

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARLYNN A. WITT and RESOLUTION TRUST CORPORATION, LEGAL
DIVISION, Overland Park, KS

*Docket No. 96-2475; Oral Argument Held November 2, 1999;
Issued December 8, 1999*

Appearances: *David W. White, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has established that her emotional condition was sustained in the performance of duty.

On August 29, 1994 appellant, then a 45-year-old attorney, filed a claim for a traumatic injury. Appellant asserted that on August 8, 1994, due to extraordinary stress in the workplace, she lost consciousness and fell on two occasions, sustaining two concussions. Appellant further indicated that as a result of the incident she further developed postconcussion syndrome, post-traumatic stress disorder, major depression and headaches.

In a narrative statement submitted in support of her claim, appellant explained that in 1992 she became divorced from her husband. Following the divorce her husband became threatening and on at least one occasion in March 1994 gained access to her workplace and verbally threatened appellant's life and the life of her daughter. After this incident, appellant requested that the employing establishment move her to a secured floor. The employing establishment was unable to accommodate this request, but did provide the office receptionist with a photograph of appellant's ex-husband and instructions not to allow him past the reception area. Appellant stated that on the date of the incident, she returned to her desk after a break to find an envelope there, without postage, addressed to her. Inside the envelope she discovered a note from her ex-husband and a nude photograph of herself, taken years earlier. In the note, her ex-husband informed her that he had given similar photographs to her supervisor. Appellant stated that she then learned that the front desk was occupied by a substitute receptionist, who was unaware of any instructions regarding appellant's ex-husband and who stated that she had admitted anyone who was wearing a suit. Appellant stated that she panicked, fearing that her ex-husband had been, and possibly still was, in her work area, and began to experience nausea and difficulty breathing. Appellant then entered the restroom, where she lost consciousness and

fell, striking her head on the stall locking mechanism. After regaining consciousness, appellant proceeded towards her supervisor's office, but again lost consciousness and fell. Upon gaining consciousness a second time, appellant stated that she could not regulate her breathing or stop shaking and was taken by ambulance to Shawnee Mission Medical Center, where she was treated and released. Appellant attempted to return to work on August 10, 1994, but became nauseated and collapsed outside the building and has been unable to return to work due to extreme anxiety, depression and headaches. Appellant stated that she had previously sustained a head injury on July 5, 1994, as a result of an automobile accident, but that she returned to work on July 27, 1994 without difficulty.

After a period of medical and factual development, in a decision dated April 18, 1995, the Office of Workers' Compensation Programs accepted the claim for a forehead laceration and concussion as a result of the first fall, during which appellant's head struck an intervening object, and limited wage-loss compensation and medical care, due to these conditions, from August 8 through October 10, 1994. The Office specifically denied compensation, however, for post-traumatic stress disorder and depression associated with the incident with appellant's ex-husband, as the incident was not sufficiently related to appellant's work duties.

Appellant requested a hearing before an Office hearing representative which was held on August 23, 1995. Appellant appeared and testified in support of her claim. In a decision dated and finalized June 6, 1996, the Office hearing representative affirmed the April 18, 1995 decision. The instant appeal followed.

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty, as alleged.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment.¹ The Federal Employees' Compensation Act² provides for payment of compensation for disability or death of an employee resulting from a personal injury sustained while in the performance of duty. The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment." "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her master'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. The employee must also establish an injury "arising out of the employment." To arise out of employment, the

¹ See *Lillian Cutler*, 28 ECAB 125 (1976). Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relationship. Congress provided for the payment of compensation for disability or death resulting from a personal injury sustained while in the performance of duty; see *Larry J. Thomas*, 44 ECAB 291 (1992).

² 5 U.S.C. §§ 8101-8193.

injury must have a causal connection to the employment, either by precipitation, aggravation, or acceleration.³ As the Board observed in the case of *Lillian Cutler*,⁴ workers' compensation law does not cover each and every illness that is somehow related to one's employment. When an employee experiences emotional stress in carrying out her employment duties, or has fear and anxiety regarding her ability to carry out her duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. On the other hand, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁵

The Board finds, based on the factual and medical evidence of record, that appellant's emotional condition did not arise in the performance of duty.

Appellant asserts that she developed post-traumatic stress disorder and major depression as a result of the August 8, 1994 incident, in which she discovered that a threatening letter from her ex-husband had been left at her desk. Although this incident occurred at her place of employment during her usual business hours, the incident did not arise out of her employment or a requirement imposed by the employment, rather it pertained to a private dispute between appellant and her ex-husband, which was imported into the work environment.⁶ Appellant's emotional reaction to the threatening note from her ex-husband is considered self-generated and not compensable under *Cutler* as it does not bear any relationship to her regular or specially assigned duties but appears based on her perceptions that her supervisor and her co-workers would now view her, both personally and professionally, in an unfavorable light. Appellant left the workplace on the date of the injury, however, and has not returned, and the record contains no evidence of either detrimental comments or actions directed at her by her co-workers as a result of the August 8, 1994 incident.

With respect to appellant's allegation that the employing establishment was negligent in failing to relocate her to a secured office or to otherwise prevent appellant's ex-husband from entering the premises, there is no evidence in the record that appellant's ex-husband actually did enter the premises. While the substitute receptionist did state that she had admitted several people wearing suits into the office, she could not confirm that appellant's ex-husband had been

³ *Bettina M. Graf*, 47 ECAB 687 (1996).

⁴ *See Lillian Cutler*, *supra* note 1.

⁵ *William E. Seare*, 47 ECAB 663 (1996).

⁶ *Compare Barry Himmelstein*, 42 ECAB 423 (1991). The incident between appellant and Ms. Totman had its origin off the employing establishment premises while each was commuting to work, not in the work performed by either employee. This became a personnel matter imported into the employment environment; *see also Allan B. Moses*, 42 ECAB 575 (1991).

one of these people, and the note written by appellant's ex-husband may in fact have been delivered to appellant through a courier or by some other means. As Larson explains in his treatise on workers' compensation law:

“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 origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor.”⁷

As the evidence in this case establishes that the employing establishment acted reasonably in its attempts to provide a secure environment for appellant, and as there is no evidence in the record that the risk of harm to appellant was facilitated by the employing establishment, appellant's employment cannot be said to have contributed to her development of an emotional condition.

Finally, the Board finds that the medical evidence of record does not establish that appellant's emotional condition arose out of her accepted head laceration or concussion. Immediately following the August 8, 1994 incident, appellant was treated at the emergency room of the Shawnee Mission Medical Center, diagnosed with concussion and bronchospasm with respiratory distress, and released. Appellant returned to the emergency room on August 10, 1994, and was admitted to the hospital for additional testing. In a discharge summary dated August 14, 1994, Dr. John Dunlap, a Board-certified internist, noted that laboratory results, magnetic resonance imaging scans of the head and electroencephalogram results were all normal, and diagnosed appellant with closed head injury, postconcussion syndrome, vasovagal syncope and mild hypovolemia. Dr. Dunlap subsequently referred appellant to Dr. Dennis P. Swiercinsky, a clinical neuropsychologist, for additional testing and evaluation. In a report dated September 14, 1994, Dr. Swiercinsky diagnosed totally disabling acute major depression and panic disorder, with limited cognitive functioning, and recommended that appellant seek psychiatric treatment. The physician explained:

“The results of the current neuropsychological evaluation reveal severe psychological distress which is interfering with most cognitive functions at this time. The current test findings are not indicative of [appellant's] true cognitive abilities and significant improvements in her mentation will follow improved psychological functioning. While she did likely sustain some degree of mild head injuries in the auto[mobile] accident and at least one fall, they do not account for the severity of dysfunction encountered in this evaluation, especially in view of some superior findings in some tests. The falling episodes appear to have a strong functional component and are likely related to panic attacks. Major depression is also contributing to a variety of vague somatic symptoms and the patient's general sense of loss of control. [Appellant] demonstrates some insight into feeling depressed but has not addressed the underlying anxieties surrounding her return to work and past marital conflicts.”

⁷ A. Larson, *The Law of Workers' Compensation* § 11.00 (1997).

In a follow-up report dated October 10, 1994, Dr. Dunlap summarized Dr. Swiercinsky's results and concurred that appellant was totally disabled due to her decline in cognitive function which was aggravated by her severe psychological distress and the presence of major depression.

In a report dated October 5, 1994, Dr. David O. Hill, a clinical psychologist, stated that appellant appeared to be suffering from a combination of postconcussion syndrome, post-traumatic stress disorder and major depression and was unable to return to work. In a follow-up report dated March 12, 1995, Dr. Hill stated that appellant is "unable to engage in any gainful employment at this time due to her memory loss, mental confusion and inability to tolerate interpersonal stress. Her depression also exacerbates the symptoms arising out of her injury." In a report dated October 7, 1994, Dr. Robert E. Bidwell, appellant's treating psychiatrist, diagnosed post-traumatic stress disorder and major depression, single episode, and concluded that appellant remained totally disabled by these conditions. In a follow-up report dated March 14, 1995, Dr. Bidwell stated that appellant remained confused, upset and unable to carry on the normal responsibilities of daily life.

The weight of the medical evidence, summarized above, establishes that appellant's disabling major depression, post-traumatic stress disorder and decreased cognitive ability stem solely from her severe psychological distress, and not from her accepted head laceration or concussion. Only Dr. Hill indicated, in his report dated October 5, 1994, that appellant suffers from a combination of postconcussive syndrome, post-traumatic stress disorder and depression. However, Dr. Hill did not provide sufficient rationale to support his opinion that appellant sustained postconcussive syndrome resulting from head trauma and is of diminished probative value.⁸

⁸ See *Barbara A. Weber*, 47 ECAB 163 (1995).

The decision of the Office of Workers' Compensation Programs dated June 6, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 8, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member