

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001457-WC

CHRIS WHITE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00075

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT;
RICHARD E. JACOBS GROUP, INC.;
JACOBS GROUP MANAGEMENT CO., INC.;
HONORABLE DONNA H. TERRY, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Chris White has petitioned for review of an opinion of the Workers' Compensation Board entered on June 23, 2004, which affirmed the administrative law judge's dismissal of his claim for benefits as the result of a psychiatric condition that arose out of and in the course of his employment as a police officer with Lexington-Fayette Urban County Government

(LFUCG) and as a security guard with Richard E. Jacobs Group, Inc. Having concluded that the Board misconstrued controlling statutes and precedent concerning the physical injury that White suffered as the result of a traumatic event, we reverse and remand.

On January 5, 2001, White, who was 35 years old, was employed full-time as a detective by the LFUCG Police Department and part-time as a security guard at Fayette Mall, an indoor commercial shopping center.¹ After White completed his shift as a police officer for LFUCG, he reported to his security guard job at the Fayette Mall. Approximately one hour into that job shift, White received a call from a LFUCG police dispatcher regarding a male subject at the mall. White was advised that the subject was dressed in a security guard uniform and carrying a night stick. The subject had reportedly threatened to commit suicide.

Subsequently, White was told by another mall security guard that the subject was near a bus stop in front of the mall. As White approached the subject, he noticed a revolver, so he drew his gun, displayed his LFUCG police badge, and identified himself as a police officer. After some conversation, the subject drew his gun. White commanded the subject to drop the gun, but instead the subject raised the gun and pointed it at

¹ Fayette Mall was developed by the Richard E. Jacobs Group, Inc. and managed by Jacobs Group Management Company, Inc.

White. White initially fired four shots, hitting the subject three times. When the subject continued to advance toward White, he fired four more times before the subject fell to the ground. White then administered first aid, including CPR, to the subject. A paramedic arrived and assisted White, but the subject died as a result of the gunshot wounds. Suicide notes were later discovered in the subject's vehicle.

Following the shooting incident, White was transported to the police department, interrogated, and placed on administrative leave during an internal investigation. White did not report, or seek treatment for, any physical injury as a result of this incident. For some unexplained reason, the subject's blood was never tested, and White was forced to undergo repeated blood tests to determine if he had contracted any diseases through his contact with bodily fluids of the deceased.

White testified that during the period of administrative leave and internal investigation, he began to experience stress; so he consulted psychologist Dr. Todd Vandenburg. White experienced nightmares, flashbacks, and paranoia regarding a potential indictment for the shooting incident and the uncertainty of having contracted diseases such as AIDS and tuberculosis from the deceased. After White returned to work, for both the police department and the mall in

April 2001,² he began to lose concentration, became more emotional, and developed road rage. He first took sick leave and then received disability retirement.

On January 6, 2003, White filed an application for resolution of injury claim with the Department of Workers' Claims. Medical evidence in support of his disability claim included the testimony of five board certified psychiatrists. All of the doctors testified that White suffered from post-traumatic stress disorder (PTSD) and that he should not return to work as a police officer.

In an opinion and order dated January 29, 2004, dismissing White's claim, the ALJ concluded that "Officer White clearly has developed a significant psychiatric condition as the result of the life-threatening situation on January 5, 2001. . . . However, KRS³ 342.0011(1) does not provide workers' compensation benefits for the psychiatric effects in the absence of a physical injury." On June 23, 2004, the Board affirmed, but noted that the law created a "hardship." The Board stated that "under the facts in this claim, White's contact with the bodily fluids of another, no matter how offensive, does not constitute a physically traumatic event." This petition for review followed.

² He was promoted to police sergeant in April 2001.

³ Kentucky Revised Statutes.

Our function in providing further review of a workers' compensation claim is to correct the Board only when it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."⁴ Since the facts related to the legal issue on appeal are not in dispute, our review is limited to determining whether the Board overlooked or misconstrued controlling statutes or precedent.

KRS 342.0011(1) provides as follows:

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury [emphasis added].

It has been noted by our Supreme Court that as a result of the amendments to this statute in 1994 and 1996, "the term 'injury' now refers to the traumatic event or series of such events that

⁴ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

causes a harmful change rather than to the harmful change, itself. Under the amended definition, a 'physical injury' is an event that involves physical trauma, without regard to the type of harmful change that results."⁵

Prior to the 1994 amendment of KRS 342.0011(1), a "mental-mental" recovery was allowed; i.e. a psychological injury was compensable even if there was no related physical injury. As stated in West, supra:

In 1989, KRS 342.0011(1) defined a compensable injury as being "any work-related harmful change in the human organism, arising out of and in the course of employment. . . ." Effective April 4, 1994, the legislature added the requirement that a compensable psychological, psychiatric, or stress-related change in the human organism be "a direct result of a physical injury." That requirement was retained when the provision was again amended effective December 12, 1996, to define an "injury[.]"

. . .

[F]or the purposes of the 1996 version of KRS 342.0011(1), a "physical injury" is an event that involves physical trauma and proximately causes a harmful change in the human organism that is evidenced by objective medical findings. An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-

⁵ McCowan v. Matsushita Appliance Co., 95 S.W.3d 30, 32 (Ky. 2002) (citing Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564, 566 (Ky. 2001)).

related. But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event. We view an incident that is described as a "full-fledged fight" in which a police officer and suspect are scuffling and rolling on the ground as an event that involves physical trauma, in other words, as a physically traumatic event.⁶

In West, a police officer who had been involved in an "incident in which she was physically assaulted by a knife-wielding suspect that she was attempting to apprehend[,]"⁷ filed a claim for workers' compensation disability benefits based upon the PTSD she had developed. The ALJ dismissed West's claim, but the Board remanded and this Court affirmed. The Supreme Court also affirmed and noted that even though West's only physical injuries "consisted of scratches, abrasions, and soreness," she had suffered a physical injury from the "incident" with the suspect because the event involved physical trauma which proximately caused a harmful change in the human organism that was evidenced by objective medical findings of a psychological condition.⁸

Likewise, in the case before us, the traumatic event experienced by White involved relatively brief physical contact with a suspect, but the nature of the physical contact was

⁶ West, 52 S.W.2d at 566-67.

⁷ Id. at 564-65.

⁸ Id. at 565.

extremely physical and intimate. Following the terrifying fatal encounter where White was compelled to fire eight shots at the subject hitting him numerous times at close range before he finally fell, White undertook the physical task of personally administering CPR and first aid, becoming mired in the man's blood and bodily fluids. This event most assuredly involved physical trauma.

In assisting the dying man, White did not have the opportunity to protect himself by using a plastic gown or gloves. He took immediate action in an attempt to save the man's life, exposing himself fully to the noxious effects of the man's blood and mucous. Later, White understandably became concerned about the significant health risks of HIV and other serious infections as a result of being exposed to the man's bodily fluids.

Thus, we hold that like the event in West, here White had a brief but seriously intimate physical encounter with a criminal suspect. While White did not suffer scratches or abrasions, he endured the physical impact of being coated with bodily fluids with a threat of much more serious health consequences than scratches and abrasions. We conclude that an event of such tangible and significant physical contact constitutes a physical trauma.

Accordingly, we reverse the Board's opinion and remand this matter for further proceedings consistent with this Opinion.

COMBS, CHIEF JUDGE, CONCURS AND FILES SEPARATE
OPINION.

MINTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING: I heartily concur with the majority opinion and would in no way characterize this injury as "mental-mental" so as to bar recovery under Kentucky law. Medical research has continued to emphasize the interconnectedness of body, mind, and spirit.

The physical injury that occurred in this case far exceeded a "mere touching." Officer White faced a violent physical confrontation resulting in the necessity of his most immediate and intimate contact with the bodily fluids of the victim. We can truly take judicial notice of the physical peril to which he subjected himself by treating the victim without the time or opportunity to sheathe himself with protective covering. The hazard of such exposure to HIV and other possible diseases is readily apparent. The psychological trauma directly flowing from the highly physical encounter is equally obvious.

Consequently, I agree that the post-traumatic stress disorder (PTSD) suffered by Officer White was inescapably attributable to his physical encounter with this victim - an

encounter that had serious physical ramifications as evidenced by the many sessions of blood-testing to ascertain whether he had yet contracted numerous fearsome diseases. As his mental problems manifested themselves over the course of those blood tests, their linkage to a physical origin became clear. His mental infirmity was a "direct result of a physical injury" under the literal wording and intent of KRS 342.0011(1).

MINTON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion. The facts indicate that Officer White's post-traumatic stress disorder (PTSD) was caused by stress and the psychiatric impact of a life-threatening situation rather than from a physical injury. Kentucky does not allow for "mental-mental" recovery without a related physical injury; therefore, I believe the ALJ correctly held White was without remedy under KRS 342.0011(1).

The crux of White's argument is that the definition of "physical injury" for purposes of workers' compensation recovery should be expanded to include a "mere touching." This issue has yet to be addressed by our courts. However, other jurisdictions have confronted the matter. In the case of Liberty Correctional Institute v. Yon,⁹ the Florida Court of Appeals held that mere

⁹ 671 So.2d 194 (Fla.App. 1996).

touching was not sufficient to establish a physical injury for purposes of entitlement to workers' compensation benefits. Likewise, in LaDay v. Catalyst Technology,¹⁰ a Louisiana court held that a supervisor's touching of his employee's buttocks was insufficient to establish a "physical injury" for purposes of workers' compensation recovery for alleged psychological harm. And in W.W. Fowler Oil Co. v. Hamby,¹¹ the Georgia Court of Appeals held that the term "discernible physical occurrence," as used in reference to workers' compensation benefits, "means a physical injury or harm, not merely a touching that can be fixed in time.'"¹²

As the majority notes, White argues that his situation should be likened to that in West. But unlike the victim in West, White has no proof of physical injury other than contact with the blood and mucus of another. This contact is insufficient to establish a "physical injury." Even though the suspect's bodily fluids physically touched White, there is no evidence that physical trauma resulted from that touching. I agree with the Board that "the distinction between direct exposure to possibly tainted blood as opposed to minor scrapes and abrasions [as was the case in West] appears Draconian";

¹⁰ 818 So.2d 64 (La.App. 2001).

¹¹ 385 S.E.2d 106 (Ga.App. 1989).

¹² *Id.* at 422 - 423.

however, I also agree with the previously cited cases that conclude a mere touching—such as White’s contact with the suspect’s blood and mucus—is insufficient to establish physical injury.

There is no question that White’s situation is sympathetic. His experience was traumatic, and he acted honorably and appropriately. But without proof of physical injury, our statutes do not provide for recovery solely on the basis of White’s psychological trauma or his contact with the suspect’s blood and mucus. Therefore, I dissent from the majority’s decision.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE LEXINGTON-
FAYETTE URBAN COUNTY
GOVERNMENT:

Sherri P. Brown
Lexington, Kentucky

BRIEF FOR APPELLEES RICHARD E.
JACOBS GROUP, INC. AND JACOBS
GROUP MANAGEMENT CO., INC.:

Carroll M. Redford, III
J. Scott Benton
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