

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

M.P., Appellant

and

U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Carol Stream, IL,
Employer

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**Docket No. 10-1573
Issued: March 21, 2011**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2010 appellant timely appealed the April 20, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on January 27, 2005.

FACTUAL HISTORY

This case was previously on appeal.¹ On January 29, 2005 appellant, then a 48-year-old mail processing clerk, filed a claim (Form CA-1) for injury to her head and right shoulder that allegedly occurred on January 27, 2005. She claimed that she was using the restroom at work

¹ Docket No. 09-1916 (issued June 19, 2009).

when a defective toilet paper holder fell and struck the right side of her head and her right shoulder. Appellant's supervisor, Jimella Wright, stated that upon investigation she found the door to the toilet tissue dispenser still intact. She stated that she peeled four pieces of tape off the door, which was hard to peel off. Ms. Wright also indicated that the holder was below appellant's head and shoulders.² Several photographs of a bathroom stall depicting a toilet and a toilet paper dispenser were submitted into the record. Appellant also submitted the manufacturer's description of the toilet paper dispenser allegedly involved.

Mary Hughes, the employer's injury compensation specialist, inspected the bathroom stall where the incident allegedly occurred. She noted that appellant stood 5'7" tall, and the toilet paper holder cover was anchored below her elbows. Ms. Hughes, who is 5'4" tall, stated that, when she sat on the toilet, the toilet paper dispenser was below her own shoulders. She questioned how a toilet paper dispenser that low could have hit appellant up high, at the head and shoulder level.

Appellant stated that a coworker, Cassandra Ellis, was in an adjacent bathroom stall at the time of the alleged incident. Ms. Ellis reportedly remained in the bathroom after appellant left to go report the alleged incident. The record, however, does not include a statement from Ms. Ellis who reportedly refused to provide one.³

On the afternoon of January 27, 2005, appellant was seen in the employing establishment health unit. She complained of pain on the right side of the head and the right shoulder. Appellant reportedly stated that at 3:10 p.m. while in the women's washroom, she used the toilet paper and the cover fell off and hit her on the right side of the head and right shoulder. She did not want to be checked at the hospital or the clinic. It was approaching the end of appellant's shift and all she wanted was some aspirin so that she could go home. She reportedly did not want to file a claim. The treatment notes reported no broken skin, no bump on the head, no dizziness, no nausea and a strong right-hand grip. Appellant, however, complained of slight pain on the head and right shoulder. She reportedly described the pain as bearable. The treatment consisted of an ice pack applied to right side of the head and the right shoulder for approximately 10 minutes. Appellant also received 325 milligrams of Acetaminophen. She was released at approximately 3:30 p.m.

Appellant returned to the health unit on January 28, 2005 complaining of annoying head pain on the left side and slight pain in the right shoulder. Dr. Eva T. Ostrowski, a Board-certified internist, examined appellant. She reportedly told Dr. Ostrowski that the previous afternoon she was sitting on the toilet pulling toilet paper out when the plastic toilet paper cover popped open,

² In addition to her remarks on Form CA-1, Ms. Wright provided a March 4, 2005 statement. In her subsequent statement, she indicated that on January 27, 2005 appellant told her she had an accident in the ladies room. Appellant reportedly stated that the toilet tissue dispenser's door fell on her head. Ms. Wright indicated that she investigated the accident 5 to 10 minutes later and found the dispenser door still intact. She stated that she peeled four pieces of tape off the dispenser and it did not seem to have fallen. Ms. Wright further indicated that the door did not just drop. It was still attached to the rest of the dispenser.

³ Appellant attributed the absent statement to a number of reasons, including a less than thorough investigation, employer intimidation and harassment and a fear of retaliation. She would later accuse Ms. Ellis of tampering with the toilet paper dispenser so as to make it seem that nothing happened.

striking her on the right side of her head and right shoulder. Although reportedly hit on the right side of her head, appellant now complained of left-sided headache, with numbness in the ear and a dull ache over the left side migrating to the back of her head. Dr. Ostrowski reported no blurring of vision or pain elsewhere. She also noted a prior medical history of discoid lupus on appellant's scalp. On physical examination of the scalp, there was no edema on the side of the reported injury. There was also no tenderness to palpation. Examination of the right shoulder also revealed no edema. There was mild tenderness to palpation, which was generalized. Dr. Ostrowski reported full range of motion with minimal discomfort. The January 28, 2005 report also noted that the plastic toilet paper cover weighed less than 10 pounds. Dr. Ostrowski stated that appellant's headache was not related to the initial minor injury reported. She advised that appellant could return to her previous work.

On January 28, 2005 appellant also saw Dr. Jacob Salomon, a Board-certified surgeon, who provided her with a disability certificate indicating she was totally incapacitated from January 29 to 30, 2005 due to head and shoulder injury. Dr. Salomon's February 2, 2005 follow-up treatment notes indicated that appellant was pulling toilet tissue out of a container on January 27, 2005 when the container broke off hitting her in the head and right shoulder. He diagnosed minor head trauma and right shoulder contusion. Dr. Salomon also advised that appellant was totally incapacitated from January 29 through February 15, 2005. He recommended, *inter alia*, a magnetic resonance imaging (MRI) scan of the brain to rule out hematoma.⁴

At the employer's request, Dr. Ostrowski reexamined appellant on February 4, 2005. She noted complaints of ongoing headaches and right shoulder pain from getting hit by a plastic toilet paper cover -- lightweight plastic -- on the right side of her head and right shoulder. Appellant's headache reportedly improved with Aleve, but returned when the medication wore off. Additionally, she advised Dr. Ostrowski that she was unable to do anything due to headaches and depression and was unable to drive due to anxiety. Appellant reportedly spent her time at home resting. Dr. Ostrowski diagnosed nonspecific headaches unrelated to the minor trauma reported. She also noted that appellant could return to work in her previous position.

The Postal Inspection Service interviewed appellant on March 4, 2005 and submitted a March 18, 2005 investigative memorandum. Appellant reportedly stated that on January 27, 2005 around 3:10 p.m. she was using the restroom and entered the handicapped stall. She noticed the toilet paper dispenser cover had tape on it, and may have pulled the toilet paper too hard, because when she leaned over, it popped open and hit her on the right side of her head. Appellant reported having just had a biopsy on the same side of her head. She stated she had seen the tape on the dispenser "every day." When asked how heavy the dispenser cover was, she replied "It's pretty thick. The clear part hit me." After the January 27, 2005 incident, appellant started to get headaches on the opposite (left) side of her head. She also stated that she injured her right shoulder on January 27, 2005.

In a March 20, 2005 statement, appellant indicated that when she saw Dr. Ostrowski on February 4, 2005, she told the doctor that a defective taped-up solid plastic toilet paper dispenser

⁴ Appellant's February 16, 2005 brain MRI scan was "unremarkable."

door fell open as she was pulling paper from a double dispenser. It hit the right side of her head, where she had a biopsy procedure, and also hit her shoulder.⁵

In a March 28, 2005 report, Dr. Salomon indicated that when he saw appellant on January 28, 2005 she complained that a day earlier she was struck on the right side of the head and right shoulder while on the toilet at work. The toilet paper holder had fallen off the wall striking appellant. Appellant complained of right-sided headache as well as right shoulder pain. Dr. Salomon's January 28, 2005 examination reportedly revealed spasm and pain in the trapezius muscle in the right shoulder area, as well as right-sided temporal headache. He stated there were no definite neurological signs to indicate any loss of brain function or vision. Dr. Salomon treated appellant symptomatically with pain medicine and steroid injections in the spastic right trapezius muscle. When appellant continued to complain of pain, he requested a brain MRI scan to rule out possible subdural hematoma. The MRI scan was normal. Dr. Salomon further stated that appellant was again treated symptomatically due to the trauma, which was the result of the toilet paper holder striking her on the right side of the head and right shoulder. Appellant returned for several follow-up visits complaining of the same symptoms. Because these symptoms had caused her multiple episodes of anxiety and depression with inability to go to work, she was eventually placed on antidepressant medication (Paxil) in hopes of relieving her symptoms. Dr. Salomon stated that appellant was subsequently referred to a neurologist. Due to persistent symptoms she continued to receive treatment and was totally incapacitated and unable to work.

The Office denied the claim on April 21, 2005 because appellant failed to establish that the injury occurred as alleged. By decision dated May 8, 2006, the Branch of Hearings and Review affirmed the Office's April 21, 2005 decision.

Appellant requested reconsideration on June 20, 2006. The request was accompanied by an April 6, 2005 notice of removal for engaging in activities inconsistent with her claim of total disability. The Office also received a May 24, 2006 report from Dr. Salomon regarding appellant's disability status between January 29 and February 15, 2005.

After an unexplained delay of almost three years, the Office issued a June 19, 2009 decision denying reconsideration. On appeal, the Board set aside the June 19, 2009 decision and remanded the case to the Office with instructions to undertake a merit review of the claim.⁶ The Board's March 12, 2010 decision is incorporated herein by reference.

On remand, the Office reviewed appellant's claim on the merits and denied modification by decision dated April 20, 2010.

⁵ The biopsy reportedly occurred in September or October 2004.

⁶ The Board explained that because of the lengthy delay in processing appellant's June 20, 2006 request for reconsideration, the Office should have conducted a merit review of the claim so as to preserve the full extent of her appeal rights.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act⁷ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁸

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.⁹ The second component is whether the employment incident caused a personal injury.¹⁰

It is the employee's burden to establish that his or her injury occurred at the time, place and in the manner alleged.¹¹ An injury does not have to be confirmed by an eyewitness to establish that it occurred in the performance of duty.¹² An employee's statement regarding the circumstances surrounding an injury is of great probative value and will be accepted unless refuted by persuasive evidence.¹³ The employee's statement must be consistent with the surrounding facts and circumstances as well as the employee's subsequent course of action.¹⁴ An employee has not met her burden of proof where there are inconsistencies in the record that cast serious doubt on the validity of the claim.¹⁵ 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 not otherwise explained, cast doubt on an employee's statements.¹⁶

⁷ 5 U.S.C. §§ 8101-8193 (2006).

⁸ 20 C.F.R. § 10.115(e), (f) (2010); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *H.G.*, 59 ECAB 552, 560 (2008); *Delphyne L. Glover*, 51 ECAB 146, 147-48 (1999).

¹² *H.G.*, *supra* note 11.

¹³ *Michelle Kunzwiler*, 51 ECAB 334, 335 (2000).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *S.P.*, 59 ECAB 184, 188 (2007).

ANALYSIS

Appellant claimed to have been struck on the right side of her head and right shoulder by a defective toilet paper holder. The plastic dispenser cover reportedly “fell” or “popped open” and struck appellant as she was sitting on the toilet. There is no dispute that the toilet paper dispenser had been taped up. In her March 4, 2005 statement to the postal inspector, appellant indicated that dispenser cover had tape on it and she may have pulled the toilet paper too hard. She further indicated that as she leaned forward to wipe, the “thing” popped open and hit her. However, in a March 20, 2005 statement, appellant indicated that the dispenser door fell open as she was pulling paper out. She did not claim to have been struck while leaning forward wiping. This discrepancy is particularly relevant because both Ms. Wright and Ms. Hughes visited the bathroom stall where the incident allegedly occurred and they each noted that the toilet paper dispenser was positioned below shoulder level. At a reported 5’7” tall, it is possible appellant could have been struck in the head and shoulder area while leaning forward wiping. However, based on information provided by Ms. Wright and Ms. Hughes it seems unlikely that appellant could have been struck in the manner alleged while sitting upright.

Apart from the discrepancy regarding appellant’s position relative to the dispenser, there is another question as to whether the dispenser “fell” or “popped open” as alleged. Ms. Wright investigated the incident within 5 to 10 minutes after appellant reported it. At that time, the toilet paper dispenser was reportedly intact. Ms. Wright indicated on both the claims form and in her March 4, 2005 statement that she peeled four pieces of tape from the dispenser. The tape was reportedly “hard” to remove. In her March 4, 2005 statement, Ms. Wright elaborated that, after removing the tape, the dispenser door did not seem to have fallen. She further commented that the door did not just drop, but remained attached to the rest of the dispenser.

At her March 30, 2006 hearing, appellant did not question what Ms. Wright reported seeing when she investigated the alleged toilet paper dispenser incident on January 27, 2005. In fact, she testified that her supervisor was “not a liar.” Appellant speculated that from time the incident occurred and when Ms. Wright went to investigate it, someone replaced the dispenser cover. She would later accuse Ms. Ellis of tampering with the toilet paper dispenser so as to make it seem that nothing happened. Ms. Ellis was reportedly in the restroom when the incident allegedly occurred. However, the record does not include a statement from her. The absence of a statement from a coworker who reportedly was in earshot at the time of the alleged incident gives one pause for concern. It does not by itself substantiate appellant’s allegation that either Ms. Ellis or someone else tampered with the toilet paper dispenser.

Appellant’s alleged January 27, 2005 head and shoulder injury is also inconsistent with the contemporaneous medical evidence. Shortly after the alleged incident she was seen at the employer’s health unit. The January 27, 2005 treatment notes reported no broken skin, no bump on the head, no dizziness, no nausea and a strong right-hand grip. When Dr. Ostrowski saw appellant the following day, she noted that on physical examination of the scalp there was no edema on the side of the reported injury. There was also no tenderness to palpation. With respect to appellant’s right shoulder, there was similarly no evidence of edema, and only mild tenderness to palpation, which was generalized. Dr. Ostrowski also noted full range of motion with minimal discomfort. Dr. Salomon reportedly examined appellant on January 28, 2005, but no treatment notes from that examination have been provided. His January 28, 2005 disability

certificate merely noted that appellant was unable to work “due to head and shoulder injury.” Dr. Salomon’s February 2, 2005 follow-up treatment records do not include any physical findings indicative of a diagnosis of minor head trauma and right shoulder contusion. He did not mention any bumps, bruises, or an incision from a prior biopsy. In his March 28, 2005 report, Dr. Salomon stated that when he saw appellant on January 28, 2005 she complained of right-sided headache as well as right shoulder pain. His examination reportedly revealed spasm and pain in the trapezius muscle in the right shoulder area, as well as right-sided temporal headache. It is not readily apparent how these reported findings justified Dr. Salomon’s diagnosis of minor head trauma and right shoulder contusion.

The Board finds that appellant did not meet her burden of proof in establishing that on January 27, 2005, a defective toilet paper dispenser struck her on the right side of the head and right shoulder. As noted above, the first element of “fact of injury” requires that appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged.¹⁷ There are unresolved discrepancies regarding the condition of the toilet paper dispenser at the time of the alleged incident. Appellant claimed it “fell” or “popped open” and struck her. However, shortly after the alleged incident, Ms. Wright examined the dispenser and found it intact. Appellant claimed that someone tampered with the dispenser prior to Ms. Wright’s examination, however, this allegation is not supported by the record. There is also some question as to whether appellant’s size and position in relation to the dispenser would permit an injury above shoulder level. Both Ms. Hughes and Ms. Wright indicated that the dispenser was positioned below shoulder level. It is also unclear from the record whether appellant was seated upright pulling paper from the dispenser when the alleged incident occurred or leaning forward wiping. Lastly, the contemporaneous medical evidence does not substantiate appellant’s claim that she was struck on the right side of her head and right shoulder. There were no reported signs of trauma to the head and/or right shoulder when appellant was seen on January 27 and 28 and February 2, 2005. The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant’s claim. Accordingly, the Board finds that appellant has not met her burden of proof in establishing that she experienced an employment-related incident at the time, place and in the manner alleged.¹⁸

CONCLUSION

Appellant has not established that she sustained an injury in the performance of duty on January 27, 2005.

¹⁷ See *supra* note 9.

¹⁸ Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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