U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIETTA BOPP and DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, Jamaica, NY

Docket No. 00-2210; Submitted on the Record;
Issued August 10, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether appellant was injured at the time, place and in the manner alleged.

On June 12, 1996 appellant's supervisor completed a traumatic injury claim for appellant, then a 50-year-old senior customs inspector. Appellant informed her supervisor on May 28, 1996 that on May 23, 1996 her left ankle had been in unbearable pain on the way home. Appellant related that she did not think her condition was serious at that time. The supervisor indicated that appellant saw a physician on June 11, 1996, who diagnosed a stress fracture.

On April 8, 1999 appellant submitted another claim for the May 23, 1996 incident. She stated that she had slipped on Jamaican rum that had leaked onto the floor of the employing establishment and sustained a stress fracture of the left ankle. She indicated that she had reported the injury to her supervisor on May 28, 1996. Appellant also submitted claims for recurrences of disability for June 11 through July 24, 1996, May 8 through November 17, 1997 and after March 17, 1998.

In a June 2, 1999 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that, while the incident had occurred as alleged, she had not submitted any medical evidence to establish that she had any injury due to the incident.

In an October 27, 1999 letter, appellant's attorney requested reconsideration and submitted an August 24, 1999 report from Dr. Irvin A. Spira, a Board-certified orthopedic surgeon, who stated that appellant was first seen on March 5, 1997 complaining of left ankle pain and swelling. Dr. Spira noted a May 23, 1996 employment injury when appellant slipped on rum that had leaked on the floor of the employing establishment and felt sudden pain in her left ankle. Appellant was treated for a stress fracture.

Dr. Spira reported that x-rays taken on March 5, 1997 showed a nonunion of the left distal tibia fracture. He, therefore, performed surgery on May 8, 1997. Dr. Spira described appellant's condition after that time, with constant complaints of pain in the left ankle. He

related the nonunion of the fracture to appellant's May 23, 1996 employment injury and concluded that appellant was unable to perform her duties for the employing establishment due to the injury.

In a January 28, 2000 decision, the Office vacated its June 2, 1999 decision and found that appellant had not established that she was injured at the time, place and in the manner alleged. The Office stated that appellant had given contradictory histories of the injury and had not submitted contemporaneous medical evidence in support of her claim.

In a March 20, 2000 letter, appellant's attorney again requested reconsideration. He submitted February 2000 statements from two coworkers of appellant. Thomas V. Shelin stated that, on May 23, 1996, while working as a customs inspector, he saw appellant fall "straight to the floor" of the employing establishment. He indicated that appellant, shaken by the fall, realized she could not support any weight on the left ankle. Mr. Shelin stated that he, with George Yarrobino, helped appellant to her car. In a February 20, 2000 statement, Mr. Yarrobino stated that he helped appellant to her car on May 23, 1996 after her tour of duty because she was unable to walk due to the pain in her ankle.

In a May 2, 2000 decision, the Office denied appellant's request for modification of the prior decision, finding that none of the witness statements indicated that appellant had slipped on rum as she alleged.

The Board finds that appellant sustained an employment injury on May 23, 1996 as she alleged.

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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. 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 cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case.[1] The employee has the burden of establishing the occurrence of the alleged injury at the time, place and manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast doubt upon the validity of the claim. However, his or her statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.[2]

In this case, appellant consistently reported that she sustained an injury to her left ankle on May 23, 1996. In the June 12, 1996 claim form, appellant's supervisor reported that appellant had complained of severe pain in the left ankle. The supervisor did not record appellant's history of injury. She did report that appellant did not seek medical attention until June 11, 1996 but had

[1] *Merton J. Sills*, 39 ECAB 572 (1988).

[2] *Carmen Dickerson*, 36 ECAB 409 (1985).

the claim form completed the next day. The record, therefore, shows that appellant reported the employment injury once she sought medical attention for it.

Appellant, in the April 8, 1999 claim form, gave her own history of the employment injury, stating that she had slipped on Jamaican rum on May 23, 1996 and sustained a stress fracture to the left ankle. She explained that her claim had been delayed due to inaccurate information given by the employing establishment.

Dr. Spira reported that appellant, when first seen on March 5, 1997, gave a history of slipping on rum on May 23, 1996 and sustaining a stress fracture to the left ankle. Mr. Shelin, in his statement, reported that he saw appellant fall on May 23, 1996. The fact that he did not mention slipping on rum was inconsequential. Mr. Shelin testified to the important point, that appellant fell on the date in question and immediately complained of pain in the left ankle. Mr. Yarrobino supported Mr. Shelin's statement by noting he helped appellant to her car on May 23, 1996 due to her left ankle pain. The factual evidence of record, therefore, consistently showed that appellant sustained an injury to her left ankle on May 23, 1996 while at work.

The Office erred in rejecting appellant's claim of the basis on minor inconsistencies among the statements of appellant, her supervisor and Mr. Shelin. Their statements concurred on the principal point, that appellant sustained an injury to her left ankle on May 23, 1996 and consistently reported such an injury thereafter.

The decisions of the Office of Workers' Compensation Programs, dated May 2 and January 31, 2000, are hereby reversed. The case is returned to the Office for further development to determine whether appellant had any work-related disability after May 23, 1996 due to the ankle injury.

Dated, Washington, DC
August 10, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member