APPEAL NO. 111516
FILED DECEMBER 19, 2011

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 16, 2011. The hearing officer resolved the disputed issue by deciding that (decedent) did not sustain a compensable injury on (date of injury), resulting in his death.

The appellants (claimant beneficiaries) appealed the hearing officer's compensability determination. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that on (date of injury), the decedent sustained an injury which resulted in his death on that same date and that the claimant beneficiaries are proper legal beneficiaries of the decedent. It was undisputed that the decedent was a courier driver for his employer, a lab facility. His job was to drive from his home to doctors' offices along his route to pick up specimens, place the specimens in a cooler with dry ice, and deliver them to the employer's lab. It was also undisputed that the decedent carried in his vehicle an employer-provided phone/radio by which he communicated to his employer's dispatch service and a scanner used to scan specimens for tracking purposes. It was also undisputed that the decedent drove his route in a vehicle owned by, and provided to the decedent, by the employer, although personal use was allowed.

In evidence is the employer's Fleet Policy and Procedure Manual (company manual). In the company manual, the employer provided that "[o]rdinary home to work and work to home travel is not considered time worked regardless of whether the employee is scheduled to work at a fixed site or at different job sites. However, once employees start their workday, all time spent traveling as part of their principal activities will count as hours worked/mileage paid." The decedent's time sheets in evidence reflect that it was his custom to clock in at the first stop on his route at 11:00 a.m. and clock out at approximately 7:30 p.m. at the lab in (City G), after delivering his last specimen, and that the decedent was not paid for travel time from home to his first stop or from the lab in City G to his home.

The claimant beneficiary, decedent's wife, testified that on (date of injury), prior to leaving the house at 9:55 a.m., the decedent turned on his employer-provided

phone/radio, which could be used by the employer to make any changes to his customary route, and left to drive to the doctor's office in (City K). While driving, the decedent was involved in the fatal motor vehicle accident (MVA). The lead phlebotomist at the lab in City G testified that to her knowledge, the decedent had not yet clocked in to start his work day prior to the time of the fatal MVA. The evidence reflects that the cooler in the vehicle contained dry ice but no specimen. In an unappealed finding of fact, the hearing officer determined that at the time of his injury, the decedent was traveling from his home to his first work appointment of the day. In the Background Information section of his decision, the hearing officer stated that "[u]nder Texas law as well as the [e]mployer manual, [the] [d]ecedent was not in the course and scope of his employment at the time of his fatal collision because he was commuting from his home to work."

The claimant beneficiaries appealed the hearing officer's determination that the decedent did not sustain a compensable injury on (date of injury), resulting in his death, because at the time of his fatal injury, he was not acting within the course and scope of his employment. The claimant beneficiaries contend that the decedent had no office at the lab in City G and that his office was his company vehicle, which carried his necessary work items of coolers, dry ice, paperwork, and the employer-provided phone/radio; the decedent's employment began when the decedent left home, driving to his first pickup stop, regardless of whether he was being paid "on the clock"; the decedent's activities originated in the business of the employer; and the decedent was engaged in and furthering the affairs or business of the employer at the time of the fatal MVA. The claimant beneficiaries also contend that the vehicle was furnished and controlled by the employer and that the decedent was directed in his employment to proceed from one place to another place. Therefore, the claimant beneficiaries argue that the decedent was in the course and scope of employment as it is defined in Section 401.011(12), as provided in 401.011(12)(A)(i)-(iii), and as mandated by the Texas Supreme Court in Leordeanu v. American Protection Ins. Co., 330 S.W.3d 239 (Tex. 2010).

In its response, the carrier contends that the decedent was not in the course and scope of his employment because of the "coming and going" rule and because the company manual provided that the decedent was not at work and paid until he clocked in at the first pickup stop or at the lab in City G.

Section 401.011(12) provides in pertinent part that "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, and that the term includes an activity conducted on the

premises of the employer or at other locations. Therefore, "course and scope of employment" has two components: (1) that the activity relates to or originates in the employer's work; and (2) it occurs in the furtherance of the employer's business. Section 401.011(12)(A)(iii) provides that "[t]he term does not include transportation to and from the place of employment unless the employee is directed in the employee's employment to proceed from one place to another place."

In Leordeanu, *supra*, the court stated:

> The Act did not require that an employee be injured on the employer's premises. Cases applying the Act concluded that work-required travel is in the course of employment, but not, as a general rule, travel between home and work. An employee's travel to and from work makes employment possible and thus furthers the employer's business, satisfying the second component of the definition, but such travel cannot ordinarily be said to originate in the business, the requirement of the first component, because '[t]he 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.' [citing Evans v. Ill. Emp'rs Ins. of Wausau, 790 S.W.2d 302, 305 (Tex. 1990)].

Under the facts of this case, the evidence establishes that the decedent's travel to and from his home to the doctors' offices and/or to the lab in City G makes employment possible and furthers the employer's business. Thus, the decedent meets the requirement of the second component of the definition of "course and scope of employment." Under the facts of this case, the evidence establishes that the decedent was traveling to the employer's client in City K at the direction of the employer to pick-up and then deliver a specimen to the lab in City G, thus meeting the requirements of Section 401.011(12)(A)(iii).

The issue in this case then is whether the facts establish that the relationship between the travel and the employment is so close that it can fairly be said that the injury had to do with and originated in the work, business, trade or profession of the employer, the requirement of the first component of the definition of "course and scope of employment."

We have long held that the situations 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 because 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 . . . Act." *See* Appeals Panel Decision (APD) 081590,

decided January 6, 2009, citing Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776 (Tex. 1963) *overruled on other grounds* by McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964). In APD 081590, the Appeals Panel in its discussion of Jecker, further noted that "[t]he 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 United States Fire Insurance Co. v. Brown, 654 S.W.2d 566 (Tex. App.-Waco 1983, no writ), the employee/decedent, was a nurse employed by a health care agency whose business was providing health care personnel to client hospitals. The decedent was paid mileage expense and an hourly wage which began when the decedent arrived at the hospital. The Waco Court addressed the "coming and going" rule, and cited Jecker. The Court held that the deceased was traveling "on the public highways pursuant to express or implied requirements of his employment contract" and concluded that "[the decedent] was not simply on his way to work at the time of his injuries, even though his hourly rate did not begin until he reached [the client hospital]" but that the travel "was an integral part of his employment contract, and he began execution of this part of his job duties when he left his home. . . ." *See also* APD 050874-s, decided June 9, 2005.

Under the facts of this case, the decedent's job duties included driving to a doctor's office to pick up a specimen for delivery to the lab. In the unappealed finding of fact, the hearing officer determined that at the time of the fatal accident, the decedent was driving to the doctor's office in City K to pick up a specimen. Thus, the decedent had begun his job duties directed by his employer regardless of whether or not he was "on the clock" and being paid travel time, as set out in the company manual. The employer's business is to analyze and report the findings of tests on specimens retrieved by traveling courier/drivers from doctors' offices. Thus, the traveling courier/drivers, provided by the employer for its clients, was a substantial aspect of the employer's business to the degree that travel itself was in furtherance of the employer's affairs. Therefore, under the facts of this case, the evidence established that the decedent met the requirements of the first and second components of "course and scope of employment."

Because the facts established requirements of Section 401.011(12)(A)(iii), the hearing officer erred as a matter of law in his compensability determination. We reverse the hearing officer's determination that the decedent did not sustain a compensable injury on (date of injury), resulting in his death. We render a new decision that the decedent did sustain a compensable injury on (date of injury), resulting in his death.

The true corporate name of the insurance carrier is **ACE FIRE UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge