

OUTSIDE COUNSEL

By Robert E. Grey

Sept. 11: Dealing With Workers' Compensation

In the aftermath of the World Trade Center catastrophe, police officers, firefighters, and others have undertaken heroic efforts to locate and rescue survivors of the building collapses. As attorneys, it is our obligation to assist the other survivors — the families of those who were employed in the buildings and are now deceased or missing and presumed dead; injured or disabled suburban uniformed and volunteer police, firefighters, and ambulance workers who responded to the scene; and the families of such rescue workers who lost their lives saving others. The first avenue of recourse for many of these survivors should be to make application for benefits under the New York State Workers' Compensation Law.

Many of those who perished in the World Trade Center catastrophe were working at the time of the attack. This raises the question: Under these cir-



cumstances, is there a viable claim for workers' compensation benefits? The answer is yes.

The Workers' Compensation Law provides benefits for "disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury." W.C.L. Section 10. "Injury" is defined as "only accidental injuries arising out of and in the course of employment." W.C.L. Section 2(7). The statute provides, however, that "it shall be presumed in the absence of substantial evidence to the contrary ... that the claim comes within the provision of this chapter." W.C.L. Section 21(1).

There is no doubt that the victims of the World Trade Center catastrophe died while "in the course of the[ir] employment," as is required by the statute. Some may wonder, however, whether the deaths arose "out of" their employment, which is also a predicate for a finding of compensability. Stated differently, did this

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horrific terrorist attack constitute an "accident" within the meaning of the Workers' Compensation Law? Again, the answer is yes.

The Court of Appeals reviewed these basic precepts of the Workers' Compensation Law in *Johannesen v. New York City Department of Housing Preservation and Development*, 84 N.Y.2d 129, 615 N.Y.S.2d 336, 638 N.E.2d 981 (1994). "The Workers' Compensation law was enacted for socioeconomic remediation purposes 'as a means of protecting work[ers] and their dependents from want in case of injury' on the job. An employee is entitled to receive compensation on a 'no-fault' basis for all injuries 'arising out of and in the course of the employment.' ... To effectuate the statutory objectives, Workers' Compensation Law, Section 21(1) creates a presumption that injuries 'arising out of and in the course of' employment are compensable under Section 10(1) as 'accidents.' Moreover, given the remedial nature of the Workers' Compensation Law, the Court has construed the statute and given the Board, as 'trier of the facts' a very wide latitude in determining whether an event is an accident. *Johannesen*, 84 N.Y.2d at 134.

The Workers' Compensation Board has historically exercised its "wide latitude" to determine that injury or death arising in the course of employment also arose out of the employment. Two categories of event are particularly relevant to the present situation: "acts of God" and assaults by third parties to the employment relationship.

The courts have affirmed awards of compensation benefits to many claimants whose spouses were killed due to the consequences of violent storms, including lightning strikes, the quintessential "act of God." *Pierce v. Young*, 252 N.Y.520, 170 N.E. 127 (1929); *Matter of Madura v. New York*, 238 N.Y. 214, 214 N.E. 505 (1924); *Rung v. New York*, 238 N.Y. 556, 144 N.E. 889; *Deziley v. Semet-Solvay Co.*, 272 A.D. 985, 72 N.Y.S.2d 809 (3rd Dept. 1947); *Moore v. Lehigh Valley R. Co.*, 169 A.D. 177, 154 N.Y.S. 620 (3rd Dept. 1915), aff'd 217 N.Y. 627, 111 N.E.1092.

Similarly, assaults and other crimes committed by third parties to the employment relationship have long been held compensable. *Muller v. Cohen*, 186 A.D. 845, 174 N.Y.S. 736

(3rd Dept. 1919); *Matter of Hooks*, 80 A.D.2d 687, 436 N.Y.S.2d 433 (1981); *Notowitz v. Rose Towel & Linen Supply Co.*, 36 A.A.D.2d 543, 316 N.Y.S.2d 694 (3rd Dept. 1971); *Williams v. Duplex Metal Corp.*, 60 A.D.2d 741, 400 N.Y.S.2d 905 (3rd Dept. 1977); *Browne v. Marvel Transp. Co.*, 246 A.D. 659, 283 N.Y.S. 209 (3rd Dept. 1935); *Commissioner of Taxation v. Bergin*, 238 A.D.876, 262 N.Y.S. 952 (3rd Dept. 1933), aff'd 262 N.Y.673, 188 N.E. 115; *Rothenberg v. AAA Custom Lab*, 77 A.D.2d 807, 430 N.Y.S.2d 393 (3rd Dept. 1980); *Baker v. Hudson Valley Nursing Home*, 233 A.D.2d 608, 649 N.Y.S.2d 105 (3rd Dept. 1996), lv. to app. den. 89 N.Y.2d 813, 659 N.Y.S.2d 854, 681 N.E.2d 1301 (1997).

It may therefore be seen that when an employee dies while in the course of his or her employment, the death is presumed to have arisen out of the employment, thereby constituting an accident. The fact that the accident is caused by factors extraneous to the employment, such as an act of God, assault by known or unknown third parties, or terrorist attack, does not remove the claim from the beneficial coverage of the Workers' Compensation Law.

Individuals other than families of World Trade Center decedents may also have valid claims for workers' compensation benefits. Certainly, individuals who were employed in the immediate vicinity of the affected buildings and who suffered physical or mental trauma would have potentially meritorious claims for medical expenses and periods of disability. In addition, persons disabled by smoke inhalation while employed in the vicinity would be well advised to file claims to protect their right to benefits.

Benefits

The Workers' Compensation Law provides for payment of lost wages for time out of work and for reduction of earnings related to the compensable injury. W.C.L. Section 13. The benefit rate is two-thirds of the injured person's average weekly wage up to the statutory maximum rate of \$400 per week. Id. The statute also provides for payment of all causally related medical expenses directly by the compensation insurance carrier. W.C.L. Section 13.

Workers' Compensation Law Section 16 defines the benefits available in compensable death cases. As in cases of injury, the benefit rate is two-thirds of the deceased person's average weekly wage, up to the maximum rate of \$400 per week. The payment is divided among the surviving spouse, children under the age of 18, children under the age of 23 who are full-time

students, and totally disabled or blind dependent children of any age. The law also provides for reimbursement of funeral expenses, subject to statutory maximum rates dependent on the location of burial.

If there is no spouse or children, then the law provides for an award to grandchildren, brothers or sisters of the deceased who were both dependent upon him or her for financial support and under the age of 18, or under the age of 23 and full-time students. In this situation, the law also provides for an award to parents or grandparents of the deceased who were dependent upon him or her for financial support.

If there are no persons described in the two paragraphs above, then the law provides for a \$50,000 award to the deceased person's parents, and if there are no parents, to the estate.

Rescue Workers' Rights

Uniformed members of the New York City Police and Fire Departments are excluded from coverage under the Workers' Compensation Law. Absent action by the State Legislature to provide benefits, private citizens (such as construction workers) who participated in the rescue effort without connection to a particular employer or agency would also appear to be excluded from coverage under the Workers' Compensation Law and related statutes.

In the hours and days after the catastrophe, however, many suburban police and firefighters, as well as innumerable volunteer firefighters, responded to the scene to participate in the rescue effort. These individuals are covered under the Workers' Compensation Law and the Volunteer Firefighter Benefit Law, and would be entitled to file claims relating to physical or mental trauma suffered in the course of the rescue effort. The Volunteer Firefighter Benefit Law (and the Volunteer Ambulance Worker Benefit Law) provides greater benefits to injured persons (and their families in cases of death) than does the Workers' Compensation Law.

Limitations

The statute of limitations for workers' compensation and volunteer firefighter claims is two years; and notice must be given to the employer (if possible) within thirty days. W.C.L. Sections 18, 28; Volunteer Firefighter Benefit Law Section 25. The New York State Workers' Compensation Board would have jurisdiction over claims involving persons who were domiciled in New York, as well as over claims by those who live outside of the state, but were employed in New York.

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