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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202044 **DATE:** August 6, 1981

MATTER OF: New York Transit Strike - Claims for Motor Vehicle Damages

DIGEST:

1. Government employees who were involved in accidents while commuting to and from work during the New York transit strike did not damage their vehicles "incident to service" and cannot make a claim cognizable under the Military Personnel and Civilian Employees' Act of 1964. Commuting is a personal expense which in the absence of extremely unusual circumstances may not be borne from appropriated funds.

2. Section 5704 of title 5, which reimburses a Government employee who uses his own vehicle for official Government business on a mileage basis, includes in that basis the cost of insurance, if any. See 5 U.S.C. § 5707. Therefore, reimbursement under 5 U.S.C. § 5704 for damage to a vehicle of an employee officially authorized to use it is precluded. However, a claim for damage can be made under the Military Personnel and Civilian Employees' Claims Act of 1964, even if the employee is reimbursed on a mileage basis.

The Director of the Division of Accounting, Fiscal and Budgeting Services of Region II of the Department of Health and Human Services (HHS) has requested our decision as to the payment of claims for automobile damages incurred by Government employees during the New York City Transit Strike in April 1980. There are three claims involved.

Mr. Constantino Conte is a lender examiner for the Office of Education (now Department of Education) who is authorized to regularly use his automobile on official Government business. Returning from a bank where he had been conducting a program review, he found that the front windshield of his automobile had been damaged. All but the $50 deductible of the replacement cost has been paid for by his insurance company. He now requests reimbursement of the $50.

Mr. Michael Hurley is an employee of the Northeastern Program Service Center. During the transit strike, he was authorized to join a carpool and to use his own automobile. While driving home from work he was involved in an accident. All but $200 of the cost of repair has been paid by Mr. Hurley's insurance company. He now seeks the $200 deductible as well as $450 in anticipated additional insurance premiums over the next 3 years.

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Mr. Joseph Gillespie is a collection agent for the Office of Education (now Department of Education). He was authorized to use his own automobile to drive himself and others to work during the strike. One morning, after discovering that his previous parking arrangements had fallen through, he attempted to partially park on the sidewalk. As a result, the exhaust pipe, muffler, and tailpipe of his vehicle were torn off. He seeks reimbursement of the cost of repairs, $95.96.

We have a copy of the memo the Office of General Counsel for Region II of HHS sent to the three employees' divisions, outlining the different options for handling their claims. That office correctly points out that the applicable statute is the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. §§ 240-243 (1976 and Supp. III, 1979) and not the Federal Tort Claims Act, 28 U.S.C §§ 1346(b), 2671-2680 (1976), or the Federal Employees' Compensation Act 5 U.S.C. §§ 8101 et seq. (1976 and Supp. III 1979). Apparently, at least two of the claimants were under the erroneous impression that they could recover under one of the latter two statutes. The Federal Employees' Compensation Act deals with compensation for Government employees who have job-related injuries. The Federal Tort Claims Act is concerned with suits filed by third parties against the United States Government for the negligent or wrongful acts of its employees. A claim by an employee against the United States for injuries or damages incurred in the course of his or her employment is not within the purview of the Federal Torts Claim Act. B-185513, March 24, 1976.

The Military Personnel and Civilian Employees' Claims Act of 1964 authorizes the head of each agency or his designee to pay claims up to $15,000 for damages to, or loss of, personal property incident to an employee's service. 31 U.S.C. § 241(b)(1). Under section 241(c)(3), a claim is allowable only if the damage was not caused in whole or part by the negligent or wrongful act of the claimant.

In addition, 31 U.S.C. § 242 states:

> "Notwithstanding any other provision of law, the settlement of a claim under this Act is final and conclusive."

Accordingly, if a claim is cognizable under this Act, we have no role in settling it. In the context of the three specific claims presented we will turn our attention to whether the Act covers them.

With respect to whether the claimed losses were incurred incident to service, we note that the legislative history of the Act does not contain a discussion of the type of claim intended to be covered. B-169236, April 21, 1970. However, except in extremely rare situations, it is clear that commuting to or from work is not a covered activity. We stated in B-200323, April 30, 1981, about commuting costs in general that:

> "The settled rule is that employees must bear the cost of transportation between their residences and official duty locations. 11 Comp. Gen. 417 (1932); 15 id. 342 (1935); B-189114, February 14, 1978. The fact that emergency conditions necessitate additional trips or otherwise increase commuting costs does not alter the employee's responsibility. 36 Comp. Gen. 450 (1956); B-189061, March 15, 1978. Similarly, the unavailability of public transportation alone does not shift this personal obligation to the Government. 19 Comp. Gen. 836 (1940); 27 id. 1 (1947); B-171969.42, January 9, 1976. These general rules clearly assign the responsibility for home-to-work transportation to the individual employee in nearly every circumstance. We have made exceptions to the general rule only in emergency situations where even alternate transportation was unavailable or scarce and Government operations were closed down except for a few essential personnel who were ordered to report to work. However, none of those circumstances are applicable to the 1980 transit strike or the UMTA employees claiming reimbursement."

Since the claims of Messrs. Hurley and Gillespie involve property damage to their respective cars while commuting, we have concluded that their claims are not compensable under this Act.

Their employer, the Northeastern Program Service Center, issued a "Transit Strike Plan" memorandum which stated that each employee had the responsibility "to make every effort to reach the office during a transit strike." As distinguished from the situation in B-158931, May 26, 1966, involving an earlier New York transit strike, employees not making it into work would be charged annual leave. The memorandum continued in part:

> "We are attempting to clarify whether or not employees who are using their cars to drive fellow employees to and from work will be eligible for reimbursement for travel expenses. However, you will be covered under the Employee Compensation Act and the Federal Tort Claims Act. We still need drivers,* * *"

The Center's Director sent Mr. Hurley (and other employees) a memorandum dated March 31, 1980, which stated in part:

> "In the event of a transit strike beginning April 1, 1980 you are hereby directed to form a carpool to transport the people mentioned below to the Northeastern Program Service Center for the duration of the strike.
>
> "For this purpose, you will be protected by the Federal Employees Compensation Act, the Federal Tort Claims Act, which will cover any injury and damage claims for which you may become liable."

(The record does not state, but we presume Mr. Gillespie received similar memoranda.)

We first note that the HHS General Counsel memorandum indicated that while the above quoted memoranda may have been somewhat ambiguously worded, they were not intended to indicate that the two Acts mentioned would provide compensation for damages to the drivers' own property. We agree that the memoranda only purport to indemnify the drivers for liability to other persons. Therefore, these employees are not entitled to rely on the memoranda for purposes of seeking reimbursement for damage to their vehicles.

Second, even if there was some confusion as a result of the memoranda, we have substantial doubt that in the absence of unusual circumstances more calamitous than this transit strike, an agency can direct its employees to drive their cars and to transport fellow employees to work, or pay them for it, or that it can determine that employees doing so may be covered under the Federal Tort Claims Act, the Federal Employees Compensation Act, or the Military Personnel and Civilian Employees Claims Act. Getting to work is the employee's personal responsibility, although the agency is authorized to assist by providing carpool information and the like. An employee's responsibilities do not and cannot normally include driving to work (as distinguished from using any other mode of transportation available) or providing transportation to his fellow employees, even during and because of a transit strike. In this case the agency apparently did not even distinguish between critical and noncritical personnel. Accordingly, we do not see any legal basis for the Northeastern Program Service Center to extend the protections of the Military Personnel and Civilian Employees Claims Act to its employees while they commuted to work.

Therefore, these employees are in the same situation as other Federal employees who commute to work: they do so at their own risk. Thus, reimbursement of the damage sustained to the employees' cars is not authorized.

Finally, we turn to the claim of Mr. Conte. While the damage to his car occurred during the transit strike, it is unrelated to the previous two claims. Mr. Conte was using his vehicle for official business and was within the scope of his employment when the damage occurred. The front windshield of his car was damaged when he was on official business conducting a program

review. Therefore, his loss may properly be considered a loss incident to service under the coverage of the Military Personnel and Civilian Employees Claims Act. B-185513, March 24, 1976.

In view of the provisions of the Military Personnel and Civilian Employees Claims Act, it is not within the jurisdiction of this Office to consider Mr. Conte's claim for damage to his automobile. B-187913, February 9, 1977, B-180994, June 12, 1974. The reasonableness of the possession of the property in question and negligence on the part of the owner are questions for determination by the Secretary of HHS or his designee. B-195295, November 14, 1979; 31 U.S.C. §§ 241(a) and (c). (Mr. Conte now works for the Department of Education as a result of the splitting of the Department of Health, Education and Welfare into the Department of Health and Human Services and the Department of Education. However, we assume that the Secretary of HHS or his designee will handle his claim since it, along with the two others, have been submitted to us through HHS.) Settlement of the claims, if made in accordance with the Act, applicable regulations, and any overall policies prescribed by the President pursuant to 31 U.S.C. § 241(b)(1), would be final and conclusive. B-185513, id.; B-18713, id.; B-180994, id.; 31 U.S.C. § 242.

In connection with Mr. Conte's claim, HHS' Office of General Counsel has expressed reservations about the applicability of the Act if the individual involved was reimbursed a mileage rate from the Government for the use of his automobile. Apparently, Mr. Conte was, at the time his vehicle was damaged, being reimbursed seventeen cents per mile. Under the provisions of 5 U.S.C. § 5704 (1976), a mileage rate authorized for the use of a privately-owned automobile is in lieu of actual expenses. The mileage rate includes reimbursement of the cost of insurance if any. See 5 U.S.C. § 5707 (1976). The only actual expenses authorized for reimbursement in addition to the mileage rate are parking fees, ferry fare, and bridge, road and tunnel tolls. We have specifically held that a claim for damage to a private automobile sustained while engaged on official Government travel is precluded under that statute where reimbursement was made on a mileage basis. B-185513, March 24, 1976; 15 Comp. Gen. 735 (1936). However, we have also held that while a claim for damages to a private vehicle cannot be reimbursed under the provisions of 5 U.S.C. § 5704, settlement of the claim can still be made under the Military Personnel and Civilian Employees Claims Act. B-185513, id.; B-174669, February 8, 1972.

Milton J. Socolar

Acting Comptroller General
of the United States