United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 08-2510**
	)	**Issued: July 16, 2009**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, San Antonio, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 22, 2008 appellant filed a timely appeal from the February 20 and August 28, 2008 merit decisions of the Office of Workers' Compensation Programs that denied his claim for an employment-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury on December 8, 2007, while in the performance of duty.

FACTUAL HISTORY

On December 28, 2007 appellant, then a 32-year-old custodian, filed a traumatic injury claim alleging that on December 8, 2007 he was assaulted at work and sustained injury to his head and neck. The employing establishment controverted the claim, contending that his injury did not occur while in the performance of duty because he was struck by another employee in the

break room during a dispute over a television channel. The employing establishment noted that appellant was aware of the zero-tolerance policy for violence in the workplace.

By letter dated January 17, 2008, the Office requested that appellant provide additional evidence in support of his claim.

In a December 11, 2007 letter, appellant stated that on December 8, 2007 at approximately 5:30 a.m. he walked into the main break room to speak with his coworkers. He noted that there were two men asleep at a table and a third man sitting with headphones on his ears at the rear of the break room. Appellant did not know his assailant by name but had seen him several times at the employing establishment. He changed the television channel to a music video channel which was broadcast in Spanish but with some English language. One of the men at the table woke up and cursed at appellant, stating that he could not understand the television. Appellant responded that maybe the channel had subtitles. The coworker again cursed at him and came to about one inch from appellant's face. Appellant told the coworker that they could not fight because they were at work but that they could talk after work. The coworker head-butted him in the forehead. Appellant could not remember the details of what happened next, but remembered being slapped in his face from right to left and his glasses knocked to the floor. The coworker punched him in his face while his hands were down at his side. Appellant experienced pain in his neck and jaw and his head pounded. He noticed blood on the floor coming from his nose. Appellant raised his left hand to keep the coworker from landing another blow and went to his supervisor's office where he reported the assault. He was asked several times who had assaulted him, but he did not know the identity of the coworker. Appellant stated that he had not previously had a conversation with his assailant.

A December 13, 2007 investigative report stated that the altercation took place on December 8, 2007 between appellant and Michael McCall at approximately 5:30 a.m. In an interview, Mr. McCall stated that he did not know appellant but was aware that he was a custodian. He was in the break room with about six other people when appellant entered and started flipping channels on the television. Appellant stopped on a Spanish-language channel. Mr. McCall told appellant, "I do n[o]t understand that," to which appellant suggested that he read the subtitles. He stood up and changed the television channel, which he believed angered appellant. The two began cursing at one another; however, Mr. McCall did not recall what was said as he was angry that appellant had disrespected him. Due to appellant's actions, he believed that a fight was inevitable and he pointed a finger at appellant. Mr. McCall pushed appellant, who then came towards him in an aggressive manner. Without thinking, he reacted and struck appellant with his fists. Several other coworkers provided witness statements regarding the December 8, 2007 incident.[1]

A December 8, 2007 hospital discharge sheet noted that appellant received treatment for facial and scalp contusions and a cervical paraspinal muscle strain.

[1] The record includes a December 9, 2007 injury report and December 27, 2007 police report. Appellant's supervisor stated that to the best of his knowledge he was unaware of any animosity between appellant and Mr. McCall. The record reflects that on January 13, 2008 appellant received a 14-day suspension due to the incident.

In a February 20, 2008 decision, the Office denied appellant's claim. It found that the December 8, 2008 incident occurred on the employing establishment's premises; however, the incident occurred while appellant was on a break and not in the performance of his federal duties as a custodian.

On March 12, 2008 appellant requested a review of the written record by an Office hearing representative. In an undated letter, he cited to the Injury Compensation for Federal Employees Publication CA-810 Chapter 3-4A, which stated that coverage under the Federal Employees' Compensation Act includes injuries that occur while the employee is engaging in an activity which is reasonably associated with the employment, such as use of facilities for the employee's comfort, health and convenience, as well as eating meals and snacks provided on the premises. Appellant also cited Publication CA-550, which stated that an employee is considered to be in the performance of duty during break or at lunch while on the premises of the employer.

By decision dated August 28, 2008, an Office hearing representative affirmed the February 20, 2008 decision. She found that the altercation arose out of a nonwork-related discussion involving a television channel and not while appellant was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.

LEGAL PRECEDENT

The Act provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation law, namely, "arising out of and in the course of employment."[3] "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 his employer's business, at a place where he may reasonably be expected to be in connection with his employment and while reasonably fulfilling the duties of his employment or engaged in something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." "Arising out of the employment" requires that a factor of employment caused the injury."[4] Larson, in addressing assaults arising out of employment, 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

[2] 5 U.S.C. § 8102.

[3] *See Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Veleria Minus*, 46 ECAB 799 (1995); *Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only that the injury occurred in the work setting, but also the causal concept that the employment caused the injury).

out of employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor."[5]

ANALYSIS

The issue is whether appellant sustained an injury on December 8, 2007 while in the performance of duty. The facts are not in dispute.[6] An altercation arose with a coworker when appellant changed the channel on a break room television located on the employing establishment premises. At the time, appellant was on break from his duties. Mr. McCall and appellant did not have any preexisting relationship outside of work and both men stated that they did not know each other at the time of the incident.

The Board finds that the altercation occurred in the performance of duty. The dispute in this case is readily distinguishable from a private matter imported into the workplace.[7] Here, the two men did not know each other or have a relationship outside the workplace. The Board has recognized that friction and strain among employees may arise as an inherent part of the conditions of employment and the strain of enforced close contact may provide the necessary work connection. Even if the subject of a dispute is unrelated to work, an assault is compensable if the work of the participants brought them together and created the relations and conditions that created the clash.[8] Here, an argument arose on the employing establishment premises regarding the use of a television furnished by the employer. The quarrel would not have taken place in the absence of their employment at the employing establishment. Therefore, the assault occurred in the performance of duty.

The fact that appellant was on break at the time of the assault does not preclude coverage under the Act. It is well established that employees who, within the time and space limits of

[5] A. Larson, *The Law of Workers' Compensation* § 8.00 (1999).

[6] While there is some question as to whether appellant or Mr. McCall was the aggressor; the fact that appellant possibly was the aggressor in the altercation does not preclude recovery or act as a bar to his claim. *See A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006).

[7] The Board has held 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 arise in the performance of duty. *See R.S.*, 58 ECAB ___ (Docket No. 06-1312, issued August 17, 2007) (where the Board found that appellant's injuries due to an assault by a coworker, who was an estranged boyfriend, arose out of a former, private relationship and were not compensable).

[8] The friction and strain doctrine "recognizes that work places employees under strains and fatigue from human and mechanical impacts creating frictions, which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences." A. Larson, *supra* note 5 at § 801(6)(a). The Board has recognized the friction and strain doctrine. *See Shirley Griffin*, 43 ECAB 573 (1992). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.12(b) (March 1994) (Coworker Harassment or Teasing).

their employment, engage in acts which minister to their personal comfort do not leave the course of employment.[9] Activities encompassing personal acts for the employee's comfort, convenience and relaxation, eating meals and snacks on the premises, including established coffee breaks and the employee's presence on the premises for a reasonable time before or after specific working hours are reasonably incidental to the employment and are in the course of employment.[10] In this case, appellant was relaxing in an employer provided break room while watching television. His activities fit squarely within the personal comfort doctrine; therefore, the assault occurred while in the performance of duty.[11]

The case therefore rests on whether this incident at work caused an injury. The Office denied appellant's claim on the basis that the incident bore no relationship to the duties he was hired to perform. Although causal relationship generally requires a rationalized medical opinion, a claim may be accepted without a medical report in clear cut traumatic injury claims when one or more of the following criteria, as set forth in the Office's procedure manual, are satisfied:

> "(1) The condition reported is a minor one which can be identified on visual inspection by a lay person (*e.g.*, burns, lacerations, insect stings, or animal bites);
>
> "(2) The injury was witnessed or reported promptly, and no dispute exists as to the fact of injury; and
>
> "(3) No time was lost from work due to disability."[12]

In the present case, the injuries reported, a bloody nose and contusions of the face and scalp, are the types of conditions that can be readily identified on visual inspection by a lay person. This is supported by the hospital discharge summary of December 8, 2007. Moreover, there is no dispute that the injury was witnessed and promptly reported to appellant's supervisor. No dispute exists as to fact of injury. Therefore, the Board finds that the record establishes that appellant sustained an injury while in the performance of duty on that date.

Because the Office made no findings as to whether appellant was disabled and, if so, the extent and nature of such disability, the case will be remanded for further development. It should make appropriate findings as to his entitlement to medical expenses and whether he missed time from work due to his injury. After such further development as the Office considers necessary, it shall issue an appropriate decision on appellant's entitlement to benefits under the Act.

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[9] A. Larson, *supra* note 5 at § 21.

[10] *See* Federal (FECA) Procedure Manual, *supra* note 8, at Chapter 2.804.4(a)(2) (August 1992) (Industrial Premises).

[11] The Board has held compensable employment incidents where an employee was using a toilet, *V.O.*, 59 ECAB ___ (Docket No. 07-1684, issued May 2, 2008); on a smoking break, *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); opening a can of fruit on a snack break, *Mary Kokich*, 52 ECAB 239 (2001); and expectorating a mouth full of phlegm into a garbage can, *Lee R. Haywood*, 48 ECAB 145 (1996).

[12] Federal (FECA) Procedure Manual, *supra* note 8, at *Causal Relationship*, Chapter 2.805.3d(1) (July 2000). *See Timothy D. Douglas*, 49 ECAB 558 (1998).

CONCLUSION

The Board finds that the December 8, 2007 altercation arose in the performance of duty and that appellant sustained an employment-related injury.

ORDER

IT IS HEREBY ORDERED THAT the August 28 and February 20, 2008 decisions of the Office of Workers' Compensation Programs is reversed. The case is remanded for further development consistent with this decision.

Issued: July 16, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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