

APPEAL NO. 001297

Following a contested case hearing (CCH) held on May 1, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that because the appellant (claimant) failed to prove that he was engaged in an activity that furthered the business affairs of the respondent (self-insured employer) on _____, when he was injured in a motor vehicle accident (MVA), his injuries did not occur in the course and scope of employment; and that the self-insured employer is not liable for benefits. The claimant challenges this legal conclusion and several underlying findings of fact, contending that his injury should be found compensable because at the time of the MVA, he was on a police motorcycle and in a police uniform controlling traffic so that the school buses he was escorting could change lanes. The self-insured employer contends, in response, that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The facts in this case are essentially undisputed. The claimant testified that he is employed by the (self-insured employer) as a patrolman motorcycle officer; that he owns, maintains, and insures the motorcycle he uses in his employment with the employer; that the employer "leases" the motorcycle from him for his use on the job, paying him \$400.00 a month for its use; and that, with the prior approval of the employer's police chief, he performs motorcycle escort work for various businesses, including the local independent school district (ISD), during his off-duty hours. The claimant further testified that prior to the fall school term, he and a fellow motorcycle patrolman arranged with the ISD to escort its school buses for out-of-town football games; that he has been performing such escort duties for the ISD for 10 years; and that he submits his invoices to the ISD and the ISD pays him directly for his services and also provides him with IRS 1099 forms for his use in preparing his income tax returns. He said he has similar off-duty motorcycle escort arrangements with other business entities and that these escort activities are voluntary. In a written statement, the claimant cited funeral homes and wide loads as examples of other escort jobs.

The claimant further testified that on _____, while escorting 8 or 10 of the ISD school buses back from a football game in (city) and while still in (city), he exited _____ and entered _____; that he pulled into an inside traffic lane, turned his red light on and slowed down so that the buses could all pass along side him and get into the lane in front of him; and that his motorcycle was struck from behind by a vehicle which he did not see. He said his right femur was fractured in two places, requiring multiple operations to repair; that he was told by (city) police officers that the man that collided with his motorcycle was charged with DWI; that his medical expenses were paid by the employer's group health insurance carrier and the employer continued his pay; and that he did not return to work until the week before the CCH. The claimant indicated in closing argument that a reason he was pursuing workers' compensation benefits was that he had to use approximately 110 days of his sick leave.

The claimant also stated that at the time of the MVA, he was not in a criminal pursuit, had not witnessed a felony, and was not preserving the peace. He did say that, in his view, he was controlling traffic in the process of escorting the school buses, although he acknowledged he was not in the jurisdiction of the employer and he had no authority to write a traffic ticket at the location where he was injured.

Not disputed are findings that the claimant worked as a motorcycle patrol officer for the self-insured employer; that on _____, the claimant was riding the motorcycle escorting ISD school buses in (city) when he was involved in the MVA and injured his leg; and that the self-insured employer did not assign or pay the claimant to escort the school buses on _____, although the self-insured employer did approve of jobs outside the department. The claimant does challenge the following findings:

FINDINGS OF FACT

4. Claimant is a peace officer of The State of Texas. At the time of the accident on _____ Claimant had not observed a felony, but at best was attempting to slow traffic so that the buses could change lanes on the freeway. Claimant was not in the jurisdictional limits of [the self-insured employer] on _____ at the time of the [MVA].

* * * *

6. Claimant was not acting as a peace officer at the time of the accident on _____.
7. Claimant was not furthering the business affairs of [the self-insured employer] at the time of the accident on _____.

In his appeal, the claimant says that he disagrees with Finding of Fact No. 4 because he had the emergency red and blue lights on and was controlling traffic in order for the buses to change lanes and that police jurisdiction is statewide; that he disagrees with Finding of Fact No. 6 because he was in full police uniform and on a marked police motorcycle; that he disagrees with Finding of Fact No. 7 because he was representing the employer by escorting children from the ISD in which he is employed; and that he disagrees with the dispositive conclusion of law because police jurisdiction is statewide and motorcycle officers escort from city to city and stop traffic when needed.

Section 406.031 provides, in part, that an insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if the injury arises out of and in the course and scope of employment. Section 401.011(12) defines "course and scope of employment" to mean "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer."

In Blackwell v. Harris County, 909 S.W.2d 135 (Tex. App. - Houston [14th Dist.] 1995, writ denied), a county deputy (one of three or four) scheduled to escort a funeral procession in his “off duty” hours was en route to the funeral home when the procession departed and a short time after the procession departed was killed in a traffic accident. The lower court granted the county’s motion for summary judgment and the appellate court reversed and remanded, holding that a fact issue existed as to whether the deputy was actually escorting the funeral procession when he was fatally injured in a collision; that the determination of whether injury to an off-duty deputy was sustained in the course and scope of employment is a fact issue to be determined on a case-by-case basis; and that a privately employed deputy is acting in the course and scope of employment as a deputy while directing traffic for a funeral procession, noting that the City of Houston requires all funeral processions to be accompanied by peace officers for the purpose of directing traffic. The court observed that peace officers have the duty to preserve the peace within their jurisdiction and are not relieved of such responsibility simply because they are “off duty”; that police officers, like other citizens, may be injured in accidents unconnected with their service as law enforcement officers; and that because they retain their status as peace officers 24 hours a day, making the distinction between compensable and non-compensable injuries may be more difficult than for other citizens. The court stated that strict adherence to traffic control signals is required by state law unless otherwise directed by a police officer; that to maintain the cohesive integrity of a motorcade in an urban environment, its members must often proceed in opposition to traffic control signals which is not possible without a police escort; that a police officer performs a valuable law enforcement function when escorting a motorcade; and that this escort activity is of a kind and character having to do with employment as a police officer. The Blackwell court went on to state its disagreement with the Dallas court in Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App. - Dallas 1982, writ ref’d n.r.e.) holding that an off-duty Dallas police officer who, while dining with his wife in a restaurant in another city, was attacked and injured by another patron, was not injured in the course and scope of employment.

The Appeals Panel has had occasion to consider the compensability of injuries to various “off-duty” peace officers in a variety of factual settings. See Texas Workers’ Compensation Commission Appeal No. 92013, decided March 27, 1992; Texas Workers’ Compensation Commission Appeal No. 93375, decided July 1, 1993; Texas Workers’ Compensation Commission Appeal No. 960004, decided February 16, 1996; Texas Workers’ Compensation Commission Appeal No. 961622, decided October 2, 1996; Texas Workers’ Compensation Commission Appeal No. 961682, decided October 9, 1996; and Texas Workers’ Compensation Commission Appeal No. 971613, decided September 25, 1997.

We are satisfied that the challenged factual 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). The hearing officer could consider that, even if the claimant had law enforcement duties in (city) by virtue of his 24-hours-a-day peace officer status, there was no evidence that the ISD buses, unlike funeral processions in (city), were required to travel as a motorcade with a police escort to take them safely through opposing traffic control

signals and that the claimant was performing the law enforcement function of directing or controlling traffic when his motorcycle was struck from behind.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge