APPEAL NO. 92250

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992 A.D.). On May 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He held that claimant, appellant herein, was not acting in the furtherance of his employer's business as he drove to work in a company vehicle, and further appellant departed from the route to work for a personal reason. Appellant asserts that his transportation of other workers to the job site was an integral part of his work and case law allows deviations from work for health and comfort reasons.

DECISION

Finding that the decision is based on sufficient findings of fact and that it is sufficiently supported by evidence of record, we affirm.

Appellant had worked for (employer) for approximately seven years. He lived in (city) and the employer was located in (city). On the day of the accident, (date of injury), appellant intended to provide a ride in the company vehicle that he drove to and from work to two other employees who lived in (city). When he arrived too early at the home of the first employee, he decided to leave and have coffee "to kill time." As he entered the highway upon departing the coffee stop, a large truck hit the front left side of his vehicle injuring him. While not a factor in this determination, appellant got a traffic ticket for that event.

The 1989 Act at Article 8308-1.03(12) addresses appellant's claim. It reads:

"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 activities 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:

(i)the transportation is furnished as a part of the contract of employment or is paid for by the employer;

(ii)the means of such transportation are under the control of the employer; or

(iii)the employee is directed in his employment to proceed from one place to another place; or . . .

The most significant of the exceptions in this instance is (i) which requires a determination of whether the employer furnished appellant a vehicle as part of his contract of employment. A contract requires that both parties receive some consideration by its implementation. A question is raised in this case and in most others under this exception as to whether the employer is compensated or has merely furnished transportation as an accomodation. Exception (iii) is only raised by the evidence insofar as it pertains to whether appellant was directed to bring certain employees to work; there was no evidence that he was directed to proceed to a cafe for coffee.

Appellant testified that it was approximately a 45 minute drive from the time he would have picked up the second rider until the employer's location was reached. He added that he had driven other employer-owned vehicles back and forth to work since starting to work for employer, but did not say that the use of the vehicle was part of the reason he worked for employer. There was no written agreement to provide transportation. Nor was there any evidence offered that jobs in (city) were abundant and that the employer needed to provide transportation in order to recruit employees to make the 45 minute drive to (city). *See* Liberty Mutual Ins. Co. v. Chestnut, 539 S.W.2d 924 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.), which also contains language indicating that "contract of employment" may be an oral contract. Appellant testified that a company official did tell him which employees to pick up and bring to work in the vehicle. Respondent pointed out that on some occasions employees did not work the same hours or would have worked at separate sites so that they would not have returned home together. A few weeks prior to the accident, employer obtained employee signatures on a statement that addressed restrictions on use of vehicles provided for driving to and from work. This statement, signed by appellant on November 7, 1991, makes it clear that the company vehicle is to be driven only between the workplace and the employee's home, between the workplace and home as part of a car pool, and to other locations specifically related to the work.

A clause in this document, which was also signed by an officer of the employer, however, effectively refutes the hearing officer's Finding of Fact No. 8, and, together with other evidence inferentially makes Finding of Fact Nos. 5 and 6 also against the great weight and preponderance of the evidence. Finding of Fact Nos. 5, 6, and 8 read as follows:

5.The vehicle was provided as an accomodation by Employer for the personal convenience of Claimant to be used to drive directly to and from his place of employment.

6.The vehicle was not provided as an integral part of a contract of employment.

8.Claimant's travel to and from work was not in furtherance of or the business of Employer.

By stating in the 1991 document, "Vehicle Approved for use in company business

only as follows:" employer admitted that each of the listed items under "as follows" are "company business." Items that followed the subject statement included driving to and from work, driving to and from work as part of a car pool, and other driving specifically related to the work.

The testimony at the hearing was conflicting as to whether appellant was told to pick up certain workers or that workers could simply arrange to ride with an employee who had been provided a vehicle as an accommodation. An earlier policy paper of the employer, dated September 10, 1982, indicated that each employee was responsible to get to work but that any employee may "catch a ride" with a truck coming to the job site. While that 1982 policy paper may have assisted employer if a passenger had been injured in this case, it made appellant responsible, as a vehicle driver, for getting the vehicle and its tools to a certain place each day. In addition, the 1991 document, described previously, not only admits that the employer considered it to be company business to provide trucks for employees to use to drive to and from work, but also required appellant to get the truck to work whether he worked (was sick) or not. These two documents plus the testimony of the appellant cause the great weight and preponderance of the evidence to indicate that appellant's driving himself and others to and from work in the company vehicle was part of his contract of employment and furthered the affairs of the employer.

While appellant's attack on Finding of Fact Nos. 5 and 8 will prevail as stated above, there is no basis to overturn Finding of Fact Nos. 12 and 13. The latter findings state:

12. Claimant's trip to the restaurant would not have been made had there been no personal reason of Claimant's to be furthered.

13. There was no business purpose of Employer's for the trip to the restaurant.

Unlike Johnson v. Pacific Employers Indem. Co., 439 S.W.2d 824 (Tex 1969), where the court found that the employer had told the claimant to deviate for a purpose beneficial to the employer, there was not even evidence that appellant's deviation to the coffee stop was for any purpose that would benefit the employer, much less that it was at the direction of the employer. On the contrary, the document appellant signed instructed him, as a driver of a company vehicle to and from work, not to use the vehicle for any other purpose during non-working hours. *See* Ranger Ins. Co. v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ), where the employer said that employees "had never been permitted nor instructed to move any irrigation pipe . . . and it would not help the employer in any way for any employee to shake a rabbit out of an irrigation pipe."

Appellant cites cases that address the health and comfort exception to the question of deviation from the furtherance of the employer's business concept. Given that the appellant was in the furtherance of the employer's business in driving employer's vehicle to work under the circumstances of this case, an argument can be made that health and comfort deviation rules should apply to the trip to the coffee house. The court in Shubert v.

Fidelity & Cas. Co. of New York, 467 S.W.2d 662 (Tex. Civ. App.-Houston [1st Dist] 1971, writ ref'd n.r.e.), however, did not apply the health and comfort exception. There, a worker arrived at the site before hours and the entrance was locked. He went across the street to get coffee and was injured. That court said the trip was personal and not to the benefit of the employer. But case law on deviations based on health and comfort usually concerns questions arising after the work period has begun. *See* Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), and TEIA v. Villasana, 558 S.W.2d 917 (Tex. Civ. App.-Amarillo 1977, no writ). Shubert's incident occurred before he had done anything to further the affairs of his employer.

Most significantly, questions as to deviation are viewed as ones of fact for the trier of fact to determine. Lesco Trans. Co. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ), *cited* Southern Surety Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.-Eastland 1931, writ refused), in stating as follows: "Unless the proof is such that only one conclusion can be reasonably drawn from it by reasonable minds, deviation from the course and scope of employment is a question of fact to be determined by the trier of facts." The hearing officer could believe that appellant was "killing time" as he stated. While appellant may not have been needed at the time by employer, he was not free to do anything he wished, particularly when such was accompanied by some degree of risk. Just because a break for a health and comfort purpose may not remove an employee from the course of employment does not mean that an employee can maintain that status while pursuing any activity during a period of time when not needed. *See* Valerio, *supra*. The hearing officer's findings that appellant had deviated from the course of employment were adequately supported and were matters for him to decide. Appellant's attack on Finding of Fact Nos. 12 and 13 is not persuasive.

Appellant cited Walters v. American States Ins. Co., 654 S.W.2d 423 (Tex. 1983) for the "positional risk" theory that appellant would not be in the current predicament if he had not been placed there by the work. Walters did refer to cases that used those words, but rejected the need for any presumption in deciding the matter before it. Appellant also cites General Ins. Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), and argues that appellant had ended his deviation and was returning to the course of employment at the time of the accident. In that case a janitor left his place of employment, a restaurant, and went across the street to use the telephone. He fell after arriving back at the restaurant but before starting to sweep again. The facts are not similar to the case at hand. Appellant cannot look to any doctrine such as "idiopathic falls" or "access" to change his status at the coffee shop. Had he returned from the coffee shop and picked up his fellow travelers before having the wreck, then the issue would require greater examination under Wickersham.

Having determined that Finding of Fact Nos. 9 through 13, addressing the trip to the coffee shop as a deviation from the furtherance of the business of the employer, are sufficiently supported by the evidence and control the decision, we affirm the decision and order.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge