

and twisted his torso as he tried to walk away as she and Charles Thomas, a team leader, tried to give him something. He stated that her actions caused pain in his neck and back which aggravated a prior herniated disc which she knew about. Appellant stopped work on June 24, 2004 and returned to work on July 6, 2004. He listed Carolyn L. Allen, Linda Smith and Derek Watson, his coworkers, as witnesses to the alleged injury.

Appellant's claim was accompanied by an email message in which Mr. Thomas advised W. David Newton, a supervisor, that on June 24 and 25, 2004 appellant left him a voice mail message indicating that he was not feeling well. He did not state why he was not feeling well. Ms. Allen's July 1, 2004 statement provided that Ms. Johnson did not grab appellant in any way or twist him around. She observed Ms. Johnson rub his arm lightly while asking him to calm down. In statements dated June 29 and July 1, 2004, Ms. Smith and Mr. Watson, respectively, related that they did not personally observe any physical contact between appellant and Ms. Johnson or Mr. Thomas.

Appellant submitted a June 24, 2004 disability statement from Dr. Harvey B. Leslie, an internist, which found that he was unable to perform the duties of his regular employment beginning June 24, 2004 until his estimated return to work on July 6, 2004. He stated that appellant aggravated a preexisting herniated disc.

Mr. Newton controverted appellant's claim, stating that both Ms. Johnson and Mr. Thomas indicated that appellant was not injured on duty and that the witnesses he identified did not observe an injury. Ms. Johnson and Mr. Thomas stated that appellant's behavior and language were inappropriate and unprofessional and constituted misconduct. In a July 2, 2004 statement, Ms. Johnson denied grabbing appellant's right shoulder or twisting his torso. She further denied any physical contact with him that could be described as grabbing, twisting, pushing or pulling. Ms. Johnson stated that it never occurred to her to perform such actions given their relative size and strength difference and appellant's previously demonstrated volatile temper. She indicated that her right hand accidentally came into contact with the left sleeve of his suit jacket between his left shoulder and elbow and that this incident was different from the one he alleged. Ms. Johnson stated that appellant was standing in the aisle just outside and to the right of his cubicle opening and she was standing facing him just to the left. Her hands were still raised in both a calming and a defensive gesture because she had just tried to calm him down from an angry and potentially threatening outburst. As soon as Ms. Johnson felt the texture of the loose fabric of appellant's coat sleeve brushing across her hand, she immediately drew back her hand and told him that it was an accident. She stated that such light and brief contact with his left arm was totally inconsistent with and could not conceivably have caused the type of injury alleged. On June 23, 2004 Ms. Johnson was the supervisor in charge and appellant did not report that he sustained a physical injury or experienced any physical pain before he left the office. No other management personnel or employee told her that appellant had reported a physical injury or pain before he left the office. Ms. Johnson concluded that appellant's allegation that she grabbed him and twisted his torso was totally false.

In a July 1, 2004 statement, Mr. Thomas indicated that he was present during the entire discussion between appellant and Ms. Johnson. He stated that she did not grab or twist him around at any time. At one point appellant was in the aisle and appeared very agitated. Mr. Thomas saw Ms. Johnson briefly and lightly rub his left shoulder to try to calm him. Later,

while again trying to calm him down, Ms. Johnson's hand accidentally touched his left arm. In both instances, she touched him very lightly and on his left arm/shoulder. Mr. Thomas did not observe any action on Ms. Johnson's part that could have caused an injury. He expressed his willingness to submit a statement regarding a number of appellant's actions on June 23, 2004 that he considered to be willful conduct. Mr. Thomas noted that appellant did not report any injury, pain or discomfort before he left work on June 23, 2004. He also noted the voice mail message appellant left him on June 24 and 25, 2004 regarding his absence from work on those dates and his failure to explain why he did not feel well.

By letter dated July 22, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised him about the factual and medical evidence he needed to submit to establish his claim.

In an August 10, 2004 letter, appellant stated that while at work on June 29, 2002 he sustained herniated lumbar discs and described his resultant medical treatment. He experienced ongoing back pain and desired the Office to authorize a full body bone scan as recommended by his attending physician, to determine why he continued to experience such pain. Appellant disputed the statements provided by Ms. Johnson and Mr. Thomas, contending that they contradicted one another regarding the position of Ms. Johnson's hand on his body. He stated that the witnesses did not want to become involved in his claim due to fear of retribution by the employing establishment. Appellant contended that they were asked to sign a statement about the alleged incident by management. He further contended that he reported the alleged injury to Mr. Newton, stating that, after being in a tremendous amount of pain on June 24, 2004 and in need of medical treatment, he called work on that date. Robert Raines, an employing establishment director, told him to report his concerns to Mr. Newton who was out of the office during the week of June 21, 2004 and did not return to work until June 28, 2004. Appellant reported the injury to him on that date.

Appellant submitted a questionnaire completed by Ms. Allen, which indicated that she sat behind him at work, divided by an aisle and partition. She was at her desk on June 23, 2004 but, did not overhear Mr. Thomas at appellant's desk. Later that evening, Ms. Allen heard appellant using a very loud voice and she went to his work area. He was having a discussion with Ms. Johnson and Mr. Thomas about a piece of paper that Ms. Johnson had in her hand. Ms. Allen did not know what the paper was or what Ms. Johnson or Mr. Thomas said prior to the uproar that caused her to get up from her desk. She responded "yes" that she heard appellant tell Ms. Johnson "don't you put your hands on me!" As to whether Ms. Allen heard Ms. Johnson state that she accidentally hit appellant, she could not remember Ms. Johnson's exact words, but she did not remember her using the word hit. She heard appellant tell Ms. Johnson not to ever put her hands on him again whether it was an accident or not. Ms. Allen did not tell Ms. Johnson not to hit appellant again, rather she stated "don't touch him." Lastly, she responded "yes" to the question whether her statements were given free from coercion.

In a September 12, 2002 report, Dr. Courtney D. Shelton, a Board-certified internist, provided a history that on June 29, 2002 appellant sustained a back injury, resulting in a herniated disc and surgery. He reported his findings on physical and orthopedic examination. Dr. Shelton diagnosed cervical, trapezius, thoracic and lumbosacral spasms, coccyx tenderness, bilateral knee and wrist contusions. He opined that appellant's disability began on the date of

injury and initial evaluation on July 1, 2002. Dr. Shelton stated that appellant aggravated his previous injury although a neurosurgical evaluation may establish that he sustained a new herniated disc in the lumbar region based on his symptoms.

Ms. Smith's questionnaire indicated that she sat near appellant's cubicle and that on June 23, 2004 she heard Mr. Thomas at his desk. She also heard a verbal exchange between appellant and Ms. Johnson regarding something she wrote and why she allowed Mr. Thomas to do something that he believed was wrong. Ms. Smith heard appellant state that Mr. Thomas was laughing and nothing was funny or something similar. She was not sure of his exact words. Ms. Smith also heard appellant tell Ms. Johnson "don't touch me." She did not personally observe this incident. Ms. Smith did not hear Ms. Johnson state that she accidentally hit appellant. She believes she twice heard appellant state "don't touch me" but was not certain. Ms. Smith did not hear Ms. Allen tell Ms. Johnson not to hit appellant again due to much verbiage going on at the same time. In addition, she did not hear enough of the incident to make a judgment about whether appellant should have been suspended. Management first asked Ms. Smith what she witnessed before her statement was typed. She concluded that her statement was provided without coercion, but noted that in situations of this nature, coercion was inherent from all involved parties.

Mr. Watson's questionnaire provided that he sat adjacent to appellant and that he was on duty on June 23, 2004. On that date, he overheard Mr. Thomas twice at appellant's desk. Appellant told Mr. Thomas that the changes he was making were wrong and as a result he was unable to finish his work by a particular due date. Later that evening, Mr. Watson heard appellant state that what Mr. Thomas was trying to do to him was not funny. Mr. Watson turned a deaf ear because he was on the telephone. He heard appellant state "look at Charles laughing over there, this ain't funny," "don't you put your hands on me!" and "accident or not, don't ever put your hands on me again." He did not overhear Ms. Johnson state that she accidentally hit appellant. When he was presented with a statement to sign regarding appellant's workers' compensation claim, Mr. Watson was asked about what he saw. He indicated that his statements were free from coercion.

Appellant submitted definitions of the words "grabbed" and "twisted" as they appeared in a dictionary. He also submitted correspondence dated April 21, 2004 between himself and Mr. Raines, an employee, regarding a request he made to Mr. Newton.

By decision dated August 25, 2004, the Office denied appellant's claim. It found that he did not establish that he sustained an injury while in the performance of duty as the medical evidence did not establish a relationship between the claimed injury and the accepted event.

The Office received Dr. Leslie's September 22, 2004 prescription which diagnosed lumbosacral orthosis, ruled out a lumbar herniated disc and provided appellant's treatment.

By letter dated August 22, 2004, appellant requested reconsideration of the Office's August 25, 2004 decision. He submitted Dr. Shelton's August 19, 2005 medical report which indicated that he had been treating him for approximately four years under workers' compensation for cervical and lumbar herniated discs, cervical, thoracic and lumbar strains, knee and wrists contusions and depression. Dr. Shelton noted appellant's physical and emotional

treatment and stated that on June 23, 2004 he was reinjured at work. He stated that, due to the severity of his illness, rapid movement, falls, trauma or twisting of the spine could easily exacerbate his condition. He agreed with Dr. Leslie's June 24, 2004 assessment that appellant experienced an exacerbation of his preexisting herniated disc of the cervical and lumbar spine.

In response to appellant's reconsideration request, Mr. Newton, in an October 14, 2004 letter, stated that appellant had not submitted any evidence establishing that he sustained an employment-related injury. He stated that his interview of two of the three witnesses identified by appellant established that they did not observe any physical contact between appellant and Ms. Johnson and the third witness stated that Ms. Johnson lightly rubbed appellant's arm and did not grab or twist him.

