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into another one for the remainder of his craft and into another one for the remainder of his career. Perhaps it would be sound policy to have such a provision in the section, but there is no language to that effect in that language at this time. Section 546.14 must be read to impose a continuing duty on the service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might be available at any point does not mean that it will never become available, because there are many changes that can take place.*

Scores of regional arbitrators over the years have applied Bernstein's precedent setting ruling to limited-duty cases. For example, Arbitrator Freitas in case # E98N-4E-C-01097720 (C-22990) wrote:

> *[a manager] stated at the arbitration hearing that he was unaware that the Postal Service has an on-going obligation to monitor the situation of limited duty employees to ensure that that if there is work for them at a higher level of the "pecking order" it must be offered to them. The general rule in this regard was stated in a national decision by Arbitrator Bernstein and has been uniformly followed by other arbitrators when faced with the issue. Arbitrator Bernstein stated the rule in this fashion: "Section 546 .14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place" (Case No H1N-1J-C23247 at p.14).*

Written evidence exists of the national parties' interpretation of "make every effort"

As stated above, since 1979 the Service has provided limited duty to employees where the primary consideration is minimizing adverse impact on the employee rather than the productivity of that work. And in fact, the Service has acknowledged this fact in arguments preserved in the written record in a national arbitration case. The Postal Service argued in writing that its "make every effort" obligation required it to offer work for which there was no operational necessity.

Here's the background to the case. The American Postal Workers Union (APWU) filed a grievance protesting the fact that an injured letter carrier was given limited duty in the clerk craft. The APWU maintained that the work should not have been limited duty and should have, instead, been posted for bid for members of the clerk craft.

The Postal Service defended the fact that it had not posted the work for bid by arguing that the limited-duty work had no operational necessity and that the position was only created out of its contractual and legal obligations.

This is an important point because the Postal Service, at any level of management, may not make simultaneous and conflicting arguments—according to whatever suits its self-interest at the moment. Therefore, the Service may not argue with APWU in one forum that it has a legal obligation to provide work that is not directly operationally necessary and then turn around in another forum with NALC and argue that it does not.

In a national award issued by Arbitrator Das (C-23742), he denied the APWU grievance and reiterated management's position that it has a legal and contractual obligation to create limited-duty assignments that are not operationally necessary. As a point of information, "Article 37 duty assignments" are operationally necessary duty assignments in the clerk craft—in other words, normal clerk jobs.

Here is how Arbitrator Das summarized the Postal Service's position in the national cases (excerpts found on pages 12-13 of the award):

> *This issue, the Postal Service stresses, is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on-the-job injury.*
>
> *The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured*

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NALC response teams throughout the country are activated to go to disaster locations and offer assistance to NALC members and their families who live in the same household. Basic supplies, including uniforms and food, are available for those who need assistance.

Financial support may be available depending on the availability of funding and qualifying criterias. Any regular member of NALC who has faced hardship as a result of a natural disaster will be able to apply for assistance.

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NALC Disaster Relief Foundation

employee. It is created under Article 21.4 and ELM *Section 546. When the injured employee vacates the assignment, it will no longer exist.*

Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of the Postal Service's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed.

Section 540 of the ELM *was promulgated to meet the Postal Service's obligations under 21.4 of the National Agreement and FECA. Cross-craft rehabilitation assignments are made pursuant to Section 546.141.a, which was promulgated in 1979 pursuant to an agreement with the NALC [M-01010 cited above] .*

In his findings, Arbitrator Das upholds and concurs with the Postal Service's position that the rehabilitation assignments were made not with an eye to operational needs but rather to meet contractual and regulatory obligations (excerpts on pages 18-20 of the award):

Section 546.222 specifically recognizes the reassignment of a partially recovered employee to a different craft to provide appropriate work and authorizes the Postal Service to establish a "uniquely created" position for that purpose.

As the Postal Service stresses, this assignment would not have existed, but for the obligation to find work for the injured employee .

In this case, the rehabilitation assignment in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee.

Regional arbitrators have adopted the national Das Award as precedent-setting (as they are required to) regarding the Service's obligations to find limited-duty work and the nature of the work that it should seek out. Here is what Arbitrator Lumbley wrote in a limited duty case—FO6N-4F-C 10067137 (C#29103) —out of Carlsbad, CA (page 7):

Indeed, I believe the Union is correct that the issue of the Employers ability to apply the 'operational necessity' standard was resolved in 2002 by National Arbitrator Das in APWU case No. E9OC-4E-C 95076238 / NALC Case No. 023742 (2002), in which this Union intervened. In that case, APWU unsuccessfully challenged the Agency's ability to tailor a rehabilitation position that included certain clerk tasks for an injured letter carrier. In turning back APWU's challenge, Arbitrator Das found that the Service could assign duties across crafts without posting the assignment for bid by APWU members because the 'assignment' in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee pursuant to ELM *546. Although that ruling, which is binding on me, was rendered in the context of a different dispute, it makes absolutely clear that assignments developed in compliance with* ELM *546 must be based on the needs of the relevant employee not the operational needs of the Service.*

Arbitrator Lumbley's holding that limited duty "must be based on the needs of the relevant employee, not the operational needs of the Service" is strongly supported by the Postal Service's historical practice of providing limited duty regardless of its operational needs for the first 26 years following the 1979 National Step 4 grievance settlement (M-01010). In fact, it was common for management during this time to annotate CA-17s with: "the Postal Service is able to accommodate all restrictions short of complete bed rest."

That all changed in 2006, when the Postal Service implemented its National Reassessment Process (NRP). Under the NRP, the Postal Service abandoned its historic criterion of accommodating almost any medical restriction when providing limited-duty work and adopted a new "necessary work" criterion that required all limited duty to consist of work necessary to the Postal Service's core mission of delivering mail. Through the NRP, USPS eliminated the limited-duty assignments of thousands of injured letter carriers. We witnessed our injured members lose their homes, pull their children out of college, and deplete their retirement savings. And we chose to fight back on the battlefield we know best: the grievance/arbitration process.

Nationally, NALC filed many thousands of grievances and took hundreds and hundreds of cases to arbitration. We were very successful, winning about 90 percent of our cases. And while we continued to take NRP cases forward through 2013, NRP officially ended in July of 2011 largely due to our efforts. Significantly, regional arbitrators in hundreds of NRP cases almost uniformly rejected the Postal Service's new "necessary work" criterion, holding the Service to its historical standards for providing limited-duty work.

Just prior to the implementation of the NRP, the Postal Service also acknowledged its "make every effort obligation" in an Aug. 19, 2005, national-level correspondence, designated as M-01550. Significant parts of that correspondence further elucidate the nature of limited-duty work:

First, the NALC is concerned that "... management appears to assert that it has no duty to provide limited duty to an injured letter carrier if the carrier cannot deliver mail, even though the employee is capable of performing casing and other letter carrier duties in the office." The Postal Service makes no such assertion...

Second, the NALC is concerned that "... it appears to be management's position that it has no duty to provide limited duty if available work within the employee's limitations is less than 8 hours per day or 40 hours per week." The Postal Service makes no such assertion.

Third, the NALC is concerned that "...it appears to be management's position that there is no obligation to provide limited duty when the employee's treating physician indicates that the employee is unlikely to fully recover from the injury." The Postal Service makes no such assertion. If an employee reaches maximum medical improvement and can no longer perform the essential functions of the city letter carrier position, the Postal Service is obligated

to seek work in compliance with ELM *Section 546 and, if applicable, the Rehabilitation Act*.

Limited-duty assignments versus rehabilitation assignments

ELM 546.141 makes a distinction between limited-duty assignments and rehabilitation assignments:

> *The procedures for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement. Persons in permanent rehabilitation positions have the same rights to pursue promotional and advancement opportunities as other employees.*

According to the *ELM*, limited-duty assignments are temporary and are intended to provide work for employees as they recover from the effects of their injury. Rehabilitation assignments are permanent and are intended to provide work for employees who are permanently disabled and have reached maximum medical improvement (MMI). Chapter 7 of *EL-505* describes the procedures that USPS must follow in providing limited duty, while Chapter 11 describes the procedures for providing rehabilitation assignments.

The distinction between limited-duty assignments and rehabilitation assignments derives from postal policy and regulations found in the *ELM* and *EL-505*. OWCP does not make such a distinction and is probably mostly unaware of it.

Historically, the Postal Service routinely provided rehabilitation assignments to those who met the criteria. However, the Postal Service largely abandoned providing these assignments in the mid-2000s around the time that it implemented the NRP. While there are still injured letter carriers in rehabilitation assignments, they are not as common as they once were.

That being said, the union should still make the distinction in the grievance process as part of the requested remedy. For injured letter carriers who are permanently disabled, there are notable benefits in having a rehabilitation assignment. Limited-duty assignments have an ad hoc open-ended quality that is often expressed in phrases such as "as needed" and "as required." Not only does this create uncertainty for the injured worker, but the ad hoc and varying nature of the "as required" work can lead to constant debates and disputes over whether the work falls within the injured carrier's medical restrictions.

On the other hand, rehabilitation assignments have fixed duties just like regular bid assignments: The injured letter carrier can go to work knowing what the day holds and that the work to be done will fall within their medical restrictions.

"The union has the basic task of proving that the Postal Service did not make every effort to provide limited duty. Union representatives must stay focused on that."

The Postal Service in the preface to Chapter 11 of the *EL-505* acknowledges that rehabilitation assignments are mutually beneficial:

> *The Joint DOL-USPS Rehabilitation Program was developed to fulfill the USPS legal obligation to provide work for injured-on-duty (IOD) employees. Providing gainful employment within medically defined work restrictions has proven to be in the best interest of both the employee and the USPS. In many cases, returning to work has aided the employee in reaching maximum recovery. This program is also one of the most viable means of controlling workers' compensation costs.*

Whether or not an injured letter carrier is permanently disabled will be determined by medical evidence in the claim file to which OWCP has given the weight of medical evidence. In most cases, if the injured letter carrier is not working, they will also be on OWCP's periodic rolls. It should be noted, however, that temporarily disabled workers may also be on the periodic rolls.

Grievances involving permanently disabled letter carriers should be developed and argued identically to any other limited-duty grievance. This is supported by the *ELM* note at the end of *ELM* 546.142, which states: "Note: Placement priority for rehabilitation assignment is the same as for limited duty." Where the rehabilitation assignment comes into play is in the requested remedy.

Developing limited-duty grievances

The union has the basic task of proving that the Postal Service did not make every effort to provide limited duty. Union representatives must stay focused on that. The union must meet its burden of proof that 1) the limited duty work exists and 2) the Service did not make every effort to provide it.

Four elements will exist in every viable limited-duty grievance:

1. The employee has an on-the-job injury with an accepted OWCP claim.
2. The injury results in work restrictions that either prevent the employee from doing all or part of their regular job or require accommodation in order to do it.
3. Management withdraws or fails to provide limited-duty work.
4. The limited-duty work is available.

Limited-duty grievances fall into three broad classes that are often intertwined:

1. Failure to provide limited duty
2. Withdrawal of limited duty
3. Failure to follow the *ELM* 546.14 pecking order

Our approach to all three will be quite similar.[5]

Every limited-duty grievance is fact-specific. While arguments specific to the case are important, evidence specific to the case documented in the grievance file is even more important. Because arbitrators hold that each limited-duty

5 While this issue of the Activist will focus on the Postal Service's obligations to find limited-duty work under *ELM* 546 because in our experience it is the most powerful and effective way to enforce management's obligations to provide limited-duty work, partially recovered compensably injured letter carriers have always had multiple avenues beyond the *ELM* and *EL-505* when seeking to return to work:

- Article 13, Light Duty
- Article 2, Reasonable Accommodation
- Equal Employment Opportunity Commission (EEOC)
- Merit Systems Protection Board (MSPB)

case must be adjudicated based on its own particular facts and circumstances, the key to winning limited-duty cases is obtaining evidence. Let's take a look at the sort of evidence every limited-duty grievance should contain.

Information from OWCP

As previously stated, as a best practice, shop stewards should have the injured letter carrier sign a USPS/OWCP **Privacy Act Authorization and Waiver.** This form specifically authorizes the NALC to review information from the DOL and OWCP to investigate and/or process a grievance. This form is included in each OWCP Grievance Starter found in the Members Only portal at nalc.org. Completing this form and including it in the grievance file will strengthen the case and dispatch complicated technical arguments about medical privacy.

The steward should have the grievant immediately obtain an up-to-date complete copy of their claim file from OWCP/ECOMP. They can download the complete file under "CASE IMAGING" by clicking on the "Download Documents" link. Because the Postal Service now has instant access to the complete file, the steward will be at a disadvantage without a current copy of the file.

The file will document not only the acceptance of the OWCP claim, but will also contain information that documents the grievant's ability to work including medical reports, CA-17s, and job offers. The steward should identify the most recent work restrictions that OWCP has accepted or has given the weight of medical evidence.[6] Work restrictions evolve and may change over time. The grievance should be based on the most recent work restrictions accepted by OWCP. The steward should also review communications between Postal Service and OWCP for evidence of the availability of work.

"Information from the Postal Service should be requested in writing. ...these written requests are often the most important documents in a limited-duty grievance file."

Information from the injured letter carrier

After reviewing the OWCP case file to determine the status of the claim, the steward should obtain a statement from the injured letter carrier. In cases where management withdraws limited-duty work, the statement should include a description of the duties performed daily at the time of the withdrawal, and any duties previously performed. The statement should be detailed and specific. The grievant should also explain in their statement how the withdrawal of limited duty, failure to provide limited duty, or the failure to follow the *ELM* 546 pecking order has harmed them and their family financially and emotionally. In pecking order cases, the harm might include working odd hours outside their schedule and travelling to a more distant work location.

Information from the Postal Service

Information from the Postal Service should be requested in writing. As will be explained below, these written requests are often the most important documents in a limited-duty grievance file.

Documenting the work search

Every limited-duty grievance should document management's efforts to find work, per the requirements of *ELM* 546.14. The information request should be for any and all information—written, electronic, telephonic—related to the Postal Service's search for work and should seek the following information:

- Who was the decision-maker?
- Who conducted the search?
- Who was consulted?
- Were searches conducted daily, weekly, monthly or when the employee's restrictions changed?
- How far did the service search for work?
- Which offices or delivery units were searched?
- The medical restrictions management relied upon in their work search

Under NRP, management developed a number of standardized work search documents such as the priority for assignment worksheet (PAW) based on the *ELM* pecking order, the part day letter (PDL) and the complete day letter (CDL). While the old NRP documentation sporadically shows up in case files, usually management's documentation of search efforts consists of emails, signed bare assertions that no work is available with no details that a search had been done, and an occasional PAW.

Because management has a continuing obligation to follow the *ELM* 546.14 in searching for work, the information request regarding the work search should indicate that the request is an ongoing one. The union should send a new work search information request every week until the Step B appeal. Emphasize subsequent requests with notation at the top: "Second Request," "Third Request," etc.

The steward should interview management regarding the work search, beginning with the decision-maker. The interview should include all the questions from the work-search information request to pin management down as to the extent of the search. Require the manager to detail all efforts made: dates, times, individuals, methods of communication, duration of communication, etc.

The steward should then interview each person—as identified by the decision-maker—who participated in the work search, asking detailed questions about the extent of their efforts.

Copies of the work-search information requests and interviews **should always be included in the grievance file.** When USPS obstructs the union's attempts to document the search efforts, document and argue those obstructions along with

Each of these avenues has different regulations, procedures and case precedent. Note that there is nothing that precludes a compensably injured letter carrier to seek relief in multiple forums at the same time. In addition, employees who are no longer part of the collective-bargaining unit, such as those who have been disability separated, may still exercise their restoration rights under MSPB.

6 It is sometimes the case that the work restrictions that OWCP has accepted and given weight of medical evidence to might be different from the work restrictions from the grievant's own attending physician. This is especially true in OWCP cases with second opinion medical reports. While the grievant may feel strongly that their own physician's restrictions should be emphasized, unfortunately within both the arena of OWCP procedure and the arena of the grievance/arbitration process, decision-makers are bound by the restrictions that OWCP has given weight to.

filing companion Articles 17 and 31 grievances.

The shifting burden in limited-duty cases

If the grievance ends up in arbitration, often the work-search information requests are the most important documents in the file. This is because there is significant arbitral precedent that in *ELM* 546.142 cases, once the union makes its *prima facie* (evidence sufficient to establish a case unless it is rebutted by contradictory evidence) case that the grievant is compensably injured with an accepted OWCP case, the burden of proof shifts to the Postal Service to show that it made every effort when limited-duty work is withdrawn.

The union carries the initial burden of proof to establish the Postal Service's violations of the *ELM*, law, handbooks and manuals, and all articles of the *JCAM* except Article 16 that affect wages, hours, and other terms and conditions of employment. This burden, however, is not absolute. It can shift from one party to the other. Violations of the *ELM* 546, of course, require the union to prove the negative assertion that management failed to make every effort to locate limited-duty work according to the *ELM* pecking order. Because of this, regional arbitrators have overwhelmingly adopted the shifting burden approach in limited-duty cases and have held that once the union establishes that the employee in question has been injured on the job and that the *ELM* 546 applies to them, the burden then shifts to the USPS to demonstrate through evidence that it made every effort to locate work.

Arbitrator David A. Dilts, for example, endorsed this shifting "burden of proof" interpretation of *ELM* 546 in a 2009 limited-duty case, C-28445:

> *The Arbitrator is persuaded that once the Union has demonstrated that the Grievant was removed from a modified assignment, received because of an on-the-job injury, the burden rests with the Postal service to show it made 'every effort toward assigning the employee to limited duty…'*

Here is how Arbitrator Sherman made the same point in more prosaic language in C-29120:

> *The Union should theoretically bear the burden of proof. But perversely, the very nature this type of grievance demands that Management in fact bears the most important burden of proof. The Union is in no position to prove that the Employer did not make every effort to minimize the adverse and disruptive impact. It is local Managers who must demonstrate that they made every effort and that there were no less disruptive redeployment alternatives that were left unexplored.*

"If the grievance ends up in arbitration, often the work-search information requests are the most important documents in the file."

Arbitrator Lange has explained in particularly clear language how the shifting burden works in a 1985 case from Long Beach, CA. According to Lange, the language in *ELM* 546.14 places an affirmative burden on management to demonstrate that they have met their obligations under the provision in locating work in accordance with the established pecking order. Once the union has established a *prima facie* case that the provisions of the *ELM* pecking order apply to the grievant, the burden shifts to management to produce evidence that they made a good-faith effort to place the grievant at each level of the pecking order.

This is what Lange wrote in his decision (C-09589):

> *In order to successfully defend against an employee's challenge to a limited duty assignment, the Service must make at least a prima facie showing that it has attempted to implement the progression set out in the* ELM *and has been unable to make a successful accommodation at each step prior to the level of the modification of craft duties, non-craft duties, work hours, or work location that was finally implemented. The showing may be made by way of documents, testimony, or other relevant and admissible evidence. After the Service has made an acceptable showing that it has attempted to satisfy each step in the progression of Sections 546.14la-c, it may then allege that no work is available at the regular work location and that an assignment within the parameters of Section 546 .141d is the only appropriate course of action. The burden to challenge the lack of available work at the employee's regular assigned work location then shifts to the Union. However, a bare assertion that there was no available work, without additional substantiation, is insufficient to demonstrate compliance with Section 546.141 and does not shift the burden of proof to the Union to demonstrate that work was available.*

By documenting the efforts that management made to find limited duty work through information requests in the grievance file, the union closes the door once the grievance is appealed and prevents management from embellishing or exaggerating those efforts in front of an arbitrator.

Documenting available work

Once the union has documented management's search efforts, or more likely its lack of effort, the union should make an affirmative case that limited-duty work is available.

In withdrawal of limited-work duty cases, the shop steward should request the following information to document the work done on limited duty:

- Time and Attendance Collection System (TACS) reports and daily schedules documenting the daily limited-work performed by the grievant for the previous 12 months
- The written limited-duty job offer (LDJO) or rehabilitation assignment that the Postal Service withdrew, along with any prior LDJOs provided to the employee
- Written notice from management that the LDJO or rehabilitation assignment is withdrawn
- PS Form 50s
- Grievant's current medical restrictions
- Any past medical restrictions
- Copies of all LDJOs performed in the installation during the previous 12 months
- Overtime Alert Reports for all employees in office (in withdrawal cases,

before and after carrier sent home)

- Employee Everything Reports for all employees in office (in withdrawal cases, before and after carrier sent home)
- Weekly and monthly flash reports (in withdrawal cases, before and after carrier sent home)

In limited-duty withdrawal cases, the shop steward should interview management regarding the work the grievant had been performing and have them identify who is doing that work now that the grievant has been sent home. The steward should speak with other employees familiar with the work and ask the same questions, getting statements if possible. While cookie-cutter statements are not very effective, detailed, specific statements regarding the withdrawn work can be powerful.

Using the gathered evidence, the shop steward should document the work the grievant performed while on limited duty. The steward should then document who did the work after it was withdrawn. The Postal Service violates the *ELM* 546.142 when it withdraws limited-duty work and then assigns that same work to CCAs, PTFs, and to full-time regulars on overtime.

In failure to provide limited-duty cases and *ELM* pecking order cases, the steward should similarly identify work within the grievant's current work restrictions that is being done by CCAs, PTFs, and work being done by full-time carriers on overtime.

Putting together the grievance file

Possible documents to be included in the grievance file:

1. Letter from OWCP accepting the injured worker's claim.
2. Written Limited Duty Job Offer (LDJO) that is being withdrawn.
3. All prior LDJOs to show the history.
4. Current CA-17 to show the injured worker's physical restrictions.
5. Prior CA-17s should be included to show the history.
6. All correspondence or other written documents concerning the LDJO.
7. Written notice from management that the LDJO is withdrawn.
8. Current and recent PS Form 50s.
9. Carrier schedules showing letter carrier duties performed by the injured worker (e.g., casing auxiliary routes, doing collections, etc.) for period of LDJO.
10. TACS records showing hours spent doing actual duties for the entire period of the LDJO.
11. Signed statement by the injured worker describing the work performed (which may or may not match duties listed on the LDJO). It can be important for the statement to detail how long certain work has been performed. For instance, if management has accommodated an employee with a pushcart or provided other specific limited duty for a certain number of years, the statement should say so.
12. Signed statements by the injured worker's co-workers detailing the actual work they witnessed the injured worker performing.
13. Signed statements from the injured worker's co-workers who have observed this work being performed by other employees (after it was taken away from the injured worker) or that the work otherwise continues to exist.
14. Signed statements from the workers who are performing the work that the injured worker used to do.
15. Evidence to show who is performing the work now that it has been taken away from the injured worker. This may include workhour reports for CCAs, PTFs, ODL or other employees—depending upon where the work went.

"While cookie-cutter statements are not very effective, detailed, specific statements regarding the withdrawn work can be powerful."

What arguments should be made?

1. The Postal Service has contractual obligations under Article 19, which states that postal handbook and manual provisions directly relating to wages, hours and working conditions are as enforceable as if they were a part of the National Agreement. The Postal Service has a contractual obligation to make every effort to provide limited duty.

2. The Postal Service is required to comply with the clear language of M-01010, which is a settlement of a national level grievance. This settlement provides restoration rights to all injured workers who have partially recovered from compensable injuries. This language was incorporated into the *ELM* under Section 546.14 and has been in place since Oct. 26, 1979.

3. The Postal Service has a legal obligation to make every effort to provide limited duty. The legal obligation is found in 5 CFR 353 and the Rehabilitation Act.

4. The withdrawal of, or failure to provide limited duty, is a violation of the above-cited legal and contractual requirements to make every effort.

5. The work still exists (provide evidence).

6. The work is within the grievant's restrictions (provide evidence).

7. Argue on behalf of each grievant's situation on a case-by-case basis. Particulars are too varied to list here, but may include things like how many years the grievant has been performing certain work, how management has accommodated the grievant's restrictions in the past, how management has accommodated similar restrictions of other employees in the past, and so on.

8. If the Postal Service failed or refused to allow input or participation from the injured worker regarding the search for limited duty, this would be an additional violation of the Rehabilitation Act (on top of the failure to accommodate). Refer to Sections 223 and 223.1 of the *EL*-307, which describes the required interactive process.

9. Argue M-01550, as applicable. For example, if the Service sends an employee home with "no work available" because the employee is capable of casing but not carrying, this would be a violation of M-01550. Another example of an M-01550 violation would be denying work to an employee because their restrictions permit only four hours of work per day.

10. If evidence in the OWCP case file indicates that the injured employee is permanently disabled, argue that as part of the remedy they should be given a rehabilitation assignment per *ELM* 546.141 and *EL-505* Chapter 11.

Remedies in limited-duty cases

Without remedies, there are no rights. National Arbitrator Richard Mittenthal restated this point when he wrote: "The grievance procedure is a system not only for adjudicating rights but for redressing wrongs." (C-03234)

An appropriate remedy for a contract violation is to restore the grievant to their *status quo ante*. This means to return the grievant to the position they would have been in if the violation of the contract had not occurred.

Establishing harm is the key to any remedy. This is why the statement from the grievant describing the harm to them and their family is so important. Withdrawal of limited duty, failure to provide limited duty, or failure to follow the *ELM* pecking order not only disrupts lives, but also causes real, tangible emotional and financial harm. Some types of harm include:

- Loss of job/benefits
- Loss of compensation
- Loss of personal time
- Denied contractual rights
- Denied due process
- Denied a job

Every limited-duty grievance should request that the grievant be made whole for all lost wages and benefits, including:

- Restoration of any annual leave (AL) and sick leave (SL) grievant was forced to use
- Crediting of AL and SL that would have been earned
- Matching TSP contributions or their equivalent
- Time and mileage in pecking order violation cases where the grievant was forced to drive to another facility
- Count the time used as LWOP, AL and SL as work hours for purposes of FMLA entitlement
- Lost overtime
- Other possible remedies: late fees on mortgage payments, explanatory letters to credit agencies etc.

If the grievance file shows that the violations are deliberate, repeated or egregious, an enhanced remedy may be

REGIONAL CONVENTIONS AND OTHER TRAININGS

Contact your National Business Agent's office for more information about these regional events.

Region 1
(CA, HI, NV & GU)
909-443-7450/909-443-7451
April 30-May 1, Golden Nugget Hotel and Resort, 129 E. Freemont St., Las Vegas, NV

Region 2
(AK, ID, MT, OR, UT & WA)
NBA Nick Vafiades, 360-892-6545
April 24-25, Oregon State Convention, Spirit Mountain Casino, Grand Ronde, OR
May 1-2, Montana State Convention, Holiday Inn Great Falls, Great Falls, MT
June 5-7, Washington State Convention, Red Lion Hotel, Pasco, WA
Oct. 4-8, Hotel Captain Cook, 939 West 5th Ave., Anchorage AK

Region 3
(IL)
NBA Michael Caref, 630-743-5320
June 24-27, Illinois State Convention, Four Points by Sheraton Peoria, Peoria, IL

Region 4
(AZ, AR, CO, OK & WY)
NBA Dan Versluis, 720-828-6840
Sept. 28-Oct. 1, Hassayampa Inn, 122 E. Gurley St., Prescott, AZ

Region 5
(MO, IA, NE & KS)
NBA David Teegarden, 314-985-8040
Feb. 28 - March 2, Downtown Marriott, Kansas City, MO

Region 6
(KY, IN & MI)
NBA David Mudd, 586-997-9917
Feb. 21-22, Kentucky State Convention, Galt House Hotel, 140 N. Fourth St., Louisville, KY
April 27-28, Indiana State Convention, Blue Chip Casino, 777 Blue Chip Drive, Michigan City, IN
Oct. 10-12, Somerset Inn, 2601 West Big Beaver Road, Troy, MI

Region 7
(MN, ND, SD & WI)
NBA Patrick Johnson, 612-378-3035
April 20-23, 2026 Regional Rap, Delta Hotels by Marriott, 1330 Industrial Blvd. NE, Minneapolis, MN
May 15-16, Wisconsin State Convention, Radisson Hotel & Conference Center, Fond Du Lac, WI
Sept. 18-19, South Dakota State Convention, Ramkota Hotel & Conference Center, Pierre SD
Oct. 4-6, Minnesota State Association, Sugar Lake Lodge, 37584 Otis Lane, Cohasset, MN

Region 8
(AL, LA, MS & TN)
NBA Steve Lassan, 256-828-8205
March 8-11, IP Casino, 850 Bayview Ave., Biloxi, MS

Region 9
(FL, GA, NC & SC)
NBA Eddie Davidson, 678-942-5295
April 3-4, South Carolina State Convention, The Westin Point, Greenville NC
June 11-13, Georgia State Convention, Holiday Inn Hotel Atlanta Airport North, Atlanta, GA

Region 10
(NM & TX)
NBA Shawn Boyd, 281-540-5627
Feb. 14-16, Houston City Place Marriott at Springwoods Village, 1200 Lake Plaza, Spring, TX
Oct. 10-12, Hotel to be determined

Region 11
(Upstate NY & OH)
NBA Mark S. Camilli, 440-282-4340, 440-282-4341
March 14-16, Hilton Columbus Downtown, 402 North High St., Columbus, OH

Region 12
(PA & South/Central NJ)
NBA Brian Thompson, 215-824-4826, 215-824-4827
March 8-11, Tropicana Casino and Resort, 2831 Boardwalk, Atlantic City, NJ

Region 13
(DE, DC, MD, VA & WV)
NBA Vada Preston, 703-840-2010
April 26-28, Details to be determined

Region 14
(CT, ME, MA, NH, RI & VT)
NBA Richard J. "Rick" DiCecca, 617-363-9299
Details to be determined

Region 15
(NY, Northern NJ, Western CT, PR & VI)
NBA Bruce Didriksen, 212-868-0284
March 1-3, Caesars Atlantic City, 2100 Pacific Ave., Atlantic City, NJ

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in order. This may include compensatory time or leave, or a "per calendar" day monetary remedy.

Summing up

Branch activists and shop stewards should educate managers and supervisors about their legal and contractual obligations when letter carriers report on-the-job injuries. Then they should hold those managers and supervisors accountable for compliance.

This will benefit all parties—USPS, NALC and individual letter carriers. The Postal Service will benefit because it will learn the true cost of maintaining a safe and healthy workplace. As things stand now, some of that cost is being transferred to the employees and their health benefit plans, instead of being paid by the Postal Service.

For example, consider what happens if 20 percent of the letter carriers who have developed carpal tunnel syndrome (as a result of casing and delivering mail) have their OWCP claims denied. In such circumstances, the Postal Service will pay only 80 percent of the true cost of its decisions relating to ergonomic matters.

The Postal Service should pay the full cost so that it can make informed decisions about investing in preventing injuries. USPS is a numbers-driven organization. If it determines that it is spending more on letter carrier on-the-job injuries than it would cost to prevent those injuries, then it will act to make the needed ergonomic changes in letter carrier work.

Activists should not allow postal management, through its own errors, to transfer the costs of legitimate on-the-job injuries onto letter carriers and their health benefit plans. They should educate their supervisors and managers concerning their legal and contractual obligations when a letter carrier reports an on-the-job injury. Then they should enforce those obligations.

This enforcement will promote the safety and welfare of every NALC member, by encouraging the Postal Service to correct unsafe working conditions. In addition, assisting letter carriers with their OWCP claims is potentially a great union organizing tool. Newly hired letter carriers as well as long-term holdouts are more likely to join the NALC when they see concrete benefits.

Finally, of course, the individual letter carriers who have experienced on-the-job injuries will benefit. Their legitimate claims will more likely be accepted by OWCP, and they will enjoy the financial protection intended by the FECA.

Almost all of us—as activists, branch representatives or shop stewards—will be called upon at some point in our careers to walk a mile in the shoes of an injured brother or sister. The NALC's goal is to make that walk a little easier, and to make the mutual aid and protection that we render to our injured members a lot more effective.


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Branch presidents:

This edition of the *Activist* was sent to each branch. To have future editions mailed to your branch's activists, please send their names, branch and addresses to:

NALC
Attn: Ed Morgan
100 Indiana Ave. NW
Washington, DC 20001

The *Activist* also will be available online in the Workplace Issues›Resources section of nalc.org.