APPEAL NO. 92251

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On December 31, 1991 and April 23, 1992, a contested case hearing was held in (city), Texas, (hearing officer), presiding, to consider two disputed issues, to wit: whether (decedent) was acting in the course and scope of his employment at the time he was fatally injured in an automobile accident on (date of injury), and whether, at that time, he was intoxicated. The hearing officer concluded that decedent was not engaged in the course and scope of his employment at the time of his fatal accident, and, that he was not shown to have been intoxicated at that time. Decedent's wife (appellant/ claimant) challenges the adverse course and scope conclusion and related factual findings. The carrier (appellant/carrier) challenges the conclusion and related findings concerning intoxication. The parties filed responses to the respective appeals urging us to support the challenged findings and conclusions.

DECISION

Finding no reversible error in the proceedings below, and sufficient evidence to support the challenged findings, we affirm.

This unfortunate matter had its genesis in a tragic accident which occurred in (city), Texas, on (date of injury), at approximately 11:47 a.m., a Saturday morning, when a delivery truck driven by decedent ran through a pool of water and apparently hydroplaned out of control, crossing over the opposite traffic lane and striking a bridge embankment. Decedent, the sole passenger, was fatally injured. According to a toxicology report, blood and urine samples obtained at autopsy the day after the accident revealed the presence of "ethanol" in concentrations of "00.10 GM%" and "00.14 GM%," respectively. Decedent had been hired in March 1991 as an assistant manager-trainee by the (employer), a concern which had retail paint store outlets in (city), Texas. (Mr. W), an area sales manager for employer, who officed at employer's store No. 3 on (street) in (city), and who hired decedent, testified that among decedent's duties at that store were waiting on customers and delivering paint orders; that employer's policy limited the use of company vehicles to deliveries and prohibited employees from making personal use of such vehicles, including going to lunch; that he had personally briefed decedent on that policy and advised that he must be contacted for approval of any exception, other than a medical necessity; that employer's personnel at the store adhered to the policy; that it was not customary for employees to use employer's vehicles for personal reasons; and that he was not aware of decedent's having previously used employer's vehicles for personal reasons. Decedent did not contact (Mr. W) on the day of the accident for any such approval.

According to appellant/claimant, on the evening before the accident, she and decedent had stopped by a garage sale, located approximately one and one-half miles from their residence, where decedent looked at a shotgun. They returned home where decedent drank two or three beers and retired at around 11:00 p.m. Decedent arose the next

morning at 6:00 a.m. and left for work at 7:00 a.m. Appellant/claimant did not see him consume any alcoholic beverage before going to work. She said that at about 10:15 a.m., decedent returned to the house in employer's truck for a short time to take medicine for a tooth infection. After he took the pill, decedent obtained a beer. This "wasn't a normal thing" and when she inquired of him, decedent said he was "stressed out" and that his teeth hurt. He told her he had to take care of some things for the company. She said decedent's job involved making sales calls and deliveries, and that he was working on some sales calls but she had no details. They arranged to meet at employer's store for lunch between 12:00 and 12:30 p.m. and decedent departed at approximately 10:30 a.m., about one hour and fifteen minutes before the accident. She didn't know where he was going when he left the house nor whether he was going to do some company business. When she arrived at the store at about 12:15 p.m., appellant/ claimant was advised of the accident which occurred approximately two to three miles from their house. Decedent had not mentioned buying the shotgun when he came home in mid-morning. Appellant/claimant was later told by a witness who had stopped at the scene that a shotgun was found in the truck and she later learned that decedent had gone back to the garage sale that morning and purchased the shotgun. Decedent also had three shotgun shells in his pocket at the time of the accident given to him by the seller.

On the morning of the accident, co-employee (Mr. R) and decedent were the only employees at the store. (Mr. R) was mixing paint orders for Monday delivery and said there were no paint orders for delivery that Saturday. During the morning, decedent told (Mr. R) "he was going to take off and go run some errands and then when he got back I could go to lunch." Decedent also told (Mr. R) he was going to go look at a horse he was going to buy and was going to take the company truck. (Mr. R) thought it unusual for decedent to say that because they generally did not make personal use of employer's vehicles and decedent never mentioned any business purpose for leaving the store. Decedent left the store between 10:00 and 11:00 a.m. At around 11:30 a.m., decedent called (Mr. R) stating he had bought a gun instead of a horse, was going to go shoot the gun, eat lunch, and then return to the store. About ten minutes later, (Mr. R) received a call advising of the accident. According to (Mr. R), who grew up in the neighborhood, the accident scene was approximately eight miles from employer's store and one-half mile from decedent's house. Though denied by appellant/claimant, (Mr. R) testified that a few weeks before the first hearing she mentioned that decedent had been "working on the state school program, as well as when he was on deliveries, and asked me if he could have been doing that that day, and to my knowledge, no." According to (Mr. R), appellant/claimant said that "if there was any way that he could've been on any type of company business, that I needed to state that." According to (Mr. R), deliveries are strictly controlled by employer's invoice system and, to the best of his knowledge, no invoices reflected a delivery on the morning of the accident. According to (Mr. W), no invoices, supplies, or paint swatches were found in the truck. As for the making of outside sales calls, had decedent made any such calls, he would have told someone about it. (Mr. R) testified "that's not the norm" for decedent to have been out on a business call without him being aware of it since the store had only three employees and an absence was felt. He denied ever telling appellant/claimant that

decedent was out on deliveries and, that when he once told her decedent could have been on a sales call, he also said but "not to his knowledge." While the generation of new business was every employee's concern, employer had an outside sales force for that area so it wasn't necessarily a responsibility of decedent's to go out and call on customers. (Mr. R) did recall decedent's mentioning, at sometime

within a few weeks of his accident, that he was trying to get a particular account and taking a booklet out to the (city) state school (state school).

Appellant/claimant was re-called for additional testimony at the end of the first hearing and testified that on the day of the accident or soon thereafter, (Mr. H), her brother-in-law who lived one block away, told her that on the morning of the accident, after leaving his residence decedent had stopped by the (H) residence. She said that decedent had previously dropped off a paint color booklet with (Mr. H). According to appellant/claimant, decedent and (Mr. H) were "buddies" who hunted together and frequently saw each other in the evenings. The hearing officer denied appellant/ claimant's request for a recess to call (Mr. H) for testimony, closing statements ensued, and the hearing was closed. On April 23, 1992, the hearing was reconvened and the deposition of (Mr. H) was admitted. (Mr. H) testified he was a maintenance mechanic at the state school with no purchase or contracting authority. He said that at sometime between 10:30 to 10:45 a.m. on the morning of the accident, decedent came to his house, dropped off a paint sample book, and left before 11:00 a.m. He and decedent had several weeks earlier discussed his taking such a book to his supervisor to make a prospective sales contact for decedent, and sometime during the week of the accident decedent said he would drop the book off that Saturday morning. (Mr. H) had previously obtained a paint inventory and price list from an employee at the school and given it to decedent for informational purposes. When decedent left (Mr. H)'s premises, he said he had some sales calls to make but provided no details.

Appellant/carrier introduced affidavits from (Mr. H)'s supervisor, the school's plant maintenance manager, and its business manager, to the effect that (Mr. H) lacked authority to obtain paint cost estimates, to accept paint bids, or even "to discuss contracts about paint."

In addition to the conclusion that decedent was not engaged in the course and scope of his employment at the time of his fatal accident, appellant/claimant challenges the following factual findings:

4.There was insufficient evidence that the Deceased was engaging in work-related activity after he left the (H) residence at approximately 11:00 a.m. on the above date.

5.A permissible inference has been drawn that after leaving the (H) residence the Deceased drove to some unknown site and purchased the shotgun he and his wife had seen the night before.

6.A permissible inference, regardless of whether or not he actually fired the weapon, has been drawn that the Deceased was travelling to his home to store the weapon prior to joining his wife for lunch.

7.The Deceased engaged in no work-related activity between the time he left the (H) residence and the time he sustained his fatal injury.

Article 8308-4.41 (1989 Act) provides that the insurance carrier shall pay death benefits to the legal beneficiary of the employee "if the compensable injury results in death." Article 8308-1.03(10) defines compensable injury as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Course and scope of employment are defined in the 1989 Act 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. The term includes activities conducted on the premises of the employer or at other locations. The term 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: (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).

We have had previous occasion to comment on the "dual purpose" doctrine relating to an employee's travel involving both work related and personal purposes. *See* Texas Workers' Compensation Commission Appeal No. 92026 (Docket No. redacted) decided March 9, 1992, and Texas Workers' Compensation Commission Appeal No. 92227 (Docket No. redacted) decided July 20, 1992. The concept has been stated thusly: "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 (1990). The court in Johnson v. Pacific Employers Indemnity Company, 439 S.W. 2d 824, 827 (Tex. 1969) stated that "the rule can only be invoked when injury is sustained during the course of travel which furthers both the affairs or business of the employer and the personal or private affairs of the employee." If the only purpose for decedent's travel was to run his own personal errands, his travel was clearly not in the course and scope of his employment. Article 8308-1.03(12). If decedent's travel benefitted only the employer, the dual purpose travel doctrine would not

arise. Texas Workers' Compensation Commission Appeal No. 92026, *supra*. Since the hearing officer seemed to find the furtherance of both employer's and decedent's affairs in the travel in this case, the doctrine does apply.

Article 8308-6.34(e) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility it is to be given. Whether an injury is incurred within the course and scope of employment is a fact question for the hearing officer. In addition to fact finding powers, as a general rule, the hearing officer "has implied findings power, and can make a reasonable inference from the direct or circumstantial probative evidence." Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182, 185 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The findings of the hearing officer, while silent as to whether decedent was acting in the course and scope of his employment when he left employer's store to run errands, and when he stopped by his residence for medication, do indicate a determination that decedent performed an activity which arose out of and in the course and scope of employment when he stopped by the (H) residence to drop off the paint color book. The hearing officer inferred, however, that after decedent left the (H) residence, he drove to the site of the garage sale where he bought the shotgun and was en route to his residence to store the weapon at the time of the accident. The hearing officer found insufficient evidence to prove that decedent was engaged in work-related activity from the time he left the (H) residence at about 11:00 a.m. until his fatal accident at about 11:47 a.m. We are persuaded the evidence is sufficient to support the hearing officer's finding and conclusion in this regard. Even assuming that included among the errands decedent intended to perform when he departed employer's premises was taking the paint color book to (Mr. H), and recognizing that although decedent was not a member of employer's outside sales force he nonetheless had a legitimate concern for the generation of new business, the preponderance of the evidence failed to show that his travel, at best in the furtherance of both his employer's affairs and his own, met the exception in Article 8308-1.03(12)(B) to qualify as being in the course and scope of his employment. There was simply not a preponderance of the evidence to show that the trip to the place of the accident would have been made whether or not decedent had any personal affairs to attend to during such travel. According to the evidence, decedent left the (H) residence at about 11:00 a.m. and the accident occurred approximately 47 minutes later. The (H)s lived only one block from decedent who lived only eight miles from the store. Decedent was traveling west at the time of the accident, a direction apparently in the direction of his home and away from the store. Incidentally, the hearing officer apparently prepared a demonstrative exhibit consisting of a map of the area with the relevant locations drawn thereupon. Regrettably, this document was neither authenticated nor made a part of the record. The time period which elapsed after decedent left the (H) residence, the telephone call to (Mr. R) about going to shoot the gun he bought and eat lunch before returning to the store, together with the fact that the shotgun was found in the truck and had not been mentioned by decedent while home getting medicine, support the factual finding as well as the inferences drawn by the hearing officer. We cannot substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana

1989, no writ).

Article 8308-3.02(1) provides that an insurance carrier is not liable for compensation if "the injury occurred while the employee was in a state of intoxication." A claimant need not prove he was not intoxicated since courts will presume sobriety. Bednar v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). Once the carrier presents sufficient evidence of intoxication to raise a fact question, the claimant then has the burden to prove he was not intoxicated at the time of the injury. March v. Victoria Lloyd Insurance Co., 773 S.W.2d 785 (Tex. Civ. App.-Ft. Worth 1989, writ denied). Appellant/carrier has appealed from the conclusion of the hearing officer that decedent "was not shown to be intoxicated, as defined, at the time of his fatal accident," and challenges the following related findings:

8.No sample of the Deceased's blood or urine was taken immediately after the accident and there was no evidence presented regarding correlation, if any, between the alcohol concentrations which existed 23 hours later and those at the time of the accident.

9.The samples of the Deceased's blood and urine which were tested, were smaller than those required by the provisions of Article 6701 I-1, V.A.T.S., for determining intoxication.

Article 8308-1.03(30) defines intoxication and includes in pertinent part the following:

(A)the state of having an alcohol concentration of 0.10 or more, where `alcohol concentration' has the meaning assigned to it in Article 6701I-1, Revised Statutes; or the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of:

(i)an alcoholic beverage, as that term is defined by Section 1.04, Alcoholic Beverage Code;. . .

This case involves the presumptive or conclusive alcohol level portion of the definition. Article 6701I-1(a)(1), Revised Statutes, provides in pertinent part that "alcohol concentration" means:

(A)the number of grams of alcohol per 100 milliliters of blood;

(C)the number of grams of alcohol per 67 milliliters of urine.

Aside from appellant/claimant's testimony that decedent had two or three beers the night before his accident and one beer during the morning of the accident, the only other evidence adduced on the intoxication issue were the toxicology test results attached to the

(county) County Chief Medical Examiner's autopsy report. An autopsy on decedent's remains was conducted on (date), the day after the accident, and 60 milliliters of blood and 30 milliliters of urine were taken for testing. According to the toxicology report, dated (date), testing of those samples revealed the following:

Blood	Ethanol	Pos	Ethanol	00.10	GM%
Urine	Ethanol	Pos	Ethanol	00.14	GM%.

Webster's Ninth New Collegiate Dictionary defines ethanol as alcohol. During closing statements at the end of the first hearing when appellant/carrier argued that the foregoing test results made it "clear" that decedent was intoxicated at the time of the accident, the hearing officer stated that the test results seemed to relate to the time the samples were taken, not to the time of the accident, and expressed concern over such claimed clarity of that evidence as follows:

"I'm not a doctor and I can't take judicial notice of things that physicians know so I don't really know what point - any suggestion I think a lay person might be sympathetic to your argument. But it says ethanol 00.10 GM percentage and I don't know what GM percentage means. It means nothing to me . . . I understand what you're saying and this report may say

everything you say it says, but I think I need somebody who knows something about autopsy reports to tell me.

Notwithstanding the hearing officer's obvious discomforture with the nature of the information in the toxicology report, no effort was made at the later hearing to adduce additional evidence on intoxication or to interpret and extrapolate the test results in terms of both the time the samples were taken vis-a-vis the time of the accident, as well as the quantity of the specimens being less than those stated in Article 6701l-1. *Compare* Texas Workers' Compensation Commission Appeal No. 92148 (Docket No. redacted) decided May 29, 1992. Appellant/carrier urges, in essence, that Article 8308-1.03(3) doesn't impose a time limit on the taking of body fluid specimens, and that the statutory blood alcohol concentration of 0.10 grams per 100 milliliters simply represents a ratio which can be determined or measured with a lesser quantity of the specimen. These assertions may be correct. However, as the hearing officer advised, such were not facts of which he could take official notice. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.2(11) authorizing the hearing officer to take official notice of, *inter alia*, "generally recognized facts within the commission's specialized knowledge." We have had a prior occasion to consider scientific evidence of intoxication which was unclear and presented a significant potential inconsistency in the data. *See* Texas Workers' Compensation Commission Appeal No.91107 (Docket No. redacted) decided January 21, 1992. We find sufficient evidence to support these challenged findings and will not require the hearing officer to apply formulae, extrapolate data, or otherwise sort out scientific test results not readily understandable to

the fact finder.

None of the challenged findings and conclusions of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no error, the decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge