

APPEAL NO. 991497

A contested case hearing was held on May 18, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), to decide the following disputed issue: "Was claimant's employer for purposes of Texas Workers' Compensation at the time of the claimed injury." The hearing officer resolved the disputed issue by concluding that appellant (self-insured county) was respondent (claimant) employer for purposes of Texas workers' compensation at the time of the claimed injury on _____. The self-insured has appealed this conclusion and two findings of fact, asserting that the hearing officer "has misapplied existing legal analysis" and requesting that the Appeals Panel "reverse and render a new opinion that comports with existing legal analysis of the same or similar fact patterns." Responses were filed by claimant and by respondent (carrier 1).

DECISION

Affirmed.

The parties stipulated that on _____, claimant was employed as a peace officer with the self-insured county; that on _____, claimant was injured while providing security services at the (shopping center), a property owned by (center owner) and managed by (management company); that on _____, the center owner was not claimant's employer; that on _____, the self-insured county was self-insured; that on _____, the center owner had workers' compensation insurance coverage with (carrier 2); and that on _____, the management company had insurance coverage with carrier 1.

According to the (city) police department crime report of _____, a Saturday, information taken from witnesses reflected that in mid-afternoon of that day, a chow dog jumped from the bed of a pickup truck parked in the shopping center parking lot and chased after the horse claimant was riding while performing mounted patrol duties, attempting to bite the horse's rear legs; that claimant was yelling at the dog to desist; that the horse began to gallop rapidly; that claimant fell off, striking his head on the concrete pavement; and that claimant was taken by emergency flight services to a hospital. The dog's owner was issued a citation for the dog's running at large and not being secured in the pickup truck, apparently violations of city ordinances. The medical records reflect that claimant was maintained on a ventilator and on December 13, 1998, underwent a craniotomy and partial lobectomy, the first of several surgical procedures; and that the assessment on December 14, 1998, was severe traumatic brain injury, facial fractures, impaired arousal and cognition, and decreased mobility and activities of daily living. The evidence also reflects that a temporary guardian of claimant and of his estate was appointed by a court based on his incompetence.

Ms. B testified that she was a property manager for the management company and involved in the management of the shopping center for two years; that the shopping center had previously hired law enforcement personnel from the self-insured (sheriff's department)

at holiday times to augment its private security patrol personnel hired by the center owner but had deleted from its 1998 budget the funding for this purpose; that she knew that the shopping center's security patrol personnel performed security duties while the sheriff's department personnel performed law enforcement duties; and that the shopping center had no personnel trained to perform law enforcement duties. She further testified that prior to the November-December 1998 holiday season, the center owner called her and advised that the city police chief, (Chief T), had recommended that the shopping center continue to utilize law enforcement personnel there during the holiday season, observing that it had been "a tremendous deterrent"; and that she subsequently made oral arrangements with (Sgt. R) of the sheriff's department to hire the deputies Sgt. R sent out to the shopping center, including claimant, to perform horse-mounted patrol duties. Ms. B indicated that her office paid the deputies gross wages with no deductions but did not provide them with any equipment or have other direct contact with them. She further stated that she knew the personnel sent out by Sgt. R were full-time officers; that she expected these officers to perform law enforcement duties, including spotting criminal activities; and that these officers wore their uniforms complete with badges and sidearms, rode horses around the parking lot, and were highly visible.

In evidence is a sheriff's department General Order 41 stating the policies governing extra jobs and off-duty employment. This order contains the following definitions:

- A. Extra Job - Any outside employment involving a member of the Department who is using, or may use, the authority of a Peace Officer, where compensation is provided by the employer in the form of money, goods, services, or free use of property or premises.
- B. Off Duty Employment - Any outside employment or other business activity involving a member of the Department, while off duty in which there is no relation to a Law Enforcement function.

The Order, in Part III entitled "Policy," states in part that "[w]orking at Extra Jobs under the 'color of authority of the [self-insured county's] Sheriff's Department' is a privilege granted at the sole discretion of the Sheriff' and that the Department shall provide guidelines and procedures to regulate such activity." The Order provides procedures for requests and records maintenance and states that a Division Commander may authorize the use of agency-owned equipment during extra job employment if certain criteria are met. Part V entitled "Supervision" states as follows:

It is intended that any incident occurring at an extra job be subject to the authority and control of the on duty Patrol Supervisor. Employees engaged in extra job employment, regardless of position or rank, shall respond to the chain of supervisory command commencing with the Patrol Duty Supervisor.

Also in evidence is a sheriff's department office Application for Extra Employment Permit signed by claimant on "11/23/98" reflecting that claimant's regular duty hours in the

patrol division were from 1700 to 0300 on Sunday, Monday and Tuesday; that the extra employment sought was that of horse-mounted patrol of parking areas around the shopping center; that the schedule claimant requested included a starting date of "11/27/98" and ending date of "12/31/98" for a total of 100 and one-half hours; that two other deputies were also to work at that location; and that the schedule was coordinated by Sgt. R. Above claimant's signature is a certification that he has read General Order 41 of the policy and procedure manual governing extra employment and will comply with the rules and regulations, and that he understands in applying for this extra employment that the self-insured county "may not provide injury leave or workers' compensation coverage" if he is injured while working for another employer. Below claimant's signature are the signatures of a sergeant, a bureau commander, and a chief deputy as well as a certification that the "application (is) (is not) in conflict" with claimant's regular duty assignment; that claimant is on scheduled time off and the maximum number of extra employment hours will not be exceeded; and that a signatory has discussed with claimant that the self-insured county may not provide workers' compensation coverage if he should be injured while working for another employer. Another sheriff's department record reflects that on _____, claimant commenced duty at 10:56:50, apparently the time he called in by radio, and went off duty at 22:12:03.

Also in evidence is a February 16, 1999, letter from (Sheriff W) to the Texas Workers' Compensation Commission stating that he would testify as follows:

I believe that [claimant] was performing a necessary law enforcement function when he was working in an "Off Duty" status in the parking lot of the [shopping center] on (alleged date of injury). He was using County equipment such as a radio, uniform, etc. as our policy permits.

Also, as a matter of public safety, deputies are permitted to accept "Extra Jobs" because the Sheriff's Office does not have the manpower to provide adequate coverage for all areas of the County. Business owners help in this area by hiring "Off Duty" Officers for crowd control and public safety.

In his transcribed interview of January 22, 1999, Sgt. R stated that he and Ms. B have a relatively fixed standing schedule for the two locations managed by the management company that involves all the major holidays, including Thanksgiving through the Christmas weekend; that he works the properties himself; and that claimant's duties at the shopping center were to provide a high visibility patrol on horseback to interdict any criminal activity, to provide security for the shoppers and merchants, and to "suppress ah the crime, the criminal activity that ah, they had been (u/a) such as burglaries, or automobiles and ah, purse snatching, that sort of thing prior to us taking the ah security there." Sgt. R further stated that he is known in the sheriff's office as one of the mounted riders and is a supervisor; that when a request comes in, it is referred to him and he makes the contacts, schedules the officers, and handles the time sheets; and that he sends the invoices for the checks to be issued directly to the officers. He further stated that Ms. B tells them what she wants accomplished and has occasional contact with them but does not

actively and directly supervise them. He also stated that claimant was on his own horse when injured, that the self-insured county does not have a mounted patrol, and that claimant performs motor vehicle patrol duties.

Not disputed are findings that the security service provided by claimant on _____, at the shopping center was an extra job authorized by the self-insured county's sheriff's department; that as it pertains to his extra job at the shopping center, claimant provided his own equipment and was paid by the job and the management company had no right of control of the performance of his duties; and that on _____, claimant was an independent contractor for the management company. The self-insured county does challenge findings that while working an extra job at the shopping center on _____, claimant wore his peace officer's uniform and acted under full color of authority of the sheriff's department; that claimant's extra job at the shopping center on _____, was subject to the authority and control of the sheriff's department; and that at the time of the injury on _____, claimant was in the course and scope of employment with the sheriff's department.

The self-insured county contends on appeal that claimant was simply another Texas peace officer "moonlighting" in uniform in the employ of a private business as an independent contractor, a common practice; that in these situations, the private business (or its insurance carrier) usually avoids workers' compensation liability by establishing the off-duty peace officers as independent contractors and the peace officers commonly fail to obtain their own workers' compensation insurance and become, in effect, non-subscribers; and that the Texas courts and the Appeals Panel have recognized that in these circumstances, the peace officer, whose primary employment is usually with a governmental entity, is not acting in the course and scope of his or her employment with the governmental entity until and unless they actually become involved in some crime situation at their second job at which time they then revert to their on-duty peace officer status because of their 24 hours per day duty to enforce the law. The self-insured county cites Blackwell v. Harris County, 909 S.W.2d 135 (Tex. App.-Houston [14th Dist.] 1995, writ denied); City of Dallas v. Half-Price Books, 883 S.W.2d 374 (Tex. App.-Dallas 1994, no writ); and Texas Workers' Compensation Commission Appeal No. 960004, decided February 16, 1996. The self-insured county contends that the hearing officer in the case we consider has incorrectly analyzed the case by finding a distinction between a self-insured county peace officer performing an "extra job" and one merely engaged in "off duty employment" because, in both situations, the peace officer is off duty and "moonlighting" for a private business and does not revert to his or her regular employment and become an on-duty officer unless required to enforce the law or apprehend a criminal suspect. The self-insured county contends further that claimant's horse being spooked by the dog in the shopping center parking lot was the equivalent of a premises defect pursuant to Blackwell, supra; that the self-insured county is not liable for an injury to one of its off-duty peace officers injured by a premises defect while "moonlighting"; and that the hearing officer, who found that the evidence was insufficient to show that claimant was attempting to enforce "that law at the time of his injury" (apparently referring to the dog leash and restraint in trucks ordinances), has "substantially extended" present case law.

Carrier 1 argues in response, essentially, that the city police report and witness statement reflect that claimant did observe the commission of a criminal offense, at least the violation of the city's dog leash and restraint in trucks ordinances, even if he did not see the dog jump out of the pickup, and thus under the case law claimant reverted to on-duty status as a sheriff's deputy.

Claimant argues in response that he was indeed involved in acting on a criminal offense when injured. He first asserts that the Texas Attorney General has determined that he was a crime victim under the Texas Crime Victims' Compensation Act and for the Appeals Panel to fail to affirm the hearing officer's decision would put it in conflict with another state agency. He attaches to his appeal certain documentation in support of this assertion which was not presented below. The Appeals Panel does not generally consider evidence presented for the first time on appeal (Section 410.203(a)) and we do not find such consideration warranted in the circumstances of this case in that the documents do not meet the criteria for newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 950331, decided April 18, 1995. Claimant further contends that the evidence, particularly General Order 41, claimant's extra employment permit, and the letter from Sheriff W establish that when claimant was injured, he was performing law enforcement functions for the self-insured county notwithstanding that the location was the shopping center parking lot and he was paid by the management company.

We are satisfied that the challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We are further satisfied that the hearing officer's determination of the disputed issue is not legally incorrect. In Blackwell, *supra*, the appeals court, finding a genuine fact issue as to whether an off-duty deputy was escorting a funeral procession when killed in a traffic accident, reversed the lower court's order granting the county's motion for summary judgment on the basis of the "going to and coming from" rule. The court noted that the decedent, a correctional officer, would undoubtedly have been in the course and scope of his employment by the county had he been assigned the duty of escorting the funeral procession and that the court needed to determine whether this activity, performed off-duty, warranted the same protective benefits provided officers injured on duty. The court noted that a police officer is an agent of government, derives all of his power and authority from the governmental entity that employs him, that he must be licensed as a peace officer, that it is the duty of every peace officer to preserve the peace within his jurisdiction, and that "police officers are not relieved of this responsibility simply because they are 'off-duty.'" The court stated further that, like other citizens, police officers may be injured in an accident unconnected with their service as law enforcement officers and that because they retain their status as peace officers 24 hours a day, it can be more difficult to distinguish between their compensable and noncompensable injuries. The court went on to state that if an officer is hired for the deterrent effect of his "visibility" and falls while walking around the premises, he is probably not within the course and scope of employment as a law

enforcement officer; but if he observes criminal activity, his status changes from that of a private "ornament" to that of a public law enforcement officer and if he is then injured attempting to enforce the law or apprehend a suspect, he is acting within the course and scope of his employment as a law enforcement officer.

In City of Dallas, *supra*, the appeals court found the existence of a genuine fact issue and remanded in a case involving a police officer who was providing general security for a store at night in uniform and interrupted the commission of a crime he witnessed while escorting employees out in the parking lot. The court stated that police officers have a duty to prevent crime and arrest offenders and that an off-duty police officer who observes a crime immediately becomes an on-duty police officer, and thus when the officer involved saw a crime being committed, he ceased being the employee or independent contractor of the book store and became an on-duty police officer.

Our decisions in Appeal No. 960004, *supra*, and in Texas Workers' Compensation Commission Appeal No. 961682, decided October 9, 1996, both involved off-duty police officers working at a private business who were determined to have reverted to on-duty peace officer status in, respectively, resisting a robbery and quelling a disturbance. *Compare* Texas Workers' Compensation Commission Appeal No. 93375, decided July 1, 1993.

We view the hearing officer's decision as basically determining, not that claimant was employed as an independent contractor by the management company when he started work that Saturday morning and reverted to being an on-duty peace officer when he became involved in a criminal situation via the unleashed dog, but as having been on duty for the self-insured county after signing in by radio with the sheriff's department at 10:50 that morning and notwithstanding that his patrol area that day was limited to the shopping center and his pay came from the management company. The hearing officer apparently viewed claimant's employment situation that day as not dissimilar from working overtime on a day off for the self-insured county in that he received a permit from the sheriff's department to perform that work, signed in by radio, wore his uniform, badge, and side arm, was subject to the authority and control of the on-duty patrol supervisor and responsive to his chain of command (General Order 41), and, according to the evidence, performed a law enforcement patrol function as distinguished from the type of security provided by the shopping center's private roving security guard. The facts that his patrol area was limited on _____, and that he was paid by the management company for his work that day did not as a matter of law prevent him from being the employee of the self-insured county on that date under the circumstances of this case.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

CONCURRING OPINION:

I concur in the result and write separately only to stress that I do not believe that the act of calling in to his dispatcher was in any way dispositive. The evidence established that the claimant clearly worked under the status and parameters conferred by General Order 41, regardless of any limitations on his area of patrol or who paid him.

I would also find, under the more traditional theory of the case law cited in the majority opinion that the claimant reverted to county law enforcement status when he attempted to maintain public safety by controlling the dog/horse confrontation. Such reversion does not, in my opinion, occur only when performing criminal law enforcement activities.

Alan C. Ernst
Appeals Judge