By decision dated November 23, 2005, the Office denied modification of the August 25, 2004 decision. It accepted that Ms. Johnson touched appellant between his left elbow and left shoulder and not his version that Ms. Johnson grabbed his right shoulder and twisted him around as he was trying to walk away from her. The Office, however, found the medical evidence of record insufficient to establish that appellant sustained a medical condition causally related to the accepted work-related incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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.³ 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.⁴

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.⁵ 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.

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 3.

⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.⁶ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁷ 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. A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁸ 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.⁹

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.¹⁰ 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.¹¹ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹²

ANALYSIS

Regarding the first component, the Office accepted that on June 23, 2004 Ms. Johnson touched appellant's left arm and shoulder. Appellant, however, contends that Ms. Johnson grabbed his right shoulder and twisted his torso as he tried to walk away from her. Ms. Johnson denied appellant's allegation, stating that she did not grab, twist, push or pull him. She noted their size and strength difference and his volatile temper as reasons for refraining from such actions. Ms. Johnson stated that, while she was trying to calm appellant down, she lightly touched the sleeve of his left suit jacket between his left shoulder and elbow. She told him that this was an accident. Ms. Allen and Mr. Thomas stated that Ms. Johnson did not grab appellant, rather she lightly rubbed his arm while asking him to calm down. Ms. Allen asked Ms. Johnson not to touch appellant. Although Ms. Allen heard appellant tell Ms. Johnson not to put her hands

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁸ *Id.* at 255, 256.

⁹ *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

¹⁰ *John J. Carlone*, *supra* note 6; see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

¹¹ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

¹² *Charles E. Evans*, 48 ECAB 692 (1997).

on him again, she heard Ms. Johnson state that she accidentally hit him and appellant's response that he did not care that she hit him by accident. Further, Ms. Smith heard appellant tell Ms. Johnson not to touch him, but stated that she did not witness the incident. She also did not hear Ms. Allen ask Ms. Johnson not to touch appellant. Moreover, Mr. Watson did not observe any physical contact between appellant and Ms. Johnson although he heard appellant tell Ms. Johnson not to put her hands on him even accidentally.

Dr. Leslie's June 24, 2004 disability statement found that appellant aggravated a preexisting herniated disc and he was disabled from performing his regular work duties beginning June 24, 2004 until his return to work on July 6, 2004. This evidence does not provide a history of an injury sustained as alleged by appellant on June 23, 2004.

Based on the statements of Ms. Johnson, Ms. Allen and Mr. Thomas, which are consistent and refute appellant's account of the events of June 23, 2004 that Ms. Johnson grabbed his right shoulder and twisted his torso, the Board finds that the evidence of record establishes that Ms. Johnson touched appellant's left arm and shoulder.

The Board, however, finds that the medical evidence of record is insufficient to establish that appellant sustained an injury as a result of the accepted employment incident. As found above, Dr. Leslie's June 24, 2004 disability statement that appellant aggravated a preexisting herniated disc and that he was disabled from performing his regular work duties beginning June 24, 2004 until his return to work on July 6, 2004 fails to provide a history of the June 23, 2004 employment incident. In addition, it does not address the issue of causal relationship between the diagnosed condition and the accepted employment incident. The Board finds that Dr. Leslie's disability statement is insufficient to establish appellant's claim.

Similarly, Dr. Leslie's September 22, 2004 note which diagnosed lumbosacral orthosis and ruled out a lumbar herniated disc does not establish appellant's claim as it fails to address the causal relationship between the diagnosed condition and the June 23, 2004 employment incident.

Dr. Shelton's September 12, 2002 report, noting injuries appellant sustained at work on June 29, 2002 and his disability beginning on the date of injury is insufficient to establish appellant's claim. His report predates the claimed injury and is therefore not relevant to the issue of whether appellant sustained an employment-related injury on June 23, 2004.

Dr. Shelton's August 19, 2005 report provided a history that appellant sustained prior work-related injuries which included cervical and lumbar herniated discs, cervical, thoracic and lumbar strains, knee and wrists contusions and depression. He stated that he was reinjured at work on June 23, 2004 and opined that, due to the severity of his illness, rapid movement, falls and trauma or twisting of the spine could easily exacerbate his condition. Dr. Shelton agreed with Dr. Leslie's June 24, 2004 assessment that appellant experienced an exacerbation of his preexisting herniated disc of the cervical and lumbar spine. His report is insufficient to establish appellant's claim because it failed to explain the causal relationship between appellant's exacerbated condition and June 23, 2004 accepted employment incident.

As there is no rationalized medical evidence of record establishing that appellant sustained a neck or back injury while in the performance of duty as alleged, the Board finds that he has failed to meet his burden of proof.

CONCLUSION

As appellant did not provide the necessary medical evidence to establish that he sustained an injury caused by the June 23, 2004 employment incident, the Board finds that he has failed to satisfy his burden of proof in this case.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board