APPEAL NO. 941569

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on September 20, 1994, (hearing officer 1) presiding. Subsequent to the hearing, the hearing officer left the employ of the Texas Workers' Compensation Commission and another hearing officer, (hearing officer 2), reviewed the record and exhibits and authored a written decision and order "based upon the evidence and testimony presented and the application of the pertinent rules and statutory provisions." She determined that the decedent was in the course and scope of his employment when he was fatally injured in an automobile accident on (date of injury), and the respondent (claimant) was the spouse and eligible beneficiary. The appellant (carrier) urges error in that the decision and order was not rendered by the hearing officer who heard the case and complains that there is insufficient evidence to support several of the hearing officer's findings of fact and that a conclusion of law that the decedent was in the course and scope of employment at the time of the accident is incorrect. The carrier asks that the decision be reversed and remanded or that it be reversed and a new decision rendered. The claimant responds that the record below, including audio tapes and transcript, was sufficient for a successor hearing officer's decision, and that there is sufficient evidence to support and sustain the hearing officer's findings and that her conclusion is correct. The claimant asks that the decision be affirmed.

DECISION

Finding error, we reverse and render.

The factual basis of this case is not complicated and is largely undisputed. The deceased worked for an employer in (City 1), Texas, and lived in (City 2), Texas. A salaried employee, his usual working hours were from 7:30 a.m. to 4:30 p.m. In his position as Director of Plans and Programs, he (as well as a coworker who also lived in City 2) would occasionally make "parts runs" (in addition to mail orders) for procuring consumable supplies generally related to computer operations. This function was a part of the normal job function and they were entitled to be reimbursed for mileage expense on such trips for that portion attributable to business. According to a statement from the coworker, this was sometimes accomplished by the claimant and the coworker at a computer store on the north side of City 2 "on our way home." The evidence indicated that reimbursement was made for only the mileage differential for the deviation to the computer store, some seven miles total. On the evening in issue, (date of injury), the decedent left his office at about 4:00 p.m., stated he was leaving for the day and when the coworker inquired why he was leaving early, the decedent stated he wanted to "swing" by the computer store in City 2 to pick up some diskette cleaner kits. The route to his home and the computer store were the same until just north of City 2 where (interstate) and (route 1) intersect. At that point, if the decedent was going to his home he would use route 1, or if he was going to the computer store, he would continue on interstate for a couple of miles. In any event, at 4:38 p.m. the decedent was involved in a tragic

automobile accident resulting in his death. This occurred at a location near the intersection of interstate and (route 2), (City 3), Texas, several miles north of the intersection of interstate and route 1.

Regarding the first issue raised by the carrier that the decision was not signed by the hearing officer who heard the case, we do not find merit to this assertion of error. In this regard, as set out above, the claimant, in opposition to the assertion of error, urged that the record was sufficient for a successor hearing officer's decision. Of significance, the thrust of the assignment of error is not concerned with the weighing or assessment of witness credibility by the hearing officer, the essential facts of the case not being materially in dispute. Rather, the error is premised on the argument that the statute and rule dealing with hearing officer's "by referring to the Hearing Officer rather than a Hearing Officer, contemplates that the Hearing Officer who heard the case signed the Decision." (Emphasis in the quote.) We have addressed the issue where a second hearing officer authors a decision from the records and evidence developed by the original hearing officer at a contested case hearing. While we readily agree that it is by far more preferable that the original hearing officer complete a case from start to finish including the final decision and order, we have recognized there will be the occasional, unavoidable circumstances where the original hearing officer is not available to conclude a case. *See* Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993; Texas Workers' Compensation Commission Appeal No. 94971, decided September 8, 1994. When the exigency arises that a different or substitute hearing officer authors and renders the decision and order in a case, we are faced with determining whether witness credibility is in issue. If there is no testimony or issue involving credibility of witnesses, we have allowed a decision by a substitute hearing officer to stand. Texas Workers' Compensation Commission Appeal No. 941512, decided December 23, 1994. However, where witness credibility is clearly a focal issue in a case, the importance of the fact finder being in a position to gauge the demeanor, reactions and emphasis of a witnesses' testimony takes on a much more important function in the hearing process. We have held that under such circumstances, another hearing may be required. Texas Workers' Compensation Commission Appeal No. 941549, decided January 2, 1995; Texas Workers' Compensation Commission Appeal No. 941592, decided January 3, 1995. We have reviewed the record, the assertion of error and briefs on this point and do not find this to be the situation in this case. No corrective action is warranted under these circumstances.

The hearing officer's findings to which the carrier takes exception are that the decedent's position required that he drive to other cities to purchase necessary items, that the decedent was reimbursed for such trips including City 2, that the decedent left his office on (date of injury), at 4:00 p.m. with the intent of purchasing an item for his employer before returning home for the evening, that but for the need to purchase the items at the City 2 business, the decedent would not have left work at 4:00 p.m. and would not have been involved in a fatal automobile accident at 4:38 p.m., and that the decedent

was engaged in or about the furtherance of the affairs or business of the employer at the time of his death at the accident scene. The conclusion with which the carrier takes exception is that the decedent was in the course and scope of his employment when he was fatally injured. While there was no evidence that the decedent "was required" to go to other cities to purchase supplies, it was clear that it was part of his duties and that he was authorized by his employer to obtain necessary supplies. While the exact wording of the finding may be somewhat inaccurate, this is not pivotal to our decision since this is not a situation of being directed to go from one place to another by the employer. Section 401.011(12)(a)(iii). And, although there was evidence that the decedent was reimbursed for business mileage on trips to City 2, it was clear that he was only reimbursed for the few miles difference when he deviated to go to the computer store on his way home. Insofar as the fact finding could be read to indicate that the decedent was paid mileage from City 1 to City 2 under such circumstances or that such was the case on the evening in question, the finding is inaccurate. This also is not pivotal to the decision in this case. The remaining findings are supported by sufficient evidence but do not resolve the case and do not support the conclusion of law assigned as error.

The evidence in this case clearly gives rise to what is commonly referred to as the "dual purpose" travel rule. In the definition of course and scope of employment in Section 401.011(12), the term is stated as not including:

> (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 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 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.

The hearing officer by her finding that but for the need to purchase the items at the City 2 business, the decedent would not have left work at 4:00 p.m. and would not have been involved in a fatal automobile accident at 4:38 p.m., apparently concludes that the dual purpose rule therefore does not apply. While the evidence may give rise to an inference that an accident may not have occurred at 4:38 if the decedent left his office earlier that 4:00 or later than 4:00, that does not control the nature of the trip. The evidence was uncontroverted that when the decedent left his office at 4:00 p.m. on (date of injury), he embarked on a trip that had two purposes: to go home and to stop on his way (swing by) a computer store to pick up supplies for his employer. Further, his fatal accident occurred on the route to both his home and the computer store before any

change of direction or deviation for purposes of picking up the supplies. The evidence simply does not support the second prong of the above test even if the first prong were met. Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824 (Tex. 1969); United States Fidelity & Guaranty Co. v. Harris, 489 S.W.2d 312 (Tex. Civ. App.-Tyler 1972, writ ref'd n.r.e). The Harris case involved an employee who purchased some supplies for her employer and was on her normal route to work with the supplies when she was involved in a fatal accident. The court, referring to the dual purpose rule, reversed the lower court's award of benefits. *Accord*, Callisburg Independent School District v. Flavors, 695 S.W.2d 370 (Tex. App.-Fort Worth 1985, writ ref'd n.r.e.). *See also* Johnson v. Pacific Employers Indemnity Co., 439 S.W.2d 824 (Tex. 1969).

The Appeals Panel has considered the application of the dual purpose rule and upheld the denial of benefits in Texas Workers' Compensation Commission Appeal No. 92026, decided March 9, 1992. That case involved an employee being involved in a serious automobile accident when she left her job at lunch time during which she stated she was going to get some supplies for the office (which she was apparently authorized to do) and to get something to eat. The hearing officer applied the dual purpose rule and determined that the injury was not in the course and scope of the employment. *See also* Texas Workers' Compensation Commission Appeal No. 93371, decided June 28, 1993, a case we remanded where there was a failure to apply the dual purpose rule where there was some evidence of two purposes to the claimant's trip which resulted in an automobile accident.

The hearing officer cites a case in her decision and order which she concludes is "almost identical" to the case under review and which is supportive of the award of benefits. Texas Workers' Compensation Commission Appeal No. 93814, decided October 26, 1993. We do not find that case applicable here either factually or in the application of law. We specifically stated in that case that given the state of the evidence and the findings of the hearing officer, the dual purpose rule did not come into play. In that case, the hearing officer found and the evidence supported that the claimant, who had been at an audit site, was involved in an accident while in route from a mail center (work-related activity) to her office to drop off items and obtain documents for a trip the following morning. Although a portion of the route to the office from the mail center would also be used to get to her residence, the evidence supported the inference that she was only on the way to her office at the time of the accident and merely continuing on her business day by going to the office before quitting for the day. The posture of the evidence in the case under review is markedly different. The evidence supports only a conclusion that there was a dual purpose for the decedent's trip at the time of the fatal accident. As the decedent told his coworker upon leaving early, he was leaving for the day to go home and on his way to stop to get some work-related supplies. The purpose of the trip was two fold and the trip would have been made whether the decedent left at 4:00 p.m. or a half hour later. Whether he would have been involved in an accident if he had left sometime earlier or sometime later is speculative, but does not alter the fact that

the trip was for a dual purpose requiring the application of the two prong test of Section 401.011(12)(B). Applying that standard, the travel was not in the course and scope of employment. Accordingly, we must reverse the decision and order of the hearing officer and render a new decision that the decedent was not in the course and scope of his employment when he was fatally injured on (date of injury), and that the surviving spouse claimant is not entitled to benefits under the 1989 Act.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge