

APPEAL NO. 030130
FILED MARCH 10, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on December 12, 2002. The hearing officer determined (Docket No. 1), relating to decedent 1, and (Docket No. 2), relating to decedent 2, that the decedents were not in the course and scope of employment at the time of the fatal motor vehicle accident on _____. The appellants (claimant/beneficiaries) appeal those determinations, contending that the decedents were on a special mission for the employer. The respondent (carrier) responds, urging affirmance. The parties stipulated that the claimant/beneficiary of decedent 1 is not barred from pursuing a claim for death benefits because she timely filed her claim with the Texas Workers' Compensation Commission and that the carrier did not specifically contest compensability on the issue of timely filing of the claim.

DECISION

Affirmed.

The facts of this case were largely undisputed. The hearing officer summarizes the evidence in her decision and we adopt her rendition of the facts. We will only briefly touch on the facts most germane to the appeal. Both decedents worked for the employer. Decedent 2 had worked for the employer since 1995 as a full-time employee¹ and helped his friend and brother-in-law; decedent 1 obtained a temporary job with the employer as a general repairman. During October 2000 decedent 1 informed the employer that he had his driver's license suspended. Although his supervisor, JW, testified that decedent 1 was very talented and a valued employee, JW told decedent 1 with respect to his drivers license, "you're going to have to have it...I want [you] to punch out and go to town and see your attorney and go see that judge and find out what you've got to do to get your license back." Decedent 1 was told to "punch out" and he was taken home by decedent 2 when decedent 2 went to town with the company vehicle to pick up some supplies for the company. JW testified that it was company policy to use the company vehicle when running company errands. JW's statement indicates that later that morning decedent 1 called him, telling JW that he found an attorney that could help him get his license back in 24 to 48 hours for \$750 but that the attorney wanted the money up front and decedent 1 did not have it. JW asked decedent 1 if he was sure he wanted to do that because he would get his license back within 60 days anyway and decedent 1 being talented could get a job somewhere else. Decedent 1 wanted to remain employed with the employer. JW decided to loan the money to decedent 1. JW testified that he gave the check to decedent 2 because he volunteered to take the check to decedent 1 and because JW knew the decedents were brothers-in-law and were close. With respect to the delivery of the check, JW stated,

¹ Decedent 2 was required to clock in at the beginning of the day to create an attendance record and was paid 40 hours per week, regardless of whether he worked less.

“He [decedent 2] could have taken it any time.” JW testified that he did not know that decedent 2 had left to deliver the check until he heard there had been a fatal accident. Decedent 1’s wife testified that the decedents had already delivered the money to the attorney and were on their way back to the job when they were involved in the collision. At the time of the wreck the decedents were in decedent 2’s vehicle. JW testified that he told decedent 1 that he would need to have a document from the judge saying that decedent 1 could drive before he could return to work.

The burden of proof is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Company v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

As defined in Section 401.011(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[.]

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 noncompensable. 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 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).

Section 401.011(12)(A)(iii) is often referred to as the “special mission” exception. The claimant/beneficiaries contend that the decedents were on a “special mission.” This exception applies when an employee is directed in the employee’s employment to proceed from one place to another place. Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990).

If an employee comes within one of the stated exceptions to the general coming and going rule, that employee must still show that the injury occurred within the course

and scope of employment. Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993. JW denied that anyone with the employer directed the decedents to "proceed from one place to another." JW denied even knowing that decedent 2 had left the employer's premise to take the check to decedent 1. Decedent 2 left in his personal vehicle rather than the company vehicle used for company errands. The hearing officer determined that decedent 2 "volunteered to deliver" the check to decedent 1 and they "were not engaged in an activity of any kind of character that had to do with and originated in their work and they were not furthering the affairs or business of employer." The hearing officer specifically determined that decedent 1 and decedent 2 were not on a special mission for the employer when they were killed.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer reviewed the record and resolved what facts were established. We conclude that the hearing officer's determinations are sufficiently supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Roy L. Warren
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge