



him, appellant alleged that he shook his head in response and then Mr. Tullius hit him and asked “[D]id you hear me[?]” On the claim form, Mr. Tullius indicated that he had only touched appellant on the shoulder to get his attention.

Maxine G. Dawkins, a union steward, provided a statement regarding conversations she had with both appellant and Mr. Tullius soon after the January 23, 2007 employment incident. She indicated that appellant came to her office complaining that Mr. Tullius had put his hands on him. Shortly after appellant left the union office, Mr. Tullius came in and explained why appellant was upset. Ms. Dawkins stated that she asked Mr. Tullius if he had put his hands on appellant and he answered in the affirmative. She then admonished Mr. Tullius for his conduct, noting that it was unbecoming of a supervisor.

In a February 5, 2007 statement, Mr. Tullius indicated that he touched appellant’s right shoulder with his index finger in order to get appellant’s attention. He explained that he had asked appellant at least three times if he needed any additional tools or parts to do his job. Appellant reportedly turned away from Mr. Tullius and did not respond to the questioning. At that point, Mr. Tullius touched appellant’s shoulder. In response, appellant jumped out of his seat and yelled “DON’T YOU TOUCH ME! DON’T YOU EVER LAY YOUR HANDS ON ME.” Mr. Tullius explained that he and several of his family members wore hearing aids and it was customary for him to touch his hearing-impaired relatives to get their attention. This was what he was attempting to do when he touched appellant’s shoulder on January 23, 2007.

In a February 21, 2007 statement, appellant indicated that Mr. Tullius used his whole hand and hit him on the upper arm. He stated that, on January 23, 2007 at 8:35 p.m., Mr. Tullius came to his workstation and slammed a box of equipment down and stated, “[H]ere is (sic) 10 gates. That should keep you until 2300 h[ou]rs.” Appellant looked at Mr. Tullius, nodded his head O.K., and kept working on the gates. Mr. Tullius then hit him on his left upper arm with his whole hand and stated in a hard tone “Did you hear me?” Appellant stated that the incident caused significant stress and frustration. He also refuted Mr. Tullius’ February 5, 2005 statement that he had asked appellant at least three times if he needed any additional tools or parts to do his job. Appellant indicated that Mr. Tullius did not ask him anything three times.

Dr. Nicki Lankerani, a psychiatry resident at the Veterans Affairs Medical Center in Baltimore, MD, saw appellant on January 24, 2007. She explained that appellant had been receiving treatment at the mental health clinic since May 2005, and that she had personally worked with him since July 2006, which included weekly meetings for psychotherapy and medication management. According to Dr. Lankerani, appellant’s working diagnoses were mood disorder, anxiety disorder and post-traumatic stress disorder (PTSD). She indicated that he was partially compliant with his current medications, Depakote and Risperdal. Dr. Lankerani also noted that during therapy sessions appellant reported significant stress at work related to problems with management. He reported being harassed and excluded from meetings and having been told he was not allowed breaks. Appellant also claimed to have received degrading comments regarding his purported illiteracy. He was also reported being told he had nothing important to say. Dr. Lankerani noted that “most recently [appellant reported being] hit on the shoulder by the supervisor for not responding to the harassment.” She explained that, due to appellant’s long-standing problems with anxiety, mood swings and hypervigilance, he had a difficult time coping with work-related stressors. Dr. Lankerani stated that appellant had

completed anger management classes and participated in some PTSD groups to learn new coping skills. She explained that appellant's frustrations at work had contributed to problems with self-esteem and mood. Dr. Lankerani advised that, given problems with current stresses, appellant might benefit from being transferred to another branch or work environment.

By decision dated March 23, 2007, the Office denied appellant's emotional condition claim. The Office accepted that Mr. Tullius touched appellant on the shoulder to get his attention. However, appellant alleged that Mr. Tullius hit him, which the Office found was not supported by the record. The Office denied the claim on the basis that appellant failed to establish fact of injury. Appellant purportedly failed to establish his version of events regarding the January 23, 2007 employment incident.

### **LEGAL PRECEDENT**

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.<sup>1</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially-assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.<sup>2</sup> Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.<sup>3</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>4</sup>

### **ANALYSIS**

The Office found that Mr. Tullius touched appellant on the shoulder to get his attention. Because appellant claimed that Mr. Tullius hit him, the Office concluded that the January 23, 2007 incident was not established as alleged.

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<sup>1</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Kathleen D. Walker*, *supra* note 1. Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

<sup>4</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

In this case, the distinction drawn by the Office between touching and hitting is not dispositive on the issue of whether appellant established a compensable employment factor. The primary issue is whether Mr. Tullius had physical contact with appellant on January 23, 2007. Physical contact by a coworker or supervisor may give rise to a compensable work factor if the incident occurred as alleged.<sup>5</sup> The statements from both appellant and Mr. Tullius establish that there was physical contact between them on January 23, 2007. Mr. Tullius did not deny initiating the contact, as acknowledged to Ms. Dawkins. Appellant did not allege that he was physically injured by the force of Mr. Tullius' contact with his left upper arm. Mr. Tullius' reason for placing all or part of his hand on appellant's upper body is of little or no importance. His stated purpose of merely trying to get appellant's attention is inconsequential. The amount of force applied to appellant's upper extremity or the reason for the physical contact is not determinative as to the compensability of the incident. Accordingly, the Board finds that a compensable employment factor has been established in that Mr. Tullius made physical contact with appellant on January 23, 2007. The Office's March 23, 2007 decision will be modified to reflect this finding. Because the Office previously found that no compensable factors were established, it did not review the medical evidence of record. The case will be remanded to the Office for further development as it deems necessary, followed by the issuance of an appropriate *de novo* decision on the merits.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>5</sup> *Denise Y. McCollum*, 53 ECAB 647, 648 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed as modified and the case is remanded for further action consistent with this decision.

Issued: September 25, 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