

she had several mail trays to remove from her cart when Mr. Sci came up with his cart; prior to her putting the last tray on top of her cart, Mr. Sci grabbed her cart and shoved it very forcefully; the cart spun around and struck her right arm and left hand; she stated that he did not need to do that and Mr. Sci replied in a threatening and hostile voice that she was taking up all the room. Appellant stated that Cliff Hilliard was passing by at that moment and she told Mr. Hilliard that she felt she was being harassed. Her arm and shoulder seemed okay “but it does hurt now because the sudden jolt, it [i]s a response to an existing condition that requires medical treatment periodically that is a direct result of an automobile injury from some time ago.” In a statement prepared for the employing establishment, on August 20, 2003, Mr. Sci stated that on that date he was pushing his cart down an aisle that appellant’s cart was blocking. He decided to move her cart so he could pass, but appellant then grabbed her cart and wedged him in. She backed off and told Mr. Sci that he was harassing her and that about 30 seconds later she told Mr. Hilliard that Mr. Sci had sexually harassed her.

In an August 21, 2003 statement, Mr. Cliff, appellant’s supervisor, stated that on August 20, 2003 she stopped him and advised that Mr. Sci was bothering her and sexually harassing her. The managers of distribution then talked to appellant and, on their instructions, Mr. Cliff had her prepare a statement. She then asked him the meaning of sexual harassment, when he told her, she said it was not sexual harassment, just harassment and that she at no time told him that she was injured or in pain. In an August 21, 2003 statement, Richard Pasek, manager of distribution operations, stated that on August 20, 2003 appellant described an incident to him and Edward Hardy, acting manager of distribution operations, in which Mr. Sci forcefully pushed her cart out of the way, with the cart striking her right arm and left wrist. He interviewed appellant, who did not state that she was hurt or wanted to file an accident report. Mr. Pasek also interviewed Mr. Sci, who admitted to moving her cart to get by but who stated that he moved her cart without excessive force and did not strike her. Mr. Sci also stated that, as he was trying to get by with his cart, appellant grabbed her cart and slammed it into his. Mr. Pasek stated that a reenactment of the incident was performed by both parties at different times and that, after reviewing the facts, management deemed that the incident was not sexual harassment, a credible threat or an assault. In an undated statement, apparently prepared on or about August 21, 2003,¹ Mr. Hardy stated that on August 20, 2003 appellant stated that Mr. Sci had stalked her in the past and described the cart incident. Mr. Hardy asked her if she was hurt and she stated no, it just hit her hand and arm. Appellant was asked if she needed medical attention and she stated no and was asked to write a statement. Mr. Sci stated that appellant rammed her cart into his after he moved her cart and that there were no witnesses.

On August 29, 2003 the Office advised appellant that it needed medical evidence regarding her August 20, 2003 injury and her earlier automobile accidents. Appellant submitted reports dated August 28 and 29, 2003, from a physician’s assistant diagnosing acute neck pain and right shoulder pain and stating that she was unable to work from August 22 to 26, 2003. In a September 8, 2003 letter, appellant stated that she was injured in automobile accidents on March 7, 1997 and July 1, 2001.

¹ This statement is marked as received by the employing establishment’s injury compensation office on the same date as the other statements.

By decision dated October 7, 2003, the Office found that appellant had not met the requirements to establish that she sustained an injury, as the medical evidence, was not sufficient to support her claim.

Appellant requested a hearing, which was held on August 31, 2004. She testified that she injured her back and shoulders in the 1997 automobile accident and injured her neck and shoulders in the 2001 automobile accident. She last saw the doctor that treated her for these injuries in 2002 and had occasionally received cortisone injections for arthritic changes in her extremities. In 2003 she was feeling fine and 100 percent able to function in her job until the August 20, 2003 incident. She noted that, as she was about to get the last tray off her cart, a coworker violently grabbed her cart and shook it and she was still holding onto it and it spun around and hit her hand and right shoulder. Appellant stated that she had a very good grip on the cart, that the coworker tried to wrench it out of her hands and she believed her right arm and shoulder were injured from the jarring and jerking rather than the striking. Appellant called to her supervisor and Mr. Sci came toward her like he would lunge at her and the “supervisor had to get in the middle and with his hands push him away.”

By decision dated November 8, 2004, an Office hearing representative found that the evidence established that some type of confrontation between appellant and her coworker did take place. He found appellant’s testimony credible and accepted that the August 20, 2003 incident occurred as she alleged, *i.e.*, a coworker jerked the cart she was holding, causing her arm to jerk when she held onto the cart. The hearing representative found, however, that appellant failed to establish fact of injury because she failed to submit any medical evidence supporting that a physical injury resulted from the incident.

On January 17, 2005 appellant requested reconsideration and submitted a December 16, 2004 report from Dr. Philip Hardy, a Board-certified orthopedic surgeon, who stated that, when he first saw appellant on November 19, 2003, “she indicated that the onset of right shoulder symptoms were as the result of an injury when a cart was forcefully pulled out of her hands by another U.S. Postal employee during the course of her employment for the USPS on August 20, 2003.” He stated:

“In spite of the fact that she underwent several previous injections and management for prior shoulder problems, she indicated [that] her shoulder was doing well at the time of the new injury on August 20, 2003. Therefore, according to the patient’s testimony on the subject, her symptoms were permanently aggravated as the result of that injury, therefore[,] consideration should be given by the USPS for coverage of at least a portion of the management for the ongoing shoulder problems.”

By decision dated March 8, 2005, the Office found that appellant had not established that she sustained an injury on August 20, 2003, as Dr. Hardy’s report contained no symptoms, findings on examination, secure diagnosis or a reasoned opinion on causal relation.

Appellant requested reconsideration and submitted copies of Dr. Hardy’s notes from her visits from November 19, 2003 to September 8, 2004. His initial evaluation on November 19, 2003 was for right shoulder pain, with an onset of symptoms when a coworker pulled her cart out

of her hands forcefully on August 20, 2003. Dr. Hardy noted that x-rays in 2002 showed calcifications of the rotator cuff and that she had received cortisone injections since 1998, lastly in April 2003. Right shoulder examination showed motion that was asymmetric compared to the left, no crepitus, questionable tenderness and a histrionic reaction with acute sensitivity to light touch. Dr. Hardy concluded: "I am really unable to demonstrate any obvious abnormal findings involving the shoulder, although she appears to demonstrate weakness, but it is more of a giving-way rather than true muscular weakness. Otherwise the remainder of the examination is negative." He diagnosed aggravation of preexisting degenerative disc disease of the cervical spine, calcific tendinitis of the right shoulder, which was almost completely resolved on x-rays and impingement syndrome of the right shoulder. Physical therapy was prescribed and she was released to modified duty with no overhead lifting and no lifting over 10 pounds with the right arm. On April 12, 2004 Dr. Hardy released appellant for full duty and an August 27, 2004 magnetic resonance imaging (MRI) scan of her right shoulder showed minimal supraspinatus tendinopathy and a type three acromion.

By decision dated May 18, 2005, the Office denied modification of its March 8, 2005 decision, finding that Dr. Hardy's office notes were based on an inaccurate history that a coworker forcefully pulled a cart out of her hands.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim³ including the fact that the individual is an "employee of the United States" within the meaning of the Act,⁴ that the claim was timely filed within the applicable time limitation period of the Act,⁵ that an injury was sustained 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.⁶

Establishing whether an injury, traumatic or occupational, was sustained in the performance of duty as alleged, *i.e.*, "fact of injury," and establishing whether there is a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed, *i.e.*, "causal relationship," are distinct elements of a compensation claim. While the issue of "causal relationship" cannot be established until "fact of injury" is established, acceptance of fact of injury is not contingent upon an employee proving a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed. An employee may establish that an injury occurred in the performance of duty as alleged but fail to

² 5 U.S.C. § 8101 *et seq.*

³ See *Daniel R. Hickman*, 34 ECAB 1220 (1983); 20 C.F.R. § 10.110.

⁴ *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁵ 5 U.S.C. § 8122.

⁶ See *Daniel R. Hickman*, *supra* note 3.

establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.⁷

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an “injury.” The term “injury” as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to or contact with, certain factors, elements or conditions.⁸ The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.⁹

ANALYSIS

There is considerable doubt that the August 20, 2003 incident occurred as alleged by appellant. The Board is unable to visualize why appellant would have a very good grip on her cart when she was about to remove her last tray of mail off it and how the cart spun around in spite of this grip. Managers at the employing establishment had similar difficulties and were unable to reenact the incident as alleged by appellant, leading them to conclude no assault had occurred. Appellant’s accounts of the incident also vary. Her account on August 20, 2003 was that the coworker shoved her cart, but at the August 31, 2004 hearing she testified that the coworker shook the cart and tried to wrench it out of her hands. Appellant testified at the hearing that she started crying immediately after the incident described and that her supervisor had to push the coworker away from her. However, this version of the incident finds no support in the statement of her supervisor, who saw her about 30 seconds after the injury. This casts doubt on the accuracy of her statements.

The evidence, however, does establish that an incident with a coworker involving carts occurred on August 20, 2003. Mr. Sci stated that appellant rammed her cart into his after he moved her cart, wedging him in. Given appellant’s statements showing her animosity toward Mr. Sci, based on her belief that he had been harassing her for some time, Mr. Sci’s version, which is contained in his written statement and in the statements of the employing establishment’s managers as what he told them at the time of the incident, is at least equally credible.

Which version is believed makes no difference in determining whether the August 20, 2003 incident occurred in the performance of duty. Other than the affirmative defense of intent to injure another, which must be invoked in the Office’s initial adjudication of a case,¹⁰ there is no basis for denying compensation because the employee was an aggressor or initiator or

⁷ As used in the Act, the term “disability” means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. See *Frazier V. Nichol*, 37 ECAB 528 (1986).

⁸ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Barry Himmelstein*, 42 ECAB 423 (1991).

otherwise did something imputing culpability or fault on his or her part.¹¹ Thus, any injury appellant sustained is equally compensable whether Mr. Sci shoved her cart or appellant shoved her cart into his.

The medical evidence, however, is not sufficient to establish that appellant sustained a personal injury resulting from the August 20, 2003 employment incident. The only medical evidence is from Dr. Hardy, a Board-certified orthopedic surgeon, who first saw her three months after the injury.¹² In his initial report, which was dated November 19, 2003, Dr. Hardy was “unable to demonstrate any obvious abnormal findings involving the shoulder.” None of Dr. Hardy’s office notes contains any opinion on the possible causal relation between the August 20, 2003 incident and her shoulder condition, for which he treated her beginning November 19, 2003.

In his December 16, 2004 report, Dr. Hardy stated that her symptoms were permanently aggravated as a result of her August 20, 2003 injury. However, the only basis for this opinion is that appellant indicated her shoulder, which had previously been injured twice in nonwork-related automobile accidents, was doing well at the time of the August 20, 2003 injury. An opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to establish causal relation.¹³ Appellant’s shoulder may have been asymptomatic immediately before the August 20, 2003 incident, but it had been symptomatic within four months of the incident to require a cortisone injection. Appellant has submitted no evidence that she received any medical attention for her shoulder between August 29 and November 19, 2003. Dr. Hardy has not provided sufficient rationale explaining why appellant’s shoulder condition beginning three months after the August 20, 2003 incident is related to that incident rather than to her preexisting, nonwork-related condition. His opinion is not sufficient to meet appellant’s burden of proof.

CONCLUSION

The Board finds that the factual evidence establishes that an employment incident involving a coworker and a cart occurred on August 20, 2003, but that the medical evidence does not establish that this incident resulted in a personal injury to appellant.

¹¹ *Allan B. Moses*, 42 ECAB 575 (1991).

¹² Reports from physician’s assistants do not constitute competent medical evidence, as they are not reports of a physician as defined by 5 U.S.C. § 8101(2). *George H. Clark*, 56 ECAB ____ (Docket No. 04-1572, issued November 30, 2004).

¹³ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

ORDER

IT IS HEREBY ORDERED THAT the May 18 and March 8, 2005 and November 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board