

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

KATRINA N. BURTON, Appellant

and

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

Docket No. 04-25

Issued: February 19, 2004

Appearances:

Katrina N. Burton, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 30, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated June 18, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 24, 2002 appellant, then a 31-year-old distribution/window clerk, filed a traumatic injury claim alleging that on that date her supervisor, Eloina Henry, hit her with an open hand in the chest during an argument. Appellant described her injury as "hit in

chest/openhanded/chest injury.”¹ On the reverse side of the claim form, appellant’s supervisor controverted the claim alleging “willful misconduct.”

In a statement accompanying her claim, appellant related that Ms. Henry hit her openhanded in the chest because she was angry that appellant put the wrong date on one of her 3971 forms. Appellant stated that Ms. Henry asked her repeatedly, which form had the correct date. Appellant related that she informed Ms. Henry that she had already told her, which form was correct. Appellant stated:

“She stormed out of her off[ice]. I was walking out behind her and said I was tired of this fucking stuff and she immediately turned around and slapped me in the chest -- yelling in the office. She proceeded to yell at me on the workroom floor when I brought to her attention that she is not to put her hands on me. She said she did not hit me -- that I was there when she turned around....”

Appellant related that Ms. Henry could not have turned around and inadvertently hit her in the chest because she was shorter than appellant.

In a statement dated May 24, 2002, Ms. Henry related that on that date she spoke with appellant about the wrong date on one of two 3971 forms. Ms. Henry described the incident as follows:

“[Appellant] stated, one of the 3971s was dated for yesterday, May 23, 2002. I asked [appellant] which one was dated for yesterday and she stated I just told you. I asked her again, which one was for yesterday and [appellant,] while continuing to write on one of the 3971s, responded I just told you. I placed the other 3971 on the desk, not wanting to argue with [her]. I walked out [of] the office, [appellant] followed and stated, [‘I’m tired of your fucking attitude.’] [Appellant] was immediately behind me on my heels. I stopped, she clipped my left heel and I turned around. When I turned to the left, [appellant] was within several inches of my face[;] I braced myself for a collision. In bracing myself, I placed my right hand up and [appellant] walked into my hand with her left shoulder.”

Ms. Henry related that she and appellant began arguing over whether she had hit appellant.

In a statement dated May 24, 2002, Ben H. Skiles, officer-in-charge, related that on that date he heard raised voices. Mr. Skiles indicated that he heard appellant tell Ms. Henry that she could not touch her and Ms. Henry replied that she “just turned around” and appellant was there.

¹ It is apparent from the context of appellant’s statements that she is claiming a stress-related condition due to an alleged assault by Ms. Henry rather than a physical condition as a result of contact by Ms. Henry.

Mr. Skiles related that appellant began telling everyone that Ms. Henry had hit her. He stated that he spoke with appellant about the incident and that she related that after she told Ms. Henry she was “tired of her fucking attitude” Ms. Henry hit her “with an open hand.”²

In a statement dated May 24, 2002, Maria Teding, a coworker, described hearing loud voices and Ms. Henry telling appellant “in the office.” In a statement dated May 28, 2002, Alvin Collins, a manager, related that on May 22, 2002 appellant requested that he help her obtain leave for a trip. Mr. Collins told appellant that he would not intervene with her supervisor and that appellant then “became argumentative and left my office mumbling words that [I] could not understand.”

Mark A. Heath, an inspector with the employing establishment, related:

“Written statements of [Ms.] Henry and [appellant] regarding the incident have been reviewed. The written statements both describe [appellant] [as] following closely to [Ms.] Henry as she was exiting the office before she abruptly stopped and turned. The resulting contact was likely caused from [appellant’s] forward momentum and is not considered an assault as reported.”

Mr. Heath noted that he was referring the matter to management at the employing establishment as it was “administrative rather than criminal in nature.”

In an employing establishment incident report dated June 3, 2002, Mr. Skiles described the May 24, 2002 confrontation between appellant and Ms. Henry. He requested a threat assessment for appellant.

In a statement dated June 27, 2002, Ms. Teding related that she heard only Ms. Henry’s voice shouting. In a statement received by the Office on July 15, 2002, Joe McHale, a coworker, indicated that on May 24, 2002 he heard Ms. Henry shouting at appellant. Mr. McHale stated:

“They were by the doorway of the office. Supervisor Henry was yelling, in [an] agitated voice, something about did [appellant] call her a name. Ms. Henry was facing [appellant] with her back to me. I could see [appellant’s] face and thought she appeared to be surprised and/or shocked, but in control. I did not observe or hear [appellant] say anything.”

Mr. McHale related that while he watched it seemed Ms. Henry was “pressing in” towards appellant.

Appellant submitted a statement received by the Office on July 15, 2002, in which she again described the incident on May 24, 2002. Appellant reiterated that it was not possible that Ms. Henry made contact with her just by turning around because she only contacted her with her hand. Appellant related that she experienced an adrenaline rush and an asthma attack while the

² Mr. Skiles provided another statement dated May 24, 2002, in which he related that he had spoken with appellant on May 22, 2002 about the denial of her request for leave without pay to take a vacation.

incident was investigated and noted that her physician “currently has me out on stress due to the incident.”

By decision dated September 17, 2002, the Office denied appellant’s claim on the grounds that she did not establish an emotional condition in the performance of duty. The Office found that appellant had not established any compensable employment factors.

On May 19, 2003 appellant requested reconsideration of her claim. Appellant related that she was not following Ms. Henry closely and that she did not step on her heel. Appellant submitted an employing establishment accident form dated May 24, 2002, in which an official described the accident as occurring after appellant “hit the back of [Ms. Henry’s] heel. When Ms. Henry turned around she put her right hand up to avoid a collision with [appellant] touching her on the left shoulder. [Appellant] was the aggressor.”

By decision dated June 18, 2003, the Office denied modification of its September 17, 2002 decision.

LEGAL PRECEDENT

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which she claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.⁶

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding, which working conditions are

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.⁷ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

ANALYSIS

Appellant primarily attributed her emotional condition to Ms. Henry assaulting her on May 24, 2002. She described the assault as occurring after Ms. Henry repeatedly questioned her about the date on her 3971 forms. Appellant related that Ms. Henry then “stormed out” of the office. Appellant stated that she walked behind Ms. Henry and told her that she was “tired of this fucking stuff,” at which point Ms. Henry turned and hit her in the chest with an open hand. In a statement dated May 24, 2002, Ms. Henry related that she questioned appellant to determine, which was the correctly dated 3971 form and that appellant twice responded only that she had already told her. Ms. Henry stated that she walked out of the office and appellant followed on her heels, stating that she was “tired of your fucking attitude.” Ms. Henry related that she turned and appellant was so close to her that she put up her right hand to prepare for a collision. Ms. Henry stated that appellant “walked into my hand with her left shoulder.”

The Board has recognized the compensability of physical threats and assaults in certain circumstances and physical contact arising in the course of employment may give rise to a compensable factor of employment.⁹ In this case, however, the weight of the evidence does not support appellant’s allegation of a physical assault by Ms. Henry. The record contains a witness statement from a coworker, who related that she heard loud voices and Ms. Henry telling appellant to go to the office. In a statement received on July 15, 2002, Mr. McHale, a coworker, related that on May 24, 2002 he heard Ms. Henry shouting and asking whether appellant had called her a name. Mr. McHale indicated that Ms. Henry was “pressing in” towards appellant. In a statement dated May 24, 2002, Mr. Skiles, officer-in-charge, stated that he heard appellant tell Ms. Henry that she could not touch her and heard Ms. Henry reply that she had “just turned around” and appellant was there. None of the witness statements establish that Ms. Henry deliberately assaulted appellant. An inspector with the employing establishment investigated the incident and concluded that the contact between appellant and Ms. Henry occurred most probably from appellant’s “forward momentum” and was not an assault as alleged. An employing establishment accident report form dated May 24, 2002, describes appellant as the aggressor and Ms. Henry as putting her hand up to “avoid a collision.” While appellant maintains that Ms. Henry hit her in the chest rather than accidentally placing her hand on appellant’s shoulder to prevent a collision, it is appellant’s burden to establish a factual basis for her allegations by showing the assault occurred as alleged. The witness statements and other

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

⁹ See *Helen Casillas*, 46 ECAB 1044 (1995).

evidence of record regarding the alleged assault are insufficient to establish that Ms. Henry physically assaulted appellant on May 24, 2002. Therefore, appellant has not established a compensable factor of employment.

Appellant also related that on May 24, 2002 Ms. Henry yelled at her on the workroom floor. Verbal altercations, when sufficiently detailed by appellant and supported by the evidence of record, may constitute a compensable factor of employment.¹⁰ However, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹¹ In this case, witness statements support that Ms. Henry raised her voice to appellant; however, the record also supports that appellant initiated the verbal confrontation by telling Ms. Henry that she was “tired of her fucking attitude.” Appellant has not shown how an isolated incident, in which Ms. Henry raised her voice to appellant in response to appellant’s use of profanity would rise to the level of a compensable employment factor under the Act.

For the foregoing reasons, appellant has not established any compensable factors of employment under the Act and, therefore, has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.¹²

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.¹³

¹⁰ *Janet D. Yates*, 49 ECAB 240 (1997).

¹¹ *Christophe Joliocoeur*, 49 ECAB 553 (1998).

¹² As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹³ Appellant submitted evidence subsequent to the Office’s June 18, 2003 decision. The Board may not consider this evidence as its jurisdiction is limited to reviewing evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2003 is affirmed.

Issued: February 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member