

		)	
S.B., Appellant		)	
		)	
and		)	Docket No. 06-978
		)	Issued: March 5, 2007
DEPARTMENT OF THE ARMY, McWETHY		)	
TROOP MEDICAL CLINIC, Fort Jackson, SC,		)	
Employer		)	
		)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On March 28, 2006 appellant filed a timely appeal from the December 21, 2005 merit decision of the Office of Workers' Compensation Programs, which denied her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the claim.

The issue is whether appellant sustained an injury in the performance of duty on September 21, 2004.

On October 7, 2004 appellant, then a 36-year-old medical records clerk, filed a claim alleging that she sustained an injury in the performance of duty on September 21, 2004.

On November 18, 2004 she recounted what happened:

“On September 21, 2004 I was attacked by a coworker. I was leaving a scheduled dentist appointment. Ms. Palmer, the coworker, approached me stating that she had to go on emergency leave and she needed for me to sign her annual leave slip. I stated to Ms. Palmer that she need[ed] to contact Kathy Bryant, the immediate supervisor, or Captain Robinson, the chief of our division, to sign the necessary documents. Ms. Palmer stated that she needed to leave right away and that she really needed for me to sign the leave slip. After repeating to Ms. Palmer that I didn’t have authority to sign her leave slip she asked me to walk with her to the car to see the fax that she received stating that she had the emergency. As I approached Ms. Palmer’s vehicle she opened the driver’s side back seat and stated to me the fax was on the back seat of the car. She asked me did I see the fax[,] I stated no and that’s when Ms. Palmer attacked me with a gun and hammer.”

Appellant told the sheriff’s department that, when she leaned into the vehicle to locate the fax, Ms. Palmer pushed her further into the vehicle and attempted to place duct tape over her mouth and face. She stated that Ms. Palmer produced what appeared to be a silver gun. As the altercation ensued, Ms. Palmer retrieved a hammer, began to hit appellant repeatedly and threatened to use pepper spray. Appellant received emergency medical care for 15 scalp lacerations, which required 60 staples. Ms. Palmer was charged with assault and battery with intent to kill and kidnapping.

Appellant explained that she and Ms. Palmer never had a relationship outside the workplace. They never ate lunch together, called one another at home or communicated on a personal level. Appellant believed the reason for the attack was that she had repeatedly spoken to Ms. Palmer about her tardiness and lack of work and had on several occasions expressed this concern to Ms. Bryant, the immediate supervisor.

Captain Robinson, the chief of the division, controverted appellant’s claim on the grounds that she was not in the performance of duty at the time of the assault: “On approved leave all day to attend to personal business (dentist appointment). Left for appointment from home address, place of attack was off the agency premises. Attacker (coworker Ms. Palmer) left work area and traveled off premises to attack location.” Captain Robinson stated that appellant was in no official “off-premises” duty. The record shows that appellant took eight hours of approved sick leave on September 21, 2004. The record also contains a map showing where the assault took place, outside the limits of Fort Jackson.

On December 2, 2004 the Office denied appellant’s claim for compensation. It found that the injury did not occur in the performance of duty, as both appellant and her attacker were in a leave status and were not on the premises at the time of the assault.

Appellant requested an oral hearing before an Office hearing representative. In an October 12, 2004 memorandum, Ms. Bryant, the immediate supervisor, recounted what appellant had told her at the hospital:

“When [appellant] saw me in the waiting area, she hugged me and began to cry. She said Ms. Palmer told her she needed to go on emergency leave and needed her to approve her leave slip. [Appellant] told her she could not approve a leave slip for more than a few hours and she needed to see me. Ms. Palmer th[e]n [sic] stated that the paper work was in her car and she needed [appellant] to at least take the paper work to me because she had to leave immediately. When [appellant] got to the car she did not see any paperwork. Ms. Palmer told [appellant], I know I will go to jail, but I need to speak with you [sic] right away. [Appellant] was hysterical as she tried to explain to me that Ms. Palmer had tried to force her in the car and kill her. The attack on [appellant] was extremely vicious and inhuman. I believe [appellant] went to Ms. Palmer’s car to get the stated leave slips and emergency leave paperwork that was never found by the police or investigators. [Appellant] was working in the capacity of a [l]ead [c]lerk trying to assist Ms. Palmer.”

At the hearing, which took place on October 19, 2005, appellant read from the position description of lead medical records technician: “Approves leave for a few hours or during emergencies.” Appellant testified that on the day of the assault Ms. Palmer came up to her in the parking lot at the dentist’s office and explained that she had an emergency, that she needed immediate leave and that Ms. Bryant and Captain Robinson were not available for signature. Appellant also read from Ms. Bryant’s October 12, 2004 memorandum:

“Since [appellant] was working in the capacity as a [l]ead [c]lerk I met with her frequently. During our meetings I asked [her] how Ms. Palmer was working out. She stated that Ms. Palmer was doing ok but that she was late several times. I advised [appellant] to ensure Ms. Palmer turned in a leave slip, that I would speak to Ms. Palmer.”

Appellant testified that she had previously given instructions while absent from the work site: “I’ve called in if I was out that day and give them instructions or an assignment.” Appellant testified that, though it had never happened before, she believed that, if Ms. Bryant and Captain Robinson were not available, she had the authority to sign a leave slip while on leave.¹ She stated that Ms. Palmer wanted her to carry the leave slip to Ms. Bryant and to review it to make sure all the appropriate boxes were filled out and to verify that it was an emergency. Appellant further explained that she would normally take leave forms over to Ms. Bryant, who worked in another building and that Ms. Bryant would have final approval.

Following the hearing, the employing establishment submitted a notification of personnel action showing that appellant’s temporary promotion to lead medical records technician expired

¹ In her October 12, 2004 memorandum, Ms. Bryant wrote that she spoke with a Mr. Stanfield at the troop medical clinic on September 21, 2004 and informed him that Master Sergeant Battle could approve leave if she was out.

on July 3, 2004, after which she returned to the lower grade of medical records clerk on July 4, 2004.

In a decision dated December 21, 2005, the Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant was on approved leave at the time of the injury, that the attack did not occur at a place where she would be expected to be in connection with her employment and that she was not fulfilling any duties of her employment.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, did not contemplate a program of insurance against every injury, illness or mishap that might befall an employee. Liability does not attach upon the mere existence of an employer-employee relationship.² Instead, Congress provided for the payment of compensation for personal injuries sustained while in the performance of duty.³ The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."⁴

To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.⁵ "In the course of employment" relates to time, place and work activity. The injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.⁶ An employee seeking benefits under the Federal Employees' Compensation Act⁷ has the burden of proof to establish by reliable, probative and substantial evidence the essential elements of her case.⁸

ANALYSIS

Appellant's injury did not occur at a time when one could reasonably say she was engaged in her employer's business. As a medical records clerk, she had fixed hours of work.

² *Christine Lawrence*, 36 ECAB 422 (1985); *Minnie M. Huebner*, 2 ECAB 20 (1948).

³ 5 U.S.C. § 8102(a).

⁴ This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

⁵ See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

⁶ *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *John S. Steber*, 5 ECAB 93 (1952).

Appellant took eight hours' sick leave on September 21, 2004 and was, therefore, off the clock when a coworker assaulted her early that afternoon.

Further, appellant's injury did not occur at a place where one could reasonably expect her to be in connection with her employment. She had a fixed place of work: Fort Jackson. The injury took place off the premises of the employer, in the parking lot of a dentist.

Time and place are the two overt physical indicia of "course of employment" and are of unusual potency in identifying an activity with the employment.⁹ Both these elements of work connection are missing from appellant's case. As Larson explains in his treatise on workers' compensation law, this places a heavy burden on the third element of "course of employment":

"When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment and even further when one has associated the time of the activity somehow with the employment. This done, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might. Conversely, if the [activity] takes place on some distant vacant lot, several hours after the day's work has ceased, some independently convincing association with the employment must be built up to overcome the initial presumption of disassociation with the employment established by the time and place factors."¹⁰

It is not apparent that appellant's injury occurred while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. She was after all, off duty. Appellant was attending to purely personal business when the coworker first approached her. If her actions in those next few moments are to overcome the presumption of disassociation with employment, the nature and purpose of her activity must conspicuously and convincingly establish work connection.

Appellant's representative argues that when the assault took place appellant was still acting as the lead medical records technician and had authority to approve leave for a few hours or during emergencies. The evidence, however, does not establish this status or scope of authority. Appellant's temporary promotion to lead medical records technician expired on July 3, 2004, following which date she officially returned to the position of medical records clerk. She testified that her immediate supervisor, Ms. Bryant, nonetheless continued the detail. Ms. Bryant stated in her October 12, 2004 memorandum that appellant was working at least in the capacity of a lead clerk when she tried to assist the coworker. Captain Robinson, chief of the division and Ms. Bryant's superior, controverted appellant's claim, stating that she was not in the performance of duty at the time of the assault and in her November 18, 2004 statement, appellant wrote that she twice told the coworker "I didn't have authority to sign her leave slip." This

⁹ 2 ARTHUR LARSON & LEX K. LARSON, *Larson's The Law of Workers' Compensation* § 22.04(4)(b) (May 2000) (using "in the course" elements to analyze injuries from recreational and social activities).

¹⁰ *Id.* at § 22.03(1).

conflicts with her later testimony before the Office hearing representative that she believed she did have such authority.¹¹

What the evidence does establish is that appellant's primary motive in going to the coworker's car was to assist or accommodate the coworker for the latter's personal benefit. Appellant's purpose was not to aid the coworker in the performance of her duties or to advance the employer's work in any meaningful sense. She simply meant to do the coworker a favor, to see the alleged fax or to check the alleged leave slip and carry it to Ms. Bryant because, for personal reasons, the coworker needed to leave right away. Although the matter somehow related to employment, the facts do not establish a conspicuous and convincing work connection. The subject matter was administrative and only indirectly related to appellant's employment and the particular activity in question was not in fact an inherent part of the conditions of appellant's employment.¹² As she testified, no one had previously asked her to sign a leave slip while she herself was on leave.

The Board finds that appellant's injury did not arise in the course of her employment. In the absence of time and place, the burden of establishing work connection rests solely with activity. As a general rule, assisting or accommodating a coworker for the coworker's personal benefit is outside the course of employment, unless the deviation is insubstantial.¹³ Appellant's attempt to accommodate her coworker on September 21, 2004 does not establish the necessary work connection. Much less it does not overcome the presumption of disassociation with the employment established by the absence of the time and place elements.

Appellant's representative argues that this case is similar enough to *Shirley I. Griffin*¹⁴ and *Eric J. Koke*,¹⁵ that the Board should find appellant's injury compensable. These cases are readily distinguishable. In both, the time and place elements of work connection were established and not in dispute. The altercations arose between employees while on the premises of the employer and during their tours of duty. The exact nature and purpose of the activity itself did not have to bear the whole weight of establishing work connection. In *Griffin*, a female coworker assaulted the claimant for not introducing a male employee. In *Koke*, the conflict involved the shooting of rubber bands and, perhaps, the claimant's use of profanity. Such is the unusual potency of the time and place elements in identifying an activity with employment that in both cases the Board found the claimant in the course of employment, notwithstanding activities that were marginal, at best, to the employment. Appellant's case presents the opposite situation, where the time and place elements are missing and activity must shoulder the full load of establishing a work connection.

¹¹ A special performance rating signed January 25, 2005 shines little light on the matter. The period covers May 1 through November 30, 2004 notes that appellant was detailed as the lead medical records clerk but identifies her current position as medical records clerk and does not rate her on elements that apply to positions with some supervisory duties.

¹² See generally Larson, Chapter 20 (general test of work connection as to activity).

¹³ *Id.* at § 27.01(5).

¹⁴ 43 ECAB 573 (1992).

¹⁵ 43 ECAB 638 (1992).

Appellant's representative also argues that the injury arose directly from the employer having brought appellant and her coworker together creating the conditions that resulted in the attack. Both *Griffin* and *Koke* quote Larson for the proposition that assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origins in the work.¹⁶ *Griffin* quotes Larson further for the proposition that an assault arises out of employment when the work brings the participants together and creates the relations and conditions that resulted in the clash.¹⁷ The Board does not base its holding in appellant's case on the "arising out of" test, which primarily concerns causation. Under the Act and Board precedent, appellant has the burden of establishing that her injury arose both out of and in the course of employment. Because she has not established the latter, the Board will affirm the denial of her claim for compensation.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on September 21, 2004. She was on leave and off the premises when the injury occurred. Appellant's attempt to accommodate the coworker for the latter's personal benefit does not bring the injury within the course of her employment.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ Larson, Chapter 8.

¹⁷ *Id.* at § 8.01(6)(a).