APPEAL NO. 050874-s
FILED JUNE 9, 2005

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 March 8, 2005. The hearing officer determined that the appellant (claimant) was not in the course and scope of her employment when she was involved in a motor vehicle accident (MVA) on _____; that the claimant had not sustained a compensable injury on that date; and that because the claimant did not sustain a compensable injury, the claimant did not have disability.

The claimant appealed, contending that she was in the course and scope of her employment when she left her "office/home," that "she was furthering the business interest of her employer from the time she left her home" until the MVA and that she had sustained a compensable injury and disability. The respondent (carrier) responded, citing various authorities and urging affirmance.

DECISION

Reversed and a new decision rendered.

The claimant was employed by (Employer S), a temporary staffing agency, as an on-site trainer of office equipment. Employer S contracted with (Company X) to supply on-site trainers for Company X's equipment. Apparently the claimant worked out of her home using her own computer, internet service and telephone. The claimant testified, and the hearing officer found (as indicated in the Background Information) that on the morning of _____, the claimant logged on to her computer at about 8:30 a.m., received an assignment from Company X by e-mail, confirmed that e-mail and called a supervisor at Company X. The claimant also called a contact person at her first customer, a primary school to confirm the assignment. (The carrier's cross-examination of the claimant also elicited testimony that the claimant did some "phone training" with the customer's contact person at the time.) Shortly there after the claimant left her home and proceeded "toward the first training assignment of the day" when she was involved in the MVA. The accident report indicates that the MVA occurred at 9:05 a.m. It appears that the claimant was paid mileage and time at least from the time she left home if not from the time she received her assignment. The regional sales manager for Employer S testified that "anytime [the claimant] is out training, we are billing for her time, so that would be a benefit to [Employer S]."

Section 401.011(12) provides:

> (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 it 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:
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> (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
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> (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 general rule is that an injury occurring in the use of public streets or highways in going to and returning from the place of employment is noncompensable. American General Insurance Co. v. Coleman, 303 S.W.2d 370 (Tex. 1957). The rule is known as the "coming and going" rule. The rationale of the rule is that "in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350, 353 (Tex. 1963). The exception to the coming and going rule in Section 401.011(12)(A)(iii) is referred to as the "special mission" exception where the employee is directed as part of the employment to proceed from one place to another. A leading case in this area is Evans v. Illinois Employers Ins. of Wausau, 790 S.W.2d 302 (Tex. 1990). In Evans the employee (Evans) was instructed by his supervisor to attend a safety meeting at a different location and different time than his normal duty location and starting time. Evans pay was to begin when he arrived at the safety meeting. On the way to the safety meeting the employee was in a MVA and was killed. The court held that "since neither [Evans and another employee] of them had begun work their injuries fall squarely within the 'coming and going' rule." The court further noted that had the employees been injured en route from the safety meeting to the primary work site there would have been coverage. We distinguish Evans from the instant case on the basis that the claimant in this case had begun work by logging in and getting her assignment, by making contact with both the employer and client company and was getting paid. There was also no evidence that the claimant's primary work site was anywhere other than her "office/home."

> The hearing officer, in the Discussion portion of his decision commented;
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> Because Claimant was traveling from home to work at the time of the [MVA] on _____, Claimant was not in the course and scope of employment within the meaning of the Act. The situation is analogous to and is governed by the coming and going rule as described in [Texas

Workers' Compensation Commission Appeal No. 010122, decided March 5, 2001].

In Appeal No. 010122, *supra*, the claimant was employed in (City 1), Texas (City 1), and had attended a seminar in (City 2), Texas (City 2). After the seminar the claimant talked to other attendees for a while and then left to return to City 1. The claimant was almost at her residence in City 1 when she was involved in a MVA. The hearing officer, in Appeal No. 010122, found the claimant was on a "special mission." The Appeals Panel applied the Evans, *supra*, and Coleman, *supra*, cases in holding:

> Going home after leaving the meeting site created no greater risk for the claimant than going home from the workplace. *See also* Texas Workers' Compensation Commission Appeal No. 941340, decided November 10, 1994, where the Appeals Panel determined that there was no compensable injury when the claimant was "simply going directly from home to a scheduled meeting which only comprised a portion of the workday, and which took place in the vicinity as her normal work site and was well within a reasonable daily commute."

The carrier cites, among other cases, Jecker v. Western Alliance Insurance Co., 369 S.W.2d 776 (Tex. 1963). Jecker, although applying the general rule prior to the 1989 Act, is not a true special mission case but rather a situation where an employee whose very nature of employment required travel from one place to another throughout the day was found to be in the course and scope of employment. The case goes on to say that to hold otherwise "would be wholly unjust to salesmen, servicemen, repairmen, deliverymen and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen's Compensation Act." Id. at 779. We would note that an on-site trainer would just as easily come within the cited categories as an on-site repairman. The carrier concludes its argument on that point by stating that the "special mission" exception, therefore, applies to travel during the day, but not "to and from the first place of employment on the particular day." It is the carrier's interpretation that the repair people whose duties "are necessarily implicit in their contract of employment" does not include "to and from the first place of employment on the particular day." (Page 6, carrier's response brief).

