APPEAL NO. 010578

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on February 16, 2001, the hearing officer resolved the two disputed issues by concluding that the respondent (claimant) was injured in the course and scope of his employment at the time of his motor vehicle accident (MVA) on _____, and that the claimant's disability started October 4, 2000, and continued through the date of the hearing. The appellant (carrier) urges on appeal that the claimant was not injured in the course and scope of his employment because he was merely driving himself and his drilling crew home from work when the MVA occurred and, alternatively, that even if the claimant was in the course and scope of his employment while driving home, he made a stop en route where the crew purchased beer which they drank on the drive home and that this deviation took the claimant out of the course and scope of employment. The claimant's response urges the sufficiency of the evidence to support the challenged factual findings and conclusions.

DECISION

Reversed and a new decision rendered that the claimant did not sustain an injury in the course and scope of his employment on _____, and did not have disability.

The claimant testified that he was hired by the employer as a driller about four months before the MVA; that it was his responsibility as a driller to acquire a crew of four hands and be responsible for their being at the drilling rig site on time for their shifts; and that in addition to his regular wages he received a $50.00 per diem payment from the employer for unspecified "expenses." The claimant further stated that he and three of the crew members lived in (City 1) which is 167 miles from the drilling rig site, a drive of approximately three hours; that he regularly picked up these crew members and drove them to and from the rig; and that the fourth crew member lived in (City 2) and sometimes, but not always, drove himself to the rig. He stated that he had been in the oil drilling business about 25 years; that in the past, to about 1993, drilling companies paid drillers "driving pay"; that this practice was stopped years ago because of tax and liability issues; and that he regarded the per diem payments which companies like the employer later began making to drillers as reimbursement for the expenses in getting to and from the rigs and as "driving pay" with another name. He conceded that the employer never instructed him to transport his crew; that he and not the employer paid for all the costs associated with operating his vehicle; that he did not go "on the clock" until he arrived at the rig site; that the per diem amount of $50.00 the employer paid him did not change when the employer's rig changed sites; and that the per diem bore no relationship to the number of miles he drove to and from the rig sites. The claimant also said that although it was his choice to drive the crew, he did so because he did not believe they would all show up for each shift, and on time, unless he did so; that having them at the rig on time was his responsibility as a driller; that this particular crew had worked with him from two days to five months before the MVA; and that the assumed they had their own vehicles. He felt that if he failed to have his crew on site and on time, he would be "let go" by the employer.

The claimant further testified that on _____, while driving home with the crew to City 1, he stopped in City 2 where he purchased a coca cola and the crew purchased beer; and that while en route from City 2 to City 1, he was injured in an MVA. He said he has undergone operations on his left ankle and left wrist, has not been released to return to work, and that he is unable to work in the oil field.

Mr. C, the employer's safety director, testified that drilling companies stopped paying travel pay to drillers in 1993 or 1994; that in the past few years the employer began paying per diem to drillers as "a perk" to meet the competition for drillers; that the employer does not tell drillers to transport their crews to the rig sites; and that the employer has crews who drive themselves to the rigs. He agreed with the notion that if a driller does not have a crew, the driller will be "let go." In her affidavit, Ms. D, who is in charge of the employer's payroll, states that in 1994 the employer stopped providing transportation to and from job sites; that since that time the employer has paid no additional monies to drillers or other rig workers for travel; and that the pay for these personnel starts when they commence work on a location and ends when they leave the location.

Section 401.011(12), which defines course and scope of employment, provides that 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 the 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 excluding "going to and coming from" work travel is that such transportation is a hazard to which the general public is exposed on the public highways and is not considered 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. 001420, decided August 2, 2000, a very similar case to that we here consider, the Appeals Panel affirmed the decision of this hearing officer which determined that the driller in that case was not in the course and scope of his employment when he was injured in an MVA on his way home from a drilling rig after completing his shift. In that case, the driller received $32.00 per day as "safety pay," regardless of the distance to the rig; he picked up his crew and drove them to and from the rig which was a two and one-half hour drive; and the employees could drive their own cars to the rig if they chose to do so. The hearing officer found in that case that it was the driller's responsibility to show up with a full crew; that the employer did not pay for the travel time to or from the rig location; that any member of the crew who wished to provide his own transportation would have been allowed to do so; that the travel 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 the employer; that the means of transportation was not under the control of the employer; and that the claimant was not on a special mission but was commuting home after his shift had ended when the accident occurred. Our decision in Appeal No. 001420 cites several similar cases.

In the case we consider, the hearing officer made a number of findings similar to those he made in Appeal No.001420 concerning the course and scope issue. However, he also found in this case that the travel to a remote location was in furtherance of the employer's business interests; that the trip was made solely for the purpose of working for the employer; that the means of transportation was under the control of the driller who was supervisor of the employer; that the means of transportation was under the control of the employer; that the per diem was for the driller's expenses; and that the $50.00 per day paid the claimant was a payment of transportation costs for the crew.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that the finding that the means of transportation was under the control of the employer, apparently grounded on the finding that the means of transportation was under the control of the claimant as a supervisor, is against the great weight of the evidence and that the conclusion of law that the claimant was injured in the course and scope of his employment at the time of the MVA is without sufficient factual foundation. Since the determination that the claimant had disability is dependent upon the determination that he sustained a compensable injury, that determination too must fall.

The decision and order of the hearing officer are reversed and a new decision is rendered that the claimant was not injured in the course and scope of his employment on _____, and that he does not have disability.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge