

APPEAL NO. 150877  
FILED JUNE 18, 2015

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 30, 2015, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on (date of injury), and because there is no compensable injury, there is no disability.

The claimant appealed the hearing officer's determinations, arguing that the claimant was clearly in the course and scope of his employment as a traveling salesman at the time he sustained an injury in a motor vehicle accident (MVA). The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and rendered.

In this case the following facts are undisputed: the claimant was a traveling salesman, and the claimant sustained an injury in a MVA on (date of injury).

The claimant testified that his job is to travel to businesses, such as convenience stores, in a company owned vehicle to obtain and place orders for merchandise. The claimant testified that the employer provided him via email with a list of business contacts for him to travel to. Also, the claimant testified that he kept the company owned vehicle at his home, and he traveled from his home to the business contacts provided by his employer. The employer's chief operating officer (COO) testified that the claimant's job was that of a traveling accounts manager. The COO testified that he created route schedules for the claimant to physically drive to the business contacts. The COO testified that the company owned vehicle was kept at the claimant's home for transportation to and from work for business purposes only.

The evidence reflects that prior to the date of injury of (date of injury), the claimant had made an arrangement with his supervisor requesting help in obtaining an order from a business on his contact list. On (date of injury), the claimant traveled to and obtained orders from all the businesses on his contact list with the exception of one business which his supervisor had agreed to help with obtaining an order. The claimant testified that after he left the premises of a business on his contact list, he proceeded to drive to the employer's premises. There was conflicting evidence as to whether the

claimant was in route to the employer's premises or whether he was in route to his home.

In evidence are contact logs that show that on (date of injury), the claimant traveled to a business and placed an order for that business at 4:26 p.m. In evidence is a police report dated (date of injury), that indicates the claimant was in a MVA and the crash time was 4:37 p.m. The claimant testified that while en route to the hospital by ambulance he received a call on his cell phone from his supervisor. In evidence is an email dated October 21, 2014, from the claimant's supervisor narrating his communication with the claimant for dates prior to and on the date of injury, (date of injury). The supervisor's email states that: he was asked by the claimant to assist him in obtaining an order from a business; he obtained an order from a business; he exchanged phone calls with the claimant in regard to the order; and he called the claimant after 5:00 p.m. at which time he was informed by a paramedic that the claimant was involved in a MVA.

### **COURSE AND SCOPE**

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.

Generally, the "coming and going rule" provides 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. *Am. Gen. Ins. Co. v. Coleman*, 157 Tex. 377, 303 S.W.2d 370 (Tex. 1957). The rationale for 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." *Tex. Gen. Indemnity Company v. Bottom*, 365 S.W.2d 350, 353 (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.

As previously mentioned, there was conflicting evidence of whether the claimant was traveling to the employer's premises or to his home. The hearing officer found that the claimant was not furthering the affairs of the employer on the evening of (date of injury), at the time of the MVA, which implies that the hearing officer was persuaded that the claimant was traveling to his home, rather than the employer's premises. However, given the nature of the claimant's employment and the terms of his employment as a traveling salesman, this is not a straightforward case which involves the coming and going rule.

The claimant argued Section 401.011(12)(A)(i) applied because he was injured while operating an "employer provided, company marked, business-use-only vehicle." We disagree. Although the hearing officer found that the claimant was driving a company car at the time of the MVA, this fact alone does not place the claimant in the course and scope of employment. It is well established that the employer's furnishing or paying transportation by itself does not render compensable an injury occurring during such transportation. See *Rose v. Odiorne*, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied) and *U. S. Fire Ins. Co. v. Eberstein*, 711 S.W.2d 355 (Tex. App.-Dallas 1986,

writ ref'd n.r.e.). In this case the mere furnishing of transportation by an employer does not automatically bring the employee within the protection of the Act.

The claimant also argued that Section 401.011(12)(A)(iii) applied because the claimant was a traveling salesman and was directed by his employer to proceed from one place to another under Section 401.011(12)(A)(iii).

In Appeals Panel Decision (APD) 081590, decided January 6, 2009, the decedent's MVA occurred when he was returning home in the employer's truck after delivering a trailer to a work site in furtherance of his employer's business and in performance of duties imposed by the employment. In that case the Appeals Panel discussed that an exception is 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. Ill. Empl'rs Ins. of Wausau*, 790 S.W.2d 302, 304 (Tex. 1990). Also, 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. W. 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). 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. Also, *Jecker* discussed the exception in terms of "[t]he rationale of it is that since the workman's employment requires him to subject himself to the risks and hazards of streets and highways, his injuries grow out of his employment. *Smith v. Texas Empl'rs Ins. Ass'n*, 129 Tex. 573, 105 S.W.2d 192 (Tex. 1937). See also APD 111516, decided December 19, 2011, and APD 050874-s, decided June 9, 2005, both citing *Jecker*. We note that *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. We note that the Texas Supreme Court stated in *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958 (Tex. 1999) that "we liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents."

In this case, the hearing officer determined that the claimant was not on a special mission at the time of the MVA. However, as discussed in *Jecker*, supra, there are work

situations where the terms of the employment requires the employee to proceed from one place to another. Under the facts of this case, the claimant's terms of employment as a traveling salesman required that he travel to businesses to obtain and place orders throughout his day. At the time of the claimant's MVA, the claimant acted both in furtherance of his employer's business and in performance of duties imposed by his employment as a traveling salesman. Therefore, the claimant was in the course and scope of his employment at the time of his MVA on (date of injury).

Accordingly, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and we render a new decision that the claimant sustained a compensable injury on (date of injury).

### **DISABILITY**

The hearing officer found that the claimed injury was a cause of the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage from September 23, 2014, and continuing through the date of the CCH. That finding is supported by the evidence. Because the hearing officer found that the claimant did not sustain a compensable injury, the claimant did not have disability. Given that we have reversed and rendered a new decision that the claimant sustained a compensable injury on (date of injury), we likewise, reverse the hearing officer's determination that the claimant did not have disability and we render a new decision that the claimant had disability from September 23, 2014, and continuing through the date of the CCH, as to conform to the hearing officer's finding and evidence on disability.

### **SUMMARY**

We reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and we render a new decision that the claimant sustained a compensable injury on (date of injury).

We reverse the hearing officer's determination that the claimant did not have disability and we render a new decision that the claimant had disability from September 23, 2014, and continuing through the date of the CCH.

The true corporate name of the insurance carrier is **HARTFORD ACCIDENT AND INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge