

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312185

JAMES BRAGG, EMPLOYEE	CLAIMANT
CITY OF STUTTGART, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 18, 2005

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SHEILA F. CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

This claim is before the Commission on the respondent's appeal of an Administrative Law Judge's decision handed down on September 23, 2004. In that decision, an Administrative Law Judge found that the claimant had sustained compensable injuries which arose out of his employment and which occurred while he was performing an employment service. We find that the decision is correct and should be affirmed.

The facts in this case are not in dispute. The claimant is a Sergeant in the Stuttgart Police Department.

On the evening of the injury, the claimant, who was off-duty, was having dinner with his wife and another off-duty police officer at a restaurant known as the "Wildlife Bar and Refuge." This establishment was just outside the city limits of Stuttgart. Just prior to leaving, the proprietor of the establishment, who presumably was aware that the claimant was a police officer, asked him for assistance in removing an obviously intoxicated patron. The claimant approached the patron, advised him that he was a police officer, and escorted him from the premises. The claimant and his party then paid their bill and left. While in the parking lot, the individual who the claimant had just escorted from the premises was observed to be "messing around with some vehicles. . .". The claimant asked his fellow officer to call for back up and he approached the intoxicated suspect. Some type of scuffle or shoving match ensued, during which the claimant fell and injured his ankle and leg. The suspect, who left the scene, was later arrested by another Stuttgart city police officer. The location of this arrest was also outside the city limits.

The respondent has controverted the claim because, at the time the claimant approached the suspect,

he was off-duty and outside his jurisdiction. The respondent contends that this was an illegal arrest, and the claimant, therefore, was not acting in the course and scope of his employment and was not performing an employment service. The claimant contends that, as a police officer, he is on duty 24 hours a day, and on previous occasions he had been dispatched to this location where he made other arrests, even though it was outside the city limits of Stuttgart.

Three witnesses, in addition to the claimant, testified at the hearing. The first of these witnesses was Deputy Dennis Swinford, who, at the time of the hearing, was an Arkansas County Deputy Sheriff, but was a Sergeant in the Stuttgart Police Department on the date the claimant was injured. Deputy Swinford (then Sergeant) arrested the suspect following the claimant's injury. Deputy Swinford corroborated the claimant's testimony that the Stuttgart Police Department frequently made arrests in and around the area of the establishment where the claimant was injured. He also agreed with the claimant that there was an "unwritten rule" that city police officers would provide assistance to the County Sheriff in making arrests outside the city when necessary. On the

night of the injury, Deputy Swinford said that after approaching the suspect, he called the Sheriff's Department, obtained permission to make the arrest, and did so. The Deputy stated that the normal procedure was to contact the Sheriff's Department prior to making misdemeanor arrests outside the city limits. However, Deputy Swinford stated that had he been in the claimant's position, he would have thought that he had the authority to follow the same course of action as the claimant.

The next witness to testify was Chief Michael Smith, the Stuttgart City Police Chief. Chief Smith also testified about the existence of an unwritten policy between Stuttgart and the Arkansas County Sheriff's Department. The Chief acknowledged that police officers were on duty 24 hours a day and that they were empowered to make arrests for crimes committed in their presence. While he acknowledged that the scene of the claimant's accident was outside the jurisdiction of the city of Stuttgart, he explained that there was a verbal agreement that the County had given city officers to go out to their jurisdiction to make arrests. The Chief explained that while misdemeanors were treated differently than felonies, there were also misdemeanors which would justify an

immediate arrest. He also stated that the unwritten policy regarding out-of-city arrests had been in place for as long as the department had existed.

The final witness was Sergeant Shonda Underwood, the officer with the claimant and his wife on the night of the claimant's accident. Sergeant Underwood likewise expressed her knowledge of the unwritten agreement allowing Stuttgart city police officers to make arrests outside the city limits. She also stated that she had contacted the police dispatcher when the claimant had begun approaching the suspect and that she was advised that the County Deputy was busy and that a city unit was being dispatched to her location. She also acknowledged that she, like Deputy Swinford and the claimant had, in the past, answered misdemeanor disturbance calls to that location in the past.

The respondent argues that since the claimant's contact with the suspect occurred when he was outside his jurisdiction and while he was off-duty, any arrest he might have made would have been illegal and he, therefore, would not be acting in the course of his employment. The two cases primarily relied upon by the respondent for this proposition are Perry v. State, 303 Ark. 100, 794 S. W.

2nd 141 (1990) and Thomas v. State, 65 Ark. App. 134, 985 S. W. 2nd 752 (1999). In Perry, a city police officer made contact with an allegedly intoxicated individual outside his jurisdiction. The officer detained the suspect until a Sheriff's Deputy arrived to take the suspect into custody. The criminal defendant later attempted to suppress evidence of his intoxication, arguing that the city police officer had illegally arrested him. However, the Court held that in detaining the suspect, the police officer had acted correctly and that the actual arrest had been made by a Sheriff's Deputy.

Likewise, in Thomas, a city police officer had stopped a suspected drunken driver outside the city limits prior to the arrival of a State Trooper. Apparently, the city police officer did not testify, but the State Trooper stated that, at the time of his arrival, the suspect was under arrest. The appellate court held that the State failed to establish that the arrest was valid and therefore the evidence of the defendant's intoxication could not be used.

In relying upon those two cases, the respondent appears to be equating questions about the validity of an

arrest with whether or not an officer was carrying out his employment duties. Neither Perry nor Thomas have any particular bearing on the present situation. Questions about whether the contact between the claimant and the suspect in the present case would have been a legal arrest so that evidence from that arrest could have been used in court are irrelevant as to whether the claimant was acting in the course and scope of his employment at the time of his injury.

Two cases more relevant to the present situation are City of Sherwood v. Lowe, 4 Ark. App. 161, 628 S. W. 2nd 610 (1982) and City of El Dorado v. Sartor, 21 Ark. 143, 729 S. W. 2nd 410 (1987). In Lowe, the claimant was an off-duty police officer with the City of Sherwood Police Department who was killed in an automobile accident. At the time of his death, the officer was in full uniform and was riding his personal motor cycle, which was equipped with police blue lights. The Court of Appeals affirmed a Commission decision that found that the officer was acting in the course and scope of his employment at the time of his injury. The rationale for this result was that, since the officer was in full uniform, he was, for all practical purposes, "on duty" and

his injuries were therefore sustained in the course of his employment.

The Sartor case is even more relevant to the facts of the present claim. In that case, the claimant was an off-duty police officer who was accosted by a criminal suspect he had previously arrested and testified against in court. During the course of the arrest of this individual, the police officer suffered an injury to his arm. Once again, the Court of Appeals affirmed a Commission award of benefits. The Court reasoned that the conduct of the suspect was sufficient to require the off-duty officer to act in his official capacity. The Court also noted that the city obtained some benefits from the officer's action in that a potential criminal activity was quelled, without any injuries to other patrons.

We find that the claimant was clearly acting in the scope of his job duties in attempting to arrest the suspect. The respondent has confused evidentiary holdings in criminal cases with the issue of employment services in workers' compensation claims. Even had the claimant physically arrested the individual he confronted, and even if that arrest had been invalid for evidentiary purposes, it still would not have changed the fact that the claimant

was acting in the course of his employment as described by himself, two other police Sergeants, and the Stuttgart Chief of Police. Here, the arrest of the suspect was made after he was stopped and detained by a Stuttgart police officer who then contacted the Sheriff's Department for permission to make the arrest. As explained by Deputy Swinford, this was the proper procedure as he understood it. The claimant, in having his fellow officer call dispatch to make contact with the Sheriff's Deputy while he detained the suspect, was clearly acting within the scope of the unwritten agreement that existed between the Stuttgart Police Department and the Arkansas County Sheriff's Department. While the respondent questions the propriety of this unwritten arrangement in regard to making arrests, that does not change the fact that the claimant, his co-workers, and the Chief of Police all thought that the policy was valid and in effect.

In short, we have no hesitation in concluding that the claimant, while acting as a Sergeant in the Stuttgart City Police Department, was acting within his duties and requirements in approaching the suspect on the night of his injury. To reach any other conclusion would contradict the testimony of every witness who testified at

the hearing. We therefore find that the Administrative Law Judge's decision was correct and should be affirmed.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. §11-9-715 (b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was performing employment services at the time he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant failed to meet his burden of proof.

Arkansas Code Ann. § 11-9-102(4) (B) (iii) (Repl. 2002) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Whether the claimant is performing employment services depends on the particular facts and circumstances of each case. The following factors are to be considered in determining whether the claimant's conduct falls within the meaning of "employment services":

(1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;

(2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work;

(3) whether the activity engaged in when the accident occurs is an unexpected part of the employment;

(4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities;

(5) whether the employee is compensated during the time that the activity occurs; and

(6) whether the employer expects the worker to stop or return from permitted non-work activity in order to advance some employment objective.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). See; Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); White v. Georgia-Pacific Corporation, 66 Ark. App. 337, 989 S.W.2d 942 (1999); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998); Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999); Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

Specifically, the majority, in its opinion, has completely ignored and disregarded the relevant statutes that apply to law enforcement officers and the officer's

ability to act outside their jurisdiction. Ark. Code Ann.

§16-81-106(c) provides in pertinent part:

(3) Statewide arrest powers for certified law enforcement officers will only be in effect when the officer is working outside his jurisdiction at the request of or with the permission of the municipal or county law enforcement agency having jurisdiction in the locale where the officer is assisting or working by request.

(4) Any law enforcement agency exercising statewide arrest powers under this section must have a written policy on file regulating the actions of its employees relevant to law enforcement activities outside its jurisdiction. (emphasis added)

(d) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

In the case of Perry v. State, 303 Ark. 100, 794 S.W.2d 141 (1990), the Arkansas Supreme Court held that a local law enforcement officer who was acting without a warrant outside the territorial limits of the jurisdiction is without official power to apprehend an offender unless he is authorized to do so by state statute. Although the arrest in that case may have been by an authorized law enforcement officer, the Court nonetheless found that an arrest can only be made by an officer authorized to do so by statute. Further, the court found in Thomas v. State,

65 Ark. App. 134, 985 S.W.2d 752 (1999), that an officer does not have an arrest warrant or statutory authority to make an arrest outside his jurisdictions. His arrest powers are the same as those of a private citizen. In the Thomas case, the court specifically set forth four instances wherein a law enforcement officer can make an arrest outside his territorial jurisdiction. These include:

(1) when the officer is in fresh pursuit; (2) when the officer has a warrant for arrest; (3) when a local law enforcement agency has a written policy regulating officers acting outside its territorial jurisdiction and when the officer is requested to come into the foreign jurisdiction; and (4) when a sheriff in a contiguous county requests an officer to come into his county to investigate and make arrests for violations of drug laws.

In my opinion, the majority simply ignores the situations set forth in the Thomas case to find the claimant was performing employment services. In the case presently before us, the claimant had to have the statutory authority in order to affect a legal arrest outside of his jurisdiction. The claimant was not in fresh pursuit of the suspect. Nor did the claimant have a warrant for arrest. He had no reasonable belief the suspect had committed a felony and the claimant admitted

that the suspect had not attempted to commit a felony in his presence. Therefore, the first and second instances for an out of jurisdiction officer to obtain authority to arrest was not met in this case.

The third manner in which an arrest may be authorized requires that there be a written policy. The respondent employer and the adjoining county had no written policy regulating when an officer of the city was authorized to come into the county to enforce law and to make arrests. The Stuttgart Police Chief testified that there was "kind of a gentlemen's agreement" between the city and the county. However, there was no written agreement. The statute specifically states that there has to be a written policy and there is no exception for oral understandings.

The claimant also cannot prove the fourth instance where he was allowed to make arrests outside of his territorial jurisdiction. The suspect was not violating any drug laws. The claimant testified that the suspect was not committing a felony in his presence nor was the claimant witnessing any drug activity. Accordingly, the claimant's actions do not fall under any of the exceptions and therefore any arrest was without authority.

Ark. Code Ann. §14-52-203 states:

(a) In cities of the first class, the duty of the chief of policy and other officers of the police department shall be under the direction of the mayor.

(b) It shall be their duty to:

(1) Suppress all riots, disturbances, and breaches of the peace;

(2) Pursue and arrest any person fleeing from justice in any part of this state;

(3) Apprehend any and all persons in the act of committing any offenses against the laws of the state or the ordinances of the city and forthwith bring the persons before the proper authority for trial or examination; and

(4) Diligently and faithfully enforce at all times all such laws, ordinances, and regulations for the preservation of good order and the public welfare as the city council may ordain. For this purpose, they shall have all the power of constables.

The Courts have interpreted this provision to mean that police officers are "in a sense on duty 24 hours a day, 7 days a week..." Gibson v. State, 316 Ark. 705, 875 S.W.2d 58 (1995). In this case presently before us, the claimant was not in his jurisdiction at the time of the injury and did not have authorization to make an arrest. Therefore, this section of the statute did not apply because the claimant was outside of his territorial jurisdiction.

My review of the evidence demonstrates that employment services were not being performed at the time the claimant sustained his injury. There was no written policy between the city and the county. The claimant was not able show that there was any sort of illegal drug activity going on. He was not in fresh pursuit nor did he have a warrant. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner