

Expanding the Coming and Going Rule One Officer's Struggle

By Benny Agosto & Chelsie King Garza

Police officers never stop acting as those who protect and serve. 24 hours a day, 7 days a week they are expected to stop crime and enforce the oath they take upon graduating the academy. And yet, for one officer who was injured in the line of duty, a fine line as to what constitutes "on duty" was drawn and he was abandoned by the County, specifically the County's workers' compensation carrier, to whom he had dedicated himself.

The Law in Texas on Course and Scope

For Officer Hinojosa and employees across the state of Texas whether or not their job related injury will be covered by Worker's Compensation Insurance may depend on whether they were in course and scope of their employment at the time of injury. Before an injury may be classified as one sustained in the course of employment it must meet two tests: (1) it must be of a kind or character originating in or having to do with the employer's work; and (2) it must have occurred while the individual was engaged in the furtherance of the employer's business or affairs. The Texas Labor Code provides, in pertinent part:

"Course and scope of employment" means 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. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:

- (A) transportation to and from the place of employment unless:
 - (iii) the employee is directed in the employee's employment to proceed from one place to another place³

The Texas Supreme Court has stated, "[i]n general, injuries which occur while the employee is traveling to or from work are not compensable under the [Worker's Compensation] Act".

Paragraph (A) has become known as the "coming and going" rule which "codifies what

originated as early judicial attempts to delineate circumstances when employee travel to and from work would come within the Act's 'course and scope' definition."⁵

Early decisions reasoned that the employee's travel to and from work would further the affairs of the employer, but determined as a general rule such travel could not usually be said to original business because "[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers." This concept evolved into the general exclusion of employee travel to and from work from the course and scope of employment.⁷ "At the same time, however, courts came to recognize three chief types or circumstances in which employee travel to and from work could potentially come within the course and scope of employment (and would be, in effect, exceptions to the exclusion for 'coming and going' travel)—the three categories of employee travel ultimately codified in subparagraphs (i), (ii), and (iii)."⁸ Consequently in Texas, when an employee is injured en route, the coming and going rule comes into play to determine if Worker's Compensation Insurance will cover the injuries.

Employee Travel Must Satisfy Two Elements of the General Course and Scope Definition

Employee travel must satisfy two elements of the general course and scope definition in order to be compensable.⁹ As the court in *Rose v. Odiorne* noted, "proof of [employer-paid travel] does not entitle appellant to compensation but only prevents his injury from being excluded from coverage simply because it was sustained while he was traveling to or from work[I]n order to prevail on the merits, *appellant was required to prove...that the injury originated in the employer's business and was sustained during the furtherance of the employer's business.*"

The first element that must be satisfied is whether the employee's travel originated in the

employer's business. The case law has demonstrated that this first element will be the most important in a summary judgment analysis or in making the ultimate decision on compensation.

The second element of the course and scope definition is relatively easy to meet; does the travel further the affairs of the employer?¹² An employee's travel between home and work furthers the affairs of the employer because it makes the employment possible.¹³ This satisfies the second element. The first element, whether the travel originated in the employer's business is where summary judgment will hinge.¹⁴ There is no bright line rule to determine what travel originates in the employer's business. Consequently the facts of each individual case will be very important.

As a general rule, an employee's travel originates in his employer's business if the travel was pursuant to the express or implied requirements of the employment contract.¹⁵ "This reflects the underlying policy goal of allocating to the employer and insurance carrier the risks inherent in an employee's job while leaving to the employee risks that are 'shared by society as a whole and do not arise as a result of the work of the employer.'"¹⁶ When the employer requires the employee to travel as part of its business, for example pursuant to a contract of employment, "the risk of traveling stems from that business and properly can be said to arise as

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a result of the employer's business."

When evaluating the origination of the employer's business element, courts must consider the nature of the employee's job, the circumstances of the travel, and any other relevant facts.¹⁸ Additionally, when evaluating these cases, one "must bear in mind that **the provisions of the Workers' Compensation Act should be given a liberal construction to affect its purpose of compensation injured workers and their dependents.**"¹⁹

The Special Mission is Probative of Whether the Travel Originated in the Employee's Business

When an employee is on a "special mission," that is, when "the employee is directed in the employee's employment to proceed from one place to another place," the employee is acting within the course and scope of employment, and injuries suffered while on the special mission are compensable. The fact that an employee is directed to report to work at a different time or a different location is, alone, not enough to establish the employee was on a special mission. Again, the probative question is whether the travel is required as part of the employment rather than simply reporting to work.

Employer Provided Transportation can also be Evidence that the Travel Originated in the Employee's Business

One fact that may be telling in the analysis of the coming and going rule is the employee's mode of transportation. An employer's provisions of transportation can be proof of origination considering that "the employer's [mere] gratuitous furnishing or paying transportation as an accommodation to the worker and not as an integral part of the employment contract ... does not by itself render compensable an injury occurring during such transportation."²² Employer provided transportation that amounts to a "necessity from the employer's perspective and not just an accommodation" to the employee can be sufficient to prove that the travel originated in the employer's business."

The "Continuous Coverage" Rule and Overnight Travel

An employee is generally within the course and scope of his employment when the employer's business requires him to travel away from the employer's premises.²⁴ In fact, relying on what has come to be known as the "continuous coverage" rule, the Texas Supreme Court has held that the course and scope of employment in cases of overnight travel is broad, extending

even beyond the actual act of travel itself to include injuries sustained during "down time.'

Should an employee be injured during overnight travel at the behest of his employer, the case law is clear that these injured are compensable.

For Police Officers the Coming and Going Rule is Slightly Different

"[B]ecause they retain their status as peace officers twenty-four hours a day, making the distinction between compensable or non-compensable injuries may be more difficult than cases involving other citizens."²⁶ The Fourteenth Court of Appeals used a test "that turns on one basic inquiry: in what capacity was the officer acting at the time [of the injury]?" The Fourteenth Court of Appeals further noted that the inquiry is generally a fact issued to be decided on a case-by-case basis. As a result of an officer's duty, determining whether the injury is compensable may be a more laborious process.

What Does All of this Mean for Police Officers in the State of Texas?

The Day That Changed Sergeant Hinojosa's Life

On January 8, 2005, Sergeant Hinojosa was injured in a motorcycle wreck while in the course and scope of his employment with the Harris County Constable's Office, Precinct One.²⁹ Harris County disputed his status as off duty and in doing so denied him the lifetime benefits that he became entitled to as a result of his length of service and the severity of his injuries.³⁰ This particular day would forever change his life and would ultimately change the law in the State of Texas.

Hinojosa was scheduled to begin his regular shift with the Constable's Office at 2:00 p.m. on that Saturday; however, as there was not a morning patrol supervisor for the Harris County Constable's Office, Precinct One, Sergeant Hinojosa signed on for duty around 10:00 a.m. that morning. It was customary and a requirement of his job to sign on with dispatch as the sergeant

on call for the morning. This made Sergeant Hinojosa available to be called to a scene or to assist the deputies on duty. Sergeant Hinojosa and several other officers were working off-duty escorting funeral processions. During a break between processions, Sergeant Hinojosa along with Deputy Terrence Leonard and Deputy Rick Wagner grabbed an early lunch at a Jack in the Box restaurant.³³

Shortly before collision, Sergeant Hinojosa received a walkie-talkie communication from Deputy Doug Crow, requesting his assistance as the supervisor on call for Precinct One.³⁴ Deputy Crow had received a call from the shift supervisor ordering him to assist a civilian in the voluntary commitment of an individual to a mental health facility. Sergeant Hinojosa agreed to meet Deputy Crow to advise him how to proceed and to provide supervisory oversight. Around 11:35 a.m., Sergeant Hinojosa called in to dispatch to report that he would be responding to the call from Deputy Crow. When the collision occurred, Sergeant Hinojosa was en route to meet Deputy Crow and assist with the voluntary commitment.⁵

The Battle for Lifetime Benefits Began for This Permanently Disabled Officer At this point, the five year battle for benefits began. The county took the position that Sergeant Hinojosa was outside the course and scope of his employment at the time of his injuries and therefore, not entitled to worker's compensation benefits.³⁶ The case determination ultimately ended up in district court. Harris County appealed the judgment of the trial court rendered in favor of Eluid Hinojosa after a bench trial. The bench trial concerned Hinojosa's appeal of a decision of the Appeals Panel of the Texas Department of Insurance—Worker's Compensation Division ("the Department"), in which the Department determined he was not acting in the course and scope of his employment when he was injured in a motor vehicle accident. In two issues on appeal, the county contended the evidence was legally and factually

insufficient to establish Hinojosa was acting in the course and scope of his employment.³⁹ The First Court of Appeals concluded the evidence was legally and factually sufficient to support the trial court's judgment.⁴⁰ The Texas Supreme Court did not grant the County's petition for review thereby upholding the decision of the First Court of Appeals.

Hinojosa was on Duty and Entitled to Compensation when Responded to the Call The First Court of Appeals evaluated all of the evidence presented at the trial court which included testimony from several acting police officers.⁴¹ Several officers testified that Hinojosa was required to respond to Deputy Crow's request for assistance and he was on duty when he responded.⁴² The evidence supported the finding that Hinojosa was responding to a call for assistance while on duty—and thus in the course and scope of his employment. The court ultimately found that Hinojosa had signed on for work before he responded to the call for

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assistance.

The court took a position similar to what the Fourteenth District Court of Appeals espoused in *Blachvell*. As the court in *Blackwell* stated, an "officer's duty under the law is frequently, and sometimes the only, basis for determining when he is in the 'course of employment."⁴³ To adopt a contrary reasoning would be to "disregard that a police officer may, while going about his private affairs, find himself unexpectedly in the presence of brutal criminal activity."⁴⁶ The court went on to state that to "hold that an officer should not expect to be compensated for injuries sustained by his attempts to enforce the law only encourages lawlessness."⁴⁷ Accordingly, the First Court of Appeals found that Sergeant Hinojosa was on duty when he accepted a call to report to work. At that point, he was entitled to compensation when injured in the line of duty regardless of where he was.

What does this mean for Workers across Texas?

Youngblood: The On-Call Plant Supervisor

Circumstances similar to those found in *Hinojosa* were presented in *Highlands Insurance Co. v. Youngblood*. In *Youngblood*, a plant supervisor, Lloyd Youngblood ("Youngblood") was traveling back to his employer's premises to address an operational problem after his normal work day had ended. Youngblood, was fatally injured while traveling back to the plant.⁵⁰ The issue was whether Youngblood was acting in the course and scope of his employment while traveling back to the plant to address the operational problem.⁵¹

The court found that it was strictly within Youngblood's discretion as to whether he needed to go back to the plant to address operational issues after hours and that he did not need an approval for that judgmental action.⁵² It was part of Youngblood's duties to keep the mill running around the clock 365 days a year.⁵³ Youngblood was provided a radio by his employer and was on call 24 hours a day.⁵⁴ On the night of the incident, Youngblood received a call on the radio indicating a problem at the plant; he responded with a phone call and indicated that he was on his way to the plant.⁵⁵ While en route, he was fatally injured in a car accident.³ Ultimately, the court held that Youngblood was "in the course and scope of his employment when his fatal automobile accident occurred by reason of his duties and responsibilities."

McVey: Going to Job-Related Training Conference

Troy McVey was killed in a motor vehicle accident while driving to Houston for a job-related training conference.⁵⁸ Chantal McVey, his beneficiary, filed for worker's compensation benefits from Zurich American Insurance Company.⁵ Zurich denied coverage, claiming that McVey's death was not compensable because he had not been acting within the course of his employment at the time of his fatal accident.⁶⁰ McVey stopped to pick up a co-worker on his

way to the conference; while en route he was involved in a motor-vehicle accident that killed him. ' Zurich argued that as a matter of law McVey had been traveling to work and had not been acting within the course and scope of his employment and potentially implicated the "coming and going" rule. The court held that the "coming and going" rule did not apply to McVey's travel and he was acting in the course of his employment at the time of death.⁶³ McVey was not merely going to work, but was acting in accordance with his job responsibilities.

Conclusion

The Texas Supreme Court in rejecting the petition for review of this matter has essentially ensured that this case stands as the law in Texas when determining an officer's on duty status. *Hinojosa* and *Youngblood* can be read together to cover those individuals who are on call to become on duty as both were in professions requiring them to be on call 24 hours per day. This encompasses individuals beyond law enforcement and arguably includes those individuals who are obligated to respond. This holding, together with the *McVey* decision, may have broader implications for workers in other industries, for example off shore workers who are injured *en route* to offshore platforms. These cases mark a consistent expansion of those entitled to benefits and a reminder of the purpose of the Act; to compensate injured workers and their dependents.

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¹ See *Harris County v. Hinojosa*, 294 S.W.3d 737 (Tex.App.—Houston [1st Dist.] 2009, no writ)

² *Id.* At 740; *Blackwell v. Harris County*, 909 S.W.2d 135, (Tex.App.-Houston [14 Dist.] 1995, writ denied)(citing *Biggs v. United States Fire Ins. Co.*, 611 S.W.2d 624, 627 (Tex. 1981); *Dickson v. Silva*, 880 S.W.2d 785, 787 (Tex.App.-Houston [1st Dist.] 1993, no writ)).

³ *Hinojosa*, 294 S.W.3d at 740; TEX. LAB. CODE § 401.011 (12) (Vernon 2007).

⁴ *Evans v. ///. Employers Ins. ofWausau*, 790 S.W.2d 302, 304 (Tex. 1990); see TEX. LAB. CODE, § 401.011(12)(A).

⁵ *Zurich v. McVey*, 2011 Tex. App. LEXIS 2384 at *3 (March 30, 2011).

⁶ *Id.* (quoting *Evans*, 790 S.W.2d at 305).

⁷ *Id.*

⁸ *Id.*

⁹ See *Rose v. Odiorne*, 795 S.W.2d 210,213-24 (Tex.App.—Austin 1990, writ denied)

¹⁰ *Id.* (emphasis added)

¹¹ *Hinojosa*, 294 S.W.3d at 740.

¹² *Leordeanu v. American Protection Ins. Co.*, 2010 WL 4910133 at 1 (Dec. 3, 2010).

¹³ *Id.*

¹⁴ See TEX. LAB. CODE § 401.011 (12).

¹⁵ /?05<2,795S.W.2dat214.

¹⁶ *Zurich*, 2011 Tex. App. LEXIS 2384 at *4 (quoting *Evans*, 790 S.W.2d at 305).

¹⁷ *Id.* (citing *Rose*, 795 S.W.2d at 214).

¹⁸ See *Meyer v. Western Fire Ins. Co.*, 425 S.W.2d 628, 629 (Tex. 1968).

¹⁹ *Zurich*, 2011 Tex. App. LEXIS 2384 at *5 (citing *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex.1999)).

²⁰ *Evans*, 790 S.W.2d at 304; see TEX. LAB. CODE § 401.011(12)(A)(iii).

²¹ *Evans*, 790 S.W.2d at 304.

²² *Id.* (citing *Texas Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350, 353 (Tex. 1963)).

²³ *Id.* (quoting *Rose*, 795 S.W.2d at 214).

²⁴ *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 293-94 (Tex. 1965); *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572, 574-75 (Tex.App. -Austin 1986, writ ref d n.r.e.).

²⁵ See *Shelton*, 389 S.W.2d at 293-94 (employee injured crossing street from hotel to restaurant was in course and scope); *Orgon*, 721 S.W.2d at 575 (employee injured by broken glass in hotel was in course and scope).

²⁶ *Blackwell v. Harris County*, 909 S.W.2d 135, 139 (Tex. App.—Houston [14th Dist] 1995, writ denied).

²⁷ *Id.*

²⁸ *Id.* at 140.

²⁹ *Hinojosa*, 294 S.W.3d at 742.

³⁰ *Id.* At 739.

³¹ *Id.*

³² *Id.* At 739.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 742.

⁴¹ Mat 740-41.

⁴² *Id.*

⁴³ *Evans v. III. Employers Ins. OfWausau*, 790 S.W.2d 302, 304 (Tex. 1990); *See Blackwell*, 909 S.W.2d at 139 ("An officer's duty under the law is frequently, and sometimes the only, basis for determining when he is in the 'course of employment.'").

⁴⁴ *Hinojosa*, 294 S.W.3d at 742.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See Highlands Ins. Co. v. Youngblood*, 820 S.W.2d 242 (Tex.App.-Beaumont, 1991, writ denied).

⁴⁹ *Id.* at 243-44.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 245-46.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 246.

⁵⁸ *Zurich*, 2011 Tex. App. LEXIS 2384 at * 1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Mat 4.

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⁶³ *Id.* at 5.

⁶³ *Id.* at 25.