

FACTUAL HISTORY

On June 1, 2011 appellant, then a 36-year-old nurse, filed a traumatic injury claim alleging that on May 24, 2011 she sustained a herniated disc at work. She related that two residents were fighting one another when one of them grabbed both of her wrists and shoved her aside. The other resident used their hip and elbow to push appellant into a bench. Appellant stopped work on May 25, 2011. She returned to modified-duty work on June 6, 2011.

The employing establishment controverted the claim on the grounds that appellant caused the injury by her willful misconduct. It stated that she was advised not to step between the veterans, but did so anyway.

By letter dated June 6, 2011, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit medical evidence, including a rationalized medical opinion from an attending physician describing a history of injury and providing dates of examination and treatment, findings, test results, a diagnosis together with an explanation as to why the diagnosed condition was caused or aggravated by the May 24, 2011 incident. Also, on June 6, 2011 OWCP requested that the employing establishment submit evidence pertaining to appellant's allegations.

A May 24, 2011 hospital emergency room report provided a history of injury that on that date appellant placed herself between residents who were fighting. One of the residents grabbed and shoved her. Appellant hit a couch. She was diagnosed as having a herniated disc.

Reports dated May 26 and June 3 through 21, 2011 contained illegible signatures and provided history that on May 24, 2011 appellant tried to break up an altercation in her unit. She sustained a herniated disc and low back sprain. Appellant was placed off work for one week commencing May 26, 2011. She was released to light-duty work on June 3, 2011.

An incident worksheet dated May 27, 2011 from the employing establishment's health unit provided a history that on May 24, 2011 two residents began to argue. One of the residents got up from a wheelchair and lunged toward the other resident and threw a punch at him. Appellant stepped in the middle of the two residents in an attempt to break up the fight. She was injured when one of the residents pushed her out of the way. The two residents began to throw punches back and forth until one fell to the ground. Neither resident was injured. A May 26, 2011 progress note from the employing establishment's health unit obtained a history that on May 24, 2011 appellant sustained an injury when a patient pushed her and she hit her lower back over a chair. Appellant was diagnosed as having low back pain and possibly a herniated disc. Another May 28, 2011 progress note from the health unit obtained a history that three days ago appellant injured her lower back after breaking up a fight between two patients. She was diagnosed as having an acute soft tissue injury.

In a May 25, 2011 memorandum, Lisa Steele, a licensed social worker at the employing establishment, related that she was working in her office on May 24, 2011 when she heard a staff person yell for assistance. She quickly went to the unit and headed down the hall towards the nurses' station telling veterans in the area to stay put and not to approach the incident. Ms. Steele observed one veteran standing with his back to the nurses' station. The veteran was

bending over to pick up a shoe he lost during a fight with another veteran. Appellant was standing in front of him. Ms. Steele escorted the veteran to his room. When she returned to the nurses' station she realized that appellant was hurt as responding emergency personnel strapped a board to appellant's back while she was sitting in a chair. Ms. Steele was informed that a staff person advised appellant not to get in the middle and wait for police.

In a May 30, 2011 statement, Christine J. Paris, a nurse manager, related that on May 24, 2011 Kimberly L. Weaver, an employee, called for assistance while two residents were involved in a heated argument. Deven Moore, a nurse, pulled the fire alarm. Colleen Poormon, a nurse, called a "BERT-33333." Ms. Paris stated that, when staff responded to the call, they were advised not to intervene because a "BERT" had been called and the situation was no longer controllable. Appellant had been passing out medications on the south end of the building. Ms. Paris stated that, despite being advised not to get in the middle of the altercation, appellant left her medication cart unattended and stepped between the two residents. She noted that Bobbi Eaton, a nurse, also approached one of the residents from behind and wrapped her arms around him in an attempt to subdue his punches. The other resident pushed appellant to the side so that he could hit the resident being subdued by Ms. Eaton. It was reported that appellant helped Ms. Steele get other residents out of the way when responders arrived. Ms. Paris stated that appellant sustained back pain for which she sought medical treatment. She asked appellant why she stepped between the residents when she had been trained on how to avoid injury when residents became disruptive and was advised not to intervene. Ms. Paris reminded appellant to never step between residents who were fighting one another. Appellant responded that she was not thinking at that time. Ms. Paris stated that an emergency medical technician reported that appellant had stated that what she had done was stupid. She noted that Ms. Eaton was reprimanded for her attempt to subdue one of the residents. In a June 2, 2011 statement, Ms. Paris related that appellant attended positive behavioral approaches retraining on August 27, 2010 and additional training on February 9, 2011.

In a narrative statement also dated June 2, 2011, Nurse Moore related that on May 25, 2011 there was a physical altercation between two residents. Staff members unsuccessfully tried to calm both residents. When one resident raised his fist to hit the other resident, Nurse Moore advised everyone to step back and pulled the fire alarm. While she was pulling the alarm, appellant stepped between the two residents.

Nurse Poormon stated in a June 2, 2011 statement that appellant was at the nurses' station when she called a "BERT" code. Appellant placed herself between the men who were exchanging blows.

In an undated statement, Heather Wheeler, an employee, related that on May 24, 2011 a fight broke out between two residents. She yelled for help and appellant and other employees came to her assistance. Nurse Moore advised them not to get involved and pulled the fire alarm for help.

In another undated statement, Ms. Weaver indicated that on May 24, 2011 a fight broke out. She yelled for help and stepped out of the way. Nurse Moore pulled the fire alarm and advised everyone to stay back while they waited for help to arrive. Ms. Weaver stated that appellant stepped in and tried to break up the fight.

In a July 6, 2011 decision, OWCP denied appellant's claim, finding that the evidence did not establish that she sustained an injury while in the performance of duty. It found that her injury on May 24, 2011 was the result of her own willful misconduct, as she left her daily responsibilities to intervene in an altercation although she had been advised not to do so.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty, unless the injury is caused by willful misconduct of the employee.³ Willful misconduct is generally regarded as deliberate conduct involving premeditation, obstinacy or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.⁴

An allegation of willful misconduct is in the nature of an affirmative defense. The adjudicating agency has the burden, if it makes such an allegation, to prove that there was willful misconduct and that such misconduct caused the injury. If the adjudicator believes that the evidence in the case record justifies a finding of the injury being caused by willful misconduct of the claimant, he or she has the responsibility of making such a finding in the original adjudication of the case.⁵

ANALYSIS

In the instant case, the employing establishment invoked the affirmative defense of willful misconduct. The Board has carefully considered the circumstances of appellant's injury on May 24, 2011 and finds that the weight of the evidence supports a finding of willful misconduct.

This case can be distinguished from other cases where the Board rejected the argument that a claimant's actions amounted to willful misconduct which removed him from the performance of duty. In *L.R.*,⁶ the claimant admittedly violated the employing establishment's standard operating procedures during a motor vehicle accident. He operated a long-life vehicle (LLV) with an unfastened seat belt and entered an intersection with the driver-side LLV door open. In that case, the Board rejected the argument raised by the employing establishment that claimant's claim be denied due to willful misconduct on the grounds that his actions caused the motor vehicle accident. The Board found no proof that the two safety infractions had any bearing on an evasive maneuver the claimant attempted to use to avoid a collision with another motorist. The Board stated that an investigating police officer attributed the motor vehicle accident to driver inattention and no additional contributing factors were noted.

³ 5 U.S.C. § 8102(a)(1).

⁴ *J.J.*, Docket No. 09-982 (issued January 6, 2010); *J.S.*, Docket No. 08-1654 (issued February 2, 2009); *Judith D. Jenkins (Ted L. Jenkins)*, 32 ECAB 1219 (1981); *Abraham Finkelstein*, 4 ECAB 130 n.8 (1951).

⁵ *Paul Raymond Kuyoth*, 27 ECAB 498, 505 (1976), *reaff'd on recon*, 27 ECAB 253 (1976).

⁶ Docket No. 08-84 (issued April 23, 2008).

In *James P. Schilling*,⁷ the claimant was run over by the rear wheel of a forklift driven by a coworker when he tried to retrieve money owed to him by this coworker. The Board affirmed as modified OWCP's denial of his traumatic injury claim to reflect that, while he did not engage in willful misconduct, he was not in the performance of duty when he followed a coworker for the sole purpose of collecting a personal debt. The Board found that OWCP did not show that the claimant knew that his conduct would likely result in serious injury or that he wantonly or recklessly disregarded probable injurious consequences by following his coworker. Based on statements from appellant and his coworkers, appellant exercised some level of caution and was not behaving recklessly as he walked behind the forklift and stood behind it from a safe distance to call loudly several times to the indebted coworker. In addition, the indebted coworker stated that he did not look behind him before backing up the forklift.

The Board finds that appellant's behavior in the instant case is reckless as she ignored a warning from a coworker to not get involved in a fight between two residents which caused her claimed back injury.⁸

The Board gives particular weight to the accounts given by appellant's coworkers, Nurse Moore, Ms. Wheeler, Ms. Weaver, Ms. Paris and Nurse Poorman who witnessed appellant's intervention of the May 24, 2011 incident. Their statements provide a credible account of what happened and establish that appellant refused to heed a warning given by a coworker to not intervene in a fight between two residents. Nurse Moore stated that she warned everyone present not to get involved in the physical altercation between the residents and pulled a fire alarm to obtain assistance, but appellant stepped between the residents. Ms. Wheeler and Ms. Weaver stated that Nurse Moore warned them and other employees present not to intervene in the altercation and she pulled the fire alarm for help, but appellant stepped in and attempted to stop the fight. Ms. Paris did not specifically identify Nurse Moore, but she stated that appellant was warned not to get involved in the altercation. She stated that appellant left her medication cart unattended and stepped between the two residents. Ms. Paris related that appellant acknowledged that she was not thinking when she stepped between the fighting parties even though she had been trained to avoid injury when residents became disruptive and she was warned not to intervene in the altercation. As a result of her actions, Ms. Paris stated that she underwent retraining in positive behavioral approaches. Nurse Poorman related that appellant was present when she called a "BERT" code, but she placed herself between the men who were involved in the physical altercation.

The Board gives less weight to appellant's statement. Although she stated that she sustained a back injury as a result of being grabbed and pushed by a resident, she failed to provide any specific details about the incident. For instance, appellant did not mention that assistance was summoned to stop the fight and that Nurse Moore warned her and other employees present not to get involved in the fight. The evidence establishes that her actions were deliberate as she ignored Nurse Moore's warning and her prior training and attempted to break up the fight. Appellant's failure to address these details leads the Board to question her

⁷ 54 ECAB 641 (2003).

⁸ *J.J.*, Docket No. 09-982 (issued January 6, 2010).

account of the May 24, 2011 incident. She did not provide any witness statements to corroborate her contentions.

The Board finds that appellant's actions on May 24, 2011 establish wanton or reckless disregard of probable injurious consequences. The back injury she sustained as a result of her willful misconduct is statutorily excluded from coverage under FECA.⁹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's claimed injury of May 24, 2011 was caused by her willful misconduct.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁹ See cases cited, *supra* note 4.