APPEAL NO. 94160

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 21, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue to be resolved was: Whether the employee sustained fatal injuries during the course and scope of employment on or about (date of injury). The hearing officer determined that JD, the decedent herein, was intoxicated at the time of his death and was not in the performance of any work activity but was en route home.

Appellant, the surviving spouse of decedent and the claimant herein, contends that the hearing officer erred in that the decedent had been required to consume beer in the course and scope of his employment, and that the employer (and ultimately the carrier) is estopped from asserting that intoxication removed the decedent from the course and scope of employment on the night he died in a one vehicle accident. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. 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.

It is undisputed that the decedent had been employed by (employer)., employer herein, which was the local distributor for a large national brewery, for about one year. The decedent had been a truck driver for most of the year prior to his death and had only been promoted to salesman a month or so before his death. On the afternoon of (date of injury) (all dates are 1992 unless otherwise noted), the employer held a "Texas Toughest" awards dinner on its premises. The award dinner began after normal work hours and lasted from 5:00 p.m. to 6:00 p.m. A keg of beer was tapped with the approval of the employer and the employees ate steak and beans and drank beer. The testimony would indicate that the employees were not required to drink beer at this function and sodas were equally available.

After the awards dinner, a "promotion" was scheduled at a local country and (club) which was promoting a nationally known country western singer who was also the brewery's national spokesman. It is undisputed that the club was an account serviced by the decedent and that the decedent had assisted in "setting up" by hanging banners that afternoon. However, it is hotly disputed whether salesmen were required or expected to attend the promotions, and/or were expected to drink the employer's beer products. It is undisputed that the sales manager, (MG), was expected to attend promotions and was present at the club on the evening in question as was the employer's president,(KG). A coworker of the decedent at the time, (DR), testified that MG expected salesmen to attend promotions, especially promotions involving their accounts, and they were expected to consume the employer's product. DR testified that MG had told him that salesmen who do not participate and consume the employer's product would not advance far in the company. Employer's president, KG, and the vice president, (TM), testified that there was no

requirement for employees to attend promotions and referred to the employee's handbook, which according to KG and TM was given to every employee and posted in the salesmen's meeting room. The handbook provided "[e]mployees will NEVER be required to attend a bar promotion. The Company does not and will not provide alcoholic beverages for employees during any promotion." As part of a promotion, the employer would hire young women, known as the Lite Force, to distribute novelty items, such as bandannas and key chains, to customers. It is undisputed that on some promotions the employer would buy "samples" of beer for the customers but on the evening in question, only novelty items were being given out. An affidavit from one of the young women of the Lite Force stated that the decedent asked if he could go to the promotion at the club on the evening in question, and that MG told him he could do as he wished. Carrier points to this as evidence that the decedent was not required to attend the promotion.

It is undisputed that the decedent did attend the promotion. Both MG, the sales manager, and KG saw the decedent at the club and the decedent appeared to be drinking a mixed drink. MG testified in his deposition that he told the decedent ". . . that it didn't look good for [decedent] to be drinking a mixed drink when [employer's product] beer is what pays his salary." It is undisputed that the promotion was to last from approximately 7:00 p.m. to 9:00 p.m. and that shortly after 9:00 KG told MG to "wrap it up" and KG left. MG, decedent, the Lite Force girls and other employees, however, according to the testimony and affidavits, stayed until at least 11:00 p.m. or so. There is no evidence as to when the decedent left the club or specifically what his condition was. MG estimated that decedent left at approximately 11:30 p.m. There is evidence that MG bought decedent, and others, drinks (presumably beer) and ran a tab. The testimony is somewhat conflicting as to whether MG would or could later turn in the tab and request reimbursement from the employer. Both claimant and carrier appear to agree that the decedent "was on his way home" when he was involved in a fatal one vehicle accident. At the autopsy it was determined that the decedent's blood alcohol level was well in excess of the legal limit in determining intoxication. Claimant has stipulated that the decedent "was intoxicated . . . when he sustained a fatal car accident." The testimony was that at the time of his death, decedent was still wearing a neatly tied necktie. Claimant points to this fact as creating an inference that the decedent was still performing services for the employer when he left the club.

The decedent had, on the day of the accident, been authorized a monthly flat rate allowance of $200 a month (plus gas) to cover the use of his private vehicle, maintenance, insurance and incidental car costs in calling on his accounts in the course of his employment. KG, employer's president, testified on the purpose of the allowance and his testimony is uncontradicted that it was not to cover transportation to or from home but rather was an allowance to offset expenses in calling on his accounts during the week.

Claimant's theory is that although the decedent was admittedly intoxicated at the time of his death, the employer required salesmen to drink its products, required the decedent to attend the club promotion, required the decedent to "party" in order to "encourage overall good will" for the employer's products and is therefore "estopped" from using the intoxication

defense. Claimant cites Highlands Insurance Company v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied) and argues that the decedent was in furtherance of the employer's business. Carrier argues that the decedent was not required to attend the club promotion, that the decedent was in transit to his home and therefore was not a covered employee, and that the decedent's admitted intoxication barred claimant's claim, citing authority for its arguments.

The parties have essentially litigated the issue in three parts: 1) Whether the decedent's attendance at the club promotion was in furtherance of the employer's business and hence in the course and scope of his employment; 2) whether the decedent's intoxication barred claimant's claim or whether the employer and hence carrier are estopped from asserting that defense; and 3) whether the decedent, being on his way home at the time of his death, was under the "coming and going" rule and therefore no longer in the course and scope of his employment.

The hearing officer determined in pertinent part, on the litigated points:

FINDINGS OF FACT

5.[Decedent] used his personal vehicle in the performance of his duties as a salesman and was paid a vehicle allowance plus gasoline was provided for his business activities.

6.Employer provided a number of special promotion activities at its larger customers throughout the year.

7.Salesmen were not required to attend, but Sales Supervisor, [MG] encouraged the attendance at the special promotion functions.

10.[Decedent's] attendance at the promotional activity at the [club] was in the furtherance of the Employer's business.

11.[Decedent] was furnished alcoholic beverages by his supervisor, [MG], while he was at the [club].

12.[Decedent's] drinking of alcoholic beverages was not part of his duties and responsibilities as a Salesman for the Employer.

13.[Decedent] left the [club] in late evening hours and while driving to his home was involved in a one car accident resulting in his death.

14.[Decedent] was intoxicated at the time of his death on (date of injury).

15.[Decedent] was not in the performance of any work activity but was en route to his home when the fatal accident occurred.

CONCLUSIONS OF LAW

2.The deceased employee, [decedent], was not in the course and scope of his employment when he sustained fatal injuries in a vehicle accident on (date of injury).

Claimant generally appealed without asserting error on any specific determinations, and therefore, we will review the record on the basis of sufficiency of the evidence on factual determinations and on the application of legal principles.

On the questions of whether the decedent was required to attend the club promotion, was required to consume the employer's product, and was acting in furtherance of the employer's business, these are factual determinations to be resolved by the trier of fact and the hearing officer is the trier of fact. In a workers' compensation case, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). The hearing officer could choose to believe the testimony of DR and MG regarding whether the decedent was required to attend the club promotion or could believe KG, TM, the employee's handbook and inferences drawn from the affidavit where the decedent asked if he could go to the club promotion. If there are conflicts or inconsistencies in the evidence, it is the duty of the hearing officer to resolve those conflicts and inconsistencies. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). In the instant case, the hearing officer essentially found for the claimant on this issue by finding that while salesmen were not required to attend such events, the sales manager, MG, encouraged such attendance, and that decedent's attendance at the club promotion on the evening in question was in furtherance of the employer's business. There is sufficient evidence to support those determinations. An appeals level body is not a fact finder, and does not normally substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The second point is whether decedent's intoxication bars a claim for workers' compensation. Intoxication is defined in Section 401.013(1) as having "an alcohol concentration as defined by Article 6701l-1, Revised Statutes, of 0.10 or more . . . ." The parties stipulated, and it is undisputed, that the decedent's alcohol concentration exceeded the specified level. Further, Section 406.032 (formerly TEX. REV. CIV. STAT. ANN. Article 8308-3.02) specifies that an insurance carrier is not liable for compensation if the injury "(a) occurred while the employee was in a state of intoxication; . . . ." Claimant argues "[t]he requirement of the employer to drink on the job estops the carrier from asserting that intoxication removes the employee from the scope and course of his employment." Claimant cites Moreau v. Oppenhein, 663 F.2d 1300 (5th Cir. 1981, cert. denied) in support of this proposition. First, we note that the hearing officer, as the fact finder, determined that

the drinking of alcoholic beverages was not part of decedent's duties and responsibilities as a salesman. Secondly, we do not believe Moreau, *supra*, involving illegal employment practices to be applicable. We believe the situation in Smith et al v. Traders and General Insurance Company, 258 S.W.2d 436, 438 (Tex. Civ. App.-Eastland 1953, writ ref'd), to be much more persuasive. In Smith, the employee was on a business trip; after conducting business, the employee was in a hotel room with his employer drinking whiskey and in the course of the evening fell from the seventh floor hotel room. In that case, as in the instant case, it was agreed that the employee at the time of his death was intoxicated. The court held that the workers' compensation law (at the time) " . . . is plain and unambiguous. It clearly declares that an injury received while in the state of intoxication is not an injury sustained in the course of employment." The court further held that "[t]he fact that the employer . . . may have originated and participated in the drinking of intoxicants . . . has no bearing on the situation." Id. at 438. Similarly, in this case, we note no exceptions to the provisions of Section 406.032, and under the principle cited in Smith, even if the employer had bought the intoxicants and participated in the drinking, such does not allow recovery when the employee was intoxicated at the time of his injury, or death as in the instant case and Smith. We find no error in the hearing officer's determinations regarding this point.

Claimant cites Youngblood, *supra*, as a case where an employee who died as a result of an automobile accident traveling from his residence to the plant as a situation which was held in the course and scope of employment. We note, and the carrier points out, that Youngblood is a "special mission" case and is not applicable here. In Youngblood, the court said that the employee, whose responsibilities included taking care of problems at the mill where he worked, was directed by written rules, approved custom, and actual authorized practice, to proceed from his home to the plant when there were operational problems. Further evidence showed that the employee had received both a telephone call and a radio transmission informing him of a problem at the mill on the evening of the accident. The decision in Youngblood turned on the specific direction the employee had received, which is not the case here. *See also* Texas Workers' Compensation Commission Appeal No. 93634, decided September 2, 1993. 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, 157 Tex. 377, 303 S.W.2d 370, 374 (1957); Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176, 178 (Tex. 1964). This rule is known as the "coming and going" rule. The rationale of the rule is that "in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex. 1963).

However, exceptions to the "coming and going" rule do exist and were present in Article 8309, § 1b, since repealed now Section 401.011(12)(A) and (B) (1989 Act). Among such exceptions are circumstances where "[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. (Citation omitted.)" Coleman, *supra*, at 374; Jecker v. Western Alliance Insurance Company, 369 S.W.2d 776, 778 (Tex. 1963). Such is clearly not the case here, where it appears that the parties are in agreement that the decedent was on his way home after attending the promotion at the club.

Carrier cites Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990), where the Supreme Court held that an employee who was killed on his way to a special safety meeting was not in the course and scope of employment, as a matter of law, notwithstanding the fact that the safety meeting started earlier and at a different location than the regular work. The court held that the time change and different location did not, in themselves, transform the trip into a special mission. Carrier points out the anomaly that claimant is claiming that the decedent's attendance at the club promotion was a requirement of his job and the fact that by all accounts the promotion was over by 9:00 or 9:30 p.m. but that the decedent was somehow still in the course and scope of his duties "some 2 to 3 hours later." In Evans, going to a safety meeting was held not to be a special mission and similarly in the instant case, returning home from a club promotion is not a special mission, particularly when the club promotion and any possible furtherance of the employer's business had ended some two hours earlier. Travel home in the instant case, much as in Evans, merely constituted travel under the coming and going rule.

It was the uncontroverted testimony of KG that claimant was to be reimbursed at a flat rate in the amount of $200.00, plus gas, for use of his private vehicle in calling on accounts during normal work hours. In order to come under the exception of Section 401.011(12)(A) that transportation to and from the place of employment is not covered unless that transportation is paid for by the employer, the claimant would have to prove that the decedent's transportation to and from the place of employment was furnished as part of his contract or paid for by the employer; or, that the employer controlled the transportation; or, that he was directed to take a certain route. *See* Texas Workers' Compensation Commission Appeal No. 91071, decided December 30, 1991. There is no evidence such was the situation in the instant case.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. An appeals level body will reverse the hearing officer's decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find.

Finding there is sufficient evidence to support the determinations of the hearing officer and applying the cited standard of appellate review, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge