

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

1
2 In Re: JOEL E. HOLLY, JR., DECEASED) DOCKET NO. 65,589
3)
4 CLAIM NO. H-985070) DECISION AND ORDER
5)
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7 APPEARANCES:

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

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14 Employer, Medical Instrument Services, by
15 Frederick Kliban, Controller

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17 Department of Labor and Industries, by
18 The Attorney General, per
19 Greg Kane and James S. Kallmer, Assistants
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21 This is an appeal filed by the petitioner, Bonnie Jo Holly,
22 on August 17, 1983 from an order of the Department of Labor and
23 Industries dated July 27, 1983 which rejected the applications for
24 benefits on behalf of Joel E. Holly, Jr. during his lifetime and
25 by petitioner on behalf of the decedent's minor children, for the
26 reason that claimant was not engaged in the course of his
27 employment on May 8, 1981 when he suffered the injuries which
28 ultimately resulted in his death. Affirmed.

29 DECISION

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

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

38 The general nature and background of this appeal are as set
39 forth in the Proposed Decision and Order, and shall not be
40 reiterated completely herein.
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1 We have given full and careful consideration to this appeal
2 and find that we concur in the proposed determination to the
3 effect that the decedent was not acting in the course of
4 employment at the time of his tragic accident on the evening of
5 May 8, 1981.

6 The automobile accident in question occurred during the
7 evening hours of May 8, 1981, a Friday, at approximately 8:00
8 p.m., at a time when the claimant was off duty. In fact, he had
9 been off duty that entire day, having used the day as compensatory
10 time/leave from work. The fact that the decedent was driving a
11 company-owned vehicle is of no particular legal significance,
12 inasmuch as the company supplied this vehicle to the decedent for
13 both business and personal use on a twenty-four hour, seven day
14 per week basis. The decedent liked to hunt and fish and was
15 instrumental in picking out this particular vehicle, a four-wheel
16 drive International Scout. In the words of Frederick Kliban, a
17 fellow employee, " ... that's the vehicle Mr. Holly wanted, so the
18 company purchased it on his behalf." (See Superior Asphalt v.
19 Department of Labor and Industries, 19 Wn.App. 800 (1978).
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21 Nor is the fact that the decedent was in an "on-call" status
22 at the time of the accident, for which he was entitled to
23 compensation in the form of one day of compensatory time for each
24 seven days of on-call time, of any particular legal
25 significance. Even had the accident herein occurred during the
26 decedent's regular on-duty hours, when he was in a regular-pay
27 status, it would still be legally incumbent upon the petitioner to
28 show that the decedent was "acting in the course of employment" at
29 the time of the accident in order for such accident to qualify as
30 an industrial injury.

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

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

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

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

1 regard to on-call cases is set forth in Larson The Law of
2 Workmen's Compensation, Vol. IA, Section 24.23, as follows:
3 "Although an employee is continuously on call, an
4 injury off the premises in the course of a personal
5 activity is not ordinarily considered to
6 be within the Compensation Act."

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

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

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

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

32 It is so ORDERED.

33 Dated this 9th day of April, 1985.

34 BOARD OF INDUSTRIAL INSURANCE APPEALS
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37 /s/ _____
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40 Chairperson
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MICHAEL L. HALL

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Member

/s/ _____

FRANK E. FENNERTY, JR.

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Member

/s/ _____

PHILLIP T. BORK