

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

G.A., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
LOGISTICS AGENCY, Tracy, CA, Employer)

**Docket No. 08-700
Issued: September 24, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 2 and November 21, 2007 merit decisions denying his claim for an employment-related May 21, 2007 injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on May 21, 2007.

FACTUAL HISTORY

On May 23, 2007 appellant, then a 57-year-old distribution process worker, filed a traumatic injury claim alleging that he sustained an employment-related back injury on May 21, 2007 at 8:00 a.m.¹ Regarding the cause of the injury, appellant stated, "I was stowing material,

¹ Appellant's regular work hours were 7:00 a.m. to 2:30 p.m., Monday through Friday.

weight approximately [two pounds]. It was located on a cart at stomach level. Took material & scanned it & then stooped over to pull out a section to put the material away when I felt a sharp stinging in lower center of my back.” The alleged injury occurred in warehouse 18 at an employing establishment facility in Tracy, CA. Appellant stopped work on May 21, 2007. An employing establishment official stated on the same form, “Unsure if employee hurt his back in performance of duty because of the time difference. Need further development to determine if injury occurred during weekend or at work.”²

In a May 29, 2007 letter, the Office requested that appellant submit additional factual and medical evidence in support of his claim.³ It advised him that he had 30 days from the date of the letter to submit this information. Appellant submitted numerous medical reports describing the treatment of his back since May 21, 2007. The reports revealed that he first sought medical treatment on May 21, 2007 and that he consistently reported to his physicians that the injury occurred on that day.⁴

Appellant submitted a May 21, 2007 statement in which he indicated that he was “doing stowing” in warehouse 18 at about 8:00 a.m. and his “lower middle back on right side started to hurt and just got tighter and stiff.” In a May 30, 2007 statement, Catherine Carter, a coworker, indicated:

“At approximately 8:30 a.m. [appellant] complained that his back was bothering him. I talked to him again at approximately 10:00 a.m. He said that his back was still bothering him and that he needed to use the telephone to talk to a supervisor.”

In a June 4, 2007 statement, Arthur Badillo, the chief of appellant’s branch, indicated that an attached work count accountability report showed that on May 21, 2007 appellant electronically processed the first work item he selected at 9:14 a.m. and that he electronically processed that same item at 10:17 a.m.⁵ Mr. Badillo stated:

“At approximately 11:45 [a.m.], on May 21, 2007, [appellant] reported a mishap. Prior [to] reporting the mishap, he had [sought] advice from one of his coworkers at approximately 8:00, stating to her that his back was bothering him, she advised him to sit for awhile until he felt better. After awhile he had gone back to work. Then at 11:45 [a.m.] he came back to his fellow coworker and asked her to call a supervisor because his back was really starting to bother him.”

² Kim Huit was listed as appellant’s supervisor on the form, but it is unclear whether Ms. Huit provided this statement.

³ The Office asked appellant to provide a detailed description of how the injury occurred and to state where he was and what he was doing at the time of the injury.

⁴ In several of the reports, appellant reported to his physician that the injury occurred at 8:00 a.m. on May 21, 2007. In other reports, he stated that on May 21, 2007 he felt pain in his low back due to twisting his back and stooping to lift an object.

⁵ Mr. Badillo stated that the document actually listed the selection time as 10:14 a.m. and the processing time as 11:17 a.m. but that 9:14 a.m. and 10:17 a.m. were the equivalent times in the time zone of appellant’s work site.

In a June 28, 2007 joint statement, Ms. Huit and another supervisor, Joe Munoz, noted that on May 21, 2007 the morning staff meeting ended at 7:25 a.m. and that appellant was working in warehouse 18 but nobody saw what he was doing between 7:30 and 8:00 a.m. Ms. Huit and Mr. Munoz stated that appellant could not have hurt his back selecting materials at 8:00 a.m. because work tickets were not even distributed until 8:45 a.m. and the accountability report shows that he did not select his first work item until 9:14 a.m. They indicated that the most work appellant could have done prior to 8:45 a.m. was to push an empty cart. Ms. Huit and Mr. Munoz stated that while they were in a meeting with Mr. Badillo at 11:45 a.m. they received a telephone call that appellant had hurt his back. Ms. Carter advised that appellant informed her at 8:30 that he had hurt his back “stowing some material.” Appellant sat for a few minutes and advised Ms. Carter that he was going to try to go back to work. Ms. Huit and Mr. Munoz stated that Ms. Carter indicated that appellant told her at about 11:30 a.m. that his back condition had worsened and he needed medical care. When they went to check on appellant in the health clinic after 11:45 a.m. he provided an account of his injury which was the same as the one provided by Ms. Carter.

In a July 2, 2007 decision, the Office denied appellant’s claim that he sustained an injury in the performance of duty on May 21, 2007. It determined that appellant had not established the occurrence of an employment incident at the time, place and in the manner alleged. The Office found that he had not explained the discrepancy presented by the fact that he claimed that an injury occurred when he handled a work item at around 8:00 a.m. on May 21, 2007 but the evidence showed that he had not handled a work item until 9:14 a.m.

Appellant submitted additional medical reports describing the treatment of his back problems. In a July 24, 2007 response to the Office’s May 2007 request for additional evidence regarding the claimed May 21, 2007 employment incident, he stated that he was in warehouse 18 where he was placing items on a cart to be stowed. Appellant experienced a sharp pain in the right side of his back when he pulled out a box weighing two to three pounds which had been at midsection level.

In a November 21, 2007 decision, the Office affirmed its July 2, 2007 decision. It found that the new factual evidence submitted by appellant was not sufficient to show that he sustained an employment incident on May 21, 2007 at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees’ Compensation Act⁶ 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.⁷ 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.⁸ An employee

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁸ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

has not met his 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.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

Appellant alleged that he sustained a back injury on May 21, 2007 at about 8:00 a.m. when he stooped to lift and handle materials weighing two to three pounds which had been at midsection level. The Office denied appellant's claim on the grounds that he had not established the occurrence of an employment incident on May 21, 2007 at the time, place and in the manner alleged.

The Board finds that appellant has established the occurrence of an employment incident on May 21, 2007. Appellant consistently indicated that he sustained an injury at about 8:00 a.m. on May 21, 2007. He consistently reported that the claimed injury occurred when he stooped to lift and handle materials weighing two to three pounds. Appellant's account of the date and time of the claimed injury is supported by a coworker, Ms. Carter, who produced a statement indicating that appellant came to her at about 8:30 a.m. and told her that his back was bothering her. Ms. Huit and Mr. Munoz, two of appellant's supervisors, indicated that Ms. Carter told them that appellant reported to her on May 21, 2007 that he had hurt back "stowing material" at about 8:00 a.m. on that date. The medical evidence of record shows that appellant provided accounts of the claimed injury to his physicians that are consistent with those provided in his claim form and other statements. Appellant reported his claimed injury to his superiors shortly after its alleged occurrence. Mr. Badillo, the chief of appellant's branch, stated that appellant advised him of the injury at 11:45 a.m. on May 21, 2007. Appellant did not delay in seeking treatment for his claimed injury as the medical record shows that he first sought treatment for it on May 21, 2007.

In denying that an employment incident occurred as alleged, the Office indicated that the record contained documents and supervisor statements indicating that appellant did not handle his first work item until 9:14 a.m. on May 21, 2007. Mr. Badillo stated that a work count accountability report, contained in the record, showed that on May 21, 2007 appellant electronically processed the first work item he selected at 9:14 a.m. The Board notes that the mere fact that there is some question about what time appellant electronically processed a work item would not create such an inconsistency as to cast doubt on the validity of his claim. As described above, appellant consistently indicated that he sustained injury by stooping to lift work

⁹ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁰ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

¹¹ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

materials at about 8:00 a.m. on May 21, 2007 and the question of what time he might have electronically processed that or some other work item would not render his statements about the time and mechanism of his claimed injury any less consistent.

For these reasons, appellant has established that an employment incident occurred on May 21, 2007 at about 8:00 a.m. when he stooped to lift and handle work materials weighing two to three pounds. 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.¹² There is no strong or persuasive evidence showing that the employment incident did not occur as alleged.

The Office denied appellant's claim on a factual basis and did not consider the medical evidence of record. The case will be remanded to the Office to evaluate the medical evidence and determine whether appellant sustained a medical condition or period of disability due to the accepted May 21, 2007 employment incident. After such development it deems necessary, the Office should issue an appropriate decision regarding appellant's claim that he sustained a May 21, 2007 employment injury.

CONCLUSION

The Board finds that appellant established the occurrence of an employment incident on May 21, 2007. The case is remanded to the Office for further development to be followed by the issuance of an appropriate decision.

¹² See *supra* note 11 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 21 and July 2, 2007 decisions are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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