

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KELLI KIMBROUGH, claiming as the widow of JACK L. KIMBROUGH and  
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,  
Kansas City, MO

*Docket No. 00-1444; Submitted on the Record;  
Issued May 16, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has established that the employee's death on March 5, 1994 occurred in the performance of duty.

On January 24, 1995 appellant filed a claim alleging that on March 5, 1994 her husband, a 28-year-old air traffic controller, was killed in an aircraft crash while in the performance of duty.

The Office of Workers' Compensation Programs received investigative reports related to the employee's death. Appellant's December 14, 1994 statement indicated that her husband had accumulated between 75 to 100 hours of flying time since he obtained a pilot's license. She stated that her husband told her that he was due a flight check before they moved to Des Moines, Iowa, in May 1994.

In a March 3, 1994 statement, Sara Freisen-Hall, the widow of Marvin Hall, stated the purpose of the flight was for the employee to obtain a biannual flight review. Mrs. Freisen-Hall's deceased husband owned the plane involved in the crash.

A September 16, 1999 statement of Jerry T. Taylor, an employing establishment manager, noted that the purpose of the flight was to provide a biannual flight review. Mr. Taylor indicated that the employee's supervisor stated that the employee had taken annual leave to obtain a biannual flight review before his currency expired.

In a June 13, 1994 letter, Clarence E. Newbern, an air traffic division manager, advised the coroner, Dr. C.C. Cunnick, that his finding that the employee was on a required flight review for the employing establishment was incorrect. Mr. Newbern stated that the employee was taking a flight check for his personal pilot's license and that the employee was not required to hold such a license for his air traffic controller position. He noted that none of the air traffic

controllers were required to have a pilot's license to hold their positions. Mr. Newbern stated that a flight review was not required for air traffic controllers.

An April 19, 1994 statement of Myron Zimpfer, the employee's coworker, noted that, on the day before the aircraft crash, he witnessed a telephone call the employee made attempting to schedule a biannual flight review. He also stated he saw the personnel log for the day of the accident, which indicated that the employee used one hour of compensatory time, before he left for the flight.

In an undated statement, Matt North, the employee's coworker, indicated that he participated in a meeting with other employing establishment employees about the employee's duty status at the time of the aircraft crash. He stated that although there was some confusion as to whether the employee was on a biannual flight review at the time of the crash, they knew that he was scheduled for one with Mr. Hall at 4:00 p.m. that day.

In an April 20, 1994 narrative statement, David Mitchell, the controller in charge, provided that, on March 5, 1994, the employee arrived at work at 6:45 a.m. and advised him that he had scheduled a biannual for 4:00 p.m. that day with Mr. Hall. Mr. Mitchell stated that the employee told him that he wanted to take the biannual sooner if the plane was available and he asked him to look out for Mr. Hall so that he could talk to him about getting it done sooner. Mr. Mitchell further stated the employee provided two reasons for taking the flight sooner:

“[The employee] said it was a beautiful Saturday which meant the weekend pilots would come out and he did [not] want to get mixed up with them in the air. He also said he knew the plane he was going to do his [b]iannual in was scheduled for a four hour cross country and there was always the possibility it would not be back in time for his four o'clock appointment.”

Mr. Mitchell explained that when he saw Mr. Hall arriving in the parking lot at approximately 7:45 a.m., he told the employee that he could go and talk to him about the flight. Mr. Mitchell stated that the employee asked him if he should sign out. He told the employee to wait until he was sure he could fly before signing out. The employee told Mr. Mitchell that he would write one hour compensatory time on the log sheet and that he would sign in and out again when he returned because he did not want to come all the way back to the tower to sign out if the plane was available. Mr. Mitchell stated that he approved the employee's use of one hour of compensatory time. He stated “I was the last person to see [the employee] alive and I believe it was clear that he was taking off work for one hour compensatory time to go and take a [b]iannual if the plane was available. The plane was obviously available.” Mr. Mitchell noted a meeting with the air traffic manager and several other employees about the employee's duty status at the time of the aircraft crash and stated:

“The bottom line was that [the employee] took an hour of compensatory time with the intentions to take a [b]iannual if the plane was available and even if his intentions changed he was still on an hour of compensatory time. If he had said he was going on a familiarization flight with Hutchinson Aviation I would have typed it on the front of the 7230-4. Not everyone agreed with the [a]ir [t]raffic [m]anager's decision but everyone told the truth in the end and the right

conclusion was made to shown [sic] [the employee was] off duty as [the employee] indicated when he left.”

In response to the Office’s March 21, 1995 letter requesting additional information regarding her husband’s death, appellant submitted an April 20, 1995 statement. Appellant contended that at the time of her husband’s death on March 5, 1994, he was taking a familiarization flight at the invitation of Mr. Hall. Appellant stated that although a private pilot’s license was not required, her husband knew it would make him a better air traffic controller. She noted that, since Mr. Hall had an 8:45 a.m. appointment scheduled for March 5, 1994, it would have been impossible for her husband to complete the flight within the one-hour time period required for such a flight as indicated by Mrs. Hall because he had less than 45 minutes to complete the flight. She concluded that, since there was not enough time for a flight review, the only other reason her husband was flying was to take a familiarization flight. Appellant stated that the familiarization flight was a significant direct benefit to the employing establishment because it was reasonably related to her husband’s employment.

In an undated narrative statement, Thomas O. Mathison, the employee’s coworker, indicated that the daily record of facility operation (FAA Form 7230-4) demonstrated specific information related to an employee on liaison or familiarization travel. He stated that, on the day of the aircraft crash, the record did not indicate that the employee was exercising familiarization privileges.

By decision dated May 24, 1995, the Office found the evidence of record insufficient to establish that the employee’s death on March 5, 1994 occurred while in the performance of duty. In a June 22, 1995 letter, appellant requested an oral hearing before an Office representative.

At the September 21, 1999 hearing, appellant testified that her husband’s private pilot’s license helped him with his job as an air traffic controller. She also testified that a few weeks after the accident, Mr. Mitchell told her that he did not know why her husband left the tower. Appellant stated that she knew that her husband had a biannual review scheduled for 5:00 p.m. on March 5, 1994. She also stated that she did not think that her husband would have used annual leave or compensatory time when he could have used them after the birth of their child who was due on that day. Appellant provided her understanding of a familiarization flight, which involved a pilot asking whether anyone wanted to go for a ride and if someone went along he was considered on duty.

At the hearing, Mr. Mitchell testified that maybe 10 percent of the air traffic controllers in his tower had a pilot’s license, which helped them in performing their jobs. He explained that on a familiarization flight an air traffic controller sat in the cockpit and observed the pilot while flying. Mr. Mitchell further explained that, when he took a familiarization flight, the controller in charge would indicate on the log before he left that he went on the flight and the tail number of the airplane. He stated that when he returned from the flight he was required to complete a questionnaire regarding the flight. Mr. Mitchell also stated that notice about taking a flight was given within a few minutes before he actually went with the pilot. He further stated that he understood he was on duty during the flight and it was a benefit to the employing establishment.

Mr. Mitchell testified that the employee told him on the morning of the crash that he had scheduled a biannual flight for four or five o'clock that day. He stated that the employee told him that he was going to take a biannual flight when he left the tower. Mr. Mitchell further stated he and the employee had a discussion in the morning about his flight and the employee described the nature of the flight and stated his reasons for taking it in the morning rather than in the afternoon. Mr. Mitchell noted that the employee signed out using one hour of compensatory time. He stated that if the employee had changed his mind and decided to take a familiarization flight, then he assumed the employee would have called him from Mr. Marvin's office or radioed him about the change. Mr. Mitchell further stated that he talked to the employee on the radio and the employee did not tell him whether he was on a biannual or familiarization flight.

In a December 24, 1999 decision, the hearing representative affirmed the Office's decision.

In response to the hearing transcript, Herman J. Lyons, Jr., an air traffic division manager, noted that Mr. Mitchell's testimony that being a pilot helped an air traffic controller with his job performance represented his opinion and not the opinion of the employing establishment. He explained that contrary to appellant's testimony that a familiarization flight helped her husband familiarize himself with the airplane prior to taking the biannual review, the familiarization flight trained the air traffic controller by acquainting him with the air traffic control system from the user's point of view. Mr. Lyons stated that the record showed that the employee was on approved compensatory time off, which indicated that he was off duty.

The Board finds that appellant has failed to establish that the employee's death on March 5, 1994 occurred while in the performance of duty.

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>1</sup> The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."<sup>2</sup> "In the course of employment" deals with the work setting, the locale and time of injury.<sup>3</sup> In addressing this issue, this Board has stated:

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

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<sup>1</sup> See 5 U.S.C. § 8102.

<sup>2</sup> *James E. Chadden, Sr.*, 40 ECAB 312, 314 (1988).

<sup>3</sup> *Denis F. Rafferty*, 16 ECAB 413, 414 (1965).

<sup>4</sup> *Robert W. Walulis*, 51 ECAB \_\_\_\_ (Docket No. 98-769, issued October 7, 1999); *Maryann Battista*, 50 ECAB 343 (1999); *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury “arising out of the employment” must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.<sup>5</sup>

In *Rivieene Levin and Jami Smilgoff (as the Administrators of the estate of Richard C. and Linda B. Smilgoff)*,<sup>6</sup> the decedents were performing a specific duty, undergoing air operations training, when they were killed in an aircraft crash. The Board held injuries sustained during training for an employee’s regular job are generally covered under the Act. Accordingly, the Board found the decedents in the performance of duty at the time of their deaths.

In contrast, the employee in this case was not performing a specific duty at the time of the aircraft crash on March 5, 1994. The record establishes that the employee was scheduled for a biannual flight review on March 5, 1994. The statements of Mrs. Hall, Mr. Taylor, Mr. Newbern, Mr. Mitchell, Mr. Mathison establish that the employee was taking a biannual flight review for his personal pilot’s license rather than participating in a familiarization flight at the time of his death. There is no evidence of record other than appellant’s allegation establishing that the employee was taking a familiarization flight, which is permitted by the employing establishment, on the date of the aircraft crash. Although appellant and Mr. Mitchell stated having a pilot’s license helped the employee perform his job duties as an air traffic controller, having such a license was not required by the employing establishment as indicated by Mr. Newbern and Mr. Mitchell. Thus, the employee was not assigned the specific duty of obtaining a pilot’s license and undergoing necessary flight training by the employing establishment.

The Board finds that the employee was not performing a specific employing establishment duty on March 5, 1994 when the aircraft in which he was flying crashed and he was killed. The employee, therefore, was not in the performance of duty at the time of his death on March 5, 1994.

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<sup>5</sup> See *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

<sup>6</sup> 45 ECAB 391 (1994).

The December 24, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 16, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member