

**United States Department of Labor
Employees' Compensation Appeals Board**

FRED D. PARKER, Appellant)
and) Docket No. 03-1633
U.S. POSTAL SERVICE, POST OFFICE,) Issued: March 29, 2004
Mission Viejo, CA, Employer)

)

Appearances:

Thomas Martin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 20, 2003 denying appellant's claim for a work-related back injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained a back injury in the performance of his federal duties.

FACTUAL HISTORY

On January 29, 2002 appellant, then a 51-year-old mechanic, filed a traumatic injury claim for compensation (Form CA-1) alleging that on January 15, 2002 he was walking to his work area when Rudolph Simon, a coworker, bumped into him and thrust his arms into him, causing him to fall backwards and hit a postal vehicle. On the bottom of the Form CA-1, Michael White, a coworker and witness to the alleged incident, wrote:

“Rudy’s contact with [appellant] was minor. As Rudy moved passed [appellant] he twisted to his left placing his back to [appellant] as he brushed [appellant] on the way. Rudy’s choice of direction placed Rudy between appellant and the vehicle. Rudy did all he could to avoid contact with [appellant].”

Appellant’s supervisor, Ignacio Quezada, wrote on the Form CA-1 that appellant refused his directive to see a doctor. In a statement dated January 23, 2002, Mr. Simon wrote:

“On Tuesday, January 15th at about 12 PM I went to the other side of the shop where my toolbox is set up. After retrieving the tool I was looking for, I turned around to go back to my work area.... I noticed [appellant] approaching and realized we had to pass each other, so I tried to go around him. Giving him the right of way. He stopped in my path, forcing me to squeeze between him and a vehicle that was to my right. I made physical contact with him when passing and apologized for the contact. I then continued to my work area....

“On the following day, ... our supervisor came to the shop to assess the problem between [appellant] and I. That’s when I realized that [appellant] was upset by the accident. After listening to him describe the event, I was compelled to call him a liar. He did not present the facts as they occurred. He said that I pushed him out of my way and said ‘so what.’ That is entirely untrue. I did my best to pass him without making contact. He deliberately cut off the path. As he stood there, contact was unavoidable. But it was as slight as I could make it given the circumstances....”

* * *

“At this time I would like to add that it seem[ed] to me that [appellant] may be trying to use me as an instrument to gain whatever he is looking to get from the Postal Service. This is not the first time he has tried to use me, to not only take attention away from himself, but to try to make me look bad to my managers. I have no idea why.”

In a January 19, 2002 letter, Mr. White wrote:

“On the morning of January 15th I was situated inside a vehicle that was parked in the garage.... While performing a visual inspection on the inside of that vehicle, I noticed [appellant] enter the area directly in front of the vehicle... he was leaving

the wash rack area. Rudy Simon who was inspecting the vehicle to my right, simultaneously initiated movement in the direction of the wash rack. Rudy's forward movement was closing the distance between them; [appellant] was standing still in front of me. Both Rudy and [appellant] were aware of the others' presence because as the two grew close, [appellant's] attempt at moving out of the way was met with Rudy's already committed direction and inadvertently limited the distance between the two of them and therefore caused Rudy to brush against [appellant] as Rudy moved past [appellant.] Neither party sustained any change in their upright alignment as a result of the contact and that the word brush does describe their interaction due to the minuscule amount of contact between the two. Rudy's choice of direction was to move towards the left of [appellant's] position between [appellant] and the vehicle I was in.

"[Appellant] immediately looked at me and within seconds became boisterous about the encounter.... [H]e approached Carlos ... and said 'your boy just bumped into me.'"

In a January 29, 2002 letter, Mr. Quezada wrote:

"On January 16, 2002, at approximately 1100, I received a telephone call from [appellant] ... [who] informed me that Rudy ... had 'bumped' him the day before and he considered that as '*violence in the workplace*. I drove to investigate.... The first person I interviewed was [appellant]. *By then [appellant's] story had changed dramatically* ... from a bump [appellant's] story had escalated to an altercation and Rudy had '*body checked him; much a like a football player, with his arms crossed*'.... I interviewed Michael White; his testimony was different from [appellant's]. Michael stated that he was working in a Long Life Vehicle (LLV) and the complete incident occurred right in front of him. [Appellant] and Rudy *barely made contact* while passing each other, with Rudy saying 'excuse me' as they brushed in passing. I th[e]n interviewed Rudy Simon and his testimony mirrored Michael White's statement." (Emphasis in the original.)

Mr. Quezada also stated that he spoke to appellant by telephone on January 18, 2002 and was told by appellant that he had back pain from the incident which he described as being thrown against the LLV and that he wished to fill out a Form CA-1. Mario Gallardo, the human resource specialist who I asked to get involved, then instructed appellant to be examined by a doctor, but appellant refused to see the doctor.

In a February 5, 2002 letter from Mr. Gallardo, the employing establishment challenged appellant's claim noting that appellant's story changed over time, was contradicted by the statements of Mr. White and Mr. Simon and because appellant refused to seek medical treatment when directed to do so.

In a February 26, 2002 letter, the Office requested more information from appellant.

In a March 7, 2002 letter, appellant wrote that the alleged incident was actually the second time Mr. Simon bumped into him that day. The first incident occurred at approximately 9:30 a.m. Appellant stated that during the alleged incident Mr. Simon “dashed across the passageway to collide” with him. The collision caused appellant to hit the LLV striking his back on the nose of the vehicle and bounce off. Appellant stated that he then spoke to Carlos Blackman, who refused to get involved because everyone knew there was something going on between appellant and Mr. Simon. Appellant also speculated that Mr. White’s vision of the alleged incident was blocked because the LLV hood was raised and that when Mr. White described the contact as a “brush” and “minimal” he may have been referring to the earlier, 9:30 a.m., contact between appellant and Mr. Simon. Appellant also stated that he did not refuse medical treatment but told Mr. Gallardo that he had previous commitments, that he was to go on vacation for a week and if the pain persisted he would file a claim after vacation. Appellant reiterated that he did not refuse medical attention; he refused an overtime situation that would have caused him to miss his prior commitments. Appellant stated that upon return from his vacation he was issued a letter of warning for failure to follow Mr. Gallardo’s instructions to see a doctor. Appellant added that he received treatment from a chiropractor on January 30, 2002.

In a February 7, 2002 report, Dr. Phillip Castellano, an orthopedist, noted that appellant stated that he was pushed by a coworker against a postal vehicle and since then has been having back spasm. He diagnosed status post lumbar contusion with sacroiliac irritation and added that appellant was being treated by a chiropractor.

In a March 25, 2002 decision, the Office denied appellant’s claim finding the evidence of record did not support that he sustained the injury as alleged. The decision noted the inconsistencies in appellant’s own representations of the events and his statements were inconsistent with other witness statements. The Office also found the medical evidence insufficient. Appellant requested a hearing and submitted an April 26, 2002 report from Dr. Minh Tran, an orthopedist, who stated that appellant presented with back pain to palpation of his bilateral paraspinal muscles, but no pain on straight leg raising. He diagnosed a contused back and noted that appellant stated that he was injured when he ran into another person and landed backwards on a vehicle. Dr. Tran noted that appellant’s complaints and objective findings were consistent with the history of the injury.

In an April 29, 2002 form report, Dr. Michael Gooing, a chiropractor, stated that he first examined appellant on January 30, 2002. Dr. Gooing diagnosed segmental dysfunction in three areas and subluxation at L5, L4, T10, C1 and C2 as determined by x-ray. He noted that appellant stated that he was bumped into a vehicle by a coworker (Mr. Simon) causing his back to strike the vehicle snapping his low back and causing him to spin around. Dr. Gooing found appellant totally disabled. The record also contains several progress notes from Dr. Tran indicating that appellant was receiving treatments. Appellant returned to light-duty work on June 3, 2002.

At the October 31, 2002 hearing, appellant testified that Mr. Simon had told a supervisor that he did not like appellant which appellant speculated was because he refused to join Mr. Simon in ganging up on a coworker. He testified that Mr. Simon dashed at an angle toward appellant and forced him into the vehicle. Regarding Mr. White’s statement, appellant stated that Mr. White’s vision was obstructed by the raised hood. He stated that he did not seek

medical treatment immediately because he was to take vacation and hoped his back would feel better after that. When he did not improve, he sought treatment. Finally, appellant testified that Mr. Simon dashed at him, his arms thrust out and he pushed appellant against the vehicle.

In a December 9, 2002 letter from the employing establishment, Mr. Gallardo argued that appellant's testimony was not credible. Specifically, he argued the evidence supported that it was Mr. Simon, not appellant, who had his back to the vehicle and therefore could not have pushed appellant into the LLV and that appellant's stories were inconsistent in how they described the alleged incident. He noted that appellant described the contact with Mr. Simon at various times as "bumped," "pushed," "body checked," and "blocked with arms extended." The letter also noted that Mr. White said that his view was not obstructed by the hood, noting the vehicle was in the shop to fix the steering column, a repair that would not require raising the hood. Finally, the letter stated that the medical evidence was of diminished probative value as it was based on an inaccurate history of the incident. Mr. Gallardo also submitted a handwritten diagram by Mr. Simon showing how the incident occurred.

In a December 23, 2002 response, appellant's representative argued that appellant's representation was credible in that he immediately reported the incident to his supervisor, that appellant explained why he did not seek medical attention immediately, *i.e.*, he was going on vacation and thought his back pain would improve while away from work and when it did not he sought medical attention. He also alleged that Mr. Gallardo was biased against appellant noting that he insisted appellant see the employing establishment doctor immediately or he was on his own with his claim. Appellant also argued that Mr. White's entire statement lacked credibility because the raised hood blocked his vision. In addition, he argued that Mr. Simon's and appellant's statements and Mr. Simon's diagram had appellant walking from Mr. White's right to left and Mr. Simon from left to right, while Mr. White's statement had them moving in the opposite direction. Finally, appellant argued that no one disputes there was contact between the two men.

In a March 20, 2003 decision, the hearing representative denied appellant's claim finding that appellant had not established he sustained an injury in the performance of his federal duties. The decision found that the two men brushed against each but not that appellant was injured after being pushed into the vehicle.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that he or she sustained an injury while in the performance of duty and that he or she had disability as a result thereof.¹ Although an injury does not have to be confirmed by eye witnesses, the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action. The burden is on the employee to establish that he sustained an injury at the time, place and in the manner alleged.² An employee has not met this burden where there are

¹ *Daniel Hickman*, 34 ECAB 1220 (1983).

² *Joseph Fournier, Jr.*, 35 ECAB 1174 (1984).

such inconsistencies in the record as to cast serious doubt on the validity of the claim.³ Once it is established that the employee experienced an employment incident as alleged, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁴

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

ANALYSIS

In the present case, appellant has not established that the incident occurred as alleged. Appellant's description of the severity of the contact, a critical issue in the case, changed repeatedly. Immediately after the incident, appellant told Mr. Blackman that Mr. Simon "bumped" into him. In his January 16, 2002 statement to Mr. Quezada, appellant stated that he was "body checked." In a January 18, 2002 telephone conversation with Mr. Quezada, appellant stated that he was "thrown against the vehicle." In his January 29, 2002 Form CA-1, appellant stated that he was "bumped" by Mr. Simon. Appellant characterized the contact to Dr. Gooing as a "bump," but later described the injury to Dr. Castellano as a "push." In a March 7, 2002 letter, appellant stated that Mr. Simon "dashed across the room to collide" with him.

Appellant's more aggressive characterizations of the contact are different from the separate statements of Mr. White and Mr. Simon to Mr. Quezada and to the Office. Mr. White on the Form CA-1 and in his January 19, 2002 statement described the contact as a "brush." He also stated that there was minuscule contact between the two that caused neither man to hit the LLV. Mr. White also stated that Mr. Simon apologized to appellant, a fact that agrees with Mr. Simon's statement of the event. Mr. Simon also described the contact as far less severe.

In addition, appellant's actions immediately following the alleged contact were inconsistent with what would be expected following a physical assault. Specifically, appellant knew at the time of the incident that there was a potential controversy and that a claim would be filed, yet he did not seek medical attention until January 30, 2002. Separately, these discrepancies may not be enough to raise questions about the accuracy of appellant's statements, but together they create serious doubts about appellant's version of events.

³ *Samuel J. Chiarella*, 38 ECAB 363 (1987).

⁴ *John J. Caralone*, 41 ECAB 354 (1989).

⁵ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

Appellant also argued that Mr. White's statement should be discounted because his vision was blocked. But Mr. White stated that the hood was not up and pointed out that there was no need to raise the hood to repair the steering column on the vehicle. Appellant also argued that Mr. White's statement lacked credibility because he misstated the direction each man was walking at the time of the incident. However, the direction they were walking is not a critical issue whereas the severity of the contact is and Mr. White was consistent in describing in detail the relatively inoffensive contact he witnessed.

The medical evidence in this case is also insufficient to meet appellant's burden of proof. Dr. Castellano did not indicate that appellant had a disability resulting from what he described as appellant being pushed against a postal vehicle. Dr. Tran also failed to state that appellant was disabled as result of landing on his back after he was run into by a coworker. Dr. Gooing did state that appellant was totally disabled after his back was snapped and he struck a postal vehicle with enough force to spin him around. This form report is insufficient to meet appellant's burden of proof as it fails to explain how or why appellant's diagnosed condition prevented him from working.

Moreover, in light of the Board's finding above on the severity of the incident, the Board further finds that the medical evidence appellant submitted is based on an inaccurate factual history of the incident and has therefore further diminished probative value.

CONCLUSION

For the reasons described above, the Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of his federal duties.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 20, 2003 is affirmed.

Issued: March 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member