

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LENNETH W. RICHARD and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, Wash.

*Docket No. 96-1097; Submitted on the Record;
Issued February 17, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury on February 4, 1994 while in the performance of duty.

On February 4, 1994 appellant, a 29-year-old letter carrier, sustained an injury to his left leg when he was struck by a gunshot while stopping off from his regular delivery route to use the bathroom in a friend's residence. Appellant filed a Form CA-1 claim on February 7, 1994, alleging that he had stopped at a friend's house and was taking a 10-minute break to use the bathroom when suddenly his friend shot him twice from behind, striking his left leg.

In a letter to the Office of Workers' Compensation Programs dated February 14, 1994, the employing establishment controverted the claim, stating that appellant was not in the performance of duty when he was shot on February 4, 1994. The letter indicated that, "it is clear, by appellant's own statement that he was not in the performance of duty and that his supervisor provided a statement indicating that appellant had completed delivery of all mail assigned to him. Therefore, when appellant stopped at his friend's house, he had deviated from his line of travel and effectively removed himself from duty, prior to the time of the assault."

By decision dated April 1, 1994, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained the claimed injury of February 4, 1994 in the performance of duty. In a memorandum to the Director, the Office claims examiner stated that appellant was not performing his assigned duties when the injury occurred, noting that the postal delivery truck was empty, which indicated that appellant had concluded his assigned duties when the injury occurred. The claims examiner further stated that appellant was not engaged in an activity reasonably incidental to his employment when he deviated from his assigned duties to pursue his personal interest in a female, who lived in the house with the assailant. The claims examiner further stated that the injury arose out of a

personal relationship appellant had with both the male and the female of the house, which had no connection to his regular or assigned duty as a letter carrier.¹

In a letter dated May 2, 1994 and received by the Office on May 4, 1994, appellant's representative requested a hearing.

A hearing was scheduled for February 6, 1995, at which appellant testified that on February 4, 1994, the day he was shot, he was in the process of completing his delivery prior to his lunch break, when he decided to visit the house belonging to the assailant and his female acquaintance in order to use the restroom. Appellant stated that he had met and become friends with them while delivering mail on his route and had used their bathroom on previous occasions. Appellant further stated that he attempted to use the restroom upon entering the house but it was occupied at the time by his female friend. Appellant stated that the assailant then told him that he and his female friend, had just had a fight in which she had tried to stab him with a knife, and pointed to it in the kitchen. He further stated that the assailant's wife then emerged from the bathroom and began to wash the dishes. Appellant stated that he was on the left side of her and reached for the knife and was in the process of handing it to her to wash, when her husband fired two shots into his left leg from behind.

In a decision dated November 30, 1995, finalized December 5, 1995, an Office hearing representative affirmed the April 1, 1994 decision of the Office. In a memorandum dated November 30, 1995, the hearing representative stated that once the female of the house emerged from the bathroom, appellant's action of entering the kitchen to help her wash dishes removed him from the course of his employment and, therefore, the performance of duty, at the time he was injured. The hearing representative stated, that this activity had no relation to the purpose of appellant's entering the residence and was not incidental to his employment. The hearing representative concluded that the evidence of record failed to show appellant was in the performance of duty at the time of his injury on February 4, 1994, and he therefore denied benefits.²

The Board finds that appellant did not sustain an injury on February 4, 1994 while in the performance of duty.

¹ The claims examiner stated that appellant and the assailant's wife had been acquainted for approximately six months prior to the shooting incident of February 4, 1994, and that appellant had been in the habit of visiting the apartment during and after delivery of the mail. The claims examiner further stated that appellant had a relationship with the assailant's wife which included her completion of his tax return, and his visits to her apartment to use her telephone and waste time after he completed his route so that he would not have to return to his station and perform any extra work which might be assigned. The claims examiner stated that appellant was in the kitchen and holding a knife when the assailant shot appellant.

² The hearing representative noted that the statements the assailant and his wife gave to the police were conflicting and not credible. The original report was consistent with the account provided by appellant, but they subsequently changed their stories, alleging that appellant and the assailant were involved in an altercation in which appellant was shot while facing the assailant. The assailant was convicted of third degree assault. The hearing representative indicated that this story conflicted with the fact that appellant was wounded in his buttock and back of the knee.

The Federal Employees' Compensation Act³ provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ The phrase "sustained while in the performance of his duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation law, namely, "arising out of and in the course of employment."⁵ "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment and 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 compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." "Arising out of the employment" requires that a factor of employment caused the injury.⁶ Larson, in addressing assaults arising out of employment, states the following:

"Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor."⁷

In the instant case, the evidence of record indicates that the assault upon appellant on February 4, 1994 arose out of personal reasons, when appellant detoured from the employment-related purpose of using the assailant's bathroom and entered the kitchen to wash a knife, which his female friend had allegedly used to attack his male friend, in the course of a domestic dispute. Appellant implicitly acknowledged that he had developed a personal relationship, in the course of making his regular deliveries, with both the assailant and his female friend. He testified at the hearing and stated in interviews with the police and the employing establishment that he regularly visited their house while making deliveries, to use their restroom and converse with them and that his female friend had even given him assistance in completing his tax returns. Appellant indicated there had been no animosity between the assailant and himself while he was in the course of making his regular deliveries in the days leading up to the shooting incident of February 4, 1994. There is no indication in the record that appellant's employment contributed to or facilitated the shooting.

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Id.* § 8102(a).

⁵ 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).

⁶ *Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); *see also Robert J. Eglinton*, 40 ECAB 195 (1988); *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph Barenkamp)*, 5 ECAB 228 (1952).

⁷ A. Larson, *The Law of Workers' Compensation* § 11.00 (1993); *see also Sylvester Blaze*, 37 ECAB 851 (1986).

Appellant has failed to show causality by submitting evidence into the case record indicating some substantial employer benefit, or that the employing establishment expressly or impliedly required appellant to engage in the activities which resulted in the injuries. At the time of the injury, appellant was not using the assailant's bathroom, which might have constituted an activity incidental to employment. Rather, he came to the aid of his female friend concerning a matter entirely personal to him, having no relation to any employer benefit or requirement. Appellant has therefore failed to show that his federal employment caused his injuries sustained on February 4, 1994. Accordingly, appellant has failed to establish that the injuries he sustained on February 4, 1994, "[arose] out of and in the course of employment," hence his injuries are not compensable under the Act, as they were not sustained "in the performance of duty." Therefore, the Office properly denied appellant's claim.

The decision of the Office of Workers' Compensation Programs dated November 30, 1995, finalized December 5, 1995, is hereby affirmed.

Dated, Washington, D.C.
February 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member