



tray of letters above his shoulder. On July 31, 2002 the Office accepted his claim for lumbosacral strain.<sup>1</sup>

On October 11, 2002 appellant filed another claim of traumatic injury, Form CA-1, alleging that he injured his lower back on October 10, 2002 when a coworker forcefully pushed down on his lower neck.<sup>2</sup> Dr. Brenda Mills<sup>3</sup> certified on October 21, 2002 that appellant had been totally incapacitated since October 15, 2002. She provided an estimated return to work date of November 4, 2002.

The employing establishment controverted appellant's claim on October 31, 2002. It submitted the October 11, 2002 statement of Joan Dash-Johnson, the coworker accused of pushing appellant, who stated that on October 10, 2002 she was collecting mail from his case and nudged him twice just below the left shoulder blade to let him know that she was working behind him. The employing establishment also reported that another coworker, Gerold Crane, made a fraud complaint against appellant on October 25, 2002, alleging that 15 minutes before his alleged October 10, 2002 injury he told Mr. Crane that he was going to have a relapse.

In support of his claim, appellant provided medical records from Dr. Mills dated June 17 to November 18, 2002. In patient progress notes dated October 14, 2002, Dr. Mills reported that appellant had been reinjured on October 11, 2002 when he was "knocked down on [his] neck" and "shoved down" by a coworker. She noted stiffness and pain in appellant's lower back and diagnosed a herniated disc and a new lumbosacral sprain. On November 26, 2002 Dr. Mills issued a disability certification for the period October 14 to December 1, 2002. In a duty status report completed the same day, she released appellant to work on December 2, 2002 with the limitations of seven pounds of lifting, 15 minutes of intermittent standing and no bending, twisting, pushing or pulling. Following his return to work, Dr. Mills certified additional periods of disability from December 12 to 15 and 17 to 18, 2002 and December 24, 2002 to February 2, 2003. Appellant received 45 days of continuation of pay for his physician certified periods of disability.

By letter dated April 1, 2004, the Office informed appellant that the merits of his claim had never been formally considered. It stated that, because the employing establishment had controverted the claim, it must be adjudicated. The Office requested that appellant resolve the discrepancies between his version of the events of October 10, 2002 and those of his coworkers, who stated that he stated he was about to have a relapse and that he was merely nudged beneath his shoulder, and that of his treating physician, who stated that he was shoved and knocked down on October 11, 2002. It also informed appellant that his disability slips did not provide adequate medical evidence about how or why he was disabled, particularly after Dr. Mills released him to work with restrictions on December 2, 2002. The Office requested a detailed narrative report from Dr. Mills providing a history of the injury, examination findings, diagnosis, period and

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<sup>1</sup> This claim was assigned file number 112009320 by the Office.

<sup>2</sup> This claim, which forms the basis of this appeal, was assigned file number 112011171.

<sup>3</sup> Dr. Mills' Board-certification status as of 2002 could not be determined. A news release in the record indicates that Dr. Mills was indicted on February 3, 2004 for health care and mail fraud.

extent of disability and an opinion of the relationship between the condition and appellant's employment.

On April 6, 2004 appellant's attorney, David Swimmer, notified the Office that appellant would not be responding to the request at that time, as the employing establishment had notified him that the case was being referred to the district attorney for possible fraud prosecution.<sup>4</sup>

By decision dated June 30, 2004, the Office denied appellant's claim on the grounds that he had not established that he sustained an injury in the manner alleged. It found that he had not provided factual evidence that he had been pushed by a coworker as alleged and that the medical evidence lacked rationalization. The Office notified him that the continuation of pay he had received earlier would be declared an overpayment.

On July 10, 2004 appellant requested an oral hearing to review the Office's June 30, 2004 decision.<sup>5</sup> The hearing was held on May 17, 2005 and attended by appellant and his attorney, Mr. Swimmer. Appellant stated that he was seated at his station when Ms. Dash-Johnson passed behind him and shoved his whole body down, causing pain from his back up through his neck. He alleged that he then jumped up and grabbed her arms and told her that she could not shove him in that manner. Appellant stated that she apologized and said she would write a statement explaining what she did to him. He denied the version of events described in Ms. Dash-Johnson's letter, but did not address Mr. Crane's fraud allegations.

By decision dated October 20, 2005, the hearing representative affirmed the Office's June 30, 2004 decision, finding that appellant failed to establish that he was injured in the manner alleged. He noted that the record contained two key inconsistencies as to the events of October 10, 2002: the differing versions of how Ms. Dash-Johnson touched appellant; and the allegations of fraud leveled by Mr. Crane. The Office hearing representative concluded that to credit appellant's version of the events, he would have to believe that Ms. Dash-Johnson deliberately tried to injure him, which was not supported by any evidence of record. He also found that Mr. Crane's allegation that appellant stated he was going to have a relapse 15 minutes before his claimed injury strongly impugned the veracity of his claim.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>6</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 the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is

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<sup>4</sup> The record does not indicate whether appellant was ever charged with fraud.

<sup>5</sup> The Board notes that around this time file number 112011171 was combined with file number 112009320, which was considered to be the master file for claims related to appellant's back. The notice of hearing was sent out under the master file number. After July 8, 2005, no documents were placed in file number 112011171.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

claimed is causally related to the employment injury.<sup>7</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury and an occupational disease.<sup>8</sup>

To establish that an injury occurred at the time, place and in the manner alleged, it must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>9</sup> An injury does not have to be confirmed by eyewitnesses to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.<sup>10</sup> An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>11</sup> 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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>12</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>13</sup>

After establishing the occurrence of an employment incident, an employee must show that any injury for which compensation is claimed is causally related to an accepted employment incident or factor.<sup>14</sup> Rationalized medical evidence is required to establish a causal relationship between a claimed period of disability and an employment injury.<sup>15</sup>

### ANALYSIS

Appellant alleged that his lower back was injured when a coworker pushed forcefully down on his neck. The Board finds that appellant failed to establish the occurrence of this alleged event because of the significant inconsistencies in the evidence.

The record establishes that appellant sustained an accepted lumbosacral strain on June 14, 2002. On October 11, 2002 he filed a new claim of traumatic injury alleging that his lower back was injured the previous day when he was pushed by a coworker. Appellant stated

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<sup>7</sup> *Caroline Thomas*, 51 ECAB 451 (2000).

<sup>8</sup> See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>9</sup> *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

<sup>10</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>11</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>12</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

<sup>13</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

<sup>14</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>15</sup> *V.F.*, 58 ECAB \_\_ (Docket No. 06-1497, issued January 30, 2007).

that he was seated at his station when Ms. Dash-Johnson passed behind him and shoved his whole body down, causing pain from his back up through his neck. He alleged that he jumped up, grabbed her arms and told her that she could not shove him in that manner. Appellant stated that she apologized and said she would write a statement explaining what she did to him. He did not provide any evidence about his previous relationship with Ms. Dash-Johnson.

In her written statement of the events of October 10, 2002, Ms. Dash-Johnson stated that she nudged appellant twice below his left shoulder blade to let him know that she was behind him collecting mail from his case. The employing establishment reported that Mr. Crane, another employee, made a fraud complaint against appellant on October 25, 2002. Mr. Crane reported that appellant told him 15 minutes before his alleged injury that he was going to have a relapse. The Board notes that appellant denied the truthfulness of Ms. Dash-Johnson's statement at his oral hearing, but did not deny or challenge the statement of Mr. Crane.

While the statements of claimants generally have great probative value in establishing the time and manner of an alleged injury, the Board finds that the statements provided by Ms. Dash-Johnson and Mr. Crane are a strong and persuasive refutation of appellant's allegation. As noted by the Office hearing representative, the record is devoid of evidence as to why his coworker would forcefully shove appellant. The Board finds that the explanation put forward by Ms. Dash-Johnson as to her actions, and the reason behind them, is much more plausible than that put forward by appellant. Mr. Crane's allegations cast further doubt on the accuracy of appellant's version of events. For these reasons, the Board finds that the factual evidence does not support appellant's claim of traumatic injury as alleged.

The Board also finds that the medical evidence provided by Dr. Mills does not support the time, manner or fact of appellant's alleged injury. The disability certification form she submitted contain no evidence of the date or circumstances of the alleged injury and does not state why appellant was unable to work. In her progress notes of October 14, 2002 she diagnosed a new lumbosacral sprain from being "knocked down on neck" and "shoved down" by a coworker. Though she misstated the date of the alleged work incident, her report largely repeats appellant's version of events. However, this report, does not diminish the probative value of statements made by appellant's coworkers. The report is also not adequately rationalized and provides no explanation of how the shoving or knocking down of his neck could cause a lumbosacral strain.

The Board finds that appellant has not met his burden of proof in establishing by a preponderance of the reliable, probative and substantial evidence that he was injured in the manner alleged.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained injury in the performance of duty on October 10, 2002 as alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs' hearing representative dated October 20, 2005 is affirmed.

Issued: April 18, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board