

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

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**MICHAEL STEMPIHAR, Appellant**

**and**

**U.S. POSTAL SERVICE, CIVIC CENTER  
STATION, Alameda, CA, Employer**

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**Docket No. 04-2155  
Issued: February 9, 2005**

*Appearances:*  
*Michael Stempihar, pro se*  
*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 August 24, 2004 appellant filed a timely appeal of December 3, 2003 and May 14, 2004 decisions of the Office of Workers' Compensation Programs that found that an employment incident on April 1, 2002 did not occur in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether an employment incident on April 1, 2002 occurred in the performance of duty and resulted in an emotional condition. Although appellant referred to other employment incidents during the development of his claim,<sup>1</sup> the only issue decided by the Office was whether the April 1, 2002 employment incident occurred in the performance of duty and resulted in an emotional condition. As the Board's jurisdiction is limited to review of final decisions of the Office, this is the only issue before the Board on appeal.

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<sup>1</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997) provides that in emotional stress cases a new claim should always be required if new incidents are alleged. *See Theresa L. Andrews*, 55 ECAB \_\_\_ (Docket No. 04-887, issued September 27, 2004).

## **FACTUAL HISTORY**

On April 17, 2002 appellant, then a 45-year-old distribution clerk, filed a claim for compensation for a traumatic injury sustained on April 1, 2002 when he was “physically assaulted by another employee while carrying registered mail on the work floor and subsequently ignored by management.” Appellant listed the nature of the injury as “stress.” Appellant stopped work on April 2, 2002. The employing establishment stated that appellant was harassing a coworker who was in the middle of a transaction with a customer on the window.

Appellant submitted form reports dated May 24 to 28, 2002 from Dr. Jonas Stern, Ph.D., a clinical psychologist, diagnosing adjustment disorder with anxiety and depressed mood and indicating that appellant was disabled for work. In a June 5, 2002 narrative report, Dr. Stern set forth a history of the April 1, 2002 incident:

“He reports that on [April 1, 2002] he got into an altercation with a coworker who ‘verbally assaulted him’ and knocked a tray of mail into his face. He describes this coworker as being very large in stature and intimidating. He states that he feels unsafe at work. He further states that after the incident occurred, he went to speak to his manager to report the incident and receive assistance. Contrary to this, he states that the manager ‘turned the tables on him, suggesting that he provoked the situation.’ When the patient attempted to further explain his position he was ordered to ‘shut up’ and was ‘taken off the clock.’”

Dr. Stern noted that appellant had a long history of interpersonal problems with this supervisor, that he feared he was being targeted for termination, that he was terminated in 1996, without just cause but was brought back to work and that he felt management was retaliating toward him for this and because of his activities as a union steward. After describing appellant’s findings on examination and the treatment provided, Dr. Stern quoted the definition of an adjustment disorder from the *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed.) (DSM-IV) and stated:

“In [appellant’s] case, his stressors are recurrent and are in relation to events that occur in the workplace. They threaten his livelihood, safety and decrease his sense of self-confidence and self-worth. He reports being the target of verbal threats, degradation, intimidation and general hostility that have been occurring over the years. Exposure to such conditions over this duration of time can certainly precipitate the symptoms that [appellant] is experiencing, *i.e.* anxiety, irritability, excessive worry, depressed mood, sleeplessness, impaired concentration, fatigue, feelings of hopelessness, decreased self-confidence and a diminished sense of self-worth.”

By letters dated May 7, 2002, the Office requested further information from appellant and the employing establishment regarding his claim. In a June 6, 2002 response, appellant stated that he had been experiencing extreme mental, emotional and physical stress as a result of verbal and physical abuse, to which he had been subjected on numerous occasions over the past few months. Appellant submitted letters he had written to the employing establishment and grievances he filed regarding alleged verbal assaults by the station manager, Stephanie

Anderson, his supervisor, Hellen Harvey and a coworker on November 1, 2001 and February 5 and 14, 2002. In an April 1, 2002 statement addressed to Ms. Anderson, appellant described the incident on that date, stating that at about 5:14 p.m. he signed for registered mail (eight envelopes and two parcels) that had been taken in by the window clerks, that as he was carrying the tray of registered mail from the window he heard the window clerk, Curtis Haney, ask him to leave the tray, that Mr. Haney raised his voice in repeating this request, that Mr. Haney then stepped in front of him and in a raised voice again asked him to leave the tray and that Mr. Haney grabbed the tray, then released his grip and violently slapped the two parcels off the tray, with the top parcel striking appellant in the face. Appellant stated that he then returned to the window area and yelled out that he was being assaulted by the window clerk, that Ms. Anderson asked him what was wrong, that he explained that he had just been assaulted, that Ms. Anderson asked him what he was doing on the window, that he explained that he was getting the registered mail, that she told him to leave the window area, that they walked onto the work floor where Ms. Anderson accused him of not following instructions by leaving the tray and that she would not answer his question how he was supposed to carry the mail, instead saying she would put him off the work floor if he did not follow instructions. Appellant continued that he proceeded to the accountable cage where a number of carriers were waiting to be cleared, that as he began to clear the carriers Ms. Anderson followed him into the accountable cage, that she became offended when he asked her if she had signed the entry sheet and that she yelled "shut up" to him and told him to clear the carriers, which he told her he was doing. Appellant stated that he went to his supervisor to inform her he was going to the hospital because he was stressed out, that Ms. Harvey told him to complete a leave request form, that he was doing so when Ms. Anderson told him to leave the building and instructed a police officer and a security guard to escort him out of the building, that Ms. Anderson did not reply to his question whether she was overriding his supervisor's instructions to complete a leave request form, instead telling Ms. Harvey to put him off the clock and that he completed the form, placed it on his supervisor's holdout and left the building.

By decision dated June 13, 2002, the Office denied appellant's claim on the basis that it had not received the requested factual or medical evidence. The following day the Office vacated this decision on the basis that the evidence appellant submitted was received on June 11, 2002 but not associated with his file at the time of the June 13, 2002 decision.

The employing establishment submitted statements regarding the April 1, 2002 incident. In an April 1, 2002 statement, Ms. Harvey stated that on that date at about 5:10 p.m. she saw and heard appellant verbally attacking the window clerk, Mr. Haney, that Ms. Anderson was steadily telling appellant to be quiet and that appellant was so argumentative that he stated that he was going to keep talking regardless of what Ms. Anderson said. Ms. Harvey continued that appellant approached her and wanted to explain; that appellant wanted to continue talking to her but she insisted that he finish clearing the waiting carriers, that Ms. Anderson instructed him to clear the carriers, that appellant instead filled out a leave request form even though Ms. Anderson told him to stop and that Ms. Anderson told postal police to escort appellant out and told her to put him off the clock immediately, which she did.

Mr. Haney submitted two statements. The one dated April 1, 2002 stated that about 5:05 p.m. appellant came and took the registered mail and the box it was in, that he asked him not to take the box, that appellant just walked away, that he followed appellant to the work floor

and told him to give back the box, that appellant said he needed the box, that he asked him then to bring it back when he was done and appellant said it is not yours, that he handed appellant a tray but he would not use it, that he grabbed the box but appellant held on and that he pulled harder and the two parcels fell to the floor, whereupon appellant headed for the window yelling loudly that he had been assaulted. In an April 2, 2002 statement, Mr. Haney apologized for his behavior the previous day, stating that he should have just let appellant take the cardboard box. Mr. Haney stated that he did not assault appellant or touch him physically at any point during the April 1, 2002 incident. The customer at the window on April 1, 2002 prepared a statement that Mr. Haney asked a coworker to please not remove his box from his work space, that this request was ignored, that Mr. Haney asked a second time “in a nice respectable and very kind manner” and was again ignored, that Mr. Haney followed the coworker to the back begging him to please not take his box and that the coworker returned to the front and reported a totally distorted and untrue version of what occurred.

In an April 1, 2002 memorandum, Ms. Anderson stated that on that date about 5:00 p.m. she went to the window operation where appellant and Mr. Haney were having words, that appellant began yelling and was out of control, that she asked him numerous times to be quiet and go behind the window operation as there was a customer present and that the customer said that Mr. Haney asked appellant very nicely to bring a tray to retrieve the registered mail but that appellant refused and began to take the tray, which Mr. Haney began to hold on to. Ms. Anderson continued that appellant began to yell at the customer, that she gave him a direct order to remove himself from the window area and be quiet, that she apologized to the customer, that appellant was waiting behind the window operation, that she again asked him to calm down and be quiet, that he was out of control and that she gave him a direct order to shut up. Ms. Anderson stated that appellant went into the accountable cage, that she asked him to clear the carriers and he continued to yell, that she entered the accountable cage and asked him again to clear the carriers and not to exhibit that behavior in front of them, that appellant cleared the carriers and she went to her office, that appellant began to slam the accountable cage door and talk loudly, that she again attempted to talk to appellant but he continued to yell, that she requested that he clock out and leave, that he insisted on completing a leave request form, that she informed him he was being placed on emergency suspension and that the postal police escorted him off the premises at her request. A postal inspector’s April 24, 2002 report described appellant’s allegations and stated that the statements from the other witnesses and participants indicated that appellant exhibited loud and aggressive behavior with Mr. Haney and Ms. Anderson. The postal inspector concluded that the matter was administrative rather than criminal. In a May 14, 2002 letter to the Office, Ms. Anderson stated that appellant was placed on emergency suspension on April 1, 2002 for unacceptable conduct, namely continuous disregard to follow the instructions of his manager and creating a hostile work environment. Ms. Anderson noted that management and postinspector investigations of appellant’s allegation of assault revealed that appellant exhibited loud and aggressive behavior and was clearly the aggressor.

By decision dated September 26, 2002, the Office found, addressing only the April 1, 2002 incident, that this incident did not occur in the manner alleged by appellant, that it was not accepted that an assault or verbal abuse occurred and that any emotional reaction to the alleged assault or verbal altercation was self-generated.

By letter dated October 24, 2002, appellant requested an oral hearing and alleged a conspiracy by employing establishment management. At a hearing held on June 24, 2003 appellant testified that his primary afternoon function was the accountable cage and the clearing of carriers and that he picked up registered mail in the window services area daily. Appellant described the April 1, 2002 incident, stating that he carried the tray of registered mail away, that Mr. Haney followed him and hollered at him, that Mr. Haney swiped the top parcel off and it struck his face, that he turned and yelled that he was being assaulted, that Ms. Anderson asked him what was wrong, that she cut him off when he tried to explain, that she told him to clear the carriers but continued to badger and verbally assault him, that he told his supervisor he was going to the hospital, that she told him to fill out a leave request form, but that Ms. Anderson saw him filling out the form and told him he would be removed. Appellant also testified that he filed a grievance regarding the April 1, 2002 incident but that it was denied because it was not timely filed.

By decision dated December 3, 2003, an Office hearing representative found that the April 1, 2002 incident did not arise in the performance of duty but rather involved an administrative or personnel matter and that error, abuse, harassment or discrimination were not established.

By letter dated March 18, 2004, appellant requested reconsideration and submitted a February 12, 2003 letter he had written to an administrative judge of the Equal Employment Opportunity Commission requesting a hearing and complaining of a history of abuse by employing establishment management. Appellant also submitted a March 17, 2004 statement from a carrier that, on April 1, 2002 at about 5:20 p.m. he saw Ms. Anderson follow appellant into the accountable cage, that they were both visibly upset, that appellant asked Ms. Anderson if she had signed in and that she told him to shut up and clear the carriers.

By decision dated May 14, 2004, the Office found that modification of its prior decisions was not warranted, that the mere fact that the manager was angry and told him to shut up did not establish abuse and that the evidence showed that appellant was the aggressor and did the yelling.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>2</sup> Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage

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<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

may be afforded.<sup>3</sup> Instructions given by supervisors in the exercise of their supervisory discretion are administrative in nature and thus not covered in the absence of a showing of error or abuse.<sup>4</sup>

Verbal or physical altercations that occur because of disputes over work matters are covered as arising out of employment.<sup>5</sup> The Board has recognized the compensability of verbal altercations but that does not imply that every statement uttered in the workplace will give rise to coverage under the Act.<sup>6</sup> There is no provision in the Act authorizing denial of compensation because the employee was an aggressor or initiator or otherwise did something imputing culpability on his or her part.<sup>7</sup>

Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>8</sup> The fact that an employee has established compensable factors of employment does not establish entitlement to compensation. Appellant must also submit rationalized medical opinion evidence establishing that he or she has an emotional condition that is causally related to the identified compensable employment factors.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background, 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 compensable employment factors identified by appellant.<sup>10</sup>

### ANALYSIS

There are discrepancies between appellant and the other participants regarding exactly what happened and what was said in the April 1, 2002 incident. Some of the particulars, though, are not in dispute. Everyone agrees that shortly after 5:00 p.m. appellant took a tray of registered mail from the window area where Mr. Haney was waiting on a customer, that Mr. Haney asked appellant not to take the tray, that words were exchanged and that appellant and Mr. Haney wound up both holding onto the tray and trying to take it from each other. This event occurred in the performance of duty, as appellant was reasonably fulfilling his duties at the time and the

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<sup>3</sup> *Michael Thomas Plante*, 44 ECAB 510 (1993).

<sup>4</sup> *Frank A. Catapano*, 46 ECAB 297 (1994); *Rudy Madril*, 45 ECAB 602 (1994).

<sup>5</sup> *Allan B. Moses*, 42 ECAB 575 (1991).

<sup>6</sup> *Dennis J. Balagh*, 52 ECAB 232 (2001).

<sup>7</sup> *Barry Himmelstein*, 42 ECAB 423 (1991); *Robert L. Williams*, 1 ECAB 80 (1948). Section 8102(a) provides that compensation is not payable if the injury was caused by willful misconduct or by the employee's intention to bring about the injury or death of himself or of another, but these affirmative defenses must be invoked by the Office in its original adjudication of a claim. *Latanya M. Cooper*, 51 ECAB 238 (1999).

<sup>8</sup> *Joel Parker, Sr.*, 43 ECAB 220 (1991).

<sup>9</sup> *James W. Griffin*, 45 ECAB 774 (1994).

<sup>10</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

altercation occurred because of a dispute over a work matter,<sup>11</sup> namely whether the registered mail should be taken in the window clerk's tray.

The evidence also clearly establishes that next appellant and the station manager, Ms. Anderson, engaged in a verbal altercation during which Ms. Anderson told him to shut up and that she ordered that appellant be placed off the clock and leave the building. The dispute with Ms. Anderson, however, concerned her instructions to appellant to leave the tray, leave the window area, not be loud, close out the carriers and clock out and leave. This was an exercise of Ms. Anderson's supervisory discretion and, as such, is compensable only if error or abuse is shown.<sup>12</sup> Appellant has not shown that Ms. Anderson acted unreasonably in any of her instructions to him on April 1, 2002. Appellant also has not shown that being told to shut up rose to the level of verbal abuse,<sup>13</sup> even if this phrase was delivered in a raised or loud voice.<sup>14</sup> The Board looks to the circumstances under which allegedly offensive or abusive phrases were uttered and the evidence in the present case shows that appellant was a willing participant in an argument that, by his account, lasted at least five minutes and that he was also loud.

There is no evidence that substantiates appellant's contention, denied by Mr. Haney, that Mr. Haney assaulted him by violently slapping a parcel out of a tray into appellant's face. Appellant has also not established error or abuse in Ms. Anderson's administrative actions of taking him off the clock, issuing an emergency suspension and making him leave the building. Appellant has the burden of substantiating these contentions and has not met this burden due to the lack of corroborating evidence.

As appellant has established one compensable factor of employment -- the altercation with Mr. Haney over the tray -- the Board will review the medical evidence to determine if it establishes that this compensable factor resulted in an emotional condition. Dr. Stern's June 5, 2002 report lends some support to appellant's claim for an emotional condition, but Dr. Stern's report reflects a history not supported by the record that a coworker verbally assaulted appellant and knocked a tray of mail into his face. The primary reason, however, that Dr. Stern's report is not sufficient to meet appellant's burden of proof is that Dr. Stern provided no explanation of how the one compensable factor on April 1, 2002 contributed to appellant's emotional condition. Instead Dr. Stern attributed appellant's condition to "verbal threats, degradation, intimidation and general hostility that have been occurring over the years." This does not meet appellant's burden of proving that the compensable aspect of the April 1, 2002 incident contributed to his emotional condition.

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<sup>11</sup> *Allan B. Moses*, *supra* note 5.

<sup>12</sup> *Rudy Madril*, *supra* note 4.

<sup>13</sup> See *Dennis M. Dupor*, 51 ECAB 482 (2000). The Board found no verbal abuse when the supervisor told the employee to shut up "and go out and do your f—king job."

<sup>14</sup> Verbal abuse was found not to be established by a showing of a raised voice in *Carolyn S. Philpott*, 51 ECAB 175 (2000) or by shouting in *Marguerite J. Toland*, 52 EAB 294 (2001).

**CONCLUSION**

Appellant has established one compensable factor of employment, but has not established that this factor contributed to his emotional condition.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 14, 2004 and December 3, 2003 decisions of the Office of Workers' Compensation Programs are modified to reflect that appellant established a compensable factor of employment and are affirmed on the basis that he did not meet his burden of proving that this factor contributed to his emotional condition.

Issued: February 9, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member