APPEAL NO. 001420

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 March 22, 2000, and the record closed on May 16, 2000, in (city 1), Texas. With regard to the two issues before him, the hearing officer determined that the appellant (claimant) was not in the course and scope of his employment at the time of a motor vehicle accident (MVA) and that the claimant has not had disability. The claimant appealed, contending that this was not a situation of going to and from the place of employment, but was rather a situation similar to where salesmen, service people, and others use their automobiles in their work which involves travel away from the employer's premises. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, citing Section 401.011(12); contending that this is a "coming and going" case and that the claimant was not engaged in the furtherance of the business of the employer at the time of the MVA; and urging affirmance of the hearing officer's decision.

DECISION

Affirmed.

Much, but not all, of the evidence is undisputed and stipulated. The parties stipulated that the claimant was a "driller" on a drilling rig and that he was injured in an MVA on _____, while returning from a drilling rig in New Mexico after the completion of a work shift. The evidence generally established that the driller is in charge of the crew and it is the driller's responsibility to obtain a full crew and supervise the members of the crew. The claimant testified that on the evening of _____, he drove to a nearby town and picked up three members of his crew, including JR, and that after getting gas, they drove to the rig site some two and one-half to three hours away and worked from around 10:00 p.m. until 7:00 a.m. on _____. The evidence is that the claimant instructed/asked JR to drive back (or at least a portion of the way) and that about an hour away from the rig, JR fell asleep and "hit the only tree in that part of (city 2)." The evidence was that the claimant received an hourly wage plus $32.00 per day as "safety pay." The claimant testified that he considered the $32.00 money for gas, tires, and money to provide transportation to his crew. It is undisputed that only the driller received this "safety bonus" and it is also undisputed that the driller would get the $32.00 regardless of how far or close by the rig was (it was clearly not based on mileage). There was also evidence that the driller received overtime pay on the $32.00 when he worked overtime and that employees could drive their own vehicles to the rig.

The hearing officer found that it was the driller's "responsibility to show up with a full crew" and it was in the employer's interest to have a full crew "to avoid safety hazards" and avoid holding over another crew. The hearing officer also found:

FINDINGS OF FACT

4. Claimant received $32 per day safety pay but no other crew member received this pay and it did not vary with distance to rig location.

5. Any member of the crew who wished to provide his own transportation would have been allowed to do so.

6. Employer did not pay for the travel time to or from the rig location.

7. Claimant directed [JR] to drive since he indicated he was not too sleepy and could do so.

8. Employer had advised it's workers and had them sign memos of understanding that Employer did not provide transportation or reimbursement for travel to the rig site.

9. The travel involved was a commute to the place of employment and the transportation was not furnished as part of the contract of hire or paid for by Employer.

10. The means of transportation was not under the control of the Employer.

11. Claimant was not on a special mission for Employer but commuting home after his shift when the accident occurred.

The hearing officer concluded that the claimant was not in the course and scope of his employment at the time of the MVA. The claimant, on appeal, contends that the employer has a fixed place of business in city 1, Texas, and sends crews to well sites at different locations, depending on the drilling contracts obtained by the employer. The claimant's argument is that any travel away from the employer's fixed place of business constitutes travel away from the employer's premises and that the claimant "was not going to work or going home from work while traveling to and from [the rig site in (state)]. Instead, he was traveling from one place to another place at the direction of Employer and § 401.011(12)(A)(iii) should be held applicable to this claim."

As referenced by the claimant, the key is the interpretation of Section 401.011(12) which defines course and scope of employment as:

> 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 does not include:

(A) transportation to and from the place of employment unless:

(i) the transportation is furnished as a 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 rationale for this exclusion regarding "transportation to and from work" is that an injury resulting during such transportation is a hazard that the general public is exposed to on the public highways and is not considered to be a risk or hazard inherent in or originating in the employment. Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex. 1963).

In Texas Workers' Compensation Commission Appeal No. 992399, decided December 13, 1999 (Unpublished), a fairly recent case involving somewhat similar circumstances where the injured employee in that case was a "tool pusher," was driving a company vehicle, and was injured in an MVA while going home, the Appeals Panel affirmed the hearing officer's decision that the claimant was not in the course and scope of his employment. In that case, we held that the "mere furnishing of transportation" by the employer (and not the situation in the present case) does not automatically bring the employment with the protection of the 1989 Act citing Wausau Underwriters Insurance Co. v. Potter, 807 S.W.2d 419, 421-422 (Tex. App.-Beaumont 1991, writ denied). A claimant still must prove that he or she was acting in the course and scope of employment at the time of the injury. In the instant case, the claimant was in his own vehicle and, other than being on his way home from work, there was no business being furthered by the claimant's activity at the time of the injury.

Nor do we find the claimant's argument persuasive that travel away from the employer's premises in city 1 constituted travel from one place to another at the direction of the employer. In Texas Workers' Compensation Commission Appeal No. 990949, decided June 17, 1999, we cited Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990) where the Texas Supreme Court held that an employee who was killed on his way to a special safety meeting was not in the course and scope of his employment, as a matter of law, notwithstanding the fact that the safety meeting started earlier and at a different location than the employee's regular work. An employer may direct an employee to begin work (or the work may end) at a different location other than the normal work location without thereby creating a "special mission." Texas Workers' Compensation Commission Appeal No. 961503, decided September 16, 1996. In the instant case, the employer had directed the claimant to work at a particular location, drilling rig site 22, and, by doing so, did not create a special mission or a situation where regular and routine travel to and from that particular rig site would bring the claimant within the exception of being directed to proceed from one place to another place. We hold that the

claimant was not in the course and scope of his employment at the time of the accident and injury but, rather, that he was merely returning from his place of employment when the accident occurred.

In that we are affirming the hearing officer's decision that the claimant did not sustain a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge