Holly, Joel, Jr., Dec'd

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

"On call" employees

The mere fact that a worker is "on call" is insufficient, standing alone, to bring the worker within the course of employment where there is no showing that the "on call" status involved a substantial intrusion on personal time or that, at the time of injury, the worker was acting in furtherance of the employer's business. ***….In re Joel Holly, Jr., Dec'd,* BIIA Dec., 65,589 (1985)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: JOEL E. HOLLY, JR., DECEASED	**DOCKET NO. 65,589**
CLAIM NO. H-985070	**DECISION AND ORDER**

APPEARANCES:

Petitioner, Bonnie Jo Holly, Guardian of the children of Joel E. Holly, Jr., Dec'd, by Walthew, Warner, Keefe, Arron, Costello & Thompson, per Robert H. Thompson

Employer, Medical Instrument Services, by Frederick Kliban, Controller

Department of Labor and Industries, by The Attorney General, per Greg Kane and James S. Kallmer, Assistants

This is an appeal filed by the petitioner, Bonnie Jo Holly, on August 17, 1983 from an order of the Department of Labor and Industries dated July 27, 1983 which rejected the applications for benefits on behalf of Joel E. Holly, Jr. during his lifetime and by petitioner on behalf of the decedent's minor children, for the reason that claimant was not engaged in the course of his employment on May 8, 1981 when he suffered the injuries which ultimately resulted in his death. Affirmed.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Petitioner to a Proposed Decision and Order issued on September 12, 1984 in which the order of the Department dated July 27, 1983 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The general nature and background of this appeal are as set forth in the Proposed Decision and Order, and shall not be reiterated completely herein.

We have given full and careful consideration to this appeal and find that we concur in the proposed determination to the effect that the decedent was not acting in the course of employment at the time of his tragic accident on the evening of May 8, 1981.

The automobile accident in question occurred during the evening hours of May 8, 1981, a Friday, at approximately 8:00 p.m., at a time when the claimant was off duty. In fact, he had been off duty that entire day, having used the day as compensatory time/leave from work. The fact that the decedent was driving a company-owned vehicle is of no particular legal significance, inasmuch as the company supplied this vehicle to the decedent for both business and personal use on a twenty-four hour, seven day per week basis. The decedent liked to hunt and fish and was instrumental in picking out this particular vehicle, a four-wheel drive International Scout. In the words of Frederick Kliban, a fellow employee, " ... that's the vehicle Mr. Holly wanted, so the company purchased it on his behalf." (See Superior Asphalt v. Department of Labor and Industries, 19 Wn.App. 800 (1978).

Nor is the fact that the decedent was in an "on-call" status at the time of the accident, for which he was entitled to compensation in the form of one day of compensatory time for each seven days of on-call time, of any particular legal significance. Even had the accident herein occurred during the decedent's regular on-duty hours, when he was in a regular-pay status, it would still be legally incumbent upon the petitioner to show that the decedent was "acting in the course of employment" at the time of the accident in order for such accident to qualify as an industrial injury.

At bottom, it is the petitioner's essential position herein that, even though the general nature and purpose of the decedent's

travel at the time of the accident in question remains unknown, the undisputed fact that the decedent was in an on-call status at the time of the accident is legally sufficient to confer compensability. In this regard, the petitioner notes that there are no "on-call" cases in Washington, and places particular reliance upon two New Jersey cases, to wit: Paige v. City of Rahway, 376 A.2d 1226 (NJ 1977), and Sabat v. Fetters Corp, 383 A. 2d 421 (NJ 1978). In both cases, the employee involved was continuously on-call during off-duty hours, and sustained his injury during the course of traveling directly from work to home at the end of his regular work shift. In both cases, the New Jersey Supreme Court held that the employee's on-call status was a sufficient basis to exempt the employee from the general rule that travel in the course of going to and from work is not in the course of employment. From a reading of the two cases, it is clear that the court was greatly influenced by the high degree of restriction that the on-call requirement placed upon the employee during his off-duty time. In Paige, the court noted that the employee was on a "tight leash" insofar as engaging in any personal pursuits in his off-duty time. The court noted that he could not leave his home even for a few minutes without first advising his employer. In Sabat, the employee was the employer's computer programming manager whose continued and ready availability was essential to the operation of the employer's business. The court felt that the actual intrusion of his employment responsibilities into his off-duty hours was so frequent and substantial as to constitute "special circumstances sufficient to render the going and coming rule inapplicable."

Unlike the two New Jersey cases, the case at hand does not involve any question providing a possible exception to the going and coming rule. As previously noted, where the decedent was

"going to" or "coming from" at the time of his accident remains unknown. Inasmuch as there is no showing that the decedent's travel at the time of his accident was work-connected, it must be deemed to have been personal in nature. It is the claimant's burden herein to prove that his use of the vehicle was within the course of employment. Superior Asphalt at 804. Moreover, in the case at hand it does not appear that the intrusion upon the decedent's personal time by his on-call status was at all substantial. During his off-duty hours, he was free to follow whatever personal pursuits he chose. The lone requirement was that whenever he was away from home, he was supposed to have with him a telephone pager, known as a "bell boy", so that he could be reached if the need therefor arose. In this regard, it is to be noted that the decedent did not have his telephone pager with him at the time of his accident. It was later found to be back in the office in its holder. Nor does it appear that the decedent was required to make service calls during his off-duty hours on what could be termed a frequent basis. Judging from the record as a whole, our impression is that service calls during off-duty hours were only occasionally required and were made as a "service" to the firm's customers rather than being essential to the customer's operations. The testimony in the record in this regard is to the effect that the firm's customers usually had back-up equipment which would suffice and carry them over until normal work-day hours.

Be that as it may, insofar as the two New Jersey cases can be deemed as supporting authority for the petitioner's position herein, they constitute minority holdings. The general rule in

regard to on-call cases is set forth in Larson The Law of Workmen's Compensation, Vol. IA, Section 24.23, as follows:

> "Although an employee is continuously on call, an injury off the premises in the course of a personal activity is not ordinarily considered to be within the Compensation Act."

The Paige and Sabat cases are specifically noted therein to be contra to the majority rule. The comment in Larson in regard to the Sabat case is as follows:

> "With this case, the New Jersey Supreme Court appears to stretch the on-call exception in going and coming cases to the outermost limits in that the exception will be applied to a routine homeward journey at normal hours, for no reason other than that the employee is on call at all times because of the nature of his work."

Finally, we would note that the New Jersey cases were not predicated upon any statutory codification of the term "acting in the course of employment". In Washington, we have such a codification, RCW 51.08.013, and under the terms thereof it must be shown that the decedent, at the time of his injury, was acting at his " ... employer's direction or in the furtherance of his ... employer's business." The petitioner has made no such showing in this case. In sum, we find that the decedent was not acting in the course of his employment at the time of his automobile accident on the evening of May 8, 1981.

The findings, conclusions and order of the Proposed Decision and Order entered in this matter on September 12, 1984, are hereby adopted as the Board's final findings, conclusions and order, and are incorporated herein by this reference.

It is so ORDERED.

Dated this 9th day of April, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____

MICHAEL L. HALL
Chairperson

/s/_____

FRANK E. FENNERTY, JR.

Member

/s/_____

PHILLIP T. BORK

Member