APPEAL NUMBER 94957
FILED SEPTEMBER 2, 1994

On June 21, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). In response to the issue at the hearing, the hearing officer decided that the respondent (claimant) was injured in the course and scope of his employment on _____, and he ordered the appellant (carrier) to pay workers' compensation benefits to the claimant in accordance with his decision and the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision in its favor. The claimant requests affirmance.

DECISION

Affirmed.

On _____, the claimant, the claimant's brother JJ, and EH were employees of (employer), and all of them lived in (City A), New Mexico. On that day EH, who was the driller on the employer's Rig 14, was driving the claimant and JJ in his truck from City A to Rig 14 which was located near (City B), Texas, which, according to JJ, is located about 113 miles southeast of City A. EH lost control of the truck on a curve on a public road and the truck went into a ditch and rolled over. EH was killed and the claimant and JJ were injured in the accident. There was no dispute that the claimant suffered injuries in the accident. The question before the hearing officer was whether the claimant was in the course and scope of his employment when injured.

JJ testified that he worked in the oil fields for about 20 years and that for the year prior to the accident he had worked for the employer. For the two months immediately preceding the accident he had worked as a motorman on Rig 14. EH was his immediate supervisor, and LS, who was the toolpusher on Rig 14, was the supervisor over EH. JJ testified that he always drove each work day from City A to Rig 14 and back again with EH in EH's truck. He said EH always paid for the travel expenses and that he never paid for any of the travel expenses. He further testified that a driller picks up his crew "to make sure he had enough people when he got to work . . ."

The claimant testified that he had worked as a derrickman for the employer for about five years and that about six months prior to the accident he had worked on Rig 14 for about a year. Just prior to the accident, the claimant said he had been working for about three months on the employer's Rig 7 which was located about 40 miles from City A near (City 1), Texas. The claimant said he traveled to Rig 7 in his own car and that he was not paid for travel time nor was he reimbursed for travel expenses.

JJ testified that on Saturday, (6 days before date of injury), drilling operations at Rig 14 were shut down and the rig had been "laid down." He testified that on Tuesday, (3

days before date of injury), and Wednesday, (2 days before date of injury), LS, the toolpusher, called him and told him to wait before going back out to Rig 14. He said that on the evening of (day before date of injury) LS called him again, told him he could not get in touch with the driller, EH, and that "he told me to get ahold of [EH] and [claimant] and be at the rig, that [H company] would be there the next morning to set the rig out." When JJ was asked: "Whom did [LS] tell you to have at the rig the next day?", JJ said that LS told him "to get [EH] and [claimant]." When asked whether LS told him to tell EH to take another route to the drill site, JJ said "he was supposed to go get [claimant]." JJ also testified that LS told him that "[claimant] is another hand, go get him and then you-all come on down." JJ explained that H company is a trucking company and that to "set the rig out" means to take the rig apart. He also explained that he, EH, and the claimant would need to be at the rig before H company got there. JJ said the weather conditions were cold and icy on Thursday (1 day before date of injury).

JJ said that after talking to LS, he called EH and the claimant. He also said that normally when he and EH went to Rig 14, EH would pick him up in EH's truck at his house in City A (EH also lived in City A) and then EH would take the street he, JJ, lived on out to (Highway A) and follow that highway out to another highway which they would then take to City B. According to maps that were in evidence on which JJ drew the normal route he and EH took to Rig 14 and the route they took on _____, their normal route to Rig 14 took them east on (Highway A) from JJ's house until they would arrive at a highway which JJ identified as (Highway B) (this may be Highway B), which would take them south to City B. On the morning of Friday, _____, JJ said that EH picked him up in EH's truck at his house in City A and then, instead of taking their normal easterly route out of City A, they drove about five miles to the far west side of City A and picked up the claimant at the claimant's house which is just outside of the highway loop around the west side of City A. After picking up the claimant, JJ testified that they did not drive back through City A to take their normal route to Rig 14 but instead took the loop around the city because that route was quicker, and that at the outskirts of City A, they stopped at a store where EH bought ice and got water in a water can that the employer had supplied. JJ said that there was no water or ice at the rig site and that they normally stopped in City B to get ice and water. He said they decided to stop in City A to get the water and ice on _____ because they were afraid that water might not be available in City B due to the freezing weather conditions. JJ said that from the store they headed for City B but not on the road they normally took. He said he was asleep at the time of the accident.

The claimant testified that from his house it is quicker to get to City B by taking the loop around City A than to go back through City A. He said that after they stopped at the store, they took (Highway B) to (N) road, and that the accident happened when EH lost control of the truck on a curve right before getting to the Texas border. According to the maps that were in evidence, on the day of the accident they traveled south out of City A and then turned on a road headed east which was about seven miles south of (Highway A) which they normally took to the highway which runs south to City B. According to the

maps, the road on which the accident happened runs into the highway that runs south into City B so that had the accident not happened, they would have eventually gotten back onto their normal route to City B.

When asked why they did not take their normal route to Rig 14, JJ said "Because we went by and picked [claimant] up." JJ also testified that it was his understanding that as the driller it was EH's responsibility "for having" the crew at the rig site and that that was why EH was driving him and the claimant to Rig 14 on _____. The claimant testified that it was the ordinary custom and practice for the employer's drillers to pick him up (to go to a rig site) during his years of employment with the employer, but that on occasion he would drive himself to a rig site. JJ acknowledged that on the day of the accident EH was not receiving "drive pay," because the employer had ceased paying drillers for driving in October 1993. He further testified that EH was not receiving mileage reimbursement for driving to the rig site. He also acknowledged that he did not receive any pay or reimbursement for traveling time to the rig site.

JJ further testified that before Rig 14 was shut down there were three other crew members besides himself and EH. One crew member lived in (City C) and his wife would drive him to City B where EH and the claimant would pick him up and drive him to the rig site. Two other crew members who lived in (City D) drove together to the rig site and stayed at the site until it was shut down. JJ also testified that when he was first hired he had driven his own car to the rig site, but then he moved to City A and drove with the driller, EH, to the rig site. JJ testified that no one would object if he drove his own car to the rig site but that crew members seldom did that.

JN, the employer's vice-president, testified that before October 1, 1993, drillers received "drive pay" of $25.00 per day, but that after October 1, 1993, drillers no longer received "drive pay." An exhibit in evidence indicated that prior to October 1, 1993, drillers received $12.75 per hour. JN testified that on October 1st drillers' pay was increased to $16.00 per hour because the company had lost a driller to another company due to better wages at the other company. JN said that the employer "wanted to make sure that he [driller] got more than what he was bringing home prior to October . . ." An exhibit indicated that at the time of the pay raise, EH, the driller, received a raise of $3.25 per hour, the claimant received a raise of $0.75 per hour, and JJ received a raise of $0.70 per hour. A notice from the employer dated October 7, 1993, which JJ said was posted on the employer's bulletin boards gave notice of the new pay scale and specifically states "Drillers WILL NOT be paid driving pay effective October 1, 1993." JN said that after October 1, 1993, no one received pay for travelling to the drill site. He also said that no one received reimbursement for travel expenses, mileage, or for ice and water.

JN further testified that the employer did not require the driller to pick up his crew and that doing that was a voluntary thing on the part of the driller. He said that it is up to every person to get themselves to the drilling rig.

The claimant testified that it was his understanding that the drillers pay raise was to supplement the driller for his drive pay because the drive pay was lost. The claimant and JJ testified that drillers at other companies made about $1.25 to $2.00 more per hour than a derrick hand. The evidence showed that after the pay raise in October, the employer's drillers made about $4.75 more per hour than the employer's derrick hands.

Pursuant to Section 401.011(12) the term "course and scope of employment" does not include 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.

The exception for when an employee is "directed in his employment to proceed from one place to another place" is referred to as the "special mission" exception. *See* Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990).

Several of the findings of fact and conclusions of law made by the hearing officer are as follows:

FINDINGS OF FACT

6.By means of a previous message to the driller delivered by [JJ], employer's toolpusher [supervisor] directed the driller and both [claimant and JJ] to go to Rig 14 on _____ to "set out" [disassemble] the rig.

7.In that communication the toolpusher directed the driller to take [claimant] to assist the driller and [JJ] in setting out the rig on _____.

8.On _____, instead of heading southeast toward the rig site after picking up [JJ] near his own house on the east side of [City A], the driller went west through town to pick up [claimant] on the west side of town.

12.The transportation to Rig 14 [and to all of employer's rigs] was not merely a gratuitous accommodation to its employees, because employer directly benefitted from its crews' [including claimant's] riding to the rigs with their drillers, which assured employer that each driller would timely arrive at remote rig locations with a full crew ready to work each

shift and would not have to wait for individual crew members to arrive, if in fact they did all arrive.

16.The trip by the driller on _____, to pick up [claimant] was at the direction of employer's toolpusher, because he told him to use [the claimant] that day to help "set out" Rig 14, and the route the driller took from the west side of [City A] back toward the road normally traveled to the rig was the quickest (if not the shortest) route from the store near [claimant's] house to Rig 14.

CONCLUSIONS OF LAW

3.Employer directed Rig 14's driller to take [claimant] to assist in setting out Rig 14 on _____.

5.Claimant was injured in the course and scope of his employment on _____, and the general exclusionary "coming and going" rule does not apply to the facts of this case.

In Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. 1964), the Supreme Court of Texas stated that the general rule is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is noncompensable and that the rule is known as the "coming and going" rule.

The court observed that the direction "to proceed from one place to another place," can be an implied direction, but the implied direction to the employee must be "in his employment," and the travel thus must be in furtherance of the business of the employer. In Janak, the court held that a drilling crew member was not precluded from recovering workers' compensation benefits for injuries sustained on the way to work by the mere fact that he was a passenger member of an employees' car pool if the owner-operator of the automobile by procuring ice for drinking water for employees performed services in the furtherance of the employer's business. In that case, the drilling crew carpooled to the drill site by a regular route, but on the day of the accident, the driller, who was in the car, directed the crew member who was driving his own car that day to deviate from the regular route in order to procure ice for their water. Water and ice were not available at the drill site. In reversing the judgment of the Court of Appeals that Janak, who was a passenger in the car, was not entitled to workers' compensation benefits and in remanding the case to the Court of Appeals, the court stated:

The injury to Janak did not occur on the regular coming-and-going route of travel; it occurred during a deviation from that route and before the crew had returned to it. There is in the record adequate evidence that the crew would not have deviated from the route through Gillett if it had not been necessary to go to Runge to obtain ice. As a matter of fact, testimony of the crew members to

> that effect is undisputed. So the question narrows once again: Was the travel during the deviation for a purpose in furtherance of the employer's business? We hold that there is evidence in the record to support the jury's finding that it was.

In the instant case the record reflects that while the claimant was an employee of the employer, he was not a regular member of the Rig 14 crew; that EH and JJ deviated from their regular route to the drill site in order to pick up the claimant; and that after picking up the claimant, but before returning to their regular route to the drill site, the claimant was injured. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having reviewed the record, we conclude that JJ's testimony sufficiently supports Findings of Fact Nos. 6, 7, 8, 12, and 16, and we further conclude that those findings support Conclusions of Law Nos. 3 and 5. Basically, the hearing officer could reasonably infer from JJ's testimony and the subsequent actions of EH and JJ, that the toolpusher directed EH to take the claimant to the drill site and that that direction necessarily resulted in a deviation from the regular route to the drill site. Since the toolpusher specifically requested the claimant's services in helping to "set out" the rig, the deviation from the regular route to the drill site in order to take the claimant to the drill site was in the furtherance of the employer's business.

The carrier cites several cases in support of its position that the claimant did not suffer a compensable injury. In five of those cases, Tramel v. State Farm Fire and Casualty Company, 830 S.W.2d 754 (Tex. App.-Fort Worth 1992, writ denied); Agricultural Insurance Co. v. Dryden, 398 S.W.2d 745 (Tex. 1965); State, Texas Department of Human Services v. Penn, 786 S.W.2d 28 (Tex. App.-Beaumont 1990, writ denied); Callisburg Independent School District v. Favors, 695 S.W.2d 370 (Tex. App.-Fort Worth 1985, writ ref'd n.r.e.); and United States Fidelity & Guaranty Co. v. Harris, 489 S.W.2d 312 (Tex. Civ. App.-Tyler 1972, writ ref'd n.r.e.), all of the employees were on their regular route of travel at the time of the accidents, which distinguishes them from the facts of this case. The other case cited by the carrier, Evans, *supra*, is also distinguishable from the instant case because neither of the injured employees in that case had begun work prior to the accident. In the instant case, the driller had picked up the claimant at the direction of the employer, and in doing so had deviated from the regular route to the drill site, prior to the occurrence of the accident.

Having reviewed the record, we conclude that the hearing officer's findings and conclusions in regard to the special mission exception to the coming and going rule are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence.

The hearing officer also made findings of fact and a conclusion of law to the effect that EH, the driller, was paid to transport the claimant to the drill site. While we do not find those determinations to be supported by the evidence, the claimant's injury is nonetheless compensable under the special mission exception to the coming and going rule.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge