APPEAL NO. 971422

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 25, 1997, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether respondent (claimant) sustained a compensable injury on (date of injury), and whether he had disability. The hearing officer determined that he sustained a compensable injury and that he had disability from March 20, 1997, to the date of the CCH. On appeal, appellant (carrier) challenges these determinations. Claimant did not respond on appeal.

DECISION

We reverse and render.

Carrier contends that the hearing officer erred in determining that claimant sustained a compensable injury. Claimant testified that he worked delivering produce. He said the most distant place he travels is about 70 or 80 miles away. He testified that on (date of injury), he was on his way back from (city 1) (City 1), Texas, to (city 2) (City 2), Texas, after delivering produce. He said he became sleepy, that he let his girlfriend drive the truck, that he fell asleep, that they had been gone for about six to seven hours, and that he was injured when she wrecked the truck. Claimant said that his girlfriend did not have a commercial driver's license, that it is illegal to drive without such a license, that she received a citation for driving without this license and for speeding, and that he was ticketed for letting her drive. The employer's general manager testified that he told claimant he was not allowed to have passengers in his truck. The general manager also testified that unlicensed nonemployees were not permitted to drive the employer's trucks.

The hearing officer determined that: (1) claimant violated the employer's policy by allowing an unauthorized person to drive the truck; (2) claimant's injury related to and originated in the employer's business and claimant's activity was performed by claimant in furtherance of the employer's business; (3) at the time of the accident, claimant was returning from a delivery run and was in the course and scope of employment; and (4) claimant sustained a compensable injury.

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). In Lesco Transportation Company Inc. v. Campbell, 500 S.W.2d 238, (Tex. Civ. App.-Texarkana 1973, no writ) the court stated as follows:

> [T]he rule is that when an employee abandons and turns aside from the course and scope of his employment, such deviation defeats a claim for compensation. Such deviation occurs if at the time of the injury the employee is engaged in and pursuing personal work or objectives that do not further the employer's interest. An injury received under such circumstances is not from a hazard that has to do with and originates in the employer's business, work, trade or profession.
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In this case, it was undisputed that claimant was not driving the truck, but had turned the truck over to his girlfriend. Therefore, the evidence shows that he stepped aside from his work duties and was not acting in furtherance of employer's business at the time of the accident. The act of turning the truck over to an unlicensed nonemployee is not in furtherance of employer's business. Therefore, we reverse the hearing officer's determinations that claimant was in the course and scope of employment and that he sustained a compensable injury and render a decision that he was not in the course and scope of employment and did not sustain a compensable injury.

Claimant contended at the CCH that turning the truck over to his girlfriend involved only the "manner" in which claimant performed his duties. The hearing officer cited Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993, in her decision and order. That case states that a violation of employer's instructions will not destroy the right to compensation if the instructions relate only the manner of doing the work. However, in this case, the claimant's action in turning over the truck did not involve the "manner" in which he performed his work. If claimant had been careless or speeding while driving and thus violated company policy or the law in the way he drove the truck, this would involve an issue of the "manner" in which he performed his work, and the proposition of law stated in Appeal No. 92716 would apply. Here, however, claimant was not performing any work.

We would also note that the personal comfort doctrine does not apply here. We do not disagree that it is reasonable for delivery drivers to take rest breaks if they become sleepy while driving. However, the accident in this case did not take place because of a comfort break; claimant was not injured while pulled over to the side of the road for a rest break. Claimant was no longer in the course and scope of employment once he decided

to permit his girlfriend to drive the truck. Just because he was sleeping, eating, drinking a soda, or taking other personal comfort while she drove does not put him back into the course and scope of his employment.

Carrier contends the hearing officer erred in determining that claimant had disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). We have reversed the compensability determination and conclude that claimant did not sustain a compensable injury. Therefore, claimant cannot have disability because there is no compensable injury. Disability, by definition, depends upon there being a compensable injury. Section 401.011(16).

We reverse the hearing officer's decision and order and render a decision that claimant did not sustain a compensable injury and that he did not have disability.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge