



## **FACTUAL HISTORY**

On November 3, 2009 appellant, then a 55-year-old maintenance mechanic, filed an occupational disease claim alleging that he sustained a strained back muscle as a result of employment activities. He stated: "I work as an equipment mechanic requiring me to bend, stretch, strain, grunt and groan while performing maintenance on the machines. I had just completed the majority of that day's assignments when I began to ache."

Appellant noted that he first became aware of his condition on October 22, 2009 and first realized the condition was related to his employment on October 27, 2009. He stopped work on October 28, 2009 and returned to work on November 3, 2009.

In an accompanying statement, appellant indicated that he strained his back "while performing my assigned duties on October 26/27, 2009." His duties, which included vac-n-go, replacing numerous belts and cleaning large machines, required him to bend often.

Appellant submitted an October 29, 2009 disability slip, bearing an illegible signature and an undated prescription receipt from Walgreen's drug store.

Appellant also filed a Form CA-1 for a traumatic injury on November 3, 2009, claiming that he strained his back on October 27, 2009 at 4:00 a.m. The CA-1 form reflects that he did not give notice of the claimed injury to his supervisor until November 3, 2009.

On November 12, 2009 the Office informed appellant that he submitted insufficient evidence to establish his claim and requested a description of the employment-related activities he believed contributed to his condition, as well as an explanation of how often and for how long he performed such activities. In addition, it requested that he submit a medical report from a treating physician, discussing his symptoms, examination results, diagnosis and providing an opinion regarding the cause of his medical condition.

In a November 2, 2009 injury report, Dr. Michael D'Amico, Board-certified in the field of family medicine, diagnosed "thoracic strain, resolving." He noted that appellant had a history of low back pain and identified October 26, 2009 as the date of injury.

The record contains an October 27, 2009 disability slip from Dr. Gina Buono, Board-certified in the field of occupational medicine, reflecting that appellant could return to work on October 28, 2009 in a sedentary position. On November 2, 2009 Dr. D'Amico stated that he strained his back while at work; the approximate date his condition commenced was October 27, 2009; and he was incapacitated from October 27 through November 2, 2009.

On November 4, 2009 Larry Berg of the employing establishment related appellant's report of the claimed injury. On October 27, 2009 appellant allegedly reached over the feeder section to close a cover and strained his back. Mr. Berg noted that appellant did not report the claimed strain until November 4, 2009. A separate incident report dated November 4, 2009 reflected that appellant strained his back while reaching over the feeder section of a cancelling machine.

A November 5, 2009 report from Dr. D'Amico reflected that he and Dr. Buono had seen appellant on November 2 and October 27, 2009 respectively for a work-related back injury. On November 2, 2009 appellant informed Dr. D'Amico that, after performing his usual job functions, his mid-back began to hurt during his work shift on October 26, 2009 and gradually worsened the following day. Dr. D'Amico diagnosed back strain on that date and recommended restrictions. He stated: "Both physicians believe the injury was caused by work functions based on the job responsibilities and type of injury."

On December 30, 2009 Mr. Berg stated that appellant had decided to withdraw his occupational disease claim so that the Office could develop a claim for COP for his October 27, 2009 injury.

On January 26, 2010 the Office accepted appellant's claim for "[sprain of the back, lumbar region], 8472 resolved by November 3, 2009." It informed him that the claim was accepted as an occupational disease claim based on Dr. D'Amico's statement that he "began to hurt on October 26, 2009" and the fact that he failed to establish a specific event that caused his diagnosed condition.

By decision dated February 9, 2010, the Office denied appellant's claim for COP, finding that he had not alleged a traumatic injury.

On February 27, 2010 appellant requested reconsideration. He stated that he originally submitted a Form CA-1, together with a physician's statement. A day or two later, appellant was directed to submit a Form CA-2 in order to negate the CA-1 form and obtain COP.

On October 27, 2009 appellant told Dr. Buono that he had been working at the employing establishment for years, changing bits and working on the processing machine. On October 26, 2009 he related that he was kneeling on the machine to stub the belts and had an increase in low back pain at work after he completed changing belts. Appellant informed Dr. Buono that he "had a back injury last year."

By decision dated May 14, 2010, the Office denied modification of its prior decision, finding that appellant sustained a low back strain due to factors of employment over a period of more than one work shift.

On May 20, 2009 appellant requested reconsideration, contending that his injury occurred during one work shift. He stated that his work shift consisted of eight and a half hours (10:00 p.m. to 6:30 a.m.) Appellant's injury allegedly occurred during his work shift beginning at 10:00 p.m. on Tuesday, October 26, 2009 and ending at 6:30 a.m. on Wednesday, October 27, 2009. As his pain continued through that morning, he went to Urgent Care and saw Dr. Buono around 3:00 p.m. that afternoon. Appellant contended that when Dr. D'Amico stated that his injury occurred during his October 26, 2009 work shift, it was the same work shift as that of October 27, 2009.

Appellant submitted a May 19, 2009 letter from Tour I shift manager, J.A. Frett, who corroborated appellant's statement that his 40-hour shift commences at 10:00 p.m. on a Monday evening and ends at 6:30 a.m. on a Saturday morning. Mr. Frett noted that appellant did not work on either his Sunday or Monday off-days of October 25 or 26, 2009 and injured himself

sometime during his service-day of Tuesday, October 27, 2009. Appellant was absent on his Wednesday service-day and reported to work on his Thursday service-day of October 29, 2009. Due to the restrictions by his physician, he was not able to perform his duties and was directed to stay on sick leave. Appellant returned to full duty on November 3, 2009 with no restrictions.

Appellant submitted copies of Dr. D'Amico's October 29, 2009 disability slip and November 5, 2009 letter and Dr. Buono's October 27, 2009 disability slip.

In a decision dated July 7, 2010, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.<sup>2</sup> A traumatic injury means a condition of the body caused by a specific event or incident or a series of events or incidents, within a single workday or shift.<sup>3</sup> Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of body.<sup>4</sup>

For most employees who sustain a traumatic injury, the Act provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days.<sup>5</sup> This is called COP. The employer, not the Office, is responsible for providing COP.<sup>6</sup> Unlike wage-loss benefits, COP is subject to taxes and all other payroll deductions that are made from an employee's regular income.<sup>7</sup> To be eligible for COP, a person must have a traumatic injury, as defined under 20 C.F.R. § 10.5(ee), which is job related and the cause of the disability and/or the cause of the lost time due to the need for medical examination and treatment.<sup>8</sup> Additionally, a person must file Form CA-1 within 30 days of the date of the injury and begin losing time from work due to the traumatic injury within 45 days of the injury.<sup>9</sup> An employer is not required to pay COP when the disability was not caused by a traumatic injury.<sup>10</sup>

---

<sup>2</sup> 20 C.F.R. § 10.5(q) (2009).

<sup>3</sup> *Id.* at § 10.5(ee).

<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8118(a), (b) (2006); 20 C.F.R. § 10.200(a).

<sup>6</sup> *Id.* However, the Office has the exclusive authority to determine questions of entitlement and all other issues relating to COP. *Id.* at § 10.200(b).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 10.205(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at § 10.220(a).

## ANALYSIS -- ISSUE 1

The Board finds that appellant's employment injury was properly designated as an occupational disease, thereby precluding entitlement to COP.

In his Form CA-2, appellant noted that he first became aware of his condition on October 22, 2009 and first realized the condition was related to his employment on October 27, 2009. His work activities as an equipment mechanic required him to bend, stretch, strain, grunt and groan while performing maintenance on the machines and noted that he began to ache after completing the majority of his assignments on that day. Appellant informed Dr. D'Amico that, after performing his usual job functions, his mid-back began to hurt during his work shift on October 26, 2009 and gradually worsened the following day. He has described a condition that was produced by the work environment over a period longer than a single workday or shift. Therefore, appellant's injury meets the definition of an occupational illness.<sup>11</sup>

Subsequent to the filing of his occupational disease claim, appellant filed a Form CA-1, alleging that he sustained a traumatic injury on October 27, 2009. The evidence of record, however, does not establish that he sustained a traumatic injury on that date. Appellant's presentation of the facts is not supported by the evidence of record and does not establish his allegation that a specific event occurred which caused an injury on the date in question.<sup>12</sup> Moreover, there are inconsistencies in the evidence which cast serious doubt on the validity of his traumatic injury claim.

Appellant initially reported on his November 3, 2009 CA-1 form that he strained his back on October 27, 2009 at 4:00 a.m. He provided no detailed account of the incident, as required in a traumatic injury claim. Appellant told Dr. D'Amico that he "began to hurt on October 26, 2009." The mere fact, however, that his back began to ache on October 26 or 27, 2009 does not establish that his accepted condition was due to employment factors occurring on that particular day. Appellant subsequently informed his supervisor that on October 27, 2009 he reached over the feeder section to close a cover and strained his back. He told Dr. Buono that he was kneeling on a machine to stub the belts and had an increase in low back pain at work after he completed changing belts. Appellant's allegations are vague and do not relate with specificity the circumstances or the exact and immediate consequences of the injury (*e.g.*, whether he fell, whether he was unable to continue working and whether he cried out). Moreover, the allegations are inconsistent, both as to the specific events claimed to have occurred on October 27, 2009 and as to the true nature of the claim.

Appellant's subsequent course of action also fails to support his claim. Most notably, the record reflects that he attempted to withdraw his occupational disease claim for the purpose of obtaining COP through his traumatic injury claim. The Board notes that the mere withdrawal of his occupational disease claim does not, in and of itself, change the nature of the claim. The issue for determination is whether appellant's condition was produced by the work environment

---

<sup>11</sup> 20 C.F.R. § 10.5(q) (2009).

<sup>12</sup> See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

over a period longer than a single workday or shift<sup>13</sup> or whether it is a condition caused by a specific event or incident or a series of events or incidents, within a single workday or shift.<sup>14</sup> Appellant also provided no statements to corroborate his claim from anyone who either witnessed or to whom he immediately reported, the incident. In fact, the record reflects that he did not report the incident to his supervisor until at least November 3, 2009. Thus, appellant did not submit sufficient evidence to establish that he actually experienced an employment incident at the time, place and in the manner alleged or that the alleged incident caused his condition.

The Board finds that the Office properly determined that appellant's claim was more appropriately classified as an occupational disease rather than a traumatic injury. Therefore, as appellant's claimed disability was not caused by a traumatic injury, he is not entitled to COP.<sup>15</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>16</sup> the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>17</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>18</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>19</sup> The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant's employment injury was properly characterized as an occupational disease and as such, he was not entitled to COP. Appellant requested reconsideration of the May 14, 2010 decision.

---

<sup>13</sup> 20 C.F.R. § 10.5(q) (2009).

<sup>14</sup> *Id.* at § 10.5(ee).

<sup>15</sup> *Id.* at § 10.220(a).

<sup>16</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(b).

<sup>20</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim. In his May 20, 2010 application for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. His argument was that his injury occurred during one work shift. A claimant may be entitled to a merit review by submitting new and relevant evidence. The Board finds that appellant did submit new and relevant evidence in this case.

Appellant submitted a May 19, 2009 letter from Tour I shift manager, Mr. Frett, who corroborated appellant's statement that his 40-hour shift commenced at 10:00 p.m. on a Monday evening and ends at 6:30 a.m. on a Saturday morning. Mr. Frett noted that appellant did not work on either his Sunday or Monday off-days of October 25 or 26, 2009 and injured himself sometime during his service-day of Tuesday, October 27, 2009. This letter constitutes new and relevant evidence not previously considered by the Office. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his burden of proof nor does it need to be dispositive. The claimant need only submit evidence that is relevant and pertinent and not previously considered. As Mr. Frett's letter is relevant to whether appellant sustained an injury on October 27, 2010 and has not been previously considered, the Office should have reviewed appellant's case on the merits.

The Board finds that appellant's request for reconsideration satisfies the third standard for obtaining merit review.<sup>21</sup> Therefore, the case will be remanded to the Office for a merit review.<sup>22</sup>

### CONCLUSION

The Board finds that the Office properly characterized appellant's employment injury as an occupational disease. Consequently, appellant is not entitled to COP. The Board further finds that the Office improperly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

---

<sup>21</sup> 20 C.F.R. § 10.606(b)(2).

<sup>22</sup> Appellant also submitted evidence previously of record, including copies of Dr. D'Amico's October 29, 2009 disability slip and November 5, 2009 letter and Dr. Buono's October 27, 2009 disability slip. The Board has long held that the submission of evidence which repeats or duplicates evidence already in the record does not constitute a basis for reopening a case. *D.K.*, 59 ECAB 141 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** and May 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that its July 7, 2010 decision is set aside and remanded for action consistent with this decision.

Issued: July 6, 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