

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

Y.R., Appellant

and

**DEPARTMENT OF DEFENSE, NAVAL
STATION COMMISSARY, San Diego, CA,
Employer**

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**Docket No. 09-994
Issued: November 9, 2009**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 6, 2009 appellant, through her representative, filed a timely appeal from the February 6, 2009 merit decision of the Office of Workers' Compensation Programs' hearing representative. 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 has met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on April 27, 2008, as alleged.

FACTUAL HISTORY

On May 9, 2008 appellant, then a 45-year-old lead sales store clerk, completed a claim for compensation alleging that she sustained a traumatic injury in the performance of duty on April 25, 2008: "Moving and stocking heavy items, and working in cash register. Hypertension occurred and bursitis of knee." She described the nature of her injury as back pain and left knee.

Appellant indicated that she gave notice of the injury that same day, April 25, 2008. The grocery manager, Eduardo B. Benito, indicated that appellant gave notice on May 21, 2008. He indicated that she stopped work on April 27, 2008 and returned to work on May 7, 2008.

Mr. Benito stated that he believed appellant was not injured on April 25, 2008. He noted that she worked on the sales floor trying to find items with no price signs, generating and attaching price signs with the items. Appellant worked from 6:30 a.m. and went home at 3:00 p.m. on April 25, 2008 without any accident reported. Mr. Benito stated that she never worked the cash register that day. He then related what happened on April 27, 2008:

“On or about 7:45 a.m.[,] April 27, 2008, the cash register line was long Ms. Cora Ames asked [appellant] to help at the [c]ash [r]egister because the Customer Service Department is short handed with personnel. [Appellant] stated that she does not want to help them because she was scanning the loose items in preparation for our Annual Physical Inventory. Ms. Ames called Mr. Pacoma and I over the phone and asked help to the cash register. Mr. Pacoma and I went to the scene and requested [appellant] to get her till and go to the cash register. [Appellant] stated to me that ‘If she goes to the cash register, she will not go back to scan the loose items anymore and she will definitely go home!’ She went to pick up her till and open her line. On or about 8:35 a.m., April 27, 2008, I went to the Front End. I saw the line was gone and ask Ms. Ames to release [appellant.] [Appellant] returned her till and went upstairs. On or about 8:50 a.m., April 27, 2008, I went to my office and found her sick leave chit to see her doctor. I went to see Mr. Vick and he told me that [appellant] was requesting to see her doctor. I paged [appellant] and proceeded to my office. She then called her doctor for an appointment. [Appellant] left the store at 9:00 a.m. and took back her sick leave without my approval because she does not have any earned sick leave in her book at that time.”

On June 10, 2008 Dr. Nick S. Nurani, a Board-certified family practitioner, reported that appellant was seen on June 9, 2008 complaining of localized low back pain and left knee pain since April 25, 2008. Appellant stated on that day at work she was made to move boxes for an extended period and she was not accustomed to that type of work. She stated that her back and knee pain were brought on by bending and lifting. Dr. Nurani diagnosed lumbar strain and knee strain. He indicated that his findings and diagnosis were consistent with appellant’s account of injury or onset of disease “per history.”

On June 13, 2008 the Office received from appellant a more detailed account of what happened on the date of injury:

“On April 25, 2008 Sunday morning, Mr. Benito came in to work for the store inventory, and I was at the sales floor where I was scanning and lifting heavy items, and suddenly I felt cold sweats, vomiting, and fast heart beat. I felt back pain, and my knee was hurting, I started feeling badly. Suddenly, Mr. Pacoma, who was a store grocery manager and Mr. Benito, they went to my duty area, and they wanted me to stop what I was doing, and they want me to go to the cash register. I went to the cash register. While working at the cash register, I felt

dizzy, and cold sweats, so I turned in my till to the cash cage, and went to Mr. Benito's office, to tell him that I needed to go to the doctor. As I'm walking at the hallway, I saw Mr. Pacoma inside the MSC's office standing by my cubicle. I went to MSC's office to filled out the leave request sheet. I saw Mr. Vick who was a Store Director, sitting on the chair and using the secretary's computer at MSC's office. I have told him that I was not feeling well and I wanted to go to the doctor same day. Mr. Vick said that I could leave but he didn't approve my one day leave. He wanted me to find Mr. Benito before I am leaving the store. Mr. Pacoma was still in the office and he heard me talking with Mr. Vick. I went back to the sales floor, checked the warehouse to find Mr. Benito, however, I couldn't find him anywhere. I was shaking, and cold sweat was getting worse. I went back to Mr. Benito's office to and waited for him. I came in to work at 0630 and sign out at 0900 in my TnA. But, I couldn't leave right away because Mr. Benito was not at his office. According to Mr. Vick that I could not leave the store until I talked to Mr. Benito, so I went back to MSC's office and I saw Mr. Benito talking to Mr. Vick, and then Mr. Benito went back at his office. I have waited an hour to talk to Mr. Benito and I finally asked him if I could leave that day because I was sick, and I needed to go to the hospital. Mr. Benito didn't believe me. He was accusing me that I'm laying. He told me that the reason why I wanted to leave that day because I didn't like to go to work. I kept repeating to Mr. Benito that I was sick and I needed a help. Mr. Benito was ignoring me, but he wanted to argue instead. Mr. Benito told me that he would approve my one day leave, if I would see my own doctor and bring him a doctor letter after. I called the Kaiser Hospital right away. I was talking with a nurse on front of Mr. Benito. I have told to nurse that I was at working having a cold sweat, vomiting, my heart beat was fast and knee was hurting. The nurses have told me to go to the hospital right away. I left Mr. Benito's office on 4/25/08 Sunday morning. I let him know that I am going to the hospital, but he was ignoring me."

Appellant stated that she drove to Kaiser Hospital that Sunday morning and had chest pain while driving. She was transferred to Kaiser Emergency Hospital and work up Monday morning at an intensive care unit, where she stayed until she was discharged on Thursday, May 1, 2008. Appellant added: "The register nurse made a mistake for putting a wrong date with discharged chart because it was supposed to be an April 25, 2008 not April 27, 2008 instead." The record shows that appellant was hospitalized on April 27, 2008.

On or about June 25, 2008 appellant advised the Office that she mistakenly wrote the date of injury on her claim form as April 25, 2008. It was supposed to be April 27, 2008. "I have started working on April 25, 26, and 27, 2008 stocking and lifting heavy items." On or about July 7, 2008 appellant wrote: "I found out that when I came back to work on June 13, 2008."

In a decision dated July 7, 2008, the Office denied appellant's claim on the grounds that she failed to establish that a specific event, incident or exposure occurred at the time, place and in the manner alleged. The Office cited a lack of clarity and consistency in the alleged history of injury.

Appellant requested a telephonic hearing before an Office hearing representative, which was held on November 13, 2008. She described what happened on April 27, 2008:

“I was -- what I’m doing -- I was lifting heavy items. As a matter of fact, I started 25, 26, and 27. The 27th, that’s the time that I really, really injured. I hear pop from my knee and my back when I lift the item from the top pallet -- the pallet is too high for me. It’s like 5’6” high and I’m 4’11”. However, then when I -- because I could not see what’s on top, I have to grab the mail crate and there’s a lot of different kind of miscellaneous item up there. I have to hold it tight and try, you know, to pull it down. However, whole -- my whole body followed that -- follow where the case goes down to the floor. So I have to bend my back all the way rapidly and my knee -- hear a pop. And at the beginning of my really get sick that day.”

Appellant later testified that she told her supervisors what happened to her:

“Yes, I told them right away on April 25 what happened to me. I told ... the customer service supervisor, and Benito and left messages. Ms. Ovic the nurse called him because I was in -- I’m passed out already. I don’t know what’s happening to me, so they called all the supervisor at my work.”

In a decision dated February 6, 2009, the Office hearing representative affirmed the denial of appellant’s claim. He found unexplained inconsistencies in the factual evidence that cast significant doubt on the claim, inconsistencies relating to the date of injury, the activity she was performing, the date of notice, how she left work on April 27, 2008, and the delay in filing her claim for compensation, and the failure of the initial medical reports to mention a work-related injury.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹ A person who claims benefits under the Act has the burden of establishing by a preponderance of the reliable, probative and substantial evidence the essential elements of her claim, including the fact that she sustained an injury at the time and in the place and manner alleged.² To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant’s

¹ 5 U.S.C. § 8102(a).

² *Henry W.B. Stanford*, 36 ECAB 160 (1984); *Samuel L. Licker*, 4 ECAB 458 (1951).

statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.³

ANALYSIS

Appellant was simply confused about her dates. In her narrative statement, received by the Office on June 13, 2008, she stated: “On April 25, 2008, Sunday morning” April 25, 2008 was a Friday. April 27, 2008 was a Sunday. Appellant has since sought to clarify that the date of her injury was actually April 27, 2008 which would make her basic account of what happened that day more consistent with the account given by Mr. Benito, the grocery manager, and with the evidence of her hospitalization on April 27, 2008. Appellant’s confusion appears to explain the reason some medical records listed the date of injury as April 25, 2008.

Nonetheless, there is still a troublesome inconsistency in appellant’s claim that she sustained a traumatic injury on April 27, 2008 while in the performance of duty. She stated that she gave notice of her employment injury the same day. Appellant’s immediate supervisor, Mr. Benito, disputed that assertion. In Mr. Benito’s account of what happened on April 27, 2008, appellant did not mention an accident at work. In appellant’s own account of what happened, received by the Office on June 13, 2008, she gave no indication that she notified any of her superiors that she had injured her back or knee in the performance of duty. In addition to sudden vomiting, cold sweats and a fast heart beat, she stated that she felt back pain and her knee was hurting. Moreover, appellant did not mention a work injury to Mr. Benito, Mr. Pacoma or Mr. Vick. She went to Mr. Benito’s office “to tell him I needed to go to the doctor.” Appellant told Mr. Vick “I was not feeling well.” She asked Mr. Benito if she could leave “because I was sick, and I needed to go to the hospital.” Appellant kept repeating that she was sick and needed help.

It appears that appellant did not notify anyone that she hurt herself at work until May 21, 2008, when the employer received her claim for compensation. It appears she did not notify any of her medical providers until June 9, 2008, when she gave a history to Dr. Nurani, her family physician, that she was made to move boxes at work for an extended period. So there is a significant and unexplained delay in reporting that she hurt her back and left knee at work.

Appellant testified during the November 13, 2008 telephonic hearing that she heard a pop from her knee and her back when she lifted an item -- a plastic container or mail crate -- from the top of a pallet she was scanning. The pallet was too high for her and when she lifted the item off the pallet, it pulled her body down toward the floor. “So I have to bend my back all the way rapidly and my knee -- I hear pop.” This was the very first time appellant mentioned anything about hearing a pop in her back and knee while lifting an item from the top of a pallet.

Appellant’s claim that she sustained a traumatic injury on April 27, 2008 is not very consistent with the surrounding facts and her subsequent course of action. If she injured her back and knee while performing her duties, if she lifted a plastic container off the top of a pallet and the weight of it jerked her body down toward the floor, causing a pop and causing back and

³ *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984). See also *George W. Glavis*, 5 ECAB 363 (1953).

knee pain, it is reasonable to expect that she would promptly tell one of her supervisors at work, that she would give this history to her medical care providers, and that she would describe this incident on her claim for compensation. However, the evidence shows none of this. Because the inconsistencies in the evidence cast serious doubt on the validity of appellant's claim, the Board finds that she has not met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on April 27, 2008, as alleged. The Board will affirm the Office hearing representative's February 6, 2009 decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury in the performance on April 27, 2008, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board