

statement dated December 20, 2004, appellant related that she was taking out a gaylord when she was almost hit by a tug driven by John H. Coxe, Jr., a coworker. A little while later, she was pulling out another gaylord. Appellant had to find another spot to put it because the original spot was taken by a coworker, who was unloading equipment from a tugger. She stated that, all of a sudden, someone ran into her gaylord. Appellant indicated that the jack she was using flew back, knocking her “right” arm back and injuring her left thumb. When she turned around, she saw Mr. Coxe laughing. Appellant reported the injury to Myland, a supervisor,¹ who stated that they had to report the alleged injury to Ama Amadhel, a supervisor.

On appellant’s claim form, Mr. Amadhel stated that the alleged injury occurred in the performance of duty, but it was due to appellant’s misconduct. Appellant failed to observe safety rules especially in a light traffic way and she did not stop for approaching vehicles. Mr. Amadhel stated that his knowledge of the facts about the alleged injury did not agree with appellant’s statement of injury. He related that no available witness verified the alleged injury. Mr. Amadhel noted that Mr. Coxe had personal conflicts with appellant off and on for about one year. They were assigned different work areas for this reason.

In a December 20, 2004 narrative statement, Mr. Coxe indicated that, while he was on his way to the FedEx docks, he sounded his horn. When he made a left into the FedEx docks he encountered a traffic jam. Mr. Coxe stated that he was unable to pass an individual that was trying to maneuver a full gaylord in the fire lane. He stopped and waited for 30 to 45 seconds but nothing moved. Mr. Coxe placed his tug in park, set the brake and sat there. He noticed appellant trying to maneuver her gaylord into a slot between other gaylords. Mr. Coxe saw Roger Baris, another tugger, which led him to believe that he was talking to appellant. While he sat on the tug waiting for her to finish, she turned to him and asked “what is your problem?” Mr. Coxe stated that she only asked him this question in a harsh tone due to him beeping his horn earlier to let the person know that he was waiting to get by. He had no idea who was moving the gaylord and was just using the safety precautions he learned, which required him to sound the horn upon approaching jams. Mr. Coxe did not respond to appellant given his past history with her, as she had concocted stories about anything that might get her some attention.

Mr. Coxe indicated that at no time did appellant mention to him or Mr. Baris that she was struck by anybody at anytime while he was tugging. He further indicated that, after she saw him on the tug, she became quite upset and yanked the pallet jack out very hard. It became stuck at an angle, and appellant was unable to get it out on her first try. Mr. Coxe and his union representative, John Russell, Jr., were later advised by Mr. Amadhel that appellant was almost hit by Mr. Coxe. Mr. Russell asked Mr. Amadhel several times whether appellant stated that she was almost hit but not touched in any way. Mr. Amadhel replied that appellant felt it was a close call, but she was not hit or touched by Mr. Coxe.

Over the course of about an hour, Mr. Coxe saw appellant visiting Emily Gismondi, a coworker, who had recently lost her tugging privilege due to reckless driving. He did not get along well with either woman for one reason or another. Mr. Coxe believed that appellant decided to seek medical attention to initiate an investigation of him as she had done so many

¹ The case record does not contain Myland’s last name.

times in the past. He wondered whether she and John Wolbert, another coworker, would testify against him although Mr. Wolbert did not witness the alleged injury. Mr. Coxe stated that the only witnesses were himself, appellant and Mr. Baris. He denied appellant's allegation that his tug hit her. Mr. Coxe stated that many people laughed at him for tugging slowly and safely.

By letter dated January 13, 2005, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual and medical evidence she needed to submit to support her claim of injury.

The Office received Dr. Bolno's December 21, 2004 report. Dr. Bolno provided a history of the alleged December 20, 2004 incident. He reported his findings on physical examination which included decreased range of motion of the lumbar spine and left leg and wrist. Appellant also experienced severe swelling of the left thumb, first metatarsophalangeal joint and radiocarpal joint. She experienced numbness and paresthesias of the left arm with decreased sensation over C5, C6 and C4, and C4 nerve distribution and weakness of the biceps and triceps muscles. Dr. Bolno stated that appellant's deep tendon reflexes were diminished over the biceps and triceps reflexes in the left elbow. Appellant also sustained acute traumatic cervical and lumbar radiculopathy, acute traumatic cervical and lumbar spine sprains and strains, acute traumatic injury to the radiocarpal joint on the left with possible left navicula fractures and acute traumatic rotator cuff tear of the left shoulder with traumatic arthritis of the left and right shoulders. Dr. Bolno's December 31, 2004 report reiterated his prior statement of injury and diagnoses that appellant sustained on December 20, 2004.

In a February 5, 2005 narrative statement, appellant indicated that she had problems in the past with Mr. Coxe. She believed that he purposely hit her by missing her the first time and then hitting her the second time, noting that she could not prove this contention. Appellant noted that Mr. Coxe had also hit Mr. Wolbert and a report had been filed regarding this incident. She stated that she would not have told Mr. Baris and Mr. Coxe that she was hurt when she was supposed to report to a supervisor first, which she did as of February 8, 2005. Appellant described the problems she experienced that were associated with not receiving any money for six weeks and the processing of her claim. She indicated that she had never filed a workers' compensation claim. Appellant reiterated her prior description of the alleged December 20, 2004 injury. She described her pain symptoms and stated that she went to see her physician on the next day.

A January 12, 2005 report of Dr. John A. Harding, a Board-certified radiologist, noted appellant's complaint of left shoulder pain. Dr. Harding diagnosed probable partial thickness tear of the humeral attachment of the anterior portion of the supraspinatus.

Dr. Bolno's February 1, 2005 report provided a history of appellant's alleged injury. He reiterated his prior diagnoses and also diagnosed acute traumatic arthritis of the left hand and wrist with ligamentous injuries of the left thumb. Dr. Bolno opined that the diagnosed conditions were directly caused by the alleged December 20, 2004 incident.

A February 8, 2005 narrative statement from Mr. Russell, appellant's coworker, provided that on December 20, 2005 he was returning to the FedEx docks, when he was called over by Mr. Amadhel to join him in a discussion with appellant concerning a recent incident. He related

that appellant stated that she was placing a gaylord in position when a tug driven by Mr. Coxe struck another gaylord which caused her gaylord to twist, pushing the hand jack she was using to twist out of her hand and bend back her thumb. Appellant also stated that Mr. Coxe thought this was amusing.

In a February 8, 2005 narrative statement, Perry Fiorentino, a union shop steward, related that he neither had any knowledge nor was he present on the date of appellant's alleged injury. He was made aware of the incident after the fact and was not present when any statement was allegedly made by appellant that she was almost struck.

On January 11, 2005 Dr. Alfio K. Pennisi, a Board-certified radiologist, performed a magnetic resonance imaging scan of appellant's cervical spine. He diagnosed moderate degenerative change and found no evidence of severe cord compression.

Dr. Bolno's January 10, 2005 form report indicated that on December 20, 2004 appellant sustained a condition that was illegible and physical restrictions.

By decision dated February 16, 2005, the Office denied appellant's claim on the grounds that she did not establish that the claimed employment incident occurred at the time, place and in the manner alleged. In a letter dated March 5, 2005, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

A February 28, 2005 report of Dr. Amelia L.A. Tabuena, a physiatrist, provided a history of the alleged December 20, 2004 injury. She stated that appellant's cervical sprain and spastic torticollis were unresolved. In addition, appellant had a severe left shoulder girdle sprain and strain with myofascitis of the upper trapezius and supraspinatus muscles. Dr. Tabuena recommended an electromyogram (EMG) and nerve conduction velocity (NCV) study to rule out cervical radiculopathy and/or carpal tunnel syndrome. On February 17, 2005 she performed an EMG and NCV study of appellant's upper extremity, which was abnormal. Appellant had acute mild to moderate C6 radiculopathy on the left. There was also evidence of severe carpal tunnel syndrome of the left wrist and moderate carpal tunnel syndrome of the right wrist.

Appellant submitted several reports from Dr. Bolno. In a January 10, 2005 narrative report, Dr. Bolno stated that appellant sustained a bulging disc of the cervical spine and possible herniated discs and rotator cuff tear of the left shoulder with acute tendinitis. He opined that the diagnosed conditions were directly caused by the December 20, 2004 alleged work injury when appellant was struck by someone driving a tug which caused her jack/gaylord to strike her left shoulder, hand and wrist and cervical spine.

Dr. Bolno's January 14 and 20, February 1 and 15, March 2 and 15, April 12, May 12 and June 2, 2005 reports found that appellant sustained acute traumatic arthritis of the left wrist and thumb with possible navicular fracture, ligamentous injuries to the left thumb including Games Keepers thumb, acute traumatic disc protrusion of the cervical spine with post-traumatic carpal tunnel syndrome of both hands and wrists, acute traumatic herniated disc of the cervical spine, acute labral trauma acute traumatic disc protrusion at C6-7 and acute bulging discs at C4-5 and C5-6. He opined that appellant's conditions were caused by the alleged December 20, 2004 employment incident and that she remained totally disabled due to these conditions.

In an addendum report dated February 1, 2005, Dr. Bolno stated that a cast was removed from appellant's left hand and wrist on that date. He opined that her recovery remained at a stand still and she remained totally disabled even though her pain had improved.

By letter dated December 14, 2005, Dr. Bolno stated that appellant continued to suffer persistent pain due to the employment-related trauma she sustained to her cervical spine and left shoulder, hand and wrist on December 20, 2004. He further stated that her condition had improved and an attempt would be made to return her to full-duty work status. Dr. Bolno indicated that, since her work-related conditions had not fully resolved, she may require additional studies and treatment in the future.

At the March 1, 2006 hearing, appellant described a gaylord.² She testified that earlier in the night of December 20, 2004 she was moving a gaylord and Mr. Coxe almost hit her. The second time appellant was dropping off the gaylord and his tugger was in front of her. She was waiting for him to unload his equipment when all of a sudden she was holding onto the hand jack and her "left" hand went flying. Appellant did not see who was driving the tugger but assumed it was Mr. Coxe because no one else was around. She also testified about the previous problems she had with Mr. Coxe which included him chiding her that she was too small to perform her work duties. Appellant stated that he was instructed to stay away from her, although he continued to speak to her. She never said anything to him. Appellant testified that she immediately informed a supervisor, whose first name was Myland, about the alleged injury. She told him that Mr. Coxe hit her with a tug. He sought Mr. Amadhel and appellant told him about the alleged injury. Appellant described her symptoms and stated that she finished her tour of duty on December 20, 2004. She sought medical treatment from Dr. Bolno on December 21, 2004.

By decision dated May 16, 2006, an Office hearing representative affirmed the February 16, 2005 decision. The hearing representative found the evidence of record insufficient to establish that the claimed employment incident occurred at the time, place and in the manner alleged and that appellant sustained a medical condition causally related to the alleged employment incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each

² Appellant testified that a gaylord was six feet tall and three or four feet wide. It sat on a pallet and she used a hand jack to move it. The hand jack had two forks and each one went under each side of the pallet. Appellant used the hand jack to pick the pallet off the floor which made it easier to pull it.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Anthony P. Silva*, 55 ECAB 179 (2003).

and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁷ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁸

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.⁹ An injury 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ An employee has not met his or her burden of proof in 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.¹¹ 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹³

⁵ See *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁷ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁸ *Id.*

⁹ See *Louise F. Garnett*, 47 ECAB 639 (1996).

¹⁰ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹¹ *Id.*

¹² *Linda S. Christian*, 46 ECAB 598 (1995).

¹³ *Gregory J. Reser*, 57 ECAB ____ (Docket No. 05-1674, issued December 15, 2005).

ANALYSIS

Appellant alleged that she sustained an injury to her hands and shoulders in the performance of duty on December 20, 2004. The Office denied her claim after finding that she did not demonstrate that the specific event occurred at the time, place and in the manner described.

The initial question presented is whether appellant has established that the December 20, 2004 employment incident occurred as alleged. An injury 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 her subsequent course of action.¹⁴ An employee has not met her burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of her claim.¹⁵

The Board finds that appellant has not established that the employment incident occurred on December 20, 2004, as alleged. She attributed the onset of the pain in her hands and shoulders on December 20, 2004 to her gaylord being hit by a tugger driven by a coworker, Mr. Coxe. Appellant, however, failed to provide a consistent history of injury. She alleged in her December 20, 2004 narrative statement, that when she was hit by a tugger the hand jack she was using flew back, knocking her "right" arm back and injuring her left thumb. At the March 1, 2006 hearing, appellant testified that her "left" hand was flung back after her gaylord was hit by Mr. Coxe's tugger.

Although appellant contended that Mr. Coxe hit her gaylord, she testified that she did not see who was driving the tugger and only assumed it was Mr. Coxe because no one else was around at the time. Mr. Coxe denied hitting appellant's gaylord with his tugger. He stated that his coworkers teased him for tugging slowly and safely. Mr. Coxe further stated that he and appellant did not get along, noting that she had concocted stories about him and had him investigated. Mr. Amadhel, a supervisor, also stated that appellant and Mr. Coxe had personal conflicts with one another for about one year and that they were assigned to different work areas for this reason.

Mr. Amadhel contended that the alleged injury occurred due to appellant's misconduct as she failed to observe safety rules and to stop for approaching vehicles. In addition, he contended that she failed to submit a witness statement to corroborate her statement of injury. A coworker, Mr. Russell, stated that appellant related to him and Mr. Amadhel on December 20, 2005 that she sustained a thumb injury when Mr. Coxe struck her gaylord with his tugger. However, Mr. Russell did not witness the alleged incident and did not provide additional relevant detail. Further, Mr. Fiorentino, a union steward, specifically stated that he did not have any knowledge of or witness the alleged incident. He related that he only became aware of the alleged incident after it occurred.

¹⁴ See *Betty J. Smith*, *supra* note 10.

¹⁵ See *Linda S. Christian*, *supra* note 12.

Under the circumstances in this case, the Board finds that there are sufficient inconsistencies in the evidence that cast doubt as to whether an incident occurred as alleged. Accordingly, the Board finds that appellant has not substantiated that the December 20, 2004 employment incident occurred as alleged and, therefore, has not established that she sustained an injury in the performance of duty. As she has not established the factual aspect of her claim, it is not necessary for the Board to consider the medical evidence of record.¹⁶

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on December 20, 2004 in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 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

¹⁶ *Alvin V. Gadd*, 57 ECAB ____ (Docket No. 05-1596, issued October 25, 2005).