The carrier cites a number of oil field worker cases which we do not consider particularly analogous to the instant case. The carrier also asserts that "the claimant attempted to produce evidence that she had somehow begun 'telephonic training' prior to her embarking on her trip from home to the work location," however we note that this was brought out in the carrier's cross-examination in the following sequence:

> Q. [Carrier attorney] Okay. So I understand it, your job is to take customers who have purchased a [brand name] product and teach them how to utilize that product. Is that correct.
>
> A. [Claimant] Yes.

Q. And do you do that at your home?

A. I do it by phone or do I do it in person.

Q. Okay. And when you do it by phone, how do you do it by phone?

A. I call the customer. I've been supplied the information by [Company X]. They give me the name, address information. I get the machine – the type that they have. Once I find out that information, I call the customer, tell them . . . . I'm their trainer and I heard that they had questions on their machine or they have training issues or anything. What can I help them or assist them with.

Q. All right.

A. They tell me what the issues and the problems are. I tell them how to use their machine, how to – how – what issues and what problems. Anything that they're having, they ask me.

Q. All right. On _____, did you do phone training that day?

A. That day, I talked with – when I talked to J [the client company contact person]

Q. You need to answer my question. Did you do phone training or not?

A. Well, she asked me about her machine while I was on the phone with her, so yes.

Q. Okay. So, you trained her

A. Part of it, yeah.

Q. And what did you tell her? What training did you give her that day?

A. She asked me what kind of machine and she had never used it. I told her – she told me about the side of the machine and I would be there to train her.

Q. Okay. So, you basically told her that – you told her how to operate the machine before you got out there?

A. Uh-huh.

* * * *

[Claimant] Yes, that's a "yes".

Q. [Carrier attorney] Why would you have done that?

A. Because she asked me how to use the machine, and to keep my customer satisfied – by [Company X], I was trained to keep them satisfied for customer satisfaction.

Although the hearing officer did not mention this particular exchange, it is clear from this testimony, and other evidence including time sheet and mileage reimbursement records, that the claimant would log on to her computer at home, get her e-mail assignment, reply to Company X by e-mail, confirm the assignment by telephone with Company X and then call the client company contact person to set up an on-site training session and/or answer questions about the equipment on the telephone. There is no evidence that the claimant at that point, or any other time, would go to either employer's office or Company X for further instruction on how to proceed. The claimant testified that her day starts when she confirms her assignment by e-mail and that she gets "paid from the time [her] day starts. . . ." There is ample evidence to indicate that the claimant began getting paid from the time that she obtains her assignment and that she was paid for her travel time. In any event, the claimant was clearly being paid, and Employer S was billing for her time, from at least the time the claimant left her "home/office", if not earlier.

We believe that the similar case of United States Fire Insurance Co. v. Brown, 654 S.W.2d 566 (Tex. App.-Waco 1983, no writ) is instructive. In Brown, the employee/decedent, was a nurse employed by a health care agency whose business was providing health care personnel to client hospitals. The decedent was paid mileage expense and an hourly wage which began when the decedent arrived at the hospital. The health care agency paid employees (including the decedent) a fixed hourly rate, and mileage and billed the client hospitals at a higher rate, the difference formed the employer's business profit. On the day in question the decedent was on his way to the assigned hospital when he was killed in MVA. The Waco Court addressed the "coming and going" rule, and cited Jecker, *supra*. The Court held that the deceased was traveling "on the public highways pursuant to express or implied requirements of his employment contract" and concluded that "Brown was not simply on his way to work at the time of his injuries, even though his hourly rate did not begin until he reached Meridan hospital" but that the travel "was an integral part of his employment contract, and he began execution of this part of his job duties when he left his home. . . ."

Although the hearing officer treated this case as a strict "coming and going" case the great weight and preponderance of the evidence was that the claimant had logged on to her computer, obtained her assignment and had actually begun to work. The employer's (Employer S) regional sales manager testified that anytime the claimant "is out training we are billing for her time, so that would be a benefit to [Employer S]" and that Employer S begins billing "[f]rom the time [claimant] leaves her home." (Transcript pages 55 and 56). We hold that what the claimant was doing at 9:05 a.m. on the

morning of _____, was an integral part of her employment, was an activity that originates with the employer's business and that the claimant was furthering the affairs or business of the employer (the employer was billing Company X for the claimant's services at the time of the MVA). *See also* Brown, *supra*.

We hold that the hearing officer's determination that the claimant was not in the course and scope of her employment on _____, to be incorrect as a matter of law and against the great weight and preponderance of the evidence. We reverse the hearing officer's decision and render a new decision that the claimant was in the course and scope of her employment when she was involved in a MVA on _____, and that the claimant did sustain a compensable injury.

The hearing officer also found, in an unappealed determination, that due to the claimed injury the claimant was unable to obtain and retain employment at her preinjury wage "beginning on _____, continuing through March 8, 2004 [*sic* 2005, the date of the CCH]." Accordingly, we reverse the hearing officer's decision that because the claimant did not sustain a compensable injury, the claimant did not have disability and render a new decision that the claimant had disability from _____, to the date of the CCH.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge