APPEAL NO. 081590
FILED JANUARY 6, 2009

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 September 17, 2008. The hearing officer resolved the disputed issue by deciding that the decedent was not in the course and scope of employment on _____, and therefore the respondent (carrier) is relieved of liability for compensation. The appellant (claimant) appealed, disputing the determination on compensability. The carrier responded, urging affirmance, and asserting that the claimant's appeal was not timely filed. The claimant's appeal was timely filed in accordance with Section 410.202.

DECISION

Reversed and rendered.

The facts of this case are largely undisputed. The decedent was killed in a motor vehicle accident (MVA) that occurred on _____. An operations manager for the employer testified that the decedent's primary job duties included transporting trailers to and from drilling locations. The decedent would pick up the trailers from the office of the employer to take to a drilling location using the employer's truck and bring them back when the trailer was no longer needed on site. The decedent also performed delivery service calls, delivering various items to the trailers when needed. The decedent kept a lot of supplies in the employer's truck and did not always go by the office prior to making a delivery service call. The decedent was on call 24 hours a day 7 days a week and was not required to come to the office every day. He was only required to come to the office to pick up or deliver a trailer. The truck used to transport the trailers was provided by the employer along with a gas card. The decedent was allowed to use the employer's truck for personal reasons without any mileage limitation. On _____, the decedent drove the employer's truck to the employer's office and picked up a trailer and transported the trailer to a drilling location using the employer's truck as directed by the employer. After the trailer was delivered to the drilling site and was hooked up to the electricity, the decedent left the drilling site in the employer's truck and was killed in an MVA on a route that would have taken him home that evening.

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

(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

(i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and

(ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

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 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 (Tex. 1963). In order for the 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 or 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.

In Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied), the court 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, *supra*; United States Fire Ins. Co. v. Eberstein, 711 S.W.2d 355 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). The employee still must prove he was acting in the course of his employment at the time.

In St. Paul Mercury Ins. Co. v. Dorman, 341 S.W.2d 480 (Tex. Civ. App.-Amarillo 1960, writ ref'd n.r.e.), the court stated:

> We think the question as to whether coverage to employees while going to and from their place of employment is recoverable depends upon the facts of each case. It seems clear that under the Texas statute, injuries are compensable which result from risks inherent in, or incident to, the conduct of the employer's business without regard to the time or place the accident occurred. It is generally accepted that the agreement of an employer to provide transportation for his employees need not be expressed but may be implied from the nature, conditions and circumstances of employment and the custom of the employer to provide transportation. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. An agreement to that effect may be either expressed or be shown by the course of business. In such case the hazard of the journey may properly be regarded as hazards of the service, hence, within the purview of the compensation act.

An exception has also been created for "special missions" when an employee is directed in his employment to proceed from one place to another. *See* Section 401.011(12)(A)(iii); Evans v. Illinois Employers Ins. of Wausau, 790 S.W.2d 302, 304 (Tex. 1990). The Supreme Court has construed this exception to include "those situations in which the employee proceeds from one place to another under the terms of an employment which expressly or impliedly requires that he do so to discharge the duties of his employment." Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776, 778 (Tex. 1963), *overruled on other grounds by* McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964). Jecker is not a true special mission case but rather a situation where an employee whose very nature of employment required travel from one place to another throughout the day was found to be in the course and scope of employment. The case goes on to say that to hold otherwise "would be wholly unjust to salesmen, servicemen, repairmen, deliverymen and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen's Compensation Act." *Id*. at 779. *See* Appeals Panel Decision 050874-s, decided June 9, 2005. The employee's duties in Jecker included the servicing of gas ranges sold by his employer. At the time of Jecker's accident, he was returning from

servicing a range so it was clear that he had acted both in furtherance of his employer's business and in performance of duties imposed by the employment.

In Travelers Ins. Co. v. Keys, 502 S.W.2d 830 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.), a jukebox repairman was fatally injured in a company truck entrusted to him for business and personal needs and was on call at all times. The repairman was generally en route to repair a jukebox, but at the time of the accident was on a short deviation from his normal route in order to drop his wife off at a church. The repairman was held to be in the course and scope of employment. Similarly, in the instant case, the decedent's MVA occurred when he was returning home in the employer's truck after delivering a trailer to a work site which he had delivered in furtherance of his employer's business and in performance of duties imposed by the employment.

We hold that the hearing officer's determination that the decedent was not in the course and scope of his employment on _____, to be incorrect as a matter of law and against the great weight and preponderance of the evidence. We reverse the hearing officer's decision and render a new decision that the decedent was in the course and scope of his employment when he was involved in an MVA on _____, resulting in his death.

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
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge