



## ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on June 29, 2015.

## FACTUAL HISTORY

On July 15, 2015 appellant, then a 48-year-old quality assurance specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a head injury when he was assaulted by Staff Sergeant (SSG) E.D. while he was sitting at his desk eating lunch on June 29, 2015. In a separate statement, he described an altercation, stating that SSG E.D. came into his office and accused him of talking about him. Appellant indicated that he denied the assertion, they then had words, and SSG E.D. walked toward him and, as appellant stood up, hit him and they began fighting. He maintained that SSG E.D. slammed him into a filing cabinet, causing injury to the back of his head. A coworker thereafter drove him to the emergency department. Appellant indicated that he was later diagnosed with postconcussive syndrome.

By development letter dated July 24, 2015, OWCP informed appellant of the deficiencies of his claim and advised him of the type of medical and factual evidence necessary to establish the claim. It also provided him a questionnaire for completion regarding the factual aspects of his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

The employing establishment controverted the claim maintaining that appellant was not in the performance of duty at the time of injury. It asserted that his injuries were caused by his own deliberate misconduct and the claim was therefore not compensable.

In a statement dated June 29, 2015, SSG E.D. related that he confronted appellant at about 12:30 p.m. that day because he had heard that appellant had been spreading rumors about him. When he confronted appellant, he denied this, cursed at him, hopped out of his chair, slammed him into a wall and into a refrigerator, and attempted to punch him. SSG E.D. indicated that he tried to defend himself and punched back. When he saw that appellant was bleeding he stopped fighting and ran out of the office. SSG E.D. indicated that he then went to an office to turn himself in. He reiterated that appellant pushed him first. When questioned about a broken coffee pot, SSG E.D. stated that when appellant slammed him into the wall and refrigerator, he heard something shatter.

In a statement dated June 29, 2015, appellant indicated that when SSG E.D. came into his office that day and began accusing him of spreading rumors, he denied the accusation and asked him to leave. When he did not leave, appellant stood up at his desk and SSG E.D. hit him several times and they began fighting and continued until SSG E.D. hit him on the back of the head with an object causing appellant to fall to the ground. He related that SSG E.D. then pushed him into the filing cabinet and continued his assault. Appellant indicated that he was able to get past SSG E.D. and leave. He went to battalion headquarters where he was assisted and taken to the emergency department. When questioned, appellant indicated that he had previously discussed SSG E.D.'s mental state with several superiors.

In additional statements dated June 29, 2015, several military personnel indicated that they witnessed the aftermath of the fight.

In correspondence dated July 21, 2015, appellant's military commander advised that, after the June 29, 2015 incident, a no contact directive was given to both parties. On July 23, 2015 he indicated that he had appointed an investigating officer to conduct an inquiry in addition to the military police (MP) investigation.

An MP desk blotter report, opened on July 22, 2015, described an incident that had occurred on June 29, 2015, had been investigated, and was closed. It indicated that a physical altercation occurred that day between SSG E.D. and appellant. The report noted that both were apprehended and transported to MP headquarters and thereafter released. Following an investigation and consultation with a judge advocate, it was determined that there was probable cause to believe SSG E.D. committed the offense of aggravated assault and that there was probable cause to believe appellant committed the offense of assault.

Medical evidence submitted included an emergency department report dated June 29, 2015 that described a history that appellant had an altercation with a coworker who pushed him into a filing cabinet, causing a forehead laceration. His wound was treated and discharge diagnoses included open wound of the forehead and a right neck strain. Appellant was discharged with no limitations. Additional medical evidence indicated that he had been seen on July 1, 2015 for a headache. In reports dated July 7 and 15, 2015, Dr. Wilbur Allen, a Board-certified internist, diagnosed postconcussion syndrome and advised that appellant could not work.

Subsequently, appellant returned to the continental United States. In an August 10, 2015 report, Dr. Gary M. Weiss, a Board-certified neurologist, noted a history that appellant was attacked by a coworker while deployed in Kuwait and that he had been hit in the back of the head with a glass coffee pot and his head was smashed into a metal filing cabinet causing a laceration that required four stitches. Appellant reported that since that time he had constant daily headaches, positional dizziness, light sensitivity, memory loss, decreased concentration, and depression.<sup>4</sup> Following a neurological examination, Dr. Weiss indicated that memory and other cortical functions were reduced. He diagnosed concussion due to assault.

By decision dated September 4, 2015, OWCP denied the claim. It found that, although an altercation occurred between appellant and SSG E.D. on June 29, 2015, appellant was not in the performance of duty because the injury arose out of a personal matter having no connection to employment.

On October 5, 2015 appellant requested a hearing with OWCP's Branch of Hearings and Review.

Thereafter appellant submitted a July 17, 2015 report by Dr. Allen who indicated that appellant continued to be symptomatic and should be transferred state-side for further evaluation and treatment by a neurologist for his mild traumatic brain injury (TBI) and postconcussive syndrome.

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<sup>4</sup> Dr. Weiss also reported that a computerized tomography (CT) scan was negative. A report of a CT scan is not contained in the record before the Board.

In an October 8, 2015 note, Dr. Weiss indicated that appellant continued to have moderate-to-severe neurological injuries due to the June 29, 2015 incident. He estimated that appellant could perhaps return to work in 1.5 years.

An October 16, 2015 electroencephalogram was positive for head trauma. An October 16, 2015 magnetic resonance imaging (MRI) scan of the brain was mildly abnormal, consistent with trauma, ischemia, or demyelinating disease. Brainstem auditory evoked potentials testing on October 16, 2015 was within normal limits. Visual evoked potentials that day were abnormal. A magnetic resonance angiogram (MRA) scan of the brain on October 25, 2015 was abnormal with a small possible aneurysm present. An MRA scan of the carotids that day demonstrated stenosis of the right and left carotid arteries.

In a December 22, 2015 physician's report, Dr. Weiss indicated that appellant was temporarily totally disabled due to head trauma with severe headaches, memory loss, and depression.<sup>5</sup>

In a statement dated February 21, 2016, appellant again described the altercation on June 29, 2015, maintaining that it was unprovoked and caused a TBI and postconcussive syndrome. He indicated that on many occasions SSG E.D. had told him that other military personnel could not be trusted and were spreading rumors about him, divulging his personal affairs, and were out to get him. SSG E.D. also informed appellant that he wanted to fight the other personnel, that his performance appraisal was embellished, and that he did not care about the Army because he knew that it was trying to kick him out. Appellant maintained that SSG E.D. was showing signs of extreme paranoia, delusion, and aggression and noted that on numerous occasions SSG E.D. accused him of spreading rumors about him and divulging his personal affairs. He noted that he would then apologize for the baseless allegations and that one morning he started crying uncontrollably. Appellant related that he had spoken to senior military personnel about SSG E.D.'s behavior, but nonetheless became a victim of an unprovoked assault on June 29, 2015. He asserted that he did not have an after-work relationship with SSG E.D., noting that he lived off base and would only encounter military members at work. Appellant provided a time line of events beginning June 29, 2015, noting that he left Kuwait on July 25, 2015. He asserted that his command did not follow violence in the federal workplace protocol, ignored his concerns regarding an unstable soldier, and ostracized him after he became a victim of workplace violence that caused a TBI.

During the hearing, held on April 13, 2016, appellant testified that he only had a working relationship with SSG E.D., and that they discussed his distrust of the military. He described the June 29, 2015 fight, indicated that it had medically disqualified him from his position, and noted that he had been on leave-without-pay (LWOP) since September 1, 2015.

On May 18, 2016 J.C., an injury compensation specialist with the employing establishment, commented on appellant's hearing testimony. She asserted that the June 29, 2015 altercation did not occur in the performance of duty, and indicated that an investigation had been

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<sup>5</sup> Monica Wise, a nurse practitioner and associate of Dr. Weiss provided a treatment note on October 27, 2015. She diagnosed concussion due to assault on June 29, 2015 with dizziness, blurred vision, and memory/concentration loss, depression, post-traumatic stress disorder (PTSD), possible seizure disorder, and abnormal MRI scan of the brain. Ms. Wise saw appellant in follow-up on February 16, 2016 and reiterated her findings and conclusions.

undertaken. J.C. asserted that appellant was not required to “reach out” to SSG E.D. as part of his work duties and that appellant’s actions and discussions with SSG E.D., leading up to the altercation, confirmed a personal relationship outside the scope of employment. She concluded that there was no evidence that verified who the victim was and who was the assailant.

The commander of the civilian personnel advisory center at the employing establishment provided a second letter dated May 18, 2016. He too indicated that violence in the workplace protocol had been followed, noting that the MP had investigative authority for assault crimes, had investigated the June 29, 2015 altercation, had concluded that the incident amounted to a mutual affray, and that the local military prosecutor opined that there was probable cause to charge both individuals with assault. The commander noted that, although the MP investigation did not preclude further inquiry, there were no witnesses to the event and any additional investigation was unlikely to yield additional evidence. He advised that the employing establishment did not have jurisdiction to criminally prosecute appellant because the Uniform Code of Military Justice only applied to civilians during a time of declared war, and maintained that management addressed concerns raised by appellant and others about SSG E.D.’s behavior.

The commander attached a July 17, 2015 memorandum in which Dr. Allen indicated that appellant was diagnosed with a mild TBI and postconcussive syndrome with symptoms of headaches, dizziness, light sensitivity, memory loss, and brain fog and opined that appellant was unable to return to work until medically cleared and should be transferred stateside for evaluation and treatment.

In e-mail correspondence dated February 12, 2016, T.M., the command judge advocate, noted that, because the MP investigation revealed two sides to the June 29, 2015 fight with no witnesses and, because their investigation showed mutual affray, management could not support appellant’s claim. He acknowledged that members of the unit had concerns about SSG E.D.’s mental health and welfare in May, but no one felt that he was a threat to anyone.

An investigation was conducted by the military in July 2015. A number of sworn statements dated July 24, 2015 from both military and civilian personnel were submitted. Although several military personnel noted that concerns had been raised about SSG E.D.’s concern that people were talking about him, no one witnessed the altercation.

By decision dated July 6, 2016, an OWCP hearing representative found that the June 29, 2015 altercation arose out of personal matters not related to appellant’s employment. She therefore affirmed the September 4, 2015 decision.

On March 28, 2017 appellant, through counsel, requested reconsideration.<sup>6</sup> Counsel asserted that it was work that brought appellant and SSG E.D. together. In a sworn affidavit dated March 21, 2017, appellant described his employment and training, the events of the June 29, 2015 incident, subsequent investigations and events, and his medical treatment. He alleged that the employing establishment acted improperly regarding his claim.

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<sup>6</sup> Wayne Johnson, Esq. began representing appellant on July 22, 2016.

A July 22, 2015 final MP report regarding the June 29, 2015 altercation was submitted. This indicated that the investigation was continuing. Several MP statements regarding the June 29, 2015 incident and subsequent events were attached.

On May 17, 2017 an employing establishment judge advocate responded to the reconsideration request. He asserted that the claim was not compensable because the trigger for the mutual affray was clearly a personal dispute imported into the work environment. The employing establishment judge advocate noted that appellant had no supervisor or management duties yet described at the hearing that he had reached out to SSG E.D. on numerous occasions to provide him with information regarding his career and advice on how to deal with others in the organization, which was clearly outside of appellant's scope of work.

In correspondence dated June 30, 2017, counsel asserted that the altercation was not purely personal and was thus compensable, maintaining that SSG E.D.'s attack on appellant was unprovoked and that work brought the two men together. Citing Defense Base Act<sup>7</sup> cases, he further asserted the claim was compensable because the employing establishment was in a zone of special danger.

By decision dated August 3, 2017, OWCP denied modification of the prior decisions. It found appellant's assignment at the employing establishment did not fall into FECA's definition for war-risk hazards and that provisions of the Defense Base Act were separate from FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>8</sup>

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.<sup>9</sup> In the course of employment relates to the elements of time, place, and work activity.<sup>10</sup> 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 or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of the employment, or engaged in doing something

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<sup>7</sup> The Defense Base Act, codified at 42 U.S.C. §§ 1651-1654 is an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

<sup>8</sup> *L.R.*, Docket No. 17-0031 (issued July 11, 2017).

<sup>9</sup> This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

<sup>10</sup> *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

incidental thereto.<sup>11</sup> As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours or at lunch time, are compensable.<sup>12</sup>

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 that would not otherwise be made, the employment becomes a contributing factor.<sup>13</sup> The Board has held that this principle applies to mental or emotional injuries as well as to assaults.<sup>14</sup>

### ANALYSIS

The Board finds that appellant was in the performance of duty when the assault occurred on June 29, 2015.

There is no dispute that on June 29, 2015 SSG E.D. entered appellant's work space, confronted him accusing him of spreading rumors, and they began to fight. At that time appellant was at his desk eating lunch. OWCP denied the claim finding that the subject matter of the dispute concerned a nonemployment-related matter. The Board, however, finds that the altercation arose in the performance of duty.

The Board has recognized that friction and strain among employees may arise as an inherent part of the conditions of employment. Even if the subject of a dispute is unrelated to work, an altercation is compensable if the work of the participants brought them together and created the relations and conditions that created the clash.<sup>15</sup>

Larson states that 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 that would not otherwise be made, the employment becomes a

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<sup>11</sup> See *J.B.*, Docket No. 17-0378 (issued December 22, 2017).

<sup>12</sup> *T.H.*, Docket No. 17-0747 (issued May 14, 2018).

<sup>13</sup> *J.G.*, *supra* note 10; see also A. Larson, *The Law of Workers' Compensation* § 8.00 (May 2004).

<sup>14</sup> See *C.O.*, Docket No. 09-0217 (October 21, 2009).

<sup>15</sup> The friction and strain doctrine recognizes that workplace 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. However, 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 13 at § 801(6)(a). The Board has recognized the friction and strain doctrine. See *Shirley Griffin*, 43 ECAB 573 (1992). See also *M.A.*, Docket No. 08-2510 (issued July 16, 2009). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.12(b) (March 1994) (Coworker Harassment or Teasing).

contributing factor.<sup>16</sup> Larson goes on to explain that the friction and strain of close contact may supply the necessary work connection by increasing the probability of quarrels among employees:

“This view recognizes that work places men 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 work 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 the 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.”<sup>17</sup>

In the case at hand both appellant and SSG E.D. were deployed to the Middle East Theater at a forward operating encampment at Camp Arifjan. The altercation between the two men occurred on the work premises during regular work hours. Although they may have had some discussions concerning their careers, this would not take the June 29, 2015 incident outside of the performance of duty.<sup>18</sup> Appellant and SSG E.D. had no relationship outside of work as appellant lived off base and did not interact with military members outside of work. The Board has recognized distinctions between altercation which arise from domestic, private life and an altercation wherein the employment setting facilitates the dispute. In *L.B.*, an emotional condition case, OWCP had concluded that allegedly harassing remarks made at work were noncompensable because they concerned appellant’s personal life and had nothing to do with her assigned duties. However, the Board explained that the fact that a coworker chose to repeatedly question appellant over an issue that was inherently personal did not make the workplace events any less compensable.<sup>19</sup> In this case, given the environment of being deployed in a foreign country and working in a forward operating base were circumstances that were created by the employment. The very nature of such employment, that is, being in close contact in a foreign country in a potentially hostile setting can give rise to the strains and fatigue where events not confined to the work duties can spill over in the form of personal animosities which are not necessarily integral to the employment duties. In this unique circumstance, the Board finds the altercation was due to such factors and therefore compensable.

Consequently, the issue is whether the incident at work caused an injury. OWCP did not adjudicate this aspect of the case as it found that the altercation did not occur in the performance of duty. The case will, therefore, be remanded for OWCP to consider whether the medical

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<sup>16</sup> 1 A. Larson, *The Law of Workers’ Compensation*, *supra* note 13. See *M.A.*, Docket No. 08-2510 (issued July 16, 2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *L.B.*, Docket No. 06-1939 (issued January 30, 2007); see also *I.D.*, Docket No. 16-0581 (issued December 12, 2016).

evidence establishes that appellant sustained an injury due to the June 29, 2015 altercation.<sup>20</sup> Following such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

The Board finds this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 4, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>20</sup> The Board notes that the most recent medical evidence of record submitted by a physician is Dr. Weiss' December 22, 2015 report.