APPEAL NO. 022942
FILED JANUARY 6, 2003

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 October 15, 2002. The hearing officer determined that the appellant (claimant) was not within the course and scope of his employment when he was injured in a motor vehicle accident on _____. Although he was unable to obtain and retain employment for certain periods of time due to his injuries, the hearing officer held that this was not disability because the injury was not compensable. The claimant appeals and argues that he was within the course and scope of employment and that the coming and going rule does not apply. The respondent (carrier) responds that the decision should be affirmed.

DECISION

Reversed and rendered.

The claimant was a truck driver, pursuant to an owner/operator contract with his wife and the employing trucking company which was the carrier's insured. The contract between the owner/operator and the insured, entitled an "Independent Contractor Equipment Lease Agreement," provided that the contractor (and its employees/drivers) retained certain discretion as to the manner of performing his or her job, but also provided that he or she was covered by the trucking company's workers' compensation insurance with an amount deducted for the premiums. The agreement provided that, except for periods when the equipment was removed from the service of the trucking company, the company retained "the exclusive possession, control, and use of the equipment." The agreement further provided that drivers would be provided by the "contractor" (the claimant's wife) and were employees of same. The contract provided that fuel and maintenance were the responsibility of the contractor. The trucking company was responsible for liability insurance while the equipment was in service of the trucking company "on an authorized dispatch." The contractor was responsible for property damage indemnification up to $1000 and for maintaining insurance on the leased equipment and for compensating drivers. The claimant said he was paid by the load. The agreement is governed by Oklahoma law (no proof of applicable Oklahoma law was made at the CCH).

The claimant picked up a loaded trailer from the regional location of the trucking company on the Friday before (the holiday) weekend. This location was around 70 miles from the claimant's home town. Witnesses for the trucking company said that this was permitted. The delivery was to be made on Tuesday morning (8:00 AM) after (the holiday) to the customer in a town around 200 miles away.

The conflicting testimony involved what happened thereafter: the claimant said that when he had picked up a load and was not leaving for the destination immediately,

he customarily would detach his loaded trailer and leave it at a truck stop five miles from his residence. He said that there were country roads and small bridges and implied that it would have been illegal to transport the overweight trailer (although he also testified that the trailer would have been just under the weight load maximum for this road). Witnesses for the trucking company stated that such separation of "bobtail" and trailer was not permitted without prior authorization, mainly for concerns about theft or damage to the loaded merchandise. The claimant said he was not aware of this policy until after the accident that led to his injury.

For the most part, the claimant said he was motivated by convenience and did not realize, before his accident, that detaching the trailer from his truck cab, or "bobtail," was prohibited by the trucking company's policy. Witnesses for the trucking company said that it was assumed that the trailer would remain attached to the bobtail when removed from the trucking company's premises. However, one witness agreed that problems and damage had occurred in past instances with drivers that informed the trucking company that trailers had been detached and left at truck stops. This same witness denied actual knowledge of what claimant's practice had been in this regard.

A witness for the trucking company said that a required procedure was a pretrip inspection of the truck and trailer (this is borne out by a trucking company manual). The claimant said that in this manner, things such as leaks or flat tires could be detected and remedied prior to transporting the goods. The claimant said that because he had to leave very early on Tuesday the 28th, he drove out to the truck stop on the night of May 27th, around 8:00, to perform his inspection. During the course of this ride, his brakes failed and he had a one-vehicle accident that caused injury and inability to work during time periods found by the hearing officer.

The carrier argued that violating the insured's rule against detaching the "bobtail" truck cab from the loaded cargo trailer provided such a deviation from the course and scope as to absolve the carrier of liability. The hearing officer makes clear in his discussion that he did not regard the rules violation as rising to a deviation from the course and scope of employment. Rather, the hearing officer ruled against the claimant for a reason not urged or argued by the carrier: that travel by the claimant in the cab portion of his truck to where the trailer was parked was covered by the "coming and going" rule set out in Section 401.011(12)(A).

We agree that it was error to find that the claimant was injured in the course of "coming and going" to or from work under these facts. There appears to be little more rationale for this holding than that the claimant's travel originated at his residence. As the claimant argues in his appeal, he was already at his "place of employment," in the leased truck, when the accident occurred.

The overriding question here, not directly answered by the hearing officer, was whether the injury arose from an activity undertaken while engaged in or in furtherance of the "employer's" business. In this regard, we would note that although the stipulation was made that the trucking company was the "employer," the claimant's actual

employer was the contractor under the owner/operator agreement, in this case his wife. Section 406.122(a) and (c) provide that an owner/operator's employees are not employees of a motor carrier (trucking company) if there is a written agreement that the owner/operator assumes the responsibilities of an employer, as is the case here. However, there may also be a written agreement providing for coverage of the owner/operator's employees under the motor carrier's coverage, Section 406.123(c), even though the owner/operator's employees are independent contractors. *See* Texas Workers' Compensation Commission Appeal No. 991328, decided August 6, 1999.

The business of the actual employer in this case appears to be furnishing a truck and driver to transport goods. A pretrip inspection is part of that operation according to the undisputed evidence. The hearing officer's decision indicates that he did not disbelieve the evidence that the claimant was driving to make a pretrip inspection (we note that the carrier does not dispute that this is what the claimant was doing at the time of the accident). The carrier's argument was that such travel for the inspection was required only because the claimant had violated the rule against separating the trailer, but the hearing officer's decision rejects the argument that this rule violation rose to the level of removing the claimant from the course and scope of his employment.

We reverse and render the decision that the claimant sustained a compensable injury in the course and scope of his employment with an owner/operator, that the carrier is liable for coverage under the agreement with the owner/operator and its insured trucking company, and that the claimant had disability for the period from May 28 through July 1, 2002, and from September 4 through October 3, 2002.

The true corporate name of the insurance carrier is **NATIONAL AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

STEPHEN CARLIN
13155 NOEL ROAD – 900 THREE GALLERIA TOWER
DALLAS, TEXAS 75240.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge