

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

A.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Rosenberg, TX, Employer)

**Docket No. 07-224
Issued: July 23, 2007**

Appearances:
Earnest Hill, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2006 appellant filed a timely appeal from the October 19, 2006 decision of the Office of Workers' Compensation Programs to rescind acceptance of his claim. 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 the Office met its burden of proof to rescind acceptance of appellant's claim.

FACTUAL HISTORY

On December 13, 2005 appellant, then a 57-year-old customer service supervisor, filed a traumatic injury claim, Form CA-1, alleging that he dislocated his shoulder and sustained back and neck injuries on December 10, 2005 when a shelf fell on him. He stated that he was "sitting [and] bending over filing papers" when a six-foot tall and eight-foot long shelf fell on top of him.

Postmaster Elias Olvera, appellant's supervisor, controverted his claim on the grounds that fact of injury was in question. He stated that the day before the alleged injury he confronted

appellant with complaints about his timekeeping practices that had been raised by his subordinates and informed appellant that he should not conduct timekeeping until further notice. Mr. Olvera then instructed appellant to report to work the following day, which he was not scheduled to work, to instruct another supervisor, Brian Boxie, on conducting timekeeping for rural letter carriers. At 11:28 a.m. the following day he received a call from Mr. Boxie informing him that a shelf in the basement had fallen on appellant. When Mr. Olvera arrived at the employing establishment at 11:55 a.m., appellant was being placed in an ambulance. Mr. Boxie told him that appellant had gone down to the basement to file two weeks worth of "blue folders." He had been downstairs for approximately 45 minutes when he called Mr. Boxie from his cell phone to tell him that a shelf had fallen on him. Mr. Boxie found appellant in the file room with a shelf partially covering his legs and with the assistance of another employee, he removed the shelf. When he complained of shoulder pain, an ambulance was called. After appellant was taken to the hospital, Mr. Olvera took photographs of the file room and had Mr. Boxie lie down to show him how appellant was found. Mr. Olvera questioned appellant about the accident by telephone on Monday, December 12, 2005. Appellant told him he was sitting in a chair and filing the blue folders in chronological order when he heard a crackle and the shelf fell on him before he could get out of the way. Mr. Olvera noted that there were no blue folders on the floor to corroborate appellant's statement.

On December 10, 2005 emergency room physician Dr. Karen Richardson, a Board-certified family practitioner, diagnosed neck and back contusions, prescribed pain medication and instructed appellant to visit his physician within two to three days. She removed him from work until he was released by his physician. On December 19, 2005 appellant's physician, Dr. Joseph Valdez, a Board-certified family practitioner, removed him from work until at least January 27, 2006.

On January 5, 2006 the Office informed appellant that he had not submitted sufficient evidence to establish that the alleged incident occurred or that it had caused the claimed injuries. Appellant responded on January 18, 2006 with a written statement and medical reports from Dr. Valdez. He stated that he was in the basement to file two weeks of folders into a storage crate. Appellant heard a noise and realized the shelf was falling. He tried to hold the shelf up, but could not because he was in a seated position and could only grab it three quarters of the way down. Appellant stated that he was pinned under the shelf, which had partially dislocated his shoulder as it fell on him and he could not get up. He called for help and two employees came to lift the shelf off of him and remove some of the objects that had fallen on him. In response to questions by the Office, appellant stated that he had previously dislocated his shoulder in 1967 and had undergone a surgery to correct it at that time, but had no history of back or neck injuries.

In a December 15, 2005 report, Dr. Valdez stated that appellant was hit on the left side of his head, shoulders and back by a shelf full of books and papers that trapped him for several minutes. Appellant was placed in a neck brace and transported to the emergency room where diagnostic images of his cervical spine revealed no evidence of neck fracture. Dr. Valdez found that appellant had pain and reduced range of motion in his left shoulder and lumbar spine and had pain and spasms in the flanks bilaterally and paravertebral musculature of the lumbar spine. He diagnosed cervicolumbar sprain, left acromioclavicular (AC) joint sprain and left shoulder contusion. On December 23, 2005 Dr. Valdez reported that appellant was experiencing constant moderately severe low back pain that was aggravated by repetitive bending and forward flexion.

He stated that appellant's left shoulder had been in pain with movement since he dislocated it and maneuvered it back into position during the accident. Dr. Valdez updated his diagnosis to sprain on the left shoulder and lumbar areas.

The Office also received the ambulance crew's emergency medical service care report, which indicated that appellant reported pain and tenderness in his upper back, neck and left arm when they arrived at the employing establishment on December 10, 2005. The report stated that appellant was sitting on a rolling chair with his back to the shelves when they collapsed, impacting his upper back, causing him to fall and pinning his legs. When the ambulance crew arrived, he was lying supine on the floor. Appellant told them that he had not lost consciousness. He was placed on a spine board and fitted with a cervical collar for transportation to the emergency room.

By decision dated February 10, 2006, the Office accepted appellant's claim for strains/sprains of the neck, lumbar region and left shoulder.

On February 15, 2006 the employing establishment submitted the report of an investigation into the allegations that appellant had fraudulently adjusted employee work hours to avoid payment of overtime and that he staged the accident that resulted in his claimed injuries. Mr. Olvera requested the investigation because he believed that appellant feared losing his job over the fraudulent timekeeping allegations and had staged that accident to obtain workers' compensation benefits. The investigators concluded that appellant had made "numerous adjustments to reduce reported hours of several employees" and that the "physical evidence at the scene of [appellant's] reported accident on December 10, 2005 contradicted his account of what happened."

In a December 12, 2005 sworn statement, Mr. Boxie stated that on the day of the accident appellant arrived at the employing establishment at approximately 8:30 a.m. to teach him how to do rural letter carrier time reports. He was busy with other activities when appellant arrived and did not see him again until 9:30 a.m., when he began using the computer on the workroom floor to enter rural time. Because Mr. Boxie needed to use the computer to finish his daily reports, he told appellant to log off and informed him that he would need to return in two weeks to train him on the entire rural timekeeping process. At 10:30 a.m. appellant told Mr. Boxie that he was going to the basement to file the blue daily folders for the previous two weeks and go through some records. At approximately 11:20 a.m. he used his cell phone to call the office telephone and told Mr. Boxie that he was hurt and needed help. Mr. Boxie found him on the floor at the far end of the basement storage room with his feet underneath the fallen shelf and his head toward the door. He noted that appellant was lying on top of records that were strewn all over the floor and complaining of pain in his shoulder and back. Mr. Boxie pushed the shelf off of appellant's leg and moved some of the papers to the side. He called Mr. Olvera and an ambulance and had another employee stay with appellant until it arrived.

On December 12, 2005 the investigators examined the basement storage room where appellant was found. They noted that Mr. Boxie told them that he had not moved anything since the accident. The investigators found blue folders dated November 22 to December 9, 2005 sitting on a chair in the hallway outside of the storage room and noted that a large cardboard box between the door and the fallen shelving unit contained older blue folders. They stated that it

would have taken only a few minutes to place the more recent blue folders in the storage box, not the 45 minutes that appellant was downstairs. The investigators noted that only the end of the shelving unit closest to the doorway had fallen because the back end was wedged against another storage unit. They found that the plastic tubs and boxes which were previously on top of the shelf had fallen backwards against the wall. The investigators stated that, if the shelf had collapsed the way appellant alleged, the items on the top shelf would have slid toward the end that fell. They found that the boxes' actual location suggested that the top shelf had moved suddenly away from the wall. The bottom two shelves were positioned in front of the shelving unit rather than being flattened underneath the upper shelves as they fell. Handprints found on the edges of the shelves indicated that they might have been intentionally pulled forward. The investigators found that files were scattered haphazardly on the floor and not in a pattern that would be expected if they spilled from falling boxes and tubs. They stated that appellant's location, with his feet under the bottom shelf near the back of the room, was not consistent with his statement that he was filing into the storage box, which was closer to the doorway. The investigators found that these facts indicated that documents from the shelf were intentionally spread on the floor before appellant lay on them.

On January 4, 2006 the investigators interviewed appellant. They reported that he told them that he filed records in the basement two to three times a week. On the day of the accident, appellant was sitting bent over on a rolling chair filing into a box that was a quarter of the way into the room. He stated that he had been there for 10 to 15 minutes when the shelves, which were filled with old records, auto parts and other items, collapsed on him. Appellant told them it happened before he could move and that he did not remember what happened after that. He stated that he could not move because the shelf was covering him, but did not remember the position in which he was lying on the floor after they fell. When asked why his finger prints would be on the edge of the shelf, he replied that they could be all over the employing establishment.

The investigators provided the reports from x-rays and a computerized tomography scan conducted at the hospital on the day of the accident. These diagnostic tests revealed varying degrees of degenerative changes throughout the spine and left shoulder, but provided no evidence of acute fracture, subluxation or prevertebral soft-tissue swelling. Dr. Jeffrey Zatorski reviewed these reports on December 10, 2005 and found that they presented no evidence of acute findings or active disease.

On March 15, 2006 Dr. Valdez reported that appellant continued to experience moderately severe pain in the left shoulder and low back. He stated that magnetic resonance imaging (MRI) scans conducted on March 9, 2006 revealed disc bulges at L4-5, L3-4 and L5-S1 and tears of the posterior and anterior labial quadrants of the left shoulder, with mild to moderate synovitis and edema.

By decision dated April 10, 2006, the Office rescinded acceptance of appellant's claim on the ground that the prior acceptance was erroneous. It found that the investigative report conducted by the employing establishment successfully controverted appellant's version of the facts surrounding his alleged injury.

The Office subsequently received a March 27, 2006 report from Dr. Victor Van Phan, a Board-certified osteopathic orthopedic surgeon, regarding appellant's left shoulder condition. He noted that the left shoulder had significant loss of motion, significant crepitus with passive range of motion and some tenderness along the anterior shoulder joint and AC joint. Dr. Phan reviewed appellant's March 9, 2006 MRI scan and found that it showed degenerative changes of the glenohumeral joint and the posterior and anterior labrums, mild edema changes and osteophyte formation on the glenoid. He opined that appellant's shoulder pain was caused by significant degenerative changes that may have been exacerbated by the December 10, 2005 accident.

On March 27, 2006 appellant was also seen by Dr. Jeremy Wang, a neurosurgeon, for a low back pain consultation. He reported that his back pain began at the time of the accident and had not improved. On examination Dr. Wang found pain with facet loading maneuvers, tenderness over the facets at L4-5 and bilateral paraspinal muscle spasms. He reviewed the March 9, 2006 lumbar MRI scan and noted desiccation at the L4-5 interspace, stenosis with lateral recess stenosis and facet arthropathy at L4-5 and a left T12-L1 epidural, which may be fat. After reviewing the diagnostic reports and conducting a physical examination, Dr. Wang could not determine whether the cause of the lower back pain was lumbar myofascial pain syndrome, facet arthropathy or lumbar strain.

On April 26, 2006 appellant requested an oral hearing. He contended that the postal inspector's findings were "completely wrong." Appellant stated that, at the time of the accident, he was sitting about two feet from the shelf. When the shelf hit him, he heard his shoulder pop. Appellant then grabbed onto it and heard it pop again. He stated that the shelf was on him "from the waist up," and that he could not move it because it was too heavy and his neck, back and shoulder were in pain.¹ When Mr. Boxie arrived to help him, he removed some debris from off of appellant and attempted to lift the shelf, but, finding it too heavy, was required to get another coworker to help him. Appellant stated that his coworkers moved the shelf and debris enough to relieve the weight and that the emergency response personnel finished removing the shelf and then transported him to the hospital.

By decision dated August 4, 2006, the Office hearing representative reversed the Office's April 10, 2006 decision, finding that the case was "not in a posture for hearing as the Office failed to accord due process in rescinding the accepted claim." He noted that the Office did not provide proper notice of the proposed rescission before terminating appellant's benefits on April 10, 2006.

On August 24, 2006 the Office issued a notice of proposed termination on the grounds that the evidence submitted by the employing establishment successfully disputed his claimed facts of injury. It found that the evidence in the record established that appellant had been found lying on his back with the shelf covering only his lower leg and knees. The Office noted that the dispersal of the objects fallen from the shelves was not consistent with appellant's version of events and pointed instead to the shelf being abruptly moved. Appellant was given 30 days to submit additional evidence and arguments. He did not respond in the allotted time.

¹ The Board notes that appellant previously alleged that his lower extremities were under the shelf, not his torso and upper extremities.

By decision dated October 19, 2006, the Office finalized its rescission of acceptance of appellant's claim.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.² The Office's regulation on rescission states: "If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time ...) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied."³ The Board has held that the power to annul an award of compensation is not an arbitrary one and only be set aside in the manner provided by the compensation statute.⁴

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the 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. 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.⁵ 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.⁶

ANALYSIS

On February 10, 2006 the Office accepted appellant's traumatic injury claim for sprains of the neck, lumbar region and left shoulder. On October 19, 2006 the Office rescinded acceptance of his claim on the basis that the evidence established that the injuries did not occur in the manner alleged. To meet its burden of proof to rescind in this case, the Office must establish that the previously accepted incident did not occur as alleged.⁷

The Board finds that the Office met its burden of proof to establish that the December 10, 2005 incident did not occur as alleged. Appellant alleged that he sustained injury when a

² *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

³ 20 C.F.R. § 10.610.

⁴ *Linda L. Newbrough*, 52 ECAB 323 (2001) ("[t]o justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale").

⁵ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

⁶ *Caroline Thomas*, 51 ECAB 451 (2000).

⁷ See *Deborah S. Stein*, 56 ECAB __ (Docket No. 04-750, issued April 26, 2005).

basement shelf collapsed on him while he was sitting in a chair and filing folders. While employee statements regarding alleged injuries are generally entitled to great probative value, the Board finds that appellant's statements were refuted by probative evidence and were not consistent with the surrounding facts and circumstances.

Appellant alleged that on December 10, 2005 he went to the basement to file two weeks worth of blue folders into a crate and that he had been filing for 10 to 15 minutes when the shelves behind him collapsed on him. This statement is inconsistent with the sworn statement of Mr. Boxie, who stated that appellant was in the basement for 45 minutes. According to Mr. Boxie, appellant had informed him at 10:30 a.m. that he was going to file blue folders in the basement but did not call asking for help until 11:20 a.m. Appellant's statement is also inconsistent with the sworn statement of Mr. Olvera, who noted that no blue folders were on the floor of the storage room after the accident. Additionally, his version of events is inconsistent with the fact that two weeks worth of blue folders, from November 22 to December 9, 2005, were found on a chair outside of the storage room.

Appellant alleged that the falling shelf hit his neck, back and left shoulder as it fell and that he was covered by the shelf from the waist down. He stated that he was unable to move the shelves or get free of them because of their weight and his injuries. When Mr. Boxie found appellant, he was lying face up on the floor with the shelves covering only the lower part of his legs. Appellant told the ambulance crew that he had not lost consciousness, but told the investigators that he could not remember what happened after the shelf fell on him or how he was lying on the ground. While he was diagnosed with contusions of the neck and back on December 10, 2005, his statements regarding the alleged incident were inconsistent enough to cast serious doubt on the validity of his claim. The Board, therefore, finds that appellant's statements are not entitled to great probative value.

The Board finds that the evidence presented by the employing establishment is sufficient to establish that the incident did not occur as alleged. In rescinding acceptance of the claim, the Office relied on the facts and analysis found in a report from the employing establishment dated February 15, 2006, which documented the physical condition of the room following the accident and contained the sworn statement of appellant's coworker.

The investigators from the employing establishment examined the basement storage room the Monday after the alleged accident. Mr. Boxie informed them that he had not moved anything in the room following the accident. The investigators found that only one side of the shelving unit had fallen because the other side was wedged against another storage unit. They found that the files and items on the floor were scattered in a haphazard manner and were not in a pattern that was consistent with falling from a shelf. The investigators stated that the position in which appellant was found, with his feet under the bottom shelf near the back of the room, was not consistent with his statement that he was filing into the storage box, which was closer to the doorway. They also noted that Mr. Boxie stated that appellant was lying on top of files and papers from the shelf. The investigators found that these facts indicated that documents from the shelf were intentionally spread on the floor before appellant lay on them.

The investigators also found evidence that the shelves had been intentionally pulled forward rather than collapsing, as appellant had alleged. They noted that boxes that were on the

top of the shelves had fallen backwards against the wall, which was evidence that the top of the shelf had moved quickly away from the wall. The investigators stated that if the shelf had collapsed, the boxes would have slid down toward the side of the shelf that came away from the wall. They noted that the bottom shelves were not crushed by the falling upper shelves, but were positioned in front of them. The investigators also found handprints on the shelf that were consistent with the shelf being pulled away from the wall.

The Board finds that the record contains substantial and probative positive evidence confirming that the December 10, 2005 injury did not occur as alleged.

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 19, 2006 is affirmed.

Issued: July 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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