



removing and carrying logs from the flume when he slipped and fell face down on a log in a creek bed. Bobby L. Shubert, appellant's supervisor, indicated that he received notice of appellant's injury on January 30, 2003.

By letter dated March 6, 2003, the Office advised appellant that the evidence was insufficient to establish his claim. The Office advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

In response to the Office's March 6, 2003 letter, appellant stated that his injury was reported to Mr. Shubert at the time of the accident. He did not give written notice of the injury as he was laid off from the employing establishment on the next day and he did not know the extent or cause of his injury until June 2002. He indicated that Stanley Huskey, a supervisor, his coworkers whose first names are Marcus and Curtis and Ted Chambers witnessed his injury. Appellant related the immediate effects of his injury included numbness in his back that radiated into his legs and pain to his legs. He walked back to the truck and rode to the maintenance area where he reported his fall and condition to Mr. Shubert. Appellant and Mr. Shubert discussed his condition and he went home for the day. Appellant noted that he had not sustained any other injury between the date of the alleged injury and the date it was reported to his supervisor and physician. Appellant stated that he saw Dr. Thomas W. Conway, a Board-certified family practitioner, on October 12, 2001. He noted that, although Dr. Conway's records did not reflect his complaints of back and leg numbness and pain, he did make such complaints. Appellant explained his delay in seeking medical treatment by stating that he resisted seeing a physician because he had been laid off and thought his symptoms would improve.

Appellant submitted a March 12, 2003 witness statement from Mr. Huskey, who stated that he was working with appellant on Junglebrook Mill when appellant said he fell while carrying a heavy piece of old flume. He did not see appellant fall, but saw that he was wet from falling into the creek. Mr. Huskey reported that he asked appellant if he was okay and appellant responded yes. He noted that the next morning appellant mentioned that his back was sore.

Appellant also submitted medical bills and medical reports. An October 10, 2002 attending physician's report of Dr. Richard P. Boyer, a neurosurgeon, listed a history that on September 19, 2001 appellant was carrying logs up a creek bed when he slipped and fell face down with resultant back and bilateral leg pain, more on the right than on the left. Dr. Boyer diagnosed right disc herniation with radiculopathy at L5-S1 and indicated that this condition was caused by the employment activity by placing a checkmark in the box marked "yes." Dr. Boyer's July 23, 2002 narrative report contains the same history Dr. Boyer provided his findings on physical examination and noted a review of a magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a fairly sizable disc herniation on the right side with impingement of the S1 nerve root at L5-S1. He discussed several medical treatment options for the lumbar spine with appellant.

A January 28, 2002 radiology report from Dr. Michael O'Malley, a Board-certified radiologist, indicated that appellant had a normal bilateral testicular ultrasound. His May 17, 2002 radiology report revealed no foreign bodies in appellant's skull. His May 21, 2002 report revealed a normal brain and internal auditory canal based on an MRI scan. In a June 24, 2002 radiology report, Dr. O'Malley reported that an MRI scan demonstrated a moderate to large-

sized herniation of the nucleus pulposus to the right of the midline at L5-S1. A June 22, 2002 radiology report of Dr. James F. Hudgens, a Board-certified radiologist, indicated a normal radiographic skull examination.

A September 18, 2002 letter from Kim Jones, a hospital employee, indicated that appellant was not seen there after the alleged injury date of September 19, 2001 until January 28, 2002. The letter also indicated that appellant had not asked the hospital to file workers' compensation paperwork on any of his visits and, thus, the employing establishment had not received his records.

Appellant submitted treatment notes from his physical therapists indicating that he was treated for lower extremity and back conditions during the period February 20 through May 3, 2002. He submitted numerous treatment notes from Dr. Richard D. Larson, a Board-certified family practitioner, Dr. Conway and Dr. Carl M. Orquia, a Board-certified family practitioner, covering the period August 17, 2001 through August 19, 2002 for treatment of lesions on his back which required excision, sinus congestion, diarrhea, fatigue, back pain, hemorrhoids, hyperlipidemia, allergies, vertigo, tinnitus and deafness in the left ear, muscle spasms and groin pain.

On April 9, 2003 the Office contacted Mr. Shubert by telephone about appellant's statement that he advised Mr. Shubert of his injury on September 19, 2001. Mr. Shubert stated that he did not recall whether appellant verbally told him about the accident as it occurred almost two years prior. He noted that appellant may have told him about the incident, but he did not remember because probably no big deal was made out of the incident. Mr. Shubert stated the fact appellant was laid off the next day was not an excuse for failing to provide written notice of the incident after it occurred.

