APPEAL NO. 020029
FILED FEBRUARY 7, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 5, 2001, in (city 1). The hearing officer determined that the appellant (claimant) was not acting within the course and scope of his employment with the respondent (self-insured) when he was involved in a motor vehicle accident on _____, and that the claimant has sustained no disability. The claimant appeals, arguing that the hearing officer misapplied the law to the facts, and arguing, for the first time on appeal, the doctrine of collateral estoppel. The self-insured responds that the hearing officer correctly determined that the claimant was not acting within the course and scope of his employment with the city. The self-insured further argues that collateral estoppel was not an issue at the benefit review conference (BRC) or the CCH, and it is therefore not properly before the Appeals Panel.

DECISION

Affirmed.

The facts of this case are not in dispute. The claimant is a police officer for the city 1. He engages in "secondary employment" during his off-duty hours, with the knowledge and approval of the police department, and in accordance with the policy of the police department, which permits secondary employment of police officers. The claimant was approved to engage in secondary employment as a security guard and as an escort for funeral processions and oversize loads. On _____, the claimant was injured when he was struck by a motor vehicle while he was riding his personally owned motorcycle and escorting a funeral procession near (city 2). The claimant was wearing his city 1 police uniform, badge, and sidearm. The funeral procession began and ended outside the city limits of city 1. City 1 established a minimum rate of pay for the secondary employment, but the claimant was being paid by the funeral home, and was considered to be an independent contractor for the funeral home. Escorting a funeral procession involves the performance of traffic-control duties, but there was no legal requirement that this funeral procession be escorted by police.

The hearing officer determined that the claimant "was not engaged in or about the furtherance of the affairs or business of Employer" at the time he was injured. The hearing officer placed great reliance upon Texas Workers' Compensation Commission Appeal No. 93375, decided July 1, 1993. In that case, an off-duty policeman was working as a security guard in a store located outside the jurisdiction where he was employed. His injury, which was sustained while chasing a suspect who reportedly tried to pass a bad check, a crime which the off-duty policeman did not see or hear being committed, was not considered to be in the course and scope of employment. The Appeals Panel said:

> We view the evidence as sufficiently supporting the findings and conclusions in this case including the finding that claimant's attempt to apprehend the suspect while working at the store was an activity which did not originate in or have to do with the business of the City [the claimant's employer] and was not performed by him while engaged in or about the furtherance of the business or affairs of the City. The only nexus between his injury and his employment with the City which claimant advanced was that he was functioning as a City police officer at that time because he viewed the Extra Job Policy as creating a duty for him to respond to "any crime in progress or incident that occurs within [his] sight or hearing," and because he perceived the law of this state to authorize him to exercise his police authority 24 hours a day anywhere in the state. He did not contend his injury occurred while in a "hot pursuit" originating in the City nor did he assert any specific statutory duty to exercise his police officer authority nor prove facts to bring himself within any such specific statutory duty.

The claimant in Appeal No. 93375 was determined not to be in furtherance of the affairs of the city which employed him as a policeman. We agree with the hearing officer's analysis of the facts, and concur that she has correctly applied the law in this case. The hearing officer was unable to identify any meaningful nexus between the claimant's off-duty employment escorting a funeral procession outside the city limits of city 1 and his employment as a city 1 police officer. We also believe that Texas Workers' Compensation Commission Appeal No. 001297, decided July 18, 2000, is applicable to this case. That appeal involved an off-duty policeman who was injured while escorting 8 or 10 buses back from (city 3), to (city 4), after a football game. He said he was controlling traffic in the process of escorting the buses, but acknowledged that he was not in the jurisdiction of his employer (city 4) and that he had no authority to write a traffic ticket at the location where he was injured. The hearing officer concluded, and we agreed, that the claimant had failed to prove that he was engaged in an activity that furthered the business affairs of his employer at the time he was injured.

Appeal No. 001297 contained a lengthy discussion of Blackwell v. Harris County, 909 S.W.2d 135 (Tex. App.-Houston [14th Dist.] 1995, writ denied), a case cited by the claimant, which has a very close factual similarity to the instant case. Officer Blackwell was found to be in the course and scope of his employment. The Appeals Panel said:

> In [Blackwell], 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 [city 3] 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. [Emphasis added.]

While we agree completely with the considerations set forth in the underlined language above, the important distinctions between the instant case and Blackwell are that Blackwell's employer (city 3) required "all funeral processions to be accompanied by peace officers for the purpose of directing traffic," and that Blackwell was "within [his] jurisdiction." The funeral procession in this case did not require a police escort, and the claimant in this case was not performing a duty required by his employer, was not attempting to preserve the peace, and was injured in an accident that was unconnected with his service as a law enforcement officer. The employer allowed the claimant to engage in off-duty employment to earn additional income, and did not thereby become a "24/7" insurer against anything that might happen to the claimant.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the evidence for that of the hearing officer. We affirm her decision that the claimant was not acting within the course and scope of his employment when he was injured, and that he does not have disability.

The claimant presented the testimony of another city 1 police officer who was injured while escorting a funeral procession, off-duty, outside of the jurisdictional limits of city 1. That police officer was awarded workers' compensation benefits by city 1. The claimant asserts that the concept of collateral estoppel applies, and that city 1 must now provide workers' compensation benefits to the claimant. The self-insured's point that this was not an issue in the case is well-taken. There was no issue of collateral estoppel before the BRC or before the CCH. In fact, the concept was only mentioned in the claimant's attorney's rebuttal argument when he stated that he was not arguing estoppel. We find it disingenuous to now devote a considerable segment of the appeal to collateral estoppel, and we decline to discuss the issue further.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

LN
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge