APPEAL NO. 001582

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 June 6, 2000. The hearing officer determined that the deceased was in the course and scope of his employment when he had a fatal motor vehicle accident (MVA) on _____. The appellant (carrier herein) appeals arguing that the deceased was not in the course and scope of his employment because he was only traveling to work at the time of his fatal accident. The carrier asks that we render a decision that the deceased was not in the course and scope of his employment and the respondent (beneficiary herein) is not entitled to death benefits. The beneficiary responds that the deceased was in the course and scope of his employment at the time of his death and that the decision of the hearing officer should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The essential facts of the case are not in dispute. The deceased was hired to work as a psychologist by the employer, which was in the business of providing psychologists and counselors to nursing homes. The deceased was living out of state when he was hired to provide psychological services at three of the nursing homes to which the employer provided psychologists and counselors. All three of the nursing homes at which the deceased was hired to work were in the rural areas--specifically the Jasper-Woodville area.

Mr. D, the employer's executive vice-president for operations, testified that it was a challenge to find personnel to work in these areas. It was undisputed that a number of the professionals provided by the employer to these nursing home facilities did not live in the local area but commuted. Mr. D testified that the employer would prefer its employees to live in the local area but did not require it. Mr. D testified that some of these employees received travel allowances and that the deceased was receiving a travel allowance of $125.00 per week at the time of his death. Mr. D testified that this travel allowance was not part of the deceased's initial compensation package but was negotiated after the deceased settled in the Houston area.

The beneficiary, the deceased's widow testified that she and the deceased located in a town near Houston when they moved to Texas because she had more opportunity to find employment as an engineer than she would have had in a rural area. She testified that the deceased commuted to and between the three nursing homes during the week. On _____, while driving from his home to one of the nursing home facilities, the deceased was killed in an MVA.

Section 401.011 defines course and scope of employment as follows:

> (12) "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 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; or
>
> (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
>
> (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
>
> (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

Both parties recognized that the foregoing provision is very similar to statutory language prior to the 1989 Act and seeks to codify long-standing Texas case law predating the 1989 Act. The parties cite numerous Texas appellate cases and Appeals Panel decisions in support of their respective positions. The hearing officer explicitly states in his decision that the case he found controlling was United States Fire Insurance Company v. Brown, 654 S.W.2d 566 (Tex. App.-Waco 1983, no writ) (hereinafter Brown). In Brown the Waco Court of Appeals held that travel by a nurse, who worked at different hospitals each

day and was paid mileage by the employer, was beneficial to the employer and was in the course and scope of employment when the nurse was killed in an MVA traveling from her home to one of the hospitals she was assigned to work by the employer. We also find the Brown case controlling to the present case, particularly in light of the hearing officer's Finding of Fact No. 5 in which he stated as follows:

> It was tacitly understood between [employer] and [deceased] that [deceased] would use his own automobiles for traveling to distant assignments at different facilities each day, and was implicit that as part of his job he would be exposed to the risks of highway travel.

We find legally sufficient evidence in the record to support this finding and believe this finding itself brings the present case into the ambit of the Brown case.

We also note that the result reached by the hearing officer in the present case is also consistent with our decision in Texas Workers' Compensation Commission Appeal No. 980133, decided March 6, 1998, in which we reversed and rendered a decision that the deceased was in the course and scope of his employment when he was traveling from his home to one of the sites to which he was assigned to work as a nurse.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result and would confine the holding of the majority to the specific facts of this case. The carrier in its appeal contended that travel cases should be analyzed in two respects: 1) did the injury arise out of a risk of employment and, 2) was the employee furthering the affairs of the employer at the time of the injury? I agree.

In United States Fire Insurance Company v. Brown, 654 S.W.2d 566 (Tex. App.-Waco 1983, no writ), the employees were allowed to refuse an assignment by the employer, but excessive refusals without good reason resulted in contract termination by the employer. The deceased in Brown, was informed before he was hired that he would do much highway traveling. A basic part of his employment agreement was that he would have to travel often and would be reimbursed for his travel expenses. The Brown court found that the deceased was directed in his employment each day to proceed from one place to another and that the required travel was pursuant to the express or implied requirements of his employment contract that he face the hazards of streets and highways. It was undisputed that the very nature of his business required the deceased to travel the highways to attend to his duties for the employer.

In the case at bar, the deceased had the option of living in the Jasper-Woodville area where he was to perform his daily activities, but chose instead to live in a suburb of Houston. It was only after he had moved and began the daily commute that he renegotiated his employment contract with the employer to include an additional $125.00 weekly travel allowance. The employer too, as in Brown, faced the difficulty of continuing operations without the deceased's willingness to travel to remote areas of East Texas. The hearing officer found a tacit agreement between the employer and the deceased that was memorialized by the additional payment of $125.00 as a travel allowance which benefited the employer by having the deceased travel from his home to the locations he was assigned. Thus, the travel became an integral part of his new employment contract and he began execution of this part of his job duties when he left his home on a direct route to his worksite. Under the facts of this case, the deceased's death which resulted from his injury of _____, did arise out of a risk of his employment with the employer and he was furthering the affairs of the employer at the time of the injury.

I affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge