

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001392-WC

DEBRA TAYLOR,  
NOW DEBRA MONTGOMERY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-95088

WAYNE COUNTY BOARD OF EDUCATION;  
HON. CAROLINE PITT CLARK, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,<sup>1</sup> SENIOR  
JUDGE.

HENRY, SENIOR JUDGE: Debra Taylor (now Montgomery) petitions for review  
of a decision of the Workers' Compensation Board. The Board affirmed an

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<sup>1</sup> Senior Judge William L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Administrative Law Judge's decision to dismiss Montgomery's claim for workers' compensation benefits. The ALJ concluded that Montgomery did not meet her burden of proving that injuries she suffered in an assault arose out of and in the course and scope of her employment as a teacher with the Wayne County Board of Education. Montgomery also challenges the ALJ's admission of certain items into evidence during her administrative hearing. For reasons that will be explained, we affirm the decision of the Workers' Compensation Board.

### **FACTS AND PROCEDURAL HISTORY**

Montgomery, formerly a teacher with the Wayne County Board of Education, filed this claim for workers' compensation benefits on March 31, 2008.<sup>2</sup> The claim stemmed from an incident in which Montgomery suffered extensive injuries to her head, eyes, neck, back, and leg, as well as a number of other physical and mental ailments,<sup>3</sup> as the result of an attack by a student, Tessa Dolan, and the student's mother at a Goody's department store on March 25, 1995. Montgomery ultimately was unable to return to work because of the severity of her injuries.

Montgomery alleges that the assault occurred after she had broken up a fight between Tessa and another student at school a few days earlier and that the assault was directly related to that incident. Wayne County challenged

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<sup>2</sup> Wayne County originally treated Montgomery's workers' compensation claim as compensable and consequently paid her temporary total disability benefits (totaling \$225,091.18) and covered her medical expenses (totaling \$131,568.33) for approximately ten years.

<sup>3</sup> The extent and nature of Montgomery's injuries are not at issue in this appeal and consequently will not be discussed in detail.

Montgomery's claim, asserting that her injuries were not compensable under the Workers' Compensation Act because the assault was unrelated to her employment as a teacher and instead was the result of long-standing personal animosity between and among Montgomery, her daughter Candace Taylor, and the Dolans. This alleged animosity stemmed from a fight between Candace and Tessa several months prior to the assault when both girls were in the sixth grade.

The parties participated in a benefit review conference on August 12, 2008, and a formal hearing was held on October 14, 2008. As to the issue of whether Montgomery's injuries were work-related, the ALJ heard testimony from Montgomery and Obie Bates, the principal at Montgomery's school at the time of the subject incidents. The ALJ also considered deposition testimony from Montgomery, along with depositions of Sandra and Tessa Dolan that were taken in Montgomery's earlier civil action against the Dolans. The admissibility of the Dolans' depositions is also at issue in this appeal. The substance of the evidence presented to the ALJ is as follows:

**Debra Montgomery**

At the time of the subject incident, Montgomery was a seventh-grade teacher at the A.J. Lloyd Middle School in Wayne County. Montgomery testified in her deposition that on Saturday, March 25, 1995, the Dolans followed her into a Goody's department store and assaulted her. According to Montgomery, she had gone shopping that day with her mother and daughter and had returned some items to a beauty shop before entering Goody's. While her daughter was trying on

clothes in a dressing room, Montgomery walked out of the dressing area and was immediately attacked by the Dolans, who knocked her to the ground and then continued to kick and punch her in the head, face and body.

Montgomery further testified in her deposition that the assault was precipitated by events that had taken place at school the previous day. She indicated that she had to break up a fight between Tessa and another student because Tessa “was going to cut up the other girl.” Montgomery believed that Tessa had a razor blade but never actually saw one. Montgomery testified that she did not have to restrain Tessa or otherwise make physical contact with her, but she indicated that Tessa threatened her and grabbed her arm. Montgomery further indicated that at the time she broke up the fight, Tessa told her, “My mom and I are going to get you,” or something to that effect and allegedly made similar comments in another classroom. Montgomery believed that another teacher took Tessa to the assistant principal following this incident, but the record does not reflect that any disciplinary action was taken against her.

Montgomery also testified in her deposition that she personally had never been part of any other incidents with Tessa prior to the day of the fight and that she “really didn’t even know what the girl looked like really other than that day.” Tessa and Montgomery’s daughter had had a physical altercation at school the previous year; however, Montgomery characterized that incident as only “a little tiff or an argument.”

