

2022 WL 12804814 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: NYC PARKS & RECREATION

Case No. G310 5096

Carrier ID No. W8462101812 W847008

October 18, 2022

*1 CNY Other Than Ed, HEd Water

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Date of Accident 9/7/2021

The Full Board, at its meeting held on September 20, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed May 13, 2022.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant's injuries arose out of and in the course of her employment.

The Workers' Compensation Law Judge (WCLJ) disallowed the claim.

The Board Panel majority affirmed the WCLJ decision, finding that claimant was not injured in the course of her employment.

The dissenting Board Panel member would find that the assault that resulted in claimant's injuries occurred in the course and scope of her employment and would establish the claim.

The claimant filed an application for Mandatory Full Board Review on June 13, 2022, arguing that there was a clear nexus between claimant's employment and the assault, which occurred on the employer's premises during claimant's regular work hours, and was precipitated by a vehicle collision that occurred in the employer's parking lot.

The self-insured employer (SIE) did not file a rebuttal.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

Claimant filed a C-3 (Employee Claim) on September 27, 2021, alleging that she was employed by the SIE as a recreation supervisor and that on September 7, 2021, while “waiting in the car to go into work” she was attacked and “kicked, bitten and punched by another employee of the park.” Claimant alleged that she suffered injuries to her right eye, head, chest, right hand, right pinky, right ring finger, left hand and left thumb as the result of the assault. The SIE controverted the claim.

A pre-hearing conference was scheduled by the Board for December 6, 2021. Prior to the pre-hearing conference, claimant's attorney filed an untimely pre-hearing conference statement on December 1, 2021, and the SIE failed to file a pre-hearing conference statement.

In the decision resulting from the pre-hearing conference, which is dated December 9, 2021, the WCLJ found that the SIE had waived its defenses to this claim by failing to file a pre-hearing conference statement, and had also waived its opportunity to obtain an IME report “regarding the directly related injury sites.” The WCLJ found prima facie medical evidence for the neck, head, mild TBI (traumatic brain injury), PCS (post-concussion syndrome), and the back, and consequential depression and anxiety, and continued the case for the testimony of the claimant and, at claimant's request, the testimony of a supervisor who witnessed the assault.

*2 The record contains a copy of claimant's supporting deposition in a criminal complaint in the Criminal Court of the City of New York, Bronx County (Doc. ID #4000742967), and a report by the New York City Police Department (Doc. ID #4000810659), which corroborate that claimant was assaulted on September 7, 2021.

Claimant testified at a hearing on February 4, 2022, that she was employed as a parks and recreation supervisor. On September 7, 2021, she was parked in her vehicle changing for work when her vehicle was struck. She got out of her vehicle and showed the other driver “how she hit my vehicle. And we agreed that we were going to meet up at 10:00 to go get an estimate on the damages on my vehicle” (Hearing Transcript, 2/4/22, p. 4). The spot where she was parked was designated for city employees. She did not know the other driver, who she believes was a seasonal employee. She spoke to the other driver's supervisor “to tell him what happened because she wasn't being honest with me” (p. 5). Claimant had tried calling the other driver, but she did not answer, so claimant went to speak to the other driver's supervisor. Claimant testified:

Upon speaking to him - upon speaking to him, she came up, she punched me in my right eye. She violently attacked me. She punched me in my eye. My eye swolled [[sic] up. She also was on top of me beating viciously like I did something to her.

(id.). The assailant's supervisor witnessed the assault. According to claimant, “[s]he attacked me because she obviously didn't want to fix my vehicle. She hit my vehicle” (p. 6). The police were called, and her assailant was arrested. She has not been able to return to work since the incident. The space where she was parked when her vehicle was struck is designated for parking by employees, such as claimant, who work in the rec center. She works from 7:00 a.m. to 3:00 p.m. and the assault took place at 9:55 a.m.

On cross-examination, claimant testified that her vehicle was struck at 6:45 a.m. while the assailant was trying to park her car. Her assailant was “also on shift” (p. 11). Claimant did not work with the assailant, who worked outside, while claimant worked in the rec center.

On re-direct, claimant testified that she is a permanent park employee and works in the rec center, and it was her understanding that her assailant was a seasonal park employee who worked in the park. She was not on break when the assault occurred.

The assailant's supervisor did not appear to testify at the February 4, 2022, hearing. After listening to claimant's testimony and summations by the parties, the WCLJ found that there was no nexus between claimant's employment and the altercation that resulted in her injuries, and disallowed the claim. The findings made at the February 4, 2022, hearing are reflected in an amended decision filed February 9, 2022, in which the WCLJ stated:

There is no nexus between employment and the altercation. The altercation was the result of a motor vehicle accident between two personal vehicles that happened before the claimant started her work day.

*3 Therefore the claim is disallowed. (see *Matter of Belaska v New York State Dept. of Law*, 96 AD3d 1252 (2012), see also *Matter of Timperio v. Bronx-Lebanon Hospital*, No. 533584, App Div 3rd Dept. Jan. 12, 2022).

Claimant requested administrative review, arguing that there was a nexus between her employment and the assault, and that the claim should be established.

In rebuttal, the SIE argued that the WCLJ decision should be affirmed, asserting that there was no evidence that the assault “was based upon employment related animus between the two individuals or that the attack had any nexus to claimant's employment or performance of her job duties.”

LEGAL ANALYSIS

“Injuries stemming from an assault which arose in the course of employment are presumed to have arisen out of the employment unless substantial evidence is presented that the assault was motivated by purely personal animosity (see *Matter of Rosen v First Manhattan Bank*, 84 NY2d 856, 857 [1994]; *Matter of Wadsworth v K-Mart Corp.*, 72 AD3d 1244, 1244-1245 [2010]; *Matter of Turner v F.J.C. Sec. Servs.*, 306 AD2d 649, 649 [2003])” (*Matter of Belaska v New York State Dept. of Law*, 96 AD3d 1252 [2012]). “For purposes of workers' compensation, altercations between coworkers are usually considered compensable regardless of fault if the injury arises out of a clash over work-related disputes. A work-related altercation is distinguishable from an altercation that is born out of purely personal animosities and, thus, noncompensable” (*Matter of Bell v Utica Corp.*, 306 AD2d 604 [2003][citations omitted]).

Here, the initial interaction between claimant and her assailant, both of whom were employees of the NYC Department of Parks and Recreation, occurred at 6:45 a.m. in the employer's parking lot, outside the recreation center where claimant worked, while claimant was in her vehicle changing to get ready for her work shift, which began at 7:00 a.m. Claimant's vehicle was struck by the vehicle driven by the assailant, who was parking her vehicle before commencing her work shift. Claimant and the assailant had never previously met. The claimant and the assailant agreed to meet at 10:00 a.m. to obtain an estimate of the cost of repairing the damage to claimant's vehicle. Claimant attempted to call the assailant prior to the meeting, but she did not answer, and claimant then discussed the incident with the assailant's supervisor. Claimant testified that “upon speaking to” the assailant's supervisor, the assailant ““came up” and began to assault the claimant.

These facts, which are not in dispute, plainly demonstrate that the assault, and claimant's resulting injuries, arose out of a work-related dispute. The initial interaction between claimant and the assailant occurred in the employer's parking lot, where claimant was parked to begin her shift, when her vehicle was struck by the vehicle driven by the assailant who was attempting to park her vehicle in an adjacent spot before beginning her work shift. The two had never met previously and had no personal relationship whatsoever (c.f., *Matter of Perez v. Victory Motor*, 2 AD3d 963 [2003]). The only interaction between the two prior to the assault was when their vehicles collided that morning. While not dispositive, it is worth noting that had claimant been injured in the collision, her injuries would almost certainly have been found to be compensable (see *Matter of Cruz v. Karl Ehmer Inc.*, 282 AD2d 841 [[2001]). That the incident involved two employees of the same employer, one of whom was parked in the employer's parking lot before her shift and the other attempting to park her vehicle before beginning work, provides a clear nexus between that initial incident and claimant's employment.

*4 Moreover, just prior to the assault, which occurred just over three hours after the initial incident, claimant sought out the assailant's supervisor and advised him of the incident. It is reasonable to conclude based on the circumstances that claimant's discussion with the assailant's supervisor precipitated the assault, at least in part, providing a further nexus between the assault and claimant's employment.

Therefore, the preponderance of the evidence in the record supports a finding that claimant's injuries arose out of and in the course of her employment.

CONCLUSION

ACCORDINGLY, the WCLJ amended decision filed February 9, 2022, is REVERSED and the claim is established for the neck, head, back, mild TBI ([traumatic brain injury](#)), PCS ([post-concussion syndrome](#)), and consequential depression and anxiety. The case is continued to consider awards and all other outstanding issues.

Clarissa Rodriguez
Chair

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