

Oct. 22, 2013

CASE NO. AB 2012-116(H)

CASE NO. (1-11-00332)

GLORIA KALAMAU, Claimant-Appellant, vs. COUNTY OF HAWAII, DEPARTMENT OF PARKS AND RECREATION, Employer-Appellee, Self-Insured, and STATE OF HAWAII, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT EMPLOYEE CLAIMS DIVISION, Third Party Administrator-Appellee.

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
STATE OF HAWAII
D/A: April 14, 2011

DECISION AND ORDER

This workers' compensation case is before the Labor and Industrial Relations Appeals Board ("Board") on appeal by GLORIA KALAMAU ("Claimant") from the March 14, 2012 Decision of the Director of Labor and Industrial Relations ("Director"), denying Claimant's May 23, 2011 claim for compensation for a work injury occurring on April 14, 2011.

On July 11, 2012, the Board issued a Pretrial Order, wherein the sole issue to be determined is whether Claimant sustained a mental personal injury, a right leg injury, and internal injuries on April 14, 2011, arising out of and in the course of employment.

For the reasons set forth below, the Board REVERSES the March 14, 2012 decision of the Director.

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. On April 14, 2011, Claimant was employed as a part-time senior community services aide with the COUNTY OF HAWAII, DEPARTMENT OF PARKS AND RECREATION, Self-Insured, whose Third Party Administrator is the STATE OF HAWAII, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, EMPLOYEE CLAIMS DIVISION (collectively, "Employer").

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2. On May 23, 2011, Claimant filed a Form WC-5 Employee's Claim for Workers' Compensation Benefits. She described the April 14, 2011 accident as follows:

A co-worker . . . attacked me in the parking lot as I was leaving work. She [and] her daughter knocked me down and hit [and] kicked me. I had complained about [the co-worker] previously at work.

Claimant's injury was described as consisting of a "broken right leg, internal injuries, bruises [and] emotional trauma."

3. Employer completed a WC-1 Employer's Report of Industrial Injury ("WC-1") dated June 1, 2011. According to the WC-1, Claimant reported on April 15, 2011, an April 14, 2011 injury. While she "was leaving work . . . she was attacked in the parking lot by a co-worker and co-worker's daughter. [Claimant] alleges she was knocked down, hit and kicked."

Injuries sustained by Claimant were reported as a "[b]roken right leg, internal injuries, bruises, emotional trauma."

As to whether the injury occurred on Employer's premises, the box indicating "No" was marked.

4. Claimant worked for Employer at the County of Hawaii Mass Transit Agency located at 1266 Kamehameha Avenue, Hilo, Hawaii, the old Hilo Iron Works property.

4. In various police reports, each of the individuals involved, including Claimant, were alternately and somewhat inconsistently identified as a "suspect" and "victim."

The April 16, 2011 Hawaii Police Incident Data Sheet Report was prepared pursuant to a report by Claimant's coworker. The offense reported was "Assault 3" occurring on April 14, 2011 at 1266 Kamehameha Avenue, Hilo, Hawaii 96720. The Report's synopsis documented the incident from the co-worker's

perspective:

[Claimant's co-worker], F-51, REPORTED THAT ON 04-14-2011 AT APPROXIMATELY 1640 HOURS, HER CO-WORKER, GLORIA KALAMAU, F-70, ATTACKED HER BY THROWING CLOSED FIST PUNCHES OVER HER DAUGHTER. . . , F-20, WHO WAS STANDING BETWEEN THEM. F-50 RELATED

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THAT SHE WAS STRUCK SEVERAL TIMES TO HER FACE;
CAUSING PAIN AND REDNESS.

(Capitalization in original.)

Similarly, an April 16, 2011 Hawaii Police Incident Data Sheet Report described the same incident from the perspective of the daughter of Claimant's co-worker. The synopsis of this report reads as follows:

[The daughter of Claimant's co-worker] F-20, REPORTED THAT ON 04-14-2011 AT APPROXIMATELY 1640 HOURS, GLORIA KALAMAU, F-70, ASSAULTED HER MOTHER, [Claimant's co-worker], F-51, IN THE PARKING LOT OF THE IRON WORKS BUILDING. F-20 RELATED THAT SHE WAS ATTEMPTING TO BREAK THEM UP AND RELATED THAT F-70 RECKLESSLY STRUCK HER FACE; CAUSING PAIN AND SWELLING.

(Capitalization in original.)

A May 6, 2011 Hawaii Police Incident Data Sheet Report was prepared based on statements to the police from Claimant. It described an April 14, 2011 physical altercation, but described Claimant as the victim of the assault. In this manner, Claimant's report clashed with that of co-worker and her coworker's daughter:

GLORIA KALAMAU, F-70, REPORTED THAT ON 04-14-2011 AT APPROXIMATELY 1640 HOURS, SHE WAS ATTACKED FROM BEHIND BY A COWORKER . . . F-51, AND HER DAUGHTER, . . . F-20. SHE RELATED THAT ONE OF THEM STRUCK HER NUMEROUS TIMES TO THE BACK OF HER HEAD AND THE OTHER KICKED HER NUMEROUS TIMES TO THE SIDE OF HER RIGHT LEG; CAUSING HER TO FALL TO THE GROUND IN PAIN. SHE RELATED THAT SHE ATTEMPTED TO GET UP TO DEFEND HERSELF BUT COULDN'T; DUE TO THE EXTREME PAIN TO HER LEG. NOTE THAT LEG WAS LATER FOUND TO BE BROKEN.

(Capitalization in original.)

The police report detailed Claimant's account as to how the incident occurred:

[Claimant] stated at that point she started to walk to her vehicle, which she explained was parked at the end of the building closer to the waterway. She stated then as she walked

away she noticed [Claimant's co-worker] coming out of the building. She stated that she continued to walk away and she was attacked by the two parties, [Claimant's co-worker] and [the coworker' s daughter]. She stated that one was punching her to the back of her head and the other was kicking to the side of her right leg.

I asked [Claimant] how many times they punched and kicked her, and if she noticed who was doing what. She stated that she was not sure how many times they had punched her, it was several times, and she was not sure who was kicking and who was punching her because she was not facing them. [Claimant] stated that from the kicks and punches she ended up falling to the ground on her stomach; and in her words 'skid across the pavement on her stomach.' She stated that she is not sure if she blacked out but she was having a hard time breathing.

The police reports substantiate that prior to exiting the building there had already begun a highly wrought conversation between Claimant and the co-worker regarding their regrettably poor work relationship.

The Board credits the police reports to establish that on April 14, 2011, Claimant was involved in a verbal argument which escalated into a physical altercation involving a coworker and the co-worker's daughter, resulting in injuries to Claimant.

5. The parking lot was situated adjacent to the building in which Claimant worked, namely, 1266 Kamehameha Avenue, Hilo, Hawaii.

Declarations of Thomas Brown, Administrator, County of Hawaii Mass Transit Agency, and others establish that the County of Hawaii Mass Transit Agency was located within the Hilo Iron Works Building. The building has an adjacent parking lot, which Employer's employees, including Claimant, were permitted to use but were not required to use. The affidavits further stated that the parking lot was not owned, maintained, or controlled by Employer.

The Board credits the declarations.

6. Claimant testified at the hearing before the Board. Claimant stated that she was at work on the date of the accident. She testified that she did not start the fight. The daughter of a co-worker would always wait for her mother outside the office in the parking lot.

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On April 14, 2011, Claimant left the office. Her coworker was still in the office. As was she was exiting, the coworker passed her and went to the co-worker's daughter. But then the co-worker returned to the office, and Claimant was still in the parking lot. She found herself half-way out of the office and where her co-worker's daughter was standing. Claimant just turned around and spoke to her co-worker's daughter.

Claimant stated that the conversation inquiring as to the reasons for a poor work relationship between Claimant and the co-worker led to the exchange of words and ultimately the physical altercation resulting in Claimant's sustaining physical injuries.

Claimant described that before reaching her parked car she was repeatedly struck by her co-worker and her co-worker's daughter and sustained various personal injuries, including a broken leg.

Claimant further testified that the co-worker never struck her or spit on her while working, but what the co-worker did was undermine Claimant's work. The co-worker would make her look bad in processing work for their customers. The co-worker criticized Claimant's job performance and acted as though Claimant did not know what she was doing on the job. Claimant testified that she spoke to her supervisors and others regarding the problems Claimant was having with her co-worker, but the situation was not resolved by management.

The Board finds that Claimant's co-worker failed to answer Claimant's work-related questions, verbally and publicly disparaged her performance and qualifications for her position, failed to post mail that Claimant prepared to be posted, and rearranged paperwork which complicated Claimant being able to perform her work duties.

7. The Board finds that a tense and strained work relationship between Claimant and co-worker led to an exchange of words on the job about their work relationship, which led to a physical altercation in the parking lot resulting in Claimant's sustaining a mental personal injury, a right leg injury, and internal injuries while defending herself during an unprovoked physical altercation with the co-worker and the coworker's daughter.

CONCLUSION OF LAW

The Board makes the following Conclusion of Law. If it should be determined that this Conclusion of Law should have been set forth as a Finding of Fact, then it shall be deemed as such.

Hawaii's workers' compensation statute, Chapter 386, Hawaii Revised Statutes ("HRS"), specifies what injuries are covered:

§386-3 Injuries covered. (a) If an employee suffers personal injury either by accident **arising out of and in the course of the employment** or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter.

Accident arising out of and in the course of the employment includes the wilful act of a third person directed against an employee because of the employee's employment.

(b) **No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self-defense,** or by the employee's intoxication.

(c) A claim for mental stress resulting solely from disciplinary action taken in good faith by the employer shall not be allowed; provided that if a collective bargaining agreement or other employment agreement specifies a different standard than good faith for disciplinary actions, the standards set in the collective bargaining agreement or other employment agreement shall be applied in lieu of the good faith standard. For purposes of this subsection, the standards set in the collective bargaining agreement or other employment agreement shall be applied in any proceeding before the department, the appellate board, and the appellate courts.

(Emphasis Added.)

An accident "arising out of and in the course of the employment includes the wilful act of a third person," and an injury sustained in "unprovoked non-work related physical altercations" may be compensable. In the instant case, the Board concludes that Claimant did not provoke the physical altercation resulting in physical injuries at the hand of a third person. In fact, Claimant's injuries were suffered while defending herself.

Chapter 386, HRS, also contains presumptions, two of which are pertinent and as follows:

§386-85 Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter **it shall be presumed, in the absence of substantial evidence to the contrary:**

1) That the claim is for a covered work injury;

* * *

4) That the injury was not caused by the wilful intention of the injured employee to injure oneself or another.

(Emphasis added.)

Injuries sustained are not compensable when a personal quarrel is imported into the employment environment. Claimant argues, however, and the Board agrees that an employment-related quarrel beginning on premises and continuing off premises after working hours is work-connected.

While such a general assertion may not always be true, the Board determines that in this case Claimant is correct.

There are, therefore, two presumptions (for a covered work injury and that Claimant did not willfully intend to injure herself or another) which Employer must overcome or rebut with substantial evidence to the contrary in order to prevail.

Employer unduly relies on a premises defense.

The Hawaii Supreme Court has spoken with respect to injuries sustained by employees while on and off premises. *Smith v. State of Hawaii Department of Labor and Industrial Relations*, 80 Hawaii 150, 154, *reconsideration denied* (1995). The Court opined that injuries sustained while "going or coming while still on the employer's premises are compensable if the injury arises from an employment-related risk." *Id.*

The court specified that:

(1) injuries suffered by employees while going to or from work arise out of and in the course of employee's employment if (a) the injury occurs on the employer's premises, and (b) the employee's presence on the employer's premises was required

by the nature of the employee's employment; (2) a parking lot owned, maintained, or controlled by an employer is considered part of the employer's premises for purposes of determining whether an employee's injury suffered in a parking lot arises out of and in the course of the employee's employment; and (3) an injury suffered by an employee in a public street, sidewalk, or other off-premises location that is on a direct and/or necessary route between the employer's main premises and the parking lot owned, maintained, or controlled by the employer also arises out of and in the course of the employee's employment.

Id. at 155-156.

In *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 636 P. 2nd 721 (1981), the Supreme Court held a work injury sustained off Employer's premises to be compensable. This approach was explained by setting forth the historical context of the adoption of a new approach to work-place injuries, where

beginning with *Royal State National Insurance Co. v. Labor & Industrial Relations Appeal Board*, 53 Haw. 32, 487 P.2d 278 (1971), however, this court moved towards adoption of the liberal, unitary concept of work-connection for interpreting the statutory requirement. The work-connection approach rejects the necessity of establishing temporal, spatial, and circumstantial proximity between the injury and employment. Instead, **focusing- on the injury's origin rather than the time and place of its manifestation, the work-connection approach simply requires the finding of a causal connection between the injury and any incidents or conditions of employment.** (Emphasis added.)

Chung at 648.

Later in the opinion, the Supreme Court warned of the inequity that could result from a rule denying compensation where injuries had their inception at work but manifested after leaving the work premises:

Further, in *Pacheco v. Orchids of Hawaii, supra*, we warned that the scope of HRS § 386-3 should not be unduly restricted and again spoke in terms of a work-connection test. The work-connection language was not negated by this court's focus on the temporal and spatial relationship between the employee's injury and her job, since the injury, occurring during

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a coffee-break, was not otherwise causally related to the conditions of her employment.

On the basis of the foregoing authority, we now conclude that the unitary work-connection approach is the correct one for interpreting and applying HRS § 386-3 in a way which fairly carries out the purposes of Hawaii's workers' compensation laws. As we have previously observed, "the legislature has decided that work injuries are among the costs of production which industry is required to bear. . . ." *Akamine, supra* at 409, 495 P.2d at 1166. Inequity would easily result from a rule which denied compensation for injuries having their inception at work but not becoming manifest until the employee had left the employer's premises.

Chung at 649.

Although the April 14, 2011 incident occurred after Claimant had completed work, had exited the building, and was walking to her parked car, the office verbal exchanges leading up to the attack were part and parcel of the attack. Claimant's co-worker struck and beat Claimant because of the poor relationship they had at work, not because of some non-work-related rationale imported into the workplace.

While the site of the physical altercation was in a parking lot which was not owned, maintained, or controlled by Employer, the unitary test and work-connection approach explained by the Supreme Court "rejects the necessity of establishing temporal, spatial, and circumstantial proximity between the injury and employment." The dispositive determination, rather, is "the injury's origin rather than the time and place of its manifestation."

The unique temporal and spatial facts in this case are significant but not dispositive. Hawaii's workers' compensation law was not crafted to render Claimant helpless and without recourse when a co-worker chose to strike and beat Claimant just after punching out of the time clock at work and just outside of Employer's building and in an adjacent parking lot.

Certainly, there was no relevant risk associated with the parking lot.

The Board applies the presumption of compensability, concludes that Employer failed to rebut or overcome said presumption, and concludes that Claimant sustained a mental personal injury, a right leg injury, and internal injuries on April 14, 2011, arising out of and in the course of employment.

ORDER

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In accordance with the foregoing, the Board REVERSES the March 14, 2012 decision of the Director.

Dated: Honolulu, Hawaii,

ROLAND Q.F. THOM, Chairman

EXCUSED

MELANIE S. MATSUI, Member

DAVID A. PENDLETON, Member

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A certified copy of the foregoing was served on the above-captioned parties or their legal representative in accordance with §12-47-18 of the LAB Rules of Practice and Procedure on .

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