U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY ZENNY, claiming as widower of INGRID HALL ZENNY and DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, Miami, FL

Docket No. 02-1615; Submitted on the Record;
Issued May 14, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the employee's death on March 12, 2001 occurred while in the performance of duty.

On March 12, 2001 at approximately 5:00 a.m. the employee, a 42-year-old office worker with the Animal and Plant Health Inspection Service, was killed in Nassau, Bahamas, when her motor vehicle rolled over. In a statement attached to an August 10, 2001 supervisor's report of death, Ayanna Smith, a workers' compensation specialist with the employing establishment, noted that the employee's surviving husband was a U.S. Customs Service employee who was sent to the Bahamas on assignment under travel orders. Ms. Smith indicated, however, that the decedent did not begin her employment with the Agriculture Department until after her husband's assignment to the Bahamas. Although the employee's husband was on travel orders overseas, the employing establishment indicated that the decedent had not been employed prior to relocating to the Bahamas and was killed during a traffic accident while on her way to work. Appellant, the employee's surviving husband, filed a claim for death benefits on September 1, 2001.

In letters dated October 30, 2001, the Office of Workers' Compensation Programs requested additional information from appellant and the Agriculture Department concerning the employee's death and employment status. In response, appellant contended that his wife was on an overseas assignment and worked 24 hours a day, 7 days a week. He indicated that, at the time of death, she was going to work at the employing establishment's duty station located at the Nassau airport. Appellant stated that his wife was also directed by the United States Embassy and considered to be on the job 24 hours a day. He stated that the distance from the airport duty station to the place of the accident was three miles and that the decedent had been traveling from their place of residence to pick up a coemployee while enroute to the airport. He noted that the automobile she was driving was personally owned, but that "it was potentially subsidized through the Embassy in as much as we [a]re entitled to recoup the tax we paid on gasoline."

On January 24, 2002 the employing establishment controverted the claim, noting that the employee was driving her personal vehicle from her home to work when the accident occurred at 5:00 a.m. Her tour of duty began at 5:15 a.m. The employing establishment contended that the employee was not engaged in any official duties which required her to be off premises at the time of the accident and under no assignment other than her general responsibility to report to work. It noted that she was not required to use her personal vehicle other than as a means of transportation to and from work.

By letter dated February 11, 2002, appellant's representative, Ambassador Arthur L. Schechter, stated that the employee was "obligated to be on call 24 hours a day, 7 days a week in our Embassy. This was the obligation of every American employee, both in the Embassy and in the agencies." He indicated that the employee's "gasoline, repairs, *et cetera*, were, in essence, subsidized by government," due to the fact that gasoline and other taxes charged by the Bahamas were returnable to employees. Ambassador Schechter noted that the employee was on a direct route to work and did not digress from that route.

In a March 6, 2002 decision, the Office found that the employee's death did not arise in the performance of duty. The Office noted that she was killed while traveling to work, such that the death arose under the "going and coming" rule. The Office determined that the employee was not on a special assignment and was killed due to the ordinary hazards of the journey which are shared by all travelers.

The Board finds that the employee's death on March 12, 2001 did not arise in the performance of duty.

Appellant has the burden of proof to establish that the employee's death occurred while in the performance of duty.[1] The Federal Employees' Compensation Act provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] However, an award of compensation in a survivor's claim may not be based on surmise, conjecture or speculation or on appellant's belief that the employee's death was caused by his or her employment.[3]

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employer/employee relation. Instead, Congress provided for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty." The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly

[1] *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB ___ (Docket No. 00-2703, issued March 14, 2002).

[2] 5 U.S.C. § 8102(a).

[3] *See Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB ___ (Docket No. 00-2007, issued October 2, 2001).

found prerequisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time which the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[4]

The evidence establishes that the employee's death occurred prior to her normal work hours on a public highway in the Bahamas, not on the premises of the employing establishment. The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5] Exceptions to this general rule have been recognized which are dependent upon the relative facts to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer.[6] The Office generally classifies persons whose work requires them to be in a travel status as "off-premises workers."[7] The evidence, however, does not establish that any exceptions to the general rule are applicable to the facts of this case. Appellant has not demonstrated that the employee was required to travel on the highway; that the employer contracted and furnished transportation to and from work; that the employee was subject to emergency calls; or used the highway while doing something incidental to her employment with the knowledge and approval of the employer. The record does not establish that the decedent was an off-premises employee; rather, her duty station was located on the premises of the employing establishment at the airport in Nassau and that she had fixed hours of employment. Her trip on March 12, 2001 does not meet any exceptions to the going to and coming from work rule.

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[4] *Connie J. Higgins (Charles H. Higgins), supra* note 1; *see also Paul R. Gabriel*, 50 ECAB 156 (1998).

[5] *Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[6] *Melvin Silver*, 45 ECAB 677 (1994); *Estelle M. Kasprzak*, 27 ECAB 339 (1976).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992); *see also Godfrey L. Smith*, 44 ECAB 738 (1993). Four categories of off-premises employees are recognized by the Office procedure manual: (1) messengers, letter carriers and chauffeurs who, by the nature of their work, perform service away from the employer's premises; (2) traveling auditors and inspectors whose work requires them to be in a travel status; (3) workers having a fixed place of employment who are sent on errands or special missions by the employer; and (4) workers who perform services at home for their employers.

Another exception to the general rule recognized by the Board is the "special errand" exception as described in *Elmer L. Cooke*:[8]

> "It is a general rule that injuries to an employee while traveling between his home and a fixed place of employment are not in the course of employment and, therefore, are not compensable. However, exceptions to the rule have been developed over the years. An exception is made for travel from home when the employee is to perform a 'special errand': in such a situation the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the special errand. Ordinarily, cases falling within this exception involve travel which differs in time, or route, or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work."[9] (Emphasis and citations omitted.)

There is no evidence that on the morning of March 12, 2001 the employee was performing a special errand for the employer. Appellant stated that the purpose of the employee's trip that morning was "to transport herself to the place she was assigned to be on that day." The accident occurred after the employee left home in her personal vehicle and commenced on her normal route in going to work. Appellant noted the same response to the Office's inquiry as to whether the employee was performing any duties during the time of the accident. He indicated that his wife traveled from their place of residence to pick up a coemployee while enroute to work. However, this does not constitute the performance of a "special errand" for the employer. There is no evidence that there was work done at home by the direction of and for the benefit of the employer; that work was regularly performed at home with the knowledge and consent of the employer; or of an essential continuity of any work done at home with that performed at the regular place of business.[10] The employing establishment noted that the employee was not engaged in any official duties other than her general responsibility to report to work. The burden of proof is not on the Office to prove a nonemployment reason for the employee's trip to work on the morning of March 12, 2001; rather, it is on appellant to prove that the trip was for an employment purpose or "special errand" exception to the ordinary going to or coming from work rule. Appellant has not met his burden in this case.

Appellant's primary argument before the Office and on appeal is that his wife should be considered to have been on duty 24 hours a day, 7 days a week; contending that her hours and details of work were controlled and directed by the government through the United States

[8] 16 ECAB 163 (1964).

[9] *Id.* at 164-65.

[10] *Id.* at 165.

Embassy in the Bahamas. The record does not establish, however, that the employee was assigned to travel, temporary duty or a special mission by her employer. Larson, in his treatise on *Workers' Compensation Law*, sets forth the general criteria for performance of duty as it relates to traveling employees, as follows:

> "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."[11]

Similarly, the Board has recognized the rule that the Act covers an employee 24 hours a day when he or she is on travel status or on a temporary-duty assignment or a special mission and engaged in activities essential or incidental to such duties.[12] In *Janet K. Matsumura*,[13] the claimant sustained an injury in an automobile accident while touring rice fields in the Philippines. She was employed at the Pearl Harbor Naval Shipyard in Hawaii but assigned on temporary duty to the Philippines. The Board found, however, that her injury was not sustained in the performance of duty as it occurred at a locality several hundred miles from her assigned temporary-duty station while engaged in activities, personal in nature and not reasonably incidental with her employment.

The record reveals that the employee was not hired by the employing establishment while in the United States and then assigned to duty in the Bahamas, as was appellant. Rather, following their move to the Bahamas the employee secured employment with the Agriculture Department. As such, her employment cannot be characterized as a temporary-duty assignment or special mission away from her home. The employee was not detailed to, assigned by or given travel orders from her employer to work in the Bahamas. Rather, she became a civil employee of the United States only after residing in Nassau. The facts of the present case are readily distinguishable from the type of situation where a person is employed and then provided with travel orders to work at an overseas location.

Appellant and his representative request the Board to extend coverage in this case, contending that the decedent's work was "under the control and direction" of the United States Embassy and she was obligated to be on call. It is well established, however, that the terms of the Act are specific as to the method and amount of payment of compensation. Unless a claimant's contentions are in keeping with the scope or intent of the Act, *i.e.*, unless the statute authorizes payment of the kind demanded, an Office denial of such demands must be affirmed.[14] Neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those in keeping with the statue.[15] The employee's

[11] A. Larson, *The Law of Workers' Compensation*, § 25.00 at 5-200 (1982).

[12] *See Stanley K. Takahaski*, 35 ECAB 1065 (1984); *William K. O'Connor*, 4 ECAB 21 (1950).

[13] 38 ECAB 262 (1986).

[14] *See Edward Schoening*, 48 ECAB 326 (1997).

[15] *See Anthony M. Kowal*, 49 ECAB 222 (1997).

employer was the Agriculture Department and as such she became a civil employee of the United States as defined under the Act.[16] The plain language of the Act does not provide that civil employees working abroad within various branches of the government come under the "control and direction" of a United States Embassy for determination of workers' compensation coverage.[17] While the circumstances of this case are indeed unfortunate, to extend coverage would not be in keeping with terms of the statute.

Appellant's claim for death benefits in this case must be denied. The fatal automobile accident of March 12, 2001 constitutes an off-premises injury sustained by an employee with fixed hours and place of work. There is no exception to the going to and coming from work rule which would allow for coverage under terms consistent with the language of the Act and Board case law.

The March 6, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[16] 5 U.S.C. § 8101(1)(a). An "employee" is defined, in relevant part, as "a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States…."

[17] *Compare* 5 U.S.C. § 8142(c)(3) which provides that an injury sustained by a Peace Corps volunteer when he or she is outside the United States is deemed proximately caused by her employment, unless the injury or disease is caused by willful misconduct of the volunteer; caused by the volunteer's intention to bring about the injury or death of himself or of another; or proximately caused by the intoxication of the injured volunteer.