

COLORADO COURT OF APPEALS

Court of Appeals No. 02CA0751
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-494-672

Corporate Express and Zurich Insurance Company/GAB Robbins, Inc.,
Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and
Joseph Garutto,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE DAVIDSON
Vogt and Dailey, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
October 31, 2002

Ritsema & Lyon, P.C., Carol A. Finley, Colorado Springs,
Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Cross & Bennett, L.L.C., Keith F. Cross, Colorado Springs,
Colorado, for Respondent Joseph Garutto

Petitioners, Corporate Express and Zurich Insurance Company/GAB Robbins, Inc., seek review of a final order of the Industrial Claim Appeals Office (Panel) determining that Joseph Garutto (claimant) sustained a compensable injury. We affirm.

Claimant was required to travel in his car to meet with customers and associates and was usually out of the office ninety percent of the time.

Claimant testified that in March 2001, while driving to a business meeting, he honked his horn at another driver who had encroached on his traffic lane while making an illegal U-turn. After claimant drove to a nearby parking lot to calm down, the other driver approached him, spit in his face, and then pulled claimant out of the car and beat him about the head. As a result of the assault, claimant suffered injuries to his face, head, neck, and back, which temporarily precluded him from returning to his regular employment.

In determining that the injuries were compensable, the Administrative Law Judge (ALJ) found that the assault was caused by a "neutral force," which arose out of and in the course of employment. The ALJ also found that claimant would not have been injured "but for" the obligations of his employment, which placed him in a position where any other person then and there present would have been assaulted by the unknown driver.

On review, the Panel affirmed.

Petitioners argue that the dispute was necessarily personal

to claimant because it was triggered by his voluntary actions of honking the horn, entering the parking lot, and exiting his vehicle. We disagree.

An injury is compensable if it "arises out of" and "in the course of employment." Section 8-41-301(1)(b), C.R.S. 2002. An injury "arises out of" employment when it is caused by a neutral force that is not personal to the victim. See In re Question Submitted by United States Court of Appeals, 759 P.2d 17 (Colo. 1988).

It is undisputed here that the assault on claimant occurred in the course of employment. Claimant's job duties required him to drive his vehicle to and from customer meetings. Thus, driving was an inherent part of his work. See Madden v. Mountain West Fabricators, 977 P.2d 861 (Colo. 1999). It is also undisputed that the assault was precipitated by events that occurred while claimant was driving his vehicle for work.

Rather, petitioners argue that the assault was motivated by a personal dispute and, therefore, did not "arise out of" the employment. We disagree.

The motivation for a workplace assault is a factual issue and must be ascertained by examining the circumstances in each individual case. See Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991). Furthermore, the ALJ's determination is binding on review if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2002.

Here, we agree with the Panel that the record supports the ALJ's conclusion that the injury resulted from a neutral force. Specifically, the record does not support petitioners' contention that there was any verbal exchange after the illegal U-turn. And the ALJ implicitly rejected the contention that claimant instigated the assault by honking his horn when the assailant's vehicle encroached on his lane of traffic. In any event, as the Panel recognized, evidence that claimant was the initial aggressor would not have barred recovery of workers' compensation benefits. See Triad Painting Co. v. Blair, supra.

Nor does claimant's knowledge that the assailant was following him compel a finding that he was personally targeted for the assault. Instead, the ALJ could reasonably infer that, under the circumstances, the assault would have happened to any driver then present.

We further disagree with petitioners that Horodyskyj v. Karanian, 32 P.3d 470 (Colo. 2001), requires a different result.

In Horodyskyj, the supreme court held that sexual harassment by one employee of another is inherently personal, does not arise out of employment, and, thus, is not compensable under the Workers' Compensation Act. The court reasoned that acts of sexual harassment are not neutral and have no connection to the employment.

Initially, we reject petitioner's argument that Horodyskyj created a new test for causation and that the Panel should have

remanded the matter to the ALJ for application of such test. In Horodyskyj, the supreme court explicitly relied upon the test for willful assaults by coemployees previously announced in In re Question Submitted by United States Court of Appeals, supra, and explained by Popovich v. Irlando, 811 P.2d 379 (Colo. 1991). Moreover, the court in Horodyskyj articulated a rule specifically applicable to sexual harassment and related torts, which are not at issue here.

We also disagree with petitioners' unsupported argument that the Workers' Compensation Act was not intended to cover this instance of road rage because such conduct is governed by other civil and criminal laws. Unlike the sexual harassment discussed in Horodyskyj, there are no comprehensive statutory remedies specifically directed at the behavior at issue here.

The order is affirmed.

JUDGE VOGT and JUDGE DAILEY concur.