APPEAL NO. 981639
FILED AUGUST 31, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). On June 24, 1998, a contested case hearing (CCH) was held in [City 1], Texas, with [hearing officer] presiding as hearing officer. The issue concerned whether the appellant, who is the claimant, sustained his injury on [date of injury], while in the course and scope of his employment. Claimant was injured that day in a motor vehicle accident.

The hearing officer found that the claimant did not sustain his injury while acting in the course and scope of employment, and was not furthering the business of his employer when injured.

Claimant has appealed. He argues that the employer furnished the transportation, a company truck. He argues that, notwithstanding a company policy that transportation to and from jobs in the metroplex area was not an item for which he was paid, he was in fact paid for this because he resided outside that area. He argues that, because he would have had to do paperwork at home, he was still in the course and scope of employment when injured. He argues he did not deviate from employment because he stopped at a mall to pick up his wife's wedding ring, as he would have been at the point of the collision regardless of this errand. The carrier argues that claimant was simply injured in the course of transportation home.

DECISION

Affirmed.

Claimant was a service technician who worked for (employer). He performed only commercial air conditioning work and said that he had been working at (customer hospital) for the previous four months. This job was scheduled to go on another four days past the day he was involved in a collision while headed home from his day's work.

Claimant said he drove a company truck, which contained a telephone. He went directly from his home to the job and back in this truck. He said that he generally performed paperwork at home at night or the next morning. Phone bills verify a certain number of "after hours" calls. Claimant said at first that the paperwork on his purchases for this job would be turned in at the completion of the job, but then said there were some invoices that would have to be prepared on a daily basis. (This is corroborated by the company policy and procedures manual put into evidence by the carrier). Claimant said he would sometimes prepare paperwork at intersections while driving.

The claimant said that he paid the company a certain amount for the truck because he lived outside the [. . .] Metroplex area and that, had he lived within the Metroplex area, he would not have had to pay. Claimant testified that he understood this was for additional wear and tear on the truck caused by additional miles he had to drive. A company memo dated May 25, 1989, makes clear that trucks are being furnished to employees so that they may be on call and ready to do after-hours jobs. A memo dated February 23, 1996, to the man in charge of benefits states that, because the claimant lived near [City 2], Texas, he agreed to pay the company $120.00 per pay period for truck use to and from home to the Metroplex area. Claimant said this was later reduced to $60.00 per pay period by the time of the accident.

He agreed that he was not paid transportation mileage (nor was it billed to the customer) for jobs that were performed within the Metroplex area, such as this job. (To some extent, on emergency calls, he would be paid this mileage.) He understood that personal use of the company truck was prohibited. On the day in question, [date of injury], claimant said he left the customer hospital at around 3:00 in the afternoon. He described two routes that he would ordinarily take to go home. He testified that the drive home would ordinarily take about an hour and twenty-five minutes.

The route he had set out on the day of the accident was the one he used less frequently, and he agreed that he chose the route in order to stop at a particular shopping mall to pick up his wife's wedding ring at the jewelers. He also stated that he was going to stop at a certain service station to get fuel for his truck. Claimant said that this stop at the mall probably put him about 15 to 20 minutes behind his ordinary schedule. In any case, the accident happened only three and one-half miles from his home, and he said that either route out of the Metroplex area he took would have placed him at the location of the collision. A drunk driver hit him, and he had no memory of what he was doing. He said that the paperwork for the job was lost in the collision. Claimant's wife testified that she was initially told by persons employed by the employer that workers' compensation would handle the accident; however, the employer is not self-insured, and the carrier in this case is a separate company. The accident was serious, and claimant is a paraplegic as a result. According to the police report, the accident occurred at around 7:00 p.m. Claimant testified that this day was a Monday.

The operations manager for the employer, (Mr. B), testified that claimant was provided with a company truck that included a parts inventory. He said he agreed that claimant was probably dispatched directly from his home for most jobs. He said that claimant would not have been dispatched each and every day to work at the client hospital. Mr. B said that the first 30-45 minutes of drive time would not be charged to the company and would be the driver's own time. He stated this in response to

questions about jobs located outside the Metroplex area. However, the last question he was asked was broadened to include a hypothetical dispatch to a location within the Metroplex along with a location outside the Metroplex, and the witness answered affirmatively to the combined question that a worker who worked a full eight-hour day on a job would be additionally paid for his driving time over and above that. Surprisingly, Mr. B was not asked about the practice of asking employees to pay for the use of the truck if they resided outside the Metroplex area.

The carrier submitted a copy of the employer's policies and procedures manual concerning truck charges to be billed to the customer. It appears that a truck charge would be made to Metroplex customers for every eight hours of work, and customers outside that area would generally (and there are exceptions) be billed for actual mileage. This policy further states that the customer within the Metroplex will not be charged drive time to and from the job, except for emergency calls. However, the portion of this policy that would seem to be more relevant to the issues is not what the customer is billed, but what the technician may charge to the company. This provides that normal working hours are 8:00 to 5:00, with certain amounts after that to be compensated at time and one-half or double overtime. This policy articulates occasions when the customer may be charged straight time, but the technician will be paid at the overtime rate. However, transportation is not specifically listed in this portion of the policy.

As we see the facts, the accident occurred while the claimant was traveling from what had been his job site for the past four months to his home after the conclusion of his work. Thus, in analyzing whether the accident would be covered, the exclusion in the definition "course and scope of employment" comes directly into play. This provides that the term "course and scope" does not include, under Section 401.011(12)(A):

> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as 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 . . . .

The next portion of the statute deals with transportation that has a mixed business and personal component. We conclude that the hearing officer did not apply this portion of the statute; he made findings of fact as follows:

> 4. On [date of injury], claimant was returning home from a service call, after he had stopped at a mall to perform a personal errand, and was involved in a motor vehicle accident in which he sustained multiple injuries.
>
> 5. The service call, from which claimant was returning, involved working on large commercial air conditioners for a client of the [employer].
>
> 6. At the time of his [date of injury], injury, claimant was driving a company vehicle, which carried parts which might be used for repairs and for which customers might be charged.

It therefore appears that the hearing officer believed that the aspect of the personal errand was an ancillary issue, and the purpose of the trip was primarily transportation home from a service call, any deviation therefrom having been consummated.

Section 401.011(A) is phrased in the alternative; if any one of the conditions applies, the transportation is not within the "transportation" exception from the course and scope of employment. In this case, the hearing officer found:

> 11. At the time of the injury on [date of injury], claimant's transportation was furnished as part of the contract of employment and was paid for in part by the employer and in part by claimant.

We believe that the hearing officer has found a fact which removes the transportation in this case from transportation which is automatically removed from course and scope. However, this does not ensure compensability of the occurrence. The injured employee must still prove that he was furthering the business interests of his employer when injured. *See* Wausau Underwriters Ins. Co. v. Porter 807 S.W.2d 419, 422 (Tex. App.-Beaumont 1991, writ denied.) As stated in Texas Workers' Compensation Commission Appeal No. 961591, decided September 27, 1996, the "exception to the exception" found in Section 401.011(12)(A)(i) is perhaps found in the secondary purpose of workers' compensation, which is to serve as the exclusive remedy against the employer for non-intentional or negligent injuries. While, as claimant points out, the facts in that case bear a resemblance to the facts here, that decision (written by the author judge herein) nevertheless cited Rose v. Odiorne, 795

S.W.2d 210 (Tex. App.-Austin 1990, writ denied) to note that the fact that an employer furnished transportation raised only an issue of fact to consider along with other facts to determine if the accident occurred within the course and scope of employment. Being subject to emergency call if required is also not dispositive of compensability. Texas Workers' Compensation Commission Appeal No. 960015, decided February 15, 1996.

The grievous injury of claimant and the fact that the accident was not his fault no doubt made the case a hard one to decide from an empathetic standpoint for the hearing officer. However, he evidently decided, factually, that the work day for claimant had ceased, and was not persuaded that any work at home that night on this project was a certainty, necessity, or planned objective. He also was apparently convinced that the claimant would not have been compensated as a usual matter of course for his driving time to and from a Metroplex customer, and apparently determined that the testimony of Mr. B was at best ambiguous in this regard. The hearing officer therefore was guided by what the customer would be charged for such transportation in determining whether the claimant was, at the time of his accident, within the course and scope of employment. We cannot agree that this resolution of the conflicting evidence was against the great weight and preponderance of the evidence, even if subject to other inferences or resolution. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, we affirm the decision and order of the hearing officer.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Appeals Judge

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Philip F. O'Neill
Appeals Judge