No. 14-0272

IN THE

The Supreme Court of Texas

SEABRIGHT INSURANCE COMPANY,

Petitioner,

v.

MAXIMA LOPEZ, BENEFICIARY OF CANDELARIO LOPEZ, DECEASED,

Respondent.

Appealed from the Fourth Court of Appeals, Case No. 04-12-00863-CV

and

229TH Judicial District Court of Starr County, Texas

Trial Court No. DC-08-484

Ana Lisa Garza, Presiding Judge

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE

Nature of the case:	This is a workers' compensation case. Petitioner, SeaBright Insurance Company, sought judicial review of an administrative decision that Candelario Lopez was in the course and scope of his employment at the time of his fatal motor vehicle accident on September 11, 2007.
Trial Court:	The Honorable Ana Lisa Garza, in the 229th Judicial District Court of Starr County, Texas.
Course of Proceedings:	Both Petitioner and Respondent, Maxima Lopez, the Beneficiary of Candelario Lopez, Deceased, filed Motions for Summary Judgment. CR-710, CR-763.
Trial Court Disposition:	Judge Garza granted Respondent's Motion for Summary Judgment, denied SeaBright Insurance Company's Motion for Summary Judgment, and entered a final judgment in favor of Respondent on October 2, 2012. CR-1278. SeaBright Insurance Company's Motion for New Trial was denied. CR-1301.
Parties in the Court of Appeals:	SeaBright Insurance Company as Appellant and Maximina Lopez, Beneficiary of Candelario Lopez, Deceased, as Appellee
Court of Appeals:	Court of Appeals of Texas, Fourth District, San Antonio. Opinion by the Honorable Marialyn Barnard. The Honorable Karen Angelini and Rebeca C. Martinez also participating.
Court of Appeals Disposition:	Trial court judgment affirmed. SeaBright's Motion for Rehearing was denied.
Court of Appeals Citation:	*SeaBright Ins. Co v. Lopez*, 2014 Tex. App. Lexis 905 (Tex. App.—San Antonio 2014).

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the court of appeals has committed an error law of such importance to the state's jurisprudence that is should be corrected. Tex. Gov't Code § 22.001(a)(6). The Supreme Court also has jurisdiction over this appeal because the case involves the construction of a statute to the determination of the case. Specifically, the Fourth Court of Appeals has substantially altered the statutory requirements for course and scope of employment under Texas Labor Code § 401.011(12)(A).

ISSUES PRESENTED

Issue 1:

Did the Court of Appeals err in applying a nexus/but for test to determine if an employee's travel originated in the business of the employer pursuant to Texas Labor Code § 401.011(12)?

Issue 2:

If an employee chooses to work away from his home, does the travel necessitated by a work location remote to his domicile originate in the business of the employer pursuant to Texas Labor Code § 401.011(12)?

Issue 3:

Did Candelario Lopez sustain a compensable injury and in the course and scope of his employment at the time of his fatal motor vehicle accident on September 11, 2007?

STATEMENT OF FACTS

This case is a judicial review of an administrative workers' compensation decision on whether Candelario Lopez "was in the course and scope of his employment at the time of his fatal motor vehicle accident on September 11, 2007." As this case concerns the specific issue of whether Candelario Lopez's travel brought him into the course and scope of employment when the accident occurred, the factual circumstance surrounding his employment and his travel during his employment are extremely important.

On September 11, 2007 Candelario Lopez ("Lopez") was employed by Interstate Treating, Inc. ("Interstate"). CR-740. Mr. Lopez was domiciled in Rio Grande City, Texas. CR-741: Deposition of Ronald Rains, p. 17, lines 13-15. However, during his entire employment with Interstate Lopez never worked in the vicinity of Rio Grande City, Texas. CR-742: Deposition of Ronald Rains, p. 18, lns. 2-5. In September, 2007 Interstate was performing a shut down of a fabrication and construction project at the Encana Plant in Ridge, Texas (approximately 60 miles north of College Station). CR-740: Deposition of Ronald Rains, p. 12, lines 13-15; CR-743: page 22, lines 12-15. At the time of the accident, Lopez was residing at a motel in Marlin, Texas (approximately 47 miles from the job in Ridge.) During the course of his employment with Interstate Treating, Lopez had

worked at a variety of locations including Virginia and Oklahoma. CR-740: Deposition of Ronald Rains, P. 13, lns. 9-15.

As with each job, Lopez made his own living arrangements when he was working. CR-746: Deposition of Ronald Rains, p. 35, ln. 7 to p. 36, ln. 8; CR-755: Deposition of John Knight, p. 11, ln. 17 to p. 12, ln. 2. His employer took no control of where he resided while working at the Encana Plant in Ridge, Texas. CR-755: Deposition of John Knight, p. 12, lns. 3-9. Lopez was not paid for any time traveling to or from the job site. CR-755: Deposition of John Knight, p. 10, lns 7-11. Rather, he was only paid from the time he arrived at the job site until he left at the end of the workday. CR-755-58: Deposition of John Knight, p. 13, ln. 24 to p. 25, ln. 5.

At the time of the accident the basis of this lawsuit, Lopez was not performing any job duties or tasks for Interstate Treating. CR-756: Deposition of John Knight, p. 14, lns. 14-20. His death occurred as he drove to the jobsite in Ridge from Marlin on the morning of September 11, 2007. He was simply en route to begin his workday at the Encana Plant when the accident happened. CR-748: Deposition of Ronald Rains, p. 43, lns. 13-15.

This case proceeded through the Texas workers' compensation administrative process. A contested case hearing was held. The contested case hearing officer determined that:

(a) Decedent's work involved travel away from the employer's premises;
(b) Decedent was engaged in or furthering the affairs or business of Employer at the time of his fatal vehicle accident on September 11, 2007.
(c) Decedent sustained damage or harm to the physical structure of his body in the course and scope of employment at the time of his fatal vehicle accident on September 11, 2007.
(d) Decedent sustained a compensable injury on September 11, 2007.

SeaBright Insurance Company (SeaBright) timely sought review of the hearing officer's Decision and Order with the Texas Department of Insurance, Division of Workers' Compensation Appeals' Panel which did not issue an opinion. Instead, the Division of Workers' Compensation notified the parties that the hearing officer's Decision and Order was the final administrative decision.

SeaBright then sought judicial review of the final administrative Decision and Order pursuant to Texas Labor Code § 410.251. CR-17. SeaBright and Respondent each filed a Motion for Summary Judgment. CR-710; CR-763. The district court granted Respondent's Motion for Summary Judgment and entered the Final Judgment on October 2, 2012 after notice to the Division of Workers' Compensation of the form of judgment. CR-1278. SeaBright filed a Motion for New Trial. CR-1233; CR-1284. The Motion for New Trial was denied by the district court. CR-1301. SeaBright susbsequently appealed the judgment to the Fourth Court of Appeals. The Fourth Court of Appeals affirmed the judgment.

SUMMARY OF THE ARGUMENT

The Fourth Court of Appeals creates a legal standard that a workers' compensation carrier, such as SeaBright, cannot possibly meet. Under the Fourth Court of Appeals' analysis any worker that accepts employment away from his home would be in the course and scope of employment during his daily commute to and from work. The Court of Appeals in determining whether Lopez was in the course and scope of his employment at the time of the accident looked beyond the scope of his employment requirements for the employee.

Instead, the Court of Appeals chose to evaluate the "nexus" between Lopez's work and commute applying a "but for" test to the employee's location. Under this analysis a workers' compensation carrier faces certain liability because any commute or travel to work by an employee would meet the proffered "but for" test. The Court should reject the Fourth Court of Appeals' analysis and clarify the definition of activities "originating" in the business of the employer under Texas Labor Code § 401.011(12) as focusing on specific employment requirements. The Court should further clarify that the location determinative to whether an employee is engaged in out of town work travel is the employer's location, not the location of the employee's domicile.

The Court should render judgment for SeaBright because there is no genuine issue of material fact in this case. Lopez's travel on the date of the accident did not originate in the business of his employer as required by Texas Labor Code § 401.011(12). Lopez was traveling to work when the accident occurred, from housing chosen by Lopez in a vehicle gratuitously provided by the employer. There was no employment contract requirements associated with the vehicle's use. Additionally, Lopez's travel to work is not subject to the "continuous coverage" doctrine because Lopez was not traveling away from the employer's premises. Further, there is no evidence that Lopez was on a "special mission" at the time of the accident.

ARGUMENT

I. The Standard of Review.

A trial court's summary judgment is subject to de novo review. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) citing *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). "When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000) (internal citations omitted). Further, "[t]he

reviewing court should render the judgment that the trial court should have rendered." *Id*. (internal citations omitted).

Nevertheless, each party moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that the party is entitled to summary judgment as a matter of law. *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 223 (Tex. 1999).

II. The San Antonio Court of Appeals erred in its construction of Texas Labor Code § 401.011(12)(A).

Under the Fourth Court of Appeal's analysis all employees that take jobs away from home who are provided transportation by their employer would fall within the "course and scope of employment" set forth in Texas Labor Code § 401.011(12). The Fourth Court of Appeals erred in its construction and application of the requirements of § 401.011(12).

A. The requirements of Texas Labor Code § 401.011(12)(A)

Under the Texas Labor Code workers' compensation benefits are only due when a worker sustains a "compensable injury." TEX. LAB. CODE § 401.011(10). "Compensable injury" is defined in Texas Labor Code § 401.011(10) as "an injury that arises out of and in the course and scope of employment …." The Texas Labor Code sets forth the requirements for "course and scope of employment" in § 401.011(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 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 the other locations. The term does not include:
>
> (A) Transportation to and from the place of employment unless:
>
> (i) The transportation is furnished as 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 employee to be furthered by the travel; or
>
> (ii) The travel would not have been made had there been no affairs or business of the employer to be furthered by travel.

TEX. LAB. CODE § 401.011(12).

The statute sets forth a complex, multipart factual analysis for determining if an injury that occurs during travel is in the course and scope of employment. In *Leordeanu v. American Protection Insurance Company* this Court clarified that §401.011(12)(A) "applies to travel to and from the place of employment." 330 S.W.3d 239, 248 (Tex. 2010). Driving while coming or going to work can only be in the course and scope of employment if the transportation was paid for by the

employer, controlled by the employer, or was directed by the employer. TEX. LAB. CODE § 401.011(12)(A)(i), (ii), and (iii).This is commonly referred to as the "coming and going rule." This is only the first part of the inquiry. Once this first element is met, the transportation to and from work is dissected further.

Simply establishing a (12)(A) exception does not automatically mean the travel was in the course and scope of employment. As the Fourth Court of Appeals set forth in *American Home Assurance Company v. De Los Santos*:

> The effect of satisfying one of these circumstances [in subsection A] does not establish that the travel is in the course and scope of employment; rather, it establishes that such travel is not summarily excluded from being within the course and scope. . . .

2012 Tex. App. Lexis 7891, *7(Tex. App.—San Antonio 2012, pet. denied).

Travel must also meet the broader statutory requirements for any activity to be in the course and scope of employment. The definition of course and scope includes the requirements that an activity "is of the kind or character that has to do with and **originates** in the work…of the employer" and is "performed by an employee while in engaged in or about the **furtherance** of the affairs or business of the employer". TEX. LAB. CODE § 401.011(12) (emphasis added). Analyzing these two requirements of origination and furtherance, this Court noted in *Leordeanu* that while traveling to and from work may further the employer's business, satisfying the second "furtherance" requirement, it is not enough to make

such travel "originate" in the work of the employer and meet the first requirement. The court wrote:

> An employee's travel to and from work makes employment possible and thus furthers the employer's business, satisfying the second component of the definition, but such travel cannot ordinarily be said to originate in the business, the requirement of the first component, because "[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers."

330 S.W.3d at 242. The present case concerns precisely the issue of whether an employee's daily commute to work meets the origination requirement to fall within the course and scope of employment for workers' compensation purposes.

B. The Fourth Court of Appeals substantially deviates from *Leordeanu* and creates a new test for course and scope of employment that excessively burdens workers' compensation carriers.

The analysis provided by the Fourth Court of Appeals for determining if such an employee's travel to work "originates" in his employment is so global to a worker that it is impossible for a workers' compensation carrier to overcome. This Court has set forth that "[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers." *Leordeanu*, 330 S.W.3d at 242. In this case the Court of Appeals has the workers' compensation carrier bearing all the risk associated with a worker that chooses to reside at a place remote to his employer's premises. The

decision to live remotely from one's employment is a decision shared by all commuters alike.

The Court of Appeals in this case agreed with SeaBright that the transportation provided to Lopez by his employer was "furnished to Lopez gratuitously." *Lopez*, 2014 Tex. App. Lexis 905 at *11. But under the Court's analysis a worker that takes a job in a different city than his home will always meet the requirements of his travel "originating" in the employer's business if transportation is paid for by the employer. With this requirement satisfied the worker's travel to and from work would always be in the course and scope of employment.

The nexus "but for" test used by the Fourth Court of Appeals treats an employee's daily commute to work the same as an employee traveling out of town and away from an employer's premises. *SeaBright Ins. Co v. Lopez*, 2014 Tex. App. Lexis 905, *12-13, n. 2 (Tex. App.—San Antonio 2014). The Court of Appeals evaluated whether Lopez's travel met the origination of requirement by "determining the nexus between the employee's travel and work." *Id*. at *10. The Court of Appeals found that Lopez's travel to work originated in the business of his employer because:

> Here, the accident occurred (1) during Lopez's commute from his de facto employer provided housing to his employer's premises, (2) in an employer provided vehicle, and (3) in an area of Texas where Lopez

> would not have otherwise been but for his employment with Interstate. These circumstances present a strong nexus between Lopez's employment and travel on the day of the accident.

*I*d. at *13.

The Court of Appeals identifies Lopez's lodging in Marlin as "de facto employer provided housing to his employer's premises." *Id*. Yet, it is undisputed that employees could "stay where they wish." *Id*. at *12. Lopez chose to stay in Marlin without the direction, control, or selection of his employer. There is no evidence in this case that Lopez was required to stay in Marlin, which was remote to his employer's premises in Ridge, Texas, as part of his employment. The Court of Appeals states that "such a commute to the jobsite is not only expected, but in reality, required." *Id*. But there is no evidence to support this conclusion. The commute from Marlin, Texas to Ridge, Texas was a result of Lopez's choice of residence while he was working, not the employer. Lopez chose to accept employment outside of Rio Grande City, Texas. The entirety of Lopez's employment was remote to Rio Grande City, Texas. CR-742: Deposition of Ronald Rains, p. 18, lns. 2-5.

The Fourth Antonio Court of Appeals sets forth a "nexus" test in its course and scope analysis, stating:

> In sum, although gratuitously furnished transportation is no per se evidence of origination, it is still a summary judgment fact we consider in determining the nexus between the employee's travel and work. *See Leordeanu*, 330 S.W.3d at 242.

Lopez, 2014 Tex. App. Lexis 905 at *10. Curiously, the court references *Leordeanu*. However, there is no reference in *Leordeanu* to a "nexus" test. That word, and such a test, does not appear in this Court's opinion. The Fourth Court of Appeals cites no other Texas case using a nexus test. Nevertheless, this is the test used:

> These circumstances present a strong nexus between Lopez's employment and travel on the day of the accident. SeaBright does not point to any evidence in the record to the contrary, and we have found none. As such, we hold the evidence presented by Mrs. Lopez showing the relationship between her husband's travel and employment for Interstate is so close it can be fairly said the injury had to do with and originated in the work, business, trade or profession of Interstate.

Lopez, 2014 Tex. App. Lexis 905 at *13-*14.

Texas courts faced with similar questions regarding application of § 401.011(12) have focused on the actual employment requirements for the worker. *Zurich American Ins. Co. v. McVey*, 339 S.W.3d 724, 730 (Tex. App.—Austin 2011, pet. denied); *Texas Mutual Insurance Company v. Jerrols*. 385 S.W.3d 619, 630-32 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). In *McVey* the Austin Court of Appeals analyzed whether travel originates in employment:

> As a general rule, an employee's travel originates in his employer's business if the travel was pursuant to the express or implied **requirements** of the employment contract. . . .**When the employer**

> **requires the employee to travel as part of its business**—i.e., pursuant to the contract of employment—the risk of traveling stems from that business and properly can be said to arise as a result of the employer's business.

McVey, 339 S.W.3d at 730. The Fourth Court of Appeals, in a prior case evaluating whether travel fell within the course and scope of employment, applied the analysis from *McVey* regarding employment requirements to determine if travel originates in employment. *De Los Santos*, 2012 Tex. App. Lexis 7891 at* 9. *De Los Santos* is factually similar to this case and concerned an employee killed while driving to work in a company vehicle. *Id*. at *2. The court's consideration of the origination requirement followed *McVey*:

> As a general rule, an employee's travel originates in his employer's business if the travel was pursuant to the express or implied requirements of the employment contract.

Id. at *9 *citing McVey*, 339 S.W.3d at 730. The court overturned the summary judgment in favor of the employee's widow because there was no evidence the travel was required. *Id*. at *12, *16. There is no reference in *De Los Santos* of the "nexus" of travel and work or a "but for" test as in the present case. *See Lopez*, 2012 Tex. App. Lexis 7891 at *13-*14.

In the present case the Fourth Court of Appeals abandoned the reasoning of *McVey* and its own prior precedent in *De Los Santos*. The Fourth Court of Appeals applied a new nexus "but for" test, suggesting that Lopez was in an area he "would not have otherwise been but for his employment." *Id*. at *13. However, this is true

in every case where an employee is traveling or commuting to work. If the purpose of an employee traveling to work is to arrive at the employer's premises, then the location of an employee when an accident occurs would always be the result of his employment. Petitioner is not aware of any other court applying such a test.

The effect of the Fourth Court of Appeals' ruling is that such employees' daily commute to work would be subject to "continuous coverage" in the course and scope of his employment even though the employee is not traveling away from the employer's premises. The analysis used by the Court of Appeals is not supported by law and substantially skews the statutory construction of Texas Labor Code § 401.011(12).

III. The Fourth Court of Appeals erred in finding that Lopez was in the course and scope of employment because his drive to work did not originate in the business of his employer.

The central issue in this case and before this Court concerns the proper legal test to analyze the parties' summary judgment evidence. The prior section focused on the flaws in the Fourth Court of Appeals' analysis of the law. As such, the summary judgment evidence in this case should properly be considered under the analysis set forth in *McVey* and *Jerrols* by evaluating Lopez's employment requirements. *McVey*, 339 S.W.3d at 730; *Jerrols*. 385 S.W.3d at 630-32). No summary judgment evidence was presented that Lopez was required to use the vehicle paid for by the employer or transport tools and other employees to the job

site. Therefore, the Fourth Court of Appeals erred in finding that Lopez was in the course and scope of his employment at the time the accident occurred.

A. Lopez's use of a company vehicle was gratuitous and not required as part of his employment.

The use of a company vehicle originates in the business of the employer if the employee is required as a condition of employment to use the vehicle. As Lopez was not required to drive the company vehicle he was in at the time of the accident, his drive to work did not originate in the business of the employer.

Further, the vehicle in this case was furnished gratuitously. Ronald Rains testified that Lopez "asked if he could drive it [the truck] to and from, and he was granted permission." CR-747: Deposition of Ronald Rains, p. 38, lines. 5-9. Respondent's own summary judgment evidence established that Lopez was allowed, but not required, to use the company vehicle. CR-758: Deposition of John Marcus Knight, p. 23, lines. 3-14.

Texas courts have generally held that "the employer's gratuitous furnishing or paying transportation as an accommodation to the worker and not as an integral part of the employment contract. . . does not by itself render compensable an injury occurring during such transportation." *McVey*, 339 S.W.3d at 730 citing *Rose v. Odiorne*, 795 S.W.2d 210, 214 (Tex. App.—Austin 1990, writ denied). Providing transportation as an accommodation to the worker can be distinguished from transportation that is a "necessity from the employer's perspective." *Id.*

The importance of evaluating the requirements of employment in transportation cases is emphasized in *Texas General Indemnity Company v. Bottom*. 365 S.W.2d 350 (Tex. 1963). In *Bottom* a truck driver was killed in an accident while driving his truck to work. *Id*. at 352. The driver was required by his employer to lease his truck (which he owned) to the employer. *Id*. at 351. As part of the lease agreement the employer controlled the use of the truck and required the driver to maintain the truck, but the driver was allowed to use the truck outside of work. *Id*. at 351-52. At the time of the accident, the driver had just finished having his truck serviced pursuant to the terms of the lease agreement. *Id*. at 352.

This Court has held that the driver was not in the course and scope of his employment because he was not required, as part of his employment contract, to specifically take the truck to have it serviced prior to work on that day. *Id*. at 354. The Court specifically noted that the driver was allowed to use the vehicle for personal use and in furtherance of the lease agreement. *Id*. Since the driver was not required to take any action with the truck prior to work his travel "did not have to do with and originate in the business of the employer." *Id*. Similarly in this case, as Lopez was not required to use the vehicle his travel did not originate in the business of the employer.

Respondent's Motion for Summary Judgment offers evidence that the employer paid for fuel expenses and provided a gas card as evidence that the travel

originated in the work of the employer. CR-771: Maxima Lopez's MOTION FOR SUMMARY JUDGMENT, p. 8. However, a gas card is only evidence that the employer furnished the transportation, not that the transportation was required by the employer. Further the employee's ability to use employer furnished transportation does not establish that the transportation originates in the employer's business. *De Los Santos*, 2012 Tex. App. 7891 at *9 citing *McVey*, 339 S.W.3d at 730.

In this case there was no employer created requirement for Lopez to use the company's truck. Instead, the vehicle used by Lopez was no more than an accommodation, and not a necessity of the job. As such, the transportation did not originate in the employer's work, and the injury that occurred while using the vehicle is not compensable.

B. Lopez was not required to bring tools or employees to the worksite.

Lopez was also not required to bring tools or fellow employees to the worksite. Unlike *Rose* where employees were required "[u]nder terms of [the] employment arrangement" to drive to and from work as a crew there is no evidence in this case that Lopez was required to transport tools or other employees to work each day. 795 S.W.2d at 212.

The summary judgment evidence submitted proves that Lopez was not required to transport tools for work. As previously noted Lopez was to work at the Encana Plant for a duration of approximately six months. Lopez was not traveling

from job site to job site on a daily basis in a manner that would require him to take tools home with him each day. John Knight testified that Lopez "had no reason to [take tools with him from the job site the day prior] unless he was doing something after hours for somebody" that "wasn't anything work related." CR-817: Deposition of John Knight, p. 13, lns. 1-13.

In *Agricultural Insurance Company v. Dryden* this Court addressed a case where an employee was required to transport and set up tools for work. 398 S.W.2d 745 (Tex. 1965). The Court held that the transportation of tools, even when required by the employer, was not sufficient to make the drive to work in the course and scope of employment. *Id*. at 747.

Similarly, Lopez was not required to transport other employees as part of his job. John Knight further testified regarding this issue:

> Q: Was there any requirement that let Mr. Lopez transport other Interstate Treating employees with him in order to get to the job site from where they were staying in Marlin?
> A: No. There was no requirement.
> Q: And had Interstate Treating made any type of arrangements that you are aware of for Mr. Lopez to get other Interstate Treating employees back and forth to Marlin for the job site?
> A: None to my knowledge.

CR-817: Deposition of John Knight, p. 13, lns. 14-23.

The summary judgment evidence submitted by the parties clearly shows there was no genuine issue of material fact that Lopez's travel did not originate in the business of his employer.

C. The location of the employer's premises determines travel, not where a worker chooses to reside.

It is generally undisputed that injuries which occur while traveling to and from work are not compensable and considered personal travel. On the day of his accident, Lopez's injuries occurred while driving to work. Thus, his travel that day and every day to and from the job site must be considered personal travel. The Fourth Court of Appeals attempts to recast this drive to work from Marlin, Texas as a trip from Lopez's domicile in Rio Grande City. This assumption and argument is without basis. Lopez was not on an overnight business trip at the time of the accident.

If an employee is traveling overnight away from the employer's premises for work and is injured then the worker may be covered by the "continuous coverage" rule that establishes that workers' are continuously in the course and scope of their employment during a work trip. *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572, 574-75 (Tex. App.—Austin 1986, writ. ref'd, n.r.e.). However, whether an employee is traveling overnight is evaluated from the location of the employer's premises, not where the worker lives.

During Lopez's entire employment with Interstate Treating, Inc. he had never worked in the vicinity of Rio Grande City, Texas. CR-742. If an employee chooses to take a job in another city, then that city becomes the premises for

determining whether an employee is traveling for work. *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 293 (Tex. 1965).

In *Shelton* this Court established that whether an employee is traveling for work is viewed from whether "work entails travel away from the employer's premises." *Id.* An injury that occurs on an employee's drive to work will always be causally related to employment, but that is not determinate of course and scope. The Fourth Court of Appeals' "but for" test is true for every employee driving to work every day. If that is the standard to be used in the evaluation of the course and scope of employment travel cases then all employees will fall within the course and scope of employment.

The Fourth Court of Appeals acknowledged that continuous coverage does not apply pursuant to *Orgon* and *Shelton*, yet still evaluated the facts from the perspective that Lopez was traveling out of town for work. *SeaBright Ins. Co. v. Lopez*, 2014 Tex. App. Lexis 905, *13, n. 2 (Tex. App.—San Antonio 2014, pet. filed) citing *Orgon*, 721 S.W.2d at 575 and *Shelton*, 389 S.W.2d at 293. Similarly, Lopez was not engaged in any required travel away from his work premises as part of his employment. As such, Lopez's drive to work is not travel that would originate in the business of the employee.

D. Lopez was not on a special mission at the time of the accident.

Finally, Lopez's commute to work may not be considered a "special mission" that brings him within the definition of "course and scope" of employment. No evidence was presented that Lopez was undertaking any special task. This Court has previously held that "travel to work" is not a special mission, even if the employee is required to travel to a different location. *Evans v. Illinois Employers Ins.*, 790 S.W.2d 302, 304 (Tex. 1990). As in *American Home Assurance Co. v. De Los Santos*, Lopez "was traveling on his customary route to his regular worksite." 2012 Tex. App. 7891, 15 (Tex. App.—San Antonio 2012, pet. denied). Lopez's commute to work on the day of the accident was not a special mission in the course and scope of his employment.

PRAYER

SeaBright Insurance Company respectfully requests the Court grant its Petition for Review, reverse the trial court's judgment, render judgment for Petitioner, SeaBright Insurance Company, and for all other relief to which Petitioner may be entitled.

Respectfully submitted,

SMITH & CARR, P.C.

By: /s/ Dana M. Gannon
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ATTORNEYS FOR,
SEABRIGHT INSURANCE COMPANY

CERTIFICATE OF SERVICE

A true and correct copy of this Petition has been forwarded via E-Service to all counsel of record on October 22, 2014, as follows:

Craig Saucier
Saucier & Smaistrla PLLC
200 Concord Plaza Dr. Ste. 750
San Antonio, Texas 78216 ***Via E-Service***

Kimberly S. Keller
Shane J. Stolarczyk
Keller Stolarczyk, PLLC
234 West Bandera Rd., No. 120
Boerne, TX 78006 ***Via E-Service***

/s/ Joy M. Brennan
Joy. M. Brennan

CERTIFICATE OF COMPLIANCE

I certify that as counsel for Appellant that the number of words in this document is 5,067 as calculated by Microsoft Word.

/s/ Joy M. Brennan_____

APPENDICES

Appendix 1: Final Judgment from Trial Court

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5/4/12/CMS/dmc

NO. DC-08484

SEABRIGHT INSURANCE COMPANY	§	IN THE DISTRICT COURT OF
	§	
V.	§	STARR COUNTY, TEXAS
	§	
MAXIMA LOPEZ, BENEFICIARY	§	
OF CANDELARIO LOPEZ, DECEASED	§	229th JUDICIAL DISTRICT

FINAL JUDGMENT

On August 11, 2011, Plaintiff's and Defendant's Motions for Summary Judgment were heard by the Court and, after consideration of the motions, the respective responses, the evidence on file, and the arguments of counsel, the Court ruled that Defendant, Maximina Lopez, Beneficiary of Candelario Lopez, Deceased's Motion for Summary Judgment be, in all things, GRANTED, and that Plaintiff, Seabright Insurance Company's Motion for Summary Judgment be, in all things, DENIED.

Therefore, it is ORDERED, ADJUDGED and DECREED that Defendant's, Maximina Lopez, BENEFICIARY OF CANDELARIO LOPEZ, DECEASED Motion for Summary Judgment is GRANTED, and the final decision of the Texas Department of Insurance, Division of Workers' Compensation ("DWC") that Descendant, Candelario Lopez, sustained a compensable injury on September 11, 2007 (which was the decision in Appeal No. 080337 rendered in DWC Docket No. WS-08129503-01-CC-WS 42) is AFFIRMED.

It is further ORDERED, ADJUDGED and DECREED that Defendant, Maximina Lopez, Beneficiary of Candelario Lopez, Deceased recover attorneys' fees in the amount of $72,425.50 and litigation expenses in the amount of $5,225.03 as submitted by Defendant's attorneys, Craig Saucier and Martin Phipps.

Further, in the event that Plaintiff, Seabright Insurance Company, files an unsuccessful appeal of this Judgment to the Fourth Court of Appeals, Plaintiff, Seabright Insurance Company

is ordered to pay Defendant, Maximina Lopez Beneficiary of Candelario Lopez, Deceased additional attorneys' fees to Defendant's attorneys in the amount of $25,000.

Further, in the event that Plaintiff, Seabright Insurance Company, files a Petition for Review with the Texas Supreme Court and Defendant Maximina Lopez, Beneficiary of Candelario Lopez, Deceased prevails, the Court ORDERS Plaintiff, Seabright Insurance Company, to pay additional attorneys' fees to Defendant's attorneys in the amount of $15,000.

Further, in the event that the Texas Supreme Court requires briefing from the parties and Plaintiff, Seabright Insurance Company is unsuccessful in its appeal, the Court ORDERS Plaintiff, Seabright Insurance Company, to pay additional attorneys' fees to Defendant's attorneys in the amount of $25,000.

It is further acknowledged by this Court that a copy of this Final Judgment was served on the DWC, as required by the Texas Labor Code Sec. 410.258, at a date more than thirty days previous to the entry of this judgment. The Court has received no objection from the DWC to accepting and entering this Final Judgment.

SIGNED this 2nd day of October, 2012.

FILED
AT 9:00 O'CLOCK P M
OCT 02 2012
ELOY R. GARCIA
DISTRICT CLERK STARR CO. TX
BY DEPUTY

Ana Lisa Garza
HONORABLE ANA LISA GARZA

1280

Appendix 2: Opinion and Judgment of Court of Appeals

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-12-00863-CV

SEABRIGHT INSURANCE COMPANY,
Appellant

v.

Maximina **LOPEZ**, Beneficiary of Candelario Lopez, Deceased,
Appellee

From the 229th Judicial District Court, Starr County, Texas
Trial Court No. DC 08-484
Honorable Ana Lisa Garza, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE BARNARD, AND JUSTICE MARTINEZ

In accordance with this court's opinion of this date, the trial court's judgment is AFFIRMED.

It is ORDERED that appellee Maximina Lopez, Beneficiary of Candelario Lopez, deceased, recover her costs of this appeal from appellant Seabright Insurance Company.

SIGNED January 29, 2014.

Marialyn Barnard

Marialyn Barnard, Justice

SEABRIGHT INSURANCE COMPANY, Appellant v. Maximina LOPEZ, Beneficiary of Candelario Lopez, Deceased, Appellee

No. 04-12-00863-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2014 Tex. App. LEXIS 905

January 29, 2014, Delivered
January 29, 2014, Filed

PRIOR HISTORY: [*1]

From the 229th Judicial District Court, Starr County, Texas. Trial Court No. DC 08-484. Honorable Ana Lisa Garza, Judge Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For APPELLANT: Dana Gannon, Houston, TX; Joy Marie Brennan, Houston, TX.

For APPELLEE: Martin J. Phipps, Goldman, Pennebaker & Phipps, P.C., San Antonio, TX; Craig M. Saucier, Saucier and Smaistrla PLLC, San Antonio, TX; Kimberly S. Keller, Keller Stokarcyzk PLLC, Boerne, TX.

JUDGES: Opinion by: Marialyn Barnard, Justice. Sitting: Karen Angelini, Justice, Marialyn Barnard, Justice, Rebeca C. Martinez, Justice.

OPINION BY: Marialyn Barnard

OPINION

AFFIRMED

This is an appeal from a trial court's order granting summary judgment in favor of appellee Maximina Lopez, Beneficiary of Candelario Lopez, deceased ("Mrs. Lopez"), and denying summary judgment in favor of appellant Seabright Insurance Company. On appeal, Seabright challenges the denial of its motion for summary judgment and granting of summary judgment in favor of Mrs. Lopez. We affirm the trial court's judgment.

BACKGROUND

Candelario Lopez ("Lopez") was fatally injured in a motor vehicle accident while traveling from his motel room in Marlin, Texas, to his jobsite in Ridge, Texas. Lopez's widow sought workers' compensation benefits, [*2] which Seabright denied, contending Lopez was not in the course and scope of his employment at the time of the accident. Mrs. Lopez then filed a claim with the Texas Department of Insurance, Division of Workers' Compensation

("DWC") to recover compensation benefits for her husband's death. After a contested case hearing, a hearing officer with the DWC determined Lopez was in the course and scope of his employment at the time of the accident. Seabright appealed, but the Appeals Panel affirmed the hearing officer's decision. Seabright challenged the administrative decision by filing a petition for judicial review in the trial court.

In the trial court, Seabright and Lopez filed competing traditional motions for summary judgment on the issue of whether Lopez was in the course and scope of his employment at the time of the accident. The summary judgment evidence presented to the trial court is largely uncontested.

At the time of the accident, Lopez worked for Interstate Treating, Inc. on a fabrication and construction project in Ridge, Texas. Because the jobsite was roughly 450 miles from his home in Rio Grande City, Texas, Lopez resided in a motel in Marlin, Texas, about forty miles away [*3] from the Ridge jobsite. Lopez commuted to work in a company truck, which was paid for and maintained by Interstate.

In addition to providing the truck used by Lopez, Interstate provided Lopez with a per diem, in addition to his salary, to cover the cost of room and board while he was away from home. Admittedly, Lopez was not paid for travel time to or from the Ridge job site.

On the morning of the accident, Lopez was driving himself and two co-workers from Marlin to the Ridge jobsite. Although there was no express policy regarding such "carpooling," the use of company vehicles to transport multiple employees to and from jobsites like the one in Ridge was a common occurrence for Interstate.

Based on the above facts, the trial court concluded, as had the DWC, that Lopez was in the course and scope of his employment at the time of the accident. The trial court granted Mrs. Lopez's summary judgment motion, denied Seabright's motion, and rendered judgment in favor of Mrs. Lopez. Seabright subsequently perfected this appeal.

ANALYSIS

On appeal, Seabright contends the trial court erred in granting Mrs. Lopez's motion for summary judgment, and in denying its summary judgment motion. We disagree.

Standard [*4] *of Review*

This court reviews a trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The well-established standards for reviewing a motion for summary judgment, as mandated by the Texas Supreme Court, are: (1) the movant for summary judgment has the burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548-49 (Tex. 1985). When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, as it has here, this court considers the summary judgment evidence presented by both sides, determines all questions presented, and if the court determines the trial court erred, we render the judgment the trial court should have rendered. *See Dorsett*, 164 S.W.3d at 661.

Course and Scope of Employment

The Workers Compensation [*5] Act compensates employees who sustain a "compensable injury," which means "an injury that arises out of and in the *course and scope of employment* for which compensation is payable

under [subtitle A of the Workers' Compensation Act]." TEX. LABOR CODE ANN. § 401.011(10) (West 2006) (emphasis added). For an employee's injury to be considered in the course and scope of employment, it must (1) relate to or originate in the employer's business, and (2) occur in the furtherance of the employer's business. *Am. Home Assurance Co. v. De Los Santos*, No. 04-10-00852-CV, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *2 (Tex. App.--San Antonio Sept. 19, 2012, pet. denied) (mem. op.) (citing *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 241-44 (Tex. 2010)); *see* TEX. LABOR CODE ANN. § 401.011(12). These elements are applied liberally as "[w]e liberally construe the provisions of the Workers' Compensation Act to carry out the Legislature's evident purpose of compensating injured workers and their dependents." *Texas Workers' Comp. Comm'n v. Patient Advocates of Texas*, 136 S.W.3d 643, 652 (Tex. 2004). An injured employee must establish both elements to satisfy the course and scope requirement. *De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *2.

Here, [*6] it is undisputed Lopez was traveling from his motel in Marlin to work at the time of the accident, therefore implicating what is known as the "coming and going rule," which excludes travel between work and home from the course and scope of employment. *See* TEX. LABOR CODE ANN. § 401.011(12)(A); *Leordeanu*, 330 S.W.3d at 242. It is also undisputed that Lopez was traveling in a vehicle provided and paid for by Interstate. This travel arrangement between Interstate and Lopez falls squarely within the statutory exception to the coming and going rule where "the transportation is furnished as a part of the contract of employment *or is paid for by the employer*." *See id.* § 401.011(12)(A)(i) (emphasis added). The effect of satisfying this statutory exception is not to establish that the travel is within the course and scope of employment, but rather to establish that such travel is not summarily excluded from being within the course and scope of the employment solely by virtue of the fact that the employee was traveling to and from work. *De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *3. Essentially, even though Lopez was traveling to work at the time of the accident, because Interstate paid for the vehicle [*7] he drove, Mrs. Lopez may still attempt to establish that her husband's injury satisfies both elements of the course and scope requirement. *See* 2012 Tex. App. LEXIS 7891, [WL] at *2.

The Texas Supreme Court has recognized that "[a]n employee's travel to and from work makes employment possible and thus furthers the employer's business." *Leordeanu*, 330 S.W.3d at 242. Therefore, Lopez's travel from his motel in Marlin to work on the day of the accident satisfies the second element of the course and scope of employment requirement. *De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *2. However, travel to and from work does not *ordinarily* satisfy the first element of originating in or relating to the business of the employer as "[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers." *Leordeanu*, 330 S.W.3d at 242 (quoting *Evans v. III. Emp'rs Ins. Of Wausau*, 790 S.W.2d 302, 305 (Tex. 1990)). Accordingly, the primary issue for our review of the cross-motions for summary judgment is determining whether a genuine issue of material fact exists that Lopez's travel originated in Interstate's business.

We recognize there is no bright [*8] line rule for determining if employee travel originates in the employer's business as each situation is dependent on the facts. *De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *4. No single fact is dispositive; rather, we consider the nature of the employee's job, the circumstances of the travel, and any other relevant facts. *Id.* In sum, we must

"determine whether the relationship between the travel and the employment is so close that it can fairly be said that the injury had to do with and originated in the work, business, trade or profession of the employer." *Leordeanu*, 330 S.W.3d at 242 (quoting *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 292 (Tex. 1965)).

Mrs. Lopez's Motion for Summary Judgment

We begin by addressing whether the trial court erred in granting Mrs. Lopez's motion for summary judgment. Mrs. Lopez presented the following evidence to the trial court to support the contention that her husband's travel related to or originated in Interstate's business such that it is considered in the course and scope of his employment under the Texas Workers' Compensation Act: (1) at the time of the accident, Lopez was traveling in a vehicle that Interstate provided and paid for; (2) Lopez was required [*9] to live in a motel during his employment, for which he was provided a per diem in addition to his salary; and (3) Lopez had subordinate workers in the company vehicle with him during the commute. Mrs. Lopez contends these facts establish her husband's travel on the day of his accident originated in his employer's business as a matter of law.

1. Transportation Provided by Interstate

It is undisputed Lopez was traveling in a vehicle provided and paid for by Interstate at the time of his accident. However, the parties do not agree as to the significance of this fact regarding whether Lopez's travel originated in his work for Interstate. Specifically, Seabright argues that "[t]he use of a company vehicle originates in the business of the employer *only* if the employee is required as a condition of employment to use the vehicle." (emphasis added). As explained in *De Los Santos* and the Third Court's decision in *Zurich Am. Ins. Co. v. McVey*, Seabright's contention is misplaced. *See* 339 S.W.3d 724, 730 (Tex. App.--Austin 2011, pet. denied).

An employer's provision of transportation is evidence that an employee's trip originated in his employer's business; however, it is insufficient *in itself* to [*10] establish origination. *See De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *3-4; *McVey* 339 S.W.3d at 730. This is because only employer-provided transportation that amounts to a necessity[1] from the employer's perspective, and not just a gratuitous accommodation to the employee, is sufficient, without more, to prove that as a matter of law travel originated in the employer's business. *De Los Santos*, 2012 Tex. App. LEXIS 7891, 2012 WL 4096258, at *3-4; *McVey* 339 S.W.3d at 730; *see also Am. Gen. Ins. Co. v. Coleman*, 157 Tex. 377, 303 S.W.2d 370, 376 (Tex. 1957) (announcing proposition "that the mere gratuitous furnishing of transportation by the employer to the employee as an accommodation, and not as an integral part of the contract of employment, does not bring the employee, when injured in the course of traveling on the streets and highways, within the protection of the Workmen's Compensation Act."). In sum, although gratuitously furnished transportation is not *per se* evidence of origination, it is still a summary judgment fact we consider in determining the nexus between the employee's travel and work. *See Leordeanu*, 330 S.W.3d at 242.

> 1 The idea of "necessity" for furnishing the transportation originates in *Coleman*'s language of "an integral [*11] part of the contract of employment." 303 S.W.2d at 376. "Necessity" has been interpreted to equate to where an employer must furnish transportation in order to secure labor. *See Rose v. Odiorne*, 795 S.W.2d 210, 214 (Tex. App.--Austin 1990, writ denied).

According to the deposition testimony of Ronald Rains, owner of Interstate, the

employer furnished Lopez with a company truck because "[h]e asked if he could drive it to and from [work and the motel], and he was granted permission." Viewing the evidence in the light most favorable to Seabright, as we must, the company truck was furnished to Lopez gratuitously. Mrs. Lopez does not point to any evidence in the record to suggest otherwise. Therefore, the fact Interstate furnished Lopez with a company truck to travel to work must be supported with other evidence to entitle summary judgment as the provided means of transportation is not in itself dispositive of origination in this case.

2. Work Away From Home

Mrs. Lopez contends the circumstances surrounding her husband's work away from home is evidence, when coupled with the other summary judgment evidence she produced, to establish Lopez was in the course and scope of his employment at the [*12] time of the accident. It is undisputed: (1) Lopez resided with his wife in Rio Grande City, Texas; (2) Interstate's jobsite was located roughly 450 miles away in Ridge, Texas; (3) Interstate paid Lopez a per diem while he was working at the Ridge jobsite that was not paid to its workers at its home office in Odessa, Texas; and (4) Lopez used his per diem to stay at a motel about forty miles away in Marlin, Texas. We hold that this evidence, when considered with the evidence that Interstate provided transportation to Lopez, entitles Mrs. Lopez to judgment as a matter of law.

The evidence of Lopez's working conditions clearly suggest his presence in the area of the accident, and the accident itself, originated in his work for Interstate.[2] Specifically, the nature of the remote job site conditions and the provision of a per diem for food and lodging illustrate Interstate clearly knew the only reason employees like Lopez would be present in the area of Ridge was their job. Further, employees like Lopez, in the words of site superintendent Knight, could "stay where they wish." As such, a commute to the jobsite is not only expected, but in reality, required.

> 2 Mrs. Lopez contends these facts [*13] entitle her husband to the protections of the "continuous coverage" rule. In Texas, the "continuous coverage" rule regards an employee whose work entails travel away from the employer's premises as being continuously within the course of their employment during the trip, except when a distinct departure on a personal errand is shown. *Shelton*, 389 S.W.2d at 293; *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572, 575 (Tex. App.--Austin 1986, writ ref'd n.r.e); *see also McVey*, 339 S.W.3d at 731-32. However, as Seabright correctly argues, the "continuous coverage" rule does not apply here because the rule protects "employees whose work entails travel away from *the employer's premises*," not the employee's home. *Shelton*, 389 S.W.2d at 293 (emphasis added). Lopez's tenure in Marlin may have been a trip away from home, but it was also travel *to* the employer's premises as opposed to travel *away* from such premises.

Here, the accident occurred: (1) during Lopez's commute from his de facto employer-provided housing to his employer's premises, (2) in an employer provided vehicle, and (3) in an area of Texas where Lopez would not have otherwise been but for his employment with Interstate. These circumstances [*14] present a strong nexus between Lopez's employment and travel on the day of the accident. Seabright does not point to any evidence in the record to the contrary, and we have found none. As such, we hold the evidence presented by Mrs. Lopez showing the relationship between her husband's travel and employment for Interstate is so close it can fairly be said the injury had to do with and originated in the work, business, trade or

profession of Interstate. *See Leordeanu*, 330 S.W.3d at 242; TEX. LABOR CODE ANN. § 401.011(12). Accordingly, Lopez's injury occurred in the course and scope of his employment as a matter of law because it both originated in and furthered his employer's business. TEX. LABOR CODE ANN. § 401.011(12).

Based on the foregoing, we need not address Mrs. Lopez's argument that evidence of "carpooling" established origination for the purposes of course and scope of employment.

Seabright's Response and Motion for Summary Judgment

By holding Mrs. Lopez established her right to summary judgment as a matter of law, we have, *per force*, determined the trial court did not err in denying Seabright's motion and that Seabright did not, in response to Mrs. Lopez's motion, produce evidence [*15] raising a genuine issue of material fact. To be entitled to summary judgment, Seabright had the burden to prove Lopez was acting outside the course and scope of employment at the time of his accident. Seabright failed to meet its burden. Moreover, Seabright failed to present more than a scintilla of evidence to negate Mrs. Lopez's right to summary judgment.

Instead of presenting distinct summary judgment evidence to entitle it to judgment as a matter of law or to raise a fact issue, Seabright merely contested the legal significance of the generally uncontested summary judgment evidence in light of existing law. Based on our interpretation of the law as set out above, Seabright was not entitled to judgment as a matter of law, and did not produce evidence to raise a fact issue relative to Mrs. Lopez's motion. Therefore, we hold the trial court did not err in denying Seabright's motion for summary judgment.

CONCLUSION

Based on the foregoing, we hold Mrs. Lopez established as a matter of law that Lopez's travel in this case: (1) related to or originated in Interstate's business, and (2) occurred in the furtherance of Interstate's business. *See* TEX. LABOR CODE ANN. § 401.011(12). Thus, Mrs. [*16] Lopez proved, as a matter of law, her husband was in the course and scope of his employment at the time of the accident. We therefore hold the trial court properly granted summary judgment for Mrs. Lopez and denied the summary judgment sought by Seabright. We overrule Seabright's contentions and affirm the trial court's judgment.

Marialyn Barnard, Justice

Appendix 3: Texas Labor Code § 401.011(12)

Texas Labor Code § 401.011(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 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:

(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.

Appendix 4:
Contested Case Hearing Decision and Order

TEXAS DEPARTMENT OF INSURANCE
DIVISION OF WORKERS' COMPENSATION
WESLACO FIELD OFFICE
WESLACO, TEXAS

IN THE MATTER OF CANDELARIO LOPEZ, DECEASED	§	
MAXIMINA LOPEZ, CLAIMANT BENEFICIARY	§	DOCKET NO. WS-08129503-01-CC-WS42
V.	§	
SEABRIGHT INSURANCE COMPANY, CARRIER	§	

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A benefit review conference was held on December 6, 2007 to mediate resolution of the disputed issue; however, the parties were unable to reach an agreement. A contested case hearing was held on January 29, 2008 to decide the following disputed issue:

1. Was the decedent in the course and scope of his employment at the time of his fatal motor vehicle accident on September 11, 2007?

PARTIES PRESENT

Claimant appeared and was represented by George P. Escobedo, attorney. Carrier appeared and was represented by Danna Gannon, attorney.

BACKGROUND INFORMATION

The evidence established that Interstate Treating Inc.'s (Interstate) primary business involved building and installing gas plants. Interstate operates out of Odessa, Texas; however, the

company is required to go to field locations in order to construct the plant. Decedent worked as lead for the work crew. Claimant worked ten years with Interstate on a project-to-project basis. Prior to the date of injury, Claimant worked on a project in Ridge, Texas. Claimant lived in Rio Grand City, Texas; therefore, in order to work on the project, Claimant was required to travel to Ridge, Texas and stay overnight in hotels. Claimant was also paid a weekly per diem that covered seven days of out-of-town expenses. The evidence established that Ridge, Texas is a rural area and thus Claimant and two other co-workers had to stay in a hotel located 40 miles from the job site. While on the project, Claimant would periodically return home to Rio Grande City for the weekends. The evidence established that Claimant would have to ask for permission from his supervisor to return home on the weekends. There was no evidence established that Claimant changed his residence from Rio Grande City to his hotel. On the morning of the accident, Decedent, who was accompanied by his co-workers, was driving a company truck from the hotel in Marlin, Texas to the jobsite in Ridge, Texas when he was involved in a motor vehicle accident.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the Weslaco Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. On September 11, 2007, Decedent was the employee of Intersate Treating Inc., Employer.

   C. Decedent suffered an injury in the motor vehicle accident of September 11, 2007.

   D. Claimant was driving a company truck at the motor vehicle accident of September 11, 2007.

2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.

3. Decedent's work involved travel away from the employer's premises.

4. Decedent was engaged in or furthering the affairs or business of Employer at the time of his fatal vehicle accident on September 11, 2007.

5. Decedent sustained damage or harm to the physical structure of his body in the course and scope of employment at the time of his fatal vehicle accident on September 11, 2007.

CONFIDENTIAL
Tex. Labor Code
§402.083

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.

2. Venue is proper in the Weslaco Field Office.

3. Decedent sustained a compensable injury on September 11, 2007.

DECISION

Decedent sustained a compensable injury on September 11, 2007.

ORDER

Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules. Accrued but unpaid income benefits, if any, shall be paid in a lump sum together with interest as provided by law.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, STE. 1050
AUSTIN, TX 78701-3232

Signed this 1st day of February, 2008

Alisha Darden
Hearing Officer