U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILFREDO CARRILLO and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Miami, Fla.

Docket No. 97-25; Submitted on the Record;
Issued October 2, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant's injuries of October 11, 1993 were sustained while in the performance of duty.

On January 17, 1995 appellant, then a 48-year-old customs inspector, filed a claim alleging that on October 11, 1993 at approximately 7:00 a.m. he sustained multiple injuries when he was involved in a motor vehicle accident while traveling in his private vehicle en route to work. Appellant submitted several maps marking his route, the location of his place of employment and the location of the accident, approximately 15 miles from his workplace. By letter dated March 8, 1995, the employing establishment controverted appellant's claim stating that he was not on a premises owned, operated, or controlled by the U.S. Customs Service, he was not on travel or temporary duty (TDY) status at the time of the accident, he was not engaged in his official or assigned duties, but was en route to his regular place of employment, the location of which was the same every working day, and he was driving his privately owned vehicle.

In a decision dated March 30, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he was not in the performance of duty when the accident occurred.

Appellant requested a hearing and submitted additional documentary evidence in support of his claim. At the hearing, appellant testified that his normal-duty station was the Miami International Airport, that his normal workday began at 8:00 a.m. and that he was on a direct route to his place of employment at the time of the accident.[1] Appellant asserted that although he had not yet arrived at his place of employment when the accident occurred, the fact that he

[1] Appellant further testified that his daughter, whom he was taking to school, was also in the vehicle and that her school was directly on the route to his employment. There is no indication in the record that he had reached the school at the time of the accident.

was in full uniform and was carrying his weapon placed him in "Peace Officer" status and, therefore, he was officially on duty.[2] In support of his claim, appellant submitted a copy of an interoffice memorandum, dated December 20, 1991, from "Regional Counsel Southeast Region" to "Special Agent in Charge Southeast Region," which addressed the coverage of S.B. 1640, Chapter 91-43, of the 1991 Laws of Florida, concerning Peace Officer status for Federal Law Enforcement Officers. The portion of this memorandum to which appellant referred stated:

> "[C]ustoms Inspectors are only considered in 'on-duty' status when they are on the way to, or from, their employment, or, when they are on assigned duty in accordance with section 5(c)(2) of the Customs firearms policy…. Generally, Customs Inspectors are considered to be on duty when they are traveling to or from work or when they are performing their regularly assigned or, specifically assigned, overtime duties."

In a decision dated January 18, 1996, the Office hearing representative set aside the Office's March 30, 1995 decision, on the grounds that appellant's evidence was sufficient to require further factual development. The hearing representative instructed the Office to advise the employing establishment to explain the employing establishment's basis for controversion of the claim, as stated in their March 8, 1995 letter, in comparison with the December 20, 1991 memorandum.[3]

In a letter dated March 21, 1996, the employing establishment stated that the December 20, 1991 memorandum, which expressed the opinion of the employing establishment regarding the Florida Peace Officer Law, was "nonbinding" and "was never intended to, could not and should not define when an officer is, or is not, 'on-duty' for any purpose other than the application of the Florida Peace Officer law."[4] The employing establishment explained that the use of the phrase "on-duty" meant having the "authority to arrest and possess firearms under federal law." In support for its contention, the employing establishment noted that the memorandum cited to section 5(c)(2) of the U.S. Customs's firearms policy, which further provides that "Customs Inspectors, Customs Officers performing inspector duties (WAEs, part-time, intermittents, temporaries), CEOs and seizure custodians on call and those officers who are

[2] Appellant also asserted at the hearing that after his return to work, he aggravated or reinjured himself while lifting some boxes. This aspect of appellant's case is not before the Board on the present appeal as there is no final Office decision on this matter. *See* 20 C.F.R. § 501.2(c).

[3] By decision dated February 8, 1996, the Office declined to develop the case further on the grounds that it was unnecessary. The Office explained that the full text of the December 20, 1991 memorandum, upon which appellant relied, made it clear that there are five requirements for being considered in Peace Officer status, that appellant did not meet several of these requirements and, therefore, was not in the performance of duty at the time of the accident. In a subsequent decision dated May 7, 1996, the District Director vacated the Office's February 8, 1996 decision and ordered that the appropriate factual development be undertaken as instructed by the hearing representative.

[4] The employing establishment further stated that "the opinions of this office are merely opinions and do not have a binding effect upon the [employing establishment] nor can they in any manner be asserted to be the 'official position' of the [employing establishment] without formal adoption via a change in policy statement, rule, or regulation. The working conditions of employees are only changed by legislation or official policy statements and not be legal opinion."

required to carry the firearm, with which they have qualified in on-duty status are authorized to carry them to and from their residence *to the place where their duties are to be performed."* (Emphasis in the original.) The employing establishment further explained:

> "In the instant case, in the opinion rendered, 'on-duty' was not intended to mean a situation where the officer was *functionally* on duty and thus performing the functions of an inspector and thus entitled to all the rights and having all the responsibilities attendant thereto, but was merely referring to an officer being 'on-duty' only in the sense that they possessed their federal arrest and firearms authority during travel to and from 'the place where their duties are to be performed.' The purpose of sub-section 5(c)(2) [of the Florida Peace Officer Bill] was 'simply to ensure that customs inspectors would not run afoul of, or be subjected to, any state laws pertaining to possession or transportation of firearms while traveling to and from the location of their duties.'"

In a decision dated August 1, 1996, the Office denied appellant's claim on the grounds that he was not in the performance of duty at the time of the motor vehicle accident.

The Board finds that the injuries appellant sustained on October 11, 1993 were not sustained while in the performance of duty.

The Federal Employees' Compensation Act[5] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[7] As a general rule, off-premises injuries sustained by an employee, having fixed hours and place 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, but out of ordinary nonemployment hazards of the journey itself, which are shared by all travelers.[8] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[9] or which are in the nature

[5] 5 U.S.C. § 8101, *et seq.*

[6] *George A. Fenske,* 11 ECAB 471 (1960).

[7] *Leo Boyd Purrinson,* 30 ECAB 644 (1979).

[8] *Mary Chiapperini,* 7 ECAB 959 (1955); *Lillie J. Wiley,* 6 ECAB 500 (1954).

[9] These recognized exceptions are dependent upon the particular facts and related situations: "(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; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer." *Lillie J. Wiley* and *Mary Chiapperini, supra* note 8; *Jacqueline Nunnally-Dunord,* 36 ECAB 217 (1984).

of necessary personal comfort or ministration.[10] The fact that no deduction is made from the employee's salary for the time he engages in the questioned activity does not, by itself, constitute that activity as being incidental to the employment.[11]

In the instant case, there were no employment factors involved in appellant's injury off the employment premises at the time the injury occurred.[12] Appellant had a set tour of duty beginning at 8:00 a.m. and the incident giving rise to his injury on October 11, 1993 occurred at approximately 7:00 a.m. after appellant had started his journey to work, but before he arrived on the employment premises and had begun his tour of duty for that day. The evidence of record does not reveal any causal relationship between appellant's federal employment and the injury he sustained on October 11, 1993.

Appellant's assertion that as he was in full uniform and carrying his weapon at the time of the accident he was brought into the performance of duty, is without merit. This contention is not directly relevant to appellant's claim as his status as a Peace Officer under the Florida State statute is not determinative of his status under the Act.[13] As appellant's case does not fall within a recognized exception to the premises rule, the Board finds that the general rule applies and appellant's injury on October 11, 1993 did not arise in the course of his employment because it occurred off the premises while he was going to work.

[10] For *e.g.*, accidents occurring while an employee is on the way to the lavatory, *Abraham Katz,* 6 ECAB 218 (1953); or the drinking of coffee and similar beverages, or the eating of snack, *Helen L. Gunderson,* 7 ECAB 707 (1955) and *Harris Cohen,* 8 ECAB 457 (1955), respectively. These activities are so generally accepted that such activity does not take an employee out of the course of his employment.

[11] *Julianne Harrison,* 8 ECAB 440 (1955).

[12] *Rose Mary Croom,* 8 ECAB 711 (1956).

[13] *See Daniel Deparini,* 44 ECAB 657 (1993).

The August 1, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 2, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member