APPEAL NO. 93634

This case returns for review, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), following this panel's decision in Texas Workers' Compensation Commission Appeal No. 93151, decided April 14, 1993. In that decision, we reversed the decision of the hearing officer and remanded for findings of fact and conclusions of law to support a determination that the injury in question occurred while the claimant was engaged in an activity in furtherance of the affairs of the employer and which was of a kind that originated in and had to do with the work of the employer. On remand the hearing officer incorporated by reference his prior opinion, including all findings of facts and conclusions of law, and made additional findings and one conclusion to support his decision that the claimant was injured in the course and scope of his employment. The carrier, who is the appellant, alleges error in the hearing officer's findings and conclusions, claiming that the evidence to support them is insufficient. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer.

The facts of this case, which involved an injury the claimant suffered while driving a truck owned by his employer, are contained in Appeal No. 93151, *supra*, and will not be entirely repeated here. The prior decision held that the evidence, which consisted of the testimony of the claimant and of his employer's comptroller, Mr. B, supported the hearing officer's findings and conclusions that the transportation was furnished as part of the claimant's contract of employment, and that the means of transportation was under the control of the employer.

As we stated, the general rule is that an injury occurring through use of the public streets or highways in going to and returning from the place of employment is noncompensable because it is not incurred in the course and scope of employment. American General Insurance Company v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The statutory exception to this rule, Section 401.011(12) provides in pertinent part that the term "course and scope of employment" does not include 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; [or]
>
> (ii) the means of such transportation are under the control of the employer . . .

Section 401.011(12)(a)(i) and (ii).

As we pointed out, however, a claimant who comes within one of the stated

exceptions must still show that the injury occurred within the course and scope of his employment. Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex. 1963).

The hearing officer in his decision on remand made the following additional findings of fact and conclusion of law:

ADDITIONAL FINDINGS OF FACT

6. Claimant served in a supervisory capacity at employer and had scheduled a crew to come in early to repair pumps on October 13, 1992.

7. Claimant was often required to pick up pump parts and supplies on his way to work and made a point of calling in to check if parts were needed.

8. The accident occurred when claimant reached for the radio telephone in his truck to contact employer to inform the crew that he [claimant] was running late and to check if any supplies or parts needed to be picked up for the day's work.

9. Claimant was acting in furtherance of employer's business at the time of the accident.

ADDITIONAL CONCLUSIONS OF LAW

4. Claimant was acting in furtherance of employer's business at the time of the accident and was therefore within the course and scope of his employment at the time of the injury.

In its appeal, the carrier contends that the evidence is conflicting as to why the claimant turned on the two-way radio in the first place. As the carrier notes, the claimant stated in the signed and transcribed statement he gave to carrier's adjuster on October 23, 1992, that he was going to work early that day and was going to call in on the radio and tell his crew that he was running late. He testified at the hearing, however, that he and his crew were coming in early that morning to begin work on repairing pumps; that many times he has been called to pick up material to take to a company or to a job site, or that he has had to call employees to give them instructions; that while on this occasion he had not been directed to pick up any parts or material, he was calling in to see whether any material needed to be picked up or whether any runs had to be made. To the extent that the claimant's testimony was conflicting, that was a matter for the hearing officer to resolve. The hearing officer, as the fact finder, judges credibility of witnesses, assigns weight to be given their testimony, resolves conflicts and inconsistencies in the testimony and to this

end, may believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The carrier further argues that, even assuming the truth of claimant's testimony as found by the hearing officer, the act of turning on the radio to call in to his co-employees does not meet the two prong test to establish course and scope of employment: that the injury occur while the employee is engaged in or about the furtherance of his employer's affairs or business and that it be of a kind and character that has to do with and originates in the employer's work, trade, business, or profession, citing Smith v. Texas Employers Insurance Association, 105 S.W.2d 192 (Tex. Com. App. 1937, opinion adopted); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). Calling in to employer does not constitute furthering the interest of the employer; rather, the carrier says, the claimant was calling in to see whether or not he was required to perform any activity that would further the employer's interest. The benefit to employer, the carrier argues, must be direct and substantial as opposed to some indirect intangible value. The carrier cites decisions of the Appeals Panel and of Texas courts in support of its position.

Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, was not a travel case but involved an employee who was killed by an assailant during lunch at a restaurant. In affirming the hearing officer's finding of noncompensability the panel said, among other things, that an injury can be found not to be compensable if facts establish the first prong of the test, but not the second (*see* Texas Employers Insurance Association v. Page, *supra*), and that the "benefit" to the employer must be direct and substantial as opposed to "intangible values of improving employee health or morale."

Among the travel cases cited by carrier were Bales v. Liberty Mutual Insurance Co., 437 S.W.2d 575 (Tex. Civ. App.-Amarillo 1969, no writ), in which the court held not to be compensable an employee's injuries suffered when he was on his way to work several hours early, as instructed by his employer. The court found that the evidence showed the employee was not furnished transportation, was not paid for transportation, was not controlled by the employer in his transportation, or was not directed in his employment to proceed from one place to another. And in Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990), the Supreme Court held that the employee, who was killed on his way to a required safety meeting, was not within the course and scope of his employment as a matter of law. Had the employee and his injured coworker been involved in an accident while en route from the safety meeting to the primary work site, the court said, these injuries would have been covered by the workers' compensation statute. "However, since neither of them had begun work, their injuries fall squarely within the `coming and going' rule and they are thereby precluded from recovering workers' compensation benefits. If other factors are not found to be special,[1] then the employee

[1]Both these cases determined that the employees were not on special missions at the time of injury or death; the "special mission" test was not raised by the facts of the instant case.

must have been actually working as he traveled down the road in order for an injury to be compensable." *Id*. at 305.

The carrier attempts to distinguish the case of Highlands Insurance Company v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied), in which the court upheld the compensability of an employee's fatal auto accident. In reviewing the sufficiency of the evidence to support the lower court's decision, the court said that the employee, whose responsibilities included taking care of problems at the mill where he worked, was directed by written rules, approved custom, and actual, authorized practice to proceed from his home to the plant when there were operational problems. Further evidence showed that the employee had received both a telephone call and a radio transmission informing him of a problem at the mill on the evening of the accident. As the carrier points out in this case, the decision in Youngblood turned on the specific direction the employee had received, which is not the case here.

Other cases not cited by carrier are somewhat analogous to the instant case. In Texas Workers' Compensation Commission Appeal No. 92324, decided August 26, 1992, an employee was fatally injured while driving a customer's car to work. (Although the employee normally used a "demo" car belonging to his employer, on this date he had taken the customer's car home in order to test drive it.) The Appeals Panel upheld the hearing officer's determination of compensability, stating as follows: "Since decedent was authorized to and customarily did on occasion drive customers' cars home to test them, decedent was not simply going to work at the time of his accident, but was already engaged in his duties when he commenced the test drive of the customer's car. . . . The test drive clearly had to do with and originated in the business of the employer and was performed by decedent while engaged in the furtherance of the employer's business."

In Texas General Indemnity Company v. Bottom, *supra*, the Supreme Court upheld the noncompensability of a fatal accident which occurred after the employee had taken his truck (which was leased to the employer) for repairs before returning to work for employer. The court said that taking the truck to be serviced was not a part of his job as a driver, and there was no evidence that he was on a special mission for his employer. However, in Employers Casualty v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ), the court of appeals found sufficient evidence to support a lower court's determination that the deceased employee was acting in the course and scope of his employment where there was evidence showing he was on his way to try to collect on one of the employer's delinquent accounts.

Our review of the foregoing cases as well as the record below does not convince us that the hearing officer's decision and order must be overturned as a matter of law. As noted above, there is probative evidence that the claimant at the time of injury was picking up the radio to contact his crew to see if a "run" needed to be made; there was also evidence that this was a usual practice which often resulted in claimant's being diverted to

carry out employer's mission. Such evidence is sufficient to support the determination of the hearing officer, which is not against the great weight and preponderance of the evidence. Pool v. Ford Motor Company, 751 S.W.2d (Tex 1986). It also does not appear to us, given these facts, that the benefit to employer by these actions was so remote or speculative as would require us to reverse the determination of the hearing officer.

Finding no error, the hearing officer's decision is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge