APPEAL NO. 980743

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in on March 17, 1998. He (hearing officer) made the following findings of fact and conclusion of law.

FINDINGS OF FACT

4. On _____, the Claimant [appellant] left the course and scope of his employment to go to [hospital] for treatment of a bone infection in his jaw.

5. After the Claimant was treated for his non work-related jaw infection, he left the hospital and was involved in a motor vehicle accident [MVA].

6. The travel to the place of occurrence of the injury was made only to further the personal or private affairs of the Claimant.

7. There were no affairs or business of the Employer to be furthered by the Claimant's travel to the point of the injury.

8. Although the Claimant was en route to a business meeting when he was involved in a [MVA], he had not yet ended the deviation from the course and scope of his employment, and he was not in the course and scope of his employment.

9. The Claimant did not show by a preponderance of the medical evidence that the medical problems he's claiming with respect to his back and neck were causally related to the [MVA] of _____.

CONCLUSION OF LAW

3. The Claimant was not injured in the course and scope of his employment when he was involved in a [MVA] on _____.

The claimant appealed; urging that the hearing officer erred in deciding an issue of extent of injury that was not before him, determining that he was not injured within the meaning of the Act, and determining that his MVA was not in the course and scope of employment when the undisputed evidence established that the accident occurred while the claimant

was en route to a business meeting; and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision that he was injured in the course and scope of his employment or, in the alternative, that the Appeals Panel reverse the decision and remand the case to the hearing officer. The respondent (self-insured) responded; stated that its position is that the claimant's travel fell within the general coming and going rule, that he was not directed to go to the building to which he was traveling, that he had deviated from his business destination to take care of personal affairs, and that the "dual purpose doctrine" did not place his travel within the course and scope of his employment; urged that the evidence is sufficient to support the decision of the hearing officer; and requested that it be affirmed. In the conclusion in its response to the request for review, the self-insured wrote:

> According to the evidence that has been presented and reviewed in this case, carrier [self-insured] contends that appellant's injuries were not sustained while he was in the course and scope of his employment, but were instead sustained while he was traveling to and from his place of employment and are therefore non-compensable within the meaning of Texas Labor Code § 401.011(12).

It is clear that the self-insured did not contend that the claimant was not injured in the accident.

DECISION

We affirm the decision and order of the hearing officer and hold that Finding of Fact No. 9 is surplusage and may be disregarded.

The Decision and Order of the hearing officer contains a six-page Statement of the Evidence and a detailed summary of the evidence will not be repeated in this decision. Briefly, prior to the date of the accident on _____, the claimant had been receiving medical treatment for a non-work-related injury. He was permitted to begin work early and take off a longer time around noon to receive the treatment. On the day of the accident he left work at about 11:45 a.m., traveled to the hospital, received the treatment, departed the hospital at about 1:55 p.m. for a business meeting at a location other than his normal place of work, was going directly to the location of the building in which the meeting was to take place, traveled on a street that he would not have traveled had he been returning to his normal place of work, and was involved in an MVA prior to getting to the building in which the meeting was to take place. The claimant was taken in an Emergency Medical Service vehicle to the emergency room in the hospital where he had received the treatment earlier; that day the doctor ordered ultrasound, heat, and massage to the cervical spine and upper back; later the doctor indicated that the claimant also had low back pain; a cervical spine MRI report dated December 8, 1997, states that the test results are suboptimal due to motion artifacts and contains impressions of moderate chronic appearing

diffuse posterior C5-6 subligamentous disc protrusion and minimal diffuse C6-7 annular bulging; and a lumbar spine MRI report dated February 5, 1998, indicates degenerative facet joint disease and degenerative spondylosis from L2 to S1 and a small posterior central and right-sided disc herniation at L5-S1.

We first address the contentions that extent of injury was not before the hearing officer and that the hearing officer erred in determining that the claimant was not injured within the meaning of the Act. The benefit review officer reported the unresolved issue as "[w]as the Claimant injured in the course and scope of his employment when involved in a [MVA] on _____?" and the remainder of his report indicates that the dispute was whether the claimant was in the course and scope of his employment when the accident occurred. The parties litigated the disputed issue on the basis that the claimant was not in the course and scope of his employment when the MVA occurred and did not litigate whether the claimant sustained an injury. The self-insured did not dispute that the claimant was injured in the MVA. The hearing officer asked the claimant what the ultimate diagnosis of the injuries was. The issue of whether the medical problems claimed by claimant with respect to his back and neck were causally related to the MVA was not before the hearing officer. In its response to the request for review, the self-insured does not contend that the claimant was not injured in the accident. Finding of Fact No. 9 is surplusage and will be disregarded.

We next consider the determination of the hearing officer that the claimant was not injured in the course and scope of his employment when he was involved in an MVA on _____. In his Decision and Order, the hearing officer wrote:

> The Claimant falls squarely within the provision of § 401.011(12), which states that the course and scope of employment does not include:
>
> (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.
>
> In this instance the Claimant was located at the point of injury only because of the personal affairs of the Claimant to be furthered by the travel, and the travel to that location would have been made even if there had been no affairs or business of the Employer to be furthered by the travel.

> Accordingly, the Claimant does not fit within the statutory exceptions. The Claimant was not on a "special mission," and the Claimant does not fit within the "dual purpose" rule. He was at the point of the injury only as a result of having deviated from the course and scope of his employment for the treatment of the infection of the jawbone.

The hearing officer made several findings of fact set forth earlier in this decision including:

FINDING OF FACT

> 8. Although the Claimant was en route to a business meeting when he was involved in a [MVA], he had not yet ended the deviation from the course and scope of his employment, and he was not in the course and scope of his employment.

In his appeal, the claimant cited St. Paul Fire and Marine Insurance Co. v. Confer, 956 S.W.2d 825 (Tex. App.-San Antonio 1997, pet. denied) and said that the controlling issue is whether he was traveling in behalf of the employer at the time of the injury, not on what road he happens to be traveling. In its response to the appeal of the claimant, the self-insured did not mention that case. In Texas Workers' Compensation Commission Appeal No. 941569, decided January 5, 1995, the Appeals Panel reversed the decision of the hearing officer in a case involving travel for dual purposes and rendered a decision that the decedent was not in the course and scope of his employment when he was fatally injured. A district court jury determined that the decedent was in the course and scope of his employment when he was injured. In Confer, *supra*, the Court of Appeals referred to Section 401.011(12)(B), the "dual purpose rule"; cited several cases, including Deatherage v. International Ins. Co., 615 S.W.2d 181 (Tex.1981); Evans v. Illinois Employers Ins.of Wausau, 790 S.W.2d 302 (Tex.1990); Janak v. Texas Employers' Ins. Assoc., 381 S.W.2d 176 (Tex.1964); and Tramel v. State Farm Fire & Cas. Co., 830 S.W.2d 754(Tex. App.-Fort Worth 1992, writ denied); affirmed the decision of the district court; and wrote:

> In the present case, St. Paul contends that all the evidence points to the fact that the sole purpose of Dr. Confer's trip on March 14, 1994, was to go home from work. St. Paul implies that Dr. Confer left work early because his wife was ill and he wanted to give himself enough time to get home on time in the rain. In the alternative, St. Paul contends that, if the dual purpose doctrine is implicated by the facts of this case, there is no evidence that the trip would not have been made had there been no business of TEF [employer] to be furthered by the travel. Thus, according to St. Paul, both prongs of the dual purpose rule have not been satisfied by the evidence. It is without question that the evidence supports a finding that Dr. Confer intended to go to Altex to pick up diskette cleaners on his way home. He clearly told Jack Keebler that

he was going to Altex before he went home; and, he left early while telling his wife he would be home at the normal time. Therefore, because the evidence demonstrates that Dr. Confer was both on an errand for his employer and on his way home at the time the accident occurred, the dual purpose rule is implicated. The question now becomes, whether the evidence adduced at trial meets the two requirements of the dual purpose rule. This determination was a fact question for the jury.

St. Paul relies on [Tramel, *supra*] in support of its assertion that Mrs. Confer failed to prove that Dr. Confer would not have been traveling if the business purpose of his trip had not existed. In Tramel, the claimant regularly traveled from her home to the bank on behalf of her employer before going to work on Thursday mornings. On the Thursday morning in question, the claimant was involved in an accident at a point in her route that was common to both her trip to the bank and her trip to work if she was not going to the bank. The court granted summary judgment in favor of the insurance carrier, holding that because the accident occurred at a point in the route where she would have traveled regardless of whether she was going to the bank or to work, she would have made the trip along this route even if there had been no business of her employer to carry out. Tramel, 830 S.W.2d at 757. Tramel is factually distinguishable from the present case because the claimant in Tramel was traveling to work when the accident occurred. In other words, because she had not begun her business errand at the time of the accident, the claimant's work day had not begun. [Emphasis added.]

The same is true in [Evans, *supra*] where the supreme court held that the employee's death was not compensable where he was involved in an accident on the way to a pre-work safety meeting. The court held that because the claimant had not "begun work," he was not on company business. Evans, 790 S.W.2d at 305. The result would be different in a situation in which the accident occurs after an employee has completed the errand for the employer and is then en route to work. [Emphasis added.] In that case, the employee has begun work, so to speak. *See* Meyer v. Western Fire Ins. Co., 425 S.W.2d 628,629 (Tex.1968) (holding injury compensable where employee was involved in accident on way to work after having taken work-related telephone calls from home); Janak, 381 S.W.2d at 182 (holding injury compensable where accident occurred on way to work *after* employee had deviated from his normal route in order to pick up ice for use during work).

The foregoing case law seems to indicate that the controlling issue in cases such as this is during what segment of a trip did the injury occur; the segments being home to business errand and business errand to work.

> These segments are reversed in the present case. In other words, Dr. Confer's fatal trip consisted of segments including work to business errand and business errand to home. Applying the logic of the cases discussed above, an injury occurring between work and the business errand would be compensable because the employee has not completed work, while an injury occurring between the business errand and home would not be compensable because the employee's work would be finished.
>
> In this case, Dr. Confer was going to Altex for his employer at the time the accident occurred. The evidence indicates that Dr. Confer did not normally leave work early, and that he did so on this occasion so that he could complete his business errand and still be home at his normal time. Accordingly, the evidence supports a finding that Dr. Confer would not have been on Interstate 35 at 4:20 p.m. if he had not been going to Altex. The fact that Altex happens to be along the same route as his route home should be of little consequence. Why should the result be any different if Altex had been located somewhere off of Interstate 35, forcing Dr. Confer to travel away from his regular route? The controlling issue should be whether the employee is traveling on behalf of his employer *at the time* of the accident, not on what road he happens to be traveling. The trial judge properly reflected this logic when he stated, in ruling on St. Paul's motion for directed verdict, "I think you'd be entitled to judgment as a matter of law if he had gotten to Altex . . . at this juncture it's a fact question." The jury answered this fact question in the affirmative, finding that Dr. Confer was in the course and scope of his employment at the time he was killed. The verdict is supported by the evidence presented at trial.

As a general rule, the mere fact that an employee is privileged to cross a street or highway to eat at nearby restaurants does not make the risks of the street or highway incident to the work for the employer. 75 TEX. JUR. 3d *Work Injury Compensation* § 221 at 503 (1991); Banks v. Commercial Standard Ins. Co. 78 S.W.2d 660. (Tex. Civ. App.-Dallas 1934, writ dism'd). We have not found a case in which the facts are the same as the case before us in which a claimant started work; left for personal reasons; departed the location where personal affairs were performed; and traveled toward a place not his normal workplace to conduct business. The claimant did not contend that he was in the course and scope of his employment when he went to the hospital for treatment. In Finding of Fact No. 8, the hearing officer determined that the claimant had not ended his deviation from the course and scope of his employment when he was involved in the MVA. The court in Confer*, supra*, held that it was a fact question for the jury to determine whether both requirements of the dual purpose were met. Likewise, it was a question of fact for the hearing officer in the case before us. We do not find that he did not properly apply the law. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing

officer's determination concerning the dual purpose rule is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 941234, decided October 31, 1994, the Appeals Panel discussed "special mission," the "coming and going" rule, and travel to and from special missions; distinguished travel to and from activities that comprised appreciably less than a full day and travel to and from a particular work-related function intended to last over several days; and affirmed a determination that the claimant was injured in the course and scope of her employment while returning from the work-related function that lasted over several days. In Texas Workers' Compensation Commission Appeal No. 941340, decided November 10, 1994, the claimant worked at one facility, was driving directly from her home to an administrative facility to turn in money, and was injured in an automobile accident. The Appeals Panel affirmed a determination that the claimant was not injured in the course and scope of her employment.

In the case before us, the hearing officer included a long quotation from Texas Workers' Compensation Commission Appeal No. 951833, decided December 18, 1995. That quotation includes all of Section 401.011(12), including the portion often referred to as the "special mission" provision; the words "special mission"; reference to Evans, *supra*; and a statement that the claimant was not on a "special mission." The hearing officer did not make findings of fact or conclusion of law on "special mission"; however, from his discussion in his Decision and Order, it can be inferred that he determined that the requirements to establish that the claimant's injuries incurred as the result of the MVA to have been sustained in the course and scope of employment while on a special mission had not been met.

We affirm the decision and order of the hearing officer. Finding of Fact No. 9 may be disregarded as surplusage.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge