APPEAL NO. 92716

On November 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent, hereinafter the claimant, was in the course and scope of his employment when he sustained an injury on (date of injury), and ordered that the claimant is entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant is Via Metropolitan Transit, a self-insured public entity, hereinafter referred to as the employer. The employer contests certain findings of fact and conclusions of law, contends that the hearing officer erred in failing to issue a subpoena for a witness, and contends that the claimant is not entitled to temporary income benefits (TIBS) and medical benefits under the 1989 Act because he was paid under the employer's sick leave policy and his medical bills were covered under the employer's health care benefits program. The claimant responds that the contested findings and conclusion are supported by the evidence, that the decision is correct, and that the hearing officer did not err in denying the subpoena.

DECISION

The decision of the hearing officer is affirmed.

The employer provides mass transit services. The claimant testified that he has worked for the employer as a bus driver for about eight years. On (date of injury), he was scheduled to relieve a bus driver at 4:49 p.m. in the downtown area of the city where the employer provides bus services. The claimant said that he drove from his home to the employer's bus garage in his car, parked his car, and then boarded an employer bus operated by (Mr. W) which was on a regularly scheduled route to the downtown area. The claimant said that he would not start getting paid until he actually got on the bus he was to relieve and started working at 4:49 p.m. The claimant said that he regularly took an employer bus to his relief point downtown because when his shift was over he would drive his bus back to the garage and pick his car up there. He said he got on the bus operated by (Mr. W) between 3:45 p.m. and 4:00 p.m. and that it was about a 35 minute drive to his relief point. The claimant said that he has an employee identification card which allows him to ride free of charge on the employer's buses at any time, not just to and from work, but since he was in uniform on (date of injury) he did not have to present his card to ride free of charge.

The claimant testified that after about 20 minutes the bus stopped to pick up two young men, and that the first passenger showed (Mr. W) a "CO" card, which is a card that allowed the passenger to ride on the bus free. The second passenger, who is identified in a report filed by (Mr. W) as (Mr. G) (he is referred to as "(G)" in the hearing officer's decision but will be called (Mr. G) herein), got on the bus, did not pay his fare, and sat down. According to the claimant, (Mr. G) then took the first passenger's free pass card, went up to the front of the bus, and showed it to (Mr. W). The claimant said that (Mr. W) was aware of what (Mr. G) was doing so he told (Mr. G) that he could not use someone else's card and

that he would have to pay the bus fare. The claimant said that (Mr. G) replied that he only had a dollar bill and did not have any change (the fare was forty cents). The claimant said that (Mr. W) told (Mr. G) that tomorrow he should have the right change or he wasn't going to ride the bus. The claimant said that (Mr. G) then started "mouthing off" and went to the back of the bus, but soon came to the front of the bus with the first passenger and they sat across the aisle from him. The claimant said that (Mr. G) was saying things about bus drivers in general such as that bus drivers think they are "big stuff, bad, and hot." He did not remember the exact words. The claimant said that (Mr. G) was looking at him while talking, and that he, the claimant, told (Mr. G) to "just be quiet" and that "you're already riding for free." The claimant testified that at this point, (Mr. G) got up, lunged, attacked, and swung at him, and so he defended himself. Other passengers broke up the fight and (Mr. G) went to the back of the bus and, according to the claimant, he continued to yell the "same thing."

The claimant said that he decided to get off the bus about six or eight blocks from his relief point and walk five to seven minutes to his relief point, because his arm was hurting and he didn't think he could defend himself if (Mr. G) were to attack him again. Later, the claimant found out that he had fractured a bone in his right forearm. The claimant said that (Mr. G) and two "other guys" followed him off the bus, (Mr. G) grabbed the claimant's driver's bag and ran off, and that someone stopped (Mr. G) and called the police who came to the location of the incident. The claimant said he thought he hurt his arm on the bus. He could not recall having any physical altercation with (Mr. G) off of the bus except for (Mr. G) grabbing and running away with his driver's bag.

The claimant testified that he believed the reason (Mr. G) came back to the front of the bus and came after him was because he, the claimant, was in his bus driver uniform and was an employee of the employer. He further testified that he didn't think he had done anything to provoke the incident and that (Mr. G) got on the bus "looking for trouble." He further testified that (Mr. G) did not threaten or fight with any of the other passengers, and that he took offense at what (Mr. G) had said. In explaining why he got off the bus before he arrived at his relief point, the claimant said that, in addition to having a hurt arm, he thought that he was the only one really in danger from (Mr. G) because he had already been attacked once, and that (Mr. G) hadn't bothered anybody else. The claimant said that he has not been reprimanded by the employer for the incident of (date of injury).

(Mr. W's) testimony was generally consistent with that of the claimant's except that he said that (Mr. G) paid 14 cents of the 40 cent bus fare after he told him that he would not accept the other passenger's card; that he told (Mr. G) that he was never going to ride the bus again, and that, in addition to fighting on the bus, the claimant and (Mr. G) were involved in a brief fight after they got off the bus. He said that he could not hear everything that was said between the claimant and (Mr. G), but that he heard the claimant tell (Mr. G) to be quiet; you are riding free. He said he could not remember what derogatory words (Mr. G) had said about bus drivers. He first said that he thought the claimant stood up first before the fight on the bus, then said he wasn't sure, and then said it was (Mr. G) who stood up first. He said that after the passengers broke up the fight, (Mr. G) continued to taunt the claimant,

calling names, and saying "all kinds of stuff." When the claimant got off the bus, (Mr. W) said that (Mr. G) got off behind him and continued to taunt and provoke him and they started to fight again. (Mr. W) finished his route, got in his car, and drove downtown and found the claimant with the police and (Mr. G). This witness further testified that the claimant did not provoke the fight, and that the claimant was only defending himself against (Mr. G) attack. He said he thought that (Mr. G) had picked on the claimant because (Mr. G) had been told to shut up. He also said that he and other bus drivers have in the past rode in an employer bus to their respective relief points; that he can ride free anytime, and that he did not feel that his passengers were in danger from (Mr. G)' actions. He testified that he didn't know whether the bus drivers' contract with the employer called for free bus rides; he assumed it was just a rule. An Accident/Incident Report filed by this witness was also in evidence. In it this witness said that "this guy [(Mr. G)] was looking for trouble and if it had not been [claimant], it would have been me." He also indicated that (Mr. G) said some derogatory words about bus drivers before he attacked the claimant. At the hearing he explained that he thought (Mr. G) really wanted to say something to him because he had told (Mr. G) he was not riding the bus anymore.

(Mr. M), who is the employer's risk manager and former director of safety, testified that he is familiar with the bus drivers contract with the employer and that riding free on the employer's buses is not part of the contract. He said that the employer allows all its employees to ride free as a courtesy for them to go anywhere they want. He said that the employer is a common carrier providing transportation to the public. He agreed that the employer did not charge the claimant to ride on the bus, but disagreed that the employer paid someone for the claimant to ride on the bus. He also agreed that the means of transportation was under the employer's control. He also testified that he did not believe that the claimant assaulted the passenger in this case.

Article 8308-1.03(12) provides as follows:

"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

(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.

In his evidence summary, the hearing officer pointed out, among other things, that it was clear to him that the employer provides transportation to people as a result of their employment with it, that the employer pays for such transportation, that the means of transportation was under the control of the employer; and that the actions of the claimant were in furtherance of the employer's obligations to deal with a disturbance created by a passenger.

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

No. 4.The claimant was riding a bus provided by his employer on (date of injury).

No. 5.The claimant was in his employer's bus driver uniform enroute to drive a bus route for his employer when a passenger failed to pay his fare and became unruly, making loud, abusive and vulgar comments about bus drivers.

No. 6.The claimant admonished the unruly passenger, who then attacked the claimant.

No. 7.The claimant broke his arm while fending off the attack of the unruly passenger.

No. 8.If the unruly passenger had not attacked the claimant, the unruly passenger would have caused trouble for the claimant's coworker who was driving the bus.

CONCLUSIONS OF LAW

No. 2.The claimant was in the course and scope of his employment when he

sustained an injury on (date of injury).

The employer disputes Findings of Fact Nos. 4 through 8. Having reviewed the record, we conclude that the challenged findings are sufficiently supported by the evidence, and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We note that although there was not specific testimony of vulgar language used by the passenger, there was uncontroverted evidence that the passenger yelled, called names, and used derogatory words.

The employer also disputes Conclusion of Law No. 2 on the grounds that the claimant rode the bus as a member of the general public, he was not on duty and was not getting paid for the time during which the incident occurred, he was not in furtherance of any business of the employer, the claimant was not acting according to the rules and procedures of the employer, and that the claimant broke his arm in the fight off the bus.

We believe that the evidence shows that the claimant was on his way to work when he was injured. As a general rule, an injury received while traveling to and from work is not compensable. Janak v. Texas Employers Insurance Association, 381 S.W.2d 176, 178 (Tex. 1964). Instead, such injuries are considered to be suffered as a consequence of the same risks to which the general public is subject, rather than having to do with the employer's business. Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). However, if the employee comes within one of the exceptions in Article 8308-1.03(12), then his injury may be considered the basis for a claim. *See* Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, no writ) in which the court discussed a similar transportation or travel provision under the prior workers' compensation law, Article 8309, Sec. 1b (repealed). In the event transportation is furnished or paid for by the employer, the employee may be entitled to compensation if he can also prove that he sustained his injury in the course and scope of his employment. Rose, *supra*. However, the employer's gratuitous furnishing or paying transportation as an accommodation to the worker and not as an integral part of the employment contract does not by itself render compensable an injury occurring during such transportation. The employee still must prove he was acting in the course of his employment at the time. Rose, *supra*.

Although the hearing officer did not make findings of fact to the effect that the transportation was paid for by the employer and that the means of such transportation were under the control of the employer (his finding was that the claimant was riding a bus provided by the employer), we conclude that the evidence would support such findings and that such findings may be implied given the hearing officer's statements in his evidence summary. *See* Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980); Charter Oak Fire Insurance Company v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.-Houston [14th Dist] 1974, writ ref'd n.r.e.). Finding that the claimant's transportation was paid for by the employer and that the transportation was under the control of the employer does not, however, end the inquiry because the claimant must still prove that he was injured in the course and scope of his employment. Rose, *supra*; Texas Employers Insurance Association v. Goad, 622 S.W.2d 477 (Tex. App.-Tyler 1981, writ ref'd n.r.e.). In other words, the claimant had to establish

that the injury occurred while he was engaged in or about the affairs of his employer and was of a kind that originated in and had to do with the work for his employer. Goad, *supra*. In this case, there was evidence that the incident had its genesis in the passenger failing to pay his bus fare, that the passenger had made derogatory comments about bus drivers, that the passenger yelled and called names while on the bus, that the claimant requested that the passenger be quiet, that the attack and injury occurred on the employer's bus, that the claimant had his bus driver uniform on when attacked by the passenger, and that the passenger attacked the claimant because he was a bus driver for the employer and had requested that the passenger keep quiet. We believe that the evidence was sufficient for the hearing officer to reasonably conclude that the claimant's injury occurred while he was engaged in or about the affairs of his employer and was of a kind that originated in and had to do with the work for the employer. As stated by the hearing officer in his evidence summary, the actions of the claimant were in furtherance of the employer's obligations to deal with a disturbance created by a passenger.

We observe that it is not required that the injury should have occurred during the hours of actual service, provided that the injured employee was acting within the course and scope of his employment when injured. *See generally*, Insurance Company of North America v. Estep, 501 S.W.2d 352 (Tex. Civ. App.-Amarillo 1973, writ ref'd n.r.e.); Texas Employers Insurance Association v. Anderson, 125 S.W.2d 674 (Tex. Civ. App.-Dallas 1939, writ ref'd). We also observe that there was conflicting testimony as to whether the claimant violated an employer rule against confronting unruly passengers; (Mr. W) was of the opinion that the claimant had not violated an employer rule while (Mr. M) was of the opinion that he had. With the evidence in this posture, we can not fault the hearing officer for failing to find that the claimant had violated an employer rule concerning confronting unruly passengers. In any event, the general rule is that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work. *See* Maryland Casualty Company v. Brown, 115 S.W.2d 394 (Tex. 1938). As to where the claimant broke his arm, the claimant testified that he thought he had broke his arm while engaged in the altercation on the bus because his arm hurt before he got off the bus. While there was evidence that the claimant engaged in a fight after leaving the bus, there was no evidence that he broke his arm at that time. Consequently, we find no merit in the employer's contention on that point.

In addition to contesting the hearing officer's findings and conclusion, the employer contends that the hearing officer's refusal to issue a subpoena for a (Mr. R) was a clear abuse of discretion. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.12(b), the Commission may issue a subpoena at the request of a party if the hearing officer determines that the party has good cause for the issuance of the subpoena. There is no mention in the hearing record of a request for a subpoena or of the hearing officer's action on a request for a subpoena. Consequently, in the absence of any evidence on this point, we must conclude that the employer has failed to demonstrate that the hearing officer abused his discretion in denying the subpoena.

The claimant also requests that we find that the claimant's injury was not

compensable because he was paid full salary for any lost time under the employer's sick leave policy and because his medical bills were covered under the employer's health care benefits program. The sole disputed issue agreed to be resolved at the hearing was whether the claimant was injured in the course and scope of his employment on (date of injury). The employer did not request that any additional issues be added concerning disability or entitlement to medical care. Consequently, since such issues were not raised in the prior proceeding, they will not be determined for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. We note, however, that under the 1989 Act, an injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed, and that an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits. Articles 8308-4.61(a) and 8308-4.23(a).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge