U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY H. HOLZEM and U.S. POSTAL SERVICE,
POST OFFICE, Merrill, WI

Docket No. 03-588; Submitted on the Record;
Issued June 19, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he was an "employee" of the United States within the meaning of the Federal Employees' Compensation Act at the time of his alleged injury.

On June 20, 2002 appellant, then 56 years old, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that, on April 31, 2001,[1] while lifting a steel grate, he sustained a "bulged disc in lower back." In completing his claim form, when he was asked his job title, he indicated "N/A." The employing establishment controverted the claim, alleging that appellant was not a federal employee on the date of the injury.

In a letter dated March 14, 2002, appellant indicated that he was temporarily working for the employing establishment and that it "was n[o]t expected to last that long, but it turned out to be over a year." Appellant stated that he understood that he was not entitled to any benefits such as insurance, sick leave or vacation days. He further indicated that, on April 30, 2001, when he "punched in" as usual, a clerk told him that a small rabbit was trapped in a window well outside of the building. He noted that a steel grate was covering the window well; that he asked for assistance to move it, but no one "seemed to be concerned over the matter, so I attempted to move the grate myself." He indicated that, while lifting the grate, he knew that something happened to his back.

By letters dated August 15, 2002, the Office of Workers' Compensation Programs requested that appellant and the alleged employing establishment provide further information.

Appellant responded that he was paid by the employing establishment by a money order. He indicated that he worked for the employing establishment from approximately April 2000 to April 30, 2001.

---

[1] The Board notes that the incident could not have occurred on this date, as April has only 30 days.

In a message dated August 30, 2002, the postmaster indicated:

> "I hired [appellant] off the street to help because our employee had cancer. Thus he had no written contract. We paid him via money order with no taxes, *etc.* taken from his pay. A 1099 form has been sent to him for his personal taxes.
>
> "[Appellant] was shown the building and told what cleaning needed to be done. Generally [appellant] did his daily work without having to be told what to do every day. If something new needed to be done, he would be advised."

By decision dated October 4, 2002, the Office denied appellant's claim. The Office found that an employee/employer relationship did not exist between appellant and the federal government at the time of the alleged incident.

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

The Act provides that 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."[2] A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that the claimant was an "employee" within the meaning of the Act.[3]

For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as:

> "(A) a civil officer or employee in any branch of the [g]overnment of the United States, including an officer or employee of an instrumentality wholly owned by the United States;
>
> "(B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual...."[4]

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.[5] The question of whether a person is an employee of the United States or an independent contractor is ultimately a question of fact to be decided on an individual basis in the particular case. Included among the many factors to be

---

[2] 5 U.S.C. § 8102(a).

[3] *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

[4] 5 U.S.C. § 8101(1).

[5] *Donald L. Dayment*, 54 ECAB ____ (Docket No. 01-1846, issued January 21, 2003).

considered are the right of control of the 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.[6] Other factors to be considered include whether the claimant has been rendering service similar to the service of a civil employee and whether the employing establishment was authorized by statute to accept such services.[7] The statute 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.[8] With regard to 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.[9]

Of the aforementioned 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.[10] The Board has held that the most important factor is the right to control work activities.

The Office's procedure manual indicates that, when there is a question as to whether appellant is an employee or an independent contractor, the claims examiner should request statements from the worker and the reporting agency to indicate, *inter alia,* whether the worker is required to furnish any tools or equipment; the period of time the work relationship is to exist; whether the reporting agency has the right to control or direct how the work is to be performed with full explanation; the manner in which payment for the workers' services is determined; and whether the activity in which the worker is engaged is a regular and continuing activity of the reporting agency.[11] The procedure manual also specifically addresses contract job cleaners used by the postal service, and indicates that these contracts typically consist of signed agreements, which may result from negotiation or invitation-bid. Determination of whether contract job cleaners are civil employees are made on a case-by-case basis by a senior claims examiner. The procedure manual indicates that the senior claims examiner should request a copy of the agreement form under which the worker was serving when injured, a statement from the postmaster showing the extent to which there was a right to control the manner of the worker's performance and the amount and extent of control exercised over the worker; and a statement from the contract job cleaner showing whether the injured person worked for any employer other than the employing establishment during the year before the injury.[12]

---

[6] *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Sandra Davis*, 50 ECAB 450 (1999).

[8] *Jane Doe*, 49 ECAB 646, 649 (1998).

[9] *David Nivens*, 46 ECAB 926, 934 (1995); *Darlene Menke*, 43 ECAB 173, 178 (1991); *Carl R. Clover*, 41 ECAB 625, 632 (1990) and cases cited therein.

[10] *Nettie Jackson (Lee F. Jackson)*, 53 ECAB ___ (Docket No. 01-498, issued November 21, 2001); *Kenneth W. Grant*, 39 ECAB 208 (1987); *Wendy S. Warner*, 38 ECAB 103, 105 (1986); *Funnia F. Hightower*, 28 ECAB 83 (1976).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee,* Chapter 2.802.6(a) (June 1995)

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee,* Chapter 2.802.8 (June 1995).

In the instant case, there is not a written contract between the employing establishment and appellant. Accordingly, the factors listed in the Act, case law, and the Office procedure manual are used as guidelines to establish whether appellant was an employee of the United States. Although the fact that there was no signed contract, that deductions were not made for taxes and the fact that appellant did not receive any employee benefits would tend to indicate that appellant was not an employee of the United States, the evidence of record is not sufficient for the Board to make a fully informed decision. The employing establishment's response to the Office's inquiry does not sufficiently address the right to or the exercise of control over appellant's work or whether the employing establishment had the right to fire appellant. There is no indication in the record whether appellant had to provide his own cleaning materials or if they were provided by the employing establishment. Although the postmaster indicated that appellant was hired to do cleaning, appellant's specific duties were not detailed. Although both the reporting agency and appellant state that appellant was performing the duties of an employee who had cancer, there is no indication as to whether he was paid comparable wages to that employee. There is also no indication as to whether appellant had regular work hours. For these reasons, the case will be remanded to the Office for further development of the evidence.

The decision of the Office of Workers' Compensation Programs dated October 4, 2002 is hereby set aside and the case is remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
June 19, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member