



a call concerning a suspicious motor vehicle. Appellant asserted that, at the time of the shooting, decedent was involved in the apprehension of an individual who was in the commission of a crime against the United States.

An autopsy report, dated June 18, 2004, noted that decedent's cause of death was gunshot wounds and the manner of death was homicide. A death certificate noted that decedent died on June 18, 2004 of gunshot wounds. Appellant submitted an incident report dated June 18, 2004 which noted that, at 9:37 a.m., officers responded to a shooting at a local Wal-Mart. The report indicated that decedent was on location at a Wal-Mart investigating a "suspicious van" displaying New Mexico license plates that was parked in the north east corner of the parking lot. The vehicle was registered to Michael Probst from New Mexico and the call history stated that the van had been running all night. When decedent contacted an unknown male inside the van, the suspect opened fire with an unknown type of firearm. Decedent was shot in the throat and head and the accompanying officer returned fired. The identity of the suspect was Timothy Joe Irwin and he was found dead in the van. It was subsequently discovered that the suspect had active warrants out for his arrest for assault/domestic violence with violent tendencies from Florida and a protection order from Florida. A September 20, 2004 memorandum from the Department of Justice, Bureau of Alcohol, Tobacco and Firearms, authored by Ronald E. Williams, assistant chief counsel in Dallas, Texas, dated September 20, 2004, noted that the suspect who shot decedent was committing a violation of the federal firearms laws on that occasion, as he possessed the firearm in violation of 18 U.S.C. §§ 922(g)(3) and 922(g)(8). In addition, it was determined that the suspect possessed a destructive device in violation of 26 U.S.C. § 5861(d). Mr. Williams opined that, at the time of decedent's death, he was engaged in the apprehension or attempted apprehension of a person who had committed and was committing crimes against the United States.

By letter dated May 4, 2005, the Office advised appellant of the factual evidence needed to establish her claim. The Office advised that, in order to fall within the purview of 5 U.S.C. § 8191, decedent must have been engaged in the attempted apprehension of a person for a crime against the United States which required that the stimulus for the officer's response was an actual federal crime. The Office advised that the later discovery of a federal crime was not, in itself, sufficient to bring the death within the coverage of 5 U.S.C. § 8191. No additional information was received.

In an August 1, 2005 decision, the Office denied appellant's claim for death benefits under section 8191 of the Act. The Office indicated that the stimulus for the apprehension or attempted apprehension of a suspect must be a federal crime or an integral part of a federal crime. However, in this instance, the stimulus for the suspect's apprehension was a local matter and decedent's injury occurred prior to the discovery of the federal offense. The Office found that subsequent discovery of a federal crime does not bring an officer into the scope of coverage.<sup>2</sup> Therefore, appellant's claim did not fall within the purview of 5 U.S.C. § 8191.

By letter dated August 11, 2005, appellant requested an oral hearing before an Office hearing representative. The hearing was held on May 30, 2006.

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<sup>2</sup> Federal Procedure Manual, Part 4 -- Special Case Procedures, *Non-Federal Law Enforcement Officers*, Chapter 4.200(7)(a) (September 1994).

By decision dated August 11, 2006, the hearing representative affirmed the August 1, 2005 decision.

**LEGAL PRECEDENT**

Under the Act, an individual seeking death benefits has the burden of proof to establish the essential elements of his or her claim, including the fact that decedent was an employee of the United States within the meaning of the Act.<sup>3</sup> In this case, decedent was a nonfederal police officer.<sup>4</sup> Appellant has the burden of establishing that decedent was an eligible officer as defined by section 8191 of the Act.<sup>5</sup> In pertinent part, this section provides that an eligible officer is any person who is determined by the Secretary of Labor in her discretion to have been on any given occasion--

“(1) [A] law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person--

(A) for the commission of a crime against the United States, or

(B) who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States, or

(C) who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or

“(2) a law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection with such a crime; or

“(3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States.”<sup>6</sup>

The Board has recognized that the issue of whether a local law enforcement officer was attempting to apprehend someone for, or prevent the commission of, a federal crime, turns initially on the question of whether, at the time the injury was sustained, the local law enforcement officer knew that a federal crime or potential federal crime was being, or about to

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<sup>3</sup> *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

<sup>4</sup> *See* 5 U.S.C. § 8101(1) (defining a federal employee).

<sup>5</sup> *See Lance D. Coleman*, 41 ECAB 604, (1990); *Morris W. Farlow*, 95 ECAB 1959 (1997).

<sup>6</sup> 5 U.S.C. § 8191(1)-(3).

be, committed and therefore formed the intent to apprehend someone for, or to prevent the commission of, a federal crime.<sup>7</sup>

However, knowledge of a potential federal crime at the time of injury or death does not, alone, establish eligibility to receive benefits under section 8191.<sup>8</sup> Appellant must also establish that the activities in which decedent was engaged at the time of his injury constituted the apprehension or attempted apprehension of a federal offender or the lawful prevention of, or lawful attempt to prevent, the commission of a federal crime.<sup>9</sup>

### ANALYSIS

Appellant indicated that when decedent was initially dispatched to the scene, the purpose was for a welfare call for a suspicious motor vehicle parked in a Wal-Mart parking lot which was located on an interstate thoroughfare. Appellant asserts that the stimulus for the dispatch changed when the suspect fired his weapon and at that point the mission was no longer a response to a welfare call. Appellant contends that the Congressional intent of 5 U.S.C. § 8191 was to bring local law enforcement within the coverage of the Act and therefore the statute should be broadly construed. Appellant asserts that decedent would have found out that his assailant was a federal fugitive but was shot before he had the chance to question him.

While the Act is remedial and should be broadly and liberally construed in accord with its purpose, the primary rule of statutory construction is to give effect to legislative intent. In arriving at such intent, the words in a statute should be construed according to their common usage.<sup>10</sup> Section 8191 does not explicitly state that an eligible officer must be aware of a federal crime, but the legislative history supports that the local officer be purposely, not accidentally, engaged in the federal law enforcement activity.<sup>11</sup> The statute's wording suggests a contemporaneous specificity. The phrases "on that occasion" and "at that time" in the statute indicate that to be eligible for coverage under the Act, the local officer must be apprehending or trying to apprehend a person who is committing or is wanted for committing a federal crime at the time of the local officer's activity.

Certainly, the congressional sponsors of section 8191 were clear that "the crime for which the person was being apprehended would be "controlling" in determining coverage.<sup>12</sup> This is because the purpose of the Act was to provide compensation benefits for state and local

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<sup>7</sup> *Joel Goldberg*, 45 ECAB 448, 452 (1994).

<sup>8</sup> *Jean Ann Nalley (Guy David Nalley)*, 38 ECAB 561, 565 (1987).

<sup>9</sup> *Kenneth Dudonis*, 37 ECAB 287, 293 (1986).

<sup>10</sup> *Mary C. Anderson-Paine (Robert O. Anderson)*, 47 ECAB 148 (1995).

<sup>11</sup> *See Lance D. Coleman*, *supra* note 5 (listing congressional comments to this effect).

<sup>12</sup> *See James R. Coon*, 43 ECAB 587, 595-97 (1992); Cong. Rec., September 11, 1967, pp. 24, 941-42; September 14, 1967, pp. 25, 564.

law enforcement officers who “expose themselves to the dangers” of enforcing federal laws or providing assistance to federal authorities.<sup>13</sup>

The Board has consistently held that coverage will not be afforded where the law enforcement officer is engaged in a purely local police matter,<sup>14</sup> nor is coverage appropriate if, only after the injury or death, is it discovered that a federal crime was involved; in such a case the initial police activity which resulted in the injury or death would have been a purely local matter.<sup>15</sup> Thus, the proximate cause of the injury or death was related to whatever prompted the local officer’s actions; any subsequent link to federal offenses or potential crimes becomes too tenuous to support coverage in keeping with the purpose of the Act.<sup>16</sup>

A review of the Board’s case law involving traffic stops demonstrates the distinguishing characteristics of purely local police activity. The Board has denied coverage when the officer was engaged in a local police matter and only later learned that the suspect was a possible federal offender.<sup>17</sup>

In this case, the facts establish that decedent had no knowledge that the occupant of the vehicle was a federal offender, potential or otherwise. On June 18, 2004 decedent was asked to respond to the parking lot of a Wal-Mart investigating a “suspicious van” with New Mexico license plates which had been running all night. According to the police incident report, decedent contacted an unknown male inside the van and the suspect opened fire, with an unknown type of firearm. Decedent was shot in the throat and head and later died at the hospital. The identity of the suspect was later determined to be Timothy Joe Irwin who was killed by a fellow officer. It was subsequently discovered that the suspect had active warrants out for his arrest for assault/domestic violence from Florida, a protection order with armed and dangerous caution from Florida, that he committed a violation of the federal firearms laws on that occasion, as he possessed the firearm in violation of 18 U.S.C. §§ 922(g)(3) and 922(g)(8) and possessed a

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<sup>13</sup> See *James David Finch*, 24 ECAB 181, 185-6 (1973); Cong. Rec., September 14, 1967, p. 25, 567.

<sup>14</sup> See *James R. Coon*, *supra* note 12 at 597-605.

<sup>15</sup> *Michael McKeon*, 28 ECAB 8 (1976); *Angel F. Poggi*, 28 ECAB 199 (1977); *Edward L. Jackson*, 31 ECAB 550 (1980).

<sup>16</sup> See *Alan R. Penberg*, 42 ECAB 610, 614 (1991) (finding that whether the on-going investigation might have prevented further federal violations was too remote a circumstance to bring appellant within coverage of section 8191).

<sup>17</sup> See *Rocco A. Ranaudo*, 35 ECAB 689, 691 (1984) (where a police officer approached an idling vehicle whose driver appeared to be asleep, was injured when the man accelerated rapidly and the driver was subsequently found to be an illegal alien; the Board denied coverage because the officer was engaged in a local police matter, a potential traffic violation, and only later did the police department learn that the driver was a possible federal offender); *Lance D. Coleman*, *supra* note 5 at 641 (where a highway patrol officer stopped a vehicle because of a broken tail light and was shot; the Board held that the officer was not covered under section 8191 because only after the incident was it discovered that the assailant was wanted for a federal crime); *Morris W. Farlow*, 48 ECAB 659 (1997) (where a police officer stopped a vehicle because its out-of-state license plate number was registered to a different make of car and the police reported “suspicious activity” by the car’s occupants; the Board denied coverage because nothing of a federal criminal nature was known to appellant as he approached the car’s driver and was immediately shot).

destructive device in violation of 26 U.S.C. § 5861(d). Nothing of a federal criminal nature was known to decedent when he approached the automobile, made contact with the occupant and was immediately shot. Only afterward, were the potential federal violations discovered. Therefore, the circumstances of this case do not afford coverage under section 8191 of the Act.

At the time of death, decedent was responding to a welfare call for a suspicious van that had been parked in the Wal-Mart parking lot and was running all night, not to arrest or apprehend the occupant. Before he could ask the suspect to identify himself, he was shot. The activity of responding to a suspicious vehicle and approaching the driver did not constitute the apprehension of a federal offender or prevention of a federal crime.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant failed to establish that decedent was an eligible officer under the purview of section 8191 of the Act.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 11, 2006 is affirmed.

Issued: July 18, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> See *Kenneth Dudonis*, *supra* note 9 at 294.