Montgomery gave additional testimony at the final hearing and, as noted by the ALJ, that testimony differed in some important areas from what Montgomery had previously testified to in her deposition in this case and in a deposition given in her civil action against the Dolans. For example, Montgomery reiterated her belief that the assault was precipitated by the incident at school in which she had broken up the fight between Tessa and another student. However, this time she could not specifically recall when this had occurred and acknowledged that it likely happened two or three weeks before the assault – not the day before.

Montgomery was also questioned about the fight that had occurred between her daughter and Tessa. She again characterized it as “a little tiff” and stated, “I don’t think that they actually got in a fight.” She also indicated that she did not believe her daughter had received a black eye in the fight. This testimony, however, differed from that Montgomery had given in a deposition in July 1998. There, Montgomery acknowledged that Tessa had given her daughter a black eye. Montgomery was also asked at the final hearing about the fact that Tessa was moved into a different school after this fight. She indicated that it was because her family was building a house and were going to be in a new school district. Again, however, she was impeached with her own prior deposition testimony in which she acknowledged that the altercation with Tessa was the cause of the move. Montgomery also denied knowing what Tessa looked like prior to the assault.

**Obie Bates**

Bates was the principal at Montgomery's school at the time of the subject incident. On the Monday following the attack, Tessa was brought to his office and she was interviewed about what had happened. According to Bates, Tessa indicated that she and her mother had made comments to the effect that Montgomery "had better not lay a hand" on Tessa again. Tessa also acknowledged that she and her mother had subsequently kicked and punched Montgomery, pulled her hair, and knocked her to the floor, where they continued to assault her. As to the motive behind the incident, Bates gave the following testimony:

Q. And from your investigation and interview of them, were you given any indication as to what their motive was or if anything lead to this altercation?

A. Motive would have been that Mrs. [Montgomery] on probably one of the previous Fridays, the young Dolan girl was in the hallway where Mrs. [Montgomery] was teaching and was having an altercation, probably a verbal confrontation with another female student. Mrs. [Montgomery] was doing her job as a teacher and asked them to break it up and to go about their ways.

Now, I can go back in history and tell you that there was not a good feeling or a good attitude between the Dolan child and Mrs. Taylor.

I can go back in history if you want to ask me those questions. But at that time Mrs. [Montgomery] was simply doing her job as a teacher stopping the confrontation telling both students to go about their ways, and basically that's what they did. They went about their ways.

Bates also acknowledged that Tessa was not placed in Montgomery's seventh-grade class because of the incident between her and Montgomery's daughter when

the two were in sixth grade. Bates indicated that Montgomery had told him that Tessa “probably should not be in her room,” and he consequently “made sure that there was no contact.”

### **Tessa Dolan**

As noted above, Wayne County introduced into evidence testimony from Tessa Dolan taken in a deposition on January 18, 2001, during the course of Montgomery’s civil action against the Dolans. At the time of the deposition, Tessa was 19 years of age and had just graduated from high school in 2000.

Tessa testified that she and Candace Taylor, Montgomery’s daughter, had had a fight when they were in sixth grade and that she had given Taylor a black eye. According to Tessa, after this incident, Montgomery tried to upset her “all the time when I was in middle school.” For example, Montgomery would stand in her classroom doorway and stare at Tessa and would make derogatory comments about Tessa to other students. Tessa described the fight that was broken up by Montgomery and testified that Montgomery came into Tessa’s classroom later that day and asked to speak to her teacher. Tessa was then called out into the hallway to speak to the teachers and was told by Montgomery that she was “nothing but a troublemaker and a bully[.]” Tessa indicated that Montgomery did not make any physical contact with her while this was occurring.

Tessa also testified about another incident that apparently took place after this fight but before the incident at Goody’s. According to her, she was walking out of the gym with another girl when Montgomery grabbed her by the

arm, jerked it, and told her that she was nothing but a bully and a troublemaker and that “if you’ve got anything to say you come and say it to me.” Tessa indicated that she reported this incident to the principal, but she was not sure if he talked to Montgomery about it. Tessa also noted that at one point a teacher said something to her about Montgomery to the effect of: “[S]he’s got it in for you and you know it.”

As for the episode at Goody’s, Tessa testified that she and her mother were looking at shoes and noticed Montgomery staring at them and giving them dirty looks. According to Tessa, she told her mother who Montgomery was and the two went back to the dressing area where Montgomery was standing. Tessa’s mother then told Montgomery not to touch her daughter. Montgomery responded by telling her, “I didn’t grab your daughter’s arm,” and an argument and fight subsequently ensued. Tessa testified that after the fight was over, Montgomery came up behind them and yelled, “That’s the girl that blacked my daughter’s eye.”

### **Sandra Dolan**

Wayne County also introduced into evidence testimony from Sandra Dolan, Tessa’s mother, taken in a deposition on January 18, 2001. Sandra acknowledged that she did not personally know Montgomery prior to the subject incident but indicated that she did know who she was. Sandra also testified about the earlier fight between Tessa and Montgomery’s daughter and noted that Montgomery would come into Tessa’s classroom and give her dirty looks after the incident. Sandra further testified that following the hallway fight broken up by



Montgomery, Montgomery called Tessa a bully and a troublemaker. This, of course, was the version of events given to Sandra by Tessa.

Sandra also reiterated Tessa's testimony that at some point after this incident, Montgomery grabbed Tessa's arm at school. Sandra testified that after this occurred, she talked to the vice-principal at the middle school and told him to keep Montgomery away from Tessa "because I knew they didn't get along." As to the events leading up to the Dolans attacking Montgomery, Sandra testified that she and Tessa were in Goody's and noticed Montgomery giving them dirty looks. Tessa told Sandra who Montgomery was, and Sandra approached Montgomery and "told her not to touch my daughter again." According to Sandra, Montgomery responded, "I didn't grab your daughter's arm." Montgomery then called Tessa a liar multiple times and a fight ensued. Sandra also testified that after the fight was over, Montgomery came up behind them and yelled, "That's the girl that blacked my daughter's eye."

On December 15, 2008, the ALJ entered an Opinion and Order dismissing Montgomery's workers' compensation claim on the grounds that she had failed to establish that the injuries she suffered in the attack were work-related. After setting forth the evidence in considerable detail, the ALJ explained her decision as follows:

Most of the essential facts in this case are undisputed. Plaintiff, a 7<sup>th</sup> grade teacher, was attacked by a student, Tessa Dolan, and the student's mother, Sandra Dolan, on Saturday, March 25, 1995, while shopping at Goody's department store. There is no question Plaintiff was

severely beaten and sustained significant physical and emotional injuries. At the time of the attack Plaintiff was not on Defendant Employer's premises and was not performing her normal and ordinary duties as a teacher. The dispute in this case involves what precipitated the attack. If, as Plaintiff contends, she was assaulted by the Dolans in retaliation for breaking up a fight between Tessa and some other students at school, then it may be found her injuries are work-related. However, if, as Defendant Employer contends, Plaintiff was assaulted due to non-work-related, ongoing personal animosity between Plaintiff, her daughter, and the Dolans, stemming from a fight between Candace and Tessa several months earlier, when the girls were in the 6<sup>th</sup> grade, then it cannot be said Plaintiff's injuries arose out of the course of her employment.

The Administrative Law Judge has conducted an exhaustive review of the evidence introduced in this case, including the lay testimony presented by Plaintiff, Obie Bates, and Tessa and Sandra Dolan, and that testimony is summarized in great detail above. Although the conduct of Tessa and Sandra Dolan on March 25, 1995, was and is deplorable and inexcusable, the undersigned does not believe Plaintiff has sustained her burden of proving the assault and resulting injuries are work-related. Plaintiff's deposition and hearing testimony were inconsistent and, at times, exaggerated and less than credible. The Administrative Law Judge is convinced it is much more likely the attack at issue in the case was precipitated by the longstanding personal animosity that existed between Plaintiff, her daughter and the Dolans, stemming from the girls' fight several months earlier. In fact, the undersigned believes the severity of the attack itself points to a conclusion it was personal in nature, and based upon a smoldering ill will between the parties.

In *Carnes v. Tremco Manufacturing Company*, 30 S.W.3d 172 (Ky. 2000), the Court addresses application of KRS 342.0011(1) noting that a compensable injury must arise both "out of" and "in the course" of employment. The Court cites to *January-Wood Company v. Schumacher*, 22 S.W.2d 117 (Ky. 1929) to

the effect “the Compensation Act does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment or collateral to it. There must be a direct causal connection between the employment and the injury. That is an essential connecting link to the operation of the Act.” The Court also cites to Larson’s Workers’ Compensation Law, Section 8.02(2) to the effect “a workplace assault which has its origins in a private relationship may be viewed as compensable where the employment environment facilitated or contributed to causing an assault which would otherwise not have occurred....”

In this case, the only possible work connection between the assault and Plaintiff’s duties for Defendant Employer is the incident that occurred in the hallway outside of Plaintiff’s classroom when she allegedly broke up a fight between Tessa and some other students. The testimony about this incident is varied, and Plaintiff’s own testimony is wildly exaggerated (at one point she claimed Tessa was going to “cut the other girl up” with a razor blade – this serious allegation is unsupported anywhere in the record) and inconsistent. Similarly, no clear testimony was provided concerning when this alleged hallway incident occurred, other than it was on a Friday and likely happened within a few weeks of the attack.

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. . . . In the instant case, it is not clear exactly what precipitated the attack on Plaintiff, though the undersigned finds it most likely she was assaulted due to a longstanding personal feud between herself, her daughter and the Dolans, that has roots in a fight that occurred between Plaintiff’s daughter and Tessa Dolan where they were in the 6<sup>th</sup> grade. The 6<sup>th</sup> grade fight was significant enough that Candace Taylor was removed from the elementary school mid-year and enrolled elsewhere. The significance of the fight is also evidenced by the fact Obie Bates, the principal of Plaintiff’s middle school, knew of the animosity resulting from the fight, and it was so great that he and Plaintiff

discussed it and mutually decided it would be best for Tessa Dolan not to be placed in Plaintiff's 7<sup>th</sup> grade class to avoid conflict. Tessa testified that immediately after the school year began Plaintiff started making comments about her to others and would repeatedly stare at her and single her out.

Based on all of the evidence presented by the parties, and the findings of fact and conclusions of law outlined above, the Administrative Law Judge concludes Plaintiff did not sustain her burden of proving to the trier of fact that the injuries she sustained from the assault on March 25, 1995, arose out of, and in the course and scope of, her employment as a teacher with Defendant Employer, the Wayne County Board of Education.

Montgomery subsequently filed a petition for reconsideration in which she renewed her objection to the ALJ's admission of the depositions of Sandra and Tessa Dolan into evidence and argued that the evidence could only support a conclusion that the assault was work-related. However, on February 2, 2009, the ALJ entered an order denying the petition. Montgomery subsequently appealed the decision to the Workers' Compensation Board.

On June 30, 2009, the Board entered an Opinion affirming the ALJ's decision. In so doing, the Board reiterated the ALJ's conclusion that Montgomery had failed to prove that her injuries were work-related:

Here, the ALJ was faced with conflicting evidence regarding the origin of the conflict that led to the assault at Goody's. There was substantial evidence supporting a finding that an incident occurring between Montgomery's daughter and Tessa Dolan during the 6<sup>th</sup> grade was the precipitating cause of ill will between the Dolans and Montgomery. Montgomery gave a sensational account of an incident between Tessa and other girls in the hallway outside Montgomery's

classroom. However, that account differs greatly from the account given by Principal Bates or Tessa. Apparently, there was no disciplinary action taken against Tessa as a result of that incident and the ALJ did not find Montgomery's account of the incident to be credible. Tessa's account of the hallway incident varied greatly from Montgomery's. By Tessa's account, Montgomery did not even enter the hallway until after Tessa had gone back into the classroom. The totality of the evidence would support a conclusion the event occurred weeks before the assault at Goody's and it was not a major incident. The evidence does not compel a finding the hallway incident was the precipitating cause of the assault at Goody's.

Tessa's testimony indicated a long standing animosity pre-existed the hallway incident. She testified Montgomery gave her mean or dirty looks, went into Tessa's classes and walked close to her and Montgomery made statements to other students about Tessa. Tessa also testified to an incident outside the gymnasium that occurred after the hallway incident but before the assault at Goody's. Tessa indicated Montgomery grabbed her by the arm and jerked her back calling her a bully and a troublemaker. Montgomery denied touching Tessa. Both Dolans testified that, at Goody's, Montgomery was told not to touch Tessa. They indicate Montgomery's response was that she had not grabbed Tessa's arm. This indicates that either Montgomery did grab Tessa's arm or she knew an allegation existed that Montgomery had grabbed Tessa's arm had been made prior to the incident at Goody's. Again, the Dolans' testimony indicated the grabbing of Tessa's arm occurred not in the incident outside the classroom, but in the incident outside the gym. The ALJ could conclude that, if the incident outside the gym did in fact occur, it was not motivated by the hallway incident, but rather by the ongoing animosity stemming from the incident in 6<sup>th</sup> grade between Montgomery's daughter and Tessa. It was the argument at Goody's concerning touching Tessa that directly precipitated the assault. Substantial evidence supports the ALJ's conclusion the assault arose from personal

animosity rather than from any performance of job duties by Montgomery.

The Board also provided an additional basis for dismissing Montgomery's claim, finding that she had failed to establish that her injuries arose in the course of her employment:

Although the ALJ focused primarily on whether the injury arose out of the employment, it is important to note Kentucky courts have recognized the terms "arising out of" and "in the course of" are not synonymous. If either of these elements is absent, there can be no recovery. Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372 (Ky. 1952). The courts have held the phrase "in the course of" refers to the time, place and circumstances of an injury, while "arising out of" the employment relates to the cause or source of the traumatic event. Stapleton, supra.

Here, it is uncontroverted the event occurred outside working hours and did not occur on the property of Wayne County. Further, it is uncontradicted Montgomery was not performing any service for the employer at the time of the incident at Goody's. Therefore, it would appear that, even had Montgomery proven her injuries arose out of her employment, she would have failed on the "in the course of" element.

The Board also found no error on the part of the ALJ in allowing Wayne County to file and introduce into evidence depositions of the Dolans taken in Montgomery's civil action against the Dolans. The Board concluded that Montgomery had failed to properly preserve any objection to those depositions and further noted that the ALJ did not err in permitting them into evidence as public records pursuant to 803 Kentucky Administrative Regulations (KAR) 25:010 § 14(2). Montgomery subsequently filed the present appeal.

## Standard of Review

On appeal, this Court can only reverse a decision of the Workers' Compensation Board where the Board “has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The claimant has the burden of proving every element of a workers' compensation claim. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). “Thus, where the party with the burden of proof is not successful before the ALJ, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.” *Carnes v. Tremco Mfg. Co.*, 30 S.W.3d 172, 176 (Ky. 2000).

## ANALYSIS

On appeal, Montgomery argues that the ALJ committed reversible error by: (1) allowing Wayne County to introduce into evidence depositions of Sandra and Tessa Dolan that were taken during her civil suit against the Dolans; and (2) finding that her injuries were not work-related. We address each issue in turn.

### **1. Did The ALJ Commit Reversible Error By Allowing the Dolans' Depositions To Be Introduced As Evidence?**

On September 16, 2008, Wayne County gave notice that it intended to file the depositions of Sandra and Tessa Dolan into evidence pursuant to 803 KAR 25:010 § 14(2). That regulation provides, in relevant part: “Any party may file as

evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, *and other public records.*” (Emphasis added). Wayne County contended that the depositions were public records because they had been filed in the Pulaski Circuit Court during Montgomery’s civil action against the Dolans (Civil Action No. 96-CI-00245) and remained on file with the clerk of that court. Montgomery filed a motion to strike the depositions, but the ALJ agreed with Wayne County that the depositions were public records and allowed them to be introduced as evidence at the final hearing.

On appeal, the Board concluded that the ALJ did not err in allowing Wayne County to file the Dolans’ depositions into evidence. Of particular note, the Board found that “[a]dmissibility of the depositions was not preserved at the benefit review conference which occurred prior to the filing of the depositions” and that “admissibility of the depositions was not noted as an issue on the [resulting] hearing order.” The Board further noted:

Montgomery made no objection to the depositions after the ALJ overruled her motion to strike and prior to the ALJ’s rendition of the opinion and award. It was not until Montgomery filed her petition for reconsideration that she sought to renew her objection to the admissibility of the Dolans’ depositions. We agree with Wayne County that any objections should have been registered at or prior to the hearing. Montgomery failed to preserve admissibility of the deposition testimony as a contested issue prior to the ALJ rendering the decision.



After our review, we find no error with the Board's conclusion that Montgomery had failed to properly preserve the deposition issue for further review by the Board and, consequently, by this Court. Pursuant to 803 KAR 25:010, § 13(14), "only contested issues shall be the subject of further proceedings" following a benefit review conference. As noted by the Board, Montgomery failed to raise the issue of admitting the Dolans' depositions into evidence as a contested issue at the benefit review conference, and it was not included as a contested issue in the ALJ's hearing order. Moreover, a review of the transcript from the final hearing before the ALJ reveals that Montgomery failed to renew any objection to the depositions at that time or in her brief before the ALJ. Consequently, we conclude that this issue has not been preserved for appellate review, and we decline to consider it any further.

## **2. Did The ALJ Commit Reversible Error By Finding That Montgomery's Injuries Were Not Work-related?**

Montgomery next argues that the ALJ and the Board committed reversible error in finding that her injuries were not related to her work. KRS 342.0011(1) requires an injury to arise both "out of" and "in the course of" employment in order for it to be considered work-related and compensable. *Carnes*, 30 S.W.3d at 174. "The Compensation Act does not afford compensation for injuries or misfortunes which are merely contemporaneous or coincident with the employment or collateral to it. There must be a direct causal connection between the employment and the injury. That is an essential connecting link to the

operation of the act.” *Id.* at 175, quoting *January-Wood Co. v. Schumacher*, 231 Ky. 705, 22 S.W.2d 117, 120 (1929). “The claimant must establish that the loss arose both out of and in the course of the employment.” *City of Prestonsburg v. Gray*, 341 S.W.2d 257, 259 (Ky. 1960). Here, the ALJ found – and the Workers’ Compensation Board agreed – that Montgomery had failed to sustain her burden of proving that her injuries were related to her employment with the Wayne County Board of Education. After reviewing the record, we cannot say that the ALJ or the Board “committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp.*, 827 S.W.2d at 687-88.

Ultimately, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence, as well as the inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997); *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Here, it is obvious that the ALJ had concerns about Montgomery’s credibility, specifically referencing her “wildly exaggerated” claim that she had broken up Tessa’s fight with another student because Tessa was going to “cut the other girl up” with a razor blade. We also note that the subject assault appears to have taken place weeks after the fight involving Tessa was broken up – not the next day, as Montgomery asserted. Montgomery also categorized the fight between her daughter and Tessa as a “little tiff” but was then forced to acknowledge that it was bad enough that her daughter was subsequently transferred to another school. Obie

Bates further indicated that Tessa was not placed in Montgomery's class because of the animosity that resulted from the fight. Thus, we cannot say that the ALJ's concerns regarding Montgomery's testimony are without justification.

Moreover, the record contains sufficient evidence to support the ALJ's conclusions. As noted by the Board, the hallway confrontation that Montgomery claims to have led to the assault appears to have been a relatively minor incident. Tessa Dolan did testify that Montgomery called her a bully and a troublemaker after it was over, but both she and Montgomery acknowledged that Montgomery did not make physical contact with her at this point. This evidence is important because testimony from the Dolans reflects that the assault at Goody's was precipitated by a claim that Montgomery had touched Tessa, and both Montgomery and Tessa deny that this occurred at the time Montgomery broke up the hallway fight. Tessa testified to a later incident at school that took place before the assault at Goody's in which Montgomery allegedly grabbed and jerked Tessa's arm. Both Dolans testified that at Goody's, Montgomery was told not to touch Tessa and that Montgomery responded to this by saying that she had not grabbed Tessa's arm. As noted by the Board, "[t]his indicates that either Montgomery did grab Tessa's arm or she knew an allegation existed that Montgomery had grabbed Tessa's arm had been made prior to the incident at Goody's." Moreover, according to Obie Bates, Tessa told him that right before the subject assault she and her mother had made comments to the effect that Montgomery "had better not

lay a hand” on Tessa again. Thus, there is certainly evidence of a physical confrontation between Montgomery and Tessa prior to the attack.

Because of this, the Board found – and we agree – that the ALJ could have reasonably concluded that the incident outside of the gym<sup>4</sup> and the ongoing animosity stemming from the incident between Montgomery’s daughter and Tessa ultimately caused the assault. Accordingly, we cannot conclude that the evidence compels a finding that the hallway incident was the precipitating cause of the attack. Instead, substantial evidence supports the ALJ’s conclusion that the attack arose from lingering personal animosity unrelated to Montgomery’s employment rather than from any performance of job duties by Montgomery. The cases cited by Montgomery to the contrary are inapplicable and/or distinguishable for reasons set forth in the ALJ’s Opinion and Order.

### **CONCLUSION**

For the foregoing reasons, the decision of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

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<sup>4</sup> We agree with Wayne County that such an incident cannot be found to be related to Montgomery’s job responsibilities even if it took place at school. “The injury, in order to be compensable, must have been an incident of or have issued from the performance of some duty that the employee owed the employer and resulted as a natural consequence of performance of that duty.” *Gray*, 341 S.W.2d at 260. “[T]hat is, there must be a causal relationship between the accident and the employment.” *Id.* at 259. As described, this incident does not appear to have been related to the performance of an employment responsibility.

BRIEF FOR APPELLANT:

Charles W. Gorham  
Lexington, Kentucky

BRIEF FOR APPELLEE, WAYNE  
COUNTY BOARD OF  
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Gregory L. Little  
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