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

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| **P.K., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1953** |
| | ) | **Issued: July 8, 2010** |
| **DEPARTMENT OF HOMELAND SECURITY, CITIZEN & IMMIGRATION SERVICES, Lincoln, NE, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On July 27, 2009 appellant filed a timely appeal from the July 14, 2009 merit decision of the Office of Workers' Compensation Programs affirming the denial of his claim for a traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

### *ISSUE*

The issue is whether appellant met her burden of proof to establish that she sustained a left knee injury on January 12, 2005.

### *FACTUAL HISTORY*

On December 18, 2006 appellant, then a 45-year-old center adjudication officer, filed a traumatic injury claim alleging a left knee injury at 8:30 a.m. on January 12, 2005 when she slipped on ice in the employing establishment parking lot. She noted that the lot where she

parked was on an incline. Appellant did not stop work. Her supervisor, Raquel Trevizo, noted on the CA-1 that notice was received on January 12, 2005.

Appellant submitted a December 18, 2006 statement and noted that she fell in her employing establishment parking lot on January 12, 2005 at approximately 7:30 a.m. She indicated that Scott Arfman, a security guard, was in the back parking lot when she fell and would file a Form 3155 incident report.

By letter dated January 4, 2007, the Office requested additional factual and medical information as the evidence submitted was insufficient to establish an injury, as alleged.

In a February 5, 2007 decision, the Office denied appellant's claim finding that the evidence was insufficient to establish that she experienced the incident at the time, place and in the manner alleged.

The employer submitted a January 31, 2007 statement from Caroline Pratt, an employing establishment field office director. On January 12, 2005 appellant did not inform her that she fell or that she had submitted a CA-1. Ms. Pratt further noted that neither the security guards nor appellant's supervisor were aware that appellant fell. In a January 31, 2007 questionnaire, Ms. Pratt noted that the employing establishment was unaware that appellant sustained an injury that day and did not receive an incident report from Mr. Arfman. She noted that appellant's claim indicated that she fell at 7:30 a.m.; however, appellant's January 12, 2005 leave slip requested leave from 7:30 a.m. to 8:30 a.m. due to icy road conditions. The employing establishment submitted a March 12, 2007 statement from Bob Hennings, a program analyst, who arrived at the employer's parking lot at 7:35 a.m. on January 12, 2005. Mr. Hennings accompanied Mr. Arfman to appellant's car offering to let her park in the garage. He noted that appellant never advised him that she fell in the lot and he did not see appellant exit her vehicle in the parking lot. The employing establishment submitted a March 12, 2007 memorandum from Kenneth Zarybnicky, appellant's supervisor, who noted that he never received a CA-1 from appellant regarding the January 12, 2005 incident and she did not inform him that she fell on that date. Mr. Zarybnicky noted that he first learned of the incident on December 14, 2006.

On February 8, 2007 appellant requested reconsideration and asserted that she placed the CA-1 documenting the January 12, 2005 injury on her supervisor's desk following the incident. She advised that Ms. Pratt had her sign for the garage door opener on January 12, 2005 and was therefore aware that she had fallen. Appellant submitted a January 12, 2005 leave slip which requested leave from 7:30 a.m. to 8:30 a.m. and noted "Icy Road conditions -- no place to park in parking lot due to asylum applicants." She submitted the December 14, 2006 deposition transcript of Frank Heinauer who noted he may have been the person to sign appellant's CA-1 form but had only a vague recollection and was not aware of the status of her claim. Appellant submitted e-mails to Christopher Meidt, an agency representative, who advised that he could not locate the incident report. She submitted a January 22, 2007 attending physician's report from Dr. Todd Sekundiak, a Board-certified orthopedic surgeon, who noted that appellant fell in the parking lot at work on January 12, 2005. Dr. Sekundiak diagnosed tendinitis and ligamentous strain.

On April 11, 2007 the Office denied modification of the February 5, 2007 decision.

On June 13, 2007 appellant requested reconsideration. She asserted that she informed Ms. Pratt and Mr. Zarybnicky that she fell on January 12, 2005 and that management was covering up the fact that the parking lot was not properly cleaned or maintained. In a January 13, 2005 report, Dr. Sekundiak treated appellant in follow-up from her left knee compartmental arthroplasty. He noted that appellant was progressing well postoperatively with postoperative diffuse pain. Dr. Sekundiak noted x-rays revealed no evidence of wear, loosening or subsidence. In a report dated May 16, 2007, appellant reported exacerbating her left knee pain after a fall on January 12, 2005. Dr. Sekundiak diagnosed tendinitis and degeneration in her remaining compartment. Appellant submitted several statements from coworkers including Douglas Fritz, Karin Stork and Joshua Point who noted that appellant reported falling at work but they were not eyewitnesses and were unsure of the date of the incident.

The employing establishment submitted an August 2, 2007 statement from Mr. Zarybnicky, who advised that he was appellant's first line supervisor from October 21, 2001 to October 21, 2005 and never received a CA-1 regarding the January 12, 2005 incident and appellant never informed him that she fell at work. The employing establishment submitted several statements from other coworkers who were not aware that she fell on ice at work or sustained a work-related injury. In an August 3, 2007 memorandum, Mr. Heinauer stated that at some point in time appellant fell or almost fell in the parking lot but he had no recollection of whether she submitted a claim form.

By decision dated August 10, 2007, the Office denied modification of the prior decision.

On June 14, 2008 appellant requested reconsideration and submitted statements from coworkers, Mr. Fritz, Ms. Stork and Cassandra A. Bullard, who indicated that appellant reported falling in the employing establishment parking lot. Also submitted was a September 14, 2007 statement from Mr. Arfman who indicated that appellant informed him that she fell in the back parking lot; however, he was unsure of the exact date but believed it was in January 2005. Appellant submitted a handicapped placard, whistleblower information, unfair labor practices article, weather reports from January 10 to 13, 2005, a picture of an iced parking lot, an award certificate, an appraisal and a copy of a grievance dated August 22, 2007.

The employing establishment submitted statements dated July 11 and 14, 2008 from Ms. Pratt who noted none of appellant's witness statements noted a date of injury or indicated that they actually witnessed the alleged incident. Also submitted was a July 2, 2008 electronic mail from Mr. Meidt who noted that he had no direct knowledge that appellant fell and injured her knee on the employing establishment parking lot and he was unable to locate the incident report.

In a decision dated September 12, 2008, the Office denied modification of the prior decision.

On April 11, 2009 appellant requested reconsideration. She submitted additional statements and materials previously of record. Appellant submitted a January 19, 2009 report from Dr. Sekundiak who saw her in follow-up after her left knee arthroplasty revision of September 10, 2008. Dr. Sekundiak noted discussions with appellant regarding an injury sustained at work in January 2005 which was not documented but confirmed by the physician.

In an April 11, 2009 statement, appellant asserted that she underwent a second knee replacement on September 10, 2008, which was determined to be related to the January 12, 2005 fall.

In a decision dated July 14, 2009, the Office denied modification of the prior decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act 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 of the Act, that an injury was sustained 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."[1] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

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.[3] In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.[4] An alleged work incident 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.[5] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[6] 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.[7] Although an employee's statement alleging that an injury occurred at a given time and in a given manner is of great

[1] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[2] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[3] *Elaine Pendleton*, *supra* note 1.

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[6] *Id.* at 255-56.

[7] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

probative value and will stand unless refuted by strong or persuasive evidence,[8] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[9]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[10]

## ***ANALYSIS***

In the present case, appellant filed a claim on December 18, 2006 alleging that she was injured when she fell on ice at the employing establishment on January 12, 2005. However, she did not stop work at the time of the alleged injury; she did not immediately seek medical treatment for the injury and she waited nearly two years to file her claim.

Appellant contended that she did not delay in filing the claim rather she completed a CA-1 form and placed it on her supervisor's desk. She stated that Mr. Arfman, the security guard, witnessed the incident and filed a Form 3155 documenting the fall. However, the record does not establish appellant's assertions. Ms. Pratt noted that the employing establishment was unaware that appellant sustained any injury on January 12, 2005 and did not have a contemporaneous CA-1 claim form documenting the incident or a form report from Mr. Arfman. Mr. Hennings provided a statement noting that he saw appellant on the morning of January 12, 2005 but she did not mention that she fell. In statements dated March 12 and August 2, 2007, appellant's supervisor, Mr. Zarybnicky, indicated that he never received a claim form from appellant regarding a January 12, 2005 incident and she never informed him that she fell or had completed a CA-1 and placed it on his desk. He noted that he first learned of the incident on December 14, 2006.

The Board also notes that appellant submitted conflicting statements with regard to when she fell. Appellant noted on a January 12, 2005 leave slip that she sought leave from 7:30 a.m. to 8:30 a.m. due to "Icy Road conditions -- no place to park in parking lot due to asylum applicants;" which contradicts her December 18, 2006 statement that she fell at 7:30 a.m. Her December 18, 2006 claim form stated that the claimed injury occurred at 8:30 a.m. Additionally, there were no witnesses to the alleged injury or contemporaneous statements from persons present at the employing establishment to support that the incident occurred as alleged. While 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, the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action. Appellant submitted statements in 2007 from various coworkers who indicated that they remembered

[8] *Robert A. Gregory*, 40 ECAB 478 (1989).

[9] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[10] *See Richard A. Weiss*, 47 ECAB 182 (1995); *John M. Tornello*, 35 ECAB 234 (1983).

appellant telling them that she fell on ice in the parking lot; however, none of the individuals witnessed the incident or remembered when it occurred. Mr. Arfman noted that appellant informed him that she fell in the back parking lot, however, he was unsure of the date.

Dr. Sekundiak did not mention any history of a work-related fall on January 12, 2005; rather he indicated that appellant was recovering from left knee surgery on November 8, 2005. The first mention of a fall at work is in the physician's January 22, 2007 report, nearly two years after the alleged incident.

These circumstances of late notification, lack of confirmation of the claimed incident and inconsistencies about the time of injury cast serious doubt upon the validity of the claim.[11]

For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. Consequently, appellant has not met her burden of proof in establishing her claim.

On appeal, appellant asserts that she earlier filed her claim, the Office relied too much on evidence from the employing establishment and factors such as her receipt of a garage door opener to a federal building help establish her claim. She also asserted that the employing establishment was biased against employees making claims. As noted, however, the record does not establish that appellant earlier filed a claim. The employing establishment also provided statements from persons who were present on the claimed date of injury to support that no injury was reported by appellant. While appellant also submitted statements, these were less specific regarding whether the claimed injury on January 12, 2005 occurred as alleged. The evidence also does not support that receipt of a garage door opener from the employing establishment shows that the January 12, 2005 incident occurred as alleged. Appellant's general assertion of bias by the employing establishment is not supported by specific evidence indicating that the employing establishment sought to prejudice her claim. She has the burden of proof to establish her claim. For the reasons noted, appellant has not met her burden of proof.

## ***CONCLUSION***

The Board finds that appellant has failed to establish that she sustained an injury on January 12, 2005 in the performance of duty, causally related to factors of her federal employment.

[11] The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 14, 2009 and September 12, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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