APPEAL NO. 970666

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 18, 1997, a contested case hearing (CCH) was held. The issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable injury on _____; (2) whether claimant had disability; (3) whether respondent (carrier) waived the right to contest compensability; and (4) claimant's average weekly wage (AWW). The hearing officer determined that claimant did not sustain a compensable injury in the course and scope of his employment and he did not have disability. Based on stipulations, the hearing officer determined that carrier did not waive the right to contest compensability and the claimant's AWW was $416.08. On appeal, claimant challenges the compensability and disability determinations. Carrier responds that sufficient evidence supports the hearing officer's determinations and requests affirmance.

DECISION

We affirm.

Claimant was injured while riding as a passenger in a truck on the way to work. Claimant said that he hurt his hip and back in the auto accident and that he has bulged lumbar discs. Claimant testified that, at the time of the accident, he lived in City 1, and that he had been working for (employer) as a construction worker for about three and one-half years. He testified that he had a verbal employment contract with employer. He said he did work for employer when employer had the work, and that he was laid off in between jobs. Claimant had been working at the job in City 2 for a few months when he was injured in the auto accident on _____. He testified that: (1) City 1 is about 80 or 100 miles from City 2 and they drove there each workday, (2) he told Mr. S, a supervisor, that he would go work in City 2 "if they provided [him] a ride," (3) previously, he had been riding to the City 2 work site with a co-worker, Mr. K, (4) Mr. K sometimes obtained "gas money" from Mr. S, and (5) claimant would not have worked in City 2 if employer had not provided transportation. Claimant said Mr. S drove him to work because Mr. K's car was not working.

Mr. S testified that: (1) he is a salaried employee of employer, (2) he was driving when the accident occurred, (3) he was taking everyone back towards home at the end of the day when the accident happened, (4) Mr. K used to drive claimant to work, but Mr. K's car was not working, so Mr. S gave claimant a ride to work in City 2, (5) Mr. S had sometimes given Mr. K money for gas, (6) Mr. S drove a company truck with a company logo on it, (7) Mr. S was not giving claimant a ride in his function as a supervisor, (8) Mr. S never told claimant that employer would provide transportation to City 2, (9) as far as he knew, transportation was not "part of the employment contract," for claimant, (10) claimant was not required to pay to ride to work and employer paid for the auto insurance and gasoline, (11) he knew that Mr. K and claimant had previously had an agreement that Mr. K would give claimant a ride to work, (12) the agreement claimant had with Mr. K was "all right" with Mr. S because Mr. S was trying to help them get a job since there were no jobs

in City 1, (13) he never told claimant that he would "make sure" that claimant had a way to get to work, (14) he did not always pay for Mr. K's gasoline, (15) he had been giving Mr. K "an hour a day extra" to cover the cost of claimant's transportation, (16) if claimant could not get to work, other employees were available in City 2, (17) there was an advantage in using workers he had worked with before, and (18) that claimant was a good worker.

The hearing officer determined that, at the time of the injury, claimant was not in or about the furtherance of employer's affairs and, thus, that his injury was not compensable. In the decision and order, the hearing officer stated that employer did furnish transportation to the job site, but that the employer's affairs were not being furthered at the time of the accident. She noted that Mr. S made arrangements for claimant's transportation to work "as a favor" to claimant.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

A claimant has the burden to prove he or she sustained an injury in the course and scope of employment. A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Course and scope of employment" means, in pertinent part, "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." Section 401.011(12). The definition of "course and scope of employment" does not generally include transportation to and from the place of employment except in certain limited circumstances. The term "course and scope of employment," 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.

That transportation might be furnished to an employee does not automatically mean an injury during that transportation is a compensable injury; generally, the employee must also show that, at the time of the accident, the employer's affairs were also being furthered. *See* Texas Workers' Compensation Commission Appeal No. 93898, decided November 15, 1993.

In this case, the hearing officer considered the issue of whether claimant was in the course and scope of his employment and resolved that issue in carrier's favor. She determined that Mr. S provided transportation to claimant, not to further employer's affairs, but as a favor to claimant.

Claimant cites Texas Employers Insurance Association v. Byrd, 540 S.W.2d 460 (Tex. Civ. App.--El Paso 1976, writ ref'd n.r.e.) and Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.--Austin 1990, writ denied) in support of his assertions. These cases are distinguishable because, in those cases, the facts established a "plan" or intent by the employer to get the employee to the job site and showed the benefits to the employer because of that plan. In Byrd, the job site was in a remote area and the employer expected the drillers to have a crew there every day. In the case before us, the benefit to the employer from the furnishing of the transportation was not so clearly established and the hearing officer could and did find that claimant was not furthering the employer's affairs at the time of the accident. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Claimant also appears to challenge the hearing officer's disability determination. The hearing officer determined that claimant did not have disability because he did not have a compensable injury. We have affirmed that determination and, thus, we also affirm the disability determination.

We affirm the hearing officer's decision and order.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge