U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN PIERCE, claiming as widow of LAWRENCE PIERCE and DEPARTMENT OF JUSTICE, U.S. BORDER PATROL, San Ysidro, CA

Docket No. 98-1574; Submitted on the Record;
Issued January 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that the employee's death on August 17, 1995 occurred in the performance of duty.

In the present case, appellant has filed a claim for death benefits as a result of the death of her husband on August 17, 1995. The circumstances surrounding the employee's death do not appear to be in dispute. The employee, an agent for the U.S. Border Patrol, was off duty on the afternoon of August 17, 1995. He was in a San Diego establishment known as the Canyon Club with his grown son, when he witnessed an apparently random attack by a man with a knife against another patron. The assailant fled the establishment and the employee followed. The employee chased the assailant, at one point stating that he was a government agent and requesting that the assailant drop the knife. In an attempt to disarm the assailant, the employee was fatally stabbed.

By decision dated June 18, 1996, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the employee's death did not occur while in the performance of duty. In a decision dated January 14, 1998, the Office denied modification of its prior decision.

The Board has reviewed the record and finds that the Office properly denied appellant's claim in this case.

An appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his employment.[1]

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[1] *Carolyn P. Spiewak (Paul Spiewak)*, 40 ECAB 552 (1989).

The Federal Employees' Compensation Act[2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[4] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[5]

In examining the traditional criteria for determining whether an injury occurred in the course of employment, the Board is unable to find a sufficient basis to bring the employee's death with coverage under the Act. With respect to the time element, the employee was off duty on the afternoon of August 17, 1995, and therefore the death did not occur at a time when the employee may reasonably be said to be engaged in the employer's business. In addition, the Canyon Club and the adjacent street are not considered a place where the employee may reasonably be expected to be in connection with his employment. Accordingly, the criteria of time and place have not been met in this case.

With respect to the third criteria, whether the employee was reasonably fulfilling the duties of his employment or engaged in something incidental thereto, appellant argues that appellant was fulfilling his duties in that he invoked his training as a border patrol agent.

Appellant's primary argument for coverage in this case is based on the statements of other border patrol agents with regard to the responsibilities of an off-duty patrol agent. A statement from Carmen Wilson, a supervisory border patrol agent, asserted that trainees were instructed that, whether off duty or on duty, if there was imminent danger either to themselves or an innocent party, they should respond to stop the aggressor. According to Ms. Wilson, "This policy is not written but is an unspoken rule handed down and taught by journeyman agents to trainees." In a statement dated June 13, 1997, Francis Jeschke, a senior patrol agent, stated that as a trainee he had been taught that he had a moral and ethical obligation as an agent to take action if they saw a felony being committed. Mr. Jeschke stated that he had heard this type of

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8102.

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

[5] *See Eugene G. Chin*, 39 ECAB 598 (1988).

instruction on many occasions during his 11-year career as an agent, noting that he recently listened to an instructor at a training class inform trainees that "it was their decision to get involved but that morally and ethically due to their knowledge and training as border patrol agents they should."

The record also contains a transcript of testimony from the assailant's criminal trial by patrol agents Keith Centner and Gary Young. Mr. Centner testified that agents are taught to be good citizens of the community, and were taught that it was their ethical and moral responsibility to intercede if they saw a crime being committed. Mr. Young stated that in the early part of training the trainees are told that if a crime is committed in their presence, they are expected to take some kind of action.

In a statement dated October 30, 1997, Ronald J. Smith, assistant chief patrol agent, asserted that there was not an unwritten code as described by Mr. Wilson. He indicated that while some instructors may interject their own personal beliefs as to appropriate action, the Border Patrol did not recognize a general off duty enforcement authority. Mr. Smith referred to the Border Patrol handbook, which discusses off duty conduct and indicates that agents are expected to obey the law and behave in a manner that their conduct will be above reproach. The record also contains an employing establishment document (known as M-69, The Law of Arrest, Search and Seizure for Immigration Officers) which states that if "on-duty" agents witness a felony or violent misdemeanor cognizable under state law, the employing establishment expected the agent to take reasonable action as a law enforcement officer to prevent the crime or apprehend the violator. No provision is found for an off-duty agent.

Based upon the evidence of record, the Board must conclude that although at least some trainees are advised that it is their moral and ethical obligation to intervene if they see a crime being committed, there is no specific job requirement, no official employing establishment written policy, or other probative evidence to establish that intervening while off duty to prevent a crime is incidental to the job duties of border patrol agent. Appellant concedes that there is no written policy; her argument is based on the "unspoken rule" that off duty agents are expected to intervene in situations such as those faced by the employee at the time of his death. But the existence of such an unwritten policy is refuted by Mr. Smith, and even if the Board were to accept that trainees were routinely encouraged to intervene in certain situations while off duty, the Board cannot find any evidence that this encouragement rises to the level of a requirement or condition of the federal job. As noted by Mr. Jeschke, trainees were told "it was their decision to get involved," but morally and ethically they were encouraged to do so. However exemplary it may be to encourage employees to act as good citizens based on moral and ethical considerations, the nexus with federal employment is simply too tenuous to support coverage under the Act. In the absence of probative evidence that intervention, while off duty and in a situation involving a violent crime, was a condition of employment, the Board finds that the employee was not doing something incidental to the fulfillment of his federal duties. None of the criteria of time, place or activity incidental to employment duties were present at the time of the employee's death on August 17, 1995.

The Board notes that workers' compensation law has recognized that there are certain emergency situations where an employee may be considered to be in the performance of duty.

According to *Larson*, when an emergency situation "takes such form that the claimant is pressed into public service, like pursuit of fugitives," coverage has been awarded in some cases.[6] One instance is when an interest of the employer can be found in the public service.[7] In this case, however, there is no indication that an interest of the employer was furthered. Neither the assailant nor the crime committed were connected to the enforcement responsibilities of the employing establishment. A second instance is when "the conditions of employment were responsible for subjecting the employee to this type of emergency public service."[8] An example of this situation is a taxi driver who is ordered by a police officer to drive in pursuit of a fugitive.[9] It is evident that in these situations the employee is on duty, and the employment has placed the employee in a position where emergency public service becomes imposed on the employee. In this case, the employee is off duty and the employment has not placed him in a position of emergency public service.

A secondary argument raised by appellant refers to the California Penal Code and the arrest authority of federal law enforcement officers in certain circumstances.[10] Whether a particular state grants certain state powers to federal officers is not determinative of coverage under the Act. The state statutory authority may be relevant to state workers' compensation issues, but under the Act it is the employee's federal duties and conditions of employment that are relevant. The M-69 document noted above recognizes that state laws may differ with respect to the authority of on-duty federal officers, although it appears that an on-duty agent would be expected to intervene in a criminal situation regardless of the state authority. In any case, the situation presented here involves an off-duty agent, and there is no evidence that a California statute would impose intervention in a criminal situation as a condition of appellant's federal employment.

For the above reasons, the Board finds that the employee was not in the performance of duty at the time of his death on August 17, 1995. The Office therefore properly denied death benefits in this case.

[6] 1A A. Larson, *The Law of Workmen's Compensation* § 28.31-32 (1993).

[7] *Id.* § 28.31.

[8] *Id.* § 28.32.

[9] *Babington v. Yellow Taxi Corporation*, 250 N.Y. 14, 164 N.E. 726 (1928).

[10] California Penal Code § 830.8 provides that federal law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in certain circumstances, such as when probable cause exists to believe there is a public offense involving immediate danger to persons or property.

The decision of the Office of Workers' Compensation Programs dated January 14, 1998 is affirmed.

Dated, Washington, D.C.
January 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member