

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

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**R.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Lancaster, TX, Employer**

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**Docket No. 13-173  
Issued: April 16, 2013**

*Appearances:*  
*Harry James, Jr.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 22, 2012 appellant filed a timely appeal from the October 17, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained an injury on November 1, 2011 in the performance of duty.

**FACTUAL HISTORY**

On November 17, 2011 appellant, then a 39-year-old city carrier, filed a traumatic injury claim alleging that at 5:13 p.m. on November 1, 2011 she sustained injury to her left shoulder and left lower back when Cedric Oliver, a supervisor, "pushed/forced me into the wall." She

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

stopped work on November 2, 2011. On the portion of the form to be completed by a supervisor, Debra Ray, the postmaster at the employing establishment, asserted that appellant was not injured in the performance of duty noting that Mr. Oliver stated that she “bumped into him very lightly, more like a brushing.” She indicated that appellant filed harassment or discrimination claims on October 31, November 12 and 14, 2011.

In a November 25, 2011 statement, Tammie Turner, a health and resource management specialist for the employing establishment, stated that appellant’s claim was being challenged on the grounds of failure to establish fact of injury, causal relationship and performance of duty. She indicated that appellant failed to establish the factual aspect of the claimed November 1, 2011 incident or provide statements of anyone who witnessed the incident. Appellant also did not provide medical evidence proving that she was injured on that date.

In an e-mail to Ms. Turner dated November 3, 2011, Ms. Ray advised that appellant called her on that date and told her that she had gone to a physician who gave her a statement stating that she could not return to work until November 13, 2011.<sup>2</sup> Ms. Ray noted that appellant stated that she went to the physician because she was working in a hostile work environment and Mr. Oliver was mad at her and had bumped into her on November 1, 2011. She noted that appellant did not advise her of these circumstances during the two and a half hour conversation they had the next day, November 2, 2011.

In a December 2, 2011 letter, OWCP advised appellant that she needed to provide additional factual and medical evidence in support of her claim of a November 1, 2011 work injury. It indicated that the evidence was not sufficient to establish that appellant actually experienced the incident or employment factor alleged to have caused injury.

In a November 30, 2011 statement, appellant indicated that on November 1, 2011 she had just entered the building to end her tour and Mr. Oliver began to come down the entrance. She stated that she braced herself against the wall to ensure no physical contact would be made with Mr. Oliver. Appellant asserted that Mr. Oliver intentionally pushed her against the wall and that she felt a popping in her neck and back and pain in her left shoulder.

In an undated statement received by OWCP on December 5, 2011, Mr. Oliver stated on November 1, 2011 at about 5:26 p.m. he was walking through the employee entrance to check the dock and appellant opened the door with her head down, earplugs in her ears and talking on the telephone. He noted that, in doing so, appellant did not notice him until he was close to the door and she accidentally bumped into him while she was coming inside the building from off the street. After the incident, appellant never stated anything to Mr. Oliver or Ms. Ray that he pushed her or tried to harm her in anyway. Mr. Oliver noted that there were four or five other carriers in the building and that appellant failed to mention anything about the alleged incident to her coworkers. He noted that she came in and put her mail away, stood at her case on Auxiliary Route 17 for about five minutes and then clocked out and went home. Mr. Oliver expressed his belief that appellant filed her claim after she thought about the incident and “figured that it would be beneficial for her.” He believed that she became disgruntled after she was instructed that she

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<sup>2</sup> Ms. Ray later indicated that appellant brought her a “statement” indicating that she needed to be excused from work. It is unclear who prepared this document and it is not contained in the record.

would have to start carrying mail again and that she was no longer going to be in an acting supervisor role on an everyday basis because the facility could no longer carry her hours in that capacity.<sup>3</sup> Mr. Oliver stated, “I never shoved [appellant], she brushed into me not paying attention to where she was walking in the [aisle way], which is something that happens everyday through that [aisle way]. After the incident we both went our separate ways-no harm, no foul.”

In a November 18, 2011 initial visit report, Dr. Edward Wolski, an attending Board-certified family practitioner, stated that appellant reported that in October 2011 she contacted an official in order to file a harassment claim against Mr. Oliver. Appellant indicated that on November 1, 2011 she was pushing a cart in a hallway and tried to get out of the way when she noticed Mr. Oliver approaching her. Dr. Wolski stated that she noted that she braced the left side of her body up against the cement wall to avoid contact with Mr. Oliver but he leaned into her while walking by and shoved her against the wall, thereby causing injury to her left upper extremity, left hip and lower back.<sup>4</sup> He diagnosed cervical, lumbar and thoracic sprains/strains, cervical radiculitis, left hip strain, contusion to the cervical, thoracic and lumbar spines, left hip contusion and disturbance of emotions.<sup>5</sup> On December 1, 2011 appellant underwent a functional capacity evaluation at Dr. Wolski’s direction. In a December 12, 2011 form report, Dr. Wolski listed various work restrictions.

In a January 6, 2012 decision, OWCP denied appellant’s claim that she sustained a work injury on November 1, 2011. It noted the conflicting accounts of what happened on November 1, 2011 and found that she had not established that the claimed work incident occurred at the time, place and in the manner alleged.

Appellant requested a telephone hearing with an OWCP hearing representative.<sup>6</sup> During the April 18, 2012 hearing, she testified that on November 1, 2011 she was performing her regular duties inside the mail facility, including transporting mail to her casing station after finishing her route. Appellant asserted that there were no other workers in the vicinity and indicated that Mr. Oliver got up from his chair and began to go through the same entrance that she was using. She stated that he walked past her and pushed her, leaning his body into her and elbowing her into the wall. Appellant indicated that Mr. Oliver leaned the whole right side of his body into her right side and then continued to walk down the hall past her. She testified that she

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<sup>3</sup> In a November 30, 2011 statement, Ms. Turner noted that appellant had been informed she would no longer be utilized as an acting supervisor and that appellant had contacted numerous management officials in an attempt to get them to allow her to continue acting as a supervisor. Appellant was told that the budget would not allow her to act in that capacity.

<sup>4</sup> Appellant provided a similar account of the claimed November 1, 2011 incident in a Workers’ Compensation Injury Questionnaire completed on November 18, 2011. The record also contains an undated handwritten statement describing the events of November 18, 2011 but the statement, although presumably completed by appellant, is unsigned.

<sup>5</sup> In a work restrictions form report dated November 18, 2012, Dr. Wolski listed the date of injury as November 1, 2011 and indicated that appellant could not work. He did not provide any history of injury or examination findings on this form. The findings of lumbar x-rays obtained on November 18, 2011 show mild disc compression at L1-2 and spondylosis. X-rays of appellant’s left shoulder from the same date showed unremarkable results.

<sup>6</sup> Appellant submitted additional medical records and reports of physician’s assistants and physical therapists.

waited for him to go through the entrance before she proceeded through the entrance. Appellant asserted that she was not wearing earphones at the time of the incident, as stated by Mr. Oliver, explaining that such an action would constitute a violation of safety practices. She testified that she attempted to care for herself at home by using hot packs and that this resulted in her delay in filing her claim. Appellant indicated that her pain subsequently worsened at which time she filed a claim and sought treatment with her attending physician. Appellant's representative also testified at the hearing and indicated that appellant had filed a grievance regarding the November 1, 2011 incident which had reached the step one meeting stage. The representative asserted that Mr. Oliver harassed appellant by pushing her into the wall and changing her work schedule, as a result of appellant ending their personal relationship.

In a July 11, 2012 decision, the hearing representative affirmed OWCP's January 6, 2012 decision. She found that appellant had not established the fact of injury regarding the mechanism of the claimed November 1, 2011 injury as there were inconsistencies in the factual account of the November 1, 2011 incident. This cast serious doubt upon the validity of appellant's claim. The hearing representative discussed appellant's delay in filing a claim and seeking medical attention.<sup>7</sup>

Appellant requested reconsideration of her claim and submitted additional medical evidence describing the treatment of her various physical complaints.

In an October 17, 2012 decision, OWCP affirmed its July 11, 2012 decision denying appellant's claim for a November 1, 2011 work injury noting that she had not established the occurrence of the claimed November 1, 2011 work incident as alleged.

### **LEGAL PRECEDENT**

An employee who claims benefits under FECA 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>8</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>9</sup> An employee has not met his or 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>10</sup> Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work

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<sup>7</sup> The hearing representative indicated that appellant had not established that Mr. Oliver harassed her by preventing her from working as an acting supervisor or by pushing her into a wall on November 1, 2011. Although there is some suggestion in the record that she claimed that she sustained an emotional condition due to actions of Mr. Oliver, appellant did not clearly make such a claim and the question of whether she sustained a work-related emotional condition is not currently before the Board.

<sup>8</sup> *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

<sup>9</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>10</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

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>11</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>12</sup>

### ANALYSIS

On November 17, 2011 appellant, filed a traumatic claim alleging that on November 1, 2011 she sustained injury to her left shoulder and left lower back when Mr. Oliver, a supervisor, "pushed/forced me into the wall." She later provided expanded descriptions of this claimed work incident and also indicated that other parts of her body were injured as a result, including her cervical region and hips. In a November 30, 2011 statement, appellant indicated that on November 1, 2011 she had just entered the building to end her tour and Mr. Oliver began to come down the entrance. She stated that she braced herself against the wall to ensure no physical contact would be made with Mr. Oliver. Appellant asserted that he intentionally pushed her further into and against the wall and that as a result she felt a popping in her neck and back and pain in her left shoulder. In several decisions, OWCP denied her claim for a November 1, 2011 work injury finding that she had not established the occurrence of the November 1, 2011 work incident as alleged. It referenced statements of managers that conflicted with those of appellant regarding the incident and noted that she did not adequately explain her delay in filing her claim and in seeking medical treatment.

The Board finds that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that she sustained an injury on November 1, 2011.<sup>13</sup> The record contains evidence which calls into serious question her account of the events of November 1, 2011.

In an undated statement received by OWCP on December 5, 2011, Mr. Oliver stated that on November 1, 2011 he was walking through the employee entrance to check the dock and appellant opened the door with her head down, earplugs in her ears and talking on the telephone. He noted that, in doing so, appellant did not notice him until he was close to the door and she accidentally bumped into him while she was coming inside the building from off the street.<sup>14</sup> After the incident, appellant never stated anything to him and did not try to inform Ms. Ray, the postmaster or anyone else that he pushed her or tried to harm her in anyway. Mr. Oliver noted that there were four or five other carriers in the building and noted that appellant failed to mention to her coworkers that he pushed her in a malicious manner. He stated, "I never shoved her, she brushed into me not paying attention to where she was walking in the [aisle way], which is something that happens everyday through that [aisle way]." In an e-mail dated November 3, 2011, Ms. Ray advised that appellant called her on that date and told her that Mr. Oliver was

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<sup>11</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

<sup>12</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

<sup>13</sup> *See supra* note 11.

<sup>14</sup> In other statements, Mr. Oliver described the contact as a very light and insignificant brushing.

mad at her and had bumped into her on November 1, 2011. She noted that appellant did not advise her of these circumstances when they had a two and half hour conversation on November 2, 2011.

Further doubt is cast upon the factual aspects of appellant's claim by the fact that she did not file a traumatic injury claim for the claimed November 1, 2011 work injury until more than two weeks later on November 17, 2011. Appellant did not adequately explain why she delayed so long in filing her claim.<sup>15</sup> She also delayed in seeking medical treatment of the conditions that she claimed that she sustained on November 1, 2011. The November 18, 2011 report of Dr. Wolski, an attending Board-certified family practitioner, detailed an examination on that date and represents the earliest medical evidence of record to mention the claimed November 1, 2011 work incident.<sup>16</sup> Appellant indicated that she treated herself at home for a period, but she did not adequately explain why her delay in seeking medical treatment was so long given the severity of the injuries she claimed for several parts of her body.<sup>17</sup>

Although an employee's statement alleging that, an injury occurred at a given time and in a given manner is generally accorded great probative value, there is strong and persuasive evidence refuting appellant's account of the events of November 1, 2011.<sup>18</sup> The Board finds that she has not established the occurrence of the November 1, 2011 work incident as alleged and therefore has not established that she sustained an injury on November 1, 2011 in the performance of duty.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury on November 1, 2011 in the performance of duty.

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<sup>15</sup> Such explanation is especially necessary given the serious claim by appellant of malicious conduct by Mr. Oliver. It should be noted that at the time of the claimed November 1, 2011 incident she had filed a harassment grievance against Mr. Oliver that was being processed in its early stages.

<sup>16</sup> Ms. Ray advised that appellant called her on November 3, 2011 and told her that she had gone to a physician who gave her a "statement" indicating that she could not return to work until November 13, 2011. She later indicated that appellant later brought her a statement indicating that she needed to be excused from work. However, there is no medical report in the record detailing a visit to a physician during this period.

<sup>17</sup> On appeal, appellant's representative asserted that appellant "immediately" sought medical care but he did not point to medical evidence in the record which supported this assertion.

<sup>18</sup> See *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 17, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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