



March 12, 2008. Regarding the nature of the injury, she stated, “I was driving forklift moving a lot of baskets from the booths turning the wheel back and forth with my left arm. It popped and swelled up.”

In an April 16, 2008 report, Dr. Joshua A. Crum, an attending Board-certified orthopedic surgeon, stated that appellant reported that she had a job as a forklift operator and had experienced at least six weeks of significant shoulder pain that started back in March 2008 and had gotten progressively worse. He discussed diagnostic testing and diagnosed left shoulder impingement and rotator cuff tear.

On May 1, 2008 Dr. Lyle Cain, an attending Board-certified orthopedic surgeon, performed a rotator cuff repair, subacromial decompression and distal clavicle coplaning on appellant’s left shoulder. In the history portion of the surgical report, he stated that she reported a two-month history of left shoulder weakness and pain.

On July 23, 2008 the Office requested that appellant submit additional factual and medical evidence in support of her claim.

In a March 12, 2008 report, Dr. Paul Ryan, an attending chiropractor, stated that appellant reported experiencing symptoms in her neck, thoracic spine, shoulders and arms since January 25, 2008.<sup>1</sup> The findings of April 2008 magnetic resonance imaging (MRI) scan testing of her left shoulder revealed hypertrophic degenerative changes of the acromioclavicular joint, complete rotator cuff tear with slight retraction of the supraspinatus and fluid in both the joint space and the subacromial bursa. In an August 20, 2008 report, a physical therapist indicated that appellant reported that her neck and shoulder had begun to bother her during the last year. The therapist stated that she received chiropractic care, which helped with her neck pain but that her shoulder pain increased.<sup>2</sup>

In a September 5, 2008 decision, the Office denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on March 12, 2008.<sup>3</sup>

In a September 23, 2008 statement, Horace Gibbons, appellant’s immediate supervisor, testified that she operated a 6,000-pound forklift, which required her to move materiel and pull her basket around to pick up such materiel. He indicated that on March 12, 2008 he saw appellant in tears and observed that her left shoulder had a large knot. Mr. Gibbons asked her to go to the clinic, but she did not want to because she was a term employee. He told appellant that the injury would not be held against her. Mr. Gibbons stated, “I truly believe that her injury is

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<sup>1</sup> Dr. Ryan obtained cervical x-rays on March 12, 2008 which showed degenerative disease between C2-3 and C6-7. He found that appellant was partially disabled beginning March 26, 2008 due to a cervical disc bulge. In an administrative form signed on March 12, 2008, appellant indicated “no” in response to a question regarding whether her medical condition was work related.

<sup>2</sup> On a July 7, 2008 form, a nurse indicated that appellant’s condition was work related.

<sup>3</sup> The Office accepted that the factual evidence established the occurrence of a work incident on March 12, 2008, *i.e.*, turning a wheel while operating a forklift on that date.

job related. She was alright at roll call at 7:00 a.m. that morning.” In a September 24, 2008 statement, Larry McConally, chief of the reciprocating drive train division, stated that on March 12, 2008 Mr. Gibbons told him that appellant injured her left arm or shoulder while operating her forklift. Mr. Gibbons also told him that she was fine when she was performing her duties earlier that morning, but that she came to him later that day complaining of shoulder pain. Mr. McConally stated, “Mr. Gibbons and I both believe [that appellant] was injured on the job performing her duties. Mr. Gibbons observed [her] performing her full range of duties earlier that day.”

Appellant also submitted statements from several other coworkers, which were produced in September 2008. Kristi Harper testified that on March 12, 2008 she saw appellant driving her forklift while holding onto her shoulder as though she were in pain. She asked appellant what was wrong and she told her about a “pop” in her left shoulder. Ms. Harper stated, “I told her I thought she needed to go to the Dear Clinic as soon as possible even though she was scared about turning it in because she was a term employee.” Carolyn Shealey testified that on March 12, 2008 she noticed redness in appellant’s face and that upon inquiry she stated that she had excruciating pain in her left shoulder. Ms. Shealey indicated that appellant was in tears and had swelling in her shoulder and noted that she left work shortly after this encounter. Jerome Shealey testified that on March 12, 2008 appellant came to him and let him know that her shoulder was bothering her. He noticed that she had some swelling around her left shoulder and that she seemed to be in pain. Donald Reynolds indicated that appellant’s job as forklift operator required her to engage in constant pushing, pulling and lifting. On the morning of March 12, 2008 he noticed that she appeared to be in a great deal of pain and she mentioned she was concerned about her job. Mr. Reynolds informed appellant that it was very important that she report her injury to her supervisor.<sup>4</sup>

In a September 11, 2008 report, Dr. Vance G. Moore, an attending Board-certified family practitioner, stated that he saw appellant on March 27, 2008 “with a history of left shoulder pain that occurred at work on March 12, 2008.” Appellant reported that she hurt her left shoulder at work and she subsequently saw Dr. Ryan before coming to see him on March 27, 2008. Dr. Moore stated that she was found to have a complete tear of the rotator cuff and was sent for consultation and ultimately surgery with Dr. Cain. He noted, “In my opinion, the damage to her shoulder was a result of her injury at work on March 12, 2008.”

In a September 19, 2008 report, Dr. Ryan indicated that appellant first consulted him on March 12, 2008 when she stated that she had injured her left shoulder at work earlier that morning. Appellant reported that she was working and felt a sharp “pop” feeling along her left posterior shoulder. She also stated that she had been having cervical, upper and mid thoracic pain for approximately six weeks, which was unrelated to the injury earlier that day. Dr. Ryan stated, “Based upon her history, the mechanism of the injury, description of the incident and subsequent MRI [scan] findings, it is my opinion that her left shoulder damage was a result of her injury at work on March 12, 2008.”

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<sup>4</sup> Most of the coworkers reported that they had seen appellant earlier in the day on March 12, 2008 and that she appeared to be fine at that time.

In a September 29, 2008 report, Dr. Cain stated that appellant was initially injured on March 12, 2008 “with beginning of shoulder pain and a pop that occurred at work at the Anniston Army Depot.” He noted that, after seeing Dr. Ryan and Dr. Moore, she was referred to him and he performed a left rotator cuff repair on May 1, 2008. Dr. Cain stated, “Based on the history I reviewed as well as notes from [Dr.] Ryan as well as Dr. Moore, it certainly appears that her rotator cuff injury and tear, which I repaired surgically was related to her injury at work on March 12, 2008.”

In a November 10, 2008 decision, the Office affirmed its September 5, 2008 decision as modified to reflect that appellant’s claim was denied because she did not establish the occurrence of a work incident on March 12, 2008. As appellant’s claim was denied on a factual basis, the Office did not further evaluate the medical evidence of record.

Appellant requested reconsideration and submitted a December 21, 2008 report of Dr. Cain. In a March 25, 2009 decision, the Office denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

An employee who claims benefits under the Federal Employee’s Compensation Act<sup>5</sup> 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.<sup>6</sup> 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 or her subsequent course of action.<sup>7</sup> An employee has not met her burden of proof of 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

<sup>7</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>8</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>9</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

<sup>10</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

## ANALYSIS

On July 9, 2008 appellant filed a traumatic injury claim alleging that she sustained a left shoulder injury while operating her forklift at work on March 12, 2008. She indicated that her forklift operation duties included turning the wheel on the forklift and moving many baskets from booths. Appellant asserted that her left shoulder “popped” and that she experienced swelling. In a November 10, 2008 decision, the Office denied her claim on the grounds that she did not establish the occurrence of a work incident on March 12, 2008.<sup>11</sup>

The Board finds that appellant has established the existence of a work incident on March 12, 2008, *i.e.*, operating her forklift duties which included such tasks as turning the wheel of the forklift and moving baskets. The Board notes that there are not such inconsistencies in the record to cast serious doubt on appellant’s claim and finds that her account of the March 12, 2008 employment incident is not refuted by strong or persuasive evidence.<sup>12</sup>

Appellant consistently claimed that she injured her left shoulder while operating a forklift at work on March 12, 2008. This account is supported by several statements in which supervisors and coworkers indicated that she reported that she injured her left shoulder at work on March 18, 2008. For example, Mr. Gibbons, appellant’s immediate supervisor, testified that appellant operated a 6,000-pound forklift, which required her to move materiel and pull her basket around to pick up such materiel. He indicated that on March 12, 2008 he saw her in tears and observed that her left shoulder had a large knot. Ms. Harper, a coworker, testified that on March 12, 2008 she saw appellant driving her forklift while holding onto her shoulder as though she were in pain. Several other coworkers also indicated that she reported developing left shoulder pain while performing her duties at work on March 12, 2008 and most stated that she had obvious swelling in her left shoulder.<sup>13</sup>

Although appellant delayed almost three months in filing a formal claim form for the alleged injury, several of the witnesses noted that she expressed a reluctance to officially file a formal claim. Mr. Gibbons and two coworkers stated that she indicated that she feared for her job security if she did so because she was a term employee. While some of the medical reports produced shortly after March 12, 2008 fail to mention the March 12, 2008 incident, the principal individuals who initially treated appellant later indicated that she reported on or shortly after March 12, 2008 that she injured her left shoulder at work on March 12, 2008. In a September 19, 2008 report, Dr. Ryan, an attending chiropractor, indicated that appellant first consulted him on March 12, 2008 when she stated that she had injured her left shoulder at work earlier that morning. Appellant reported that she was working and felt a sharp “pop” feeling

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<sup>11</sup> Given its grounds for denial, the Office did not evaluate whether the medical evidence showed that appellant sustained a condition due to the alleged March 12, 2008 work incident.

<sup>12</sup> See notes 8 through 10.

<sup>13</sup> Mr. Gibbons and most of the coworkers reported that they had seen appellant earlier in the day on March 12, 2008 and that she appeared to be fine at that time.

along her left posterior shoulder.<sup>14</sup> In a September 11, 2008 report, Dr. Moore, an attending Board-certified family practitioner, stated that he saw appellant on March 27, 2008 “with a history of left shoulder pain that occurred at work on March 12, 2008.” Appellant reported to Dr. Moore that she hurt her left shoulder at work on that date and subsequently saw Dr. Ryan before coming to see him on March 27, 2008. Dr. Moore stated that she was found to have a complete tear of the rotator cuff and was sent for consultation and ultimately surgery with Dr. Cain, an attending Board-certified orthopedic surgeon.<sup>15</sup>

For these reasons, appellant established the occurrence of a work incident on March 12, 2008. Because the Office denied her claim for a March 12, 2008 injury on a factual basis, it did not evaluate all the relevant medical evidence of record.<sup>16</sup> Therefore, the case should be remanded to the Office for appropriate consideration of the medical evidence of record. After such development it deems necessary, the Office should issue an appropriate decision regarding whether appellant sustained an injury due to the accepted March 12, 2008 employment incident.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant established the occurrence of a March 12, 2008 work incident and that the case is not in posture for decision regarding whether she met her burden of proof to establish that she sustained an injury in the performance of duty on March 12, 2008.

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<sup>14</sup> Some of the medical reports of record suggest that appellant had left shoulder pain prior to March 12, 2008, but Dr. Ryan indicated that she reported that she had been having cervical, upper and mid thoracic pain for approximately six weeks prior to March 12, 2008, which was unrelated to the March 12, 2008 injury.

<sup>15</sup> In a September 29, 2008 report, Dr. Cain stated that appellant was initially injured on March 12, 2008 “with beginning of shoulder pain and a pop that occurred at work at the [employing establishment].”

<sup>16</sup> The record contains medical reports in which Dr. Moore and Dr. Cain indicated that appellant sustained a left shoulder injury due to the work incident on March 12, 2008.

<sup>17</sup> Given the Board’s finding on the merit issue of this case, it is not necessary for the Board to consider the nonmerit issue.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 10, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 19, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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