APPEAL NO. 950361

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in _____. The issue was whether (hereinafter "deceased"), who was killed in a motor vehicle accident on _____, suffered a compensable injury on that date. The claimant, who appeared at the hearing, and who is the appellant on appeal, is deceased's surviving spouse (hereinafter "claimant"). She contends that the hearing officer erred in holding deceased's death noncompensable because she says the evidence shows that his employer paid for or controlled his transportation, or directed him to go from one place to another. She additionally argues that he was in the course and scope of his employment when he was killed, as he was furthering the business interests of his employer. Finally, the claimant argues that "justice and fairness" dictate a reversal because she did not have legal counsel present at the contested case hearing, her request for continuance was denied, and because the sole witness for the opposing party was an "incompetent" witness to whose testimony claimant did not know how to object. The claimant attaches to her appeal several documents which were not in evidence at the hearing below. The respondent, a self-insured governmental entity (hereinafter "carrier"), responds that the hearing officer's decision is correct, and that the deceased did not come within any of the exceptions to the general rule that travel-related injuries are not compensable.

DECISION

We affirm.

As the hearing officer correctly noted, the facts of this case were largely undisputed. Deceased was a motorcycle police officer employed by (employer). He generally worked from 7:00 a.m. to 3:00 p.m., but he was subject to varying assignments on a daily basis. The evening before his death, the deceased was telephoned at home by a supervisor, SC, and told to report for duty earlier than usual at a school zone. Claimant testified that her husband got up earlier than usual on the morning of _____, and was en route to the assignment by means of his motorcycle when he was struck and killed by a truck on (County Road) at approximately 6:15 a.m. At the time of the accident, the deceased was on a stretch of road outside the county, although no one contended that he was not on his way to the assignment he had been given.

According to the transcription of a statement SC gave to the carrier's representative, officers who live outside the county must be in the county by the time their shift starts. He also stated that "[n]ormally when [an officer] hits the county line that is [sic] he will have signed on." The claimant testified that SC had told her that her husband, who did not live in county, had already signed on that morning, and that he had done so shortly before the accident. SC later clarified his position in a letter dated July 22, 1994, which states in pertinent part:

It is a standing (unwritten) rule that <u>all</u> deputies assigned to this division will

be in their assigned areas by the time designated by their supervisor regardless of where they live. Normally those deputies living outside the county would "sign on" when they entered the county. However, there is no rule covering when they "sign on" as long as they do so by their designated duty time. Also, if they do "sign on" before their designated time then they are considered to be available for calls.

All Texas Peace Officers are obligated to take actions on certain matters anywhere in the state of Texas regardless of their jurisdiction. Generally these matters are felonies and breaches of the peace committed in the officer's presence. However, certain traffic offenses such as DWIs have been held to be breaches of the peace as are other violations which present a clear and immediate danger to the public. There is also case law which allows peace officers to direct and control traffic regardless of their jurisdiction. Also, to the best of my knowledge, jurisdiction is not specifically defined in the Texas Code of Criminal Procedure. Finally, it is not unusual for deputies within this division to travel outside the boundaries of county to perform special assignments or assist other agencies. This occurs most frequently with the motorcycle officers.

SC also stated that the Traffic Enforcement Division, as well as most of the Sheriff's Office, considered deceased to be on duty at the time of the accident. The claimant pointed to the fact that the deceased was given in-the-line-of-duty funeral services and was recognized as having died in service by public and private groups and individuals, and was paid for the day of his death.

In addition, claimant testified that the deceased was reimbursed by his employer for the costs of purchasing and maintaining his motorcycle in the amount of approximately $400.00 per month. She also stated that the motorcycle was marked with the name of the sheriff's office, that it was for official use only and he was prohibited from using it for personal reasons, and that he was required to be in full uniform whenever he rode it.

The general rule in workers' compensation law has been that an injury occurring through the use of the public streets or highways in going to and returning from the place of employment is noncompensable because 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 rationale behind the rule is that injury incurred in such travel does not arise out of the person's employment, but rather occurs as a result of the dangers and risks to which all members of the traveling public are exposed. Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. 1964).

This general rule is embodied in Section 401.011(12) of the 1989 Act, which also contains several exceptions thereto:

(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 . . .

