

APPEAL NO. 93898  
FILED NOVEMBER 15, 1993

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. 8308-1.01 *et seq.*). On September 8, 1993, a contested case hearing was held in [City], Texas, with [hearing officer] presiding as hearing officer. The sole issue agreed upon to be decided was: "Was the deceased employee, [deceased], injured and killed in the course and scope of his employment on [date of injury]?" The hearing officer determined that the deceased employee (deceased) was not engaged in or about the furtherance of the affairs or business of the employer at the time of his death and therefore was not injured and killed in the course and scope of his employment.

Appellants, the minor children of the deceased represented by their guardian (claimant), disagreed with certain of the hearing officer's determinations and in essence request that we reverse the hearing officer's decision. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The facts in this case are not in dispute and have largely been agreed upon by stipulation. The hearing officer sets out the agreed upon facts in his Statement of the Evidence and Findings of Fact and we adopt them for purposes of this decision. Briefly, as background, the deceased was employed as a mechanic by [employer], employer herein, and did approximately half his work at employer's shop and half at various locations in the field. The deceased was paid an hourly wage and the unrefuted testimony was that the deceased would clock in at 8:00 a.m. and clock out at 5:00 p.m. He was not required to clock out for "normal" lunch hours (for "abnormal" lunch periods where the deceased did extra personal items he was expected to clock out). On the day in question the deceased took a normal lunch hour. The deceased was provided with a company truck with a two-way radio (virtually all employer's trucks had two-way radios) for the mutual benefit of the deceased and the employer. The deceased was authorized to drive the company truck to and from work and to drive it home for his lunch break. The deceased customarily returned home for his lunch break and was traveling in the direction of his home on the day of the accident. On [date of injury], the deceased had reported for work as usual and was on his way home for his lunch break when he was involved in a head-on vehicle accident at 11:49 a.m. Deceased had been scheduled to replace a rope socket at 1:00 p.m. at another location in the opposite direction deceased was traveling at the time of his death.

Claimant contends that the deceased was in furtherance of the affairs of the employer at the time of the accident because he was on "24 hour call" and the radio in the truck enabled the employer to send deceased on emergency calls, should the need arise. Carrier contends that the purpose of deceased's trip was solely for the deceased's benefit (obtaining lunch) and that driving a company vehicle with radio capability does not automatically render the employee in the course and scope of his employment. Both claimant and carrier provided the hearing officer with case authority to support their respective positions. The hearing officer determined deceased was not engaged in and about the furtherance of the affairs or business of the employer at the time of his death and consequently was not in the course and scope of his employment.

Claimant appealed and specifically contended that Findings of Fact Nos. 18 and 19, and Conclusions of Law Nos. 3 and 4 were erroneous. The cited determinations state:

### **FINDINGS OF FACT**

18. [Deceased's] trip, at the time of his death, was to obtain lunch and was not in the furtherance of the affairs or business of the employer.
19. If it were not for the need to obtain lunch, [deceased] would not have made the trip that resulted in a vehicle accident and his subsequent death.

### **CONCLUSIONS OF LAW**

3. [Deceased] was not engaged in or about the furtherance of the affairs or business of the employer when he was involved in a vehicle accident that resulted in his death on [date of injury].
4. . . . deceased employee, was not injured and killed in the course and scope of his employment on [date of injury].

By definition (Section 401.011(12)) 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 an activity 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 the transportation are under the control of the employer; or
  - (iii) the employee is directed in the employee's employment to proceed from one place to another place; or
- (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
- [i] the travel to the place or 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 travel; and
  - [ii] the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

Claimant cites as authority for her position Texas Workers' Compensation Commission Appeal No. 92009, decided February 21, 1992. That case, while involving an injury during the lunch hour, and reviewing other lunch hour cases, is distinguishable from the instant case in that all of the Appeal No. 92009 cases dealt with on premises injuries and did not deal with transportation off premises. Those cases are not controlling in the instant case which is an off premises transportation case during the lunch period. In Appeal No. 92009, we held that the evidence raised a question of fact as to whether the employee was injured in the course and scope of her employment and that "it could reasonably be concluded . . . that the employer impliedly invited [the employee] to remain on its premises and in the vicinity of her work during her lunch period."

Claimant also refers to Jones et al. v. Casualty Reciprocal Exchange, 250 S.W. 1073 (Tex. Civ. App.-Texarkana 1923, writ ref'd) as having "identical facts." We would disagree. In Jones, the employee was taken in the company truck to a distant work site and at lunch the truck returned the employees to the employer's premises where the employee clocked out and then was taken by the company truck to his home for lunch. On the return trip, after lunch, while in the company truck on his way back to work, the employee was in a car crash. The court in that case premised its holding that the employee was in the course and scope of employment on the fact that,

. . . not only that the deceased was injured 'while returning' to resume his work, but 'while being transported in the employer's conveyance' for the purpose of resuming his special work. The rule is general . . . that where an employee is to work at a certain place and is transported to and from such place by the employer as a part of the contract of employment, the period of service continues during the time of transportation, and the relation of employer and employee exists during that time.

Jones seems to say the test is ". . . where an employee is being carried by his employer in the conveyance of the latter to and from the work for which the employee is employed, such employee is regarded as an employee . . ." That case also distinguished "an employee" from "a passenger." The court found that the transportation expedited employer's work in that the deceased would ". . . go and come with his fellow workmen." We submit that the facts of the instant case are entirely different from Jones where apparently the employer provided transportation (which remained under control of the employer) in order to expedite the employer's work.

We believe that the facts in Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993, and its companion case on remand Texas Workers' Compensation Commission Appeal No. 93634, decided September 2, 1993, are factually much more similar to the instant case, and more instructive, than any of the other cases cited by claimant. The employee, in Appeal Nos. 93151 and 93634, was a shop foreman who was assigned a company vehicle which he was allowed to drive to and from work. Although the vehicle was for company use the employee drove it home when he was on 24-hour call. The vehicle had a two-way radio and the evidence was that on the morning of the accident, as the employee was reaching down "to pick up the two-way radio to call one of the employees at the shop, a rollover accident occurred." In Appeal No. 93151 we noted that the general rule in workers' compensation law has been that an injury occurring through the use of the public streets or highways in going to and returning from the place of employment is noncompensable because it was not incurred in the course and scope of employment. American General Insurance Company v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The rationale behind this rule is that an injury incurred in such travel does not arise out of the person's employment, but rather as a result of the dangers and risks to which all members of the traveling public are exposed. Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. 1964). This rule was reaffirmed in Wausau Underwriters Insurance Co. v. Potter, 807 S.W.2d 419, 421-2 (Tex. App.-Beaumont 1991 error denied) which went on to state:

[3] The mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the *Texas Workers' Compensation Act* . . . United States Fire Insurance Company v. Eberstein, 711

S.W.2d 355 (Tex.App.-Dallas 1986, *writ ref'd n.r.e.*). If this were not the law in this State, then each and every accident in a company vehicle, including those operated for purely personal reasons, would be compensable under the *Texas Workers' Compensation Act*.

We note that the facts of the instant case do not appear to bring into consideration other provisions of the statute such as the dual purpose test and the special mission exception. (Section 401.011(12)(B) and (iii)). The undisputed facts are that the deceased was on his way home for the sole purpose of eating lunch and that his next scheduled job was in the opposite direction more than an hour later.

As we have previously indicated, the fact that the employer gratuitously furnished transportation as an accommodation to the worker, or even for a mutual benefit, but not as an integral part of the employment contract, does not render compensable an injury and death occurring during such transportation; the claimant must still prove deceased was acting in the course of his employment at the time. Rose v. Odiorne, 795 S.W.2d 210 (Civ. App.-Austin 1990, writ denied). Texas Employers Insurance Association v. Byrd, 540 S.W.2d 460 (Civ. App.-El Paso 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92324, decided August 26, 1992, and Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1992. We also note that courts have held that the fact that an employee was "on call" and could be called at any time is not controlling on the issue of compensability, see Loofbourow v. Texas Employers Insurance Association, 489 S.W.2d 456 (Civ. App.-Waco 1972, writ ref'd n.r.e.).

Appeal No. 93634, *supra*, is the decision we reviewed on remand of Appeal No. 93151. In Appeal No. 93634, which had the same facts as Appeal No. 93151, we reviewed the two prong test to establish course and scope of employment, which is: 1) that the injury (or death in the instant case) occur while the employee is engaged in or about the furtherance of his employer's affairs or business, and 2) that it be of a kind and character that has to do with and originates in the employer's work trade, business or profession. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). We noted that Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, although not a travel case, involved an employee who was killed by an assailant during lunch at a restaurant. In affirming the hearing officer's finding of non-compensability the panel said, among other things, that an injury can be found not to be compensable if facts establish the first prong of the test, but not the second (see Page, supra), and that the "benefit" to the employer must be direct and substantial as opposed to "intangible values of improving employee health or morale." In Appeal No. 92324, *supra*, an employee was fatally injured while driving a customer's car to work. (Although the employee normally used a "demo" car belonging to his employer, on this

date he had taken the customer's car home in order to test drive it.) The Appeals Panel upheld the hearing officer's determination of compensability, stating as follows: "Since decedent was authorized to and customarily did on occasion drive customers' 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 . . . . 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."

In Texas General Indemnity Company v. Bottom, 365 S.W.2d 260 (Tex. 1963) the Supreme Court upheld the non-compensability of a fatal accident which occurred after the employee had taken his truck (which was leased to the employer) for repairs before returning to work for employer. The court said that taking the truck to be serviced was not a part of his job as a driver, and there was not evidence that he was on a special mission for his employer. However, in Employers Casualty v. Hutchison, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ), the court of appeals found sufficient evidence to support a lower court's determination that the deceased employee was acting in the course and scope of his employment where there was evidence showing he was on his way to try to collect on one of the employer's delinquent accounts.

Obviously there are cases where an employee is injured (or killed) while driving the employer's vehicle which have been held compensable, and others non-compensable, depending on the precise fact situation. In the instant case it was undisputed that the deceased was traveling home to eat lunch at the time of the accident. Claimant appears to be saying that going home for lunch, in a company vehicle which had a two-way radio, was in furtherance of the employer's business. Claimant argues that the deceased was on call 24 hours a day by means of the two-way radio, but we have noted authority for the proposition that being "on call" was not controlling on the issue of compensability. See Loofbourow, *supra*. Although the Appeals Panel ended up affirming the hearing officer's determination of compensability in Appeal No. 93634, *supra*, that panel had earlier in Appeal No. 93151 remanded for findings to support a determination that the injury in question "occurred while the claimant was engaged in an activity in furtherance of the affairs of the employer and which was of a kind that originated in and had to do with the work of the employer." The hearing officer in Appeal No. 93634 made additional determinations that the claimant, at the time of the injury (when the vehicle overturned) was using the two-way radio "to contact his crew to see if a 'run' needed to be made; there was also evidence that this was a usual practice which often resulted in claimant's (in that case) being diverted to carry out employer's mission." No such evidence was present in the instant case, there being no evidence that the deceased was doing anything at all in furtherance of the employer's business, but rather was just going home for lunch.

Upon review of the evidence and the foregoing cases, it does not appear to us that the claimant has proved that there was any benefit to the employer in the deceased's trip home for lunch, other than a remote or speculative benefit that had the employer so wished he could have gotten in touch with the deceased in order to divert him to some new job. We find such benefit too remote and too speculative to require us to reverse the determination of the hearing officer. The hearing officer found, and we agree, that the deceased was not engaged in or about the furtherance of his employer's affairs or business as required by the second prong in the definition of course and scope of employment. (Section 401.011(12)). Nor was deceased engaged in an activity that has to do with and originates in the employer's business. The deceased was clearly on his way home for lunch, and was not in the furtherance of his employer's business, as was the case in Appeal Nos. 93151 and 93634, *supra*, where the employee was in the process of using his radio to get a new or different assignment.

Consequently, we do not find the hearing officer's determination to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. For Motor Co., 751 S.W.2d 629 (Tex. 1986). Finding no basis on which to disturb the hearing officer's decision, we affirm.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge