

APPEAL NO. 991282

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 May 20, 1999. The issues concerned whether the respondent (claimant), was in the course and scope of his employment when he was injured on _____, and whether he had disability due to that injury.

The hearing officer determined that the claimant was in the course and scope of his employment as a deliveryman for (employer) when he injured his knee on _____, and that he had disability from January 30 through March 31, 1999.

The appellant (carrier) has appealed. It argues that, because the claimant was performing his normal duties and was not on a special mission, his injury was not compensable. The carrier also asserts that, because the claimant chose his route home from making deliveries, he was not on a special mission, but was merely traveling to and from the place of employment. There is no response from the claimant.

DECISION

Affirmed.

The claimant said he was employed as a deliveryman by the employer, a pet supply company based in another state with no permanent locations in Texas. His duties involved delivery of small pets and supplies to customers in West Texas and (State 1). The claimant was supplied with a delivery van, which could not be used for personal purposes, and the employer also paid for gasoline and maintenance. The claimant worked out of his home and his days of work ran from Tuesday through Friday. He said he worked 45 to 50 hours a week for a set salary of \$300.00

The claimant was called anywhere from 11:00 p.m. through 3:00 a.m. and he would then meet with a representative of the employer every morning at a local hotel room where he picked up the supplies to be delivered that day and given the list of the customer destinations. He would also turn over any returned products. Paperwork was also required for his deliveries, which he completed in the van or in his house. The claimant testified he also would "babysit" returned animals at his home until return could be accomplished.

The claimant said he was pulled by muddy conditions into a ditch on Friday, _____, when he was returning home from the (City M) area. The claimant had met the (State 2) driver at about 2:30 or 3:00 a.m., was given his products and list of delivery destinations, and thereafter headed to City M, which was a two and one-half hour drive. He made deliveries and finished around 3:30 p.m., and then returned to his city of residence. He had left the highway to make a shortcut to the small town where he lived.

He was on a dirt road when his truck became stuck. He said this was his normal route of return from City M. When he got out of his truck, he slipped in the mud and twisted his left knee. He informed his employer of the accident the following Monday afternoon, when the employer's headquarters office was open again, and was told to go to a doctor. He selected a doctor with a clinic and sought treatment that Tuesday. His treating doctor was Dr. H, who diagnosed pulled tendons and ligaments; Dr. H put him on a sedentary level of work, but the employer had no sedentary work to offer him as there was no Texas office.

The claimant stopped seeing the doctor because the carrier denied the claim. He therefore did not work until March 31, 1999, when he began working a lighter duty job as a telephone technician for a communications company. He said he could not have worked his delivery job because of the need to load and climb into the van. He said that, although he was headed "home" when the accident occurred, he also would have had to complete paperwork for the employer at his home office. The claimant said he would have had no reason to be traveling on the road from the town where he left the highway to his residence were it not for the deliveries made into City M.

Resolution on conflicting facts, and assessment of whether it was believable that the claimant fell on his hands or knees, were within the scope of responsibilities of the residing finder of fact, who has had the opportunity to observe the demeanor and testimony of witnesses as we have not. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

However, we note that the facts in this matter are essentially undisputed; the controversy involves a legal issue. While the carrier argues that the claimant was required to prove he was on a special mission, the case law it cites is inapplicable to the situation here, where the claimant works as a deliveryman for an employer that has no permanent location in the state, and where the means of transportation are provided by the employer. More directly applicable are Appeals Panel decisions involving persons who, like the claimant herein, are not employed from one set work station but travel from site to site and home again as the basis of what is done to further the employer's business. Texas Workers' Compensation Commission Appeal No. 961193, decided July 30, 1996; Texas Workers' Compensation Commission Appeal No. 962134, decided December 9, 1996; and Texas Workers' Compensation Commission Appeal No. 980133, decided March 6, 1998.

The "transportation exception" in the definition of course and scope is set forth in Section 401.011(12). While travel to and from "the place of employment" is generally not covered as part of the course and scope of employment, there are exceptions to this where transportation is furnished as part of the contract of employment or paid for by the employer, where the means of transportation are under control of the employer, or where the employee is directed in the course of employment to proceed from one place to another place. Where the essence of the employee's employment is delivery of the employer's products, and in a company van supplied by and paid for by the employer who directs the destination of deliveries on a daily basis, any one of these exceptions could be found by the hearing officer to apply. The "special mission" provision relates only to Section 401.011(12)(A)(iii) and the hearing officer was not bound, under the facts of this case, to consider that sole exception. To the extent the carrier seeks to argue that the claimant's return home was a purely personal mission, Section 401.011(12)(B) provides that the injury is still within the course and scope of employment if travel to the place of occurrence would have been made even without the personal motivation, and would not have been made had it not been for the business of the employer. The claimant testified that his sole reason for following this route related to his assigned deliveries into City M. He also indicated (and it was not refuted) that he would have performed paperwork incident to his employer's business when he was at home.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That does not appear to be the case here, where the record contains evidence that supports the hearing officer's finding of fact and correctly applies the law to those facts. We therefore affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge