

Matter of: Mark J. Tonner, Deceased - Death in
International Waters

File: B-255037

Date: March 18, 1994

DIGEST

1. An employee apparently committed suicide by jumping off a ship in international waters without anyone seeing him. The designated beneficiary of the employee's unpaid compensation is his father who seeks to use a United States Coast Guard Report in lieu of a court-issued declaration of death to legally establish his son's death. Since the suicide occurred in international waters, we accept the Coast Guard Report and all the surrounding circumstances as sufficient evidence to establish the employee's death and grant the father's claim for the unpaid compensation due his son.

2. Where best evidence, i.e., death certificate, is not available, our Office may exercise discretion in establishing the quantum of evidence necessary to support a claim. See Mary K. Heffernan, B-184305, Dec. 22, 1976.

DECISION

Mr. Gerald W. Tonner appeals our Claims Group's settlement which required him to obtain a court-issued declaration of death of his son, Mr. Mark J. Tonner, before his claim for the unpaid compensation of his son could be paid. For the following reasons, we modify our Claims Group's action and grant Mr. Tonner's claim for his son's unpaid compensation.

Mr. Mark J. Tonner, a civilian employee of the National Oceanic and Atmospheric Administration, Department of Commerce (NOAA), was a resident of Longboat Key, Florida. On or about March 23, 1992, he executed and filed with the NOAA a Standard Form (SF) 1152, Designation of Beneficiary, Unpaid Compensation of Deceased Civilian Employee, in which he designated Gerald W. Tonner, his father, as the sole

beneficiary of all his unpaid compensation in the event of his death.

The NOAA assigned Mark Tonner as an observer for the National Marine Fisheries Service, aboard the fishing vessel, F/V Cape San Vincent. The Report of Investigation of the United States Coast Guard² states that the F/V Cape San Vincent was in the Pacific Ocean about 225 miles northeast of the Galapagos Islands, Ecuador, at 0630 hours, local time, on December 10, 1992, when the Coast Guard received a telephone call, reporting that a man was overboard. The Coast Guard Report further states that Mr. Mark Tonner was last seen at approximately 2030 hours, local time, on December 9, 1992, aboard that ship. He was discovered missing at approximately 0600 hours on December 10, 1992, and a hand-printed suicide note was reported found in his cabin. A jump-rope and two thirty-pound exercise dumbbells were also reported missing from the ship.

The Coast Guard found no reason to suspect any criminal activity in connection with the apparent suicide of Mr. Tonner, and the Coast Guard Report closed the investigation as an apparent suicide. The body was not recovered and it is clear that the F/V Cape San Vincent was in international waters from the time when Mr. Tonner was discovered missing at 0600 hours, local time, on December 10, 1992, until he was reported missing at 0630 hours, local time, on December 10, 1992.

Mr. Gerald W. Tonner submitted a properly executed Standard Form (SF) 1153, Claim for Unpaid Compensation of Deceased Civilian Employee, dated February 13, 1993, to the NOAA. The gross amount of Mr. Tonner's unpaid compensation is \$518.28. There is no question that Gerald W. Tonner is the designated beneficiary and under the order of precedence established by 5 U.S.C. § 5582(b) (1988), he is entitled to receive the unpaid compensation if his son's death is legally established. No other claims have been received by the NOAA.

Title 5 U.S.C. § 5582(b) provides that money due to an employee at the time of his death shall be first paid to the beneficiary designated by the employee in a writing received in the employing agency before his death. Before any death-related payments may be paid, the fact of the death of the employee must, of course, be legally established. Normally,

²Issued on Form CG-4806, Report of Investigation, signed by SS/A G.M. Oviedo, USCG, Chief, Investigation Section, Eleventh Coast Guard District, dated Dec. 30, 1992. We note that no death certificate is available since the death occurred in international waters.

a properly issued certified copy of the death certificate is used to legally establish the death of a person. However, neither 5 U.S.C. §§ 5582 (1988), the implementing regulations in 4 C.F.R. Part 33 (1993), nor our decisions have provided definitive guidance in cases of a disappearance at sea in international waters without recovery of a body.

In at least two decisions concerning retired military members who disappeared at sea, our Office has rendered determinations only after courts of competent jurisdiction have declared the members dead, although neither decision actually makes such a judicial declaration a prerequisite to payment of a death claim.³ Also, in two decisions concerning civilian employees, where there was some doubt about entitlement to a statutory benefit or there were legal or factual conflicts in the written record, we found it necessary for a court of competent jurisdiction to resolve the matter.

However, for purposes of establishing entitlement to unpaid compensation, this Office looks at all the surrounding circumstances to determine the facts concerning death claims, and we are not necessarily bound by a court declaration of death. Thus, in Technical Sergeant Donald R. McRimmon, U.S.A.F. (Retired), B-251968, July 22, 1993, we held that where evidence exists that a person died on a particular date several years before the date of presumptive death declared by a state court, that person's arrears of pay are payable to his designated beneficiary only through the earlier date of suspected death.

In our latest decision specifically addressing the use of the best evidence in a claim for unpaid compensation of a deceased employee, we reiterated our Office's longstanding position that under our statutory authority to settle and adjust claims brought against the government, now found at 31 U.S.C. § 3702 (1988), we may exercise our discretion as to what evidence shall be the basis for the allowance of a

³ See Technical Sergeant Frederick V. Rusokoff, Sr., USAF, Retired, B-207841, July 20, 1982, and Commander Mike J. Trene, USN (Retired), B-203903, Sept. 3, 1981, reconsidered and affirmed by B-203903, Feb. 11, 1985, and B-203903, July 3, 1985.

⁴ See, respectively, Ned E. Kerr (Deceased), B-228750, Oct. 7, 1988, and Estate of John A. Thomas, 68 Comp. Gen. 284 (1989).

⁵ See Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991).

particular claim.⁶ Furthermore, while, as a general rule, we have required that all claims be supported by the best evidence obtainable, we have recognized that under certain circumstances the presentation of the best evidence is impossible or impracticable, and thus we have exercised our discretion in such cases in establishing the quantum of evidence necessary to support a claim.

In regard to the particular circumstances of the instant case, the Coast Guard investigation turned up strong circumstantial evidence that Mr. Mark J. Tonner committed suicide in international waters on or about December 10, 1992. In the absence of any evidence to the contrary, and in light of all the surrounding circumstances, we accept the Coast Guard Report as the best available evidence of what happened. We, therefore, conclude that there is sufficient evidence to establish the death of Mr. Mark J. Tonner on or about December 10, 1992.

Furthermore, we note that Mark J. Tonner resided in Florida, and Fla. Stat. Ann. § 731.103(2) (West 1976) provides that:

"(2) A copy of any record or report of a governmental agency, domestic or foreign, that a person is alive, missing, detained, or from the facts related, presumed dead is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report."

Accordingly, under the particular circumstances of the instant case, we modify our Claims Group's action in this matter and grant Mr. Tonner's claim for his son's unpaid compensation.

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⁶Mary K. Heffernan, B-184305, Dec. 22, 1976, citing 22 Comp. Gen. 269 (1942).

⁷Mary K. Heffernan, supra, citing 55 Comp. Gen. 402 (1975).