United States Department of Labor
Employees' Compensation Appeals Board

YVONNE D. McCRARY, Appellant	)	
and	)	**Docket No. 04-1154**
	)	**Issued: July 27, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer	)	

Appearances:
Steve Burt, for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument June 21, 2005

DECISION AND ORDER

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

JURISDICTION

On March 25, 2004 appellant filed a timely appeal of a February 4, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs that found that appellant was not injured in the performance of duty on May 30, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the assault on appellant on May 30, 2000 was sustained in the performance of duty.

FACTUAL HISTORY

On June 6, 2000 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim for stab wounds sustained on May 30, 2000 when she was attacked and stabbed while attempting to deliver her route. A postal inspector noted that appellant was attacked, stabbed and seriously wounded by her ex-boyfriend while delivering mail on May 30, 2000, and that the ex-boyfriend had reportedly been harassing appellant and her family recently, although no threats had been

made against her on the job. On June 23, 2000 the ex-boyfriend pleaded guilty in United States District Court of assaulting a federal employee who was engaged in official duties at the time of the assault. The guilty plea was to a violation of 18 U.S.C. § 111(a)(1) and (b), which provide for imprisonment up to 10 years for forcibly assaulting with a deadly weapon a federal employee "while engaged in or on account of the performance of official duties."

In a telephone conference on June 21, 2000, appellant stated that, on May 30, 2000, just after she had delivered mail to a residence, her ex-boyfriend suddenly came from behind a hedge and demanded $25.00, she told him she did not have $25.00 but had $20.00, he grabbed the $20.00 from her hand and did not say anything else, she started to walk away, and he then pulled out a knife and repeatedly stabbed her. Appellant stated that the ex-boyfriend had had a hostile relationship with her since three to four years earlier when they split up when their son was four years old, that he had no formal child visitation rights, that he had choked and threatened her in the past, that as a result she had personal protective orders issued ordering him to stay away from her, but that these were not successful. Appellant continued that he tried to visit her at work about one and one-half years earlier, and that when he tried to call her at work she had her supervisor tell him she was not available.

By decision dated July 10, 2000, the Office found that the evidence failed to establish that appellant's claimed injury arose out of the course of her employment.

Appellant requested a hearing, which was held on January 30, 2001. She testified that the ex-boyfriend called the employing establishment so frequently the supervisors knew his voice and would tell him she had already gone to her route, that he once came onto employing establishment property and grabbed and choked her, and that the Thursday before the Tuesday assault the employing establishment allowed her two hours to obtain a peace bond. Appellant's testimony continued that her request for time off without pay was denied, and that her request to be moved, temporarily or by a transfer, to another station was denied.

By decision dated April 17, 2001, an Office hearing representative found that the assault on May 30, 2000 arose out of a prior personal relationship between appellant and the assailant, and that it did not arise out of the employment because it had no connection with her employment or her assigned duties. The hearing representative acknowledged that the employing establishment had knowledge of .appellant's problems with the assailant, but found not tenable the argument that it facilitated the assault by not allowing appellant to take time off or to transfer to another station. Appellant appealed this decision to the Board, which, by order dated May 30, 2002, remanded the case to the Office for reconstruction and proper assemblage of the case record.[1] By decision dated June 26, 2002, the Office found that the May 30, 2000 assault did not arise out of the course of appellant's employment.

Appellant requested a hearing, which was held on November 5, 2003. She testified that she did not know how the assailant knew where to find her on her route though he did know which station she worked at, and that he told police he was riding a bus, saw appellant, and got off the bus. She further testified that she told employing establishment managers that she was afraid of him because he had hit her, that the incident in which he came to the employing

[1] Docket No. 01-1693 (issued May 30, 2002).

establishment occurred about six months before the May 30, 2000 assault and also involved the ex-boyfriend breaking the window of her car, that she formally requested a transfer, and that she also made postal inspectors aware of what was going on.

By decision dated February 4, 2004, an Office hearing representative found that the May 30, 2000 assault was a dispute imported into the employment from appellant's private life, that the human instincts doctrine did not apply, that there was no evidence the employing establishment failed to act to protect appellant, that the robbery of appellant immediately before the assault did not make the assailant a neutral force, that there was no evidence the employing establishment erred by not reassigning appellant to a different mail route, and that the employing establishment was not responsible for all hazards and dangers encountered by its employees in the public domain.

LEGAL PRECEDENT

The Federal Employees' Compensation Act (hereinafter the Act)[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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."[4] "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 the employer's business, at a place where he may reasonably be expected to be in connection with his employment, and 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 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.[5]

Larson, in addressing assaults arising out of employment, states the following:

> "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.[6] … When the animosity or dispute that culminates in an assault is imported into the

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8102.

[4] 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).

[5] *Guadalupe P. Americano*, 53 ECAB 297 (2002).

[6] A. Larson, *The Law of Workers' Compensation* § 8.00 (2004).

employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test.[7]"

ANALYSIS

At the time she was assaulted on May 30, 2000, appellant was in the course of her employment, that is, she was performing the employer's business of delivering mail during her regular hours and on her assigned mail route. The crucial question is whether the assault arose out of her employment. The Board finds that it did not.

The assailant in this case was appellant's ex-boyfriend, who is the father of her child. There is no suggestion that he had any dealings with appellant pertaining to her employment duties. The evidence shows that the assault on May 30, 2000 was motivated solely by the assailant's personal animosity toward appellant, imported from their personal relationship.

The evidence does not show that appellant's employment facilitated an assault that otherwise would not have occurred. There is no indication the assailant was waiting for appellant along a route he knew she would be taking that day. The only evidence on how he came upon appellant indicates he was riding on a bus and happened to see her delivering her route.[8] The employing establishment also did not facilitate the assault by refusing appellant's request for a transfer or a job inside its facility. To hold that it did would make the employing establishment into an insurer of the public streets, which the Board has declined to do.[9] While the employing establishment has some duty to provide a safe working environment, it cannot prevent an individual motivated to find and assault an employee from doing so on the public streets. Appellant was not engaged in a job that subjected her to an increased risk of assault, such as guarding property or keeping the peace.[10]

The fact that the assailant robbed appellant of $20.00 before assaulting her does not render the risk of assault neutral. The assailant was still motivated to assault appellant by his personal animosity toward her, which was imported from their personal relationship, nor does the fact that the assailant was convicted of assaulting a federal employee while she was engaged in the performance of her official duties necessitate a finding that she was in the performance of duty for purposes of entitlement to compensation under the Act. The mere fact that the statute under which he was convicted contains language concerning her employment is insufficient to establish coverage under the Act.

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[7] *Id.* at § 8.02(1)(a).

[8] Even if it could be shown that the employment placed appellant at a location where the assailant knew he could find her, this may not be a sufficient connection to the employment to afford coverage under the Act. *See George A. Fenske, Jr.*, 11 ECAB 471 (1960).

[9] *See Jimmie D. Harris*, 44 ECAB 997 (1993) (the Board held that the employing establishment's provision of an observation facility to watch postal property and the ingress and egress from that property did not convert it into an insurer of the public streets surrounding its facility).

[10] A. Larson, *The Law of Workers' Compensation* § 8.01(1) provides these and other examples of such jobs.

The Board finds that the human instincts doctrine does not apply to the circumstances of this case. Briefly stated, this doctrine states that, when an employee becomes ill on the job and is rendered helpless to provide for his or her own care, the employer has a duty to exercise reasonable care to render or procure assistance so that the employee may avoid further harm.[11] This doctrine has been applied only to situations involving a helpless employee needing medical assistance, and thus does not apply to the situation in the present case.

CONCLUSION

The Board finds that the assault on appellant on May 30, 2000 was not sustained in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[11] *Jerry L. Sweeden*, 41 ECAB 721, 729 (1990).