

because she did not establish any compensable employment factors.¹ In reaching its decision, the Board adopted the findings and conclusions of the Office hearing representative's December 3, 2001 decision. Certain relevant facts are reiterated.

Appellant claimed that she sustained an emotional condition due to a pattern of alleged harassment on the part of the employing establishment towards her. On December 2, 1996 she alleged that a coworker, John M. Gonzalez, "wanted me to remove the spore test from the sterilizer, but I told [him that] the drying cycle was not complete." She alleged that Mr. Gonzalez then stated: "I [wi]ll do it myself. Move. Get out of my way." When he "started to push me to the left and backward, I grabbed the arm that was pushing me. I told him that this was not the right way to do this, but he still said, 'Move. Get out of my way.' [Mr.] Gonzalez moved me even harder backwards, I grabbed his arm more tightly, pinching it, as I lost my balance and stepped backwards." He then stated: "You [a]re in trouble for touching me." Appellant stated that Mr. Gonzalez reported the incident to Supervisor Tina Pirofsky, who "had [him] write out a statement of what happened, but did not ask me to do the same." She claimed that Ms. Pirofsky took his side since Mr. Gonzalez stated that she was the instigator of the incident. Appellant alleged that Supervisor Brian Fortner harassed her by attempting to get her to change her Equal Employment Opportunity appointment and that Mr. Fortner followed her after they got in an argument and she asked to be left alone. She generally contended that the employing establishment was not supportive of civilian employees.

On April 29, 2004 the Office received an April 15, 2004 request for reconsideration and supporting brief from appellant's attorney. She submitted a July 15, 2003 statement from Kathy Marugaki, an Employees' Assistance Program's counselor, describing appellant's demeanor after the December 2, 1996 incident. In an August 7, 2003 statement, Jane Tsakamoto, appellant's childhood friend, described a man from their neighborhood in the 1950's. Also submitted were a 59-page brief from appellant's attorney and an August 10, 2005 affidavit from appellant. In her affidavit, appellant questioned the legitimacy of Mr. Gonzalez' statement, essentially alleging that there were two versions written and she denied spinning him around on December 2, 1996. In a January 24, 2004 medical report, Dr. Robert Dave recreated the December 2, 1996 incident from Mr. Gonzalez' statement. He asserted that for Mr. Gonzalez to have reached over appellant to get to the autoclave, he would have had to have been either behind her or to the left of her.

By decision dated October 18, 2005, the Office denied modification of its prior decision, which found that appellant had not established any compensable factors of employment.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase while in the performance of duty in the Act has been

¹ Docket No. 02-889 (issued April 18, 2003).

² 5 U.S.C. §§ 8101-8193.

interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.³ In addressing this issue, the Board has stated that, in the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Act.⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁶ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁷

³ *Bernard D. Blum*, 1 ECAB 1 (1947).

⁴ *Allan B. Moses*, 42 ECAB 575 (1991); *Barry Himmelstein*, 42 ECAB 423 (1991); *Mary Keszler*, 38 ECAB 735 (1987).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁷ *Id.*

ANALYSIS

Appellant alleged that she sustained an emotional condition causally related to various factors of her federal employment, primarily harassment by management, an altercation with a coworker and error in certain administrative matters. The Office found that none of appellant's allegations were compensable factors of employment.

On reconsideration, appellant advanced additional arguments pertaining to the December 2, 1996 incident. The record reflects that she and a coworker became involved in an altercation on December 2, 1996, regarding whether a spore test should be removed from a sterilizer. Appellant alleged that the December 2, 1996 altercation arose over a work-related matter and, thus, should be a compensable work factor. In determining whether an assault arises out of employment, the Board has relied on Larson's treatise on workers' compensation law. Larson states:

"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."⁸

The Board has held that, when animosity or dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment.⁹ It is clear from the record that appellant was performing her assigned duties and an altercation arose with Mr. Gonzalez over whether the test sample was properly sterilized and should be removed. There is no evidence that this was a personal dispute arising outside the employment that was carried into the workplace or that appellant and her coworker had any relationship outside of work.¹⁰ Moreover, at the time of the altercation, appellant was in a place she was reasonably expected to be working and was engaged in an activity incidental to her employment. The fact that she possibly was the "aggressor" or the "initiator" in the altercation that followed the dispute would not preclude recovery or act as a bar to her claim.¹¹ Therefore, whether or not appellant had assaulted Mr. Gonzalez would not act as a bar to her claim for compensation benefits for an emotional condition.

As the altercation arose in the performance of duty under *Cutler*,¹² any injury resulting from the altercation would be covered under the provisions of the Act. The Board finds that the

⁸ A. Larson, *The Law of Workers' Compensation* § 8.00 (2000).

⁹ See *Agnes V. Blackwell*, 44 ECAB 200 (1992); *Jean A. Kolinchak*, 43 ECAB 1138 (1992).

¹⁰ See *Arlene F. Stidham*, 46 ECAB 674 (1995).

¹¹ *Id.*; see also *Eric J. Kike*, 43 ECAB 638, 641 (1992).

¹² See *Lillian Cutler*, *supra* note 5.

altercation on December 2, 1996 arose within the performance of duty and constitutes a compensable employment factor. Appellant has established a compensable work factor regarding the altercation on December 2, 1996. On return of the case record, the Office should evaluate the medical evidence and make a determination whether an emotional condition resulted from the December 2, 1996 incident.

CONCLUSION

The Board finds that appellant has established a compensable factor of employment with respect to the December 2, 1996 altercation. The case is remanded for the Office to evaluate the medical evidence and make a determination whether an emotional condition resulted from the December 2, 1996 compensable work factor.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for further consideration consistent with this decision of the Board.

Issued: October 17, 2006
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