APPEAL NO. 950021
FILED FEBRUARY 16, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 1, 1994, a hearing was held. He determined that appellant (claimant) was not injured in the course and scope of employment on _____. Claimant asserts that respondent (city bus) established a practice allowing employees to pick up their pay at a time after claimant's shift ended and that his return to obtain his pay after departing the premises when his shift ended, placed him within the course and scope of employment. City bus replied that the decision should be affirmed.

DECISION

We affirm.

Claimant has worked as a bus driver for city bus since May 1988. He lived in (City), described as 45 miles from his work. He testified that at some point since he began work, employees have been allowed to pick up their pay from the dispatcher at work at or after 5:00 p.m. on Thursday, the day before payday, which is biweekly on Friday. Claimant regularly does this and testified that many employees obtain their pay in this manner. Claimant testified that picking up his check on Thursday after 5:00 p.m. was his option. He has a credit union account and part of his pay is deposited directly into that account. He also acknowledged that he could have picked up his check on Friday, which would have been inconvenient, or even on Saturday, when he was next scheduled to work. He stated though that city bus "encourage us to pick it up on Thursday," adding thereafter, "they have a memo to come out and made it clear that we could pickup [sic] our checks on Thursday." He then replied affirmatively to a question that asked if it was "left up to you whether or not you picked up the check on Thursday?"

Claimant further testified that after getting off work between 2:00 and 2:30 p.m., he left work and killed time until returning at approximately 4:45 p.m. He obtained his check shortly after 5:00 p.m. and left immediately for the city bus parking lot adjacent to work where he parked his car. There was no issue that the lot belonged to city bus or that it was there for employees to park. After starting his car, claimant's car and another car driven by a city bus employee collided while still within the lot. Claimant described his injuries as "a neck injury and a disc bulge to my back;" he has not worked since either May 12 or May 14, 1994.

Other than testifying that city bus policy encouraged him to pick up his check at the time described on Thursday, claimant did not testify that he believed that city bus required him to pick up his pay on the premises.

(DD) testified that she worked for city bus as "benefit coordinator." She stated that employees of city bus may receive their pay by check mailed to their address--checks would be mailed on the Thursday before payday; deposits can be directly made to a credit union or other financial institution; or employees can pick up their checks at or after 5:00 p.m. on that Thursday or during business hours thereafter. She did not have the memo that first allowed an employee to receive pay at or after 5:00 pm on Thursday before the Friday payday. A memo was introduced that is dated February 2, 1993, which indicates that Thursday night payments had become a problem to those on duty; it stated, "the issuance of some payroll checks on Thursday evening should be thought of as a convenience to those eligible, but the dispatcher is sometimes very busy . . . . " DD testified that virtually any employee could be paid on Thursday evening.

Claimant cites INA of Texas v. Bryant, 686 S.W.2d 614 (Tex. 1985), which dealt with an employee who returned to the place of employment to receive pay several days after ceasing employment. The Supreme Court affirmed the court of appeals decision to reverse and remand to determine the fact issue which the granting of summary judgment had disregarded. The majority stated that if plant practice required Bryant to return to pick up her check, or if she reasonably believed that she was required to return to pick up that pay, then injury would be in the course and scope of employment. While the court's inclusion of Bryant's "reasonable belief that she was required to return" was attacked by the dissent, there is no question that this case calls for consideration of a claimant's belief as to what the policy is, if it is a reasonable belief--and if it is a belief that the policy required the return. Bryant said nothing of a reasonable belief that the employer simply allowed an employee to return.

Claimant did not testify that he believed he was required to pick up his check on Thursday after 5:00 p.m. or even that he was required to pick it up at any other time. He acknowledged that part of his pay was sent to his credit union. He stated that how he received his check was his option and was left up to him. Claimant states that being paid for work is an integral part of the employer-employee relationship and that if a worker is not paid, that worker will not work. Bryant did not say that an accident occurred in the course and scope of employment because a matter of pay was involved, rather it identified the test as whether the employee was required to return to receive that pay or whether the employee reasonably believed that she was required to return to receive pay due. Bryant dealt with a fall on the premises. *See also* McCoy v. Texas Employers' Insurance Company, 791 S.W.2d 347 (Tex. App.-Fort Worth 1990, writ denied).

Claimant points out that the accident happened in the parking lot where claimant was authorized to park making it part of the premises. City bus did not dispute the character of the parking lot or the access it afforded to the work site. The fact that the accident occurred in an area of access to the premises does not make it in the course and scope of employment when similar facts of an accident on the premises would not result in compensability.

The rationale of Bryant or some similar case that reports an employee on, or within access to, the premises, is necessary to recovery because claimant was not on the premises to work. Cases such as Bordwine v. Texas Employers' Insurance Association, 761 S.W.2d 117 (Tex. App.-Houston [14th Dist] 1988, writ denied) (cited by claimant) ruled as a matter of law that a nurse falling while exiting her car in a hospital parking lot, who arrived for the "purpose of going to work," was injured in the course and scope of employment. Cases such as Bordwine acknowledge the access test to be whether the accident occurred within a reasonable margin of time and space to the place where the work is to be done. *See* Turner v. Texas Employers' Insurance Association, 715 S.W.2d 52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.) As stated, claimant testified to no work that he was to do when he came to his place of employment at approximately 4:45 p.m. on Thursday to pick up his pay approximately two hours after he ceased work and more than 24 hours before his next shift began.

Turner ruled as a matter of law that an employee of a corporation was not in the course and scope of employment when injured driving through a parking lot of her employer, other than the one closer to her work site in which she was to park, while coming to work. The court recited the test for access and pointed out that Turner was not within the reasonable margin of space. The court went on to note that Turner had performed work at the facility whose lot she drove through and was injured in, but she was not to work at that place at that time. Turner, like Bordwine acknowledged that in most instances these issues are fact questions for the trier of fact, but considered the facts before it to constitute the case as determinable as a matter of law.

Claimant also points out that if claimant had been paid when he finished his shift at approximately 2:30 p.m., gone to the parking lot, and had an accident, the claim would be compensable. We agree that such a fact situation would place the claimant in a different position relative to the rule set forth above as to the margin of time and space to work. In that regard, we would surmise that had Roberts in Roberts v Texas Employers' Insurance Association, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1971, writ refused), waited until the end of her workday, as she left work, to take an empty box to her car in the employer's parking lot, she would have been in a different position as to compensability also. Roberts had arrived for work and was within her work area, but had not started to actually work; she told her supervisor, who did not instruct her otherwise, that she was going to take an empty box, for her use, to her car, on the employer's parking lot; she did so and was injured. The court held as a matter of law that she was not in the course and scope of employment (affirmed summary judgment for carrier). *Compare* Texas Workers' Compensation Commission Appeal No. 91037, decided November 20, 1991, which affirmed a hearing officer's decision that a claimant who reported for work approximately 30 minutes prior to the time her work began, went to her work site, and then went to the restroom before beginning work and was injured when she fell therein, was compensably injured.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He found (Finding of fact No. 16) that claimant was not directed to

nor did he reasonably believe he was required to come in on Thursday night, _____, at 5:00 p.m. to pick up his pay check. This finding of fact is sufficiently supported by the testimony of claimant, the testimony of DD, and the documentary evidence of city bus. That finding of fact and others, including that claimant was not furthering the business of city bus, all of which were sufficiently supported by the evidence, sufficiently support the conclusion of law that claimant was not in the course and scope of employment at the time of his accident on _____.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge