APPEAL NO. 92324

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). A contested case hearing was held in (city), Texas, on June 2, 1992 to determine whether the death of (hearing officer) (decedent) in an automobile accident on (date of injury) arose out of and in the course and scope of his employment, and whether respondent (claimant below) was entitled to death benefits under the 1989 Act as his eligible common-law spouse. At the hearing, respondent contended that although decedent was driving to work when he was fatally injured, he was test driving a customer's car as a service manager and was thus in the course and scope of his employment at the time. Appellant urged that because decedent was merely driving to work, he was not in the course and scope of his employment at the time of his death. Appellant also asserted that decedent, after having been divorced from respondent, resumed cohabitation with her only to assist her financially and thus did not effect a common-law marriage. The hearing officer, concluding that decedent received his fatal injuries while test driving a customer's car in the course and scope of his employment, and that respondent and decedent had a common-law marriage, determined that respondent is entitled to benefits. In its request for review, which adopts the hearing officer's statement of the evidence, appellant challenges the sufficiency of the evidence to support certain of the findings of fact, as well as the salient conclusions of law, on both issues. Respondent filed a response, also adopting the hearing officer's statement of the evidence, which supports the challenged findings and conclusions.

DECISION

Finding sufficient evidence to support the findings below, we affirm.

According to the evidence, decedent was the service manager for the (employer) dealership in (city), Texas (employer). Employer provided him a demonstrator automobile (demo) which he drove to and from work except on the occasions when he test drove customers' cars. On (date), one of employer's technicians, who was supervised by decedent, worked on a new car brought in for the second time with the complaint that the engine stopped while in operation. Because the problem was unusual and couldn't be replicated while driving the car around the dealership, and because decedent was very conscientious about customer satisfaction and wanted to ensure the problem had actually been fixed, he decided to drive the customer's car home that evening and back again the next morning to road test it. According to employer's business manager, its parts manager, and a technician, as well as the respondent, decedent occasionally drove customers' cars to his home to road test them. On (date), he loaned his demo to the customer and drove the customer's car home that night. According to the business manager, such actions were a part of decedent's job. His authority, as employer's service manager, to do so was not challenged below. On the morning of (date of injury), while driving the customer's car to work along one of his two usual routes, and at or about the time he usually drove to work, decedent was fatally injured in an automobile accident.

The parties stipulated that decedent was killed in an automobile accident on (date of injury); that at the time of the fatal accident decedent was driving a customer's automobile that was in the dealership's possession for repairs; and that decedent was the service manager for employer on (date of injury).

Respondent testified that she and decedent were married on June 20, 1962 and were divorced in March 1985. They had separated approximately six months before the divorce and remained separated until they began dating in February or March 1989 when decedent moved into the same apartment complex where respondent resided. In May or June 1989, decedent moved into respondent's apartment and they resumed living together as husband and wife and remained together until decedent's unfortunate death on (date of injury). Prior to decedent's moving in with her, respondent testified that she and decedent had a talk and agreed to be married. She said they later bought each other rings and had "done everything but obtain a marriage license and go before a judge." She had anticipated that on some future anniversary date of their original marriage, they would have another ceremonial marriage. Respondent denied that decedent, known to be a generous man, moved back in with her to help her with her financial problems. At the time she and decedent resumed living together, respondent was a vice-president at a bank where she had worked for 21 years and had a substantial salary. It was not until a year later, in June 1990, that she was laid off. She filed her Chapter 7 petition in bankruptcy in April 1991 to discharge debts she incurred during the separation, and was later employed by another bank at a substantially reduced salary. In her bankruptcy petition, respondent showed her marital status as divorced. She testified she felt she should not reflect her status as married on documents without another formal marriage, nor did she believe that they should have joint bank accounts. She had the paperwork to add decedent's name to her lease when he was killed. She claimed decedent introduced her as his wife at his employer's parties. She also stated that they had between them their private joke in which they would commonly refer to one another as "my ex" (wife or husband). As beneficiary, respondent collected the proceeds of decedent's life and accidental death insurance policies and said she used a substantial amount to pay his funeral expenses and debts.

Employer's business manager testified that decedent's test driving of customers' cars furthered employer's business interests and that employer approved of decedent's giving his demo to customers while taking their cars home for test drives. However, she also opined that the accident didn't happen in the course of decedent's employment since he would have had to drive to work regardless of whose car he was driving. She said that had decedent not been driving the customer's car, he would have been driving the demo. She explained that employer's providing the demo was a part of decedent's taxable compensation, and that it amounted to the employer's providing decedent with transportation to and from work. She once heard decedent state at a wedding reception that respondent was his ex-wife and she never heard him refer to respondent as his wife. However, this witness knew at least by the summer of 1990 that decedent was living with respondent. Decedent told her he was living with respondent and that she had lost her job at the bank and he was helping her out financially.

Employer's business manager also identified various employer business records reflecting decedent's marital status. An insurance enrollment form, signed by decedent on December 25, 1989, reflected he was single; an insurance change of beneficiary form, signed on August 22, 1990, changed decedent's beneficiary from a former girlfriend to his grandson; decedent's group life and accidental death insurance application designated respondent as decedent's primary beneficiary but stated her relationship as "ex-wife;" decedent's IRS W-4 forms for 1986, 1987, 1989 and 1990 reflected his marital status as "single;" and, a credit application signed by respondent in March 1989 in connection with her purchase of a new car from employer, arranged for by decedent, listed decedent as her "ex-husband." Respondent testified that she didn't fill out that portion of the form.

Respondent's two brothers testified that they very frequently visited with decedent and respondent and regarded them as husband and wife. According to these witnesses, who were introduced by decedent as his brothers-in-law, decedent and respondent talked and acted just like a married couple. Respondent's sister, who visited respondent almost every weekend, testified similarly and stated that decedent and respondent held themselves out as husband and wife over the last few years and were open about it. She said decedent once told her he had made a mistake in moving away from respondent and he talked to her about their future plans. This witness also testified that members of decedent's own family were never weekend visitors. The daughter of decedent and respondent testified that when decedent moved back in with respondent in May or June 1989, they lived as husband and wife and said they were back together.

Decedent's sister testified that she kept in touch with decedent but not in close touch, having been in his home only twice in 30 years and both times prior to the divorce. She saw decedent and respondent approximately twice a year and talked to her brother on the telephone four or five times a year. She said he told her he moved back in with respondent to help her after she lost her job. In her opinion, decedent and respondent were not married at the time of his death and were not holding themselves out as husband and wife. She didn't know decedent had moved back in with respondent before the latter lost her job. Decedent's former girlfriend testified that after decedent's divorce, they dated and cohabitated for a year or so, separated in October 1988, and that she subsequently married. She did not know where decedent was living at the time of his death and he never mentioned to her that he had resumed living with respondent.

Employer's parts manager knew and worked with decedent and never heard him refer to respondent as his wife. He said decedent acted like a confirmed bachelor, although he conceded he had no social contact with decedent beyond the workplace. He confirmed it was decedent's practice to take customers' cars home for test driving if the problems couldn't be repeated at work. One of employer's technicians, who was trained and supervised by and was very close to decedent, testified that while he knew decedent and respondent were living together, he didn't regard them as husband and wife because decedent liked being on his own. He said that while he was not the technician who worked

on the customer's car in which decedent was killed, the technician involved, decedent, and the witness had together discussed the problem with the car and decedent said he was going to take it home to see if it had really been fixed.

In its request for review, appellant specifically challenges Finding of Fact Nos. 7, 12, 13, and 14, and Conclusion of Law Nos. 5, 6, 7, and 8 which are as follows:

FINDINGS OF FACT

7.[Decedent] died of fatal injuries received in an automobile accident on (date of injury) while test driving [an employer's] customer's car to diagnose a mechanical problem.

12.[Respondent and decedent] agreed to reestablish their marital relationship as husband and wife in May 1989.

13.[Respondent and decedent] lived together as husband and wife from May, 1989 until his death on (date of injury).

14.[Respondent and decedent] presented themselves as husband and wife to others from May, 1989 until his death on (date of injury).

CONCLUSIONS OF LAW

5.[Decedent] received fatal injuries while test driving a customer's car in the course and scope of his employment on (date of injury).

6.[Respondent and Decedent] had a common-law marriage from May, 1989 until his death on (date of injury).

7.[Respondent] is entitled to death benefits as the eligible spouse of [decedent].

8.[Appellant] is liable for death benefits pursuant to Article 8308-4.41 of the Texas Workers' Compensation Act.

Appellant challenges Finding of Fact No. 7 and Conclusion of Law No. 5 as being against the great weight and preponderance of the evidence, and "asserts that the evidence fails to establish that [decedent] was test driving a customer's car." This challenge is utterly without substance. Not only did respondent, as well as employer's technician, testify that decedent drove the customer's car home to test it, but appellant joined in a stipulation that "[a]t the time of [decedent's] fatal accident on (date of injury), he was driving a customer's automobile that was in the dealership's possession for repairs." This finding and conclusion are amply supported by the evidence.

Under the 1989 Act, death benefits are payable by the insurance carrier to the legal beneficiary of the employee, including an eligible spouse, if the compensable injury results in death. Arts. 8308-4.41-4.42. A compensable injury means an injury which arises out of and in the course and scope of employment for which compensation is payable. Art. 8308-1.03(11). Course and scope of employment is defined by Article 8308-1.03(12) as follows:

> [A]n 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:
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> (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
>
> (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.

As a general rule, injuries sustained by employees while traveling on public streets in going to or returning from work are not compensable because they are not incurred in the course of employment. American General Insurance Company v. Coleman, 303 S.W.2d 370, 374 (Tex. 1957); Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176, 178 (Tex. 1964). However, exceptions to the "coming and going" rule do exist and were codified in TEX. REV. CIV. STAT. ANN. art. 8309, § 1b, since repealed, now Article 8308-1.03(12)(A) and (B) (1989 Act). Texas Employers' Insurance Assocation v. Goad, 622 S.W.2d 477 (Tex. Civ. App.-Tyler 1981, writ ref'd n.r.e.). Among such exceptions are

circumstances where the employer furnishes or pays for the transportation or controls the means of the transportation. Another exception exists and "[a]n injury is held to be in the course of a workman's employment if in going to or returning from his place of employment or his place of residence he undertakes a special mission at the direction of his employer, or performs a service in furtherance of his employer's business with the express or implied approval of his employer. (Citations omitted.)" Coleman, *supra* at 374; Jecker v. Western Alliance Insurance Company, 369 S.W.2d 776, 778 (Tex. 1963). The court in Employers' Casualty Company v. Hutchinson, 814 S.W.2d 539, 543 (Tex. App.-Austin, 1991, no writ) recently stated it thusly: "An injury received while using the public streets is compensable when the employee has undertaken a special mission at the direction of the employer or is performing a service in furtherance of the employer's business with the express or implied approval of the employer. (Citations omitted.)." Because decedent's fatal injuries occurred while he was involved in automobile travel, respondent thus had to show that decedent not only was engaged in an activity having to do with and originating in employer's business and was furthering the business of employer, but also met one of the exceptions now embodied in Articles 8308-1.03(12)(A) and (B). Rose v. Odiorne, 795 S.W.2d 210, 213 (Tex. App.-Austin, 1990, writ denied); Liberty Mutual Insurance Company v. Chesnut, 539 S.W.2d 924, 926 (Tex. Civ. App.-El Past 1976, writ ref'd n.r.e.). *And see* Hutchinson, *supra* at 540; Meyer v. Western Fire Insurance Company, 425 S.W.2d 628, 629 (Tex. 1968).

Appellant asserts that decedent's fatal injuries were not compensable pursuant to Article 8308-1.03(12)(A) because even though decedent was driving a customer's car at the time of the accident, he was driving to work and would have had to do so even were he not driving the customer's car. Appellant also contends, without elucidation, that Article 8308-1.03(12)(B), which it refers to as the dual purpose test, is inapplicable. The evidence established that decedent, as the service manager, was authorized to test drive cars being repaired by employer and, for cars with problems requiring more extensive testing than merely being driven around employer's premises, decedent customarily tested them by driving them to and from his home. Appellant did not challenge Finding of Fact No. 9 that employer "expected [decedent] to provide customer service including driving customer's cars to diagnose mechanical problems." We view such test drives as being in the nature of special missions for employer, as well as the performance of decedent's duties for employer pursuant to his employment contract, and thus within the exceptions articulated by the Coleman and Hutchinson courts. The times he selected to make such drives as well as the routes he chose, including routes that took him to and from his home, we view as incidental and within his authority and discretion. Since decedent was authorized to and customarily did on occasion drive customer's cars home to test them, decedent was not simply going to work at the time of his accident, but was already engaged in his duties when he commenced the test drive of the customer's car. His employer was further benefitted by decedent's not taking time out from performing other duties at employer's premises to perform the test drive. The test drive clearly had to do with and originated in the business of the employer and was performed by decedent while engaged in the furtherance of the employer's business. *See* Jecker, *supra*.

Appellant further contends that none of the exceptions under Article 8308-1.03(12)(A) are applicable contending there was no evidence that the demo provided by employer "was an integral part of the employment contract or anything more than a gratuity or accommodation to the employee," citing Bottom, *supra* at 353-354. Appellant argued that the demo was used only for personal purposes, not for any purpose connected with the employment, and "therefore injuries sustained while operating the company vehicle would not be compensable." We must disagree with appellant's assessment of this evidence. In its request for review, appellant "adopts" the hearing officer's statement of the evidence. The hearing officer's recital of the evidence stated it was "undisputed" that employer assigned a demo for decedent's use; that the demo was a part of employer's payment plan and treated as a taxable benefit; and that employees furnished a demo signed an agreement to at all times maintain the car in good condition, know its location, and have it on display for sale. We believe this evidence brings decedent's transportation to and from work in the demo within the provisions of Articles 8308-1.03(12)(A)(i) and (ii). Although decedent wasn't driving the demo at the time of his fatal injuries, the hearing officer made the following Finding of Fact Nos. 5 and 6, and Conclusion of Law No. 4, which appellant did not challenge:

FINDINGS OF FACT

5.[Employer] provided a demonstrator to [decedent] for his use and required him to maintain the car and have it available for display and sale at all times.

6.[Employer] withheld payroll taxes from [decedent's] wages based upon a percentage of the dollar value of the demonstrator car provided to [decedent].

CONCLUSIONS OF LAW

4.[Employer] provided transportation as part of [decedent's] contract of employment.

These findings and conclusion could support the position, not articulated by either party nor the hearing officer, that since decedent was provided transportation by employer and would have been within the exception of Article 8308-1.03(12)(A)(i) had he been driving the demo at the time of the accident, he was impliedly authorized, in view of his position as service manager, to substitute a customer's car for employer's demo. Under that view, decedent would also have come within that exception. However, we need not decide the merits of such position and these findings and the conclusion may be disregarded.

As we have previously observed, the existence of a common-law marriage is a question of fact to be resolved by the hearing officer as the fact finder. Texas Workers' Compensation Commission Appeal No. 92007 (Docket No. redacted) decided February 21, 1992. *And see* Texas Workers' Compensation Commission Appeal No. 92100 (Docket No. redacted) decided April 27, 1992. The statute governing informal or common-law

marriages in Texas provides that, in any judicial or administrative proceeding, a marriage not registered as provided by the statute may be proved by evidence that the parties "agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." Tex. Fam. Code Ann. § 1.91(a) (Vernon 1975). We are satisfied that there is sufficient evidence to support the challenged factual findings and legal conclusions on this issue.

In its request for review, appellant concedes that the cohabitation requirement was not in issue, and recognizes that the evidence of respondent's and decedent's holding themselves out to the public as husband and wife was in conflict. With regard to the requirement for the agreement to be married, however, appellant asserts "there is clear and convincing evidence that no agreement to be married existed." Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging the relevance and materiality of the evidence, as well as its weight and credibility. As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves inconsistencies and conflicts in the evidence. Gonzales v. Texas Employers Insurance Association, 419 S.W. 2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). "Marriage, whether ceremonial or common-law, is proved by the same character of evidence necessary to establish any other fact . . . proof of common-law marriage may be shown by the conduct of the parties, or by such circumstances as their addressing each other as husband and wife, acknowledging their children as legitimate, joining in conveyance as spouses, and occupying the same dwelling place . . . the circumstances of each case must be determined based upon its own facts. (Citations omitted.)" Estate of Claveria v. Claveria 615 S.W.2d 164 (Tex. 1981). Respondent testified that after decedent moved into her apartment complex but before they resumed cohabitation, they had a talk and they agreed to be married. Subsequently, decedent moved into respondent's apartment and they cohabited from May 1989 until his death on (date of injury). They had previously been married from June 20, 1962 until their divorce on March 4, 1985, a period of nearly 23 years, albeit they had separated approximately six months before the divorce. At some time after they resumed living together, they bought each other rings and, according to their daughter and the relatives who saw them most frequently, they resumed their lives together as a married couple for approximately two and one-half years until decedent's untimely death. The fact that they were chary of indicating their marital status as married on tax, bank, loan application, bankruptcy forms and like documents, knowing they had not undergone another ceremonial marriage after their divorce, went to the weight of the evidence but did not negate the existence of their common-law marriage. Matter of Estate of Giessel, 734 S.W.2d 27, 31 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.). While the law requires a present agreement to be married as an element of a common-law marriage, it being insufficient to agree on present cohabitation and future marriage (Rosetta v. Rosetta, 525 S.W.2d 255, 261 (Tex. Civ. App.-Tyler 1975, no writ)), respondent's testimony was clear and undisputed that she and decedent agreed to be married before they resumed cohabitation and that she entertained the expectancy that on some future wedding anniversary date they would undergo a second ceremonial marriage. Appellant has shown no basis for the hearing officer to reject that testimony.

We have carefully reviewed the record including the testimony and exhibits, and are satisfied there is sufficient evidence to support the challenged findings and conclusions of the hearing officer. The findings are not 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).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge