APPEAL NO. 92320

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on June 4, 1992, in (city), Texas before hearing officer (hearing officer). The sole issue at the hearing was whether the claimant (appellant herein) was in the course and scope of his employment when he sustained a partial amputation of the right index and long fingertips while checking an alternator belt on (date of injury).

Appellant's position at the hearing was that he was an employee of (employer) for workers' compensation purposes on (date of injury). He further asserted that the injury arose in the course and scope of his employment with employer since it occurred while the truck the appellant was to drive was being repaired at the direction of employer.

Respondent, employer's workers' compensation insurance carrier, took the position that appellant had two employers on (date of injury): employer and (Mr. Ze), who was the owner of the truck in question. Respondent claimed that pursuant to the agreement between employer and Mr. Ze, the appellant was not acting within the course and scope of his employment with employer when repairing the truck on (date of injury), because employer had no control over such repairs.

The hearing officer held, pursuant to stipulations, that on (date of injury), employer was a "motor carrier" as that term is defined under the 1989 Act, Article 8308-3.05(a)(3), and Mr. Ze was an "owner operator" as that term is defined under Article 8308-3.05(a)(4). She also held that appellant was not performing services in furtherance of the business interests of employer at the time he sustained the injury in question, and therefore respondent was not liable for compensation.

Appellant asks that we review the decision of the hearing officer. Respondent contends that appellant's letter does not qualify as a request for review under the 1989 Act. If, however, the letter is assumed to be based on a no evidence or insufficient evidence point, the respondent contends that the hearing officer's decision is supported by the overwhelming weight of the evidence.

DECISION

Because we find appellant was acting within the course and scope of his employment pursuant to the contract on (date of injury), we reverse the decision of the hearing officer and render a new decision.

Appellant was a truck driver who lost the tips of two fingers on (date of injury) in an accident that occurred in the course of testing the alternator belts on his trailer truck. He testified that the night before, while at a rail yard in (city) where he had been sent by employer to pick up a load, his lights began to dim and he noticed that the belts had broken.

He said he called (Mr. J), employer's dispatcher, who told him to bring the trailer back into employer's yard and to get the truck fixed in the morning. Appellant accordingly delivered the trailer to the yard and drove his truck home. He drove the truck to the repair shop the next morning, where the accident occurred.

Appellant said after the accident he called Mr. J, who said "[w]ell, we're covered under workers' comp. Let me let you talk to [the manager]." He said the manager got on the telephone and told him to go to (Hospital), which employer used.

The truck appellant drove was owned by Mr. Ze, who hauled for employer pursuant to a written contract. Under the contract, Mr. Ze leased the truck to employer and was not permitted to haul for any motor carrier other than employer. Appellant testified that he was assigned loads by employer on a first come, first served basis, and that Mr. Ze was liable for repairs to the truck. He said as a driver he had to perform a pretrip inspection of the truck every morning, and was responsible for getting any problems fixed before he picked up a load. After a load was hauled, employer retained 30 percent of the gross, then paid 70 percent to Mr. Ze who in turn paid appellant.

Admitted into evidence was the driver's daily log completed by appellant on (date). This log, which was required to be kept on a daily basis, showed the driver's hours under four categories: off duty, sleeper berth, driving, and on duty (not driving). Appellant said the problem with his truck was not noted on this log because he did not take it into the repair shop that day because it was too late. He said he filled out a log for (date of injury) but he did not remember whether he turned it in or not. He said he did not do any work at all on that date because he got hurt when having his truck repaired.

(Mr. Zo), manager of employer's Houston terminal out of which appellant worked, said he talked to appellant after he was injured and suggested he go to the clinic employer uses, but said he could not recall discussing workers' compensation coverage with appellant. Mr. Zo had signed, on behalf of employer, the contract with Mr. Ze which contained the following provision, "CONTRACTOR" referring to Mr. Ze and "CARRIER" referring to the employer:

Expenses of Equipment

5.CONTRACTOR agrees to pay and shall reimburse CARRIER, if CARRIER is required to pay, all expenses of the operation of the equipment under this lease, including but not limited to repairs and maintenance of leased equipment so as to comply with all local, state and/or federal regulatory bodies, or by the insurance company carrying the insurance risk on any leased equipment . . . Any infractions of this paragraph shall be cause for immediate termination of this lease by CARRIER without further liability for rental."

With regard to that provision, Mr. Zo said that employer does not have the authority to require the driver to have repairs done and then to charge the repairs back to the owner. For purposes of repair he distinguished between tractors (trucks), which are owned by the owner operator, and trailers, which are checked out of rail or port facilities on behalf of customers; he said the employer could have a damaged trailer repaired but that it never has trucks repaired. Mr. Zo also said whether or not a driver would be covered under the employer's workers' compensation insurance policy would depend upon whether he was on duty or not. His understanding of "on duty" was "[w]hen he [the driver] has logged on, duty driving for us and pulling a load." He said that a driver who had a breakdown on the road and had to stop for repairs would be considered within the "on-duty, non-driving" category of the log sheet. During those periods drivers would not stay on duty, he said, because that would cause them to have excessive on-duty log time in violation of federal requirements. He said appellant had not turned in a log sheet for (date of injury).

Employer's dispatcher, Mr. J, testified that appellant first informed him of problems with the truck when he called from his home the morning of (date of injury), and that he did not remember appellant calling him the day before. He denied telling appellant to get his truck fixed, stating that he does not do that. He said the trailer was being held for appellant at the yard, but that it was assigned to another driver after appellant's injury.

At the outset of the hearing the parties stipulated that the employer was a "motor carrier" pursuant to Article 8308-3.05(a)(3) of the 1989 Act, and that Mr. Ze was an "owner operator" pursuant to Article 8308-3.05(a)(4). They also stipulated that on (date of injury), the employer provided workers' compensation insurance coverage to Mr. Ze and his employees while they were performing duties pursuant to the contract entered into between employer and Mr. Ze.

Traditionally, independent contractors have not been considered employees covered by workers' compensation insurance. The 1989 Act specifically addresses its application with regard to types of independent contractors. Article 8308-3.05(a)(4) provides that an owner operator, defined as a person who provides transportation service for a motor carrier under contract, is an independent contractor. However, the Act further provides that a motor carrier and an owner operator may enter into a written agreement under which the motor carrier provides workers' compensation insurance coverage to the owner operator and the employees of the owner operator; if the motor carrier elects to provide such coverage, the motor carrier may deduct premiums for the coverage from amounts owed to the owner operator. Article 8308-3.05(g). In the case before us, the parties stipulated, among other things, that Mr. Ze was an owner operator as that term is defined by the 1989 Act, and that the employer by agreement provided workers' compensation coverage to Mr. Ze and his employees while they were performing duties pursuant to the contract between employer and Mr. Ze. These stipulations are binding upon us as a reviewing body. Geo-Western Petroleum Development v. Mitchell, 717 S.W.2d 734 (Civ. App.-Waco 1986, no writ). Because of the stipulated workers' compensation agreement, issues regarding control and direction are not relevant. Rather, we will consider whether the evidence

demonstrated that appellant was injured while performing duties pursuant to the above contract.

In addition to the provision on expenses of equipment quoted above, the contract contained the following:

Scope of Service

1.CONTRACTOR agrees, when and as requested by CARRIER, to pick up, transport to destination, and deliver trailers and their cargo moving under the operating authority of CARRIER. Where requested by CARRIER or its shipper(s), CONTRACTOR shall be responsible for loading and unloading property onto and from motor vehicles and shall be compensated for driver labor pursuant to Addendum A to this Agreement. CONTRACTOR's responsibility in the performance of such services shall be only to CARRIER.

Equipment

2.CONTRACTOR agrees that the equipment described in Exhibit 1 hereto [not made part of the record in this case] . . . shall be used solely in the performance of services hereunder. CONTRACTOR represents to CARRIER that he holds title to and/or has authority to lease the motor vehicle equipment described in Exhibit 1 and hereby leases said equipment to CARRIER for CARRIER'S exclusive possession, control and use, including for the purpose of subleasing the equipment to other authorized carriers during the term of this Agreement . . .

The terms of the contract require Mr. Ze and his employees to transport trailers and cargo under employer's authority, an act which necessarily requires the use of equipment (trucks) which are leased to employer for its sole use. Whether the injury occurred within the course and scope of appellant's employment under this contract would be a question of fact. Texas Employers' Insurance Association v. Anderson, 125 S.W.2d 674 (Tex. Civ. App.-Dallas, writ ref'd). The 1989 act defines "course and scope of employment" in pertinent part 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." Article 8308-1.03(12). Key to the foregoing is the establishment of a causal relationship between the risk that caused the injury and the conditions of employment; the injury must result from a hazard that is necessarily and ordinarily involved in the type of work the employee performs. American General Insurance Co. v. Williams, 227 S.W.2d 788 (Tex. 1950). Moreover, if the injury results from a risk or hazard that the employee assumes in order to perform the employer's work, compensation is due without regard to when, where,

or how the employee was injured. It is not necessary that the injury occur during hours of actual service. Texas Employers' Insurance Association v. Davidson, 295 S.W.2d 482 (Civ. App.-Fort Worth 1956, ref. n.r.e.).

Under the facts of this case, we find that appellant's actions in taking the truck to be repaired to be an integral part of his duties pursuant to the agreement with employer and Mr. Ze, and was a risk or hazard assumed in order to perform employer's work--transporting cargo for hire--which, by its very nature, could not be accomplished without functional equipment. Maintaining the equipment in good working condition clearly furthered employer's affairs or business; this is no less true even though such repairs also benefitted Mr. Ze as owner operator. The fact that the injury occurred at a repair shop also makes it no less compensable than a road site accident as envisioned by Mr. Zo. For this reason, we do not believe it is material whether or not employer actually instructed appellant to have the truck repaired, as could be material in a case where an employee deviated from his usual duties. This result also is not changed because of the contractual provision requiring Mr. Ze to bear the cost of repairs, as under the contract the employer had the right of control over the equipment in question. And, this particular section of the contract does not concern itself with who initiates necessary repairs but only covers who bears the costs. Our holding is consistent with court decisions in other jurisdictions with very similar fact situations. *See, e.g.*, Moser v. Industrial Commission, 440 P.2d 23 (Utah 1968); Pritchett v. G & B Log Company, 424 So. 2d 623 (Ala, 1982).

We accordingly hold that appellant, while engaged in repairing the equipment, was injured in the course and scope of his employment. The decision of the hearing officer is reversed and a new decision rendered in accordance with this opinion.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge