U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELAINE HEGSTROM (claiming as widow of WAYNE R. HEGSTROM) and U.S. POSTAL SERVICE, POST OFFICE, Shattuck, OK

Docket No. 99-470; Submitted on the Record;
Issued June 5, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the motor vehicle accident on July 18, 1997 or the employee's subsequent death on August 10, 1997 were causally related to his federal employment.

On July 24, 1997 the employee's representative submitted a Form CA-1, traumatic injury claim, stating that the employee, then a 57-year-old substitute rural carrier, had been injured in a motor vehicle accident on July 18, 1997 while delivering mail. He sustained a broken neck with resulting paraplegia. By letters dated July 29, 1997, the Office of Workers' Compensation Programs requested that both the employee and the employing establishment furnish additional information regarding the accident. The employee died on August 10, 1997. By decision dated December 1, 1997, the Office denied the claim on the grounds that the evidence of record established that intoxication was the proximate cause of the accident on July 18, 1997 and was not compensable under section 8102 of the Federal Employees' Compensation Act. Appellant timely requested a hearing and, in a June 3, 1998 decision, an Office hearing representative remanded the case to the Office. Upon remand, the Office was to prepare a detailed statement of accepted facts which was to include a description of the accident and the employee's blood alcohol level and the fact that he had a history of "pseudoseizures, for which he was taking medication, as well as medication for depression. The Office was to then obtain a report from appellant's treating physician regarding whether intoxication was the proximate cause of appellant's injury with no contribution of prescription drugs. Following further development, by decision dated September 4, 1998, the Office again denied the claim, finding that the fatal injury was caused by the employee's intoxication and was, therefore, not compensable under section 8102 of the Act. The instant appeal follows.

A police report dated July 18, 1997 described the motor vehicle accident, indicating that the employee was driving a Pontiac Grand-Am at approximately 50 miles per hour (mph) and that the accident occurred on his regular route on a dry dirt road in clear weather. The legal speed limit was 55 mph. There was 29 feet of skid mark to impact with a fence and the car was then airborne for 40 feet. The employee was cited for driving under the influence.

A blood alcohol test, completed by the Oklahoma State Bureau of Investigation laboratory on September 22, 1997, indicates that, under the Dubowski automated gas chromatographic method, the employee's blood alcohol was 0.12g/100ml.[1]

The employing establishment submitted a number of statements from the employee's coworkers who described his appearance and behavior on July 18, 1997, the day of the motor vehicle accident. An Office form, report of employee's death, indicates that the employee died on August 10, 1997 due to a broken neck and internal injuries. An employing establishment accident investigation report dated September 8, 1997, described the circumstances of the accident, the employee's subsequent treatment at the Newman Memorial Hospital and Northwest Texas Hospital and his death on August 10, 1997. The interviews with the coworkers were discussed. The report concluded that the proximate cause of the accident was the intoxication of the employee with no other contributing factors including weather or road conditions.

The relevant medical evidence[2] includes a report dated July 18, 1997 in which Dr. R. Phillip Berry, a Board-certified family practitioner, advised that the employee had been admitted to the emergency room of Newman Memorial Hospital in Shattuck, Oklahoma on July 18, 1997 following a motor vehicle accident. He diagnosed paraplegia secondary to spinal cord trauma. Dr. Berry noted that the employee's blood alcohol level was 208.5 mg/dl. The employee was transferred to the Northwest Texas Hospital in Amarillo, Texas where he underwent stabilization for a fracture at C6-7. Dr. Berry submitted Office form reports dated July 29 and 30, 1997 in which he indicated that the employee could not work and that he had a seizure disorder. In a letter dated August 15, 1997, he advised that, as reflected in the employee's hospital records on the day of the accident, "he had a blood alcohol level considered legally intoxicated in the state of Oklahoma." Dr. Berry concluded, "I think that [the employee's] intoxication definitely contributed to the accident." In a September 3, 1997 letter, he again opined that there was a proximate cause between the employee's intoxication and the motor vehicle accident. Following a request by the Office for further information regarding the impact of the employee's seizure disorder and medication on his condition the day of the accident, by report dated August 20, 1998, Dr. Berry stated:

> "[T]he circumstances of the accident would not be suggestive of a seizure. In particular, when a person experiences a seizure we would not expect them to have been able to react by braking the vehicle prior to impact. More specifically, during a seizure, the driver will typically leave the roadway as they lose control of their muscles. The car will leave the roadway and an accident would occur in this manner. The [employee] was driving straight down the road, was driving a route that was well known to him and did leave skid marks at the scene prior to impact. These circumstances just do not suggest to me that a seizure would be the proximal cause of his accident. Certainly no testing was done to ascertain if he

[1] Oklahoma statutes indicate that an alcohol concentration of 0.10 or more is *prima facie* evidence that the person was under the influence of alcohol. 47 O.S. § 756 (OSCN 1999).

[2] Appellant also submitted an unsigned medical report dated January 6, 1997 that provided diagnoses of probable complex partial seizure disorder by history, depression and systolic hypertension.

> had experienced a seizure prior to the accident. Because of the seriousness of [the employee's] injuries it was felt that stabilization and transfer were of the utmost importance. [His] blood alcohol level was 208.5 mg/dl, nearly twice the legal intoxication limit in the state of Oklahoma. Certainly this level of intoxication is sufficient to establish intoxication as the proximate cause of the injury. There would need not be any other drug interaction to explain alcohol intoxication as the proximate cause, in my opinion."

The Board finds that appellant has not met her burden of proof to establish that the motor vehicle accident on July 18, 1997 or the employee's subsequent death on August 10, 1997 were causally related to his federal employment.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee/employer relationship.[3] Rather, Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[4]

> "In the course of employment" deals with the work setting, the locale and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.[5] In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place, (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.[6]

[3] *George A. Fenske*, 11 ECAB 471 (1960).

[4] *Timothy K. Burns*, 44 ECAB 291 (1992).

[5] *Larry J. Thomas*, 44 ECAB 291 (1992).

[6] *See Carmen B. Gutierrez* (*Neville R. Baugh*), 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

In the instant case, the Office invoked the affirmative defense of intoxication as codified at section 8102(a) of the Act[7] which provides in pertinent part:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is --
>
> (3) proximately caused by the intoxication of the injured employee."[8]

In reviewing claims under section 8102, the Board has held that allegations under section 8102(a) of the Act can be invoked only as an affirmative defense and that the Office's use of an affirmative defense must be invoked in the original adjudication of the claim.[9] The Board has further determined that, in order to correctly invoke section 8102(a)(3), the Office must establish by reliable, probative and substantial evidence that intoxication was the proximate cause of injury or death.[10]

Here, the Office invoked section 8102(a) in its initial decision dated December 1, 1997, as the police report of the July 18, 1997 motor vehicle accident indicates that the employee was driving under the influence. The employing establishment conducted an investigation into the circumstances of the accident and came to the same conclusion. Dr. Berry, who treated the employee upon arrival at the hospital after the accident noted that he had a blood alcohol level of 208.5 mg/dl and a state crime laboratory blood alcohol level was reported at 0.12 g/100ml, a level above the state's defined limit for intoxication. Finally, in a report dated August 20, 1998, Dr. Berry concluded that the employee's level of intoxication was sufficient to establish intoxication as the proximate cause of the injury and resulting death. For these reasons, the Board finds that the employee's intoxication removed him from the performance of duty.[11]

[7] 5 U.S.C. §§ 8101-8193.

[8] *Id.* at § 8102(a)(3).

[9] *Gayle M. Petty*, 46 ECAB 996 (1995); *Paul Raymond Kuyoth*, 27 ECAB 498 (1976).

[10] *See Ruth Perras*, 33 ECAB 1646 (1982).

[11] *See generally Soo F. Dong*, 47 ECAB 800 (1996).

The decision of the Office of Workers' Compensation Programs dated September 4, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 5, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member