

APPEAL NUMBER 94982
FILED SEPTEMBER 6, 1994

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 16, 1994, a hearing was held in (City 1), Texas, with (hearing office) presiding. He determined that respondent (claimant) was in the course and scope of employment on _____, when injured in a motor vehicle accident. Appellant (carrier) asserts that Findings of Fact Nos. 3, 9, 11 and 12 are in error and that conclusions of law that address course and scope of employment and disability are not sufficiently supported by the facts and evidence. The file contains no reply by the claimant.

DECISION

We affirm.

Claimant worked for (employer). On the weekend of _____, claimant was "on call" for service calls for plumbing repairs. Claimant testified that he lived in (City 2), Texas, but when on call, he generally stayed at his mother's home in (City 1) in order to respond more quickly to calls. Claimant testified that employer wanted his employees to respond within an hour to calls for service. In his testimony, Mr. B said that he expected an employee on call to be on the job within an hour after being notified of the address that needed service. On cross-examination, Mr. B agreed that he could have stated in a prior statement that a response within an hour and one-half would be adequate, would be the "edge of the envelope."

Mr. B also testified that he provided a truck for claimant or anyone else on call to use. This truck had tools and equipment on it for use in providing the service. All maintenance, gas, and expense of the truck were paid by Mr. B. The truck was provided for claimant to drive back and forth from calls to his mother's house, at which Mr. B knew that claimant generally stayed when on call. The truck contained legible advertising of the business showing a pipe being cleaned and included the name and phone number; Mr. B stated that business had been generated from people who saw that truck in action. Claimant was paid for service calls made from the time he departed for the site of the call until the job was finished. Claimant testified that on the weekend he could not stay at the business location between calls.

On _____, claimant had finished a service call and was returning to his mother's home where he would remain "on call." When visibility was obscured because of smoke on the roadway, his vehicle was hit from the rear, resulting in his back being broken. He was hospitalized and was immobilized. Later, in April he had surgery to his hip. He testified that he could not work and last saw his doctor "yesterday."

Carrier did not dispute the route taken or the fact that a service call had just been made. No question was raised that the truck was being used in accordance with the employer's policy or that the employer had provided the truck for making service calls.

Carrier attacks Finding of Fact No. 3, which states that the claimant was in the accident while performing on-call duty for the employer, by pointing out that claimant was not performing any duty at the time because he had finished the call. That call resulted in his being on a road, other than the one he travelled to and from his employer's work site, when smoke obscured visibility after which the accident occurred inflicting serious injury. While claimant was not being paid, he was driving the employer's truck which had advertising on its exterior; once the service call had been made, it was more than of "intangible" value to the employer to have the claimant return with employer's truck, an integral part of the service call itself, to his "on call" location. That truck was not just transportation provided, it became the work station from which the right tools and equipment could be employed to further the interest of the employer in accomplishing the task for which the employer, not the claimant, was hired. The facts and evidence sufficiently support Finding of Fact No. 3.

Carrier mentions Finding of Fact No. 7 about the awareness of the employer that claimant stayed at his mother's house when on call. Whether or not the employer knew that claimant stayed there each time, he testified that he knew claimant stayed there this time.

Next, carrier attacks Finding of Fact No. 9, which states that employer benefited from claimant staying at his mother's house while on call because he could respond faster to service calls, asserting that it is speculative depending on where the calls originated. The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. As fact finder he may make reasonable inferences from the facts. See Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). While some testimony stated that a call in (City 1) could require an hour to reach, it may be inferred that by adding 55 miles of drive time, found to be the distance between (City 1) and (City 2), that in many instances response time therefrom would be increased. There was no evidence that the great preponderance of the calls for service came from the environs of (City 2), rather than (City 1). Finding of Fact No. 9 is sufficiently supported by the evidence.

Finding of Fact No. 11, which states that the employer benefited from his service truck being driven with his advertising thereon, was attacked, not as being based on insufficient evidence, but appears to be questioned as to the usage that is to be made of such a finding. No case law is cited to support an attack on a finding of fact based on the purpose for which the finding of fact is to be used. The evidence from the employer himself sufficiently supports this finding of fact.

Finding of Fact No. 12 found that the claimant has been unable to work since the time of the accident. Carrier disagrees. All the evidence offered at the hearing indicates that claimant has not worked and cannot work because his injury incurred in the accident. This finding is sufficiently supported by the evidence.

In stating that certain conclusions of law are not supported by the facts and evidence, no assertion is made that the findings of fact do not address sufficient issues upon which to base the conclusions of law. Argument is correctly made that claimant in a travel case must show not just an exception to the general exclusion of such accidents from compensability but also must show injury within the course and scope of employment.

In regard to "on call" cases, carrier cites Loofbourow v. TEIA, 489 S.W.2d 456 (Tex. Civ. App.-Waco 1972, writ ref'd n.r.e.) and Smith v. Dallas County Hosp. Dist., 687 S.W.2d 69 (Tex. App.-Dallas 1985, writ ref'd n.r.e.). Both dealt with employees (nurse and x-ray technician) injured travelling to or from the hospital, where they always worked, while on call. Neither case involved any testimony that the employee, after arriving at the hospital, had to use the vehicle she arrived in as an integral part of her work; neither was provided transportation by the employer; neither advertised the hospital to the general public as they responded. See Highlands Ins. Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied) in which an "on call" death was compensable.

In Texas Workers' Compensation Commission Appeals No. 93151 decided April 14, 1993, and Texas Workers' Compensation Commission Appeal No. 93634, September 2, 1993, use of a special truck was found to be in furtherance of the employer's affairs in addition to transporting that claimant to and from work. The case before us on appeal is distinguished from the two "on call" cases cited by carrier because claimant was not just travelling to a site, he was moving his employer's property to and from each work site, he was using employer's vehicle, he was going to a different site each time (not to and from the place of employment), and he advertised for his employer along the way.

The findings of fact sufficiently support the conclusions of law. In addition, the facts that show it was necessary to employer to have the truck at the site of the service call because of the function it served also support the conclusion of law that claimant was injured in the course and scope of employment. The decision and order are sufficiently supported by the findings of fact, the conclusions of law, and the evidence of record; they are affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge