United States Department of Labor
Employees' Compensation Appeals Board

STEVEN W. VINCENT, Appellant	)	
and	)	**Docket No. 06-741**
	)	**Issued: June 12, 2006**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Steven W. Vincent, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 10, 2006 merit decision denying his claim that he sustained an injury on November 12, 2005 in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury on November 12, 2005 in the performance of duty.

FACTUAL HISTORY

On November 15, 2005 appellant, then a 31-year-old boilermaker, filed a traumatic injury claim alleging that he sustained a broken jaw on November 12, 2005 in the performance of duty. Regarding the cause of the claimed injury, appellant stated:

> "I was working on the 13th floor with Larry Dunn and got on the elevator to go down. A joke was said between Larry Dunn and myself and the hourly guy who

had gotten on the elevator got offended and when I turned around he hit me in the jaw with a bolt that he had in his hand."

On the claim form, Don E. Gaston, Jr., the plant manager, indicated that the employing establishment was controverting appellant's claim because he was involved in a "physical altercation with another hourly employee." He stated, "Employee was hit by an hourly pipefitter who was mad about a joke that he had made about being a pipefitter." Appellant stopped work on November 12, 2005.

In a statement dated November 15, 2005, Mr. Gaston stated:

"On Saturday, November 12, 2005 [appellant] was involved in a physical altercation on an elevator on unit 3. An investigation by TVA [Tennessee Valley Authority] Police is currently ongoing.

"The information obtained through the investigation to this point indicates that [appellant] and an employee of GUBMK exchanged words and derogatory comments toward each other. The verbal exchange culminated in the GUBMK employee striking [appellant] in the face causing the medical problems for which he is filing the claim.

"It is our contention that this claim should be denied due to the fact that the incident is not work related and the altercation was caused as a result of the verbal exchange between the two individuals."

Appellant submitted a November 15, 2005 report in which a nurse indicated that he sustained left and front jaw fractures. Regarding the cause of the injury, the nurse noted, "On elevator talking with coworkers and hourly employee. Verbal conversation and hit in left jaw with bolt per hourly employee."

In a letter dated December 7, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim.[1]

On December 28, 2005 the Office received appellant's response to its December 7, 2005 letter. Regarding the events of November 12, 2005, appellant stated, "The joke was made about pipefitters in generally [sic]. It was just a joke that was harmless." Appellant asserted that there were three witnesses to the incident and indicated that he was "waiting on the police report and a copy of their statements." He indicated that the witnesses were on vacation and that he would get their statements when they returned to work.

[1] The Office asked appellant to clarify whether the GUMBK employee was on the elevator when he and Mr. Dunn got on and to indicate whether he said the joke "because of who was already on the elevator."

The record contains a December 21, 2005 statement, added to the record on December 28, 2005, in which Mr. Dunn and another coworker, Donnie R. Webster, stated:

> "On the 12th day November 2005 on unit 3 south end elevator. Me, (Larry Dunn, Donnie Webster, [appellant], Michael Moore and maybe some others were on the elevator with a fitter coming from the 13th floor. When on the way down the fitter asked where he could find a nut for a bolt Donnie told him to go to the turbine room. And then he asked where the turbine room was at. I and Steve laughed because he did not know where he was going. [Appellant] was agitating me saying he sounds like a fitter. Then the fitter took offense and [appellant] told him to kiss his -- then the fitter said suck his -- and the fitter said you need to have some respect for your elders and [appellant] told him to suck his --. Fitter said to -- you and [appellant] turned around and faced him and said suck my -- and the fitter hit him with a right cross and I believe he had a bolt in his hand when he hit him. Then [appellant] held the fitter with his hand against the elevator wall and then Donnie broke them up and then the elevator opened and they got [appellant] to get off the elevator on the 4th floor. Larry, Donnie and Michael and the fitter got off on the 1st floor. But [appellant] never threatened the fitter."

By decision dated January 10, 2006, the Office denied appellant's claim that he sustained an injury on November 12, 2005 in the performance of duty. The Office stated that the events of November 12, 2005 "appeared to be an incident of private animosity" that was not considered to have arisen out of appellant's employment.[2]

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[4] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to

[2] The Office cited *John H. Woods, Jr.*, 39 ECAB 971 (1988) for the proposition that, when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not rise out of the employment.

[3] 5 U.S.C. § 8102.

[4] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[5]

Under the Act, although it is the burden of an employee to establish his or her claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[6]

ANALYSIS

Appellant alleged that he sustained left and front jaw fractures on November 12, 2005 when a pipefitter hit him in the jaw with a bolt in his hand. Statements from him and two coworkers, Mr. Dunn and Mr. Webster, suggest that he was hit after comments were exchanged between the pipefitter and appellant. By decision dated January 10, 2006, the Office denied appellant's claim that he sustained an injury on November 12, 2005 in the performance of duty.

The Board finds that additional development of the evidence is necessary before a reasoned determination can be made regarding whether appellant met his burden of proof to establish that he sustained an injury on November 12, 2005 in the performance of duty.

The record is lacking information which would be helpful in clarifying the precise nature of the events of November 12, 2005 and determining whether appellant's claimed injury occurred in the performance of duty. Mr. Gaston, the plant manager, indicated that there was an ongoing investigation by the TVA Authority Police, but there is no copy in the record of any report by the TVA police, state or local police or any other investigative body. Such a report might clarify a number of uncertainties in the case record as it currently exists. For example, the record does not contain any statement from the individual who is alleged to have struck appellant and he has only been identified as a pipefitter who worked for the GUBMK company.

In denying appellant's claim, the Office cited a portion of Board precedent which indicates that, when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not rise out of the employment.[7] In order to reasonably apply Board precedent relevant to evaluating whether a claimed injury occurred in the performance of duty, it would be useful to have additional information about the pipefitter's prior relationship with appellant, if any, and his precise working relationship with the employing establishment. In particular, it would be helpful to know whether appellant had any prior difficult encounters with the pipefitter.

The Board notes that it would also be useful to know if there are additional statements of other witnesses to the events of November 12, 2005. For example, Mr. Dunn and Dr. Webster indicated that another coworker, Mr. Moore, was present in the elevator at the time of the alleged injury, but it is unclear whether any attempt was made to obtain a statement from Mr. Moore.

[5] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988).

[6] *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

[7] *See supra* note 2.

Mr. Dunn and Dr. Webster also indicated that other employees might have been in the elevator as well and additional development of the evidence might clarify this matter. Such additional statements, either already in existence or newly obtained, would serve to clarify the precise nature of the comments made among appellant, the pipefitter and perhaps other individuals. They would provide further insight regarding the question of whether the events of November 12, 2005 were sufficiently related to appellant's employment to have occurred within the performance of duty.

As noted above, although it is the burden of an employee to establish his claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[8] Therefore, the case should be remanded to the Office for further development of the evidence regarding the question of whether appellant met his burden of proof to establish that he sustained an injury on November 12, 2005 in the performance of duty. After such development as it deems necessary, the Office should issue an appropriate decision regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained an injury on November 12, 2005 in the performance of duty. The case should be remanded to the Office for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 10, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: June 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[8] *See supra* note 6 and accompanying text.