

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MADELINE S. MILLS and U.S. POSTAL SERVICE,
POST OFFICE, Portsmouth, N.H.

*Docket No. 97-1170; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on February 2, 1994.

On January 17, 1992 appellant filed a claim for a traumatic injury occurring on that date when she slipped and fell on snow and ice. The Office of Workers' Compensation Programs accepted the claim for a contusion of the left hand, a contusion of the lower back and lumbosacral strain.

On February 7, 1994 appellant filed a notice of recurrence of disability (Form CA-2a) due to her January 17, 1992 employment injury. Appellant related that on February 3, 1994 "while performing my duties, I felt a terrible pain in my lower back and it has not subsided. I am having the same symptoms as when I first injured my back." She stated that she stopped work on February 3, 1994. On the reverse side of the claim form, appellant's supervisor related that appellant claimed a recurrence of disability on February 2, 1994 at 3:30 p.m. and stopped work on February 4, 1994.

In a report dated February 7, 1994, Dr. Jonathan L. Holzaepfel, a Board-certified orthopedic surgeon, stated:

"[Appellant] relates the onset of her symptoms to work[-]related activities of February 1, 1994. [She] found that lifting mail sacks precipitated her back pain symptoms. She continued to work over the ensuing [two] and a half days but found that her work activities continued to exacerbate her symptoms to the point where she was unable to continue working and left work early on February 4, 1994."

The physician diagnosed discogenic low back pain.

In a report dated February 11, 1994, Terry R. Lee, an official with the employing establishment, related that on February 4, 1994 appellant informed him that on February 2, 1994 at 3:30 p.m. she experienced back pain after “lifting buckets [of mail] putting them in the back of her truck.” He stated that on February 4, 1994 appellant phoned in and said that she was “aching all over” and that she should not have worked an extra day that week. He further noted that appellant’s supervisor presented her with a letter of warning for absences prior to her claim of a recurrence of disability.

In a report dated March 16, 1994, Dr. Frank A. Graf, a Board-certified orthopedic surgeon and appellant’s attending physician, stated that appellant related that “on February 2, 1994, while lifting a heavy bucket of mail, [she] experienc[ed] a pulling in her lower back.” He diagnosed an employment-related thoracolumbar injury and found that she was disabled from her employment.

In a report dated March 29, 1994, Dr. Holzaepfel diagnosed discogenic low back pain “which can be attributed to her work activities of February 1, 1994 and that these symptoms may well be an aggravation of her initial back injury of January 17, 1992...”

In a report dated March 30, 1994, Dr. Graf discussed the history of injury as occurring on February 2, 1994 after appellant lifted a heavy bucket of mail and opined that the incident caused an “injury to the intervertebral disc ligamentous structures, peripheral spinal nerve roots... Her disability is related to the more recent injury lifting a bucket of mail with an additional causal contribution from [the] work-related injury of January 17, 1992, consisting of a slip and fall.” He recommended that appellant undergo a magnetic resonance imaging (MRI) study.

By letter dated June 30, 1994, the Office informed appellant that it was developing her claim as a traumatic injury rather than a recurrence of disability. The Office requested that appellant clarify factual discrepancies regarding the circumstances of her alleged injury.

In a statement received by the Office on July 19, 1994, appellant related that she injured her back on February 2, 1994 at around 3:30 p.m. She stated:

“...I was performing collection duties after making route deliveries. I was loading approximately ten buckets of mail weighting approximately twenty to thirty-five pounds each. I was loading the buckets onto a dolly and then wheeling them out to the truck. After bringing the buckets to the truck, I then proceeded to load the buckets onto the truck. As I picked up one of the buckets and lifted it onto the truck I felt extreme pain in my lower back, which radiated to my legs at the same time.”

In a letter dated July 21, 1994, an official with the employing establishment submitted the notes of appellant’s supervisor, Kevin Lonergan. In a note dated February 4, 1994, Mr. Lonergan indicated that appellant had phoned him and reported aching all over. When she arrived at work on that date, she received a letter of warning for attendance, became upset and stated that she injured her back “picking up packages at Green Pages.” Mr. Lonergan noted that he asked appellant why she did not initially report the injury and she related that she “did [not] want to upset anyone.”

By decision dated July 29, 1994, the Office denied appellant's claim on the grounds that she did not establish fact of injury.

Appellant requested a hearing before an Office hearing representative, which was held on September 12, 1995. At the hearing, appellant testified that on February 2, 1994 she experienced a pull in her back loading buckets of mail from a dolly to her truck.

Following the hearing, appellant submitted a report dated September 8, 1995, from Dr. Graf. The physician stated:

“[Appellant] has been diagnosed with a subligamentous intervertebral disc herniation L5-S1 and annular bulge T12-L1 representing specific structural changes superimposed upon a degenerative disc disease. The subligamentous intervertebral disc herniation and annular bulge represent new injury, which were caused by the injury of February 2, 1994 (of lifting a heavy bucket of mail).”

The physician further diagnosed a thoracolumbar injury due to her employment injury, pain patterning and structural changes. He opined that appellant was totally disabled due to her February 2, 1994 employment injury and found that the injury directly caused the disc herniation and annular bulge as these conditions did not predate the February 1994 incident.

A radiologist interpreted appellant's August 17, 1994 MRI scan of the lumbar spine as showing a minimal central bulge of the annulus.

By decision dated October 10, 1995, the Office hearing representative affirmed the Office's July 29, 1994 decision. The hearing representative found that the evidence did not establish that the February 2, 1994 incident occurred in the time, place and manner alleged.

In a report dated June 29, 1996, Dr. James Fiesher, Board-certified in family practice, opined that objective studies supported a diagnosis of “chronic radiculopathy of the S1 nerve distribution.... Furthermore, I cannot absolutely claim that this was due to a lifting of boxes at work, however, that would be the type of injury that would be consistent with this finding.”

In a report dated September 9, 1996, Dr. Barry C. Gendron, an osteopath, interpreted an electromyogram (EMG) and nerve conduction study as consistent with “either a chronic right S1 radiculopathy, or a very proximal sacral plexopathy.”

By letter dated September 18, 1996, appellant, through her attorney, requested reconsideration.

By decision dated December 19, 1996, the Office denied modification of its prior decision. The Office found that the evidence submitted in support of reconsideration did not resolve the discrepancies in the factual evidence surrounding the time, place and manner of the employment incident alleged to have caused an injury on February 2, 1994.

The Board finds that the case is not in posture for a decision.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.¹ An injury does not have to be confirmed by eyewitnesses in order to establish 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.² 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.³ 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.⁴ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.⁵

The Board finds that the record does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. Appellant submitted a detailed statement on July 19, 1994 describing her injury as occurring on February 2, 1994 at around 3:30 p.m. when she lifted buckets of mail from a dolly onto a truck. The record establishes that appellant notified her supervisor of the injury within two days and sought medical treatment the same week. The medical reports of record contain a history of injury generally consistent with appellant's account of events. The fact that appellant completed the claim form using an incorrect date of injury, that of February 3, 1994 rather than February 2, 1994, does not render the claim factually deficient. Appellant informed her supervisor of the employment incident during a meeting on February 4, 1994. The record contains no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.⁶

Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish an incident as alleged on February 2, 1994.

The remaining issue is whether the medical evidence establishes an injury causally related to the employment incident. In a report dated March 30, 1994, Dr. Graf, a Board-certified orthopedic surgeon, diagnosed an injury to appellant's intervertebral disc structure

¹ See *Elaine Pendleton*, 40 ECAB 1142 (1989).

² *Charles B. Ward*, 38 ECAB 667 (1989).

³ *Tia L. Love*, 40 ECAB 586 (1989).

⁴ *Merton J. Sills*, 39 ECAB 572 (1988).

⁵ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

⁶ See *Thelma Rogers*, 42 ECAB 866 (1991).

which he attributed primarily to her lifting a bucket of mail on February 2, 1994. In a report dated September 8, 1995, Dr. Graf diagnosed a disc herniation at L5-S1 and an annular bulge which he found represented new injuries caused by the February 2, 1994 employment incident. He opined that appellant was totally disabled from employment.

The Board finds that the reports of Dr. Graf are sufficient to find that appellant sustained a thoracolumbar injury with sacral and lower extremity pain causally related to her February 2, 1994 employment injury. However, the case must be remanded for further development to determine whether appellant sustained additional back injuries such as a herniated disc and a determination of the period or periods of disability associated with the above injury and for payment of medical expenses incurred as a result of the above injury.

The decision of the Office of Workers' Compensation Programs dated December 19, 1996 is hereby reversed and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member