Government of the District of Columbia

Department of Employment Services

Office of the Director • Employment Security Building • 500 C Street, N.W. • Suite 600 • Washington, D.C. 20001

DAVID BIRD,

Claimant,

v.

H&AS No. 84-69
OWC No. 0015644

ADVANCE SECURITY

&

AMERICAN MOTORISTS INS. CO.

Employer/Carrier.

RECEIVED
JUN 14 1985
HEARINGS AND
ADJUDICATION

PROPOSED COMPENSATION ORDER

Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act, as amended, D.C. Law 3-77, D.C. Code, §36-301 et seq. (1981 Ed. & Supp.) (hereinafter the "Act").

On November 6, 1984, Chief Hearing Examiner Mell issued a Recommended Compensation Order finding Claimant entitled to the receipt of permanent partial disability benefits for a 5% impairment to the right thumb.

I thereafter reviewed the record. Any person aggrieved by this order may file exceptions and written arguments to

Director, DOES
Attn: General Counsel
500 C Street, N.W., Room 601
Washington, D.C. 20001

Background

Claimant at the time of his injury was a security guard stationed at the World Bank. On October 6, 1983, Claimant engaged in a fight with a parking garage attendant who was also assigned to the World Bank. At the hearing Claimant alleged that the parking attendant challenged Claimant to fight and that the attendant actually started to fight by hitting Claimant on the left side of his face. As a result of the fight, Claimant alleges that he suffers a 15% permanent partial disability to his right thumb.

Employer refuses Claimant's request for permanent benefits because Employer believes that the injury did not arise out of or in the course of employment. Employer contends, moreover, that Claimant's request for benefits cannot be granted because Claimant's actions amounted to a willful intention to injure another. Employer further suggests that Claimant's permanent partial disability does not exceed a 5% disability rating.

The Chief Hearing Examiner recommends that Claimant's injuries be found to have arisen out of and in the course of employment, that Claimant's behavior not be found a willful intent to injure another although he challenged the parking attendant to a fight, and that Claimant's disability be given 5% disability rating.

Because I do not view the circumstances in this case as supporting the Chief Hearing Examiner's conclusions, I decline to adopt her recommendations as my proposed order. Based on the following discussion, I find that Claimant's request for benefits must be denied.

Discussion

The initial question raised by this proceeding is whether the injuries sustained by an employee engaged in a personal fight with a co-worker 1/ can be said to have arisen out of and in the course of employment. According to the Chief Hearing Examiner, the injury arose in the course of employment because at the time of the fight Claimant had reported

---

1/ Claimant and the parking attendant did not work for the same employer. Claimant worked for Employer, namely, Advance Security. The parking attendant worked for Diplomat Parking. The World Bank apparently contracts with these firms to provide for its security and parking needs, respectively.

early to the locker room to be able to change into his uniform, punch in at another building, and report to his duty station on time. Because the pre-duty time activity was preparatory and incidental to Claimant's work, the fight occurring during this pre-duty time was found by the Hearing Examiner to be in the course of his employment. The Chief Hearing Examiner found, moreover, the injury to have arisen out of the employment because "an assault is compensable if 'the work of the participants brought them together and created the relations and conditions which resulted in the clash.'" RCO at 8, quoting Hartford Accident and Idemnity Company v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 18 (1940).

While I do not find error with the Chief Hearing Examiner's conclusions regarding the "course of employment" issue, I cannot agree that the assault in this instance arose out of employment. Even if I accept the Hartford Accident rule as interpreted by the Hearing Examiner as good law, 2/ I do not find the rule, as interpreted, to be applicable to the facts in this proceeding. Having reviewed the treatment of co-worker fights by the U.S. Court of Appeals for the District of Columbia Circuit [hereinafter referred to as the Court], I think that Hartford Accident does not stand for so broad a principle as cited above and that, under a narrower reading of Hartford Accident, the Claimant's injury did not arise out of his employment. A brief discussion of the Court's treatment under the prior law follows.

In 1938, the Court, apparently for the first time, confronted the issue of co-worker fights. In Maryland Casualty Co. v. Cardillo, 69 App.D.C. 199, 99 F.2d 432 (1938), the Court upheld an order by the deputy commissioner awarding compensation to the widow and surviving children of an employee attacked by a co-worker. The deceased employee was an assistant cook who, so the testimony indicated, critized the way that one of his inferiors, a bus boy, peeled potatoes. During an ensuing altercation, the bus boy attacked and killed the employee with a meat cleaver. Because the argument centered around the manner in which work was being performed, the Court readily agreed with the deputy commissioner that the injury arose out of the employment.

One year later, the Court affirmed the deputy commissioner's order denying compensation for injuries sustained during a personal altercation. In Fazio v. Cardillo, 71 App.D.C. 264,

---

2/ I do not reach the issue of whether Hartford Accident establishes an appropriate rule under the Act.

109 F.2d 835 (1940), the Court held that "injuries sustained by an employee in a personal difficulty with another employee of the same employer, having no relation to the employment itself and in which there is no causal connection between the injury and the employment, are not compensable." 109 F.2d at 836.

According to the Fazio Court, the employee's injury grew out of horseplay. "By engaging in such horseplay, the employee had "stepped aside from his employment." Id. at 836. The Court thereby found that the assault was not directed against him "because of or as a natural incident of his work or employment." Id.

Three months following Fazio, another division of the Court issued its decision in Hartford Accident. In language laden with dicta, Judge Rutledge sets forth what Professor Larson refers to as the "friction-and-strain" doctrine. See, 1 A. Larson, The Law of Workmen's Compensation, §11.16(a). According to Judge Rutledge, regardless of the nature of a fight among co-workers, whether personal or work-connected, injuries to a non-aggressor participant3/ in a dispute between co-workers is compensable if, essentially, the fight occurs at work.4/ Work, after all, "places men under stress and fatigues from human and mechanical impacts creating irritations." Hartford Accident, 112 F.2d at 17.

After Judge Rutledge's opinion in Hartford Accident, the Court had occasion to consider two other co-worker fights or assaults. In Penker Const. Co. v. Cardillo, 73 App.D.C. 168, 118 F.2d 14 (1941), the Court upheld an award of benefits to a widow of an employee who refused to pay his co-worker a commission for helping him obtain the employment. The Court found that the employment led to the commission demand and to the refusal of that demand and was thus the cause of the attack.

3/ Neither the Hearing Examiner nor Professor Larson places any emphasis upon the fact that the claimant in Hartford Accident was not the aggressor. As discussed infra, the distinction is important.

4/ Professor Larson suggests that Judge Rutledge's opinion is not so broad as to include private disputes brought to work. 1 A. Larson, supra, §11.16(a). Judge Rutledge,

In Ackerman v. Cardillo, 78 U.S.App.D.C. 310, 140 F.2d 348 (1944), injuries to the claimant grew out of horseplay initiated by a co-worker. In upholding denial of the requested benefits the Court included the following remarks:

> In the last mentioned case [Hartford Accident] all that we held was that compensation is payable where a claimant under the Longshoremen's Act is merely the victim and not the aggressor in a quarrel with a fellow employee resulting in personal injury. But in announcing this rule we were careful to limit it to situations in which the claimant was not the aggressor.

140 F.2d at 349.

Because the claimant in Ackerman had engaged in similar pranks earlier that day, the Court felt justified in concluding that claimant had "voluntarily stepped aside from his employment and taken upon himself the consequences of his acts." 5/ The Court held that the claimant's acts during such periods of divergence from duties could not lead to injuries which were "the natural or ordinary result of his work." Id.

In applying the holding in Hartford Accident, the Benefits Review Board has created only one test, essentially. The Board looks to see if the fighting co-workers had any personal relations outside of the employment. If not, the Board then infers that "the emotions which precipitated the altercation" had their origins in the workplace. Twyman v. Colorado Security, 14 B.R.B.S. 829, 833 (April 1, 1982). Regardless of the subject matter of the dispute leading to the fight, whether work-related or purely personal, injuries resulting from a fight between co-workers become compensable if there is no proof that the precipating emotions "had their origins anywhere other than the workplace." Id.

The Chief Hearing Examiner has apparently followed the Twyman interpretation of Hartford Accident and concluded that since Claimant and the parking attendant had no outside

(Footnote Continued)...

however, seemed to recognize the possibility of compensating purely private disputes: "Others [personal animosities] initated outside the job are magnified to the breaking point by its [the work environment's] compelled contacts." 112 F.2d at 17.

5/ This language is of the type severely critized in the previous case Hartford Accident.

relationship, the employment brought them together and "created the environment for a clash" leading to Claimant's injury. RCO at 8. In that sense, the injuries are thought by the Chief Hearing Examiner to have arisen out of the employment.

It is with the interpretation of Hartford Accident by the Benefits Review Board in Twyman and by the Chief Hearing Examiner here that I cannot agree.

For the work to "create the relations and conditions which resulted in the clash", I think that Hartford Accident at a minimum requires: 1) a showing that the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them; and 2) a finding that the injured employee was not the aggressor.

In Hartford Accident there were two environmental factors which tended to [illegible] the likelihood of friction between the fight parti[illegible] First, there existed a supervisor-supervisee re[illegible] between the fight participants. Disputes will often develop within such relationships based on the different notions of how, how fast, how well or how carefully a particular task should have been, was, or should be performed. In many instances, a supervisor's performance rating depends upon the performances of his supervisees. Pressures on the supervisees from supervisors sometimes erupt into violence or heated verbal exchanges.

Second, the nature of the duties of the claimant, a grocery helper, and the supervisor, a checker, assured that they would come into contact regularly. Thus, the more opportunities which arose for their temperaments and emotions to cross paths, the greater the likelihood of friction.

In this proceeding Claimant was a security guard principally stationed near the main receptionist area inside of a World Bank building. The parking garage attendant worked outside and under that building. Claimant and the parking attendant would have occasion to see each other on the parking area when Claimant arrived at work or when he was on patrol and sometimes in the locker room when Claimant changed clothes.

Although Claimant's occasional visits to the garage area to park or remove his car or to perform a security function and his use of the locker rooms might have brought him into

contact with the parking attendant, it cannot reasonably be concluded that the nature of their respective duties or their employment relationship was likely to increase friction. Moreover, there is no evidence in the record that Claimant was required to drive to work or to come to work in his street clothes. While the World Bank may have permitted Claimant's use of the locker rooms, that fact is insufficient to justify a conclusion that the employment created the relations and conditions which resulted in the clash. Indeed, if that were the case, any two employees who have occasion to ride an employer's elevators together, to use the same bathroom facilities or to see one another in the company cafeteria and who engage in a personal fight, would sustain compensable injuries. Hartford Accident, however, does not go so far.

At the end of Hartford Accident Judge Rutledge attempted to reconcile his view with those expressed in Fazio by pointing out that "claimant there was the aggressor in the physical assault." Id. at 18. In Ackerman, moreover, the Court once again noted that Hartford Accident was limited to circumstances where the claimant was not the aggressor. In light of those remarks, I must conclude that injuries resulting from a fight with a co-worker are not compensable under Hartford Accident unless the claimant is not the aggressor.

In this proceeding, the evidence tends to support the view that Claimant was the aggressor. Regardless of who struck the first blow, it was Claimant who first approached the parking attendant and who seemed bent on settling a score. I accept, moreover, the Chief Hearing Examiner's finding that claimant "challenged Mohamed to go outside to fight." RCO at 8. Based on these facts, I find Claimant to have been the aggressor and that under Hartford Accident his injuries did not arise out of his employment.

Because I find that Claimant's claim for benefits must be denied on the grounds that his injuries did not arise out of his employment, I need not reach the second issue of whether Claimant's intent to fight constitutes a willful intent to injure another.6/

6/ The Chief Hearing Examiner found that Claimant's intention to fight the parking attendant was not a willful intention to injure another under §4(d) of the Act [D.C. Code 1981, §36-303(d)] because the evidence did not establish who struck the first blow.

ORDER

Having reviewed the record in this matter and the law pertinent to these facts, it is hereby

ORDERED that Claimant's request for benefits be, and hereby is, DENIED.

MATTHEW F. SHANNON
Director
Department of Employment Services

JUN 7 1985
Date