APPEAL NO. 950386

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 9, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. In response to the sole issue presented, the hearing officer determined that claimant had sustained a compensable injury on (date of injury) (all dates are (year) unless otherwise noted), by applying the "dual purpose" travel provision of Section 401.011(12)(B). Appellant (carrier) contends that the hearing officer misapplied the law and requests that we reverse the hearing officer's decision and render a decision in its favor. There was no response in the file from the respondent (claimant).

DECISION

We reverse and render a new decision.

The facts are not in dispute and the case revolves around the interpretation of the dual purpose rule. Claimant was employed by (employer), a manufacturer's representative to military commissaries throughout the world. In March of 1993 claimant was transferred from the employer's home office in (city), (state) (herein city), to employer's office in (city), Texas. Claimant's wife continued to reside in the family home in (city) "awaiting the disposition of other matters." During the following year claimant would typically spend three weeks of a month working out of the (city) office and one week in the home office in (city). In approximately March 1994, claimant began to make plans to schedule his wife's move to Texas. Claimant scheduled his week in the home office in (city) for the first week in (month). Claimant then scheduled several days vacation in (city) and a large commercial moving company was scheduled to pack and move claimant's household goods on (month) (day), (day), and (day). Claimant's plans were to then go to (city), (state) ((city)), for the weekend of (month) (day) to (day) to visit family. Claimant would leave his wife in (city), rent a car, drive and make a monthly sales call in (city), (state) ((city)), on (month) 20th and 21st, before returning to (city) to pick up his wife and proceed on to Texas. The plans were followed on schedule with claimant flying to (city), working in the home office, taking his vacation and assisting in and supervising of the packing and moving of his household goods. During the packing and moving claimant was drawing his usual salary and was not on vacation "or administrative leave." The employer was paying the costs of the move. On (date of injury), as claimant was loading his car at his home (in the garage) with both personal belongings and sales materials he struck his knee on a metal shelf. Claimant was unable to testify whether the exact item that he was loading was a personal or business item. After resting and waiting for the pain to subside claimant and his wife proceeded to (city), and then to (city) where claimant gave a presentation, and subsequently on to Texas. Claimant sought medical attention for his knee in September when the pain become so bad he could no longer golf (claimant described himself as "an avid golfer"). The doctor told claimant that he had a "broken kneecap" which would require surgery or else claimant would risk permanent injury in the form of arthritis. Claimant testified that he would not have wanted his wife to drive cross country by herself.

The hearing officer makes several factual determinations which are generally consistent with the undisputed facts, and references "Section 101.011(12)(D)(i)(ii) which should, in fact, be the definition of course and scope of employment found in Section 401.011(12) (A) and (B) which state:

(12)"Course and scope of employment" means an activity of any kind that has to do with and originates in the work, business, trade, or profession of the employer . . . . The term does not include:

(A)transportation to and from the place of employment. . . .

(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.

The hearing officer stated claimant would have been in (city) "even if he were not planning to move." We agree, and in fact claimant did work in the employer's home office the first week in (month). The hearing officer goes on to state, in her discussion, "Apparently [claimant] would not have scheduled his move to Texas to transpire on (month) (day), (day), (day), had he not also been planning to work in the Employer's [(city)] office that week." That statement is not supported by the evidence. Claimant had worked in the employer's (city) office the first week in (month), had taken several days vacation in (city) and was assisting his wife in overseeing the move on (date of injury). Claimant had not worked in the employer's office during the week of (month) (day) to (date of injury).

Carrier appealed the hearing officer's decision on the basis that as a matter of law the injury occurred outside the course and scope of the claimant's employment and therefore was not compensable. We agree, and further agree with both carrier and the hearing officer that the provisions of the dual purpose rule in Section 401.011(12)(B) applies. To paraphrase Section 401.011(12)(B), course and scope does not include travel for dual purpose (i.e. for both business and personal affairs) unless: 1) the travel would have been made even if there had been no personal or private affairs, and; 2) the travel would not have been made if there had been no business of the employer furthered. The hearing officer appears to lump all elements of the (month) trip to (city) together when in fact there were

separate and independent aspects of the trip. We agree that claimant would have made his monthly trip to (city) in the first part of (month) regardless of whether he was planning to move. This satisfies the requirement of Section 401.011(12)(B)(i). However, after accomplishing that portion of the trip, claimant then took some vacation and beginning (month) (day) proceeded to begin his move. The employer did not charge vacation time to claimant but appears to have given claimant time to move as an accommodation to claimant. It appears from the evidence that claimant would have gone to (city) to assist in the move of his family, attend to personal business and visit family regardless of work in the home office. Claimant testified that he would not have wanted his wife to drive cross country by herself and made references to visiting an ill father in (city) as well as moving. Consequently, we cannot find that the provisions of Section 410.011(12)(B)(ii) which provides that there is no coverage for travel which would not have been made had there been no affairs of the business of the employer were satisfied. Claimant had conducted the affairs of the employer and at the time of his injury was conducting his personal affairs which included packing personal items as well as sales material for the (city) meeting. The fact that claimant's plans called for him to visit family in (city) after loading his car and supervising the movers reinforces that in all likelihood claimant would have made this portion of the trip had there been no affairs of the business of the employer.

The rationale for the transportation provisions in Section 401.011(12) are explained in United States Fidelity & Guaranty Co., v. Harris, 489 S.W.2d 312, 315, (Tex. Civ. App.-Tyler 1972, writ ref'd n.r.e.), being that the purpose of the provision is to not provide compensation for an injury which is usually suffered as a consequence of the risks and hazards to which all members of the public are subject, rather than risks and hazards having to do with and originating in the work or business of the employer. We reject the hearing officer's determination that claimant's act of loading his car furthered the business interest of the employer. Rather clearly, the employer was accommodating claimant by continuing his salary while he was moving to Texas. Further, in moving, claimant was at no greater risk or hazard that any member of the public might be in moving and the injury was not the result of some greater hazard or risk having to do with the employer's work or business, particularly in that it is not clear whether claimant was moving personal goods or business material.

Texas Workers' Compensation Commission Appeal No. 94680, decided July 13, 1994, a case involving an employee who died on his way to his golf club to discuss business and play golf with a client, and Texas Workers' Compensation Commission Appeal No. 941569, decided January 5, 1995, a case where the employee left work early to pick up supplies for the employer and who was involved in a fatal accident on a route both to his home and the supply establishment, both applied the "dual purpose" travel doctrine. In both cases compensation was denied because the claimant had failed to establish that both prongs of Section 401.011(12)(B)(i) and (ii) had been met. Appeal No. 941569 cited Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824 (Tex. 1969) and Harris, *supra*. The Harris case involved an employee who purchased some supplies for her employer and was on her normal route to work with supplies when she was involved in a

fatal accident. The court, referring to the dual purpose rule, reversed the lower court's award of benefits. *Accord*, Callisburg Independent School District v. Favors, 695 S.W.2d 370 (Tex. App.-Forth Worth 1985, writ ref'd n.r.e.). *See also* Johnson, *supra*.

The Appeals Panel has considered the application of the dual purpose rule and upheld the denial of benefits in Texas Workers' Compensation Commission Appeal No. 92026, decided March 9, 1992. The case involved an employee being involved in a serious automobile accident when she left her job at lunch time during which she stated she was going to get some supplies for the office (which she was apparently authorized to do) and to get something to eat. The hearing officer applied the dual purpose rule and determined that the injury was not in the course and scope of employment. *See also* Texas Workers' Compensation Commission Appeal No. 93371, decided (month) 28, 1993, a case we remanded where there was a failure to apply the dual purpose rule where there was some evidence of two purposes to the claimant's trip which resulted in an automobile accident.

Accordingly, we reverse the hearing officer's decision and, applying the dual purpose test of Section 401.011(12)(B), we find that claimant would have made a trip to (city) to move his family even if there had been no business purpose, and we render a new decision that claimant was not in the course and scope of his employment when he injured his knee while loading his car at his house on (date of injury), preparatory to travel to visit relatives, make a sales call and eventually move to Texas. Claimant is not entitled to benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge