

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

D.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Muscatine, IA, Employer)

**Docket No. 07-440
Issued: April 23, 2007**

Appearances:

Robert DeKock, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2006 appellant filed a timely appeal of a September 12, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative. 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 established that she sustained a back injury in the performance of duty on August 17, 2005.

FACTUAL HISTORY

On September 12, 2005 appellant, then a 49-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury in the performance of duty. The date of injury on the claim form was initially reported as August 25, 2005; this date had been crossed out and a date of August 17, 2005 was inserted. Appellant stated that she had moved a large, heavy package from her vehicle to the door of a residence, and felt back pain and numbness in her leg. On the reverse of the claim form, a supervisor indicated that appellant had

not reported the incident until at least 13 days after the alleged incident.¹ The Form CA-1 also indicated that appellant stopped working on August 19, 2005 and returned to work on September 27, 2005.

In a September 13, 2005 statement, the supervisor indicated that appellant had filed the Form CA-1 on September 12, 2005 with a date of injury of August 25, 2005. The supervisor stated that appellant was advised that she did not work on August 25, 2005, and the date of injury was changed to August 17, 2005. According to the supervisor, appellant did not report the injury until 26 days after the alleged incident.

With respect to medical treatment, the record contains a hospital report from Dr. John Meyer, an osteopath, dated September 7, 2005. Dr. Meyer indicated that appellant was seen with acute lumbosacral back pain radiating into the left leg. He reported that appellant had been seen for a kidney checkup and was referred to the emergency room. Dr. Meyer diagnosed sciatica and told appellant that she needed to get a different vehicle for delivering mail because she has to climb over the console.

In a report dated September 12, 2005, Dr. J. Gipple, an orthopedic surgeon, reported that appellant had a three-month history of low back and leg pain. He stated that symptoms had improved but then appellant squatted over to pick up a package at work and felt a pop in her back. Appellant saw an urologist to rule out kidney stones and eventually presented to the emergency room. Dr. Gipple diagnosed degenerative disc disease with recent lumbar strain. Appellant continued to receive treatment from Dr. Gipple.

By decision dated December 30, 2005, the Office denied the claim for compensation. The Office determined the evidence was insufficient to establish an employment incident occurred as alleged.

Appellant requested an oral hearing before an Office hearing representative, which was held on June 27, 2006. At the hearing she described the alleged August 17, 2005 employment incident. Appellant acknowledged that she did not initially report the incident, although she stated that she asked where her supervisor was and was told that he had left for the day. She stated that she thought her back pain was related to kidney stones. According to appellant, she did not work on August 18, 2005 because she could not move, but did work light duty on August 19, 2005. With regard to the date of injury, appellant stated that she misunderstood the claim form. She stated, "I was going from the time that I reported the incident to [the supervisor] at work from the time in between because I believed at first that I had the kidney stone problem."

In a decision dated September 12, 2006, the hearing representative affirmed the December 30, 2005 decision. The hearing representative found that the evidence did not establish an August 17, 2005 incident as alleged.

¹ It appears the supervisor was referring to a date of injury of August 25, 2005, as this date had been crossed out and the change initialed by someone other than the supervisor.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing that he or she sustained an injury while in the performance of duty.³ 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 which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.⁴

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁵ An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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.⁶ An employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁸ 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.⁹

ANALYSIS

The Office did not accept that an incident occurred as alleged on August 17, 2005. Appellant alleged that on August 17, 2005 she was carrying a package for delivery and when she stood up, she felt a pop in her back. As noted above, a claimant has not established an employment incident when there are inconsistencies in the evidence that cast serious doubt as to

² 5 U.S.C. §§ 8101-8193.

³ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁴ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁵ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁶ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁷ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁸ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

⁹ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

the validity of the claim. In this case there are a number of inconsistencies in the evidence. Appellant initially reported the incident as occurring on August 25, 2005. According to the employing establishment, appellant then determined that the incident occurred on August 17, 2005 after she was informed that she did not work on August 25, 2005.

At the hearing appellant indicated that she was confused by the claim form and thought that she should report the date she notified the supervisor. The claim form is clear and explicit in requesting the date the injury occurred. To the extent appellant alleges that she notified her supervisor on August 25, 2005, there is no supporting evidence in the record. The supervisor reported on the claim form that appellant did not report an injury until 13 days after August 25, 2005 or September 7, 2005. The September 13, 2005 memorandum from the supervisor indicated that he did not have knowledge of the injury until the filing of the claim on September 12, 2005.¹⁰ There is no indication that appellant promptly notified the employing establishment of an August 17, 2005 employment incident.

The Board also notes that the evidence of record does not establish that appellant promptly sought medical treatment. The first medical report with any history of a lifting incident was the September 12, 2005 report from Dr. Gipple. Appellant did receive treatment for back pain on September 7, 2005, but the hospital report does not provide a history of a lifting incident. The record therefore indicates a delay in notification of injury, delay in obtaining medical treatment for the alleged injury and inconsistency in reporting the date of the injury. Based on the evidence of record, the Board finds that appellant has not established an August 17, 2005 employment incident as alleged. Accordingly appellant did not establish the first component of fact of injury and the Office properly denied the claim.

CONCLUSION

Appellant did not establish an injury in the performance of duty on August 17, 2005.

¹⁰ In view of the supervisor's September 13, 2005 statement, it may be that he intended to write 18 days after the injury on the claim form.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 12, 2006 and December 30, 2005 are affirmed.

Issued: April 23, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board