APPEAL NO. 061042
FILED JUNE 22, 2006

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 March 20th and concluded on April 13, 2006. With regard to the two issues before him, the hearing officer determined that the respondent (claimant) was in the course and scope of his employment when he was involved in a motor vehicle accident (MVA) on _____, and that he had disability resulting from those injuries from January 9, 2005, and continuing through the date of the CCH.

The appellant (self-insured) appeals, contending that the claimant was not in the course and scope of his employment when he was injured, that the "coming and going" rule was applicable and that the claimant was not on a "special mission" at the time of his injury. The claimant responds generally urging affirmance and contending that he was responding to a fellow officer's request for assistance.

DECISION

Reversed and a new decision rendered.

The following facts are undisputed: (1) that the claimant was a sergeant in the self-insured's constable's office; (2) that he sustained serious injuries in a MVA which occurred at 11:55 a.m. on _____; (3) that at the time of the MVA the claimant was operating a personally owned and maintained motorcycle (although the claimant had a self-insured owned and maintained vehicle available to him for his regular duties); (4) that the claimant's regular work shift on _____, was from 2:00 p.m. to 10:00 p.m.; and (5) that the self-insured's (employer) policy allowed the claimant to obtain secondary employment including providing motorcycle escorts for funeral processions. It is also relatively undisputed that on the morning of _____, the claimant and three other peace officers had provided escort services for one or two funeral processions, that the claimant had "signed on" at 10:00 a.m. (the testimony generally was that by "signing on" one indicated their availability to take assignments or respond to calls) and that the officers, including the claimant, were having lunch at a fast food restaurant. It is also relatively undisputed that while at the restaurant the claimant received a call on his "walkie-talkie." The substance and nature of the call are disputed. The hearing officer, in his Background Information, commented;

> Claimant testified that the call he received came from one of his deputies, [DC] who had been directed by another sergeant to meet with an individual who was requesting a "civil standby," understood to be a voluntary mental health commitment, and that, because the Constable's office would not customarily undertake such action, [DC] called Claimant, a sergeant and therefore his supervisor, to ask that he also meet with the individual in order to determine whether or not the Constable's office could take the action requested. Claimant indicated that the accident occurred

while he was en route to such meeting; that he had no plans to escort another funeral that afternoon and that if he had not received the call from [DC], he would have gone to the office following lunch.

DC testified that he had called the claimant and that he wanted to meet with the claimant "at some point in time in the future" (Transcript of the March 20, 2005, hearing, page 96) and when asked about the time and place by the hearing officer, DC identified a coffee shop and testified that the meet "was supposed to be after 1:00 o'clock, 1:15, you know, whenever he got there." (Emphasis added) (Transcript page 100). Very shortly after receiving the call from DC, the claimant and other officers "left the restaurant at substantially the same time." The claimant was injured in the MVA a few minutes (or less) after leaving the restaurant parking lot.

The hearing officer found that the claimant received a call from DC shortly before 11:55 a.m. on _____, requesting that the claimant meet with DC "and a third party to provide assistance with a civil standby" (Finding of fact No. 8) and that because the claimant was obligated to respond, the claimant's "workday on _____ began upon receipt of [DC's] call requesting assistance" (Finding of fact No. 11).

Section 401.011(12) in pertinent part provides:

> (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 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).

The hearing officer, in the Background Information, commented that clearly the claimant did not come within either of the first two exceptions to the coming and going rule (Sections 401.011(12)(A)(i) and (ii)) but that it was not unreasonable for the claimant to "respond to requests for assistance from deputies over whom he exercised supervisory authority." We agree. However at issue in this case is when did the claimant start the performance of his duties. The hearing officer found that "[b]ecause Claimant was obligated to respond, his workday on _____, began upon receipt of [DC's] call requesting assistance" (Finding of Fact No. 11). It is with this determination that we disagree.

Clearly on the morning of _____, the claimant was engaged in performing a funeral escort and having lunch some hours before he was to begin his regular job at 2:00 p.m. The claimant received a call from DC requesting assistance and advice regarding a "civil standby" and there was an agreement to meet "after 1:00 o'clock, 1:15, you know, whenever he got there" at a certain coffee shop. In essence, the claimant is being asked to report for work at a different time than his normal duty location and starting time which would have been at the office at 2:00 p.m. We believe the facts of this case are substantially similar to the facts in Evans v. Illinois Employers Ins. Of Wausau, 790 S.W.2d 302 (Tex. 1990). In Evans the employee (Evans) was instructed by his supervisor to attend a safety meeting at a different location and different time than his normal duty location and starting time. Evans pay was to begin when he arrived at the safety meeting. On the way to the safety meeting the employee was in a MVA and was killed. The court held that "since neither [Evans and another employee] of them had begun work their injuries fall squarely within the 'coming and going' rule." The court further noted that had the employees been injured en route from the safety meeting to the primary work site there would have been coverage. In this case DC was requesting assistance to discuss a "civil standby" matter at a coffee shop (different location) after 1:00 p.m. or 1:15 p.m. (a different starting time than the claimant's usual start time of 2:00 p.m.). DC testified that he did not ask the claimant to come immediately (Transcript page 96) but after 1:00 p.m. Nor do we find that the fact that the claimant had "signed on" or was on call after 10:00 a.m. to be controlling on the issue of compensability. *See* Appeals Panel Decision (APD) 93898, decided November 15, 1993, and cases cited therein. The evidence was that the claimant was not being paid at the time of the accident, was not considered to be on duty and his regular shift had not started. (Transcript page 69). The communications radio log shows that the claimant had "signed on" at 10:00 a.m. but does not indicate that he had been dispatched to meet with DC or anyone else on the morning of _____. There was no evidence, or even discussion, regarding whether the claimant would be paid once he got to the coffee shop. We hold that the claimant's travel to meet DC falls squarely within the coming and going rule. The risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers. Evans, *supra*, at page 305.

In that the claimant was outside of the scope of employment, merely being on his way to work, (i.e. to meet with DC), at the time of the accident, we reverse the hearing officer's decision that the claimant was in the course and scope of his employment when he was involved in a MVA on _____. We render a new decision that the claimant was not in the course and scope of his employment when he was involved in a MVA on _____.

Because we are rendering a decision that the claimant was not in the course and scope of his employment the claimant did not sustain a compensable injury. Without a compensable injury, the claimant, by definition in Section 401.011(16) cannot have disability. Accordingly we reverse the hearing officer's decision that the claimant had disability from January 9, 2005, and continuing and render a new decision that the claimant did not have disability.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

COUNTY CLERK
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I believe that the hearing officer's decision that the claimant was in the course and scope of his employment when he was injured in a MVA is supported by sufficient evidence, is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and is a correct application of the law to the facts found by the hearing officer.

_____
Robert W. Potts
Appeals Judge