

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LAVENIA DOSTER, claiming as widow of GORDON J. DOSTER  
and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD,  
Philadelphia, Pa.

*Docket No. 96-2539; Submitted on the Record;  
Issued September 10, 1998*

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DECISION and ORDER

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

The issue is whether appellant established that the employee's death occurred in the performance of duty, thus entitling her to survivor's benefits.

Appellant filed a survivor's claim on December 7, 1993, alleging that the employee's death on November 28, 1993 from a gunshot wound was sustained in the performance of duty. The employee, appellant's husband and an electrical systems mechanic, had been on extended temporary duty at the Charleston, South Carolina Naval Shipyard. The employing establishment reported that he had left work at 5:00 p.m. on the day he died and was due back at 7:30 a.m. the next day.

A police report indicated that officers were called by a witness in a motel office who heard a gunshot and saw four youthful males running away from a red/maroon Oldsmobile in the parking lot of the Felix Pickney Recreation Center across the street. Police found the employee slumped in the driver's seat of the car, bleeding from the left chest area. He was pronounced dead on arrival at a nearby hospital.

The employing establishment's investigative service reported that the area in which the employee was shot was "a known center of distribution of illegal narcotics" and that the North Charleston Police Department was actively pursuing an investigation. In a faxed report dated May 26, 1994, Detective R.D. Hatchell stated that the purpose of the employee's trip to the recreation center was to buy crack cocaine. He related:

"[The employee] and a female friend had planned to get together when he got off work and get high. [The employee] had got off work, drove to the North 52 motel room 115 which was in his name and picked up the female friend in the parking lot. They then drove to the Master Inn motel room 127, which was also in [the employee's] name. [The employee] then shower[ed] and changed clothes. The

female friend then took a shower herself. [The employee] then drove to a money machine and withdrew some money. [The employee] returned to the Master Inn and picked up the female friend. They then drove to the Liberty Hill neighborhood. They checked Nesbit Street for drug dealers and located none. They then drove to the Felix Pickney Community Center where [the employee] attempted to buy 'crack cocaine' from some subjects. The subjects in turn attempted to rob him and he was shot."

The detective added that the scene of death was three to four miles from the navy base where the employee worked.

The death certificate revealed the time of death as 7:15 p.m. and the cause as exsanguination, massive internal hemorrhage and single gunshot wound to the left arm and chest.

On June 2, 1994 the Office of Workers' Compensation Programs denied the claim on the grounds that the evidence failed to establish that the employee's death occurred in the performance of duty. The Office added that the activity leading to the homicide did not arise out of and in the course of employment.

Appellant timely requested a hearing, which was held on December 22, 1994. Appellant did not testify at the hearing, but her attorney argued that there was no proof that the employee was out to buy crack cocaine, that he was wearing a sweat suit and could have been at the recreation center to exercise and that employees on temporary duty are covered under the Federal Employees' Compensation Act for 24 hours a day.

On June 12, 1995 the hearing representative denied the claim on the grounds that the employee's fatal injury did not occur in the performance of duty. The hearing representative found that the factual evidence compelled the conclusion that the employee was at the site of his death for purely personal reasons, having no connection with his temporary-duty assignment.

Appellant timely requested reconsideration and submitted an autopsy report. Appellant's attorney argued that the Office erred in relying on "hearsay upon hearsay" from the detective in concluding that the employee was engaged in a drug transaction at the time of his murder and that thus the Office had not met its burden of proving that he was outside the scope of employment.

On May 20, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office noted that the autopsy confirmed a lack of alcohol or cocaine in the employee's system<sup>1</sup> but concluded that his presence at the recreation center, whether or not to purchase drugs, could only be considered a personal activity of sufficient deviation to remove him from the course of his employment.

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<sup>1</sup> Toxicological examination of the blood showed the presence of the metabolite of cocaine, benzoylecgonine (2.06 ug/ml).

The Board finds that the employee's death did not occur in the performance of duty and that, therefore, appellant is not entitled to survivor's benefits.

The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> However, Congress 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.<sup>3</sup>

An employee whose work entails travel away from the employer's premises is held to be within the course of his or her employment continuously during the trip, except when a distinct departure on a personal errand is shown.<sup>4</sup> The Board has recognized the general workers' compensation rule<sup>5</sup> that the Act covers an employee 24 hours a day when he or she is on travel status, a temporary-duty assignment, or a special mission and is engaged in activities essential or incidental to employment duties.<sup>6</sup>

Thus, injuries arising from the necessity of eating in restaurants, sleeping in hotels or motels and driving to and from the temporary-duty station are generally covered because these activities are essential or reasonably incidental to an employee's official duties away from home.<sup>7</sup> Therefore, coverage is extended to an employee who "was where he was, at the time he was, solely because of his mission on behalf of his employer."<sup>8</sup>

However, the fact that an employee is on travel status, a special mission or temporary duty does not raise an inference that the condition or injury claim occurred in the performance of duty.<sup>9</sup> When the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.<sup>10</sup>

The Office bears the burden of proof in showing that an employee on temporary duty deviated and removed himself from the performance of duty for purely personal pursuits.<sup>11</sup> The

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Christine Lawrence*, 36 ECAB 422, 423 (1985).

<sup>4</sup> *Ann P. Drennan*, 47 ECAB \_\_\_\_ (Docket No. 94-2170, issued August 27, 1996).

<sup>5</sup> A. Larson, *The Law of Workmen's Compensation*, § 25.00 (1993).

<sup>6</sup> *Jennifer P. Sharp*, 48 ECAB \_\_\_\_ (Docket No. 95-379, issued November 25, 1996).

<sup>7</sup> *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993).

<sup>8</sup> *William K. O'Connor*, 4 ECAB 21, 25 (1950).

<sup>9</sup> *Herschel A. Rodgers*, 48 ECAB \_\_\_\_ (Docket No. 95-2746, issued August 20, 1997).

<sup>10</sup> *Janet Kidd (James Kidd)*, 47 ECAB \_\_\_\_ (Docket No. 95-1977, issued July 17, 1996).

<sup>11</sup> *Michael J. Koll, Jr.*, 37 ECAB 340, 341 (1986).

Office's procedure manual requires that the Office investigate whether an injury or death occurred in the performance of duty by considering a number of factors, including when and where the employee was last on official duty and was expected to resume duty, the distance between the places of injury or death and the official duty, the points between which the employee was traveling, the purpose of the trip, whether the injury or death occurred on the direct or most usually traveled route and, if not, a full explanation of the nature and extent of any deviation, whether the employee was in a government-owned car and whether the employee's travel expenses were reimbursable.<sup>12</sup>

Here, the employee's death occurred outside of working hours and off the premises of the temporary-duty station. His activities prior to his presence at the recreation center—taking a shower, changing clothes, withdrawing money from an ATM—could be considered reasonably incidental to his specially assigned employment.

However, the detective's report establishes that his presence in the parking lot where he was killed was a deviation from the normal everyday incidents of employment. The center was commonly known to the police as an area "where illegal narcotics [were] frequently bought and sold."<sup>13</sup>

Appellant's attorney argues that the Office did not meet its burden of proof in establishing a deviation because the police report is hearsay. The attorney speculates that the employee may have gone to the recreation center to eat or to exercise and that these activities would have been reasonably incidental to his employment.

The Board finds that the report from Detective Hatchell is credible and probative. The report was written on the letterhead of the North Charleston Police Department, was signed by a sworn law enforcement officer and was presented to an investigative agency of the employing establishment. The information in the report comes from a disinterested but locally knowledgeable detective who was responding to specific questions from employing establishment investigators.

The details of the employee's activities after he left work at 5:00 p.m. suggest a witness' contemporaneous account of what transpired in the two-hour period before his death. The lack of drugs or alcohol in the employee's system does not contradict his presence at a known place of narcotics dealing. Thus, the Board finds that the Office has met its burden of proof in showing that the employee was not engaged in normal, ordinary, and natural activities and circumstances reasonably incidental to his temporary-duty assignment. Therefore, the employee

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(d)(1)(a)-(h) (August 1992).

<sup>13</sup> See *Ronelle Smith*, 47 ECAB \_\_\_\_ (Docket No. 94-2308, issued September 5, 1996) (finding that appellant's beer-drinking with her supervisor at three different establishments after work constituted an identifiable deviation, thus removing her from the protection of the Act).

had removed himself from the course of employment and consequently from coverage under the Act.<sup>14</sup>

The May 20, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
September 10, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>14</sup> See *Evelyn S. Ibarra*, 45 ECAB 840, 841 (1994) (finding that appellant's jogging during her lunch time was not an incident reasonably related to her temporary-duty assignment, such as eating or traveling to her hotel, but was a personal recreational activity).