

**United States Department of Labor
Employees' Compensation Appeals Board**

S.L., claiming as widow of C.L., Appellant)

and)

CITY OF CHANDLER POLICE)
DEPARTMENT, Chandler, AZ, Employer)

**Docket No. 12-1525
Issued: August 27, 2013**

Appearances:
Kenny Thatcher, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 9, 2012 appellant, through her representative, filed a timely appeal from the March 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her claim for benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the law enforcement officer was an "eligible officer" under 5 U.S.C. § 8191.

FACTUAL HISTORY

On August 27, 2010 appellant filed a notice of law enforcement officer's death and claim on behalf of widow and children. She alleged that on July 28, 2010 her husband, an undercover narcotics officer, died from gunshot wounds to the chest while investigating a large-scale narcotics trafficker.

¹ 5 U.S.C. § 8101 *et seq.*

Kenny Thatcher, the property and evidence supervisor for the Chandler Police Department, responded on behalf of the police chief to OWCP's questions. He explained that these types of investigations are very quick. Large-scale buyers come into town with money wanting to buy large amounts of narcotics and leave pretty quickly, normally within a day or two. They use middle men to locate and set up the purchases.

The investigation at issue began the morning of the shooting. A confidential informant working with narcotics unit detectives was contacted by a middle man looking for marijuana. The unit, including the officer, initiated the investigation. Detective Bugallo was designated the main undercover with the officer and Detective Arbizu as his assistants. They met with the middle man earlier in the day to show him a sample of marijuana. The middle man advised that his buyers wished to buy the marijuana. He set up a meeting for the exchange at a house in South Phoenix later that afternoon.

Detective Bugallo and the informant went into the house and were shown what was purported to be the \$250,000.00 in cash to buy the marijuana. The officer and Detective Arbizu were then called and directed to deliver 500 pounds of marijuana to the house. They parked their vehicle in the garage, as directed, and went inside the house to help identify those participating in the act and await the arrival of the Special Weapons and Tactics (SWAT) team to assist with the arrests of the suspects. Sixty seconds after the delivery vehicle drove into the garage, and before the SWAT team arrived, suspects entered the house with weapons and opened fire on the officers and informant.

Mr. Thatcher explained that the investigation was not initiated pursuant to a particular statute. Their investigations begin with a broad spectrum of possibilities for charging suspects, federally or locally. Normally detectives do not decide on a particular statute when they initiate this kind of investigation; they wait to see the final evidence to decide what crimes might have been committed. "While typically we rely on state statutes for most of our prosecutions, when federal statutes provide greater prosecution and enhanced sentences such as in the case of weapons violations, repeat offenders, gang members or prohibited possessors of weapons, we utilize that venue of prosecution."

Mr. Thatcher advised that the officer was not assigned to a joint federal operation or task force at the time of his death. Due to the quick time frame of the deal, there was no time to get positive identification on any suspects nor were any warrants issued.

The undercover narcotics officers were considered the arresting officers, responsible for identifying the suspects to be arrested, completing the reports and charging documents. They were discouraged, however from being involved in the initial take down of the suspects, to minimize the danger of suspects mistaking them as other bad guys trying to take their money. Tactics for arrest, therefore, involved an arrest team, typically the SWAT team, staged nearby. Once the undercover officers confirmed the criminal conduct necessary to charge for the conspiracy and attempt to buy narcotics, a bust signal is given and the arrest team moves in to assist in making the arrest.

Asked whether the officers believed, at the time of the shooting, that a crime was actively being committed, Mr. Thatcher answered affirmatively:

“Yes. After the initial meeting with the middle man and agreement that the ‘buyers’ wished to purchase the 500 pounds of marijuana, along with Detective Bugallo seeing what appeared to be \$250,000 in cash at the residence just prior to the ‘delivery’ there was sufficient evidence of crimes being committed to warrant the arrest of the suspects.”

Mr. Thatcher informed OWCP that the applicable citations for crimes committed at the time of the investigation were: (1) Attempted possession of a controlled substance (500 pounds of marijuana) with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846; and (2) conspiracy to possess a controlled substance with the intent to distribute in violation of the same statutes.² He added that the Phoenix Police Department was investigating the officer’s murder and would decide which venue was appropriate for the prosecution. “With the criminal histories for some of the suspects, certainly they could have been prosecuted by the U.S. Attorney here in Phoenix had the investigation outcome been different.”

On January 4, 2011 OWCP denied appellant’s claim for compensation benefits. OWCP found that the officer was not engaged in the apprehension of a person sought for the commission of a crime against the United States. Rather, he was involved in the preliminary stages of an investigation when he was murdered. For consideration under FECA, OWCP explained, a federal warrant must be outstanding, the warrant must be at least part of the reason for the apprehension or attempted apprehension, and the apprehension must be in progress, meaning that officer is trying to take someone into custody or make an arrest.

Appellant requested reconsideration. She argued that the act of arresting the suspects for the attempted violation of the law prior to the purchase, transport across state lines and distribution was clearly the prevention of a crime against the United States.

OWCP received a copy of the grand jury indictment, which itemized the state felony charges made against the suspects. The indictment charged suspects with attempt to commit the sale of marijuana over the threshold and/or the transportation of marijuana for sale over the threshold.

On June 6, 2011 OWCP reviewed the merits of appellant’s case and denied modification of its prior decision. It found that her claim did not meet the necessary criteria under 5 U.S.C. § 8191. At the time of the shooting, no federal crime had yet been committed, so it was not possible to establish that the officer was engaged in the apprehension or attempted apprehension of a person who committed a federal crime. As the identity of the suspects was unknown, it was not possible to establish that the officer was in the act of seeking a known felon with an outstanding federal arrest warrant.

There was no indication, OWCP added, that the suspects were being sought as material witnesses in a criminal proceeding or that the officers were engaged in protecting or guarding a

² Mr. Thatcher earlier indicated that the suspects were, at the time of the officer’s death, also in the act of committing the crime of using or carrying a firearm during and in relation to the commission of a drug trafficking crime in violation of section 924(c) of Title 18 of the United States Code.

person held for the commission of a crime against the United States or as a material witness in connection with such a crime.

Further, OWCP found that the evidence did not support that the officer, at the time of the shooting, was engaged in the lawful prevention, or lawful attempt to prevent, the commission of a crime against the United States. At the time of the shooting, the officers were not specifically pursuing the suspects for a federal crime. Rather, the intent was to trap them into buying the marijuana and then charge them with whatever crimes were uncovered. "In this situation, the connection to a federal crime is too tenuous."

Appellant again requested reconsideration. She submitted an overview of federal conspiracy law from the Congressional Research Service, a copy of a Board decision denying benefits under 5 U.S.C. § 8191, and letters from the United States Department of Justice relating to Arizona's Medical Marijuana Program.

Appellant also submitted Mr. Thatcher's response to OWCP's decision. Mr. Thatcher advised that the suspects had committed the crime of conspiracy under 21 U.S.C. §§ 841(a)(1) and 846. Those acts occurred prior to and continued after the detectives became involved with the suspects to thwart them from obtaining the objective of the conspiracy -- possession of marijuana for distribution -- thus preventing a federal crime from occurring. Mr. Thatcher explained that the elements necessary to prove the federal crime of conspiracy had occurred prior to the officer's death.

Further, Mr. Thatcher noted, the suspects would have been charged with attempted possession of marijuana, a controlled substance with intent to distribute, which was a federal crime. Both conspiracy and attempt to possess a controlled substance were the stimuli to which the detectives responded. The fact that the grand jury charged the suspects with conspiracy and attempted possession supported that those crimes occurred and that the detectives had probable cause to arrest the suspects prior to responding to the house to make the arrest. "Federal charges would have been brought against the suspect if the case had been presented to a federal grand jury," but the officer was killed, and a decision was made to prosecute in state court to seek the death penalty. Indeed, Mr. Thatcher argued, the Federal Government considers any possession of marijuana to be a violation of federal law.

On March 12, 2012 OWCP once again reviewed the merits of appellant's case and denied modification of its prior decision. It found no evidence that a federal crime had actually been committed prior to the officer's death and no evidence that he was engaged in the apprehension or attempted apprehension of a person who committed a federal crime. OWCP noted no proof of a federal warrant to support Mr. Thatcher's contention that a federal crime was in process. The evidence did not show knowledge of a specific federal crime prior to the events on July 28, 2010.

On appeal, appellant disagrees with OWCP's finding that no federal crime was committed or was in the process of being committed when her husband was killed trying to apprehend the suspects.

The Director argues that the evidence fails to establish that the officer's death occurred under circumstances enumerated in 5 U.S.C. § 8191. He submits there was no evidence that a federal crime had actually been committed; the officer was not assigned to a joint federal or local operation or task force; the officer was not specifically pursuing the suspects for a federal crime.

Further, there was no proof of a federal warrant to support that the federal crime of conspiracy and attempt to possess a controlled substance was in progress. No federal crime was specifically being prevented, no threat of a federal crime was actual and imminent, and no federal crime was charged. The fact that a controlled substance was involved, the Director argues, does not establish that the officer was engaged in actual or attempted apprehension of a federal criminal or prevention of a federal crime. He and his fellow officers were performing an investigation in order to establish the suspect's potential wrongdoing.

LEGAL PRECEDENT

FECA benefits are available to eligible law enforcement officers under section 8191.

“An eligible officer is any person who is determined by the Secretary of Labor in his 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 the 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 the 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;

“and to have been on that occasion not an employee as defined in section 8101(1), and to have sustained on that occasion a personal injury for which the United States would be required ... to pay compensation if he had been on that occasion such an employee engaged in the performance of his duty.”³

Regulations implementing section 8191(3) state that for benefits to be payable when an officer is injured preventing, or attempting to prevent a federal crime, there must be objective evidence that a federal crime is about to be committed. An officer's belief, unsupported by objective evidence, that he is acting to prevent the commission of a federal crime will not result in coverage. Moreover, the officer's subjective intent, as measured by all available evidence (including the officer's own statements and testimony, if available), must have been directed

³ 5 U.S.C. § 8191.

toward the preventing of a federal crime. In this context, an officer's own statements and testimony are relevant to, but do not control, the determination of coverage.⁴

Regulations further provide that based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a federal crime was in progress, or was about to occur. This awareness need not extend to the precise particulars of the crime (the section of Title 18, United States Code, for example), but there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a federal crime or prevention of a federal crime.⁵

ANALYSIS

It is a federal crime for any person knowingly or intentionally to possess, with intent to manufacture, distribute, or dispense, a controlled substance.⁶ Marijuana is a controlled substance.⁷

The officer became aware that a buyer was looking to purchase -- that is, possess -- 500 pounds of marijuana for \$250,000.00. Given the scale of the proposed transaction, it was reasonable to conclude that the buyer was attempting to possess a controlled substance with intent to distribute, a violation of federal law.⁸ As Mr. Thatcher of the Chandler Police Department explained, large-scale buyers would come into town with money wanting to buy large amounts of narcotics and leave pretty quickly, normally within a day or two.

A middle man contacted a confidential informant and expressed his intent to purchase a large quantity of marijuana. The officer and two other undercover detectives in the narcotics unit met with the middle man to show him a sample. The middle man again expressed intent by advising that his buyers wished to purchase the marijuana. In an act toward the commission of this crime, he set up a meeting for the exchange and produced what was purported to be \$250,000.00 in cash. The officer and a third detective delivered the marijuana to the house, as directed.

Under section 10.739 of the implementing regulations, the officer thus had sufficient information that would lead a reasonable officer, under the circumstances, to conclude that a federal crime was about to occur. The officer was an undercover narcotics officer engaged, at the time of his shooting, in a sting operation designed to prevent the prospective buyers from distributing a large quantity of marijuana. As measured by all available evidence, it was the officer's subjective intent to prevent the knowing or intentional possession of a controlled substance with intent to distribute, which is a federal crime.

⁴ *Id.* at § 10.738(b).

⁵ *Id.* at § 10.739.

⁶ *James R. Coon*, 43 ECAB 587 (1992), *citing* 21 U.S.C. § 841(a)(1).

⁷ *Id.*, *citing* 21 U.S.C. § 812(c), Schedule 1(c)(10).

⁸ *See* 21 U.S.C. § 802(11).

Accordingly, the Board finds that the officer was a law enforcement officer and engaged on the occasion of his shooting in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States. He was therefore an “eligible officer” under 5 U.S.C. § 8191(3).

In *James R. Coon*,⁹ the Board reviewed the legislative history of section 8191 and exhaustively examined case precedent. As one senator observed:

“Congress has established whole categories of offenses against federal criminal law such as kidnapping, robbery of national banks, taking stolen automobiles across state lines for which the enforcement and apprehension of the criminals falls in great part upon local law enforcement officers. Since we ask them to expose themselves to the dangers of enforcing federal law, it is only just that we should compensate them as though they were federal officers should they sustain injury or death in the performance of these duties.”¹⁰

This is not a case in which the officer was “merely enforcing local laws,” such as investigating a local robbery scene,¹¹ picking up from the street a device that the officer thought was a pen,¹² responding to a call that there was a dead woman in an abandoned apartment building,¹³ arresting females for prostitution and transporting them back to the station,¹⁴ sitting in a patrol car to complete a missing person report,¹⁵ investigating suspects who appeared to be stealing a car,¹⁶ addressing a potential traffic violation¹⁷ or pursuing a suspect in a possible mugging.¹⁸

This is a case in which a local law enforcement officer attempted to prevent an activity that was both a state and a federal crime. In *Peter A. Ross*,¹⁹ the officer, seeking to avoid coverage under FECA, argued he was enforcing only state law and did not intend to prevent a federal offense. As there was substantial evidence that a potential federal crime was about to be committed, the Board held that the fact that the officer was attempting to prevent state law offenses did not preclude him from preventing potential federal offenses involving the same subject matter.

⁹ *Supra* note 6.

¹⁰ Cong. Rec., September 14, 1967, p. 25, 567.

¹¹ *Thomas T. Thackerson*, 27 ECAB 14 (1975).

¹² *Michael B. McKeon*, 28 ECAB 8 (1976).

¹³ *Angel F. Poggi*, 28 ECAB 199 (1977).

¹⁴ *Edward L. Jackson*, 31 ECAB 550 (1980).

¹⁵ *Pauline Kaner (Kenneth G. Kaner)*, 31 ECAB 1597 (1980).

¹⁶ *Dorothy Ryman (Harry Ryman)*, 33 ECAB 1594 (1982).

¹⁷ *Rocco A. Ranaudo*, 35 ECAB 689 (1984); *Lance C. Coleman*, 41 ECAB 604 (1990).

¹⁸ *Donald Rios*, 36 ECAB 425 (1985).

¹⁹ 43 ECAB 126 (1991).

Similarly, in *James R. Coon*,²⁰ the officer argued that the scope of his employment was limited to focusing on state law violations, that he never formulated the intent to prevent the commission of a potential federal crime. The search warrant issued by the county magistrate cited no violation of a federal statute. There was no evidence of DEA involvement. Although the officer had no knowledge of the specific potential violations of 21 U.S.C. § 841(a)(1) or § 802(15), the Board found that this did not preclude coverage. At the time of his injury, he was engaged in attempting to prevent the cultivation and production of marijuana. The fact that the cultivation and production of marijuana was a violation of state law in no way negated or diminished the fact that such activities also constituted a violation of federal drug laws. “His activities, attempting to prevent the cultivation and production of marijuana, at the time injury was sustained constituted a lawful attempt to prevent a crime against the United States. It was this very task that the record demonstrates appellant was attempting to fulfill when injured.” In doing so, the Board continued, the officer was assisting in the enforcement of the laws of the United States and engaged in activities which the legislative history reveals Congress intended to cover under FECA.

The Board has thus applied the doctrine of transferred intent where the violation of state law and federal law both arose from a common nucleus of operative facts. Because the officer was attempting to prevent the knowing or intentional possession of a controlled substance with intent to distribute, which is a federal crime under 21 U.S.C. § 841(a)(1), he was engaged on the occasion of his shooting in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States. And in doing so, he effectively exposed himself to the dangers of enforcing federal law.

That the officer was not assigned to a joint federal operation or task force, as the Director argues, is immaterial. As the Board found in *James R. Coon*, this is not a condition precedent. That there was no federal warrant or federal charge made against the suspects is not dispositive. The Director adds there was no evidence that a federal crime was committed. The evidence establishes otherwise: the crime of attempt or conspiracy under 21 U.S.C. § 846 had already been committed at the time of the shooting. Moreover, the completed commission of a federal crime is not a required element under 5 U.S.C. § 8191(3).²¹ Section 8191(3) applies to the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States. The officer, together with his fellow detectives, lawfully prevented the knowing or intentional possession of a controlled substance with intent to distribute. That is sufficient to establish coverage under section 8191(3).

The Director also argues that the officer was not specifically “pursuing” the suspects for a federal crime. However, the Board needs not to decide the issue of whether the officer was engaged on the occasion of his shooting in the apprehension or attempted apprehension of any person for the commission of a crime against the United States, under 5 U.S.C. § 8191(1)(A). Even if the officer were not in pursuit of the suspects, if he were not engaging in the act of apprehending or attempting to apprehend them after the commission of a federal crime, he is nonetheless covered under section 8191(3), which relates instead to the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States.

²⁰ *Supra* note 6.

²¹ Compare 5 U.S.C. § 8191(1), which applies to apprehension.

The undercover operation was more than a mere investigation or preliminary inquiry relating to a potential crime. It was more than the gathering of intelligence for later analysis and possible action. At the time of his shooting, the undercover officer was, in point of fact, actively and lawfully engaged in the actual prevention of a federal crime. For this reason, the Board finds he was an “eligible officer” falling within the coverage of FECA.

CONCLUSION

The Board finds that OWCP abused its discretion in finding that the officer was not an “eligible officer” under 5 U.S.C. § 8191. The evidence establishes that he was a law enforcement officer engaged, at the time of the shooting, in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2012 decision of the Office of Workers’ Compensation Programs is reversed and the case remanded for further action on appellant’s claim for compensation benefits.

Issued: August 27, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees’ Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees’ Compensation Appeals Board

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