APPEAL NO. 010996
FILED JUNE 21, 2001

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 April 18, 2001. The hearing officer resolved the two disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____, and that he had disability as a result of the injury sustained on _____, beginning January 22, 2001, and continuing through February 20, 2001. The appellant (self-insured employer) appealed, contending that the claimant was not in the course and scope of his employment at the time he was injured in a motor vehicle accident (MVA) and that the "coming and going" rule should be applied. The appeal file does not contain a response from the claimant.

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 employed as a customer service representative for a self-insured employer in which he served delinquent notices, disconnected water services, and was on a rotational "stand-by" or "on-call" status to respond to service calls from customers. In addition, the claimant had other job duties such as delivering mail to the company's field office. On _____, the claimant was on "stand-by" status as he traveled from his office to the field office to deliver mail and he then proceeded to travel to his home in the company truck at about 5:25 p.m. Shortly thereafter, while en route to his home, the claimant was involved in an MVA in the company truck at 5:30 p.m. The claimant called his supervisor to inform him of the MVA and was directed to take the company vehicle to an auto repair shop. While the claimant was at the auto repair shop, he was called by the company's dispatcher to respond to two service calls at 8:05 PM. After the claimant responded to the service calls, he proceeded to travel to his home and called the dispatcher to clock out at 9:34 p.m. The claimant was paid by the self-insured employer from the time he left the field office, at 5:25 P.M, to the time he got home and clocked out by calling the dispatcher at 9:34 p.m. The self-insured employer's representative testified that payment to the claimant for these hours was an administrative error and the self-insured employer has proceeded to clarify the payment policy for employees on "stand by" status by an internal memo as a result of the claimant's MVA.

The claimant contends that at the time of the MVA, he was in the course and scope of employment because he was on "stand by" status, did not clock out until he got home at 9:34 p.m., and because he was paid. The self-insured employer contends that the claimant was not in the course and scope of employment because he was on his way home and subject to the same risks and hazards as any person traveling to and from home, pursuant to the "coming and going" rule.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The pertinent findings of fact and conclusions of law at issue are as follows:

> Finding of Fact No. 2. On _____, Claimant was involved in a MVA, after regular business hours, on his way from the dispatcher's office to his place of residence while driving the company vehicle.
>
> Finding of Fact No. 3. Claimant was on "standby" status at the time of the MVA on _____ and had not called the dispatcher to "clock out."
>
> Finding of Fact No. 4. Claimant was paid from the time he left his office until he returned home and called the dispatcher several hours after the MVA.
>
> Finding of Fact No. 5. Claimant was engaged in or about the furtherance of the affairs or business of the employer at the time he was involved in the MVA on _____.
>
> Finding of Fact No. 6. Claimant did sustain an injury in the course and scope of his employment on _____.
>
> Finding of Fact No. 7. Due to the claimed injury of _____, Claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage beginning January 22, 2001 and continuing through February 20, 2001.
>
> Conclusion of Law No. 3. Claimant did sustain a compensable injury on _____.
>
> Conclusion of Law No. 4. Claimant did have disability as a result of the injury sustained on _____ beginning January 22, 2001 and continuing through February 20, 2001.

The hearing officer erred in determining that the claimant sustained an injury in the course and scope of employment on _____, and that he had disability. Section 401.011(12) provides that:

> 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.

The general rule is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is not compensable. Texas Workers' Compensation Commission Appeal No. 961622, decided October 2, 1996; American General Insurance Co. v. Coleman, 303 S.W.2d 370 (Tex. 1957). The rule is known as the coming and going" rule. The rationale of the rule is that "in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject to rather than risks and hazards having to do with and originating in the work or business of the employer." Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350, 353 (Tex. 1963). Appeal No. 961622.

The hearing officer was persuaded by the claimant's testimony that he was in the course and scope of employment at the time of the MVA because: (1) he was traveling in the company vehicle; (2) he was in "stand by" status; and (3) he was paid from the time he left the office until he returned home later that evening. It is undisputed that the claimant was traveling to his home in a company vehicle; however, this fact in and of itself does not bring the claimant within the course and scope of employment." The Appeals Panel has held that merely because claimant was assigned a vehicle does not, in and of itself, put

claimant in the course and scope of employment. Appeal No. 961622, *supra*. A Texas court also has held that the "mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the Texas Workers' Compensation Act. If this were not the law in this State, then each and every accident in a company vehicle, including those operated for purely personal reasons would be compensable under the Texas Workers' Compensation Act." Wasau Underwriters Ins. Co. v. Potter, 807 S.W.2d 419, 422 Tex. App.-Beaumont 1991, writ denied) citing United States Fire Insurance Company v. Eberstein, 711 S.W.2d 355 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). See also Poole v. Westchester Fire Ins. Co., 830 S.W.2d 183 (Tex. App.-San Antonio, 1992) citing Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965). See also Texas Workers' Compensation Commission Appeal No. 92324, decided August 26, 1992, and Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993.

A Texas court of appeals held that even if the employee falls within one of the recognized exceptions to the "coming and going" rule, he must be in the furtherance of the employer's business at the time of the injury. Poole, *supra*.

The hearing officer was persuaded by the claimant's testimony that he was in the furtherance of his employer's business efforts "as he was returning from delivering mail to the dispatcher and he was on standby ready to accept a page or radio call from the dispatcher as he proceeded home." Although the MVA occurred while the claimant was on "stand by," the Texas courts have held that this fact does not place the claimant in the course and scope employment.

In Loofbourow v. Texas Employers Insurance Association, 489 S.W.2d 456 (Tex. Civ. App.-Waco 1972, writ ref'd n.r.e.) a nurse-anesthetist who was required by a hospital to be "on call" at particular times was involved in an MVA on her way to the hospital. The claimant contended that the injury occurred while she was "at work," being paid for her duty, and acting in the course of her employment. The court held that the fact that the employee was "on call" and could be called at any time was not controlling, and where the employee is not required to perform any duty for the employer on the public street but rather all of his duties are to be performed at the place of business of the employer, the employee's injury while going to the employer's place of business is not in the course of employment and is not compensable. Loofbourow, 489 S.W.2d at 457; Aetna Life Insurance Co. v. Palmer, 286 S.W. 283, 284 (Tex. Civ. App.- Austin 1926, writ ref'd). This rule applies to the facts in the case at hand. The claimant was on "stand by" or "on call" at the time of his injury and was not required to perform any duty for the employer at the time he was traveling to his home.

Also, the Appeals Panel has held that "the fact that claimant was on-call 24 hours a day and that claimant carried a pager where his employer could contact him does not necessarily place him within the course and scope of employment. Were this theory carried to its logical conclusion, it would mean any number of occupations would automatically carry with it 24-hour-a-day workers' compensation coverage and would

include doctors, plumbers, locksmiths, etc., or anyone else that carries a pager." Appeal No. 961622, *supra*. See also Texas Workers' Compensation Commission Appeal No. 93898, decided November 15, 1993.

The great weight of the evidence establishes that the claimant was not in the course and scope of employment when he was involved in an MVA on _____, and does not establish disability. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We reverse the hearing officer's decision and order, and render a new decision that the claimant did not sustain an injury in the course and scope of employment on _____. Because the claimant did not sustain a compensable injury, he did not have disability.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge