

APPEAL NO. 040891
FILED MAY 26, 2004

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 January 13, 2004, and concluded on March 30, 2004. The hearing officer determined that the decedent was in the course and scope of his employment at the time of his fatal injury on _____, and that his average weekly wage (AWW) is \$354.00 per week. The appellant/cross-respondent (carrier) appealed the hearing officer's determination regarding course and scope of employment. The respondent/cross-appellant (beneficiaries) responded, urging affirmance of that determination. The beneficiaries appealed the hearing officer's determination regarding the decedent's AWW. The appeal file does not contain a response from the carrier.

DECISION

Affirmed.

The underlying facts of this case are largely undisputed. The decedent was a contract welder who was sent out on welding jobs for the employer. A coowner of the employer testified that while the decedent was an independent contractor, he was covered under a Texas Workers' Compensation Policy owned by the employer through the carrier (we note that "coverage" was not disputed by the carrier). The claimant was paid \$25.50 per hour, of which \$6.50 was attributable to "labor" and \$19.00 was attributable to "rental." A deduction was made from each of the decedent's "invoices" to pay for his workers' compensation coverage. A contract between the employer and the decedent indicates that for every 15.385 hours the decedent worked at the employer's request, \$13.96 would be deducted from his invoice to pay for the workers' compensation coverage. It is undisputed that the decedent was paid \$25.50 per hour "portal to portal," that is to say, from the time he left on a job until the time he returned home or to the shop. On _____, the decedent was sent out to do a welding job in New Mexico by the employer. After completion of the job, the decedent was killed in a motor vehicle accident (MVA) on his way home. There is no dispute that the decedent was "on the clock" at the time of the fatal MVA.

The hearing officer did not err in determining that the decedent was in the course and scope of his employment at the time of his fatal injury on _____. The evidence presented indicates that traveling from location to location was an essential function of the decedent's job. The decedent was "on the clock" from the time he left for a job until the time he returned. The carrier asserts that the decedent, while having been directed to the job location in New Mexico by the employer, had completed his assigned task and was merely returning home. The carrier asserts that the decedent was doing nothing to further the employer's affairs at the time of the fatal MVA. The carrier asserts that the claimant was at no greater risk on his drive home than the general public.

We are not persuaded by the carrier's arguments on the issue of course and scope. The very nature of the decedent's work for the employer required him to drive to various different locations. As part of the agreement of employment, the decedent was to be paid "portal to portal." We find no authority to hold that unless the decedent was actually performing welding duties for the employer at the time of the fatal accident, he was not in the course and scope of employment. See Texas Workers' Compensation Commission Appeal No. 961193, decided July 30, 1996. We have likewise held that when a claimant travels to perform his or her job functions at the direction of the employer and the travel falls under the exception to the coming and going rule articulated in Section 401.011(12)(A)(iii), the exception pertains to both travel to and from the location to which the claimant is directed to travel. See Texas Workers' Compensation Commission Appeal No. 980133, decided March 6, 1998. Finding sufficient evidence in the record, we affirm the hearing officer's determination that the decedent was in the course and scope of his employment at the time of his fatal injury on _____.

The hearing officer did not err in determining that the claimant's AWW is \$354.00. The hearing officer arrived at this figure by multiplying the 708 hours the decedent worked during the 13-week period immediately preceding his death by \$6.50, and dividing that figure by 13. On appeal, the beneficiaries note that the decedent was paid at a rate of \$25.50 per hour, and even deducting a portion for expenses, the claimant's AWW should be between \$518.83 (40% profit) and \$657.68 (51% profit). We note that there was no evidence presented by either party regarding the decedent's actual expenses. Both a contract signed by the decedent and the employer, and the decedent's pay invoices, indicate that while he was paid \$25.50 per hour, \$19.00 per hour was attributable to the employer's rental of the decedent's personal equipment.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(c)(1) (Rule 128.1(c)(1)) provides in pertinent part that AWW shall not include payments made by the employer to reimburse the employee for the use of the employee's equipment, for paying helpers, for reimbursing actual expenses related to employment such as travel related expenses, or reimbursing mileage up to the state rate for mileage. The language of the contract in evidence is clear, \$19.00 per hour was being paid as rental of the decedent's equipment and as such, pursuant to Rule 128.1(c)(1), it is not to be included in the AWW.

The hearing officer's decision and order are affirmed.

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

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge