



## ADVISORY NO. 479

### TOPIC: NEW LINE-OF-DUTY PAY CASE IS A BIG *DIEHL* FOR CITIES

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The El Paso Court of Appeals has issued an important opinion for governmental entities who are required to provide line of duty pay to police officers and firefighters under § 143.073 of the Texas Local Government Code.

In *City of San Antonio v. Diehl*, the court considered the interplay between a self-insured city's obligation to pay workers' compensation benefits to an injured employee who might also be entitled to line of duty pay under the Local Government Code. The court recognizes a right of recoupment of overpaid line of duty payments, and describes how that recoupment can be taken.

The case construes an earlier decision from the San Antonio court of appeals, *The City of San Antonio v. Vakey*, 123 S.W.3d 497 (Tex.App.--San Antonio 2003, no pet.).

As the Diehl court noted, in Vakey, the City paid line of duty pay equal to Vakey's full pay for one year pursuant to Section 143.073 of the Local Government Code. The City also paid Vakey temporary income benefits in accordance with the workers' compensation statutes. After Vakey returned to work, the City began making deductions from his paycheck. Vakey obtained a temporary restraining order preventing the City from making any further deductions. The City argued that overpayments to Vakey were overpayments of workers' compensation benefits. In upholding the injunction, the San Antonio Court of Appeals construed Section 504.051 as follows:

Section 504.051 permits the City to offset the amounts paid for temporary income benefits under the workers' compensation statutes by the amounts paid for line of duty pay under section 143.073. *See* TEX.LAB.CODE ANN. § 504.051 (Vernon 1996). **In applying the offset, the amount paid under section 143.073 is reduced, not the workers' compensation benefits.** *Texas Workers' Compensation Commission*, Appeal No. 931084, 1994 WL 20165 (Jan. 12, 1994).

The court continued by noting that if the City failed to make the offset by reducing the amount paid pursuant to Section 143.073, "the question becomes whether the City can later reduce an employee's wages to recoup the overpayment." The court then answered the question in the affirmative:

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Section 504.051(b) states, 'If benefits are offset, the employer may not withhold the offset portion of the employee's wages until the time that benefits under this chapter are received.' See TEX.LABOR CODE ANN. § 504.051(b)(Vernon 1996). **This appears to permit an employer to withhold wages on a later date after benefits are received,** 'if benefits are offset.'

Diehl describes whether that offset can be accomplished and, if so, how it should be taken:

The City construes *Vakey* to mean that all payments above and beyond Diehl's full salary are necessarily overpayments of line of duty pay. This appears to be a logical conclusion. It is clear from *Vakey* that workers' compensation benefits are paid first, and the difference between the TIBs and the employee's full salary is supplemented by line of duty pay.

The court goes on to hold that a city may adopt a policy that pays an officer full salary during the period in which the officer also receives full workers' compensation benefits, so as to prevent the officer from encountering hardships based on automatic deductions from his pay checks. The court also holds that a City is not prohibited from recouping those overpayments at a later date. Any overpayments of line of duty payments may be recouped to the extent that the employee receives 100 percent of his full salary.

The San Antonio court's holding in *Vakey* has been questioned by other courts. However, the El Paso Court of Appeals was not free to question the *Vakey* holding because it heard the case under a docket equalization transfer from the San Antonio Court of Appeals. Because the El Paso court was so constrained, the Diehl opinion does not reconsider whether *Vakey* was correctly decided. Similarly, the Diehl opinion does not explore the limits of a city's right to reimbursement for line of duty overpayments (assuming the correctness of the *Vakey* holding) or reimbursement for workers' compensation benefits overpayments (assuming that *Vakey* was incorrectly decided).

Diehl is also notable for its treatment of the claimant's attempt to appeal from a Division decision with which it essentially agreed. The court agreed with the City that Diehl could not file suit for judicial review of a decision in which the claimant had prevailed.

Only a party that has exhausted all its administrative remedies and that is aggrieved by a final decision of the appeals panel may seek judicial review. TEX.LAB.CODE ANN. § 410.251 (West 2006). A party is aggrieved only when the loss resulting from the final decision is actual and immediate. *Insurance Company of the State of Pennsylvania v. Orosco*, 170 S.W.3d 129, 133 (Tex.App.--San Antonio 2005, no pet.). The future defense of a personal injury lawsuit is not an actual and immediate loss. See *Orosco*, 170 S.W.3d at 133 (the possibility of a future loss is not an actual and immediate loss).

Here, the TDI-DWC, determined that Diehl was entitled to receive workers' compensation benefits, did receive such benefits, and that there were no overpayments of those benefits. The Division's decision did not require Diehl to pay any money nor did it authorize the City to recoup funds. In fact, it could not have done so, as the panel duly noted. Therefore, Diehl was not aggrieved by the Appeals Panel decision and lacked standing to appeal. *See In re Texas Mutual Insurance Company*, 331 S.W.3d 70 (Tex.App.--Eastland 2010, orig. proceeding). Because the trial court erred in denying the City's plea to the jurisdiction, we sustain Issue One.

The full Diehl opinion can be accessed at:

<http://www.8thcoa.courts.state.tx.us/opinions/htmlopinion.asp?OpinionId=65969>.

If you have questions concerning the impact of this case, please contact Steve Tipton, James Sheffield or Bobby Stokes.