APPEAL NO. 991057

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 23, 1999. He determined that the appellant (claimant) was not in the course and scope of his employment when involved in a motor vehicle accident (MVA) on _____; that the claimant failed to give his employer timely notice of the claimed injury; and that he did not have disability. The claimant appeals these determinations, contending that they are not supported by sufficient evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a car salesman. He testified that he left work at the dealership in City at about 4:00 or 4:30 p.m. on Saturday, September 19, 1998, with the employer's permission, to drive a sale car to a potential buyer in West City 1. If the customer liked the car, the claimant was to leave it with the customer and bring her trade-in back to the dealership for appraisal. It was prearranged that the claimant would meet later that day with the customer. He said that he arrived in City 1 about 8:00 p.m. and called the customer, but could not reach her. He stayed overnight at his sister's house in City 1 and the next morning, Sunday, _____, met with the customer, who lived at her place of business. The claimant admitted that he had already known the customer and had dated her in the past. When the claimant arrived at the customer's location, he had to wait while her trade-in was being worked on by a Mr. J, her mechanic and possibly an employee at her place of business. According to the claimant, he showed the car to the customer, who test drove it, and agreed to buy it contingent on the value of her trade-in. The claimant said that she asked him to show Mr. J how everything worked on the sale car and also to drive Mr. J home. The claimant did so in the sale car and on the return trip from Mr. J's residence to the customer's location, the claimant had a MVA, as a result of which he claimed back injuries. The accident occurred at approximately 4:51 p.m. and there was little evidence about the distance from the customer's location to the scene of the MVA. The claimant further testified that on the drive to Mr. J's residence, Mr. J expressed interest in buying a vehicle if he could afford the payments. He said he had not previously known Mr. J and only took him home to show him how the car worked, pursuant to the customer's request, and because he thought Mr. J may become a customer. The claimant returned to the dealership that day in the customer's trade-in vehicle, and the customer eventually bought a car from the dealership. The customer did not testify, but submitted an affidavit in which she said the claimant was taking Mr. J home "and demonstrating the new vehicle as he was also interested in a purchase." Mr. J did not testify or submit a written statement.

It was not disputed that the employer regularly would send salesmen with cars to potential buyers for sale and return with a trade-in for appraisal. Ms. W, the general manager, testified that the claimant had permission to take the sale car to City 1 to show it

to the customer and directly return with the trade-in vehicle. She said she made arrangements with the customer for the claimant to arrive on Saturday and show her the vehicle that day. She also knew that the claimant intended to stay in City 1 overnight with his sister and return the next day. It was her opinion that the claimant also knew the employer's policy that use of the sale vehicle or the trade-in vehicle for any personal reason was not allowed. The distance from City 1 to City was represented as being approximately 122 miles.

The claimant had the burden of proving that he was injured in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether an injury occurs in the course and scope of employment is generally a question of fact for the hearing officer to decide. Section 401.011(12) defines course and scope of employment 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 concept of course and scope generally does not include transportation to and from the place of employment except in certain limited circumstances; one of these, the "special mission" exception, arises where the employee is directed in his employment to proceed from one place to another. Section 401.011(12)(A)(iii). In addition, the "dual purpose" exception arises where the travel furthers both the employee's personal affairs as well as the employer's business, so long as the travel would have been made even if there had been no personal business and would not have been made in the absence of the employer's business. Section 401.011(12)(B). As a general rule, a compensable injury arises if an injury occurs in the course of activity that is required or authorized by the contract of employment. Lesco Transportation Company, Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ). There is no question that the claimant was on a special mission directed by the employer when he drove the sale car to City 1. The fact that a trip of 122 miles took some three to four hours to complete does not necessarily remove the activity from the course and scope of employment. Critical to a resolution of the course and scope issue in this case is whether the claimant at the time of the accident had so deviated from the special mission as to no longer be engaged in the furtherance of the employer's business.

The position of the claimant that he did not deviate from the course and scope of his employment is based on his contention that Mr. J expressed interest in buying a vehicle and thus was a potential customer that he was cultivating and also that, by offering the ride to Mr. J, he was in effect pleasing the customer by doing a reasonable favor for her friend. Not to have done the favor, he argues, could have antagonized her to the point of not buying a car from this dealership. The carrier counters this position with the terse

argument that the claimant was simply returning from a "personal favor for a woman he was dating." The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). He commented in his decision and order that he did not "give much credibility to the Claimant and his version of events." In particular, he wrote that the claimant's "explanation of why he drove Mr. J home for the prospective buyer is not credible at all, and was a severe departure from his business in City 1" and that the claimant knew the restrictions placed by the employer on such activities. He made findings of fact that the claimant's trip to take Mr. J home was a "favor for the prospective buyer," Finding of Fact No. 4, and that in doing so, the claimant "deviated from his business for the Employer." Finding of Fact No. 6. Based on these findings, he concluded that the MVA did not occur in the course and scope of the evidence.

In his appeal, the claimant asserts that the hearing officer was wrong in his evaluation of the evidence and failed to recognize the importance of taking Mr. J home both to business development and the completion of a sale to the customer. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer or to impose on the hearing officer a set of inferences to be drawn from evidence. Rather, we conclude that the evidence deemed credible by the hearing officer was sufficient to support his determination that the MVA did not occur in the course and scope of employment and affirm that determination.

The hearing officer found that the claimant did not give the employer notice of his injury within 30 days as required by Section 409.001 thus relieving the carrier of liability had there been a finding of a compensable injury. Whether and, if so, when notice is given is a question of fact. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The claimant testified that he told Ms. W by telephone on _____, while still in City 1, that he was involved in the MVA and was experiencing headaches. He said he also told Mr. G, the used car sales manager, at work on _____, that he hurt himself the day before while selling a car and requested permission to visit a doctor. Both Ms. W and Mr. G testified that the claimant had been regularly going to a chiropractor before the MVA and that the claimant only reported he was in an MVA, not that he was hurt. In a transcribed recorded telephone conversation, Mr. G was asked if he inquired of the claimant why he wanted to go to a chiropractor or if the claimant told him, and Mr. G responded "I just assumed that it was because of the wreck. I did not ask him." At another point, Mr. G said "this accident, of course, could not have helped the situation at all. And in this case, him going to the chiropractor more than usual is, I believe, what he is complaining about now . . . I think he just reinjured. . . an old injury." In his appeal of the finding of no timely notice, the claimant asserts that the hearing officer "failed to consider [Mr. G's] admission of notice" and that, based on Mr. G's statement, "at the very least the employer was aware of an [sic] reinjury." The claimant had the burden of proving timely notice. Contrary to the position of the claimant on appeal, the hearing officer was not

required to construe the comments of Mr. G (or Ms. W) to be an "admission of notice." To the contrary, the comments of Ms. W and Mr. G, as further amplified at the CCH, could be construed as knowledge only of the MVA, not an injury. The suggestion that Mr. G was "aware" of a reinjury is also speculation on the part of the claimant and does not address the important question of when he became "aware." Under our standard of review, we find the evidence sufficient to support the determination of no timely notice.

Finally, we find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge