APPEAL NO. 960004
FILED FEBRUARY 16, 1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act). On November 27, 1995, a contested case hearing (CCH) was convened. The issues were whether the injuries sustained by the appellant, who is the claimant, were sustained in the course and scope of employment by the (County), or as an employee of (Retailer), and whether she had disability as a result of such injuries. The date that claimant was injured was _____, during a robbery. The claimant was a peace officer for the County. The carriers for the County (a self-insured political subdivision) and the Retailer appeared as parties at the CCH.

The hearing officer determined that Article 14.03(c) of the Texas Code of Criminal Procedure applied to this case and conferred upon claimant a duty to act as a peace officer, and make an arrest, within the course and scope of her employment with County. However, he determined that claimant was not actually within the course and scope of employment by the County until after her physical injuries occurred, and only after this did she begin arrest of the robber. The hearing officer further found that until her employment with County "resumed" by virtue of the attempted arrest, she acted as an employee, and not an independent contractor, of Retailer. He found that she was unable, as a result of injuries sustained in the attack, to obtain and retain employment with the County for the period from December 22, 1994, through January 10, 1995. He determined that the carrier for Retailer was liable for compensation because the claimant was Retailer's employee at the time she was injured, and not an independent contractor.

Claimant appealed, arguing that the hearing officer misapplied the applicable provisions of the Code of Criminal Procedure to the facts here, and that her duty to act as a police officer began prior to the injuries in question. The claimant asserts entitlement for benefits, including for the period of time it was found that she was off work due to the injuries. The carrier for the Retailer has appealed the hearing officer's determinations that claimant did not act as an independent contractor in her relationship with the Retailer, or that she was not an employee of County at the time of her injury. The carrier for the County responds that the decision is correct because claimant was not furthering any interest of the County when the injuries occurred. The County asks that the decision be affirmed. No party has appealed the determination that claimant sustained physical injuries in an assault, or that it caused the inability to work for the time period found.

DECISION

We reverse the decision on that claimant was not acting in furtherance of the County when she was injured, and render a decision that the claimant was injured within the course and scope of her work for County, and that County is liable for workers' compensation benefits. We reverse the finding that claimant was an employee, rather than an independent contractor, for the Retailer, and render a decision that she was an independent contractor with respect to the Retailer.

The claimant was a deputy sheriff for the County, and worked her usual hours, 6:00 a.m. to 2:00 p.m., at the central offices located in (City). Among her other duties, the claimant stated that she would also serve as escort for persons from her division to transport payroll from the administrative offices. The claimant testified that the training and policy of the County stressed that, even in social situations, she was required to carry her badge, her identification, and her weapon. The reason for this, as she understood it, was the legal duty of a peace officer to respond to felonies committed in their presence, which could not be anticipated. Claimant said this duty to act was spelled out in the procedures and ethics manual for the County.

Claimant testified briefly about the "extra" jobs policy of her department. She indicated that in order to work off-duty jobs, it was necessary for officers to fill out a card describing the duties, and whether a uniform would be worn, and to submit the card for approval. Claimant's testimony indicated a network within the County of co-ordinators among the staff of such outside and off duty positions.

Claimant said that she was approached by Officer G, who held a similar position as she did within the County, about "filling in" for him at Retailer. The task Officer G performed for Retailer was to drive to Retailer before closing time, and, using a key provided by Retailer, open the night deposit box, take the receipts, and deposit them at a bank only four blocks away. Retailer was located in City, within the County boundaries. Claimant agreed that she would fill in as needed.

Claimant indicated that her instructions about the duties of this service, such that there were instructions, were provided by Officer G. Claimant said that she submitted an "extra card" for this service, indicating that wearing of a uniform would be optional, and received approval. Claimant said that on _____, she was filling in for Officer G when the events leading to her injury occurred.

Claimant said she was wearing a tee-shirt and blue jeans, but wearing her County badge and weapon, and driving her own car, when she went to the Retailer at about 6:45 p.m. on the day in question. She picked up the bag of receipts, and, as she walked to her vehicle, was accosted by a man who lunged at the bag. Claimant said

she ordered him to stop, and identified herself as a police officer. Notwithstanding this, the man lunged again and knocked her down, and began kicking her around the head and shoulders, in his attempt to wrestle the bag from her. Claimant said that she managed to get her firearm and fired two rounds at the man, who began running. Claimant gave chase, and saw the man jump into a waiting automobile a few blocks away. (The men were ultimately arrested by City police officers.)

After the incident, claimant called immediately to her division and spoke with Deputy GR, who in turn contacted an ambulance and, because discharge of the firearm was involved, reported the incident to internal affairs division for the County. Claimant said she later gave a report to internal affairs, and also was instructed to attend a lineup and photograph identification session although she was off on "workers' comp." Claimant said she was off work from December 22 through January 10, 1995, and was released back to work with no restrictions.

Claimant recalled she had attended a brief meeting at the Retailer when the owner of the Retailer instructed persons present that his employees were not to resist burglars, but were to surrender the money rather than risk danger to themselves. She understood that she was included within this instruction.

Claimant's testified that the perpetrators were tried and convicted of a felony. Claimant testified at their trial, in uniform.

Mr. W, the owner of the Retailer, said that he initially contacted a friend who was a sheriff with County, about having a trained officer deliver receipts to the bank, because he believed that his regular employees did not have the training or expertise to safeguard the receipts. Mr. W said that the meeting claimant recalled was one in which he instructed his employees that, if approached at either the cashier's area or the check cashing station by a robber, they were to surrender the money rather than risk endangerment. Mr. W said that he was contacted by Officer G, and he understood that Officer G would arrange for substitutes when he was unable to transport receipts but that Officer G was not paid for recruitment of substitutes. Mr. W stated that the amount he paid for the delivery service was a flat $15.00, regardless of the actual amount of time taken, and that he did not withhold taxes or provide benefits that were extended to regular employees. Payment to claimant was made daily for each time she performed the service. Mr. W said that he did not regard the officers as employees, but stated they were contract labor. Mr. W said that he did not directly instruct the claimant and understood that Officer G told her what to do.

The hearing officer made the following pertinent Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

9. While carrying [Retailer's] receipts to the bank on _____, claimant was confronted by a robber who grabbed the receipt bag. Claimant told the robber to stop and identified herself as a police officer. The robber pushed claimant down, hit and kicked her. Claimant suffered injuries to her head, collar bone, shoulder and other parts of her body, in that assault. When the assailant fled claimant attempted to arrest the assailant, and discharged her firearm.

10. The assailant committed a felony in the presence of claimant on _____. Claimant first attempted to arrest assailant after she had been knocked down and suffered her injuries.

12. [Retailer] directed claimant, through [Officer G], when to report for duty, provided the bag and the money, directed her when and where to take the money, and when and where to return the night deposit key. [Retailer] exercised actual control over the details of the claimant's work.

CONCLUSIONS OF LAW

3. Because claimant has shown by a preponderance of the evidence that she is a peace officer who is employed by [County], a political subdivision, and began exercising authority granted under Article 14.03(c) of the Code of Criminal Procedure on December 21, 1994, when she first attempted to arrest has shown that she was an employee within the meaning of Section 501.001(5)(c) of the Texas Labor Code, but because claimant's _____, injuries occurred before she resumed employment under Section 501.001(5)(c), her _____, injuries did not occur in the course and scope of her employment with [County].

4. Because claimant has shown by a preponderance of the evidence that [Retailer] exercised actual control over the details of her work, she was an employee of [Retailer] and not an independent contractor, on _____.

The other Conclusions of Law which allocate responsibility for workers' compensation benefits are consistent with these recited findings and conclusions.

First of all, we believe the hearing officer plainly erred by finding that claimant did not act as an independent contractor for Retailer. Mr. W plainly indicated that he sought deputy sheriffs to deliver receipts because they had training and expertise that his regular employees did not have. They were paid by the job and not by the hour. They furnished the vehicles and firearms. The evidence indicates that the "instruction" given

was general information about how to pick up the receipts and where the bank was located. In order for a master-servant relationship to be found, the employer must control not merely the end sought to be accomplished but also the means and details of its accomplishment. Thompson v. Travelers Indemnity Company of Rhode Island, 789 S.W.2d 277 (Tex. 1990); Industrial Indemnity Exchange v. Southard, 160 S.W.2d 905 (Tex. 1942). There is essentially no evidence that the Retailer exercised "control" over the details of claimant's performance of the delivery; the "instruction" imparted to claimant, not by the Retailer, but by Officer G, was merely that concerning the objective of the delivery job. The one instruction that claimant testified to receiving from the Retailer, concerning surrender of money to robbers, was one she clearly felt was overridden by her duties as a peace officer. Because the hearing officer's determination that claimant was an employee of Retailer for purposes of workers' compensation is against the great weight and preponderance of the evidence, we reverse this and render a decision that claimant was an independent contractor with respect to her delivery services for Retailer.

On the matter of whether claimant was within the course and scope of her employment with the County, we would first observe that the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 93375, decided July 1, 1993, is distinguishable from the facts of this case. In that case, as opposed to the one under appeal, the peace officer was employed in a regular second job as a security guard for another company, outside of his jurisdiction, and the event leading to injury in that decision was one that his supervisor testified went beyond an appropriate level of response. The claimant in Appeal No. 93375 was in no way identified as a police officer.

The County in this case is a political subdivision within the meaning of Texas labor Code, Chapter 504. Section 504.001(2)(A) defines "employee" as "a person in the service of a political subdivision who has been employed as provided by law" as well as other optional categories which do not apply to this case. Section 401.001(12), which defines course and scope of employment, applies under Chapter 504. (We do not agree with the hearing officer's findings that Section 51.005(c) is the applicable denfinition of employee in this case.)

In the case under appeal, the hearing officer evidently agreed that, at some point during the incident, claimant was within the course and scope of employment by County; although County's reply brief asserts that claimant was working for the benefit of Retailer while undertaking delivery of receipts, and that being "on call" would alone be insufficient to bring an officer within the course and scope of employment, the County has not appealed the essential conclusion that the claimant's attempted apprehension of the assailant in this case was within the course and scope of her

employment for County. What the Appeals Panel must review, therefore, is whether the hearing officer erred in fixing the point of time where claimant entered the course and scope of employment at the midpoint, rather than the beginning, of the felonious incident in question. We agree that he so erred.

The hearing officer took official notice not only of Section 14.03 of the Texas Code of Criminal Procedure, but also of Sections 2.13[1] and 6.06[2]. Section 14.03 has to do with the arrest of suspects, without warrant. This was the only provision cited by the hearing officer in his decision. However, the hearing officer has given no indication in his decision as to why claimant would be found to be exercising her authority as a peace officer only upon an attempted arrest, but not with respect to her attempts to curtail the threat to the property of another. We believe that he has erred as a matter of law, and that the law, applied to the facts herein, establish that claimant's authority as an officer of the County began when the threat to the property of another arose in her presence; *i.e*, when the robber first lunged at the receipt bag, and the claimant thereupon identified herself as a police officer.

The County argues that the decision in Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App.-Dallas 1982, writ ref'd n.r.e.) precludes regarding the injury here as compensable based upon any duty of the claimant to act as a police officer. We disagree. First of all, the injury in the Vernon case arose, essentially, out of an altercation that involved the claimant in his private capacity. The Court based its decision in large part upon Section 2.13 of the Code of Criminal Procedure, pointing out that Vernon was outside his jurisdiction, and that there was no duty, therefore, for him to act. While the Court then went on to discuss that the existence of a duty to act would not compensate for lack of proof that an injured officer was acting in furtherance of the employer, the case did not overrule Travelers Insurance Co. v. Hobbs, 222 S.W.2d 168 (Tex. App.-San Antonio 1949, no writ), in which a traffic-related death of a police officer was held to be compensable, based upon his duty as a peace officer, and the Vernon court refers back to the fact that Officer Vernon was beyond his jurisdiction, in analyzing whether he acted "in furtherance" of his employer. We cannot agree that the holding of Vernon, and the law of this state as developed in other case law, demands that the legal duties of a peace officer acting within his or her jurisdiction may never be considered in

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[1] Art. 2.13: It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. . . . He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and tried.

[2] Art. 6.06: Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another . . . . it is his duty to prevent it. . . . The peace officer must use the amount of force necessary to prevent the commission of the offense, and no greater.

determining the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 93375, *supra,* and cases cited therein. For example Monroe v. State, 465 S.W.2d 757 (Tex. 1971).

In the overall context of this case, given that claimant was injured in the act of preventing a commission of a crime, whether she was "on the clock" for the County, or whether she was engaged in performing a service for Retailer (as opposed to being a shopper and preventing a crime in progress), is not determinative in analyzing whether the in injury arose out of her employment as a peace officer. The hearing officer evidently agreed, because he found claimant was within the course and scope of her employment for the County at least by the point of hot pursuit. However, we believe there is no basis for resuming her "employment" with County only at the point that hot pursuit began, as opposed to the point at which claimant first sought to stop theft of another's property. We therefore render a decision that the claimant acted in the course and scope of her employment with the County at the time she was injured, beginning when she sought to avert the taking of the bag and identified herself as a police officer. We render a decision that County is liable for workers' income benefits.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Judy L. Stephens
Appeals Judge