APPEAL NO. 002546-S

Following a contested case hearing held on September 18, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability as a result of the claimed injury of _____. The claimant has appealed, asserting that the fact that he was driving a police car to work at the time he was injured in a motor vehicle accident (MVA) and the fact that the respondent's (self-insured) police department had a policy of permitting certain police officers to drive police cars to and from work operated to place the claimant in the course and scope of employment at the time of the MVA. The self-insured's response urges the absence of legal error and the sufficiency of the evidence to support the challenged determinations.

DECISION

Reversed and a new decision rendered that the claimant sustained an injury in the course and scope of his employment and that he had disability from _____, through January 4, 2000.

The claimant testified that he has been employed by the self-insured's police department for approximately two years; that he resides in another county, 47 miles from his place of employment; and that pursuant to his employer's policy, he is permitted to drive a police car to and from work and his residence, at no cost to him. The evidence reflects that on _____, while driving a police car to work, the claimant became involved in a two-car MVA at a location about two to three miles from his residence and that both he and the other driver were seriously injured. The claimant indicated that he has since recovered from his injuries and has returned to his police force duties. As for the circumstances surrounding the MVA, the claimant stated that he "was going to work"; that he has no recollection of the accident; and has lost his memory of most of the week of the accident; and that he cannot say he was involved in making an emergency call or an apprehension at the time of the accident. In evidence is a written reprimand of the claimant from his employer for his involvement in "a preventable accident." The claimant further testified that it is his understanding that he is "on duty" while driving to and from work both because as a Texas peace officer he is always on duty and because the employer has a written policy to this effect. He also said that the road he was on at the time of the MVA is the route he always uses in driving the police car to and from work.

The self-insured introduced a driving policy memorandum which the claimant and the self-insured's risk manager signed in April 1998 which states, in part, that the claimant's duties indicate that he will be required to operate a vehicle "during the time [he] is working" and that he "may drive a vehicle during the hours [he] is employed." The self-insured also introduced its police department's Policy 40, dated January 5, 1999, which provides for the police department's "Personalized Vehicle Program" in order to establish greater police visibility, reduce transportation and vehicle maintenance costs, and provide

police officers with a sense of ownership in their particular assignment. According to this policy, police vehicles are issued to certain officers with certain limitations on their use for "on-duty work assignments" and "off-duty assignments." The "on-duty work assignments" include going "to and from work (subject to residency limitations below) which may include temporary stops" for snacks, soft drinks, clean uniforms, etc.; to and from court; to and from department-approved training; to and from any emergency; and to and from any other assignment expressly authorized by the chief of police. The residency limitations state that officers not living within the city limits of the self-insured may operate their "personal" police vehicles "to and from work and home only, if living within 5 miles of the Extra Territorial Jurisdiction (ETJ) of the [self-insured]"; that the ETJ line extends two miles out in all directions from the existing city limits; and that officers not eligible to take their vehicles to their residence will park their vehicles at the police station at the end of their duty tour.

The claimant contended that he was in the course and scope of his employment at the time of the MVA pursuant to the police department's Policy 40 which permitted him the use of the police vehicle to drive to and from work and also because, as a Texas peace officer, he is required to be on duty 24 hours a day. As noted, the claimant testified that he resided 47 miles from the police station and in another county but that he nonetheless drove his police vehicle to and from work in accordance with what he understood was the department's policy. The evidence indicated that the claimant was but a few miles from his house at the time of the MVA. He did not contend that he was within either the city limits or the ETJ of the self-insured but made clear he was permitted to drive the police vehicle between home and work, with the apparent approval of his superiors.

The self-insured contended that at the time of the MVA the claimant had driven a few miles on his 47-mile trip to work, was not within the jurisdiction of the police department, and was not in pursuit of a lawbreaker nor responding to an emergency. The self-insured maintained that the claimant was merely driving to work and, thus, was not in the course and scope of his employment.

Section 401.011(12) defines "course and scope of employment" to mean 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 but does not include transportation to and from the place of employment (the "coming and going" rule) unless the transportation is furnished as part of the contract of the employer or is paid for by the employer, the means of the transportation are under the control of the employer, or the employee is directed in the employment to proceed from one place to another place. As a general rule, an injury sustained by an employee while traveling to or from work is not sustained in the course and scope of employment because the risks of the road are risks to which all persons using the road are exposed and do not have to do with and originate in the business of the employer. *See, generally*, American General Insurance Company v. Coleman, 303 S.W.2d 370 (Tex. 1957); Texas General Indemnity Co. v. Bottom, 365

S.W.2d 350 (Tex. 1963); and Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. 1964), rehearing denied.

In Texas Workers' Compensation Commission Appeal No. 961622, decided October 2, 1996, the Appeals Panel reversed the hearing officer's decision for a police officer injured in an MVA while driving a police vehicle to work, stating simply that because the employee was in uniform, in an employer-assigned vehicle, on call 24 hours a day, and "on the lookout for criminal activity" while going to work did not change the fact that he was going to his regular place of employment, at the regular time, and was consequently exposed to the same risks as are other members of the traveling public. Our decision cited Rose v. Odiorne, 795 S.W.2d 210 (Tex. App.-Austin 1990, writ denied) for the proposition that transportation furnished by the employer is not dispositive of the issue of compensability. We further stated that the fact that an employer has furnished transportation as an accommodation to the worker, or even for a mutual benefit, but not as an integral part of the employment contract, does not render compensable an injury occurring during such transportation and the employee must still prove that he or she was acting in the course and scope of the employment. Our decision also cited Texas Workers' Compensation Commission Appeal No. 950361, decided April 24, 1995, a police officer on a police motorcycle MVA case, in which we stated that a finding that the transportation was furnished or controlled by the employer does not end the inquiry as to compensability because the employee must still prove that he or she satisfied the statutory requirements; that is, that the injury met both elements of the definition of course and scope.

The claimant argued below and continues to contend on appeal that the mere fact that he was permitted by the employer to drive the police vehicle to and from work and that he was "on duty" when doing so was all he was required to prove and that in the above-cited Appeals Panel decisions, the Appeals Panel effectively added new requirements to the 1989 Act and , thus, ran afoul, of the Texas Supreme Court's decision in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 548 (Tex. 1999) concerning certain ad hoc rule-making in Appeals Panel decisions. We find no merit in this contention since these Appeals Panel decisions and other similar decisions involving the "coming and going" rule are firmly grounded in well-settled Texas case law.

The hearing officer's decision contains a discussion of the principles set out in Appeal No. 961622, *supra*, and he found that the claimant was not in the furtherance of the employer's interests and, thus, not in the course and scope of his employment at the time of the MVA. The hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), and the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We find the hearing officer's determination to be against the great weight of the evidence because Policy 40 plainly and unambiguously provides that the claimant's driving the police vehicle to and from work is an "on duty" work assignment. *Compare* Texas Workers' Compensation Commission Appeal Nos. 000024 and 000025, decided February 10, 2000,

wherein the Appeals Panel reversed and rendered a decision that, construing the regulations of a fire department's regulations, two deceased firemen, killed while fighting a fire in a neighboring jurisdiction, were in the course and scope of employment at the time of their deaths. Accordingly, we reverse the decision and order of the hearing officer and render a new decision that the claimant sustained a compensable injury on _____.

As for the issue of disability, the hearing officer determined that the claimant was off work as a result of his injury from _____, through January 4, 2000, and the self-insured does not dispute the period of the claimant's absence from work as a result of his injury of _____. We render a new decision that the claimant had disability from _____, through January 4, 2000.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge