

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL BERRY and U.S. POSTAL SERVICE,
POST OFFICE, RIMPAU STATION, Los Angeles, CA

*Docket No. 99-93; Submitted on the Record;
Issued May 11, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty.

The Board has duly reviewed the case record in the present appeal and finds that appellant has not established that he sustained an employment-related injury.

On March 7, 1997 appellant, then a 42-year-old letter carrier, sustained two gunshot wounds while he was on his route delivering mail. He stopped work that day. Following development of the record, by decision dated April 16, 1997, the Office of Workers' Compensation Programs denied the claim, finding that appellant had not sustained an injury in the performance of duty. In the attached memorandum, the Office found that the evidence established that appellant had a personal association with his assailant and there was no indication that the assault was the result of a work activity or aggravated by work association. Appellant requested reconsideration on July 29, 1997 and April 30, 1998. In decisions dated August 20, 1997 and May 7, 1998, respectively, the Office denied modification of its prior decision. The instant appeal follows.

The relevant evidence includes a police report dated March 7, 1997 indicating that appellant had been shot twice that day while delivering mail. The report noted that no mail had been taken and \$200.00 was found by the police in appellant's trouser pocket. An employing establishment postal inspector, Ralph H. Perez, filed a report in which he noted that appellant had filed a restraining order against his former girlfriend, Bethlehem "Mimi" Asrat, because she had threatened him. On February 9, 1997 Ms. Asrat had complained to the police about appellant.

The report indicates that Ms. Asrat's then boyfriend was Vida Lott. The postal inspector interviewed appellant in the hospital and appellant identified Mr. Lott as his assailant.¹

On April 1, 1997 a telephone conference was held between an Office claims examiner and appellant in which he stated that Mr. Lott had shot him. In an April 10, 1997 response to the memorandum of conference, appellant stated:

"I had *no personal association* with [Mr. Lott]. I had been to Ms. Asrat's place of residence prior to the attempted murder only after she gave me an address to come to so that I could retrieve my wallet which she had had in her possession. I had to have a sheriff escort accompany me because she did not want to return it to me. [Mr.] Lott, the suspect, happened to be a resident where she resided. I did not know him and had not talked to him. I do not, nor ever have I had a personal association with this person, [Mr.] Lott."

In a June 21, 1997 statement, Leon D. Jackson, appellant's housemate who is a police officer, stated that on February 9, 1997 appellant told him that Ms. Asrat had taken his wallet and stated that she was going to destroy it. Mr. Jackson stated that he advised appellant to contact the Los Angeles County Sheriff's Office to escort him to her house in an effort to recover the wallet. Mr. Jackson concluded that appellant came home with his wallet, informing him "that the sheriff was successful in his efforts without incident...."

In his August 20, 1997 request for reconsideration, appellant stated that he believed he was shot in an attempted robbery, advising that Ms. Asrat had "set him up." He stated that the robbery was thwarted because people came out of their homes. In an April 15, 1998 letter, appellant's representative argued that, just because appellant knew Mr. Lott, this did not form a personal relationship and stated that the shooting was an attempted robbery that was foiled because neighbors came out of their homes.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim³ including the fact that the individual is an "employee of the United States" within the meaning of the Act,⁴ that the claim was timely filed within the applicable time limitation period of the Act,⁵ that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are

¹ The record indicates that appellant could not speak at the time but nodded his assent in identifying Mr. Lott as his assailant.

² 5 U.S.C. §§ 8101-8193.

³ See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

⁴ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁵ 5 U.S.C. § 8122.

⁶ See *Melinda C. Epperly*, 45 ECAB 196 (1993).

essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

In this case, there is no dispute that appellant was an employee within the meaning of the Act, that his claim was timely filed, or that the assault occurred as alleged. He, however, failed to establish that the gunshot wounds were sustained while he was in the performance of duty.

Larson states that 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.⁸ Likewise, the Board has held that when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment.⁹ Larson further describes the specific categories of employment and exposures which would provide coverage. The particular jobs that have been held to subject an employee to a special risk of assault are those jobs that have to do with keeping the peace, guarding property, settling disputes or carrying or handling money.¹⁰ In this case, the record indicates that appellant's former girlfriend, Ms. Asrat, had an ongoing relationship with his assailant, Mr. Lott, at the time of the assault. The record does not establish that, but for his employment as a postal carrier, the assault would not otherwise be made. Instead, the record reveals that appellant, Ms. Asrat and Mr. Lott had a prior history which precipitated the shooting. The Board therefore finds that the assault in the instant case was imported into the employment from a private relationship and is thus not compensable.

⁷ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ A. Larson, *The Law of Workers' Compensation* § 11.00 (1990).

⁹ See *Veleria Minus*, 46 ECAB 799 (1995).

¹⁰ *Id.* at § 11.11(a).

The decision of the Office of Workers' Compensation Programs dated May 7, 1998 is hereby affirmed.

Dated, Washington, D.C.
May 11, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member