APPEAL NO. 080372
FILED MAY 8, 2008

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 February 5, 2008. The disputed issues were: (1) whether the respondent (claimant) sustained a compensable injury on _____; and (2) whether the claimant had disability resulting from an injury sustained on _____, and if so, for what period. The hearing officer determined that the claimant sustained a compensable injury on _____, and had disability from July 3, 2007, through the date of the CCH.

The appellant (carrier) appealed, contending that the hearing officer erred in determining that the claimant had sustained a compensable injury and that, because the claimant did not have a compensable injury, the claimant did not have disability as defined in Section 401.011(16). The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that on _____, the claimant was an employee of "Employer" (the employer). This case turns on whether the claimant was in the course and scope of his employment at the time that he was injured on _____. The hearing officer, in the Background Information portion of his decision, commented:

> The Claimant stated he called [HH], a life time friend, and was offered the job with the proviso that [HH] would provide transportation because the Claimant did not have a driver's license.

It is undisputed that HH was a crew leader and supervisor for the employer and was a life long friend of the claimant. The claimant testified regarding the circumstances of how he was hired and the arrangement regarding his transportation to and from work. The claimant testified that he called HH and told him "I need a job" and that HH said "come on and work with me." The claimant testified that he told HH that he wanted to go to work but that he "didn't have [a] way" (later testimony established that claimant did not have a driver's license and did not have transportation), and that HH said "I can pick you up" to which the claimant replied "that's fine – cool." Testimony on cross-examination was that HH told the claimant "if you want to work I'll pick you up every day, if you want to work." The claimant testified that he began working for the employer in February 2007. It was established that the employer had a contract with the (State Agency) to pick up trash along highways and that the workers would clock in at the employer's premises each day between 8:00 and 9:00 a.m. and be assigned to crews. The claimant was paid hourly, beginning when he clocked in. The claimant was asked if HH charged the claimant for riding with him, and the claimant testified that HH told him "if you gonna ride with me you gotta pay." Testimony established that HH drove a crew

cab pickup which was owned by the employer, and picked up several workers (some of the workers rode in the bed of the pickup because the cab was full). The workers that HH picked up were not necessarily assigned to HH's crew. The claimant testified that he paid HH $60.00 a month cash for transportation.

The circumstances of the accident itself are undisputed. On _____, HH had picked up the claimant at about 5:30 a.m., and they were on their way to pick up other workers. There was at least one other worker with the claimant and HH when the truck ran out of gas and coasted to a stop on the right shoulder of the road. Another car (vehicle 2), going in the same direction as the truck claimant was in, struck the back of the pickup and came to rest on the left shoulder of the road. The claimant, HH and the other worker crossed the highway to check on the driver of vehicle 2. A third vehicle (vehicle 3) then hit vehicle 2. It is undisputed that the claimant sustained serious injuries in this accident. The police report indicates that the accident occurred at 5:42 a.m. on _____.

Section 401.011(12) provides as follows:

> (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; or

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 (Tex. 1963). In order for Section 401.011(12)(A) exceptions to the "coming and going" rule to apply, the claimant must

not only show that a specific exception applies, but must show that the injury is of a kind and character that had to do with and originated in the work, business, trade or profession of his employer and was received while he was engaged in or about the furtherance of the affairs or business of his employer. Bottom, *supra*.

In Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied), a case where the court addressed whether a summary judgment should have been granted, the court cited Bottom, *supra*, and United States Fire Ins. Co. v. Eberstein, 711 S.W.2d 355 (Tex. App.-Dallas 1986, writ ref'd n.r.e.) and stated:

> However, the employer's gratuitous furnishing or paying transportation as an accommodation to the worker and not as an integral part of the employment contract (i.e., that the employer need not furnish transportation in order to secure workers) does not by itself render compensable an injury occurring during such transportation. *Bottom*, 365 S.W.2d at 353; Eberstein, 711 S.W.2d at 357. The employee still must prove he was acting in the course of his employment at the time.

The hearing officer made the following disputed Findings of Fact:

> 3. The manner of transporting multiple employees to the place of business furthered the business interest of the Employer.
> 4. The means of transportation for the Claimant to go to and from the place of employment were under the control of the Employer.

Although the hearing officer determined that the manner of transporting multiple employees to the place of business furthered the business interest of the employer, the hearing officer does not indicate how it does so. Based on the evidence presented at the CCH, there was an informal agreement between the claimant and HH that HH would give the claimant a ride to work each day and that the claimant would pay HH $60.00 cash each month. There was no business interest of the employer involved. Workers would proceed to the employer's premises arriving between 8:00 and 9:00 a.m., be assigned to a crew, and then go to a work site. There was no evidence that the workers were required to arrive at precisely the same time or that the supervisors were to pick up and furnish their own crews. The hearing officer commented, in the Background Information, that the claimant "was offered the job with the proviso that [HH] would provide transportation." The testimony established that the claimant asked for a job, HH offered the claimant a job, the claimant said he didn't have transportation (no driver's license), and HH offered to give the claimant a ride to work for a fee. There was no requirement that the claimant ride with HH, rather it was an accommodation to the claimant because otherwise the claimant would not have had transportation. We view the offer to provide transportation to the claimant by HH to be an accommodation to the claimant and not an integral part of the employment contract. Rose, *supra*.

The hearing officer found that the means of transportation for the claimant to go to and from the place of employment were under the control of the employer. While the

evidence established that the pickup owned by the employer and driven by HH was under HH's control, there is no evidence to establish that the employer directed HH to pick up the claimant, and other employees, or that the transportation was under the control of the employer. Further, the mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the Texas Workers' Compensation Act. Wausau Underwriters Insurance Co. v. Potter, 807 S.W.2d 419 (Tex. App.-Beaumont 1991, writ denied) citing Bottom, *supra*, and Eberstein, *supra*. A claimant still must prove that he or she was acting in the course and scope of employment at the time of the injury. Appeals Panel Decision (APD) 992399, decided December 13, 1999. There was no business of the employer being furthered by the claimant's activity in rendering assistance to the driver of vehicle 2, at the time of the injury.

The claimant, at the CCH, also contended that the emergency or "good Samaritan" doctrine would apply. In Texas Employers' Insurance Association v. Thomas, 415 S.W.2d 18 (Tex. Civ. App.-Fort Worth 1967, no writ) the plaintiff, a truck driver who was driving in the furtherance of the employer's business, came upon an accident which blocked the way. The truck driver was allowed recovery for injuries sustained while he was searching for the wallet of one of the accident victims. The court was of the opinion that the driver's help in looking for the billfold was a continuing part of clearing the road so the driver could proceed with his employer's business. The court stated that "[a] servant does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him, if in the course of his employment an emergency arises, and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his employer." (Emphasis added). In the instant case the claimant was not in the course of his employment at the time he crossed the road to render assistance to the driver of vehicle 2. Therefore, we hold the ruling in Thomas, *supra*, clearly distinguishable from the facts of the instant case. The hearing officer's finding that transportation is furnished or controlled by the employer does not end the inquiry into compensability. The claimant still must prove he was acting in the course of his employment at the time of the injury. Rose, *supra*. APD 990949, decided June 17, 1999. In this case there was no business of the employer being furthered by the claimant's activity at the time of the injury.

We hold that the hearing officer's findings that the manner of transporting multiple employees to the place of business furthered the business interest of the employer and that the means of transportation for the claimant to go to and from the place of employment were under the control of the employer are not supported by the evidence. We reverse the hearing officer's determination that the claimant sustained a compensable injury on _____, as being against the great weight and preponderance of the evidence and render a new decision that the claimant did not sustain a compensable injury on _____.

DISABILITY

The hearing officer's determination that the claimant had disability is premised on the determination that the claimant had sustained a compensable injury. *See* Section 401.011(16). Because the claimant did not have a compensable injury, the claimant by definition, cannot have disability. Accordingly, we also reverse the hearing officer's determination that the claimant sustained disability from July 3, 2007, through the date of the CCH and render a new decision that the claimant did not have disability.

SUMMARY

We reverse the hearing officer's determinations that the claimant sustained a compensable injury on _____, and had disability from July 3, 2007, to the date of the CCH. We render a new decision that the claimant did not sustain a compensable injury on _____, and did not have disability from July 3, 2007, to the date of the CCH.

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 RAY OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723-1098.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge