U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK LUIS REMBISZ and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Detroit, MI

Docket No. 99-2407; Submitted on the Record;
Issued November 27, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury while in the performance of duty on November 30, 1995.

In April 1996 appellant, then a 35-year-old special agent, filed a notice of traumatic injury alleging that, on November 30, 1995, he sustained a gunshot wound to the face. The employing establishment controverted the claim, contending that appellant was not in the performance of duty when the incident occurred. In a January 28, 1997 decision, the Office of Workers' Compensation Programs found that appellant did not establish that his injury occurred in the performance of duty. In a July 8, 1999 decision, a hearing representative affirmed the January 28, 1997 decision.

The Board finds that appellant was not in the performance of duty at the time of his injury.

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.[1] The Board has interpreted the phrase "sustained while in the performance of duty" as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[2] "Arising in the course of employment" relates to time, place and work activity. To arise in the course of employment, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably

[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

be expected to be in connection with his employment and; (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

In this case, the record contains numerous documents detailing the events of the November 30, 1995 shooting, including the results of an investigation by the employing establishment, a letter reprimanding appellant for using a government car for other than official purposes and police records regarding the incident. Furthermore, a hearing was held on January 28, 1998, at which appellant related the events of the shooting incident and the results of his personal investigation.

The evidence of record shows the following course of events on November 30, 1995: Appellant met his brother at a rental property that appellant owned and in which Kevin Horrigan, a former agent for the employing establishment, was a tenant, to look at a hot water tank that he said was broken. Appellant arrived first. As the house appeared vacant, appellant used his key to enter the premises. Soon after, his brother arrived. Both were carrying tools used to repair a hot water heater.

Shortly after the brothers arrived in the basement, Mr. Horrigan came out of hiding. Appellant, being startled, said, "Kevin, you scared the hell out of me. It's a good way to give a guy a heart attack." Without saying a word, Mr. Horrigan shot appellant in the face with a handgun. In the struggle that ensued, he shot at appellant again and also shot appellant's brother, resulting in his death. Appellant, who carried a gun as part of his employment, fired at Mr. Horrigan killing him.

Appellant contends that the reason Mr. Horrigan fired on appellant and his brother was that he wished to kill federal agents and that Mr. Horrigan did not have any personal vendetta against appellant. Appellant testified that, although Mr. Horrigan owed him about six months of rent, he was happy that someone was occupying his house. Appellant stated that Mr. Horrigan was having some troubles with the employing establishment at the time regarding back taxes and submitted an April 15, 1994 letter from Mr. Horrigan, in which he discussed his back taxes and called his financial situation "desperate." Appellant also testified that Mr. Horrigan had some problems with the employing establishment regarding a complaint by a former girlfriend that he had assaulted her with a gun.

The employing establishment's investigation included an interview with Mr. Horrigan's neighbor who indicated that in a conversation in November 1995, Mr. Horrigan stated that "all federal agents should be killed if they don't have sense to get out of that job" and that the people in Waco, Texas did the right thing by killing the agents at the Branch Davidian compound. This witness added that he knew of no ill will between Mr. Horrigan and appellant, who had been letting Mr. Horrigan stay in his house for several months without paying rent.

Appellant's supervisor stated that he believed appellant was shot because he was a federal agent and that was why he had indicated on appellant's claim form that the injury had occurred in the performance of duty. Dr. Neil S. Hibler, a clinical pychologist, and Dr. Lary R.

[3] *Robert W. Walulis*, 51 ECAB ____ (Docket No. 98-769, issued October 7, 1999); *Maryann Battista*, 50 ECAB _____ (Docket No. 96-2501, issued April 16, 1999); *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

Berkower, a Board-certified psychiatrist, agreed with this theory that appellant was shot because of his status as a federal agent.

Appellant contends that his injury should be covered because he stopped by the rented house that night to do some office work and planned to catch some sleep before reporting to work the next day. Appellant's statements are contradicted by the police report, which indicated that the only furnished accommodations were on the second level of the duplex, the level occupied by Mr. Horrigan. Appellant was not close to Mr. Horrigan and only one bed was found in Mr. Horrigan's living quarters. Furthermore, the first floor was essentially empty, the toilet was not working, and there were no personal care items on the first floor or in appellant's government car.

The evidence also does not support appellant's contention that he was going to do some office work on the night of the shooting. Police found no files from the employing establishment or other type of work in the house or in appellant's car. Appellant's supervisor stated that he knew of no official reason why appellant would be at the house. The evidence does not establish that appellant was engaged in any work-connected activity on November 30, 1995. Nor does the evidence show that the house was a place where he reasonably might be expected to be in connection with his employment. Rather, the evidence establishes that at the time of appellant's injury he was conducting personal business, *i.e.,* he was engaged in carrying out his role as the lessor of rental property where the shooting incident occurred.

Appellant also asserts that the reports of Drs. Hibler and Berkower support his contention that he was injured in the performance of duty. Dr. Hibler described Mr. Horrigan as someone who did not easily accept responsibility for his behavior; his way of dealing with problems was to blame others and his "view of the world, therefore, was to assume a position that *he* was the victim, misunderstood and mistreated" at the hands of others. (Emphasis in the original.) Dr. Hibler added that, "to win," such individuals must do more than defend themselves, they must "strike back." He added that appellant was the "last unfortunate symbol" of all that Mr. Horrigan hated about the government and his own, self-perceived, failure. The Board finds that Dr. Hibler's opinion is purely speculative and appears based on hearsay -- statements made by other people about Mr. Horrigan and his motivation or behavior. Dr. Hibler's report is thus irrelevant to establish that appellant was injured in the performance of duty. For the same reason, Dr. Berkower's opinion is also irrelevant. In short, both medical opinions are basically speculation and fail to support that appellant was injured in the performance of duty.[4]

Appellant contends that his injury would not have occurred but for the fact that the conditions and obligations of his employment put him in the position where he was injured.

Larson observes in his treatise on workers' compensation law that courts are accepting the full implications of the positional-risk test: an injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant, in the position where he was injured.[5] According to Larson, all risks causing injury to

[4] *Geraldine H. Johnson*, 44 ECAB 745 (1993); *see also Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

[5] A. Larson, *The Law of Workmen's Compensation* § 6.50 (1990) (emphasis in the original).

a claimant can be brought within three categories: risks distinctly associated with the employment, risks personal to the claimant, and neutral risks, *i.e.*, those having no particular employment or personal character. Harms resulting from the first are generally compensable. Those from the second are generally not compensable. It is within the third category, Larson notes, that the most controversy in modern compensation law occurs. The view that the injury should be deemed to arise out of employment if the conditions of employment put the claimant in a position to be injured by the neutral risk is gaining acceptance.[6]

In all cases where the Board has determined that the positional-risk doctrine applies, there has been no dispute that the employee was in the course of employment at the time of injury. In *Edward P. Prior*,[7] a letter carrier filed a claim for an injury sustained in the performance of duty, alleging that when delivering mail at an office building, he felt a stinging feeling across his forehead and when he wiped it, he saw blood. Although he speculated as to the cause of the injury, he consistently maintained that he could not explain what happened. The Board found that because the risk appeared to have been neither distinctly associated with the employment nor personal to the employee, the risk was neutral. Having arisen in the course of his employment, the injury caused was found to be compensable.

In *Monica M. Lenart*,[8] a case cited by appellant, a mailhandler alleged that she was injured when a coworker intentionally shoved a cart into her chair five times as an apparent result of a dispute over work space at the rewrap table. In that case, there was no dispute that the employee was carrying out the employing establishment's business and that the assault occurred in the course of her employment. There was also no evidence that the employee and her assailant had any relationship outside of the one at work where they sat near each other while working on the rewrap table. The Board found that the injury occurred in the performance of duty.

In this case, appellant alleged that he was shot solely because he worked for the employing establishment and Mr. Horrigan had a vendetta against his former employer. The Board rejects this contention.

Appellant was not in the course of his employment when he was shot. The evidence establishes that he was on a personal mission as lessor of the duplex. The employing establishment had nothing to do with appellant's duties as a landlord and did not place appellant in the situation where he was injured. The positional-risk doctrine does not apply to anything that happens to a claimant as a result of being a federal government employee. The doctrine does not afford coverage under the Act if the employee is outside his course of employment.

Appellant has not proven that he was assaulted as a result of his federal employment. Mr. Horrigan's sister stated that she had not been contacted by her brother for at least seven months prior to his death, that he had been acting strangely recently, that he had been depressed

[6] *Id.* at § 7.00.

[7] 45 ECAB 288 (1994).

[8] 44 ECAB 772 (1993).

about recently losing a sales job and that he "probably finally lost it." No mention was made of any problems Mr. Horrigan had with the employing establishment.

Appellant alleged that Mr. Horrigan's termination from the employing establishment resulted from an altercation involving a gun, but the evidence does not support this. Instead, the record establishes that Mr. Horrigan voluntarily resigned to accept a job in the private sector.

Appellant contends that Mr. Horrigan was "desperate" because he owed $12,000.00 in back taxes which made him hostile to the agency. Appellant bases this contention on a letter Mr. Horrigan wrote to the employing establishment on April 15, 1994; he noted that he was currently unable to pay his back taxes, that a shortage of funds due to a problem with a former boss had made him "desperate" and that the employing establishment could collect the back taxes from his thrift savings plan. This letter was written 18 months prior to the assault and does not indicate any hostility towards the employing establishment; it merely discusses the factual situation pertaining to Mr. Horrigan's taxes. Furthermore, there is no evidence of subsequent contact between Mr. Horrigan and the employing establishment since that time.

Finally, appellant relies on a statement by Mr. Horrigan's neighbor that he made hostile statements about the federal government. This statement by the neighbor was not made until July 12, 1996, eight months after the shooting. In his original statement to the police, the neighbor did not mention any such threats; he merely noted that Mr. Horrigan "started acting freaky the last couple of months." The Board finds that none of the evidence offered by appellant is sufficient to establish that he was wounded while in the performance of duty. Rather, the record establishes that he was engaged in personal business at the time of the November 30, 1995 shooting.[9]

[9] *Joe L. Wilkerson*, 47 ECAB 604-05 (1996) (workers' compensation is not applicable to each and every injury or illness that is somehow related to an employee's employment).

The decision of the Office of Workers' Compensation Programs dated July 8, 1999 is hereby affirmed.

Dated, Washington, DC
November 27, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member