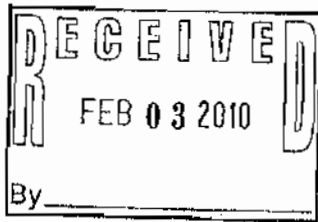


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge



February 1, 2010

Ann S. Fuelberg
Executive Director
Employees Retirement System of Texas
1801 Brazos Streets
Austin, Texas 78711

INTER-AGENCY MAIL

Re: Docket No. 327-09-3984; Appeal of Jana Kim Keen from Denial of Application for Chapter 615 Survivor Benefits Payable to a Surviving Spouse

Dear Ms. Fuelberg:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

By copy of this letter, I am informing the parties that under TEX. GOV'T CODE ANN. § 2001.062, each party has the right to file exceptions and present briefs with respect to the Proposal for Decision. If a party files exceptions or briefs, all other parties may file replies. A copy of any exceptions, briefs, or replies must be filed with the State Office of Administrative Hearings and served on all parties.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. O'Malley".

Michael J. O'Malley
Administrative Law Judge

MJO/sb
Enclosure

xc: Tim Sims, Staff Attorney, ERS, 1801 Brazos Street, Austin, Texas, 78711 w/ ICD and Certified Evidentiary Record
- VIA INTER-AGENCY MAIL
Vuk S. Vujasinovic, Attorney, Vujasinovic & Beckom, LLP, 1001 Texas Avenue, Ste. 1020, Houston, TX 77002 -
VIA REGULAR MAIL

Post Office Box 13025 ♦ William P. Clements Building ♦ Austin Texas 78711-3025
(512) 475-4993 300 West 15th Street, Suite 502 ♦ Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

DOCKET NO. 327-09-3984

APPEAL OF JANA KIM KEEN	§	BEFORE THE STATE OFFICE
FROM DENIAL OF APPLICATION	§	
FOR CHAPTER 615 SURVIVOR	§	OF
BENEFITS PAYABLE TO A SURVIVING	§	
SPOUSE	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The surviving spouse of Thomas L. Keen (Sergeant Keen), Jana Kim Keen, appealed the denial of her application for survivor benefits under Chapter 615 of the Texas Government Code. This statute provides financial assistance for the survivors of law-enforcement officers who die in the line of duty under prescribed circumstances. The Executive Director of the Employees Retirement System of Texas (ERS) denied the application on the grounds that Sergeant Keen was not acting in the line of duty when he was killed in an accident. This proposal for decision finds that the Executive Director incorrectly denied the application. Therefore, the Administrative Law Judge (ALJ) recommends that the ERS Board of Trustees grant Ms. Keen's appeal and award her survivor benefits.

II. JURISDICTION AND PROCEDURAL HISTORY

ERS has jurisdiction over this matter pursuant to TEX. GOV. CODE ANN., Chapter 615, including §§ 615.002 and 615.044, and §§ 815.101 and 815.511. The State Office of Administrative Hearings (SOAH) has jurisdiction over the hearing of this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN., Chapters 815 and 2003.

On March 27, 2009, ERS denied the application for survivor benefits filed by Ms. Keen on behalf of herself. Ms. Keen timely filed a notice of appeal. ALJ Michael J. O'Malley convened a public hearing on the appeal on November 5 2009, at the State Office of Administrative Hearings (SOAH), 300 W. 15th Street, Austin, Texas. Vuc S. Vujasinovic

represented Ms. Keen. Tim N. Sims represented ERS. The record closed on December 23, 2009.

III. APPLICABLE LAW

The law applicable to this proceeding is found at TEX. GOV. CODE ANN. § 615.021(a), which allows survivor benefits to the qualified surviving spouse if the officer “died as a result of a personal injury sustained in the line of duty” Personal injury includes an “injury resulting from an external force, an activity, or disease caused by or resulting from: (A) a line-of-duty accident; or (B) an illness caused by line-of-duty work under hazardous conditions.” TEX. GOV. CODE ANN. § 615.021(e).

The definition of “line of duty” at TEX. GOV. CODE ANN. § 615.021(e)(2) states:

. . . an action an individual listed under Section 615.003 is required or authorized by rule, condition of employment, or law to perform. The term includes an action by an individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual’s employer.

The statute at TEX. GOV. CODE ANN. § 615.021(d) further provides:

In a determination of whether the survivor of an individual listed under Section 615.003 is eligible for payment of assistance under this chapter, any reasonable doubt arising from the circumstances of the individual’s death shall be resolved in favor of the payment of assistance to the survivor.

The sole issue in this case is whether Sergeant Keen’s personal injury and resulting death resulted from a line-of-duty accident.

IV. BACKGROUND

Most of the background facts are not in dispute. The dispute arises from whether Sergeant Keen was in the line of duty when a tragic accident took his life. On September 13, 2008, Hurricane Ike hit Galveston, Texas, and the surrounding area and moved northward. Sergeant Keen and his wife lived in Montgomery County, Texas, which is approximately 100 miles north of where Hurricane Ike initially made landfall. The Keens stayed in their house and rode out the storm.

Sergeant Keen was a 35-year veteran with the Harris County Sheriff's Office (HCSO) and worked in the Detective's Bureau. On September 13, 2008, Sergeant Keen was scheduled to work. On the morning of September 13, 2008, Sergeant Keen put on his uniform and intended to drive to work. Before leaving that morning, he had several work-related communications by telephone at his house. He then left his house in uniform and drove his patrol car away from his house. Shortly after leaving, Sergeant Keen returned to his house and told his wife that a tree was blocking the roadway, preventing him from getting to the HCSO Tomball station, where he was supposed to report to work. The Keens lived on a dead-end street, and their street was the only street that Sergeant Keen could use to get to work.¹

Sergeant Keen had been assigned to work with Deputy Steve Spillars but told him he could not report to the Tomball station because of the downed tree. At one point during the day, Deputy Spillars was going to pick up Sergeant Keen, but his car ran out of gas and he had difficulty finding a gas station with electric power. Also, at some point that morning, Sergeant Keen had spoken with Sergeant Mike Smith. He indicated to Sergeant Smith that he had signed on for duty but was waiting for Deputy Spillars to pick him up. He also told Sergeant Smith that a tree was blocking his street, preventing him from getting to the station.² Also that morning,

¹ There is also evidence that Sergeant Keen could have driven in a ditch, although somewhat risky, to get around the fallen tree.

² Keen Ex. 12 and Keen Ex. 25, Smith Deposition at 12-14.

Sergeant Keen and other officers were under a "shelter in place" order because the weather was still severe. This order requires that the officers stay in a safe place and, if they are not in a safe place, go to a safe place immediately.³ If an officer is under a "shelter in place" order, he is still considered on duty.⁴

It continued to rain that morning, preventing Sergeant Keen and others from removing the fallen tree. While waiting and preparing to remove the tree, Sergeant Keen changed out of his uniform and into casual clothes. Later that morning, Sergeant Keen left the house a second time to check on the tree situation. The weather continued to be an obstacle, so Sergeant Keen returned to his house.

Later that afternoon, the weather improved, and Sergeant Keen returned to the tree.⁵ The tree, which had fallen from the neighbor's property, had landed on a power line and blocked the roadway. The power line was approximately three to four feet from the ground.⁶ Two of Sergeant Keen's neighbors, Chris Burton and George Lockhart, had begun to remove the tree and Sergeant Keen joined them about 15 minutes later.⁷ Sergeant Keen noticed that Mr. Burton was having trouble with his saw blade, so he retrieved his chainsaw and took over the cutting.⁸ Sergeant Keen cut part of the tree, causing a slingshot effect, which threw a 2-3 foot piece of the tree in the air that came down and hit Sergeant Keen in the head.⁹ Sergeant Keen died three days later as a result of the accident.

³ Keen Ex. 23, Jorge Deposition at 24-25.

⁴ Keen Ex. 24, Ricks Deposition at 13.

⁵ The oak tree was about 40-60 feet tall. Keen Ex. 20, Burton Deposition at 24-25.

⁶ Keen Ex. 19, Cervenka Deposition at 29-30.

⁷ Keen Ex. 20, Burton Deposition at 13-14.

⁸ Keen Ex. 20, Burton Deposition at 14-15.

⁹ Keen Ex. 20, Burton Deposition at 15.

V. PARTIES' POSITIONS

A. ERS's Position

ERS sets forth several reasons for denying Ms. Keen survivor benefits. ERS argues that commuting or preparing to commute to work is not considered in the line of duty. ERS compares the federal definition of line of duty to the Government Code definition of line of duty. The federal definition includes authorized commuting as part of the definition, but the Government Code definition does not. ERS contends that the Government Code definition was modeled after the federal statute; therefore, the Texas legislature intentionally excluded authorized commuting as part of the line of duty definition.

ERS also argues that Sergeant Keen violated his duty to reach his assigned patrol station as safely as he could have. ERS argues that removing the tree was not necessary as part of Sergeant Keen's obligation to reach his station as quickly as possible. ERS maintains that Sergeant Keen had the opportunity to remove the tree earlier in the day and, besides removing the tree, Sergeant Keen had other alternatives to get to his assigned station quickly and safely. ERS suggests that Sergeant Keen could have driven between the tree and the fence line as other drivers had done that day, or he could have asked Deputy Spillars to meet him at the end of the street. ERS opines that, for some inexplicable reason, Sergeant Keen stayed at home the entire day before attempting to remove the tree. ERS asserts that Sergeant Keen's delay in removing the tree was inconsistent with his duty to get to work as quickly as possible.

In addition, ERS argues that Sergeant Keen's actions did not involve an emergency. ERS contends that the situation could not have been an emergency because Sergeant Keen waited most of the day before beginning to remove the tree. If the situation presented a risk to Sergeant Keen's neighbors, ERS maintains that Sergeant Keen would have begun the tree removal earlier in the day.

Finally, ERS argues that Sergeant Keen's actions do not fall within the community caretaker doctrine. ERS acknowledges that none of the case law, however, deals with the facts of this case. ERS also questions whether the community caretaker doctrine extends beyond the jurisdiction of Harris County. Examples of community caretaker function cited by ERS include abating a public nuisance or helping citizens who may be in need of assistance. ERS concludes, however, that based on the case law and absent a clear exception, the community caretaker doctrine ends at the boundary line of the county that employs the officer. *Thomas v. State*, 864 S.W.2d 193, 195-196 (Tex. App. – Texarkana 1993, pet. ref'd). Even if Sergeant Keen's actions could be considered a law enforcement activity, ERS argues that his actions do not fall under the community caretaker doctrine because the incident occurred in Montgomery County and Sergeant Keen's duties were limited to Harris County.

B. Ms. Keen's Position

Ms. Keen begins her argument by relying on TEX. GOV. CODE ANN. § 615.021(d), which states that any reasonable doubt should be resolved in favor of payment to the survivor. From a reasonable doubt perspective, Ms. Keen argues that there is sufficient evidence to show that her husband's accident was in the line of duty. She argues that removing the tree was part of his duties under the HSCO Code of Ethics, which required him to "serve mankind" and "safeguard lives and property." According to Ms. Keen, Sergeant Keen was required to follow the HSCO Code of Ethics to safeguard lives and property, which explains his actions on September 13, 2008, in his attempts to remove the tree. Ms. Keen relies on the testimony of Captain Richard Ricks, in which he stated that Sergeant Keen's fundamental duty under the Code of Ethics was not limited to Harris County. Therefore, the fact that the accident occurred in Montgomery County does not change the fact that it was a line-of-duty accident. In fact, Ms. Keen argues that it was reasonable for Sergeant Keen to see the downed tree as a dangerous situation.

Ms. Keen also argues that the HCSO Standard Operating Procedures (procedures) confirm that Sergeant Keen was acting in the line of duty. According to Ms. Keen, the procedures indicate that a peace officer is in the line of duty if he responds to a person in danger of harm, assists with a natural disaster, responds to a citizen requesting assistance, or responds to road hazards and downed power lines.¹⁰

Additionally, Ms. Keen maintains that Sergeant Keen was “signed on” for duty that day. She argues that the evidence shows that Sergeant Keen was removing the tree not only as a duty required of him but also so he could get to the Tomball station. She maintains that he was not on a personal mission because he was not trying to remove trees that were down in his own yard.

Ms. Keen argues that it does not matter that the accident did not occur in Harris County; it was still a line-of-duty accident. She asserts that none of the cases cited by ERS deals with Chapter 615 of the Government Code. She notes that Chapter 615’s reasonable doubt requirement is not addressed in the case law relied on by ERS. She specifically points out that Chapter 615 contains no geographical limitation.

Ms. Keen also refutes the argument that if Sergeant Keen was really trying to get to work, he could have driven around the tree and through the ditch. Ms. Keen argues that it was not reasonable for him to do that given the downed power line, the wet conditions, and the risk of him getting his vehicle stuck in the ditch.

Ms. Keen also dismisses the argument that Sergeant Keen could have called someone to pick him up. She argues that Sergeant Keen was in contact with Deputy Spillars throughout the morning. She realizes that communications broke down between the two later in the day, but given the recent devastating hurricane, that was not unusual according to Ms. Keen.

¹⁰ Keen Exs. 14 and 15, Standard Operating Procedures.

Ms. Keen also argues that it was reasonable for Sergeant Keen to begin removing the tree later in the day. According to Ms. Keen, the weather conditions prevented Sergeant Keen from removing the tree until later in the day. Ms. Keen points to the deposition testimony of Chris Burton and George Lockhart, in which they testified that the rain (at some points, pouring rain) prevented them from removing the tree until later in the day.¹¹

Finally, Ms. Keen asserts that any reference to the workers compensation insurance company initially denying benefits is not relevant to this proceeding because the workers compensation standard is completely different than the standard for receiving benefits under Chapter 615.

VI. ALJ'S ANALYSIS AND RECOMMENDATION

The one question in this case to be resolved is: was Sergeant Keen's personal injury sustained in the line of duty?¹² Although this case contains a lot of facts, the ALJ must sift through and weigh the facts to determine whether Sergeant Keen was on duty at the time of the accident that ultimately took his life.

A. ALJ's Analysis of Facts Surrounding the Accident

To begin with, Sergeant Keen awoke early the morning of September 13, 2008. No only was the hurricane in full force early that morning, he had to report to work at 6:00 a.m.¹³ Sergeant Keen put on his uniform and left the house to drive to the Tomball station, where he was supposed to report for work. These facts establish that Sergeant Keen had every intention of reporting to work at 6:00 a.m. on September 13, 2008.

¹¹ Keen Ex. 20, Burton Deposition at 10; and Keen Ex. 21, Lockhart Deposition at 27-28.

¹² Although there is only the one issue in this case, the parties deposed eight witnesses and two of those witnesses also appeared at the hearing to testify. In addition, multiple exhibits were admitted in evidence to establish the facts that occurred on September 13, 2008.

¹³ Keen Ex. 10, Time Sheets.

Sergeant Keen returned to his house shortly after leaving because a large oak tree was blocking the street.¹⁴ Clearly, had the tree not been blocking the road, Sergeant Keen would have timely reported to work.¹⁵ Not only had the tree fallen, it also presented a danger. The tree blocked the road entirely, and it had fallen on a power line, bringing the power line within a few feet of the ground. These facts show that it was reasonable for Sergeant Keen to suspect that the downed tree posed a danger to the neighborhood and that action needed to be taken to remove the tree.

In addition to putting on his uniform to report for work, Sergeant Keen had been in contact with his partner for the day, Deputy Spillars. In fact, they talked as early as 4:45 a.m., and it was at that time they had agreed to meet at the Tomball station at 5:45 a.m., where Deputy Spillars would pick Sergeant Keen up to begin their shift. Shortly after the officers agreed to meet, Deputy Spillars received a telephone call from Deputy P. Bruce,¹⁶ informing him that all patrol officers were under a shelter-in-place order, which meant they were to stay put until told otherwise. When Deputy Spillars called Sergeant Keen to inform him of the shelter-in-place order at 5:30 a.m., Sergeant Keen told Deputy Spillars that he was dressed and ready to go but had discovered a tree blocking the road. At 7:00 a.m., Deputy Spillars talked to Sergeant Keen and told him that he had the patrol car and would try to make it to him. At that time, Sergeant Keen told Deputy Spillars that he was going to try and remove the tree and meet Deputy Spillars at the Tomball Station. Sergeant Keen told Deputy Spillars that he would contact him after he removed the tree.¹⁷ These facts further indicate that Sergeant Keen had every intention to get to the Tomball station, but he believed he had a duty to remove the tree first.

¹⁴ Keen Ex. 3, Photograph of the road where the tree had fallen.

¹⁵ Sergeant Keen was a 35-year veteran of the HCSO, and it is reasonable to assume that if he believed it was safe to leave the tree blocking the road and somehow make his way to the Tomball station, he would have done that.

¹⁶ Deputy Bruce had the patrol car that Deputy Spillars and Sergeant Keen were to use that day (it was a car share arrangement).

¹⁷ Shortly after talking with Sergeant Keen, Deputy Spillars discovered he did not have gas in the patrol car and had difficulty finding a gas station that was open. It was not until 11:30 that Deputy Spillars was able to get gas for the patrol car. Deputy Spillars and Sergeant Keen did not speak again that day, although Deputy Spillars tried to reach Sergeant Keen.

Sergeant Keen had also talked with Sergeant Mike Smith that morning. Sergeant Smith was the officer in charge of the Tomball station that day. During their conversation, Sergeant Keen told Sergeant Smith that he was signed on, that he was waiting for Deputy Spillars to pick him up, and that he needed to remove the tree in the road. Again, these facts show that Sergeant Keen was on duty (he was signed on) and intended to report to the Tomball station (or get picked up) after he removed the tree. The evidence shows that Sergeant Keen intended to get to the Tomball station after he removed the tree from the road, which he believed was part of his duty to help alleviate a dangerous situation that had resulted from Hurricane Ike.¹⁸

The other evidence, which supports that Sergeant Keen was in the line of duty, is that the four officers that testified by deposition and/or live at the hearing all believed Sergeant Keen was in the line of duty while he was removing the tree. In fact, on February 10, 2009, Captain R.W. Ricks submitted a memorandum detailing why Sergeant Keen was in the line of duty on September 13, 2008, while he was removing the tree.¹⁹ Captain Ricks was also deposed and appeared live at the hearing to testify that Sergeant Keen was obligated to follow the HCSO Code of Ethics, which required him to safeguard lives and property, and this duty outweighed any arrest powers that may have been limited to Harris County. In addition, as early as September 29, 2008 (16 days after the accident), Captain Ricks stated in the "Employers First Report of Injury or Illness" that Sergeant Keen was performing his regular job when the accident occurred.²⁰

Furthermore, Sheriff Tommy Thomas (the sheriff at the time of the accident), and Adrian Garcia (the current sheriff) both wrote letters stating that Sergeant Keen was in the line of duty

¹⁸ Apparently, the other officers believed it was Sergeant Keen's duty as well. Sergeant Keen talked to Deputy Spillars and Sergeant Smith, and neither officer told him to abandon the tree removal and find his way to the Tomball station. Therefore, it is reasonable to conclude that these officers also found it reasonable for Sergeant Keen to remove the tree before heading to the station.

¹⁹ Keen Ex. 10, February 10, 2009 Memorandum from R.W. Ricks, Captain.

²⁰ Keen Ex. 9, Employers First Report of Injury or Illness

when the accident occurred that took his life.²¹ Sheriff Garcia affirmatively stated that Sergeant Keen's activities were authorized and within the scope of his duties. He specifically indicated that removing the tree was within the scope of Sergeant Keen's duties to protect the public safety following the devastation of Hurricane Ike.²² The HCSO determined that Sergeant Keen had died in the line of duty, and he received a memorial service recognizing that he died in the line of duty.

B. ALJ's Analysis of ERS's Arguments

ERS argues that if Sergeant Keen was attempting to remove the tree and report to work, he would have removed the tree sooner. The evidence, however, shows that later in the morning, Sergeant Keen attempted to go out and remove the tree, but the weather prevented that. Later in the afternoon, the weather cleared up and Sergeant Keen was able to assist his neighbors in removing the tree. ERS's argument that Sergeant Keen was simply helping his neighbors clean up the neighborhood is without merit. Sergeant Keen had not helped other neighbors during the day to clean their yards. Furthermore, he did not even clean up the fallen trees in his own yard.²³

ERS's next argues that Sergeant Keen could have driven in the ditch between the tree and a neighbor's fence.²⁴ Although the evidence indicates that a few cars drove through the ditch that day, Sergeant Keen opted not to. It is likely that regardless of whether Sergeant Keen could have safely driven through the ditch, he chose not to drive in the ditch because he believed it was his duty to remove the tree first.

²¹ Keen Ex. 13, December 18, 2008 letter from Tommy Thomas; Keen Ex. 17, August 2009 letter from Adrian Garcia.

²² Keen Ex. 17, August 2009 letter from Adrian Garcia.

²³ Recorded testimony of Jana Keen, wife of Sergeant Keen, at the hearing on the merits.

²⁴ The evidence shows that the tree had brought down the power line within a few feet of the ground and the ditch likely had water in it from the hurricane and storms that followed. Keen Ex. 19, Corvenka (a neighbor) Deposition at 29.

ERS's argument that commuting to work is not a condition of employment is an irrelevant argument for this case. Ms. Keen is not asserting that Sergeant Keen was commuting to work when the line-of-duty accident occurred. She argues that removing the tree was the line-of-duty event that caused his death. Although removing a tree from the road was not a routine duty for Sergeant Keen, Hurricane Ike had just hit the Houston area and emergency situations were occurring all over the city. It is likely that many officers performed non-routine duties that day.²⁵

ERS's argument that Sergeant Keen violated his duty to reach his station as soon as quickly and as safely as possible is also without merit. None of the officers²⁶ who testified in this case even remotely hinted that Sergeant Keen somehow violated his duty that day.²⁷ In addition, the evidence does not support ERS's argument that there were safer and quicker ways to get to work that day. Although a few cars had driven through the space between the tree and the fence, it is not reasonable to assume that Sergeant Keen should have taken such a risk to get to work more quickly, especially given the danger presented by the tree.

ERS also argues there was no plausible reason for the delay in removing the tree. The evidence shows otherwise. The evidence shows that the morning and possibly early afternoon of September 13, 2008, there was rain, often pouring rain, and it would not have been reasonable to remove the tree in the rain.²⁸ Furthermore, the neighbors who assisted Sergeant Keen in

²⁵ The ALJ does not find that the "authorized commuting" argument applies in this case; however, assuming it does, the ALJ disagrees with ERS's analysis. The ALJ believes that like the federal statute, under certain circumstances, commuting to work could be considered in the line of duty under Chapter 615 of the Government Code. See 28 C.F.R. § 32.3.

²⁶ Two officers, Deputy Spillars and Sergeant Smith, knew that Sergeant Keen was trying to remove the tree. Sergeant Smith, the supervising officer that day, stated that after his conversation with Sergeant Keen, he could say "without hesitation that he was on duty at the time of his accident." Keen Ex. 12, Smith Sworn Statement

²⁷ Moreover, it is not ERS's responsibility to infer that Sergeant Keen violated his duty that day. There is no evidence to support this accusation.

²⁸ Recorded testimony of Jana Keen, wife of Sergeant Keen, at the hearing on the merits.

removing the tree arrived about just 15 minutes before Sergeant Keen, which indicates that several people believed it to be unsafe earlier in the day to remove the tree.²⁹

ERS also argues that Sergeant Keen's actions did not involve an emergency because he waited until later in the day to remove the tree. ERS states that an emergency could not have existed because there were no barricades and Sergeant Keen permitted his neighbors to help in a potentially dangerous situation. This argument also fails. Nothing in the definition of line of duty requires the duty to be an emergency. Moreover, there are different levels of emergency situations. Clearly, an individual severely injured during the hurricane would be considered a higher level of emergency than a downed tree. However, the downed tree in this case posed other problems that one could reasonably believe needed to be urgently addressed. The tree not only blocked the roadway, it also brought down a power line. Even if the power was not likely to come back on, a downed power line poses a threat to those in the area.³⁰

Next, ERS argues that Sergeant Keen's actions do not qualify under the community caretaker doctrine, especially given that the actions occurred in Montgomery County. Although generally, ERS may be correct that an officer is limited in the performance of his duties to the county in which he is employed, there are clearly exceptions, whether stated in case law or not, that must be applied. Furthermore, common sense allows an officer to perform community caretaker duties regardless of the county of employment. If ERS's argument is taken to the extreme, an officer employed by Harris County could not apprehend a person committing a robbery, rape, or even murder if witnessed in Montgomery County. This logic clearly makes no sense. Although a downed tree is clearly not a crime, the duty to assist is the same. What if, for example, a child had been trapped in the fallen tree and his life was at risk; is ERS contending that Sergeant Keen, while on duty for Harris County, could not assist that child in Montgomery

²⁹ ERS raises the issue that some of the neighbors heard chainsaws earlier in the day, which shows that it was possible to remove the tree earlier in the day. The ALJ finds this argument speculative. Other than the noise from the chainsaws, there is no evidence describing the circumstances as to why those chainsaws were operating earlier in the day.

³⁰ For example, there is the threat of children playing with the power line; there is a danger of the power coming back on; and there is the danger of cars getting entangled in the power line.

County because he was limited to only address situations in Harris County? Again, the logic of this argument falls short. Furthermore, the Harris County Sheriff's Department procedures have no limitation on geographic boundaries. Although typically an officer will be working in the county in which he is employed, it seems reasonable that he may encounter situations needing his attention in other counties nearby, especially in emergency situation such as natural disasters, crimes in progress, and persons in danger.³¹

The evidence overwhelmingly shows that Sergeant Keen was in the line of duty when the accident occurred that took his life on September 13, 2008. TEX. GOV. CODE ANN. § 615.021(e)(2). Furthermore, TEX. GOV'T CODE ANN. § 615.021(d) states that "any reasonable doubt arising from the circumstances of the individual's death shall be resolved in favor of the payment of assistance to the survivor." Accordingly, the ALJ finds that Ms. Keen is entitled to survivor benefits under TEX. GOV'T CODE ANN. § 615.021(d).

VII. FINDINGS OF FACT

1. The surviving spouse of Thomas L. Keen, Jana Kim Keen, appealed the denial of her application for survivor benefits under Chapter 615 of the Texas Government Code.
2. Chapter 615 of the Texas Government Code provides financial assistance for the survivors of law enforcement officers who die in the line of duty.
3. On March 27, 2009, the Executive Director of the Employees Retirement System of Texas (ERS) denied the application on the grounds that Sergeant Keen had not died in the line of duty.
4. Ms. Keen timely filed a notice of appeal.
5. Administrative Law Judge Michael J. O'Malley convened a public hearing on the appeal on November 5, 2009, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas.
6. At the hearing, Vuc S. Vujasinovic represented Ms. Keen; Tim N. Sims represented ERS.

³¹ Keen Ex. 15, Harris County Sheriff's Department Standard Operating Procedures.

7. The record closed with the filing of post-hearing arguments and objections on December 23, 2009.
8. On September 13, 2008, Hurricane Ike hit Galveston, Texas and the surrounding area and moved northward.
9. Sergeant Keen and his wife lived in Montgomery County, Texas, which is approximately 100 miles north of where Hurricane Ike initially made landfall.
10. The Keens stayed in their house and rode out the storm.
11. Sergeant Keen was a 35-year veteran with the Harris County Sheriff's Office (HCSO) and worked in the Detective's Bureau.
12. On September 13, 2008, Sergeant Keen was scheduled to work.
13. On the morning of September 13, 2008, Sergeant Keen put on his uniform and intended to drive to the Tomball station to begin his shift.
14. Sergeant Keen left his house in uniform and drove his patrol car away from his house.
15. Shortly after leaving, Sergeant Keen returned to his house and told his wife that a tree was blocking the roadway, preventing him from getting to the HCSO Tomball station.
16. Sergeant Keen had several work-related communications by telephone at his house.
17. Sergeant Keen had been in contact with his partner for the day, Deputy Spillars. They talked as early as 4:45 a.m., and it was at that time they had agreed to meet at the Tomball station at 5:45 a.m., where Deputy Spillars would pick Sergeant Keen up to begin their shift.
18. Shortly after the officers agreed to meet, Deputy Spillars received a telephone call from Deputy P. Bruce, informing him that all patrol officers were under a shelter-in-place order, which meant they were to stay put until told otherwise.
19. The HCSO officers were under a "shelter in place" order because the weather was still severe.
20. If an officer is under a "shelter in place" order, he is still considered on duty.
21. When Deputy Spillars called Sergeant Keen to inform him of the shelter-in-place order at 5:30 a.m., Sergeant Keen told Deputy Spillars that he was dressed and ready to go but had discovered a tree blocking the road.
22. At 7:00 a.m., Deputy Spillars talked to Sergeant Keen and told him that he had the patrol car and would try to make it to him.

23. Sergeant Keen told Deputy Spillars that he was going to try and remove the tree first and meet Deputy Spillars at the Tomball Station. Sergeant Keen told Deputy Spillars that he would contact him after he removed the tree.
24. Sergeant Keen had also talked with Sergeant Mike Smith on the morning of September 13, 2008.
25. Sergeant Smith was the officer in charge of the Tomball station that day.
26. During their conversation, Sergeant Keen told Sergeant Smith that he was signed on, that he was waiting for Deputy Spillars to pick him up, and that he needed to remove the tree in the road.
27. Sergeant Keen had every intention to report to the Tomball station on the morning of September 13, 2008.
28. The tree presented a danger because it blocked the road and had fallen on a power line.
29. It was reasonable for Sergeant Keen to suspect that the downed tree posed a danger to the neighborhood and that action needed to be taken to remove the tree.
30. The Keens lived on a dead-end street, and their street was the only street that Sergeant Keen could use to get to work.
31. It continued to rain that morning, preventing Sergeant Keen and others from removing the fallen tree.
32. While waiting and preparing to remove the tree, Sergeant Keen changed out of his uniform and into casual clothes.
33. Sergeant Keen left the house a second time to check on the tree situation. The weather continued to be an obstacle, so Sergeant Keen returned to his house.
34. Later that afternoon, the weather improved, and Sergeant Keen returned to the tree.
35. The tree, which had fallen from the neighbor's property, had landed on a power line and blocked the roadway. The power line was approximately three to four feet from the ground.
36. Two of Sergeant Keen's neighbors, Chris Burton and George Lockhart, had begun to remove the tree and Sergeant Keen joined them about 15 minutes later.
37. Sergeant Keen noticed that Mr. Burton was having trouble with his saw blade, so he retrieved his chainsaw and took over the cutting.


38. Sergeant Keen cut part of the tree, causing a slingshot effect, which threw a 2-3 foot piece of the tree in the air that came down and hit Sergeant Keen in the head.
39. Sergeant Keen died three days later as a result of the accident.
40. The tree blocking the road was the only tree Sergeant Keen helped remove that day.
41. On February 10, 2009, Captain R.W. Ricks submitted a memorandum detailing why Sergeant Keen was in the line of duty on September 13, 2008, while he was removing the tree.
42. Sergeant Keen was obligated to follow the IICSO Code of Ethics, which required him to safeguard lives and property.
43. On September 29, 2008 (16 days after the accident), the "Employers First Report of Injury or Illness" stated that Sergeant Keen was performing his regular job when the accident occurred.
44. Sheriff Tommy Thomas (the sheriff at the time of the accident), and Adrian Garcia (the current sheriff) both wrote letters stating that Sergeant Keen was in the line of duty when the accident occurred that took his life.
45. In removing the tree, Sergeant Keen was protecting the public safety following the devastation of Hurricane Ike
46. The HCSO determined that Sergeant Keen had died in the line of duty, and he received a memorial service recognizing that he died in the line of duty.

VIII. CONCLUSIONS OF LAW

1. The Board of Trustees of ERS has jurisdiction over this matter pursuant to TEX. GOV'T. CODE ANN. Chapter 615, including §§ 615.002 and 615.044.
2. The State Office of Administrative Hearings has jurisdiction over the hearing of this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of hearing was provided to the parties according to the provisions of TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Ms. Keen timely appealed the ERS Executive Director's denial of her claim for financial assistance under Chapter 615 of the Texas Government Code.

5. Ms. Keen had the burden of proof in this case pursuant to 34 TEX. ADMIN. CODE § 67.55.
6. Ms. Keen proved that Sergeant Keen was in the line of duty on September 13, 2008, when the accident occurred that took his life. TEX. GOV'T CODE ANN. § 615.021(e)(2).
7. Sergeant Keen's death was the result of a line-of-duty accident. TEX. GOV'T CODE ANN. § 615.021(e)(1) and (2).
8. Ms. Keen is entitled to survivor benefits under TEX. GOV'T CODE ANN. § 615.021.
9. If there is any reasonable doubt arising from Sergeant Keen's death, it shall be resolved in favor of the payment to Ms. Keen. TEX. GOV'T CODE ANN. § 615.021(d).
10. Ms. Keen's appeal should be granted.

SIGNED February 1, 2010


MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS