# United States Department of Labor
# Employees' Compensation Appeals Board

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| **A.B., Appellant** | ) | |
| **and** | ) | **Docket No. 15-288** |
| | ) | **Issued: May 21, 2015** |
| **U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

### ***JURISDICTION***

On November 20, 2014 appellant filed a timely appeal from an October 23, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 met his burden of proof to establish an injury in the performance of duty on July 16, 2014.

### ***FACTUAL HISTORY***

On September 11, 2014 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 16, 2014 he sustained a work injury at 4:45 p.m. Regarding the cause of injury, he stated, "As I was leaving post office to go to my car, I was

[1] 5 U.S.C. §§ 8101-8193. Appellant submitted additional evidence after OWCP's October 23, 2014 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

confronted by employee Walter Triquet and he hit me in my face (right eye)." Appellant stopped work on July 16, 2014. On the same form, his immediate supervisor checked a box indicating that the claimed injury did not occur in the performance of duty and stated, "[Appellant] was off the clock and walking to his car in the municipal lot when he was punched by another employee who was also off the clock." Appellant's usual work hours were listed as 7:00 a.m. to 3:50 p.m. The supervisor noted that the employing establishment was controverting his claim and stated, "Incident happened off the clock and off of the [employing establishment] premises."

Appellant submitted medical evidence in support of his claim, including a July 18, 2014 report in which Dr. Michael Demaria, an attending Board-certified gastroenterologist, diagnosed right eye hematoma, chin laceration, concussion, and headache and indicated that he reported being punched on July 16, 2014.

In a September 11, 2014 letter, the employing establishment contended that it was controverting appellant's claim and stated:

> "At the time of the alleged injury/incident, [appellant] was off the clock, not in the performance of duty, walking to his car in the municipal parking lot, and was off [employing establishment] premises when he was punched in the eye by another employee. As per the [Form CA-1] submitted by [him], the alleged injury occurred at approximately 4:45 p.m. [Appellant] mentioned, as he was leaving the [employing establishment] to go to his car he was confronted by another employee, and the other employee hit him in his face (right eye). [Employing establishment] management has indicated and confirmed that the incident with [him] was not in the performance of duty, happened off the clock, and off [employing establishment] premises. [Appellant] was punched by another employee who was also off the clock."

In a September 19, 2014 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It requested that he complete an attached questionnaire which included questions about the site of the claimed assault and his relationship to the claimed assailant. OWCP also sent a September 19, 2014 development letter to the employing establishment asking for additional information.

In a September 20, 2014 response to OWCP's request, appellant indicated that on July 16, 2014 he clocked out of work at approximately 4:40 p.m. and "was leaving postal property walking towards my car" when he was approached by Mr. Triquet who punched him in his right eye after stating, "You have a problem with me." He indicated that the assault occurred in the parking lot (approximately 15 feet from the employing establishment property) within five minutes of when he clocked out. The parking lot was not owned, controlled, or managed by the employing establishment. Appellant indicated that at work on July 9, 2014 Mr. Triquet threatened him on the workplace floor by stating to him, "What are you looking at?" and "He thinks he's a tough guy." He responded by asking Mr. Triquet whether he was "going to do anything about it," but that Mr. Triquet did not do anything further.

Appellant submitted an employing establishment time record indicating that he effectuated several clock rings on July 16, 2014, including clock rings at 4:44, 4:50, and 4:59 p.m. The clock ring at 4:59 p.m. contains the notation "nonscheduled end tour."

A July 16, 2014 report from the Glen Cove Police Department was added to the record which concerned an incident reported as occurring at 4:44 p.m. on that date. The report noted that appellant had indicated that Mr. Triquet asked him "if he had a problem with him" and that Mr. Triquet then punched him in his right eye. Appellant reported that he fell as a result of the punch and split his chin open on the ground. He was observed with severe facial swelling and a chin gash. Mr. Triquet was arrested and charged with assault in the third degree. In an undated witness statement, a coworker indicated that on July 16, 2014 at about 4:40 p.m. in the parking lot she heard Mr. Triquet state to appellant that he had "a problem" with him and then observed Mr. Triquet punch appellant in the face. Appellant also submitted additional medical evidence in support of his claim.

In an October 20, 2014 letter, an employing establishment official stated that appellant had already clocked out and was in the public parking facility at the time of the claimed injury. The parking lot was not owned by the employing establishment and was a municipal parking lot. Employees were not required to utilize the parking lot and no parking spaces were assigned by the employing establishment. The employing establishment official indicated that it is the employees' responsibility to pay for the use of the municipal parking lot.

In an October 23, 2014 decision, OWCP denied appellant's claim for a July 16, 2014 work injury because he failed to establish that the claimed injury occurred in the performance of duty. In one portion of the decision, it found that he had established a work incident on July 16, 2014 but did not submit sufficient medical evidence to show that he sustained a medical condition due to that incident. In another portion of the decision, OWCP found that appellant had not established a work incident on July 16, 2014. It noted that the claimed injury occurred off the employing establishment premises while he was off the clock.

## ***LEGAL PRECEDENT***

FECA 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 stated to be engaged in his or her employer's business, at a place where he or she may reasonably be expected to be in connection with his or her employment and while reasonably fulfilling the duties of his or her 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

[2] 5 U.S.C. § 8102.

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

employment. Arising out of the employment requires that a factor of employment caused the injury.[4]

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work, or during a lunch period, are not compensable as they do not arise out of and in the course of employment, but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5] When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday, and is governed by the same rules and exceptions.[6] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[7] or which are in the nature of necessary personal comfort or ministration.[8]

The Board has pointed out that factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's premises include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether the parking lot was checked for unauthorized vehicles, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees.[9] The proximity rule dictates that under special circumstances the industrial premises are constructively extended to hazardous conditions, which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment.[10]

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[4] *Veleria Minus*, 46 ECAB 799 (1995) (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).

[5] *Mary Keszler*, 38 ECAB 735 (1987).

[6] *Donna K. Schuler*, 38 ECAB 273 (1986).

[7] The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: "(1) where the employment requires the employee to travel on the highways; (2) where the [employing establishment] contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the [employing establishment]." *Betty R. Rutherford*, 40 ECAB 496, 498-99 (1989); *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[8] *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

[9] *Roma A. Mortensen-Kindschi*, 57 ECAB 418 (2006); *Diane Bensmiller*, 48 ECAB 675 (1997).

[10] *See William L. McKenney*, 31 ECAB 861 (1980).

The Board has held that workplace altercations occur in the performance of duty where the work brings the two together and creates the conditions that result in the altercation.[11] Professor 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 out of employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor."[12]

With respect to situations where conflicts occur after employees are brought together by work, OWCP procedures provide:

> "Another factor to consider in determining the compensability of injuries allegedly due to coworker harassment is the "friction and strain doctrine" … which is followed by the Board. Under this doctrine the fact that employees with their individual characteristics (emotions, temper, etc.) are brought together in the workplace creates situations leading to conflicts which may result in physical or emotional injuries. Because these conflicts have their origin in the employment they arise out of and in the course of employment even though they have no relevance to the employee's tasks. In other words, a conflict between employees involving a nonwork topic may be found to have occurred in the performance of duty because the employment brought the employees together and created the conditions which resulted in the conflict. However, the "friction and strain doctrine" does not apply to privately motivated quarrels or disputes imported from outside the employment."[13]

The Board has included within the performance of duty a reasonable interval before and after work to allow for coming and going, as well as personal ministrations, such as lunch or bathroom breaks, engaged in for the benefit of the employing establishment.[14] If the injury does not take place during those periods or on employing establishment premises, the Board will place special emphasis on whether the employee was engaged in an activity related to fulfilling the duties of his employment.[15] The Board denied compensation to an employee who tripped on a loose floorboard after arriving at work 25 minutes early to get coffee and breakfast.[16] In *George E. Franks*,[17] an employee failed to establish an injury in the performance of duty with respect to a fall in the parking lot of an Army base that occurred 45 minutes prior to the start of

[11] *F.S.*, Docket No. 10-1398 (issued May 12, 2011).

[12] A. Larson, The Law of Workers' Compensation § 8.00 (2000).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.12b (March 1994).

[14] *George E. Franks*, 52 ECAB 474 (2001).

[15] *See Venicee Howell*, 48 ECAB 414 (1997); *Narbik A. Karamian*, 40 ECAB 617 (1989).

[16] *T.F.*, Docket No. 09-154 (issued July 16, 2009).

[17] 52 ECAB 474 (2001).

his shift. The Board found that the action he was performing at the time, getting coffee and breakfast, was solely personal in nature. In *John F. Castro*,[18] the Board granted recovery when an employee was injured in an automobile accident at a naval station five minutes after the end of his shift.[19]

## ***ANALYSIS***

On September 11, 2014 appellant filed a traumatic injury claim alleging that on July 16, 2014 he sustained a work injury at 4:50 p.m. Regarding the cause of injury, he stated, "As I was leaving post office to go to my car, I was confronted by employee [Mr. Triquet] and he hit me in my face (right eye)." In an additional statement, appellant indicated that the claimed injury occurred approximately five minutes after he clocked out for the day while he was walking to his car in a municipal parking lot about 15 feet from the employing establishment premises. He stated that Mr. Triquet punched him in his right eye after stating, "You have a problem with me." The employing establishment controverted the claim and, in an October 23, 2014 decision, OWCP denied appellant's claim, in part, because he did not show that the claimed injury occurred in the performance of duty.[20]

The Board finds that appellant has failed to establish that an employment incident occurred on July 16, 2014. Although the record is vague regarding the precise times that appellant clocked out of work and the assault by Mr. Triquet occurred on July 16, 2014, it appears that the assault occurred within a few minutes of appellant clocking out of work on that date. Appellant indicated that the incident occurred at approximately 4:50 p.m. on July 16, 2014 and the record contains a document suggesting that he clocked out around that time on July 16, 2014.[21] The Board notes that it appears that the claimed work incident occurred within a reasonable interval after clocking out from work and would not be denied solely on a temporal basis.[22] However, in examining whether the July 16, 2014 incident occurred within the performance of duty, it is important to also examine whether it occurred at a place where appellant 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.[23]

[18] Docket No. 03-1653 (issued May 14, 2004).

[19] *Id.*

[20] In its decision OWCP was vague regarding the reason for denying appellant's claim. In one portion of the decision, it found that he had established a work incident on July 16, 2014 but did not submit sufficient medical evidence to show that he sustained a medical condition due to that incident. In another portion of the decision, OWCP found that appellant had not established a work incident on July 16, 2014 as it was off premises and off the clock.

[21] Appellant submitted an employing establishment time record indicating that he effectuated several clock rings on July 16, 2014, including clock rings at 4:44, 4:50, and 4:59 p.m. The clock ring at 4:59 p.m. contains the notation "nonscheduled end tour."

[22] *See supra* notes 14 through 19.

[23] *See supra* note 4.

First, the Board notes that the claimed work incident occurred off the premises of the employing establishment. The assault occurred on a municipal parking lot that was not owned, controlled, or managed by the employing establishment. Moreover, the employing establishment did not provide parking spaces for its employees in this lot or pay for parking in the lot. There is no evidence that the municipal parking lot where the claimed injury occurred was part of the employing establishment premises or that the premises extended to the parking lot under the proximity rule.[24] Second, it does not appear that appellant was reasonably fulfilling the duties of his employment or engaged in something incidental thereto at the time of the claimed injury on July 16, 2014. He was merely leaving work after clocking out for the day and walking to his car.

Appellant suggested that the assault occurred due to an ongoing dispute with his coworker, Mr. Triquet. He indicated that, at work on July 9, 2014, *i.e.*, a week prior to the claimed July 16, 2014 injury, Mr. Triquet threatened him on the workplace floor by stating to him, "What are you looking at?" and "He thinks he's a tough guy." Although the Board has held that workplace altercations occur in the performance of duty where the work brings the two together and creates the conditions that result in the altercation, the facts of the present case are not sufficiently similar to those cases where coverage is found under this principle.[25]

In the cases where coverage is found, based on the employment bringing two employees together and creating the conditions that resulted in the altercation, the two employees engaged in the altercation are typically located on the premises and engaged in performing work duties around the time of the altercation. For example, in *C.O.*,[26] coverage was found where the assailant approached the claimant while he or she was working on the premises and assaulted him or her after questioning the actions of the claimant's pastor. In *Shirley I. Griffin*,[27] a work incident was found where the assailant approached the claimant while she was working on the premises and assaulted her ostensibly due to her failure to introduce the assailant to a male employee. In these cases, it was reasoned that coverage was warranted, even though the conflicts were not strictly over work matters, because the employment brought the two employees together, and created the conditions that resulted in the altercations.

The facts of the present case differ significantly in that appellant was not on the premises of the employing establishment when he was assaulted. Nor was he engaged in any work duties or actions incidental thereof at the time of the assault. Appellant's situation does not fall under the exceptions to the general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are

[24] *See supra* notes 9 and 10.

[25] *See supra* note 11. The Board notes that the nature of the conflict between appellant and his assailant remains vague and that there is no evidence that the conflict was imported into the workplace from their private lives. *See supra* note 13.

[26] Docket No. 09-217 (issued October 21, 2009).

[27] 43 ECAB 573 (1992).

not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[28]

The facts of appellant's case are more similar to the case of *S.C.*,[29] a case where coverage was not found because the claimed injury did not occur at a place where the claimant was reasonably expected to be in connection with his employment and did not occur while reasonably fulfilling the duties of his employment or engaged in something incidental thereto. In that case, the claimant and the assailant had a tense conversation at work approximately one week prior to the assault. However, the assault occurred while the claimant was off the premises of the employing establishment and while he was not on official time. For these reasons, appellant has not established the occurrence of a work incident on July 16, 2014.

Because appellant has not established the occurrence of a work incident on July 16, 2014, he has not established that he sustained an injury in the performance of duty on July 16, 2014.[30] He 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.[31]

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on July 16, 2014.

[28] *See supra* notes 5 through 8.

[29] Docket No. 13-1915 (September 16, 2014).

[30] *See supra* notes 2 through 4.

[31] The Board notes that the record contains a Form CA-16 completed on appellant's behalf. Where an employing establishment properly executes a CA-16 form, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a CA-16 form is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c). The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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