APPEAL NO. 042334
FILED NOVEMBER 9, 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 (CCH) was held on August 19, 2004. With regard to the disputed issues the hearing officer determined that the respondent (claimant) was injured in the course and scope of his employment when he was injured in a motor vehicle accident (MVA) on _____; that the appellant (self-insured) is not relieved of liability pursuant to Section 409.002 because the claimant timely notified the employer of his injuries; and that the claimant had disability from June 27, 2003, through the date of the CCH.

The self-insured appeals, contending that the claimant was subject to the coming/going provision of Section 401.011(12) and was therefore not in the course and scope of his employment at the time of the MVA, and that the self-insured was relieved of liability because the claimant failed to timely report his injury without good cause for failing to do so. The disability determination is contingent on a finding of a compensable injury. The file does not contain a response from the claimant.

DECISION

Affirmed.

The background facts are not in dispute. The claimant was a corrections officer at a prison with duty hours of 5:30 p.m. to 6:00 a.m. On the morning of _____, the claimant left work at about 6:00a.m., and after a brief stop at a friend's house drove home. In changing clothes at home the claimant discovered he had forgotten to turn in the "front gate crash gate keys" to the next shift. The employer had a directive dated February 11, 2000, in effect which stated:

> Any employee who inadvertently carries a key away from the duty post or unit/facility shall return it immediately to the shift supervisor.

The claimant immediately got in his vehicle to return to the unit to turn in his keys to the shift supervisor. On the way to the unit the claimant was involved in a serious MVA where he sustained multiple severe injuries, which are the basis of this claim.

COURSE AND SCOPE

The pertinent provision of Section 401.011(12) states:

> "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:

* * * *

(iii) the employee is directed in the employee's employment to proceed from one place to another place;

The self-insured contends that the claimant's injuries were not 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," citing Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350, 353 (Tex. 1963). 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, 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." Bottom, *supra*.

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 Insurance Company, 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 generally asserts compensability based on the special mission exception pursuant to the employer's directive which required him to "immediately" return the keys to the facility. It is the self-insured's contention that the claimant could not create his own "special mission." We would, in part, agree with the self-insured, however, in this case it is the employer's directive, not the claimant, that created the "special mission" that the claimant "immediately" return the keys. We give the plain dictionary meaning to immediately as being without interval of time or straight way. In Texas Employer's Insurance Association v. Ables, 665 S.W. 2d 564 (Tex. App.-El Paso, 1984. writ denied), although it was not the worker's normal duties to keep a company butane tank filled there was a "standing order to 'keep' the tank filled" and the worker was held in the course and scope of employment when he was injured following the

standing order. Likewise we hold that the claimant was in the course and scope of his employment, on a special mission, pursuant to the employer's standing directive to "immediately" return any key inadvertently carried away from the unit.

The carrier cites Appeals Panel decisions and Loofbourow v. Texas Employers Ins. Ass'n, 489 S.W.2d 456 (Tex. Civ. App.-Waco 1972, writ ref'd n.r.e.) for the proposition that being on-call does not place the employee in the course and scope of employment. We do not disagree with the cited cases but distinguish them on their facts. In the instant case there was no "on call" or stand by, but rather the claimant was required to immediately return the keys from wherever and whenever they were inadvertently taken from the unit.

TIMELY REPORTING

The self-insured also contends that the claimant did not timely report his injury in that a written report of injury was not filed until October 22, 2003. Section 409.001(a) provides:

> An employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which:
>
> (1) the injury occurs;
>
> * * * *
>
> (b) The notice required under Subsection (a) may be given to:
>
> (1) the employer; or
>
> (2) an employee of the employer who holds a supervisory or management position.

In this case the hearing officer found that the claimant notified the employer of his claimed injury on _____, the date of injury. In the Background Information section of his decision the hearing officer identifies two individuals (who were both identified at the CCH as supervisors) who "admitted in writing that they were aware on _____, that Claimant was claiming a work related injury in the MVA on _____." The hearing officer does not identify the writings to which he refers. In evidence is a Employer's First Report of injury or Illness (TWCC-1) which indicates that the date of injury was reported as "_____." We agree with the self-insured that this document may not be considered to be an admission by or evidence against the self-insured pursuant to Section 409.005(c). *See also* Texas Workers' Compensation Commission Appeal No. 93262, decided May 19, 1993.

Also, in evidence is a form entitled Notice of Employee's Work-Related Injury or Illness. On page 2 of that document under "Acknowledgement of Work-Related Injury or Illness" one of the individuals identified by the hearing officer indicated he was a supervisor and that the employee reported the injury or illness to him on _____. Although that document has some inconsistencies it was sufficient to support the hearing officer's determination on the issue.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not incorrect as a matter of law 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 **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge