

duty. Under the headings on the form for “relationship of illness to employment” and “nature of injury,” appellant stated:

“I was at a 10-foot deep trench and the backhoe was placed along the straight vertical face of the trench. The operator of the backhoe kept making passes at me with a bucket full of mud. I could feel a breeze from the bucket and the GC yelled at him to stop.

“Acute mental and physical trauma from the events. I fell on my knees as I was climbing up the thick muddy rain soaked four-foot high spoil pile. I was frightened. I thought the operator was going to strike my body with the bucket.”¹

In a December 13, 2006 letter, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

In an undated statement received by the Office on January 19, 2007, appellant contended that her life was threatened on November 17, 2006 by Louis Scampone, the owner of the company Scampone and Son which had performed subcontracting work.² She indicated that Frank Librich, a supervisor, directed her to conduct an inspection on that date of Scampone and Son and East End Plumbing, another company which performed general contracting work. The inspection site included a 10-foot deep trench without any protective system. Appellant noted that it was raining when she arrived at the inspection site, which was the scene of an accident the prior day involving a backhoe that struck an underground cable. She had to climb a spoil pile which was about four feet high to gain access to the area and noted that the rain and a very cramped work area made it difficult to take measurements and photographs.

Appellant claimed that Arthur Mascilli, the general contractor of East End Plumbing, was very upset and remarked that he knew which neighbor near the site had called her. She alleged that, while she was at the vertical face of the 10-foot deep trench trying to measure how far back the stabilizers of the backhoe were from the trench’s side, Mr. Scampone kept making passes at her with the bucket of his backhoe. With each pass, the bucket came closer and closer to her body “with the full intent of trying to intimidate or harm [her].” Appellant indicated that she made eye contact with Mr. Scampone and then continued measuring. After the fourth pass of the bucket, Mr. Mascilli told Mr. Scampone to shut down his machine and then Mr. Scampone shut it down and dismounted. Appellant claimed that she attempted to get away from the trench which was surrounded by mud and fell on her knees as she was walking up the spoil pile.³

In January 12, 2007 statement, Mr. Librich stated that there was nothing in the investigative file to indicate the proximity of the bucket to appellant or anything in the file of the

¹ Appellant indicated that she first became aware of her claimed injury and its relation to her work on November 17, 2006. She did not stop work.

² Appellant actually made reference to “Louis Sapone” and “Sapone and Son” but other evidence shows that they should properly be referred to as Louis Scampone and Scampone and Son, respectively.

³ Appellant stated that during another investigation someone threatened to shoot her with a nail gun. She did not allege that this incident contributed to the emotional condition claimed in the present case.

general contractor, East End Plumbing, to substantiate her claim. In a January 31, 2007 letter, an employment establishment official stated that Robert Szymanski, an area director, spoke with Mr. Mascilli who stated that the backhoe did not pass near appellant at anytime and that most of her activity took place at the opposite end of the trench from where the backhoe was located.⁴

In a March 9, 2007 decision, the Office denied appellant's claim that she sustained an emotional condition in the performance of duty. It accepted as an employment factor that appellant performed an inspection of East End Plumbing and Scampone and Son on November 17, 2006. The Office further noted that appellant had not submitted any medical evidence in support of her claim and, therefore, did not establish that she sustained an emotional condition due to an employment factor.

Appellant, through her attorney, submitted photographs which she indicated that she took of the inspection site on November 17, 2006. The photographs show the presence of a ditch and earthmoving equipment.

Appellant requested a hearing before an Office hearing representative. At the hearing held on August 10, 2007, she addressed the events which occurred at the inspection site on November 17, 2006. Appellant indicated that, when she was kneeling down to measure a trench, the stabilizer bar of a running backhoe operated by Mr. Scampone was less than a foot from her. She asserted that Mr. Scampone started revving the engine of the backhoe and then made three or four passes with the backhoe which had a bucket full of mud. Appellant feared that she would be struck by the backhoe and she considered Mr. Scampone's actions constituted a "terroristic threat."⁵

In an undated report received by the Office on September 28, 2007, Dr. Joseph Greenberg, Ph.D., an attending clinical psychologist, indicated that reports of appellant's therapist showed that she met the criteria for diagnosing post-traumatic stress disorder. He indicated that continued exposure to "traumatic stress through her job duties" is likely to exacerbate her symptoms to a significant degree. Dr. Greenberg recommended that she discontinue her "on-site visits to workplace-related accidents/fatalities." He noted that appellant had to visit work sites where workers have suffered significant injuries or death, stating:

"The events that she witnessed are often gruesome in nature and cumulative impact of these events appears to have taken a significant toll on [appellant's] emotional functioning. In addition, [appellant] has had to endure multiple threats

⁴ The employing establishment submitted descriptions of appellant's job which indicated that she was required to inspect work sites that sometimes involved hazardous conditions, such as working in confined spaces and being exposed to chemical, biological or physical hazards.

⁵ Appellant stated that the November 17, 2006 incident was not the first threat that was made against her. She indicated that employees circled her car at a gas station and blocked her in at a pump and that someone pointed a loaded nail gun at her and stated that she would be shot if she took any more photographs. Appellant also stated that employees sprayed her with chemicals, told her that "they killed once and will kill again" and then came off a scaffolding system and charged her. She indicated that she had filed previous claims with regard to these matters but that the claims had not been accepted. Appellant did not indicate that she felt that these incidents contributed to the emotional condition claimed in the present case.

to her own safety during work site visits, as workers at these sites have verbally threatened her and at times used their equipment (nail guns, backhoes, etc.) to threaten her with bodily harm.”⁶

In a December 5, 2007 decision, the Office hearing representative affirmed the March 9, 2007 decision. She found that appellant had not established that she was threatened with a backhoe as alleged. The Office hearing representative concluded that appellant had not established any compensable employment factors and had not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.⁷

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.⁸ 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.⁹

A claimant 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.¹⁰ 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.¹¹

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 deemed compensable factors of employment and are to be considered by a physician when

⁶ Dr. Greenberg stated that in making a determination of the extent that the above-described stressors impacted appellant, it was important to note aspects of her situation, including that she had “been exposed to situations that involved actual death or serious injury to others, as well as threats to herself.”

⁷ The Office hearing representative did not directly discuss the fact that the Office had previously accepted an employment factor, *i.e.*, the fact that appellant performed an inspection of East End Plumbing and Scampone and Son on November 17, 2006.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹¹ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹² 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.¹³

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.¹⁴

The Board finds that appellant established a compensable employment factor under *Cutler* with respect to the fact that she had to perform an inspection of East End Plumbing and Scampone and Son on November 17, 2006. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.¹⁵ It is accepted that the work site was wet and muddy, that appellant had to perform measuring and photographing duties near an open trench and that she had to maneuver around obstacles such as a soil pile.¹⁶

The Board finds, however, that appellant has not established her claim that Mr. Scampone, the subcontractor at the site, made several passes extremely close to her with a backhoe or otherwise attempted to intimidate her through his operation of the machinery. The Board has recognized that physical threats and other forms of harassment can constitute employment factors.¹⁷ To the extent that incidents alleged as constituting harassment or physical threats are established as occurring and arising from a claimant's performance of her regular duties, these could constitute employment factors.¹⁸ However, for harassment or physical threats to give rise to a compensable disability under the Act, there must be evidence that harassment or physical threats did in fact occur.¹⁹

¹² See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹³ *Id.*

¹⁴ In a March 9, 2007 decision, the Office accepted one employment factor but indicated that appellant had not submitted any medical evidence at that point. In a December 5, 2007 decision, it determined that appellant had not established any compensable employment factors.

¹⁵ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

¹⁶ Appellant has submitted evidence which tends to support the existence of these working conditions and the employing establishment has not challenged her account of the November 17, 2006 inspection in this regard.

¹⁷ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

¹⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

Appellant did not submit sufficient evidence to establish that Mr. Scampone's operation of the backhoe on November 17, 2006 occurred as alleged. She did not submit witness statements or other supporting evidence to verify that Mr. Scampone actually drove the backhoe close to her or that he made any attempt to intimidate or threaten her.²⁰ Mr. Mascilli, the general contractor present at the inspection site, stated that on November 17, 2006 the backhoe did not pass near appellant at anytime and that most of her activity took place at the opposite end of the trench from where the backhoe was located. For these reasons, appellant has not established her account of Mr. Scampone's operation of the backhoe and has not shown that she was subjected to harassment or a physical threat.²¹

In the present case, appellant has established a compensable factor of employment with respect to the fact that she had to carry out her duties and perform an inspection of East End Plumbing and Scampone and Son on November 17, 2006.²² However, her burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.²³

Dr. Greenberg, an attending clinical psychologist, indicated that appellant met the criteria for diagnosing post-traumatic stress disorder. The submission of this report would not establish that appellant sustained an employment-related emotional condition as Dr. Greenberg did not indicate that her emotional condition was due to the above-described employment factor. Rather, Dr. Greenberg appears to have related appellant's emotional condition to incidents that have not been accepted as employment factors. For example, he suggested that appellant's condition was related to being threatened at inspection sites, including being threatened with a backhoe.²⁴ Appellant did not submit any other medical evidence.

²⁰ Appellant submitted photographs which she indicated she took of the inspection site on November 17, 2006. The photographs show the presence of a ditch and earthmoving equipment, but they do not provide any further support for appellant's claims about the actions of Mr. Scampone on November 17, 2006.

²¹ Appellant alleged that she previously had been exposed to threats at work, including an incident when she had chemicals sprayed on her and was verbally threatened and another incident when she was threatened with a loaded nail gun. She indicated that she had filed previous claims with regard to these matters but that the claims had not been accepted. Appellant did not indicate that she felt that these incidents contributed to the emotional condition claimed in the present case. Therefore, these matters do not need to be considered in connection with the present case.

²² As noted above, it is accepted that the work site was wet and muddy, that appellant had to perform measuring and photographing duties near a trench and that she had to maneuver around obstacles such as a soil pile. It is also accepted that Mr. Scampone operated a backhoe at the site on November 17, 2006, but it is not accepted that the backhoe came extremely close to appellant or was operated in a threatening manner.

²³ See *William P. George*, 43 ECAB 1159, 1168 (1992).

²⁴ Dr. Greenberg also noted that appellant had to witness "gruesome" events and visited work sites where workers had suffered significant injuries or death. Appellant has not alleged that such matters caused her emotional condition and the record does not otherwise establish their existence as employment factors.

For these reasons, appellant has not shown that she sustained an emotional condition in the performance of duty.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board finds that appellant established an employment factor in the form of her performance of a work site inspection on November 17, 2006 under *Cutler*. Appellant did not submit sufficient medical evidence to show that she sustained an emotional condition due to the accepted employment factor.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 5 and March 9, 2007 decisions are affirmed as modified.

Issued: August 5, 2008
Washington, DC

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

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

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