By decision dated April 11, 2003, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury at the time, place and in the manner alleged. The Office found inconsistencies in the evidence of record regarding the history of the alleged injury and also with appellant's behavior immediately following the injury. The Office noted that appellant did not provide notice of injury to his supervisor within 30 days and did not immediately pursue medical treatment.

In a May 5, 2003 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

At the November 18, 2003 hearing, appellant testified that he performed seasonal work for the employing establishment and that he was laid off on September 20, 2001. He testified that Mr. Huskey and two coworkers, Curtis and Marcus witnessed the alleged injury and that Mr. Chambers was not a witness. He described the pain from his neck to his knees which he experienced as a result of the alleged injury. Appellant stated that he returned to the maintenance area and told Mr. Shubert about his injury and Mr. Shubert responded by telling him to go home. Appellant testified that he told Mr. Shubert that he believed he was alright and that, in response to his question as to whether he should file an accident report, Mr. Shubert responded that filing such a report would hurt his opportunity to come back next year. Appellant stated that he did not fill out a report because he believed he was going to be alright.

Appellant testified that on the night of the alleged injury and the next morning he was feeling stiff and sore. He reported to work on that day and he did not do anything except attend a party since it was his last day at work. Appellant stated that after working for the employing establishment he ran his gutter business noting that he was unable to climb ladders due to pain in his feet and legs. Appellant stated that he saw Dr. Conway about his back problem and numbness in his feet and legs a week or two after he was laid off from work. He noted the subsequent medical treatment he received from Drs. Larson and Boyer and testified that prior to September 19, 2001 he had not sustained a back injury. Appellant, however, stated that he hurt his back while building a fence for the employing establishment two or three weeks prior to September 19, 2001, but that he was not having any problems at the time of the alleged injury.

Appellant's attorney noted that the record does not mention any complaint of neck, back or leg pain until December 26, 2001. Appellant explained that he thought he would get better and that he first complained to his physician the week following the alleged September 19, 2001 injury.

Appellant submitted a May 30, 2003 letter from Dr. Larson to his attorney apologizing for providing misinformation about his back injury. Dr. Larson stated that, when he reviewed appellant's chart, he did not find any entry indicating that he saw appellant in September 2001 for a back injury. He indicated that a June 2002 entry, which was previously overlooked, revealed that he saw appellant on June 20, 2002 and that appellant told him that he injured his back while working for the employing establishment. Dr. Larson noted that appellant also reported this incident to him on July 2, 2002. He concluded that knowing the problem appellant had with his back, the original injury certainly was a causative factor in his low back problem. He further concluded that it had since been proven that appellant sustained a herniated nucleus pulposus at L5-S1, vertebral interspace.

In response to appellant's hearing testimony, A. Dianne Westfaul, an employing establishment human resources officer, disputed appellant's claim that he complained of an injury to either his crew leader or his first-line supervisor for over a year after the alleged injury in a December 11, 2003 letter. She stated that although time and attendance records confirmed that appellant was absent for four hours on sick leave on September 19, 2001, he reported to and was assigned work as usual on September 20, 2001. Ms. Westfaul indicated that, after working the scheduled 10 hours on that date, appellant followed a fellow worker home where they loaded a full-sized truck rear-end, weighing approximately 350 pounds into appellant's truck. She submitted the statements of Mr. Shubert and Mr. Huskey in support of her statement.

In a December 11, 2003 declaration, Mr. Shubert stated that during September 2001 he was appellant's first-line supervisor and that he reviewed his daily work record for September 19 and 20, 2001 prior to making his declaration. He declared that on September 19, 2001 he was inspecting another project and he was not in the maintenance area when appellant returned from his project and left early. Mr. Shubert stated that he did not recall having a conversation with appellant on that date concerning his leaving work early or having hurt himself during work. He noted that, on September 20, 2001, he assigned appellant and other crew members to the Elkmont work area to construct a replica wooden sink for one of the log cabin exhibits in the park. He noted that the seasonal going away part was not a day-long party, rather it traditionally lasted for two to three hours during the middle of the day. Mr. Shubert related that appellant did

not make any statement to him on September 20, 2001 about his accident or complain about any injury, aches or pains. He denied advising appellant that filling out an accident report would hurt his chances to be rehired and providing such advice to any other employee. Mr. Shubert noted that he encouraged any employee to fill out an accident report if injured on the job. He recalled an incident that took place on September 13, 2001, where another crew member was injured on the job and an accident report was filed by the injured employee. Mr. Shubert concluded that he did not have a conversation with appellant concerning his alleged September 19, 2001 accident until approximately one year later.

In a December 11, 2003 declaration, Mr. Huskey stated that he did not see appellant fall. He described the creek in which appellant fell and stated that, when he first saw appellant, he was wet on one side. He further stated that appellant did not complain of any injury to his back and they completed the project prior to returning to the maintenance area. Mr. Huskey noted that he and the crew worked on another project during the afternoon of September 19, 2001. He related that he had no knowledge of why appellant left early on that date. Mr. Huskey noted that appellant reported for work on September 20, 2001 and reiterated Mr. Shubert's comments about the time period for the seasonal going away party. He further noted a prior conversation with appellant regarding the use of a three-fourths ton truck rear-end to repair a truck he used for his gutter business. Mr. Huskey stated that appellant followed him home on September 20, 2001 to get the truck rear-end. He also stated that he and appellant lifted and loaded the complete rear-end unit into appellant's truck noting that two people were required to lift the rear-end since it weighed at least 350 pounds and included the differential, housing and axles. Mr. Huskey also noted that appellant made no complaints to him about his back on September 20, 2001 and that he did not have a conversation with appellant concerning his alleged accident until approximately one year later.

Counsel's letter was accompanied by appellant's December 29, 2003 declaration, which responded to the statements of Mr. Huskey and Shubert. Appellant stated that, on September 20, 2001, the day of the seasonal going away party, he was assigned to the Elkmont work area to construct a replica wooden sink. He noted that this assignment did not involve any heavy lifting and he specifically told Mr. Huskey, who asked him how he was doing, that his knees were bruised and his back was "jammed up." Appellant explained that on September 20, 2001 he did follow Mr. Huskey to his house to get a truck rear-end and that they both loaded it into his vehicle. He stated that the truck rear-end was unloaded at his house and it had not been moved since then because he was physically unable to do so. Appellant indicated that his back hurt prior to moving the truck rear-end and the pain did not worsen as a result of moving the equipment. He estimated that the equipment weighed less than 200 pounds.

In a December 9, 2003 letter, Dr. Boyer noted appellant's description of the alleged injury. Appellant stated that he was working for the employing establishment when he fell while carrying logs up a creek bed. Dr. Boyer noted appellant's denial of significant difficulties with his back or legs prior to the alleged incident. He further noted appellant's complaints of pain in his right foot and groin and the results of imaging studies, which showed evidence of a fairly sizable disc herniation to the right at L5-S1 with impingement of the S1 nerve root. Dr. Boyer opined that it was more likely than not that appellant suffered an injury during the fall on September 19, 2001 resulting in his right-sided disc herniation at L4-S1.

By decision dated February 3, 2004, the hearing representative affirmed the Office's April 11, 2003 decision. The hearing representative found several inconsistencies sufficient to cast serious doubt upon the validity of appellant's claim. Accordingly, the hearing representative found that appellant failed to establish that he sustained an injury at the time, place and in the manner alleged on September 19, 2001.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.<sup>3</sup>

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 or exposure, which is alleged to have occurred.<sup>4</sup> In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged. 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 as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his 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 sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the 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 serious doubt upon the validity of the claim.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> See *Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

<sup>4</sup> See also, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

<sup>5</sup> *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>6</sup> The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>7</sup> The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.<sup>8</sup>

### ANALYSIS

Regarding the first component, appellant contends that on September 19, 2001 he injured his back when he slipped and fell face down on a log in a creek bed while working for the employing establishment. The Board notes that appellant did not file a claim for his alleged back injury until January 30, 2003. Appellant stated that he reported his injury to his supervisor, Mr. Shubert, at the time of the accident, however, Mr. Shubert, indicated on appellant's claim form that he received notice of appellant's alleged injury on January 30, 2003, the filing date of appellant's claim. Mr. Shubert subsequently stated that he could not recall whether appellant verbally told him about the incident since it occurred almost two years ago. He also stated that appellant may have told him about the incident, but he did not remember it because no big deal was made out of it. Mr. Shubert noted that on the next day following the alleged injury, appellant did not complain to him about any injury, aches or pains and that appellant performed his assigned duty of constructing a replica wooden sink for a log cabin exhibit. He further noted that appellant's layoff on September 20, 2001 was no excuse for failing to provide written notice of the alleged injury immediately after it occurred. Mr. Shubert denied appellant's allegation that he advised him not to fill out an accident report because it would hurt his chances of being rehired. He related that he did not have a conversation with appellant concerning the alleged September 19, 2001 injury until approximately one year later.

Appellant responded that the construction of the replica wooden sink did not involve heavy lifting. He noted that he specifically stated that his knees were bruised and his back was "jammed up" in response to the question of his coworker, Mr. Huskey, as to how he was doing on September 20, 2001. Although Mr. Huskey stated that, on the morning of September 20, 2001, appellant told him that his back was sore, he stated that he had no knowledge of why appellant left early on September 19, 2001.

Further doubt is cast on appellant's claim by the employing establishment's response to his hearing testimony. Ms. Westfaul, an employing establishment human resources officer, disputed that appellant complained to his crew leader and his first-line supervisor about the alleged injury. She stated that although appellant used four hours of sick leave on September 19, 2001, he reported to work and performed his duties as usual on the following day. She also stated that after working the scheduled 10-hour shift on September 20, 2001, appellant followed

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<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

<sup>7</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>8</sup> *Charles E. Evans*, 48 ECAB 692 (1997).

Mr. Huskey home where they loaded a full-sized truck rear-end, weighing approximately 350 pounds into appellant's truck. Mr. Huskey confirmed Ms. Westfaul's version of the September 20, 2001 events. He stated that after working their shift on September 20, 2001, appellant went home with him and they lifted a truck rear-end weighing at least 350 pounds into appellant's truck. Although he noted that the truck rear-end weighed less than 200 pounds, appellant admitted that he and Mr. Huskey both loaded the equipment into his vehicle on September 20, 2001.

Appellant submitted a witness statement from Mr. Huskey in support of his contention that he sustained an injury on September 19, 2001. Mr. Huskey stated that he observed that appellant was wet on the day of the alleged injury, but he acknowledged that he did not actually see appellant fall. He stated that appellant told him that he fell while carrying a heavy piece of old flume. Mr. Huskey noted that he asked appellant if he was okay and appellant responded yes. He stated that appellant did not complain of any injury to his back and they completed the project prior to returning to the maintenance area. Appellant stated that there were three other witnesses, Marcus, Curtis and Mr. Chambers. However, he later testified at the hearing that Mr. Chambers was not a witness to the alleged injury and he did not submit any corroborative statements from Marcus or Curtis.

The record does not contain any contemporaneous medical evidence establishing that appellant sustained a back injury on September 19, 2001. Appellant stated that he delayed in seeking medical treatment because he thought his symptoms would improve. He stated that he did not know the extent or cause of his injury until June 2002. Appellant, however, contends that when he saw Dr. Conway on October 12, 2001, he complained of back and leg pain and numbness. The most contemporaneous evidence of record is Dr. Conway's October 12, 2001 treatment notes, which do not contain a history of appellant's complaints of back and leg pain. Further, the October 12 and 17, 2001 treatment notes of Ms. Thomas, a registered nurse, reflect appellant's treatment of a sinus infection, nasal congestion and chronic diarrhea. They do not provide a description of how appellant injured his back on September 19, 2001.

Dr. Conway's December 25 and 26, 2001 treatment records indicate that appellant was first evaluated for his back pain on these dates. In his June 24, 2002 radiology report, Dr. O'Malley found moderate to large-sized herniation of the nucleus pulposus to the right on the midline at L5-S1. The treatment notes covering the period February 20 through May 3, 2002 from appellant's physical therapists indicated that appellant was treated for his lower extremity and back conditions. Although Dr. Conway's treatment notes and prescriptions, Dr. O'Malley's report and the treatment notes of appellant's physical therapists reveal that appellant was treated for back and leg problems after the alleged September 19, 2001 injury, they failed to provide a description of how appellant injured his back and legs on the date in question.

Similarly, the September 18, 2002 statement of Ms. Jones, a hospital employee that appellant was not seen there after the alleged injury date of September 19, 2001 until January 28, 2002, does not provide a description of the September 19, 2001 injury. Further, Ms. Jones stated that appellant had not requested the hospital to file any workers' compensation paperwork during his visits.

Dr. Larson, appellant's own attending Board-certified family practitioner, reported that he could not locate an entry in appellant's chart indicating that he saw appellant in September 2001 for a back injury. He stated that entries made on June 20 and July 2, 2002 revealed that appellant told him that he sustained a back injury while working for the employing establishment.

Dr. Boyer's July 23 and October 10, 2002 reports and December 9, 2003 letter recounted appellant's description of his alleged injury which provided that while working for the employing establishment and carrying logs up a creek bed he fell. Dr. Boyer opined that appellant suffered a right-sided disc herniation at L5-S1 as a result of a fall on September 19, 2001. Dr. Boyer's initial presentation of appellant's account of the alleged injury was not contemporaneous to the alleged September 19, 2001 injury as it was reported almost one year after the alleged injury occurred.

Based on the above deficiencies, the Board finds that appellant has failed to carry his burden of proof to establish that he was injured by a fall in the performance of duty on September 19, 2001. Therefore, the Board finds that appellant has failed to establish fact of injury.

### **CONCLUSION**

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 3, 2004 and April 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 16, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member