

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NETTIE JACKSON claiming as survivor of LEE F. JACKSON and
DEPARTMENT OF THE TREASURY, EUROPEAN BANK FOR
RECONSTRUCTION & DEVELOPMENT, Washington, DC

*Docket No. 01-498 Submitted on the Record;
Issued November 21, 2001*

DECISION and ORDER

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

The issue is whether decedent was an “employee” of the United States within the meaning of the Federal Employees’ Compensation Act at the time of his death on April 3, 1996.

On July 29, 1999 Sara Paulson acting on behalf of Deputy Assistant Secretary, William E. Schuerch, filed an Official Superior’s Report of Employee’s Death for the April 3, 1996 death of Lee F. Jackson, who was killed while performing his duties for the European Bank for Reconstruction and Development in a plane crash in Croatia.¹

In a February 6, 1998 letter to Major Kenneth David, Rochelle Granat, the Deputy Assistant General Counsel of the Department of the Treasury, responded to his inquiry to determine whether decedent was a federal employee. She indicated that at the time of his death, decedent was the United States Executive Director (USED) representing the United States in the European Bank for Reconstruction and Development (EBRD). Ms. Paulson noted that the position was a presidential appointment requiring Senate confirmation and subject to the oversight and policy direction of the Department of the Treasury’s Under Secretary and Assistant Secretary for International Affairs. She further noted that decedent received his salary from the EBRD; however, his salary was limited to the rate of level IV of the executive schedule under section 5315 of Title 5, United States Code. Ms. Paulson stated that pursuant to 22 U.S.C. § 276c-2, the USED of the EBRD was eligible, at the Secretary of the Treasury’s discretion for “all of the employee benefits afforded employees in the civil service of the United States, including [f]ederal retirement, health and life insurance coverage.” She further noted that his parents received a Federal Employees Group Life Insurance (FEGLI) death benefit as well as a \$10,000 death gratuity payment authorized by section 651 of the Treasury, Postal Service and

¹ The record contains an undated and unsigned claim for compensation by parents, brother, sisters, grandparents, or grandchildren (Form CA-5B). The parents of decedent filed the forms to preserve the decedent’s rights; however, they contested that he was a federal employee.

General Government Appropriations Act for Fiscal Year 1997. Ms. Granat further noted that the status of USEDs was the cause of some confusion since they were placed on the payroll of the respective international institutions and were not treated operationally as being on the “rolls” of the Department of the Treasury. She stated that in 1988, in connection with a question concerning the Alternate USED to the International Monetary Fund, the General Counsel of the Office of Personnel Management confirmed the department’s understanding that the positions of USED and Alternate USED to the various international financial institutions were civilian positions within the Executive Branch.

By letters dated August 18, October 4 and November 1, 1999, the Office requested detailed factual and medical information from the employing establishment.

By letter dated March 31, 2000, Mr. Schuerch, the Deputy Assistant Secretary, For International Development, Debt and Environment Policy, of the Department of the Treasury, responded to the Office’s request for information. Mr. Schuerch indicated that decedent did not perform “services to the public generally as a contractor” but rather his services were rendered, principally:

“(a) to the President, in representing the interests of the United States in the European Bank for Reconstruction and Development (EBRD) and

“(b) to the EBRD, in accordance with his duties as executive director thereof....”

Mr. Schuerch indicated that appellant was appointed by the President with the advice and consent of the Senate to the post of the USED of the EBRD and the Department of the Treasury provided oversight and policy direction to him. He further noted that decedent was not required to furnish any tools or equipment and was nominated by the President for the position on July 17, 1995 and confirmed on August 11, 1995. Mr. Schuerch stated that the President signed his commission on August 14, 1995. In response to the question of whether the reporting agency had the right to discharge decedent at any time, Mr. Schuerch said that the Department of the Treasury had no legal authority to discharge decedent. He further explained that, as decedent was appointed by the President, with the advice and consent of the Senate, he served at the pleasure of the President. Therefore, the President could dismiss him at any time. Mr. Schuerch indicated that the decedent was subject to the oversight and policy direction of the Department of the Treasury’s Secretary for International Affairs and Assistant Secretary for International Affairs. Furthermore, he was most directly under the oversight and policy direction of the Deputy Assistant Secretary for International Development, Debt and Environmental Policy, to whom the Under Secretary for International Affairs has delegated the responsibility for formulating, evaluating and implementing Treasury Policy and positions with respect to the EBRD and the other multilateral development banks (MDBs) in which the United States participates. He further noted that the Department of the Treasury frequently sent instructions on the positions that should be taken concerning important issues before institutions. Mr. Schuerch stated that there were numerous statutes that directed the Secretary of the Treasury to instruct the USEDs as to how to vote on certain issues. He referred to 22 U.S.C. §§ 262p-4q, 2291j(a)(2) (directing the Secretary of the Treasury to instruct the USED of the EBRD “to use the voice and vote of the United States to oppose any loan or other use of funds of the [EBRD] to or for” a terrorist country and a major drug transit or drug producing country). He further noted that

USEDs could express their own views and it was possible for them to vote counter to instructions; however, the instructions were intended to prevail. Mr. Schuerch indicated that the United States did not supervise decedent's day-to-day operations and that he was in charge of the USED office, as well as directing his staff. However, in consultation with the Department of the Treasury, decedent selected his own staff. His responsibilities and duties were mandated by the EBRD Agreement and the EBRD By-Laws. In response to the question determining the manner in which payment for decedent's services was determined, Mr. Schuerch stated:

“[The decedent] was compensated by the EBRD, according to a rate established by the Board of Governors. However, [decedent's] compensation was subject to the following restriction imposed by a U.S. statutory provision in the annual Foreign Operations, Export Financing and Related Programs Appropriations Act: The rate of compensation must not be “in excess of the rate provided for an individual occupying a position at level IV of the Executive Schedule under Section 5315 of title 5, United States Code” (*see e.g.* Section 533 of the 1998 Act, ... Like other USEDs, [decedent] implemented this limitation by refusing the higher EBRD salary and accepting a lower amount from the EBRD equal to a U.S. Statutory cap. In addition, as a USED, subject to the Secretary of the Treasury's direction, Mr. Jackson could receive certain [f]ederal employee benefits, in which case, the Department of the Treasury would be considered the employing agency, pursuant to 22 U.S.C. § 276c-2.... Because the [d]epartment, through administrative error, had not offered [decedent], upon his appointment, the opportunity to elect [f]ederal benefits pursuant to this provision, including coverage under the Federal Employees Group Life Insurance (FEGLI) program, the Department and Office of Personnel Management treated [decedent] as having been covered under basic FEGLI (because he had not waived the coverage). As a result, his family received a FEGLI death benefit....”

In response to the question of whether the activity decedent engaged in was a regular and continuing activity of the reporting agency, Mr. Schuerch indicated that decedent was engaged in a regular and continuing activity, but “this activity was not ‘of’ the Department of the Treasury, but rather was ‘of’ the U.S. participation in the EBRD with respect to which the Department of the Treasury provided oversight and policy direction.” He stated that there was no written agreement with either the Department of the Treasury or with the EBRD.

In a decision dated September 28, 2000, the Office accepted that decedent was a federal employee. Appellant disagreed with the employee finding and filed the instant appeal.

The Board finds that decedent was an employee of the United States at the time of his April 3, 1996 death.

A claimant of benefits under the Act has the burden to establish all the necessary elements of his claim, including that he, or decedent, if applicable, at the time of the injury, or death, was a civil employee of the United States.² For purposes of determining entitlement to

² *See, e.g. Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

compensation benefits under the Act, an “employee” is defined, in relevant part, as a “civil officer or employee in any branch of the Government of the United States, including an officer or an employee of an instrumentality wholly owned by the United States.”³

In the case of *Carl R. Clover*,⁴ the Board stated:

“With regard to whether a claimant is a federal employee for purposes of the Act, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment. *Herbert G. Horne (father of Kenneth Horne)*, 20 ECAB 5 (1968). The question of whether a person is an employee of the United States or of an independent contractor is ultimately a question of fact to be decided on an individual basis in the particular case. *Funnia F. Hightower*, 28 ECAB 83 (1976). Included among the many factors to be considered in resolving the issue are the right of control of work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job and the intention of the parties. See *Kenneth W. Grant*, 39 ECAB 208 (1987); see also *Funnia G. Hightower*, *supra*.... With regard to the method of payment for the work, including the identity of the party who paid the wages, the implication that a claimant was a federal employee cannot be drawn solely from the fact that his or her salary was derived from a fund to which the federal government contributed. See *Funnia F. Hightower*, *supra*.”⁵ (Emphasis added.)

Of these factors, the Board has held that the right to control the work activities of the person whose status is in dispute is the most important.⁶ These factors and the Board’s holding, in prior precedent,⁷ that the most important factor is the right to control work activities, are derived from Larson’s *The Law of Workers’ Compensation*.⁸ On the issue of the right to control work activities, Larson states that the principle factors showing right of control are: “(1) [D]irect evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire.”⁹

³ 5 U.S.C. § 8101(1)(A).

⁴ 41 ECAB 625 (1990); *order granting petition for recon. and granting clarification*, Docket No. 90-309 (issued March 7, 1991).

⁵ *Id.*

⁶ *Kenneth W. Grant*, 39 ECAB 208 (1987); *Wendy S. Warner*, 38 ECAB 103, 105 (1986); *Funnia F. Hightower*, 28 ECAB 83 (1976); *Barbara Andrews (Glenn T. Andrews)*, 26 ECAB 361 (1975); *June M. Beswick (John D Beswick)*, 22 ECAB 252 (1971).

⁷ *Id.*

⁸ Larson, *The Law of Workers’ Compensation*, §§ 43.00 to 45.32. (1997).

⁹ Larson, *The Law of Workers’ Compensation*, § 44.00.

In the instant case, the Department of the Treasury stated that decedent was not a general contractor and his services were rendered principally to the President, in representing the interests of the United States and to the EBRD in accordance with his duties as executive director. The decedent was not required to furnish tools or equipment and was appointed by the President and confirmed by the Senate. The Department of the Treasury could not discharge decedent but the President could dismiss him at any time. Further, decedent was subject to the oversight and policy direction of the Department of the Treasury's Under Secretary for International Affairs and Assistant Secretary for International Affairs and received instructions on the positions he should take concerning important issues before the EBRD. While his day to day work activities were not supervised and he was responsible for directing his own staff, he received policy direction and oversight by the employing establishment. Additionally, he was compensated by the EBRD, although it was subject to the restriction of the annual Foreign Operations, Export Financing and Related Programs Appropriations Act.¹⁰ The restriction mandated that the rate of compensation was not to exceed the rate for an individual occupying a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code. The Department of the Treasury confirmed that decedent refused the higher EBRD salary and accepted a lower amount from the EBRD equal to the U.S. statutory cap. Additionally, decedent as a USED, subject to the Secretary of Treasury's discretion, could receive certain federal employees' benefits.¹¹ The Department of the Treasury stated that due to an administrative error, decedent was not afforded the opportunity to elect federal benefits, including coverage under the FEGLI program. Since he had not waived coverage, the Department of the Treasury and the Office of Personnel Management treated decedent as being covered at the time of his death and his family received a FEGLI death benefit.¹² The Department of the Treasury further stated that decedent was engaged in regular and continuing activity that was of the U.S.'s participation in the EBRD.

Furthermore, the General Counsel of the Office of Personnel Management confirmed the Department's understanding that the positions of USED and Alternate USED to the various international financial institutions are civilian positions within the Executive Branch.

The statute which defines an "employee" of the United States does not require that any written form of agreement be entered into by the employer and the individual providing services prior to acceptance of personal services by the employer. There is no dispute that as part of his duties decedent was performing personal service to the President and the United States at the time of his death and the employing establishment was authorized to accept such service; appellant, therefore, was an "employee" of the United States at the time of his death on April 3, 1996.

¹⁰ Section 533 of the 1998 Foreign Operations, Export Financing and Related Programs Appropriations Act.

¹¹ Pursuant to 22 U.S.C. 276c-2, the USED to the EBRD is eligible, at the Secretary of Treasury's discretion, for all of the employee benefits afforded employees in the civil service of the United States, including federal retirement, health and life insurance coverage.

¹² The decedent's family was authorized to receive a FEGLI death benefit and a \$10,000 death gratuity payment authorized by section 651 of the Treasury, Postal Service and General Government Appropriations Act for Fiscal Year 1997.

Having considered the total circumstances of the case, the Board finds that decedent was, at the time of his death, a civil employee of the United States within the meaning of the Act.

The decision of the Office of Workers' Compensation Programs dated September 28, 2000 is affirmed.

Dated, Washington, DC
November 21, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member