

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE PATRICK SEMONCO and U.S. POSTAL SERVICE,
POST OFFICE, Charleston, WV

*Docket No. 97-1760; Submitted on the Record;
Issued September 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury while in the performance of duty.

On May 19, 1995 appellant, then a 31-year-old letter carrier, filed a claim alleging that he sustained an emotional condition based on "testifying at sentencing against Alphonso Martin who had previously fired a gun at me" and intimidation from other members of the Martin family. In support of his claim, appellant submitted an attending physician's report from Dr. Riaz Uddin Riaz, a Board-certified psychiatrist, who treated appellant on May 19, 1995. Dr. Riaz diagnosed an adjustment disorder with anxiety and indicated that appellant was totally disabled from work. The record reflects that appellant stopped work on May 9, 1995 and was released by Dr. Riaz to return to work on July 1, 1995.

By letter dated June 16, 1995, the Office of Workers' Compensation Programs requested that appellant submit additional factual and medical evidence in support of his claim within 15 days.

By decision dated July 7, 1995, the Office rejected appellant's claim, finding that he failed to submit evidence in response to the June 16, 1995 letter and, therefore, the record failed to demonstrate that he sustained an injury as alleged.

On July 19, 1995 the Office received appellant's statement and other materials relevant to the claim. Appellant described an incident occurring October 4, 1994, as follows:

"Later that day, while on my route, I was delivering to the residents of Greenbrier Street. I was at 1209 Greenbrier Street when Alphonso Martin demanded to know if I had any mail for him. Since I was coming down a flight of steps, I really didn't look at him and he met me at the bottom of the steps. He then fired a gun that I didn't even know he had, as I said before I really didn't look at him.

The bullet landed about twelve inches from my foot. He unloaded the gun right in front of me....”

Following the incident, appellant returned to the employing establishment where he reported it to his supervisor. He was subsequently interviewed by postal investigators and local police. Appellant related that on several occasions he met with Monica K. Schwartz of the U.S. District Attorney’s office and testified as a witness before a grand jury. He related that he also testified at trial on February 9, 1995 and had to point Mr. Martin out while in court. Appellant indicated that Mr. Martin was found guilty and that sentencing was scheduled for May 9, 1995 at which he was again asked by Ms. Schwartz to testify. He related that during the pendency of the trial and sentencing proceedings, he continued to work but worried constantly that something would happen to him. Appellant noted that he was subject to being glared at by Mr. Martin and that rude gestures were made to him by members of Mr. Martin’s family.

Appellant submitted a March 13, 1995 letter from Ms. Schwartz, Assistant U.S. Attorney written to Garnett Webb, the postmaster at the employing establishment. Ms. Schwartz stated:

“This letter is written to let you know that [appellant], the victim of the assault by Alphonso Martin, has been extremely cooperative and helpful in this prosecution.

“Because there is a long history of threats and problems relating to [Mr.] Martin, and because [Mr.] Martin has engaged in violence and intimidation towards his victims, I believe it is especially brave of [appellant] to cooperate in this prosecution.

“At my request, [appellant] appeared before the grand jury to indict [Mr.] Martin. As a result, [appellant] was pursued very aggressively, perhaps even hounded, by the investigator for [Mr.] Martin. [Appellant] also testified against [Mr.] Martin at trial. However, that is not the end of [appellant’s] cooperation in this case. Also at my request, [appellant] met with Dave Stevens, the probation officer in this case, to assist in [the] preparation of the presentence report. Further, despite his concern regarding the fact that [Mr.] Martin will likely return to the Bluefield, West Virginia area in the not-too-distant future. [Appellant] has agreed, again at my request, to testify at [Mr.] Martin’s sentencing hearing.”

Appellant also submitted a February 22, 1995 letter from Postmaster Webb thanking him for his participation in the investigation and trial phases of the proceedings against Mr. Martin. Postmaster Webb anticipated appellant’s participation in the sentencing procedures, noting:

“Our attention is now focused on the April 24, 1995 sentencing date.¹ I am sure that the U.S. Attorney’s office will do all they can to make sure that the defendant receives as significant a sentence as possible. In that regard, they may be in contact with you and other employees....”

¹ The record indicates the sentencing hearing was postponed to May 9, 1995.

By letter dated July 28, 1995, counsel for appellant requested a hearing before an Office hearing representative. Counsel submitted the August 15, 1995 report of Dr. Riaz, who described his treatment of appellant. Dr. Riaz stated his opinion that appellant's psychiatric disorder "was precipitated by work-related psychiatric stress when he was shot at by a resident while distributing mail on his route." By letter dated October 24, 1996, counsel requested that the Office hearing representative review the case on the record.

By decision dated March 3, 1997, the Office hearing representative rejected appellant's claim, finding appellant failed to submit sufficient evidence to support his claim of intimidation following testimony of appellant and sentencing of Mr. Martin.

The Board finds that the case is not in posture for decision.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept of coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by his employment, the disability comes within the coverage of the Federal Employees' Compensation Act. On the other hand, the disability is not covered where it results from a reduction-in-force or his frustration from not being permitted to work in a particular work environment or to hold a particular position.²

The evidence of record indicates that on October 4, 1994, while appellant was delivering his mail route, an incident arose in which he was assaulted by a postal patron with a gun.³ This incident, however, does not form the basis for appellant's emotional condition claim on appeal. Rather, appellant has alleged that following the October 4, 1994 incident, he was requested by the U.S. District Attorney's office to testify in proceedings against Mr. Martin and claimed an emotional reaction to his testifying at the sentencing phase of proceedings against Mr. Martin on May 9, 1995.

The statement of Ms. Schwartz, Assistant U.S. Attorney, noted that at her request appellant appeared before the grand jury to indict Mr. Martin, testified at trial, assisted in the preparation of the presentence report and agreed to testify again at the sentencing hearing. It is readily apparent, through the letter of the employing establishment Postmaster, that appellant's cooperation with the U.S. District Attorney's office and presence in court was anticipated and expected by his employer. During the period preceding the May 9, 1995 sentencing hearing, appellant furnished information and assisted in securing evidence pertaining to the charges brought against Mr. Martin arising out of the October 4, 1994 assault. Under the facts of this case, the Board finds that appellant's participation in the May 9, 1995 sentencing hearing

² See *Frank A. Catapano*, 46 ECAB 297, 306 (1994).

³ Compare *Maribel Dayap*, 48 ECAB ____ (Docket No. 95-545, issued December 20, 1996); *Larry J. Thomas*, 44 ECAB 291 (1992).

constituted a specially assigned work duty arising out of the course of his federal employment.⁴ The evidence of record also distinguishes this case from *Blondell Blassingame*,⁵ and similar cases in which the Board has held that an employee's participation in Equal Employment Opportunity Commission proceedings will not generally afford coverage under the Act. Rather than an action brought for the personal benefit of the employee, the legal proceedings in which appellant participated provided a benefit to the employer in securing the safety of its employees while on their assigned postal routes through the prosecution of Mr. Martin. For these reasons, the Board finds that appellant has established a compensable factor of employment.

With regard to his allegation of intimidation by Mr. Martin and members of his family during the sentencing proceedings, the Board notes that for harassment to give rise to a compensable factor of employment there must be evidence that harassment did, in fact, occur. Mere perceptions are not compensable.⁶ Appellant has not submitted sufficient evidence to the record to establish his allegations of being glared at by Mr. Martin or rude gestures by members of his family.

The Board will remand the case to the Office to prepare a statement of accepted facts to be considered by a physician in providing an opinion as to causal relationship. After such further development of the medical evidence as the Office finds necessary, it should issue an appropriate decision.

⁴ "In the course of employment" deals with the work setting, the locale and time of injury, whereas "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement that an employment factor caused the injury. To arise in the course of employment, an injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she is reasonably fulfilling the duties of the employment or engaged in something incidental thereto. *Id*; see also *Timothy K. Burns*, 44 ECAB 125 (1992).

⁵ 48 ECAB ____ (Docket No. 95-2779, issued October 9, 1996).

⁶ See *Helen P. Allen*, 47 ECAB 141 (1995).

The March 3, 1997 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action in conformance with this decision.

Dated, Washington, D.C.
September 22, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member