Patterson, Peter

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Aggressor doctrine

A worker injured during a fight which he instigated with his employer was not in the course of employment at the time of the injury. **….*In re Peter Patterson*, BIIA Dec., 53,306 (1980)** [*Editor's Note*: The Board has abandoned the aggressor in favor of a broader course of employment analysis as used in *In re Stanley Murebu*, BIIA Dec., 37,335 (1972).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PETER EARL PATTERSON	**)**	**DOCKET NO. 53,306**
	)	
CLAIM NO. H-382516	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Peter Earl Patterson, by
Gerald Casey and Tim Martin

Employer, Lynnwood Home Appliances, by
Franco, Asia, Bensussen, Coe & Finegold, per
James S. Rogers

Department of Labor and Industries, by
The Attorney General, per
Kirk Mortensen, Assistant

This is an appeal filed by the claimant on December 8, 1978 from an order of the Department of Labor and Industries dated November 30, 1978 which rejected the claim on the ground that claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws and that at the time of the injury the claimant was not in the course of employment. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued by a hearing examiner for this Board on February 1, 1980 in which the order of the Department dated November 30, 1978 was affirmed.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue in this appeal concerns whether the claimant was in the course of his employment at the time that he sustained an injury on August 29, 1978. The record establishes that Jack Roberts, the owner, communicated words of employment termination to the claimant at approximately 10:30 a.m. on August 29, 1978, and that shortly thereafter a physical struggle ensued between the claimant and the employer with the claimant suffering injuries. The altercation took place while the claimant's final paycheck was being prepared at the request of the claimant and at the direction of the employer.

Our hearing examiner held that at the time the claimant was injured he was no longer in the "employ" of the employer, having effectively been fired a short time before, and therefore he was not entitled to benefits under the Act for the injuries sustained. The claimant properly pointed out in his Petition for Review that coverage under our Act does not always cease at the moment that the employer communicates words of employment termination, or at the time that the employee notifies the employer that he is quitting. In Perry v. Beverage, 121 Wash. 652 (1922), a logger gave notice to his employer that he desired to quit his employment at the end of that day's shift. At 6:30 p.m., after working hours. Perry attempted to collect his last paycheck. He became embroiled in an argument with his foreman or superintendent and suffered injuries. One of the issues was whether his injury occurred after he had ceased to be an employee. The court quoted, with apparent approval, cases from other jurisdictions in which the courts had stated that the essential elements of the contract of employment were the services rendered by the employee and the right to be paid by the employer and that until an employee is paid for his services the employer-employee relationship may still exist, at least so long as the employee is lawfully on the jobsite premises.

In the instant case, Mr. Patterson had not been paid in full when he was discharged. He asked to be paid before leaving. His employer acquiesced to the request for payment. Under these circumstances, we feel Mr. Patterson was entitled to remain on the jobsite premises until paid, and the employer-employee relationship still existed at the time of the altercation.

The determinative issue, however, is not whether the employer- employee relationship existed, but whether the claimant was in the course of his employment at the time he sustained an injury. If the evidence shows that Mr. Patterson had deviated from the course of his employment due to a willful act on his part, then his injury would not fall within the coverage of the Workers' Compensation Act.

Under the facts represented by this appeal, the alleged willful act which would disqualify the claimant for benefits would be his acting as an aggressor in instigating the altercation in which he and Mr. Roberts engaged.

The testimony concerning which person was the instigator and aggressor is in sharp conflict. Mr. Patterson maintains that it was he who was first stuck by his employer. On the other hand, Mr. Roberts, the employer, claimed that Mr. Patterson called him names, threatened him, threw his glasses at him, and commenced the struggle which found the two men struggling on the floor and eventually found Mr. Roberts' torso being pinned against a refrigerator by Mr. Patterson's head, at

which point the altercation was broken up by two nearby persons, who were non-witnesses to the fight.

Apparently no one other than the two participants actually witnessed the beginning of the fight. However, Norma Van Fleet, a book-keeper for the company, testified to her observations of the events immediately preceding the altercation. We doubt that Mr. Roberts was as blameless and objective as his testimony would support if believed in toto. Similarly, the record as a whole does not support that Mr. Patterson's conduct entitles him to be viewed in a favorable light. With particularity, Mr. Patterson was unable to explain or recall his alleged actions immediately following the altercation when he purportedly destroyed a headlight in Mr. Roberts' automobile with his foot. He did not deny the event, he simply could not recall his actions at that point. Yet, he seemed to have an extremely clear picture from his viewpoint of all other events preceding that moment.

Given the testimony of Mrs. Van Fleet, we feel the preponderance of credible evidence establishes that Mr. Patterson in this instance was the primary instigator of the altercation and was the initial aggressor in the fight which led to his injuries.

A substantial majority of jurisdictions in this country now permit benefits to a worker injured in a fight whether he is the aggressor or not, assuming that the subject matter of the fight was related to the work. This is based upon the doctrine that the instigation of the fight by the claimant alone is not enough to deprive his ensuing injuries of the quality of "arising out of employment." Larson, Workmen's Compensation (Desk Ed.) Sec. 11.10, 3-49. In this state, a worker is entitled to benefits under our compensation act if he is injured in the "course of his employment." RCW 51.32.010. "Acting in the course of employment" means that the worker is acting at his employer's direction or in furtherance of his employer's business. RCW 51.08.013. Our statute does not depend on an injury "arising out of employment" as many other jurisdictions do.

It can be argued that a fight between an employee and an employer concerning work-related matters did "arise out of employment", no matter who was the aggressor in the ensuing fight. But it would seem a more difficult hurdle to establish that under the same circumstances, the injuries occurred while "acting in the course of employment" as that term is defined in our Act; especially if the worker was the instigator of the fight. The fight did not occur at the direction of the employer, nor was it in the furtherance of his business. The Board therefore finds that the claimant was not in the course of his employment at the time he instigated the fight with the employer, or, shortly

thereafter, when he suffered his injuries, and that he had by a willful act deviated from the course of his employment.

FINDINGS OF FACT

After a careful review of the record, the Board finds as follows:

1. On September 6, 1978 the claimant, Peter Earl Patterson, filed a report of accident with the Department of Labor and Industries alleging that he had sustained an injury in the course of his employment with Lynnwood Home Appliances on August 29, 1978. On November 30, 1978 the Department entered an order rejecting the claim for the reason that the claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws, and that at the time of injury the claimant was not in the course of employment. On December 8, 1978 the claimant appealed to the Board of Industrial Insurance Appeals and on January 5, 1979 the Board issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. On August 29, 1978, at approximately 10:30 a.m., the president of the employer corporation, Jack Roberts, informed the claimant of his termination from employment with the company and another employee of the employer was directed to make out a check paying the claimant the balance due and owing to him for services rendered to the employer.

3. Before the claimant was given his final paycheck, and while still on the employer's premises, he willingly instigated and incited a physical altercation with Jack Roberts, that Mr. Roberts could not avoid. During the altercation the claimant sustained physical injuries.

4. The instigation of the physical altercation was neither at the employer's direction or in furtherance of the employer's business.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board concludes as follows:

1. The Board has jurisdiction of the parties and the subject matter to this appeal.

2. At the time the claimant was injured on August 29, 1978, he was not acting in the course of his employment with Lynnwood Home Appliances, within the meaning of RCW 51.08.013, and was therefore not entitled to compensation under the Industrial Insurance Act within the meaning of RCW 51.32.010.

3. The order of the Department of Labor and Industries dated November 30, 1978 rejecting the claim for the reason that claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws, and that at the time of injury the claimant was not in the course of employment, is essentially correct and should be affirmed.

It is so ORDERED.

Dated this 24th day of June, 1980.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
AUGUST P. MARDESICH Member