APPEAL NO. 041408
FILED AUGUST 2, 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 May 18, 2004. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability from February 14, 2004, through the date of the hearing. In its appeal, the appellant (carrier) challenges the hearing officer's determinations that the claimant was in the course and scope of his employment at the time he was injured in a motor vehicle accident (MVA) and that he had disability. The appeal file does not contain a response to the appeal from the claimant.

DECISION

Affirmed.

The claimant testified, and the parties stipulated, that the claimant was employed as a construction worker for the employer on _____. It is undisputed that the claimant sustained serious injuries in the _____, MVA. The carrier contends that the hearing officer erred in determining that the claimant's injuries were sustained in the course and scope of his employment, because the claimant was merely "coming and going" to work, which is not within the statutory definition of "course and scope of employment." 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. American General Insurance Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (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) provides, in pertinent part, that the phrase "course and scope of employment" 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.

If an employee comes within one of the stated exceptions to the general "coming and going rule," he or she must still show that the injury occurred within the course and scope of his or her employment in order to establish compensability. Bottom, *supra*; Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993.

In Freeman v. Texas Compensation Ins. Co., 603 S.W.2d 186 (Tex. 1980), the Texas Supreme Court discussed the exceptions to the "coming and going rule" and specifically noted that "[a]mong the situations comprehended by the [special mission] exception, applicable when the employee is directed to go from one place to another, are situations in which the employee performs a 'special mission' at the express or implied request of his employer." *Id.* at 192 (citations omitted). At issue in this case is the question of whether the claimant falls within the "special mission" exception of Section 401.011(12)(A)(iii). The claimant and a coworker who was also injured in the incident at issue, both testified that the employees were customarily instructed by the employer to arrive at the employer's premises (the yard) at 6:00 a.m. to pick up their assignments for the day, load up whatever equipment was necessary to perform the day's work, proceed to their assigned company vans, and ride approximately two hours to the jobsite at a military base in (State 1). Testimony by both the claimant's and the employer's witnesses establishes that, on _____, one of the three company vans was out of commission and the employer paid for a tank of gas so that another of the claimant's coworkers could drive six of the employees, including the claimant, in the coworker's pickup truck from the yard in (State 2) to the jobsite at the military base in (State 1). While traveling from the yard to the jobsite, the truck carrying the claimant struck a patch of ice in the road and rolled over four times, killing two employees and injuring four others, including the claimant. The carrier asserts that at the time of the MVA, the claimant was not acting in the course and scope of his employment. The employer and the operations manager testified that the employees were not instructed to convene at the yard, that the vans were provided merely as a convenience for the employees who did not have reliable transportation, that it was not a part of the employees' duties to load materials at the yard, and that, on the day of the injury, the six coworkers were merely car-pooling from the yard to the job site when the accident occurred.

The Supreme Court of Texas held in Evans v. Illinois Employers Ins. of Wausau, 790 S.W.2d 302 (Tex. 1990), an employer may direct an employee to begin work (or the work may end) at a different location other than the normal work location without thereby creating a "special mission." Texas Workers' Compensation Commission Appeal No. 961503, decided September 16, 1996. Thus, the critical questions in this case are whether the claimant was directed to go to the employer's yard to get the day's assignments and to load company equipment and tools and whether the claimant was traveling from the employer's premises to the job site by means of transportation that was under the control of the employer. There was conflicting evidence on those issues. In her discussion of the evidence, the hearing officer determined that, the travel arrangements had been made by the employer to the benefit of both the claimant and the employer, and that the claimant was engaged in "coming and going" activity when he traveled from his home to the yard. The hearing officer found that the claimant was

under the control of the employer once he arrived at the yard, and that he was furthering the employer's interests when the MVA occurred. Thus, the hearing officer concluded that the claimant was in the course and scope of his employment at the time of the accident. The hearing officer was acting within her province as the fact finder in so resolving the conflicts in the evidence. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the hearing officer's decision on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier's challenge to the disability determination is wholly premised upon the success of its argument that the claimant was not in the course and scope of his employment at the time of his injury. Given our affirmance of that determination, we likewise affirm the disability determination.

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

RUSSELL OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge