APPEAL NO. 93880

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on September 8, 1993. The sole issue was whether the respondent (claimant) was in the course and scope of his employment when injured while riding as a passenger in the appellant's (employer) vehicle. The employer's workers' compensation insurance carrier accepted liability for the claim and paid benefits to the claimant. The employer, however, contested compensability pursuant to Section 409.011 and requested the hearing below. The hearing officer found that the claimant was injured in the course and scope of employment. The employer appeals this decision. No response has been filed.

DECISION

The decision and order of the hearing officer is reversed and remanded for further findings on the issue of whether the claimant was acting in the course and scope of his employment when the injury occurred.

We note at the outset that the carrier did not contest the claim and paid benefits. It was the employer who contested the claim and became a party to the proceeding. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. The hearing officer erroneously styled the case to show the carrier as a party and permitted the carrier to participate in the hearing as a party. *See* Texas Workers' Compensation Commission Appeal No. 93886, decided November 15, 1993, and Texas Workers' Compensation Commission Appeal No. 93263, decided May 19, 1993.

According to employer's president, Mr. N, who was the sole witness, the claimant worked as a laborer for the employer who provided contract cleaning services at construction sites throughout the metropolitan area. The employer permitted its employees to ride in a company van which regularly traveled between the downtown area and various job sites picking up and delivering equipment. On _____, after the work day was over, the claimant was riding in the back of the van with several coworkers from his work site to some downtown location when the van was hit by steel trusses that fell off a passing truck. The claimant suffered undisclosed injuries which are not in dispute.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(12) provides in relevant part:

> "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work . . . 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 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;. . .

The Appeals Panel, after an exhaustive review of case law under the prior similar statute, TEX. REV. CIV. STAT. ANN. art. 8309, Section 1b (repealed), involving travel to and from work, has determined that the travel exceptions listed above merely prevent certain transportation-related claims from being excluded outright from coverage. To obtain benefits under the statute, "the employee still must prove he was acting in the course and scope of his employment at the time." Texas Workers' Compensation Appeal No. 93151, decided April 14, 1993. *See also* Wausau Underwriters Insurance Company v. Potter, 807 S.W.2d 419 (Tex. App.-Beaumont 1991, writ denied).

The relevant determinations of the hearing officer are:

FINDINGS OF FACT

3. On _____, [claimant] sustained an injury as an employee of [employer] while being transported from the place of employment which transportation was furnished as part of the employment contract he had with [employer].

4. On _____, [claimant] sustained an injury as an employee of [employer] while being transported from the place of employment which means of transportation was under the control of [employer].

CONCLUSIONS OF LAW

2. On _____, [claimant] sustained an injury in the course and scope of employment for [employer].

The only evidence regarding Findings of Fact Nos. 3 and 4 offered at the hearing was the testimony of Mr. N.[1] He conceded in his testimony that the van in which the claimant was riding on the date of the accident was owned by and under the control of the employer. He testified that the van only had front seats, was used to haul equipment, and that employees could elect to ride in the van for their own convenience at a cost of $2.00 per day. The van would pick up and drop off employees before and after work only at points along the route the van would otherwise be traveling. The fee was meant to offset the cost of the transportation. On the day in question, the claimant's work shift ended at 3:30 p.m. and approximately one hour later he was riding the van to a drop off point downtown. According to Mr. N, the intent of the employer was only to give the claimant a ride if he wanted one and he had to ride with the van wherever it went to make stops before it reached the location claimant desired. In Mr. N's word, riding the van was "strictly optional." The claimant "could have taken the bus, or he could have gone with somebody else." Mr. N admitted that he could not definitely say that the van was independently going to the exact spot downtown where the claimant would be dropped off, but "it wouldn't have been much of a deviation to do that." He stated that the primary purpose of the van was to pick up and drop off equipment between employer's numerous job sites.

The testimony of Mr. N unequivocally established that the van was under the control of the employer as found in Finding of Fact No. 4 and this finding was not appealed. However, the finding that the van was furnished as a part of the employment contract (Finding of Fact No. 3) is erroneous. There is no evidence in the record to support, directly or by fair inference, that the provision of transportation was part of the contract of employment.

Finding that the van was under the employer's control, while meeting the exception in Section 401.011(12)(a)(ii), was not alone sufficient to establish that claimant was injured in the course and scope of his employment. To establish course and scope there must be further findings of fact (not made in this case) that the activity of the claimant in riding in this van when the injury occurred both "has to do with and originated in the work . . . of the employer" and was performed by the claimant "while engaged in or about the furtherance of the affairs or business of the employer." Section 401.011(12). *See* Appeal No. 93151, *supra*, and Texas Workers' Compensation Commission Appeal No. 93634, decided September 2, 1993, and cases cited therein. Both aspects or "prongs" of this

[1] Only claimant's counsel, not the claimant, was present at the hearing.

test of course and scope must be met, and the benefit conferred on the employer under the second prong of the test "must be direct and substantial as opposed to `intangible values of improving employee health or morale.'" Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, citing Appeal No. 93634, *supra*. The only evidence on the benefit of this transportation arrangement to the employer was the testimony of Mr. N who asserted, as we mentioned above, that the transportation program was for the convenience of the employees but that employees could use any means they wanted to get to work. Suggestions of claimant's counsel in his questions to Mr. N that transportation was provided because the employees would otherwise have no way to get to work were dismissed by Mr. N as speculation, especially in light of his knowledge that transportation is no longer provided to employees "and it's not a problem one way or the other."[2]

As noted above, the decision and order of the hearing officer made findings only that the van was furnished as part of the employment contract and that it was under the control of the employer. No additional findings were made that, at the time of the injury, 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. Because such a finding "is essential to a holding of compensability in a transportation case, we are loathe to imply it" from the decision and order or from the evidence in this case. Appeal No. 93151, *supra*.

The Decision and Order of the hearing office is reversed and remanded for further consideration and findings on the issue of course and scope of employment.

Pending resolution of this remand, a final decision has not been made in this case. Since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request

[2]The claimant's attorney's question to Mr. N, "Are you aware of the fact that most, if not all of [the employees], did not own their own vehicle or transportation?" was answered in part, "We don't keep up with what kind of transportation they've got." In any event, there was no such "fact" in evidence.

for review not later than 15 days after the date on which such new decision is received from the Commission's division of hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge