

APPEAL NO. 961622  
FILED OCTOBER 2, 1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 15, 1996, a contested case hearing (CCH) was held in [City], Texas, with [hearing officer] presiding as hearing officer. In response to the sole issue before him, the hearing officer determined that the injuries sustained by respondent (claimant) in an automobile accident on his way to work occurred in the course and scope of his employment on [date of injury].

Appellant, the [carrier] (employer or carrier as appropriate), contends that the hearing officer erred as a matter of law, citing the "coming and going" rule and the fact that being "on call" was not controlling on the issue of compensability. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant requests affirmance, citing special considerations that should be given to claimant, as a police department captain.

DECISION

We reverse and render a new decision.

The facts are not disputed. Claimant was a police captain for employer's traffic and accident division. On the morning of [date of injury], claimant left his home in [County 1] wearing his uniform and proceeded to drive to work in an unmarked vehicle furnished by the employer to high ranking police officers. The vehicle had a police radio, pager and telephone. Claimant testified that he was "on duty" or "on call" 24-hours-a-day and that as he drove to work he generally looked for traffic violators, speeders, DWI and, when appropriate, would help stranded motorists and assist in directing traffic. It is undisputed that at the time of his traffic accident he was outside of the city limits (but within the 45-mile radius of the central police station required by policy) and was not actively engaged in a law enforcement capacity. The accident was caused when another vehicle failed to yield the right of way and pulled directly in front of claimant's vehicle. Claimant testified that he was not required to check in with the dispatcher (because of his "prerogative as a [police] captain") but that he does maintain contact with his employer by means of the cellular telephone, radio and pager.

Claimant, and to some extent carrier, discussed other anecdotal cases where police officers may, or may not, have received compensation for coming and going injuries. No citations were given to any of these cases. Claimant distinguished Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App.-Dallas 1982, writ ref'd n.r.e.) on the basis that pursuant to Article 14.03(c) of the Texas Code of Criminal Procedure, a peace officer has state-wide jurisdiction to make arrests. Claimant further, at the CCH, argued that

there was a "public interest" in making this case compensable, otherwise there would be some (unspecified) "chilling effect" on the employer's police department.

The hearing officer determined that claimant was "on duty at irregular hours," was "engaged in a reasonable lookout for criminal activity, and was in effect on duty since he was subject to call at any time." (Finding of Fact No. 5.) The hearing office concluded that claimant's accident occurred in the course and scope of his employment. No attempt was made by the hearing officer to attempt to analyze and/or distinguish numerous "coming and going cases," police officer cases and Appeals Panel decisions.

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. American General Insurance Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The rule is known as the "coming and going" rule. The rationale of that 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 Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). Section 401.011(12) provides as follows:

"Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:

- (A) 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; or
- (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.

Although there are some exceptions to the "coming and going" rule, the hearing officer apparently bases his decision on the contention that claimant, a police captain, was on duty, in an assigned vehicle, was "subject to call," and "was engaged in a reasonable lookout for criminal activity" as he was driving to his office at 7:30 a.m. on the morning in question and, therefore, was in the course and scope of his employment. Initially, we would comment that the rationale of the coming and going rule (the employee is subject to the general risks and hazards of the traveling public) was applicable to claimant. Because he was in uniform, in an employer-assigned vehicle, was on call 24 hours a day, and was on the "lookout for criminal activity" as he was going to work, did not change the fact that he was going to his regular place of employment, at, presumably, the regular time and was consequently exposed to the same risks as other members of the traveling public who were also going to work.

Regarding the fact that claimant, because of his position as a police captain, was assigned a vehicle (testimony was that it was an unmarked vehicle which had a police radio), the Appeals Panel has cited Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied), for the proposition that transportation furnished by the employer is not dispositive of the issue of compensability. In Texas Workers' Compensation Commission Appeal No. 950361, decided April 24, 1995 (also a police officer coming and going case, albeit a motorcycle case), the Appeals Panel held:

However, furnishing and controlling the means of transportation are disjunctive provisions in the statute, and the claimant is not required to establish that both existed. Nevertheless, as noted above, even a finding that transportation is furnished or controlled by an employer does not end the inquiry as to compensability. As explained by the court in [Rose, *supra*], "[p]roof of this fact does not entitle appellant to compensation but only prevents his injury from being excluded from coverage simply because it was sustained while he was traveling to or from work . . . Appellant still was required to prove that his injury satisfied the [statutory] requirements" that the injury was sustained in the course and scope of employment. *Id.* at 213-4.

The fact that an employer has furnished transportation as an accommodation to the worker, or even for a mutual benefit, but not as an integral part of the employment

contract, does not render compensable an injury occurring during such transportation. The claimant must still prove that he was acting in the course of his employment at the time, Rose, supra; Texas Employers' Insurance Association v. Byrd, 540 S.W.2d 460 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92324, decided August 26, 1992; and Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993. This concept was reaffirmed in Wausau Underwriters Insurance Co. v. Potter 807 S.W.2d 419, 421.2 (Tex. App.-Beaumont 1991, writ denied) which went on to state:

The mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the *Texas Workers' Compensation Act* . . . United States Fire Insurance Company v. Eberstein, 711 S.W.2d 355 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). If this were not the law, in this State, then each and every accident in a company vehicle, including those operated for purely personal reasons, would be compensable under the *Texas Workers' Compensation Act*.

Consequently, merely because claimant was assigned a vehicle does not, in and of itself, put claimant in the course and scope of his employment.

Similarly, the fact that claimant was on-call 24 hours a day and that claimant carried a pager where his employer could contact him does not necessarily place him within the course and scope of employment. Were this theory carried to its logical conclusion, it would mean any number of occupations would automatically carry with it 24-hour-a-day workers' compensation coverage and would include doctors, plumbers, locksmiths, etc., or anyone else that carries a pager. In Texas Workers' Compensation Commission Appeal No. 93898, decided November 15, 1993, the Appeals Panel noted that courts have held that the fact that an employee was "on call" and could be called at any time is not controlling on the issue of compensability, see Loofbourow v. Texas Employers Insurance Association, 489 S.W.2d 456 (Tex. Civ. App.-Waco 1972, writ ref'd n.r.e.). We further note that Professor Larson has written that the fact that an employee is "subject to call" should not be given "any independent importance in the narrow field of going to and from work . . . The mere fact that an employee is generally on call should not make a special errand of a normal going and coming trip that is not in response to a special call." See 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 16.6 (1990). See also Smith v. Dallas County Hospital District, 687 S.W.2d 69 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.). With regard to police officers, Larson writes that "[p]olice officers who are 'on call' at all times have sometimes been brought within the rules just discussed as to on-call employees generally," although he notes that some jurisdictions have found compensable injuries suffered by police

officers in the course of ordinary coming or going journeys. *Id.*, at § 16.17. See also Appeal No. 950261, *supra*.

Claimant, in his response, and both parties at the CCH, refer to Vernon v. City of Dallas, *supra*. We distinguish that case on the ground that it did not involve an injury suffered in the course of travel but rather denied workers' compensation liability for injuries an off-duty and out-of-uniform police officer suffered in an altercation at a restaurant after identifying himself as an officer and attempting to silence a loud and abusive customer. The claimant pointed to requirements of Section 14.03 of the Code of Criminal Procedure to say that proposition in Vernon, *supra*, that a peace officer "outside his jurisdiction cannot be in the course and scope of his employment, have been repealed by implication of law, due to . . . Art 14.30." That provision was addressed in Texas Workers' Compensation Commission Appeal No. 960004, February 16, 1996, and we might agree that it might have some applicability had claimant in this case been engaged in some law enforcement activity, such as apprehending a criminal suspect or preventing the commission of a crime, as was the case in Appeal No. 960004. However, the undisputed evidence was that claimant was simply on his way to work when he was involved in a motor vehicle accident.

In Appeal No. 93898, *supra*, we reviewed Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993, and the remand, Texas Workers' Compensation Commission Appeal No. 93634, decided September 2, 1993, which discussed the two-pronged test to establish course and scope of employment, which is: (1) that the injury occur while the employee is engaged in or about the furtherance of his employer's affairs or business, and (2) that it be of a kind and character that has to do with and originates in the employer's work, travel, business or profession. Texas Employers Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977). Appeal No. 93151, *supra*, and Appeal No. 93634, *supra*, both had the same facts and were coming and going cases where the employee was assigned a company vehicle, with a two-way radio, which he was allowed to drive to and from work and was on "24-hour call." Eventually, Appeal No. 93634, *supra*, found the roll-over accident compensable because it occurred as the employee was reaching down "to pick up the two-way radio to call one of the employees at the shop." In other words, the employee, at the moment of the accident, was engaged in the furtherance of the employer's business. There is no evidence, in the instant case, that claimant was doing anything in furtherance of law enforcement and, consequently, we see nothing in this case which would distinguish claimant, at the moment of the accident, from any number of other commuters on their way to work. None of the reasons given by the hearing officer, or the claimant, would remove claimant from the normal risks involved in the coming and going rule or would place claimant at greater risk because of his employment as a

police officer. Neither do we see any "chilling effect" on the employer police department or any reason distinguishing this case from a myriad of other coming and going cases.

Accordingly, we reverse the hearing officer's decision and render a new decision that the injuries claimant sustained in an automobile accident while going to work were not sustained in the course and scope of employment on [date of injury].

Thomas A. Knapp  
Appeals Judge

CONCUR:

Susan M. Kelley  
Appeals Judge

Alan C. Ernst  
Appeals Judge