

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD A. BEETS and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Umatilla, OR

*Docket No. 00-387; Submitted on the Record;
Issued February 15, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant established that he sustained an injury to his right shoulder in the performance of duty on January 21, 1998.

On January 22, 1998 appellant, a 46-year-old powerhouse operator, filed a traumatic injury claim, alleging that he hurt his right shoulder on January 21, 1998 when a co-worker grabbed his arm and jerked it "over [appellant's] head and extended [sic]." In an email to management on January 22, 1998, appellant explained how the injury occurred.

Appellant stated that when he entered the control room at the beginning of his shift at 4:00 p.m., the temperature was 20.7 degrees Celsius, and he therefore adjusted the thermostat several times to raise the temperature. He related that at 11:15 p.m. he began to lower the temperature to cool the control room for the next shift. When appellant returned to the control room at 11:57, he noticed that the temperature had not changed since his previous adjustment, so he attempted to lower the temperature again. As appellant removed the thermostat cover, however, his co-worker, Doug Oliver, stepped between him and the thermostat, grabbed his right arm and jerked it above his head, saying, "leave it alone," in a threatening voice.

When appellant ordered Mr. Oliver to leave the control room because his shift had not started, he responded, "It is after midnight. You have been relieved." Appellant looked at the clock at that moment and noted that the time was 11:58 p.m. After Mr. Oliver released his right arm, appellant waited two minutes and left the control room when his shift ended. Appellant noted that in 1983, a federal judge ruled that no employee was to enter the control room before the start of his shift, as this would constitute grounds for overtime pay.

In addition, appellant filed an accident report dated January 22, 1998, in which he also stated that he was injured when a co-worker jerked his right arm over his head.

In a report dated January 22, 1998, Dr. Ronald R. Bowman, a Board-certified orthopedic surgeon, indicated that appellant sustained a strained right shoulder resulting from an incident

with another employee who jerked his right arm back to prevent him from setting the thermostat. Appellant had diminished range of motion in the shoulder, and x-rays indicated minimal arthritic or post-traumatic changes in the inferior portion of the humerus. Dr. Bowman placed appellant's right shoulder in an immobilizer.

In reports dated January 29, 1998, Dr. Bowman released appellant to return to light duty and restricted him from operating heavy equipment until at least February 19, 1998.

Mr. Oliver stated on April 29, 1998 that, when he reported to the control room at 11:58 p.m. on January 21, 1998, he noticed that the room was very hot. Mr. Oliver went to the thermostat and turned down the temperature, and then noticed appellant removing the cover. At that moment, Mr. Oliver asserted, he placed himself between appellant and the thermostat and told him to leave it alone, as his shift was over. Although appellant objected, he tossed Mr. Oliver the thermostat cover and left the control room. Mr. Oliver stated that he then got a drink of water before returning to the control room and told two of his co-workers in the kitchen that appellant was turning the thermostat back up after he had turned it down.

In a statement dated April 24, 1998, the plant superintendent concluded:

“Upon completion of our investigation, we have found that there is no proof either way as to the allocation of injury due to physical workplace violence. Statements from [appellant] and Doug Oliver do not agree as to the happenings of the incidents and statements from the other [two] employees during shift change indicate they were unable to see or hear anything.”

By decision dated May 8, 1998, the Office denied the claim, finding that appellant failed to establish that he actually experienced the employment incident at the time, place and in the manner alleged.

By letter dated June 1, 1998, appellant's attorney requested an oral hearing, which was held on March 30, 1999.

By decision dated August 10, 1999, an Office hearing representative affirmed the Office's previous decision. The hearing representative found that there was conflicting evidence on whether the incident actually occurred and that there was no proof that appellant had sustained an injury due to violence inflicted by his co-worker. The hearing representative noted that two other co-workers who were in the vicinity of the alleged incident indicated that they were unable to see or hear anything.¹

The Board finds that the employment incident occurred at the time, place and in the manner alleged on January 21, 1998.

¹ These statements from appellant's co-workers are not in the record. Appellant, however, testified at the hearing that his supervisor showed him these statements, and appellant's supervisor cited them in his April 24, 1998 statement summarizing the investigation of appellant's allegation.

Appellant's statements regarding the incident are singularly consistent. He alleged initially that he injured his right shoulder when a co-worker grabbed his arm and jerked it "over [appellant's] head and extended [sic]." Appellant explained the next day that Mr. Oliver stepped between him and the thermostat at 11:58 p.m., grabbed his right arm and jerked it above his head, saying, "leave it alone."

Mr. Oliver conceded that he placed himself between appellant and the thermostat and told him to leave it alone because his shift was over. He has not denied physically assaulting appellant.²

Additionally, the mere fact that two other co-workers in the vicinity of the alleged assault stated that they were unable to see or hear anything does not establish that the incident as alleged by appellant did not occur. An injury does not have to be confirmed by witnesses to establish the fact that the 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.³ Here, appellant submitted two statements alleging that he injured his right shoulder on January 22, 1998 when a co-worker jerked his arm up over his head, and his testimony at the March 30, 1999 hearing was consistent with his previous statements regarding the incident.⁴ Also, Dr. Bowman's reports indicated that appellant missed work from January 22 to 29, 1998 due to a dislocated right shoulder which he claimed he had injured in the manner described above.

While the medical evidence appellant submitted is not sufficient to establish that the employment incident caused a personal injury, Dr. Bowman's January 22 and 29, 1998 reports suggest that appellant sustained at least some level of disability attributable to the employment incident.

Accordingly, the Office should further develop the medical evidence by requesting that the case be referred to an appropriate physician to submit a rationalized medical opinion on whether appellant has sustained any disability attributable to the January 21, 1998 employment injury. The Office should also determine the duration and extent of appellant's shoulder strain, and the date the disability, if any, ceased. The Office may also consider, on remand, the extent to which appellant is entitled to reimbursement for medical treatment. After such development of the record as the Office deems necessary, a *de novo* decision shall be issued.

² In a letter dated August 5, 1998, appellant's attorney stated that there had been "bad blood" between appellant and Mr. Oliver prior to the January 21, 1998 incident, and suggested that this was attributable to appellant's union activities.

³ *Nathaniel Cooper*, 46 ECAB 1053 (1995).

⁴ Appellant also submitted into the record the results of a polygraph examination administered on August 5, 1998, which indicated "no consistent indications of deception" regarding the work incident.

The August 12, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
February 15, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member