

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

M.P., Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Baltimore, MD, Employer**

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**Docket No. 09-545
Issued: January 14, 2010**

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 19, 2008 appellant filed a timely appeal from the November 21, 2008 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant established that she sustained an emotional condition as a result of a July 11, 2008 work incident.

FACTUAL HISTORY

On October 3, 2008 appellant, then a 49-year-old compliance safety and health officer, filed a traumatic injury claim alleging that on July 11, 2008, while conducting an inspection, she was repeatedly yelled at by an employee of Shamrock Signs, Tim McPherson, who was the lead worker. She noted that Mr. McPherson did not want her to cite him for failing to wear a safety

harness and begged her to give him only a warning. Mr. McPherson refused her request for names and other information and then other employees also refused to provide her with information. Only after appellant stated she would obtain a warrant did Mr. McPherson and the other employees talk with her. Afterwards, he kept making comments that her employer was a joke, shouted obscenities at her and threw objects around which frightened her. Appellant stated that the incident aggravated her preexisting anxiety disorder.

In a July 16, 2008 letter to appellant, the president of Shamrock Building Services forwarded various reports on safety issues. He addressed the July 11, 2008 incident in which Mr. McPherson was cited for not wearing a safety harness while working out of an elevated bucket truck. He stated that actions were taken to prevent a reoccurrence. The president had informed his employees that company job site inspections would be increased to ensure compliance with work site safety rules. He also apologized for the behavior of Mr. McPherson who had expressed regret about the violation and in losing his temper.

Appellant received treatment from Dr. Paul Bernstein, Ph.D., a clinical psychologist. The record contains reports from Dr. Bernstein, who advised on July 18, 2008 that appellant was finding it increasingly difficult to return to work. In an October 6, 2008 attending physician's report, he discussed of the July 11, 2008 incident, which he stated contributed to appellant's preexisting anxiety condition by aggravation. Appellant also submitted a November 3, 2008 report by Dr. Mildred Lane.¹

By decision dated November 21, 2008, the Office denied appellant's claim for an emotional condition. It accepted the July 11, 2008 incident as a compensable factor; however, the Office found that the medical reports of Dr. Bernstein did not support a causal relationship between appellant's current condition and the July 11, 2008 work incident.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.² On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.³

¹ It is not clear from the record whether Dr. Lane is a clinical psychologist under the Federal Employees' Compensation Act. See *Jacqueline E. Brown*, 54 ECAB 583 (2003).

² 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Gregory E. Conde*, 52 ECAB 410 (2001).

Appellant has the burden of establishing by the weigh of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions which she believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the record establishes the truth of the matter asserted, the Office must based its decision on an analysis of the medical evidence.⁶

ANALYSIS

Appellant alleged that the July 11, 2008 incident aggravated her preexisting anxiety. The Office found that she established that an incident occurred in which Mr. McPherson lost his temper, but that she did not prove that he verbally abused or threatened her use obscenities or making threats towards her.

The Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable under the principles of *Cutler*.⁷ The record establishes that appellant was in the performance of her federal duties as a safety compliance officer when she was repeatedly yelled at by Mr. McPherson, a lead worker from Shamrock Building Services, Incorporation. Appellant noted that he did not want her to cite him for failing to wear a safety harness. When she request information, Mr. McPherson and other employees refused to provide names or talk to her. After appellant stated that she would obtain a warrant, the employees at Shamrock Building Services, spoke to her. However, Mr. McPherson shouted obscenities and threw objects around which frightened her. The July 16, 2008 letter from the president of Shamrock Building Services, acknowledged that Mr. McPherson had violated safety codes and had lost his temper on July 11, 2008 when questioned by appellant. The Board finds that appellant has established a compensable factor of employment under *Cutler*. Appellant was performing her duties as a compliance safety and health officer when the July 11, 2008 incident arose.

Appellant must also submit rationalized medical evidence in support of an emotional condition caused or aggravated by the accepted employment factor.⁸ The Office found that Dr. Bernstein did not provide a well-reasoned explanation to support a causal relationship between appellant's current medical condition and the work sight inspection she performed on July 11, 2008 at Shamrock signs. However, in making this determination, it found that the

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Peter D. Butt, Jr.*, 56 ECAB 117 (2004); *Lillian Cutler*, *supra* note 2.

⁸ *Kathleen D. Walker*, 43 ECAB 603 (1991).

evidence did not support that she was verbally abused or physically threatened by Mr. McPherson. However, Dr. Bernstein noted a history of the incident and stated that it had aggravated appellant's preexisting anxiety disorder. The decision of the Office focused too narrowly on the question of verbal abuse or physical threat and not on appellant's performance of her job under *Cutler*. On remand the Office shall further develop the medical evidence as necessary and make an appropriate decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2008 is set aside and this case is remanded for further action consistent with this decision.

Issued: January 14, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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