

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY MACK SUTTLES and U.S. POSTAL SERVICE,
ALCOA POST OFFICE, Alcoa, TN

*Docket No. 03-1414; Submitted on the Record;
Issued September 11, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a neck injury in the performance of duty.

On January 22, 2003 appellant, then a 42-year-old city letter carrier, filed a claim alleging that, while casing mail on January 9, 2003, he sustained a pinched nerve in his neck with left hand and arm numbness. He attributed these conditions to "twisting, turning in [mail] case." On the reverse of the form, Postmaster Kathy B. Wuenstel asserted that appellant injured himself on January 7, 2003 and was feigning an injury to avoid working. She explained that the "original complaint was pain in back. Now [appellant] is saying pain is in his left arm." Postmaster Wuenstel added in a February 10, 2003 letter, that on January 7, 2003 after being scheduled for a fitness-for-duty examination, appellant stated that his "back was hurting" but did not allege a specific injury.

In a February 14, 2003 letter, the Office of Workers' Compensation Programs advised appellant of the deficiencies in the evidence of record. The Office requested that he submit witness statements, a description of the effects of the injury and a description of his condition and any other injuries sustained between the date of injury and first medical treatment.¹ Appellant was afforded 30 days, in which to submit the requested evidence.

In a February 16, 2003 response, appellant stated that, on Thursday, January 9, 2003, he experienced a painful, pinching sensation in his upper back and neck while casing mail. He recalled informing Postmaster Wuenstel during his work shift, then returned to casing mail. Appellant noted that he was off work during the "long weekend." Upon arising at home on Sunday, January 12, 2003 appellant experienced severe left arm and upper back pain, with numbness in the left hand. Fearing a heart attack, he sought emergency room treatment,² where

¹ The file also contains a March 11, 2003 nurse medical management worksheet, indicating that appellant returned to part-time limited-duty work on March 10, 2003.

² Appellant submitted a January 12, 2003 emergency room discharge instructions holding him off work through

physicians informed him he had a “pinched nerve or a bulging dis[c].” Appellant noted that the January 7, 2003 fitness-for-duty examination occurred two days prior to the claimed January 9, 2003 neck injury.

In a February 28, 2003 statement, Paul Summers, a coworker of appellant’s, recalled that on January 9, 2003 he heard appellant speak to Postmaster Wuenstel at approximately 9:00 a.m., stating that he “had hurt his back.... [Appellant] said ‘I just want to cover my rear’ and went back to work,” completing his route. Mr. Summers noted, however, that he could not “hear the exact words” Ms. Wuenstel said to appellant.

Appellant submitted medical evidence in support of his claim.

In a January 14, 2003 report, Dr. Laykoon T. Huang, Board-certified in occupational medicine, noted findings of a January 7, 2003 fitness-for-duty examination, requested as appellant failed to meet minimum standards for casing mail as he used both hands. He explained that appellant used his left hand to support his right due to a bilateral intention tremor caused by a skull fracture sustained 25 years previously. Dr. Huang opined that appellant was medically able to perform the city carrier position without restrictions, except for a temporary episode of tennis elbow.

In a January 17, 2003 report, Dr. Todd R. Griffith, an attending Board-certified orthopedic surgeon, stated that appellant was “casing mail this past weekend and was doing a lot of work over the level of his chest with his left arm.” Appellant awoke at home on January 12, 2003 with “severe upper thoracic pain radiating into his left arm.” Dr. Griffith diagnosed “left arm radicular pain with improved right lateral epicondylitis.” He stated that, if appellant’s history was “correct where he spent a considerable amount of time working with his neck extended, this radiculopathy could be the result of irritation of cervical nerve root either by a bulge or herniated dis[c]. Therefore, [Dr. Griffith] fe[l]t it [was] work related.”³

Dr. Griffith submitted reports through March 5, 2003. In a January 29, 2003 report, he diagnosed a herniated cervical disc caused by “twisting and turning in case”⁴ In a March 5, 2003 letter, Dr. Griffith stated that appellant’s history of an onset of neck and left arm pain, while casing mail on January 9, 2003 and worsening through January 12, 2003, was “consistent with radicular pain from a herniated disc, which more likely than not is associated with his work ... duties.”

January 14, 2003.

³ Appellant also submitted a January 16, 2003 form report from a walk-in clinic regarding treatment for neck and left arm pain. The physician’s signature on this form is illegible.

⁴ Dr. Griffith specified, in a February 6, 2003 chart note, that the neck and left arm pain was in the C6 dermatome.

By decision dated March 19, 2003, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant submitted insufficient evidence "to establish that the event(s) occurred as alleged."⁵

Appellant filed his appeal with the Board on May 6, 2003.⁶

The Board finds that appellant has not established that he sustained a neck injury in the performance of duty.

When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury.⁷ The employee must show that the injury occurred at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.⁸ While an injury does not have to be confirmed by eyewitnesses statements in order to establish that the injury occurred in the performance of duty, the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁹ Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.¹⁰

The evidence of record contains conflicting accounts of the alleged date of injury, the parts of the body affected and the work duties alleged to have caused the claimed mechanism of injury. Thus, the Office found in its March 19, 2003 decision, that appellant submitted insufficient evidence to establish a workplace event that would have caused the claimed neck and upper back condition.

In his January 22, 2003 claim form and a February 16, 2003 letter, appellant asserted that, while casing mail on January 9, 2003 he sustained a pinched nerve in his neck and informed Mr. Wuenstel, while at work later that day. However, Mr. Wuenstel asserted on the reverse of the claim form and in a February 10, 2003 letter, that appellant reported back pain on January 7,

⁵ Following issuance of the Office's March 19, 2003 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time the Office issued its final decision in the case. 20 C.F.R. § 501.2(c).

⁶ The record contains May 30, 2003 correspondence from the Office's Branch of Hearings and Review, including cover letters for a hearing transcript under Claim No. 16-2042070. This claim is not before the Board on the present appeal. The only claim on appeal is Claim No. A06-2078088 pursuant to a January 9, 2003 neck and upper back injury.

⁷ *Leon Thomas*, 52 ECAB 202 (2001).

⁸ *Bill H. Harris*, 41 ECAB 216 (1989); *Charles B. Ward*, 38 ECAB 667 (1987).

⁹ *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁰ *Leon Thomas*, *supra* note 8.

2003, shortly before a fitness-for-duty examination. Paul Summers, a coworker of appellant's, asserted in a February 28, 2003 statement, that appellant told Ms. Wuenstel on January 9, 2003 that he had "hurt his back," but admitted that he could not hear all of appellant's conversation. Thus, the factual record indicates that appellant experienced back pain on January 7, 2003 and experienced neck or back pain on January 9, 2003.

Dr. Griffith, an attending Board-certified orthopedic surgeon, also provided inconsistent histories of injury. In a January 17, 2003 report, he stated that appellant experienced symptoms while "casing mail this past weekend." However, appellant was not on duty the previous Saturday and Sunday according to Mr. Wuenstel and appellant's own accounts. Dr. Griffith then stated that a cervical disc bulge or herniation would be consistent with appellant working with "his neck extended" for a "considerable amount of time." However, there is no evidence of record and appellant did not allege that he worked for a prolonged period with his neck extended.¹¹ In his last two reports, dated January 24 and March 5, 2003, Dr. Griffith conformed his accounts with appellant's assertion that the herniated cervical disc and radiculopathy were caused by casing mail on January 9, 2003.

The Board finds that the inconsistent histories of injury in both the factual and medical evidence cast serious doubt on whether the claimed January 9, 2003 incident occurred as alleged.¹² As the date, mechanism and precise diagnosis of the claimed injury remains in question, appellant has failed to establish fact of injury in this case.

¹¹ In his January 14, 2003 report, Dr. Huang, the fitness-for-duty examiner, described appellant's method of casing mail with both hands due to intention tremor. However, he did not comment on appellant's other body habitus or degree of neck extension used while casing mail.

¹² *Bill H. Harris*, 41 ECAB 216 (1989).

The decision of the Office of Workers' Compensation Programs dated March 19, 2003 is hereby affirmed.

Dated, Washington, DC
September 11, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member