APPEAL NO. 101035
FILED SEPTEMBER 30, 2010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 25, 2010. The hearing officer determined that the decedent was in the course and scope of his employment when involved in a fatal motor vehicle accident (MVA) on _____, and that the respondent (claimant beneficiary) is a proper legal beneficiary of the decedent, entitling her to death benefits. The appellant (carrier) appealed the hearing officer's compensability and death benefits determinations. The claimant beneficiary responded, urging affirmance.

DECISION

Reversed and rendered.

BACKGROUND INFORMATION

The parties stipulated that on _____, the decedent was involved in a fatal MVA; the decedent died as a direct result of the injuries sustained during the MVA on _____, and that the claimant beneficiary is a proper legal beneficiary of the decedent.

COURSE AND SCOPE OF EMPLOYMENT

Section 401.011(12) provides in part:

> "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.

Generally, an employee engaged in business travel, such as a special mission, does not go into and out of the course and scope of employment while on that special mission, which is sometimes referred to as the principle of "continuous coverage." *See* Aetna Casualty & Surety Co. v. Orgon, 721 S.W.2d 572 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

The salient facts are undisputed. The decedent, a service representative for the employer's oil field production business, began each work week picking up supplies and parts from the main office in (City A) and then traveling to (City B). The decedent spent the week working in the area of City B, living in an apartment maintained by the employer for its employees. There are restaurants available for eating in City B. The employer also paid for groceries for the employees to cook in the apartment. There is

evidence that the decedent usually ate his meals in City B; however, he as well as other employees and the owner, had traveled to (City C). The distance from City B to City C is approximately 35 to 40 miles.

On (day before date of injury), the decedent drove to City C with a personal friend (NM). The decedent ate supper at a restaurant in City C with NM and a co-worker (MS), who had driven to City C earlier for an oil change in his company vehicle. Following their meal, the three men went to a bar to watch a basketball game, drink, and play pool. In the early morning hours of _____, the decedent and NM were driving back to the apartment in City B when the decedent lost control of his company vehicle and died in a fatal MVA approximately 7 miles away from the apartment.

The carrier contends that at the time of the fatal MVA, the decedent was not in the course and scope of employment because he had undertaken a trip solely for his pleasure and entertainment. The claimant beneficiary contends that the decedent was within the course and scope of his employment under the principle of continuous coverage when he chose to eat in City C and if there was a deviation in going to the bar, the deviation was over when the decedent began to return to the apartment in City B on the same road traveled to the restaurant in City C.

It is well-settled that "[a]n employee whose work involves travel away from the employer's premises is in the course and scope of employment continuously during the trip, except when a distinct departure on a personal errand is shown. Injuries arising out of the necessity of sleeping in hotels and eating in restaurants away from home are usually compensable." PHILLIP HARDBERGER, TEXAS WORKERS' COMPENSATION TRIAL MANUAL p. 11-4 (Parker-Griffin Publishing 1991). The question of whether the claimant is engaged in a personal errand is a fact question for the hearing officer to resolve. *See* Appeals Panel Decision (APD) 980907, decided June 15, 1998. In APD 950973, decided July 31, 1995, we noted that the geographically closest restaurant need not be chosen in order for the claimant to continue in the course and scope of her employment when going to eat while traveling.

In the Background Information section of the decision, the hearing officer states:

> The [decedent] went to [City C] to eat, which the then-owner of the employer testified was permissible and understandable once a week or so. While the time traveling to and the time at the location where he watched the basketball game and played pool was a deviation, when the [MVA] occurred the [decedent] was on the road between [City C] and [City B], returning to the apartment belonging to the employer. It is the road on which the [decedent] would have been even if he had not made the deviation. Based on the reasoning and outcome of the more recent [APD 000679, decided May 15, 2000], the [Appeals Panel] limited reference to the earlier decision cited by the carrier [APD 950973, *supra*], and generally the more recent decisions of the Appeals Panel that an employee does not go in and out of coverage absent a clear deviation, the

> claimant/beneficiary carried her burden of proof to establish that the [decedent] was in the course and scope of his employment when he suffered the injuries that resulted in his death.

The hearing officer erred in his factual determination by relying on APD 000679, *supra*. The facts in that case are distinguishable from those in the instant case. In APD 000679, there was no evidence that the injured worker was on some form of personal errand or off-duty social or recreational activity that was not required by her employment or the necessity of sleeping or eating away from home at the time the injured worker, a flight attendant on a layover, took a 10 to 15 minute shuttle bus ride to a restaurant to eat, tripped and fell walking towards the restaurant. Rather the facts in the instant case are similar to those in APD 950973, *supra*, in which the injured worker was at an out-of-town job site, staying at a motel. After work, the injured worker, who was without transportation, went with his supervisor to eat at a restaurant approximately 15 miles away from his motel, although there were restaurants within walking distance of his motel. At the restaurant, the injured worker ate and drank while joined by other co-workers. There was no evidence that any business was discussed. Enroute to the motel, there was a MVA. The Appeals Panel reversed the hearing officer's determination that the injured worker was in the course and scope of his employment, stating that:

> an employee, when housed near a job site by employer and away from his city of residence or when away from his hometown temporarily on order of his employer, may, or may not, be covered for injury under the 1989 Act when eating "close" or "nearby" the job site or the housing provided or while occupying the assigned residence. We expressly do not require that food be sought from the geographically nearest source for injury to possibly be compensable in the situation described. In parts of Texas, seeking food "nearby" may result in a need to travel several miles. "Close" or "nearby" does not include driving from a town . . . 15 miles to another town to eat." The finding of fact that claimant was not engaged in personal pleasure . . . in travelling that distance in the situation described while other food sources were available nearby, even if only available by walking, was against the great weight and preponderance of the evidence.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In a review of the evidence in the instant case, the choice made by the decedent that evening to eat, drink, play pool, and watch television in City C, 35 to 40 miles away from his accommodations, was made due to his personal pleasure and recreation and was not an incident of his employment. *See* APD 950973, *supra*; APD 992094, decided November 3, 1999.

Accordingly, we hold that the hearing officer's determination that the decedent was in the course and scope of his employment when involved in a fatal MVA on _____, to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the decedent was in the course and scope of his employment when involved in a fatal MVA on _____, and we render a new decision that the decedent was not in the course and scope of his employment when involved in a fatal MVA on _____.

LEGAL BENEFICIARY

The hearing officer's determination that the claimant beneficiary is a proper legal beneficiary of the decedent is supported by sufficient evidence and is affirmed. Given that we have reversed the hearing officer's compensability determination, we reverse that portion of the hearing officer's determination by striking that the claimant beneficiary is entitled to death benefits and we render a new decision that the claimant beneficiary is a proper legal beneficiary of the decedent.

SUMMARY

We affirm that portion of the hearing officer's decision that the claimant beneficiary is a proper legal beneficiary of the decedent but we reverse that portion of the hearing officer's decision by striking that the claimant beneficiary is entitled to death benefits and we render a new decision that the claimant beneficiary is a proper legal beneficiary of the decedent.

We reverse the hearing officer's decision that the decedent was in the course and scope of his employment when involved in a fatal MVA on _____, and we render a new decision that the decedent was not in the course and scope of his employment when involved in a fatal MVA on _____.

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

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge