APPEAL NO. 92227

A May 6, 1992 contested case hearing was held in (city), Texas, with (hearing officer) presiding. A February 5, 1992 contested case hearing had been continued. The single issue on appeal was whether respondent (claimant below) was injured in the course and scope of his employment on (date of injury). The case was adjudicated under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant (carrier below) raises the following points on appeal: the hearing officer erred in finding that respondent was specifically instructed by his supervisor to get gas in the company truck; the hearing officer erred in finding that respondent's trip to the gas station for gas would have been made even if respondent and his coworker, (Mr. C), were not going to get lunch; the hearing officer erred in his conclusion of law indicating that respondent was undertaking an activity in the furtherance of his employer's business at the time of the injury and therefore sustained a compensable injury; the hearing officer erred in finding that respondent sustained an injury in the course and scope of his employment and ordering that benefits be paid.

DECISION

Finding no error on the part of the hearing officer, we affirm.

On (date of injury), respondent was employed by (employer) as a laborer, rebuilding oil tanks. He testified that it was customary for him to show up at employer's yard early in the morning, and then to be transported to the work site in one of employer's vehicles; he said he never went directly to the work site. Employer owned four or five vehicles, including a pickup truck that was driven by (Mr. D), the foreman and supervisor. All the employees, respondent said, were authorized to drive the trucks and to fill them with gas, using employer's Exxon credit card. Respondent said he had been instructed that the trucks needed to be kept filled up at all times, and that the majority of time the crew of employees would all stop and fill up the truck after they finished a job, before they came back to the shop.

Respondent testified that (date of injury) was a Friday and that he finished work and clocked out around lunchtime. He and his immediate supervisor, (Mr. C), decided to go get chicken for lunch. They went into the shop where Mr. D and some other employees were playing dominoes. Respondent said the two announced they were going for chicken, and asked everyone if they wanted some. He said Mr. D said to take his pickup (the one owned by employer) and to fill it up with gas on the way. According to respondent, Mr. D said, "[y]'all going over there? Y'all take the truck and fill it with gas for me." Respondent also said Mr. D asked them, "[y]'all have a credit card?", to which Mr. C replied, "[y]eah, I have one." Prior to Mr. D's offer, respondent said, they had been planning to go to pick up lunch in Mr. C's own vehicle.

Mr. C then drove himself and respondent to an Exxon station which was on the way to the chicken restaurant. Respondent got out of the truck and accompanied Mr. C to the office, where Mr. C presented the credit card to the person working there. Coming back toward the truck, while Mr. C went to pump the gas, respondent stepped in a hole in front of the truck. The two went on to get the chicken, then returned to the shop where they told Mr. D what had happened. Respondent's leg started swelling, and Mr. D told him to go to the hospital. Mr. C drove respondent home, as he did not have a vehicle at work, then he drove himself to the hospital. His leg was x-rayed and later found not to be broken, but he also experienced back pain. Respondent has been seeing an orthopedist, who was still treating him at the time of hearing, and had not been released to work. He said he has not worked since the date of the accident.

Respondent said he had not been given a gasoline credit card, but that all the employees were authorized to sign for gas on the cards. He said that he could not remember actually signing for gas, but that he had on occasion filled a truck with gas. On those occasions he would be with Mr. C. He testified that on (date of injury) he would not have gone to the gas station if Mr. D had not so directed him.

Mr. C testified that on (date of injury), as he was leaving with respondent to pick up chicken for lunch, Mr. D asked, "[a]re y'all going by the gas station? Do you-all have a credit card?" He also said Mr. D asked, "[d]o you mind filling my truck up?" He assumed Mr. D knew both men were going to get chicken, and was addressing both him and respondent. It was a usual practice, he said, for more than one employee to go get gas, although he said on cross-examination that he could have taken the truck and pumped the gas by himself. Mr. C said Mr. D was his boss, and had the authority to direct him to do what he asked. He said that Mr. D had directed that the trucks be kept gassed up. He also said that if Mr. D had not made the request to fill the pickup on (date of injury), he would have taken his own vehicle to get lunch.

(Mr. CC), who was a supervisor working for employer at the time of the accident, testified on (date of injury) that he heard that Mr. D say "[s]ince y'all were going to get some lunch, that they could take his truck and fill it up with gas with the company credit card so he wouldn't have to stop on his way home and put gas in it." Mr. CC said it wouldn't have taken two people to fill the truck, but that both of the men had authority to put the gas in.

Mr. D, who was both respondent's and Mr. C's supervisor, said he and other employees were sitting around socializing on (date of injury), when he was told by Mr. C that he was going to get something to eat. Mr. D said Mr. C was planning to use one of the one-ton trucks, so Mr. D said, "[t]ake my truck instead, if it needs gas, put gas in." He said on occasion his employees used the company trucks to go get lunch. He denied that he directed respondent or Mr. C to fill up the truck, or that he even knew whether the truck needed gas; he said that if Mr. C had not filled the truck up, he (Mr. D) would have filled it up himself. He testified that he was only speaking to Mr. C; that he was not aware that respondent was going until the latter said, "I'll go along too." He said that nonsupervisors

did not have credit cards, and that he did not intend anyone other than supervisors to fill the trucks with gas. It was stipulated by both parties that Mr. D had authority to direct the work activities of respondent and Mr. C.

(Mr. R), who was employer's vice-president at the time in question, said he did not know about respondent's accident until respondent called him in September of 1991 with reference to insurance coverage. He said respondent told him he realized he was not hurt "because of his work," but that he needed workers' compensation to pay his bills. Mr. R said that was the first time it had come up that respondent may have suffered a work-related injury. He said respondent told him that employer wouldn't be affected because he had a suit against Exxon and that Exxon would ultimately reimburse the workers' compensation carrier.

On redirect examination, respondent testified that the attorney he had retained one month after the accident had told him he had a workers' compensation cause of action that should be pursued, but respondent was afraid of being fired. He said he decided to file a workers' compensation claim in August of 1991 because of his medical bills and lack of health insurance.

The 1989 Act defines a compensable injury as one "arising out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). "Course and scope of employment" is defined as "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." Article 8308-1.03(12).

The current law's definition of course and scope is nearly identical to that contained in the prior law, TEX. REV. CIV. STAT. ANN. art. 8309 Sections 1, 1b (repealed). Case law interpreting that statute held that a compensable injury must result from a hazard that is necessarily and ordinarily involved in the type of work the injured employee performs. If the injury results from a risk or hazard that an employee assumes in order to perform the employer's work, it is compensable regardless of where, when, or how the employee was injured. American General Ins. Co. v. Williams, 227 S.W.2d 788 (Tex. 1950).

The 1989 Act, however, provides in pertinent part that the term "course and scope of employment" does not include:

> . . . (B)travel by the employee in the furtherance of the affairs or business of his employer if such travel is also in furtherance of personal or private affairs of the employee unless:
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> (i)the trip to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be

furthered by the trip; and

(ii)the trip would not have been made had there been no affairs or business of the employer to be furthered by the trip. (Article 8308-1.03(12)(B))

When the evidence in a case supports a determination that both the employer's business and the employee's personal affairs are furthered, this "dual purpose" test comes into play. Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824 (Tex. 1969). The rule has been stated as follows: "Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principal applies to out-of-town trips, to trips to and from work, and to miscellaneous errands . . . motivated in part by an intention to transact business there." Larson, Workmen's Compensation Law, Volume I § 18.00, Matthew Bender, NY, 1990.

Wausau Underwriters Ins. Co. v. Potter, 807 S.W.2d 419 (Tex. App.-Beaumont 1991, writ denied) involved a fact situation somewhat similar to the case at bar. In that case, the claimant and two other employees were getting ready to leave for lunch in a company vehicle when claimant's supervisor arrived and asked if he could "tag along." En route to lunch, during which time the claimant and his supervisor discussed their project, the accident occurred. The court noted that the mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the workers' compensation statute. It reversed and remanded the case, however, because the facts in the case merited a "dual purpose" instruction to the jury.

Compare Texas Workers' Compensation Commission Appeal No. 92026 (Docket No. redacted) decided March 9, 1992, upholding the hearing officer's decision that, under the facts presented, the trip would not have been made except for the furtherance of personal or private affairs, and that the trip would not have been made even solely for business-related purposes.

Whether an injury is incurred within the course and scope of employment is a question of fact. TEIA v. Anderson, 125 S.W.2d 674 (Tex. App.-Dallas 1939, writ refused). With regard to the facts of this particular case, the record below contains evidence as follows: that keeping trucks gassed up was part of the employees' job duties (including respondent's); that respondent and Mr. C were directed by their supervisor, Mr. D, to take a company truck and fill it with gas on their way to get lunch; that the injury occurred while these instructions were being carried out; that while not strictly necessary, it was not unusual for trucks to be gassed up by crews, rather than by a single person; that the trip to the gas station would have to have been made even if respondent and Mr. C had not been going to get lunch, and would not have been made except for employer's business purposes. The testimony which supported this evidence was not uncontroverted, most notably by Mr. D's testimony that employees sometimes used the company vehicles to get lunch and that he

offered use of the pickup only to prevent Mr. C from using one of the larger trucks. He also testified unequivocally that he was offering the pickup only to Mr. C, and that he did not instruct either employee to get gas. However, conflicts in testimony were for the hearing officer as fact finder to resolve. Article 8308-6.34(e); Garza v. Commercial Ins. Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Unless the findings, conclusions and decision are so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust, there is no basis in law or fact to disturb the hearing officer's determination. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Accordingly, the decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Joe Sebesta
Appeals Judge