

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOREEN ANDRADE and U.S. POSTAL SERVICE,  
POST OFFICE, Pawtucket, R.I.

*Docket No. 97-2652; Oral Argument Held September 2, 1998;  
Issued February 9, 1999*

Appearances: *Doreen Andrade, pro se; Sheldon G. Turley, Jr., Esq.,*  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury on August 23, 1996 in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned her request for a hearing.

On August 25, 1996 appellant, then a 40-year-old clerk, filed a claim for a traumatic injury alleging that on August 23, 1996 at 3:00 a.m. she sustained an injury to her ribs as she unloaded mail from a push truck at work. On the reverse side of the claim form, supervisor Edward Bettencourt noted that appellant had requested sick leave on August 23, 1996 and told him that she had fallen at home.

A form disability certificate dated August 24, 1996, indicated that appellant had sustained a left-sided rib separation. No date of injury was given and, in answer to the question on the form as to whether appellant stated that the condition was work related, there was no response to the question.

A copy of a request for leave to commence at 4:50 a.m. on August 23, 1996, shows that appellant requested annual leave and that the request was denied by Mr. Bettencourt for the reason that five other employees were already on leave. In a second request for leave on August 23, 1996, appellant requested sick leave for the reason that she was "not feeling well" and Mr. Bettencourt approved the request.

In a statement dated August 23, 1996, Mr. Bettencourt stated that at approximately 11:45 p.m. on August 22, 1996, appellant requested leave without pay which he denied. He stated that

at 1:30 a.m. August 23, 1996, appellant requested annual leave, which he denied and then appellant told him that she had fallen down some stairs at home and was in pain but that she did not want to use sick leave. Mr. Bettencourt stated that at approximately 2:45 a.m. appellant requested three hours sick leave which he granted.

In a statement dated August 24, 1996, supervisor Paul McLoughlin related that he had received a telephone call from appellant on that date at about 3:00 p.m. and was informed that she had just returned from the hospital, had damaged her rib cage and might need light-duty work on Monday, August 26, 1996. He stated that he asked appellant how she sustained the injury and she replied that the injury might have occurred August 23, 1996 when she was "throwing buckets around." He stated that he then asked her if she was claiming an employment injury and she said that she was not and that she would be lying if she told him how the injury occurred because she really did not know.

A disability certificate dated August 26, 1996 indicated that appellant had stated that the condition was work related. The certificate indicated that appellant was totally disabled from August 25 to 30, 1996.

In an undated statement, supervisor Edward Gutierrez related that on August 26, 1996 he was informed that appellant had reported to work on Sunday night at 11:30 p.m. and had informed supervisor Tom Collins that she was taking medication and was in pain from an injury to her rib cage area and could not work. He related that appellant requested a claim form because she felt that the injury had occurred at work on August 23, 1996. Mr. Gutierrez related that Mr. Bettencourt, who was the supervisor on duty on August 23, 1996, stated that when appellant had arrived at the start of her work shift she had submitted a leave slip for three hours of leave without pay and that at 1:30 a.m. she changed her request from leave without pay to annual leave. He related that Mr. Bettencourt took appellant's leave slip to her at 2:00 a.m. and explained to her that he had to deny her request but that she stated that she was in pain because she had fallen down some stairs at home and hurt her side. A short while later she submitted a leave slip for three hours of sick leave, which was approved and she left the employing establishment at 4:30 a.m. Mr. Gutierrez stated that he asked appellant why she did not report her claimed injury to a supervisor when it occurred and her response was that she was afraid to do so because of other accidents at work. He noted that at 2:00 a.m. on the date of the alleged injury appellant told Mr. Bettencourt that she was hurting from a fall at home but later claimed that she was injured at 3:00 a.m. when she was passing out flat buckets at work, one hour after she told Mr. Bettencourt that she had injured her side at home.

In response to a request from the Office for additional information, appellant stated that she was injured on August 23, 1996 at 3:00 a.m. at work when she was lifting a bucket of flats from a flat truck, turned and lost her balance. Appellant stated that she did not report the claimed injury until August 25, 1996 because she thought she had just pulled a muscle in her stomach and did not know until later when she sought treatment that she had a rib separation and torn cartilage. She stated that she told her supervisor that the injury occurred when she fell down at home because she had previously received a suspension for having an accident at work and did not want to get into trouble again.

By decision dated October 24, 1996, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that she had sustained an injury as alleged.

By letter dated November 6, 1996, appellant requested a hearing before an Office hearing representative.

By letter dated April 24, 1997, the Office's Branch of Hearings and Review advised appellant that an oral hearing would be held on June 17, 1997 at 4:00 p.m. and the location of the hearing was provided.

By decision dated June 30, 1997, the Office advised appellant that it had found that she had abandoned her request for a hearing because she failed to appear at the time and place set for the hearing and did not, within 10 days after the time set for the hearing, show good cause for her failure to appear.<sup>1</sup>

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an injury on August 23, 1996 in the performance of duty, as alleged.

An employee who claims benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>3</sup> An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.<sup>4</sup> An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>5</sup> Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>6</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>7</sup>

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<sup>1</sup> The Board notes that this case record contains evidence which was not before the Office at the time it issued its June 30, 1997 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

<sup>4</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>5</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>6</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

<sup>7</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

In this case, there are several inconsistencies in the evidence which cast serious doubt upon the validity of appellant's claim.

On August 25, 1996 appellant filed a claim alleging that on August 23, 1996 at 3:00 a.m., during her work shift, she sustained an injury to her ribs as she unloaded mail from a push truck. However, on the reverse side of the claim form, Mr. Bettencourt, a supervisor, noted that appellant had requested sick leave on August 23, 1996 and told him that she had fallen at home. This statement to her supervisor that she was injured at home is not consistent with her claim that the injury occurred at work, nor is the fact that she did not file the claim until August 25, 1996, two days after the alleged work injury.

In a request for leave dated August 23, 1996, appellant requested sick leave for the reason that she was "not feeling well." She made no mention of having sustained an injury at work and, therefore, this leave request is not consistent with her claim of a work-related injury on August 23, 1996.

A form disability certificate dated August 24, 1996, indicated that appellant had sustained a left-sided rib separation but no date of injury was given and, in answer to the question on the form as to whether the patient stated that the condition was work related, there was no response to the question. As appellant did not indicate at the time of her treatment for her condition that the injury was sustained at work, this disability certificate casts doubt upon her claim that the injury was employment related.

In a statement dated August 23, 1996, Mr. Bettencourt stated that at approximately 11:45 p.m. on August 22, 1996, appellant requested leave without pay which he denied. He stated that at 1:30 a.m. August 23, 1996, appellant requested annual leave, which he denied and then appellant told him that she had fallen down some stairs at home and was in pain but that she did not want to use sick leave. Mr. Bettencourt stated that at approximately 2:45 a.m. appellant requested three hours sick leave which he granted. As appellant indicated to Mr. Bettencourt at 1:30 a.m., prior to her claimed 3:00 a.m. work injury, that she had been injured at home and as she also began seeking permission to leave work several hours before the claimed work injury on August 23, 1996, this statement from Mr. Bettencourt is not consistent with her claim of a 3:00 a.m. August 23, 1996 injury at work.

In a statement dated August 24, 1996, Mr. McLoughlin related that he had received a telephone call from appellant on that date at about 3:00 p.m. and was informed that she had damaged her rib cage and might need light-duty work on Monday, August 26, 1996. He stated that he asked appellant how she sustained the injury and she replied that the injury might have occurred August 23, 1996 when she was "throwing buckets around" but that she really did not know how the injury occurred. Her statement to Mr. McLoughlin on August 24, 1996 that she did not know how the injury occurred is not consistent with either her statement to Mr. Bettencourt at 1:30 a.m. August 23, 1996 that the injury occurred at home or her subsequent claim that the injury occurred at 3:00 a.m. at work on August 23, 1996.

Although appellant asserted that she did not initially file a claim for a work-related injury because she had previously been injured at work and did not want to get into trouble for sustaining another accident at work, this assertion does not explain the fact that she told her

supervisor, one and one-half hours prior to the time of the claimed work injury that she had sustained the injury at home. Her assertion also does not explain why she did not advise medical personnel at the time she sought treatment as to how the injury occurred.

Due to these inconsistencies in the evidence of record, appellant has failed to discharge her burden of proof to establish that she sustained an injury at work on August 23, 1996.

The Board further finds that the Office properly determined that appellant abandoned her request for a hearing.

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.<sup>8</sup> Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in the assessment of costs against such claimant.”

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“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claimant to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing.”<sup>9</sup>

In the present case, by letter dated November 6, 1996, appellant requested a hearing before an Office representative in connection with the Office’s October 24, 1996 decision. By notice dated April 24, 1997, the Office advised appellant of the time and place of a hearing scheduled for June 17, 1997. Appellant did not request postponement at least three days prior to the scheduled date of the hearing. Neither did she request within 10 days after the scheduled

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<sup>8</sup> 5 U.S.C. § 8124(b).

<sup>9</sup> 20 C.F.R. § 10.137(c).

date of the hearing that another hearing be scheduled. Appellant's failure to make such requests,

together with her failure to appear at the scheduled hearing, constitutes abandonment of her request for a hearing and the Board finds that the Office properly so determined.

The June 30, 1997 and October 24, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
February 9, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member