The claimant contends that the evidence shows that the evening before his death the deceased was directed by his employer to report to a special traffic assignment, and thus the "special mission" exception of Section 401.011(12)(A)(iii) applies. She also argues that the job itself required him to travel the highways. We believe, however, that the facts of this case do not establish that claimant was on a special mission as the courts of this state have interpreted that exception. *See, e.g.*, Evans v. Illinois Employers Insurance of Wausau, 790 S.W.2d 302 (Tex. 1990), wherein the Supreme Court held noncompensable the death of an employee who was en route to an early, off-site safety meeting as instructed by his employer. The court found that since attendance at the meeting was "an integral part of the job, and was not a special mission, travel to the safety meeting was simply travel to work." *Id*. at 304. The claimant argues that this case can be distinguished based upon the fact that the deceased was on the way to a special, and not a regular assignment. However, the evidence indicates that by the vary nature of the employment, the deceased was given changing and varying assignments on a daily basis. As the court in Evans noted, citing Bissett v. Texas Employers Insurance Association, 704 S.W.2d 335 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.), an employee can have more than one fixed place of employment and that fixed place of employment can change according to the nature of his work. As in Evans, the deceased in this case was merely starting his workday at a different location.

We would agree with the claimant, however, that the evidence shows that deceased's transportation was furnished by the employer. (Though not entirely clear, the hearing officer appears to have also reached this determination in Finding of Fact No. 4.) It

was uncontroverted in the evidence that, although title to the motorcycle was in deceased's name, he was fully reimbursed by his employer for the expenses of purchasing and maintaining it. As we have previously held, a contract of employment which includes provision of transportation may be written or oral. Texas Workers' Compensation Commission Appeal No. 92250, decided July 29, 1992. The claimant additionally argues that the transportation was controlled by the employer due to the fact that the deceased was strictly prohibited from using it for personal purposes. It has been held that control, under this part of the statute, refers to an employer's ability to "avoid departure from direct or designated routes and in the exercise of [this] control . . . may avoid extra hazards." Republic Underwriters v. Terrell, 126 S.W.2d 752 (Tex. Civ. App.-Eastland 1939, no writ). However, furnishing and controlling the means of transportation are disjunctive provisions in the statute, and the claimant is not required to establish that both existed. Nevertheless, as noted above, even a finding that transportation is furnished or controlled by an employer does not end the inquiry as to compensability. As explained by the court in Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied), "[p]roof of this fact does not entitle appellant to compensation but only prevents his injury from being excluded from coverage simply because it was sustained while he was traveling to or from work . . . Appellant still was required to prove that his injury satisfied the [statutory] requirements" that the injury was sustained in the course and scope of employment. *Id*. at 213-4.

At the outset, we note that the fact that deceased was honored by many groups and individuals as having died in the line of duty does not provide us with that degree of proof necessary to determine whether he was acting within the course and scope of his employment at the time of his death. Further, it was not contended that the deceased was engaged at that time in any specific activity, such as apprehending a suspect, related to his employment. The evidence was conflicting as to whether he had "signed on" prior to his death, with claimant contending he had done so and SC stating that the usual practice was for officers to do so upon entering the county. "Signing on," according to SC, meant that an officer was available for calls. The hearing officer, although stating in her discussion that the "credible evidence" suggested that deceased "may have signed on duty," added that the act of signing on was not dispositive; however, she made a finding of fact that officers who live outside the county "normally" sign on when they reach the county line.

Despite some seeming inconsistency between the hearing officer's discussion and her finding implying that the deceased had not signed on, we note that Professor Larson has written that the fact that an employee is "subject to call" should not be given "any independent importance in the narrow field of going to and from work . . . the mere fact that an employee is generally on call should not make a special errand of a normal going and coming trip that is not in response to a special call." *See* Larson, Workmens' Compensation Law, Vol. 1, § 16.16 (Matthew Bender & Co., Inc., New York, 1991). *See also*, Smith v. Dallas County Hospital District, 687 S.W.2d 69 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.). With regard to police officers, Larson writes that "Police officers who are `on call' at all times have sometimes been brought within the rules just discussed as to on-

call employees generally," although he notes that some jurisdictions have found compensable injuries suffered by police officers in the course of an ordinary coming or going journey. *Id*. at § 16.17. The sole Texas case cited, Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App.-Dallas 1982, writ ref'd n.r.e.), did not involve an injury suffered in the course of travel but rather denied workers' compensation liability for injuries an off-duty and out of uniform police officer suffered in an altercation at a restaurant after identifying himself as an officer and attempting to silence a loud and abusive customer. The claimant pointed to requirements of the Code of Criminal Procedure which he said required police officers to take action whenever and wherever necessary. The court, however, rejected this interpretation based on the statutory provision which limited a police officer's duty to preserve the peace "within his jurisdiction." In so holding, the court wrote:

> We recognize the important policy considerations implicated in this case of first impression. A rigid rule defining course of employment by reference to the territorial boundaries of the officer's employment may result in hardship when applied to injuries sustained by any particular officer. It may also frustrate the public's desire to assure that a peace officer be protected in the vigorous pursuit of his duties, even when performance of those duties is outside the officer's jurisdiction. On the other hand, a rule compensating officers for injuries sustained without reference to the territorial boundaries of their employer might, in some circumstances, encourage officers from outside a jurisdiction to take more--or different--action than is desired by local officials, thus undermining the Texas tradition of local control in law enforcement.

Based upon Texas case law and the facts before us, we are compelled to agree that the evidence supports a determination that the deceased was not acting within the course and scope of his employment at the time of his death. The deceased was clearly on his way to his first duty assignment of the day which, we have already determined, was not assigned as a special mission. Whether or not he had signed on, he was not responding to a call. He was not engaged at the time in any law enforcement activity of the nature described by SC such as could arise even outside his county of jurisdiction. Under these circumstances, we find especially compelling the fact that deceased was outside the county limits; had he crossed the county line, even had all other conditions remained the same, we believe that the deceased's presence in the county, in full uniform, riding a motorcycle identifying him as a peace officer of the county, would compel an inquiry as to whether or not the travel portion of the deceased's job was an integral part of his employment contract. *See* United States Fire Insurance Company v. Brown, 654 S.W.2d 566 (Tex. Civ. App.-Waco 1983, no writ), which made this determination with regard to the compensability of the death of a traveling health care provider whose employer reimbursed his transportation and required him on a daily basis to travel between hospitals. *See also* Rose v. Odiorne, *supra*, which distinguishes between transportation which is provided gratuitously, as an accommodation to the employee, and transportation which is an integral

part of the employment contract. *And see* Millers Mutual Fire Insurance Company v. Rawls, 500 S.W.2d 545 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.), concerning the relationship between the transportation and the employment and whether such was a necessity from the standpoint of the employer. However, as noted earlier, we believe the evidence in this tragic and unfortunate case does not remove it from the general rule as to injuries suffered in coming and going to work.

Claimant's final point on appeal concerns whether "justice" and "fairness" require our reversal because the claimant was not allowed a continuance until her attorney could be present and because, in absence of an attorney, she did not know how to object to carrier's sole witness. The record below shows that although the claimant had been represented by counsel at the benefit review conference, her attorney was not present on the day of the contested case hearing and had not sought a continuance, and that claimant asked for a continuance because she did not understand that the hearing was an evidentiary proceeding. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(b) (Rule 142.10(b)), provides that a continuance may be granted by the hearing officer at the request of a party, upon a showing of good cause; Rule 142.10(c)(3) states that such motion may be made during a hearing upon further showing that such continuance will not prejudice the rights of the other parties. While it is not clear from the record that such motion would have prejudiced the carrier (which, apparently, had paid no benefits to the claimant), nevertheless we do not find that the hearing officer abused her discretion in denying a motion which was based essentially upon a misunderstanding of the law. *See* Texas Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991, for a generalized discussion of motions for continuance and the requirement that the movant must show due diligence. With regard to the testimony of carrier's witness (who it is not contended was never identified as a potential witness), we would note that the presence or absence of evidence from the carrier does not relieve the claimant of the ultimate burden to prove that the injury in question occurred in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

As to the additional evidence attached to claimant's appeal, the 1989 Act provides that the hearing officer, not the Appeals Panel, is the fact finder. Section 410.165(a). The Appeals Panel is limited in its consideration of evidentiary matters to the record developed at the contested case hearing. Section 410.203(a). We further note that there was no showing that the attached evidentiary items were unknown or unavailable at the time of the hearing or that due diligence would not have brought them to light. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge