

APPEAL NO. 000118

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 December 16, 1999. The hearing officer determined that the respondent (claimant) sustained an injury in the course and scope of employment on _____, and that he had continuing disability from June 16, 1999, through the date of the hearing. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a structural welder. ALI, a "temporary personnel service," provided labor staffing to clients. One of these clients was BP. The claimant testified that he filled out an employment application for ALI at the BP facility in Pearland, Texas, with the assistance of a BP employee. According to Mr. B, a co-owner of ALI, this was a common practice, and that ALI reviewed all employment applications. The claimant said that two days later he was told (presumably by ALI) he was hired and that he should meet a Mr. M, also an employee of BP, in the (city) area for transport to a BP job site in (state). The claimant was paid an hourly wage rate for his work in (state). He testified that he was also paid for the travel time to (state). Once there, he checked into a prepaid hotel room and earned a per diem in addition to his hourly wages. His first day of work at the job site was June 9, 1999. On the morning of _____, he was riding to the job site in a vehicle driven by a Mr. L, whom he described as an employee of ALI, when the vehicle was rear-ended on a public street and he was injured. In a matter of days, he was flown back to Houston. The parties stipulated that the claimant was an employee of ALI on _____.¹

The primary issue in this case was whether the claimant sustained his injuries while in the course and scope of employment. 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.

¹Given this stipulation, and under the facts of this case, it is not necessary to perform a right of control analysis to determine the identity of the employer. See Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. We also note that, given the relationship between ALI as a personnel staffing company and BP as its client, the parties did not raise an issue of borrowed servant. See Texas Workers' Compensation Commission Appeal No. 941124, decided October 6, 1994.

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). Generally, an employee on a special mission does not go into and out of the course and scope of employment while on that special mission for purposes of eating or commuting to and from lodgings at the site of the special mission. This is sometimes referred to as the principle of "continuous coverage." Texas Workers' Compensation Commission Appeal No. 980924, decided June 22, 1998; Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995. It applies to special missions unless there is a deviation from or abandonment of the course and scope of employment while on a personal errand.

The carrier argued both at the CCH and again on appeal that the claimant was not in the course and scope of employment at the time of the injury for two reasons: first, that ALI did not direct the mission to (state) and did not even know the claimant was there; and, second, because the injury occurred when the claimant was traveling to the job site from his "home base" just as he would have had to do had he been traveling from his usual home to his place of employment.

With regard to the defense that he was not on a special mission of the employer, ALI, the carrier offered the testimony of Mr. B. He agreed that ALI sent the claimant to BP to fill out the application for employment. He also said it was not normal for ALI's clients to send ALI employees out of the state, that ALI did not pay the per diem, lodging or travel costs, but that ALI did pay the claimant his wages. He said neither he nor anyone at ALI gave the claimant instructions about the job in (state) and he believed that the claimant would work for the client at their Pearland site, not in (state). Beyond this, there was little evidence on the business relationship between ALI and BP other than the payroll records completed by BP for the claimant's labor on an ALI form and submitted to ALI for preparation of the claimant's paycheck. One of the provisions on the back of this form states that the "Client [in this case BP] accepts the obligation to discuss all matters concerning Employee [in this case claimant], including without limitation, employee's job assignments, wages and payroll procedures with Contractor [in this case ALI] and not with Employee directly." The claimant himself had little knowledge of who paid his per diem, travel, and lodging expenses, but knew that his paychecks came from ALI.

The hearing officer considered this evidence and found that the "Claimant was directed to a job site in (state)," Finding of Fact No. 3, and that "ALI paid Claimant for the days and work performed in (state) from June 8, 1999 to June 15, 1999." Finding of Fact No. 4. The carrier appeals Finding of Fact No. 3 on the grounds that it was fatally defective in not containing a finding of who directed the claimant to the (state) job site. We construe these findings to be essentially that the claimant was on a special mission and that ALI, the employer, directed him on, or at least concurred in, this special mission. Indeed, given the order to pay benefits, this is the only plausible interpretation of this finding. The carrier appeals Finding of Fact No. 4, asserting that it was "based on the assumption that the work

was performed at the location documented on the work slip, . . ."; that is, the BP location in Pearland. Clearly, Mr. B testified that ALI had no idea that the claimant was working in (state) and had nothing to do with his being assigned duties there. The hearing officer, as fact finder, could reject this testimony as not credible. Section 410.165(a). She could also have inferred from the portion of the payroll record quoted above that the parties complied with their obligations and conferred on the claimant's work assignment. Ultimately, whether the claimant was on a special mission directed by ALI was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 991524, decided August 30, 1999 (Unpublished). 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). Under this standard of review, we find the evidence sufficient to support the determination that the claimant was on a special mission directed by ALI, and decline to reverse it.

The carrier also argues that, regardless of the special mission status of the claimant, he was not in the course and scope of employment when injured because he was merely traveling to work from his temporary "home," and that normal principles which place injuries while going to work outside the course and scope of employment should govern. These include the premise that in going to work on this day, the claimant was not exposed to any greater risk than the general public is exposed to on a commute to work. We do not believe that this gloss on the special mission doctrine comports with existing law and precedent. See Texas Workers' Compensation Commission Appeal No. 941234, decided October 31, 1994, and cases cited therein. When a claimant is assigned on a special mission reasonably construed to require spending the night at the special mission site or beyond a normal commute to and from home, that claimant remains in the course and scope of employment unless he or she deviates from the special mission for personal reasons. Such personal reasons may include sightseeing or going to a special restaurant or entertainment facility. Deviations, generally, do not include a more or less direct route from the temporary lodgings to the workplace. There was no evidence or suggestion in this case that the claimant and the driver of the vehicle in which he was riding were not in a more or less direct route to the work site. For this reason, we find no merit in this aspect of the carrier's appeal.

Finally, the carrier appeals the disability determination primarily on the basis that there was no compensable injury, but also on the basis that there was insufficient medical evidence to support a finding of disability and because a surveillance videotape demonstrated the contrary. Whether the claimant had disability was a question of fact which could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant testified that he could not return to his preinjury job (and, by implication, wages) because of his compensable injury. The hearing officer found this testimony credible and not overcome by the videotape evidence. Under these circumstances, the lack of more medical evidence was not fatal to the claim of disability.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCUR IN THE RESULT:

Joe Sebesta
Appeals Judge