APPEAL NO. 980133

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 17, 1997. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____; that he timely reported an injury to his employer; and that he did not have disability because he did not sustain a compensable injury. In his appeal, the claimant argues that his injury occurred in the course and scope of his employment under either the special mission or dual purpose exception to the coming and going rule. In its response, the respondent (carrier) urges affirmance. The carrier did not appeal the determination that the claimant timely notified his employer of his injury and that determination has become final pursuant to Section 410.169.

DECISION

Reversed and a new decision rendered that the claimant was in the course and scope of his employment at the time of his motor vehicle accident.

The claimant testified that he is employed as a licensed vocational nurse for a home health care agency and that his job requires him to perform various nursing duties in patients' homes. He stated that on Saturday, _____, he had completed an assignment for a patient and was on his way back to his home, when the left front tire of his car blew out, causing the vehicle to cross the traffic lanes of the freeway and to strike the retaining wall. The claimant stated that the windshield of the vehicle he was driving was broken in the accident. He testified that he called his roommate who came to take him home. He stated that he laid down to rest and later that evening woke up with intense pain in his left shoulder and arm. His roommate took him to the emergency room, where he was diagnosed with a possible cervical herniated disc. Thereafter, he went to his primary care physician who ordered an MRI, which confirmed a herniated disc at C5-6. After an unsuccessful course of conservative treatment, the claimant had a discectomy and fusion at C5-6 on August 1, 1997. He returned to light-duty work with the employer on November 24, 1997.

The claimant testified that he was returning home on _____ to eat and to receive his other work assignments for the day. He stated that he had one other appointment scheduled on _____, but that that appointment was not set for a specific time. He acknowledged that he was not on his way to that appointment at the time of his accident. In addition, he stated that he knew that he had received telephone calls from his employer on Friday evening requesting his services for other patients on Saturday, _____; thus, he stated that, although he had not yet scheduled additional appointments for that day, he knew he would have other appointments and that he was not finished working for the day.

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 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 Co. v. Bottom, 365 S.W.2d 350, 353 (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:
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> (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.

If an employee comes within one of the stated exceptions to the general coming and going rule, he must still show that the injury occurred within the course and scope of his employment in order to establish compensability. Bottom, *supra*; Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993.

In determining that the claimant was not in the course and scope of his employment at the time of his motor vehicle accident, the hearing officer made the following unchallenged Findings of Fact:

FINDINGS OF FACT

2. Claimant was given work assignments from the staff coordinator.

3. Claimant worked from home.

4. On _____, Claimant injured his neck and left shoulder in a motor vehicle accident returning home from an assignment given to him by his employer.

5. The only other appointment scheduled for Claimant by employer on _____ was planned to be completed later in the day.

6. Claimant was driving home to eat lunch and wait for another appointment.

The critical question in this instance is whether the claimant's transportation falls within one of the recognized exceptions to the coming and going rule and, if so, whether he was in the course and scope of his employment at the time of his accident because he was furthering the affairs or business of the employer. In this instance, it is undisputed that the claimant works out of his home and that he receives his nursing assignments from a staff coordinator. After receiving his assignments, the claimant travels from his home to the patient's home to perform the required services.

In Texas Workers' Compensation Commission Appeal No. 962134, decided December 9, 1996, the Appeals Panel considered a factually similar case. In that case, the claimant was a home health nurse who was injured in a motor vehicle accident while she was driving to a patient's home to provide nursing services. The claimant was paid mileage from her home to the patient's home because the visit occurred prior to 8:00 a.m., when the employer's office opened for the day. The hearing officer determined that the claimant was in the course and scope of her employment at the time of her accident. In arguing for reversal, the carrier maintained that the claimant's injury was not compensable under the coming and going rule, arguing that the patient's home was a remote premises of the employer where the claimant regularly commuted to begin her workday. The carrier in Appeal No. 962134 conceded that the travel was at the direction of the employer. The Appeals Panel affirmed the determination that the claimant was in the course and scope of her employment at the time of her accident, noting that "the question in this case boils down to whether the claimant had begun work (was "on the clock" so to speak) at the time

of her [accident]."

Appeal No. 962134 noted that Texas Workers' Compensation Commission Appeal No. 961193, decided July 30, 1996, was instructive on the course and scope question. In Appeal No. 961193, the decedent was killed in a motor vehicle accident as he drove from his home to a customer's premises to make a service call. The decedent, a computer service technician, was going to deliver a printer he had repaired and respond to the customer's service requests. The decedent's supervisor had approved the request that the decedent proceed directly to the customer's location rather than coming first to the employer's office. Both the decedent's supervisor and her supervisor testified that the practice of having the service technicians proceed directly to the customer's location was of benefit to the employer because it saved time which could be translated to billable service hours. In affirming the determination that the claimant's accident occurred while he was in the course and scope of his employment, Appeal No. 961193 stated:

> Applying the provisions outlining the transportation exception to "course and scope of employment", it is clear from the evidence that the hearing officer could believe that decedent was travelling to the customer at the direction of the employer, within the exception in Section 401.011(12)(A)(iii) to the "coming and going" rule. We believe that the "direction" in this case is found in the employer's objective that its customer's needs be serviced, that approved and reimbursed travel was therefore undertaken by decedent to allow expeditious performance of such servicing missions, and that travel to the customer's site without the need to report first to the office furthered the employer's desire to allow more billable projects to be accomplished within the workday.

See also Texas Workers' Compensation Commission Appeal No. 961345, decided August 23, 1996 (affirming a determination that a salesman was in the course and scope of his employment at the time of his motor vehicle accident which occurred while he was on his way to have a contract signed and to receive payment on the contract) and Texas Workers' Compensation Commission Appeal No. 951910, decided December 27, 1995 (affirming a determination that an insurance agent was in the course and scope of his employment when he was involved in a motor vehicle accident while driving to collect premiums).

In his appeal, the claimant notes that the hearing officer implied that his travel to the patient's home was within the course and scope of his employment and argues that it "just does not make sense" to conclude that he was not in the course and scope of his employment on his return trip in the absence of some evidence of a deviation, which is not present here. We agree that it does not appear that there is a basis for so limiting a course and scope determination. In this instance, it is undisputed that the claimant worked out of his home; thus, as the claimant notes, his return to his home is in the nature of his returning back to the office. In addition, it is undisputed that the claimant travelled at the

direction of the employer to his various assignments. Thus, his travel falls within the exception to the coming and going rule articulated in Section 401.011(12)(A)(iii). Under our reading of that section, it provides an exception for both travel to and from the location to which the employee is directed to travel. We are unaware of a basis for limiting the exception to one-way travel, as the hearing officer appears to be doing in this instance. Accordingly, we reverse the hearing officer's determination that the claimant was not in the course and scope of his employment at the time of his accident and render a new determination that the claimant was in the course and scope of his employment on _____, when he was involved in the motor vehicle accident, injuring his neck and left shoulder.

The hearing officer's decision and order are reversed and a new decision rendered that the claimant sustained an injury in the course and scope of his employment on _____. The carrier did not challenge the factual determination that as a result of the injuries the claimant sustained in the motor vehicle accident, he was unable to obtain and retain employment at wages equivalent to his preinjury wage from _____ to November 24, 1997. Based upon our determination that the claimant's injury is compensable, it follows that the claimant had disability for that period and is entitled to temporary income benefits.

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge