No. 14-0272

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

SEABRIGHT INSURANCE COMPANY,
Petitioner,

v.

MAXIMINA LOPEZ, BENEFICIARY OF CANDELARIO LOPEZ, DECEASED,
Respondent.

ON REVIEW FROM FOURTH DISTRICT COURT OF APPEALS
UNANIMOUS OPINION FROM JUSTICES ANGELINI, BARNARD (AUTHOR), MARTINEZ

RESPONDENT'S BRIEF ON THE MERITS

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STATUTORY AUTHORITY

EXPLANATION OF RECORD CITATIONS

Respondent will use the following citation forms to refer to the varying volumes of the appellate record in this case:

- **[Volume] CR [Page]**: used when citing to the two-volume Clerk's Record.

- **[Volume] RR [Page]**: used when citing to the three-volume Reporter's Record of the proceedings before the district court.

OBJECTIONS TO PETITIONER'S STATEMENT OF JURISDICTION

The Petition for Review and Brief on the Merits filed by Petitioner claims it seeks to overturn an opinion that "substantially altered the statutory requirements for course and scope of employment." *Pet.* at vii. But, a simple reading of the Opinion below, which was written by a very experienced appellate justice, Honorable Marialyn Barnard, reveals that the Opinion followed longstanding Texas jurisprudence. In essence, Petitioner's "labeling" of the Opinion does not match the content of the Opinion. Petitioner's "parade of horribles," *i.e.,* the appellate court "creates a legal standard that a workers' compensation carrier, such as SeaBright, cannot possibly meet," is hyperbole and ignores the specific facts of this case. In sum, Petitioner has made much ado about nothing.

Indeed, nowhere in the Opinion will this Court find an "overruling" of existing precedent or a "first impression" analysis of statutory provisions. *Opinion* at 2 (included in the record as Appendix 2 of Petitioner's Brief on the Merits). Rather, the Fourth District Court of Appeals applied the case law to the particular facts

of this case that is consistent across all Texas appellate courts addressing this issue. Petitioner cited to no case law in its Statement of Jurisdiction demonstrating a "conflict" amongst the Courts of Appeals or a case from this Court wherein Opinion from the Fourth District Court of Appeals conflicts.

The facts of this case are distinct and different than the facts of the cases relied upon by Petitioner. All other authorities reviewing those distinct facts rejected Petitioner's arguments and ruled in favor of Respondent:

- The Texas Department of Insurance Hearing Officer ruled in favor of Respondent;
- The Texas Department of Insurance Appeals Panel ruled in favor of Respondent;
- The trial court below granted summary judgment in favor of Respondent, (1 CR 19, 22-28, 35; 2 CR 1301-03); and
- A unanimous Panel of the Fourth District Court of Appeals (Justices Angelini, Barnard (author), and Martinez) held in favor of Respondent, *see Pet's Appx 2.*

This Petition presents the last of many meritless attempts to deny Respondent the worker's compensation benefits she is entitled to

under Texas law.

ISSUES PRESENTED BY PETITIONER

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

Issue Three: 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 THE FACTS

The Petition for Review before this Court by Seabright Insurance Company ("Seabright") asks this Court to reverse a determination that Candelerio Lopez ("Lopez") was killed during the course and scope of his employment with Interstate Treating, Inc. ("Interstate"). Respondent asks this Court to affirm the rulings of the four other examining officers, all of which rejected Seabright's contention. The relevant facts follow:

Lopez lived in Rio Grande City.

Lopez lived in Rio Grande City, Texas, with his wife, Maximina, for 27 years. (2 CR 790). During his tenure with Interstate, he never moved from Rio Grande City. Instead, "[t]he jobs would finish and . . . [h]e came back" to his wife and home in Rio Grande City. (2 CR 791-92). When Lopez worked at a jobsite in Ridge, he would come home "[e]very two weeks." (2 CR 797-98). Even when his wife would visit him at a job location, she testified that "[w]e came back when [the job] finished." (2 CR 792).

Lopez receives an assignment from Interstate away from his home.

Interstate is a business primarily involved in building and installing gas plants. (1 CR 26). Although Interstate's home office is in Odessa, Texas, "the company is required to go to field locations in order to construct the plant[s]." (1 CR 27). Seabright is Interstate's workers' compensation insurance carrier. (1 CR 28, 237).

Lopez's work for Interstate required him to travel away from Rio Grande City. (1 CR 27; 2 CR 791). For example, Interstate had previously sent Lopez to work in Missouri and Colorado. (2 CR 792). In fact, every job that Lopez took with Interstate required him to work away from Rio Grande City. (2 CR 832).

Lopez started his work for Interstate at a job site in Ridge in July 2007. (2 CR 797). At the Ridge job site, Lopez worked as a "civil foreman." (1 CR 236; 2 CR 823, 832). Interstate acknowledged that Ridge is "pretty far" from Lopez's home in the valley and that Interstate would not have required Lopez to commute between work and home "[b]ecause of the distance of travel[.]" (2 CR 819, 833).

Lopez "would have to ask for permission from his supervisor to return home on the weekends." (1 CR 27).

Interstate pays special benefits to Lopez based on the remote job location.

When Interstate sent Lopez to remote sites, he would live "[i]n a hotel." (2 CR 793). However, Interstate always paid Lopez a "per diem" for the hotel stay, in addition to his hourly wage. (1 CR 27; 2 CR 793-94). As Maximina explained:

> Q Okay, And what I mean is, did Interstate Treating make arrangements to pay for your hotel stay?
>
> A A per diem.
>
> Q Okay. So Interstate Treating gave you a per diem?
>
> A That's right.
>
> Q Okay. And you would use the per diem to pay for your hotel?
>
> A Yes.

(2 CR 793). In fact, during his employment with Interstate, Lopez was always given a per diem. (2 CR 793). Interstate confirmed that it paid its employees, include Lopez, a per diem in addition to the hourly wage. (2 CR 815).

Interstate paid the per diem based on a 7-day cycle:

> [p]eople were away from home. They rent their motel rooms. Usually you got a better rate if you rent it for seven days. So our position is, he's paying rent on that room, so – and we pay him the seven days.

(2 CR 815, 824). The per diem covered out-of-town expenses while at the remote job locations, including lodging and food. (2 CR 824, 842-43).

Interstate also provided Lopez with a company vehicle for the remote job locations. (2 CR 795-96; *accord* 2 CR 825, 833-34, 837). According to Maximina:

> Q When your husband traveled for Interstate Treating, would he take his own vehicle to the job site or to the area where he was – the job was?
>
> A No.
>
> . . .
>
> Q He would leave the vehicle with you?
>
> A That's right.
>
> . . .
>
> Q He left the vehicle with you?
>
> A That's right. He went in his work truck.

(2 CR 795-96; accord 2 CR 825, 833-34, 837).

Interstate admitted, "[t]here was a company vehicle at the job site. And [Lopez] drove it to and from his room." (2 CR 833-34). Lopez was provided the company truck because "[h]e was the lead guy" at the Ridge jobsite. (2 CR 835, *accord* 2 CR 845, 852-53). Additionally, Interstate provided Lopez with a credit card "to put diesel or gasoline in the truck." (2 CR 794). Interstate also explained that in addition to gasoline, the company credit card could be used to purchase "supplies for the project." (2 CR 846-48). Moreover, since the vehicle was company owned, Interstate also paid the insurance on the truck. (2 CR 820, 837).

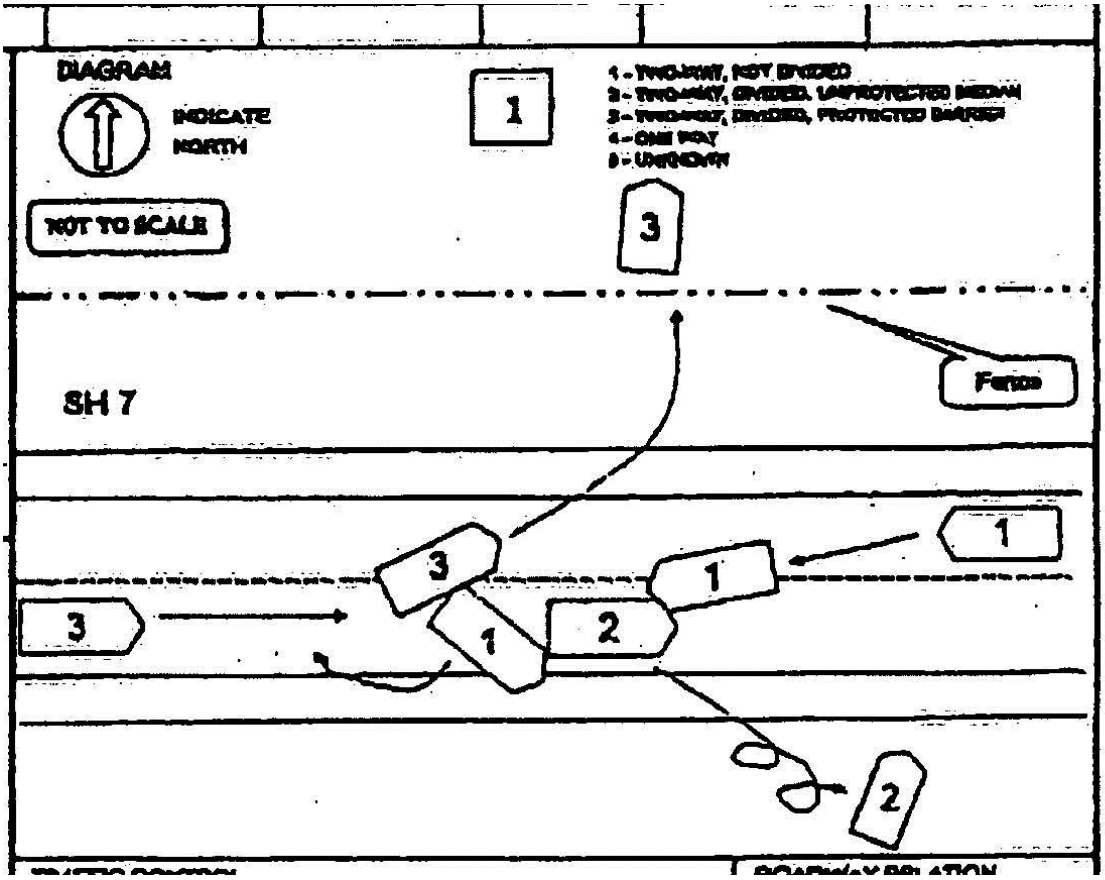
Lopez drove the company truck to and from the jobsite in Ridge every day. (2 CR 795, 798). Lopez commuted between a motel in Marlin and the Ridge jobsite. (2 CR 819). Lopez made this commute in the company truck at the direction of Interstate so that he could "transport coworkers to the jobsite." (2 CR 821).

The day of the fatal accident: Interstate's company truck is hit by a car that crosses the median & hits the truck head on

On the morning of the accident, Lopez was transporting two of Interstate's employees (Mario Lopez and Gerardo Garcia) to the

jobsite. (1 CR 27, 236, 244-318; 2 CR 818-20, 822, 849-51) (Interstate admits Lopez "was going to work" when the accident occurred). Lopez, as "lead guy," had the responsibility of transporting employees to the jobsite and was doing so when the accident occurred. (2 CR 822, 835; 2 CR 845, 852-53). Neither of the employees had been provided a company truck by Interstate. (2 CR 822). The truck Lopez was driving was also transporting company equipment to the jobsite. (2 CR 840-42).

When the accident occurred, Lopez's truck was traveling eastbound on State Highway 7. (1 CR 230) (Texas Peace Officer's Crash Report). Another vehicle driven by Levi McFadin was heading in the opposite direction (westbound) on the same roadway. *Id.* "The driver of Unit 1 [Levi McFadin] stated he dosed off and went into the oncoming traffic lane. Unit 1 [the McFadin vehicle] struck Unit 2 [Lopez's truck]. . . . Unit 2 went into the EB bar ditch and rolled." *Id.* A third vehicle behind Lopez's truck ("Unit 3") later struck McFadin's vehicle as well. *Id.* A diagram of the accident from the Peace Officer's Report (Lopez's truck is Unit 2) is below:



Lopez was airlifted to Hillcrest Medical Center in Waco. *Id.* He later died from his injuries. *Id.*

Texas Department of Insurance Administrative Hearing and Appeal

After Lopez's death, Seabright denied workers' compensation benefits to Maximina, contending the fatal accident was not in the course and scope of Lopez's employment. (1 CR 22-28, 34, 237-43). The Hearing Officer for the Texas Department of Insurance's Division of Workers' Compensation ruled in favor of Maximina. (1 CR 27). The Texas Department of Insurance Hearing Officer found

that "Decedent [Lopez] was engaged in or furthering the affairs or business of Employer [Interstate] at the time of his fatal accident on September 11, 2007 . . . 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." (1 CR 27).

Thus, the Hearing Officer concluded that Lopez sustained a compensable work injury, and ordered Seabright to pay benefits under the Act. (1 CR 28). Seabright then appealed the decision, but the Appeals Panel of the Texas Department of Insurance also rejected Seabright's contention that Lopez was not in the course and scope of employment when the accident occurred. (1 CR 19, 22, 35).

Seabright's lawsuit

Undeterred by the Texas Department of Insurance, Seabright filed suit in Falls County, Texas. (1 CR 18-30). From the very beginning of these proceedings – since Maximina's application to receive workers' compensation benefits – Seabright has improperly and erroneously contended Ridge was Lopez's residence. Therefore, Maximina moved to transfer venue from the improper venue of Falls County to Starr County because Lopez was a permanent resident of

Starr County at the time of his death (*i.e.* a resident of Rio Grande City, not Ridge, Texas). (1 CR 36-58). The motion to transfer venue was granted and the matter was transferred to Starr County. (1 CR 87-89). ***Seabright did not appeal this ruling.***

The parties later filed cross-motions for summary judgment on the question of course and scope. (2 CR 710-726, 763-890, 893-901, 908-989, 992-1000, 1007-1088). At the hearing, Interstate conceded, "Mr. Lopez actually resided in Rio Grande City" and that Lopez was merely "staying in a hotel in Marlin, Texas, which is 40 miles away from Ridge, Texas" "[w]hile he was doing his job[.]" (1 RR at 4-5). Interstate also conceded, "[h]e was driving a company vehicle." (1 RR at 5). After considering the evidence, the trial court granted Maximina's motion and denied Seabright's motion. (2 CR 1217-18).

The Fourth Court's unanimous affirmance of the ruling of the Texas Department of Insurance and trial court.

Seabright filed a notice of appeal and asked the Fourth Court of Appeals to reverse the ruling made by the trial court, the Texas Department of Insurance's Appeals Panel, and the Texas Department of Insurance's Hearing Officer. (2 CR 1304). The Fourth

Court assigned Justices Angelini, Barnard, and Martinez to consider the appeal. After considering the appellate record, Justice Barnard authored the 10-page Opinion that was joined by Justice Angelini and Justice Martinez.

INTRODUCTION: WHAT THIS CASE IS REALLY ABOUT

Seabright makes clear in its Petition for Review and Brief on the Merits that it sees this case as an "error correction" case. Although this Court has begun taking some cases that appear to be for purposes of "error correction," as opposed to those taken for purposes of resolving a "court split" or important issue in Texas jurisprudence, this case presents this Court with an opportunity to accomplish neither. This is because there is no error to correct and there is no "important" jurisprudential questions posed in this case. Indeed, the facts of this case are distinct, specific, and unrelated to other "course and scope" cases. Thus, a ruling by this Court, in either direction, would not be usable by future parties. What this really boils down to is yet another "run of the mill" last ditch appeal by an insurance company seeking to avoid paying compensation despite having taken in premiums for just this occasion.

Here, the Texas Department of Insurance twice rejected Seabright's request to avoid payment (both the Hearing Officer and Appeals Panel rejected Seabright's arguments). Then, Seabright was rejected twice more in the judicial system – once by the Starr County District Court and once by a unanimous Panel of the Fourth Court of Appeals (authored by Justice Marialyn Barnard and joined by Justice Karen Angelini and Justice Rebeca C. Martinez). Simply put, there is no error here or important issue of Texas jurisprudence. The only thing present here is an insurance company asking this Court for relief after four other ruling bodies have denied them the same relief requested. Respondent respectfully requests this Court to deny the Petition for Review.

SUMMARY OF THE ARGUMENT

Seabright tries to manufacture a conflict of laws in order to draw this Court's attention. But, a review of the governing case law shows that no conflict exists. The unanimous Opinion of the Fourth Court correctly applied well-established principles from this Court to arrive at the correct result. *E.g., Leordeanu v. Am. Petroleum Ins. Co.,* 330 S.W.3d 239, 241-45 (Tex. 2010); *Tex. Emp'rs Ins. Ass'n v. Page,* 553 S.W.2d 98, 99 (Tex. 1977); *Shelton v. Standard Ins. Co.,* 389 S.W.2d 290, 293 (Tex. 1965); *Jecker v. W. Alliance Ins. Co.,* 369 S.W.2d 776, 779 (Tex. 1963), *overruled in part on other grounds by McKelvy v. Barber,* 381 S.W.2d 59 (Tex. 1964); *Smith v. Texas Emp'rs' Ins. Ass'n,* 105 S.W.2d 192, 193 (1937).

The evidence shows that, at the time of the fatal accident, Lopez: (1) lived in Rio Grande City; (2) was staying in the hotel in Marlin because he was required to do so to carry out his employment; (3) was paid a per diem for lodging/food and provided a company credit card for gas; (4) was considered a "lead guy" for the employer and, thus, was provided a company vehicle to transport himself, subordinate employees, and equipment to the jobsite; and (5) on the day in question, was driving the company

vehicle to the worksite, carrying Interstate workers and equipment to the worksite. Despite these undisputed facts, Seabright continues to deny coverage. The Texas Department of Insurance's Hearing Officer and Appeals Panel, as well as the District Court and Fourth Court of Appeals all rejected Seabright's claim. So should this Court.

ARGUMENT

I.
STANDARD OF REVIEW

The trial court decided this case on cross-motions for summary judgment. As the Fourth Court noted in its Opinion, Seabright did not present any summary judgment evidence, but rather, argued about the legal effect of the evidence presented to the trial court. *Op.* at 9 ("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.").

The standards for reviewing summary judgments are well settled. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). When cross-motions for summary judgment are filed, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). On appeal, the appellate court should determine all questions presented when the trial court grants one motion and denies the other. *Id.* Moreover, this Court must render

the judgment that the trial court should have rendered. *Id.*

The motions for summary judgment filed by both parties related solely to the issue of whether Lopez was in the course and scope of his employment at the time of the fatal accident. (2 CR 710-726, 764-890, 893-901, 908-989, 992-1000, 1007-1088). In her motion, Maximina argued that she was entitled to summary judgment because (1) Lopez's transportation was furnished and paid for by his employer thereby excepting his travel from the general rule that employee travel is not covered under the Act, and (2) Lopez's activities satisfied the general test for course and scope of employment under the Texas Labor Code since his travel to work furthered the affairs of his employer, and his travel originated in his employer's business. (2 CR 764-890). The trial court agreed. (2 CR 1217-18, 1278-80). Because the summary judgment evidence conclusively established that:

- Lopez was driving a company vehicle at the time of the accident;
- Lopez's employer not only owned the vehicle, but it provided Lopez with a gas card to pay for fuel;
- Lopez's employer paid him a per diem for the motel and food

while he worked far from home;

- Lopez, hired by the company as the "lead guy," had been provided a company truck to transport subordinate employees and equipment to and from the worksite (and Lopez was doing this exact task when the accident occurred); and
- Lopez would not have been traveling at the time and place the accident occurred but for his work responsibilities,

(2 CR 764-890). Lopez was, therefore, in the course and scope of his employment at the time of the fatal accident; and, this Court should affirm the trial court's grant of summary judgment in favor of his widow.

II.
THIS COURT'S TEST FOR COURSE AND SCOPE OF EMPLOYMENT IS WELL-ESTABLISHED

An event is considered to be in the "course and scope of employment" if it 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.

TEX. LAB. CODE § 401.011(12). The Texas Labor Code creates a general test with respect to employee travel that dates back to 1917:

the activity must be of a kind or character that originates in the employer's business and it must further the affairs of the employer. *See Leordeanu v. Am. Petroleum Ins. Co.,* 330 S.W.3d 239, 241-45 (Tex. 2010) (discussing course and scope and its historical relationship with employee travel).

Generally, normal transportation "to and from the place of employment" is not within the course and scope of employment under what is known as the coming and going rule. TEX. LAB. CODE § 401.011(12)(A). This exception applies when the travel merely exposes employees to the same risks that "are shared by society as a whole and do not arise as a result of the work of employers." *Evans* v. *Illinois Employers Ins. of Wausau,* 790 S.W.2d 302, 305 (Tex. 1990). However, the coming and going rule is not unlimited.

Texas law defines three categories of employee travel that are statutory exceptions to the coming and going rule:

(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.

TEX. LAB. CODE § 401.011(12)(A).

This Court has consistently recognized that an injury that occurs in the course and scope of employment is compensable. *E.g., Leordeanu*, 330 S.W.3d at 242; *Tex. Emp'rs Ins. Ass'n v. Page,* 553 S.W.2d 98, 99 (Tex. 1977); *Shelton v. Standard Ins. Co.,* 389 S.W.2d 290, 293 (Tex. 1965); *Jecker v. W. Alliance Ins. Co.,* 369 S.W.2d 776, 779 (Tex. 1963), *overruled in part on other grounds by McKelvy v. Barber,* 381 S.W.2d 59 (Tex. 1964); *Am. Gen. Ins. Co. v. Coleman*, 303 S.W.2d 370, 384 (Tex. 1957); *Fritzmeier v. Tex. Employers' Ins. Ass'n*, 114 S.W.2d 236 (Tex. Com. App. 1938); *Smith v. Texas Emp'rs' Ins. Ass'n,* 105 S.W.2d 192, 193 (1937); *accord McKim v. Commercial Standard Ins. Co.,* 179 S.W.2d 357, 359 (Tex. Civ. App.—Dallas 1944, writ ref'd).

In this case, the Fourth Court applied this well-established standard. In particular, the Fourth Court recognized that "an injury that arises out of and in the course and scope of employment" is compensable under the Act. *Seabright Ins. Co. v. Lopez*, 427 S.W.3d 442, 447 (Tex. App.—San Antonio 2014, pet. filed). Too, the Fourth Court recognized, and properly applied to Lopez, the settled exceptions to the coming and going rule – exceptions likewise

recognized by this Court, and codified in 401.011(12)(A). *Id.*; *Leordeanu,* 330 S.W.3d at 241–44. Although Seabright seeks to garner this Court's attention by arguing the Fourth Court has "altered" this Court's precedent, a review of this case shows that the unanimous Fourth Court panel applied this Court's established law to the distinct facts of this case to arrive at the same result as the Texas Department of Insurance's Hearing Officer, Texas Department of Insurance's Appeals Panel, and the District Court.

Simply put, if Seabright has its way, no employee will be covered when driving to a worksite, regardless of the circumstances, the reason for the travel, and the facts underlying the travel. This sort of pro-insurance ruling would surely benefit workers' compensation insurance companies. But, Seabright's self-serving interpretation of the law is myopic. The more relevant question is whether Seabright's interpretation contradicts well-established precedent from this Court and flies in the face of the provisions in the Texas Labor Code and the terms of the insurance contract. The answer to that question is "yes," and therefore, this Court must affirm the Opinion of the Fourth Court of Appeals. Bottom line, if Seabright wants to change the law, it should seek redress in the

Texas Legislature, not by asking this Court to re-write provisions of the Texas Labor Code.

III.
THE FOURTH COURT CORRECTLY ANALYZED THE STATUTORY PROVISIONS

In the Opinion below, the Fourth Court correctly upheld the trial court's findings because Lopez's travel satisfied one of the three exceptions to the coming and going rule under section 401.011(12)(A), and Lopez's travel on the day of the accident otherwise satisfied the general test of course and scope of employment under section 401.011(12). The Fourth Court's Opinion is also correct because the two judicial exceptions to the coming and going rule apply: the continuous coverage and special mission rules.

On petition for review to this Court, Seabright claims (1) Lopez's use of a company vehicle was gratuitous and not required as part of his employment, and (2) Lopez was not required to transport tools or workers as part of his employment. Both claims lack merit because, under well-established standards, Maximina provided more than enough summary judgment evidence to show that Lopez's travel did originate in Interstate's business.

A. *Seabright's interpretation of case law is flawed.*

In an attempt to create a conflict where none exists, Seabright compares the Opinion below to other appellate decisions, and argues that under the Fourth Court's construction of section 401.011(12), "all employees that take jobs away from home who are provided transportation by their employer" would qualify under one of the exceptions to the coming and going rule. Br. at 6. To the contrary, Seabright's interpretation of the relevant case law is flawed.

First, Seabright points to *Amer. Home Assur. Co. v. De Los Santos,* No. 04–10–00852–CV, 2012 WL 4096258 at *1 (Tex. App.—San Antonio 2012, pet. denied). At first blush, the facts there seem similar (employer provided company vehicle, paid for gas, and allowed employee to drive it to/from home and worksite). *Id.* But, there, the accident occurred when the employee was driving to work with a non-coworker for a meeting not scheduled by the employer. *Id.* Thus, the employee was not on an employer's "special mission." *Id.* at 5. Here, however, it is *undisputed* that Lopez was traveling to the worksite as required by his job at the time of the fatal accident. (2 CR 833-35, 837).

There, the appellate court also recognized that although a vehicle supplied by an employer may be indicative of course and scope, it does not "in and of itself" establish course and scope. *Id.* at 3-4. Clearly, unlike the protestations by Seabright, the Fourth Court has demonstrated an appreciation of the test established by this Court. *Id.*

Also, in *De Los Santos*, there was no evidence that the company provided the truck for any reason other than "gratuitous." *Id.* Whereas here, in contrast, the evidence shows Lopez did much more than merely drive a company vehicle; rather, he transported tools and subordinate employees to and from the Ridge work site. (2 CR 817-18, 851-52). Additionally, the evidence showed Interstate paid for Lopez's travel expenses, food, and lodging; and that Lopez would not have been traveling at the time of the accident ***but for*** his work responsibilities. (2 CR 793-95, 815-18, 825-26, 833-35, 837, 842-43, 845-48, 851-52).

Simply put, Lopez did not wake up in his home on the morning of the fatal accident and drive to work. Instead, Lopez woke up in a motel paid for by his employer, was driving to the job site in the company truck paid for and insured by his employer,

paid for gas with a company card and was transporting his subordinate employees, or crew. Thus, contrary to Seabright's argument, Lopez met the "origination" and "furtherance" requisites of the statute so that the activity was in the course and scope of his employment – as required by section 401.011(12) and as found by the Fourth Court.

Seabright then attempts to call into question the Opinion by citing to this Court's decision in *Leordeanu*. Br. at 8-9. Seabright's reliance on *Leordeanu* is misplaced, and its argument that the Fourth Court improperly deviated from the standards set forth in *Leordeanu* are flawed because Seabright's argument is based on the faulty premise that Lopez's travel was an ordinary "daily commute." Br. at 9. While an ordinary worker's commute between home and work falls within the coming and going rule – the evidence undisputedly shows that Lopez was not at home, and he was not engaged in an ordinary "daily commute" when the accident occurred. Rather, Lopez's employer furnished the truck he was driving, (2 CR 795-799, 819-24), and paid for expenses related to transportation, (2 CR 794-95, 825-26, 845-46), and had tasked Lopez with carrying subordinate employees and equipment to the

worksite in the company truck. (2 CR 835, 845, 852-53; 1 CR 27, 236, 244-318; 2 CR 818-20, 822, 840-42, 849-51). As such, Lopez trip is statutorily excepted from the coming and going rule. TEX. LAB. CODE § 401.011(12)(A)(i); *accord Zurich Am. Ins. Co.* v. *McVey,* 339 S.W.3d 724, 729 (Tex. App.—Austin 2011, pet. denied); *Rose v. Odiorne,* 795 S.W.2d 210, 214 (Tex. App.—Austin 1990, writ denied).

Thus, the Fourth Court's decision does not create a blanket exception for any "worker that chooses to reside at a place remote to his employer's premises," (Br. at 9), but, rather, like in *Leordeanu*, the Fourth Court applied the settled rule that "course and scope of employments" includes transportation to and from the place of employment if the transportation is furnished to the employee as part of the employment, it is under the employer's control, or the employer directs the employees travel from one place to another. *Leordeanu*, 330 S. W.3d at 244. For the same reason, the Fourth Court's decision is not erroneous because it uses the term "nexus" to explain the relationship between Lopez's employment and the travel on the date of the accident – it is undisputable that the application of the section 401.011(12)

exceptions requires such a relationship to be established. *Id.*; TEX. LAB. CODE § 401.011(12).

Seabright also cites *Zurich Am. Ins. Co.* v. *McVey,* 339 S.W.3d 724 (Tex. App.—Austin 2011, pet. denied) as an example of how the Fourth Court supposedly got it wrong. But, review of the *McVey* case actually shows the opposite. In *McVey,* the appellate court addressed almost identical facts to this case. McVey was killed in while driving a company vehicle a few miles from his home on the way to a work assignment. *McVey,* 339 S.W.3d at 727. McVey "had planned to pick up a coworker" who lived on McVey's planned route. *Id.* "Although the men were not required to carpool by [the employer], strictly speaking, the company emphasized policies that its employees should be efficient in company travel." *Id.*

After the insurance company denied coverage, the hearing officer, trial court, and appellate court all agreed that McVey was within the course and scope of his employment. *Id.* The appellate court said McVey was "traveling in a vehicle that his company provided and paid for" which fits squarely within the exception to the coming and going rule for "'transportation [] furnished as a part of the contract of employment or [that] is paid for by the employer."

Id. at 729 (quoting TEX. LAB. CODE § 401.011(12)(A)(i)). Similarly, in the other case cited by Seabright, *Tex. Mutual Ins. Co. v. Jerrols*, 385 S.W.3d 619 (Tex. App—Houston [14th Dist.] 2012, pet. denied), the appellate court agreed that were the transportation is provided by the employer, the travel – there, traveling to and from the job site to eat lunch – was within the course and scope of employment, and satisfied the "origination" requirement of the statute. *Id.* at 630-32. Here, too, Interstate provided Lopez with the company vehicle (as conceded by Interstate at the summary judgment hearing), and it paid for the gas and insurance on the vehicle. (2 CR 794-95, 825-26, 845-48; 1 RR at 5). Therefore, the Fourth Court correctly applied the standards in *Leordeanu* and TEX. LAB. CODE § 401.011(12).

B. *Lopez's activities satisfied the general test for course and scope of employment because Lopez's travel furthered Interstate's affairs and originated in Interstate's business.*

Seabright next argues that the Fourth Court erred in finding that Lopez satisfied the course and scope of employment requirement of the statute. While it is clear that Lopez's employer furnished and paid for his transportation, in order for summary judgment to have been properly granted, Lopez's death must also have originated in the employer's business *and* must have been "sustained during the furtherance of the employer's business." TEX. LAB. CODE §401.011(12). The summary judgment evidence proved just that.

As a general rule, all travel to work furthers the affairs of the employer because the travel makes the employment possible. *See Leordeanu v. Am. Petroleum Ins. Co.,* 330 S.W.3d 239 (Tex. 2010). Thus, Lopez's trip to the jobsite automatically furthered Interstate's affairs. *See id.* The *important* inquiry out of the two-part test is whether Lopez's travel originated in the employer's business. The summary judgment evidence established that it did.

Both the Fourth Court below and the *McVey* and *Jerrols*

Courts explained that "there is no bright-line rule for determining whether employee travel originated in the employer's business," but there are general considerations guiding the analysis. *See McVey,* 339 S.W.3d at 730; *Jerrols*, 385 S.W.3d at 630. For example, travel originates in the employer's business if the travel is part of the express or implied requirements of the employment arrangement. *Rose v. Odiorne,* 795 S.W.2d 210, 214 (Tex. App.—Austin 1990, writ denied). Moreover, when the employer requires the worker to travel, then the risk of traveling stems from the business and should be deemed to originate in the employer's business. *McVey,* 339 S.W.3d at 730. Providing transportation may be merely gratuitous, but when the transportation is a "necessity from the employer's perspective" then the travel originated in the employer's business. *Rose,* 795 S.W.2d at 214.

Because the inquiry of whether travel originated in the employer's business is necessarily fact specific, this Court must be guided by a liberal construction of "originating in the employer's business" to effect the Act's purpose – which is to compensate injured workers and their dependents. *See Albertson's, Inc. v. Sinclair,* 984 S.W.2d 958, 961 (Tex. 1999). Since the Act is to be

"liberally construe[d]," employers and insurers must not be allowed to hedge the Act with strict constructions or limited interpretations of phrases and language, because such defeats and limits workers' compensation coverage. *E.g., Tex. Workers' Compensation Comm'n v. Patient Advocates of Tex.,* 136 S.W.3d 643, 652 (Tex. 2004); *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 294 (Tex. 1965) (explaining that "our Workmen's Compensation Act must be given a liberal construction to carry out its evident purpose."); *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572, 575 (Tex. App.—Austin 1986, writ ref'd n.r.e.) ("The Act must be liberally construed in favor of the employee; it must not be hedged about with strict construction, but must be given a liberal construction to carry out its evident purpose.").

Courts who have encountered similar cases to the circumstances surrounding Lopez's accident have found similar facts important to this inquiry. The *McVey* court found it significant that the place the employee was traveling to was outside his normal workplace, that attendance was required, that the worker drove a company truck with a company gas card, that driving was customary, and that the worker was carpooling with another

worker. *See McVey,* 339 S.W.3d at 731. The same factors are present in this case:

- Out of town requirement of work. Lopez, similar to *McVey*, worked away from home, since he was from Rio Grande City yet the work required him to travel over 450 miles to Ridge. (2 CR 833-35, 837).
- Car pool. Lopez, like *McVey*, was taking subordinate workers to the job site, as was expected since Lopez was a supervisor and entrusted with a company vehicle. (2 CR 817-18, 851-52).
- Gas card. Lopez, like *McVey*, was also provided a company gas card for fuel expenses. (2 CR 794-95, 825-26, 845-48).

This Court has likewise encountered another similar case where an employee was required to spend several nights away from home. *Shelton,* 389 S.W.2d at 293-94. There, this Court emphasized:

> [f]ood and sleep were necessary if he was to perform the work for which he was hired, and under the terms of his employment contract he was permitted to stop and satisfy these physical needs and was paid the expenses incident thereto. He was not in Dallas by his own choice but was required to be there to do his job. By the very nature of the employment, moreover, the place and circumstances of his eating and sleeping were dictated to a large degree by contingencies inherent in the work.

Id. at 94.

The same can be said here:

- Required travel. Lopez was required by his employer to stay nearby. (2 CR 793-94, 815-16, 842-43).
- Per diem. Lopez's employer paid for his hotel and meals. (2 CR 793-94, 815-16, 842-43).

Thus, like in *Shelton* and *McVey*, Lopez was given a per diem by his employer for travel from his home, required to stay in the vicinity of the job site, given a company truck, given a company gas card, and expected to carry other workers to the job site. (2 CR 793-95, 815-16, 825-26, 833-35, 837, 842-43, 845-48).

In other words, Lopez was not in Marlin "by his own choice," and ***but for*** his employer requiring him to stay so far from his home, he would not have died. *See Shelton*, 389 S.W.2d at 294. Thus, Seabright's reliance on the fact that Interstate provided the vehicle gratuitously is not only misplaced, but contrary to the plain language of the statute that requires only that the transportation be provided as part of the employment – not that it be paid for. TEX. LAB. CODE § 401.011(12)(A)(i); *Leordeanu*, 330 S.W.3d at 244.

Seabright also points to *Rose v. Odiorne,* 795 S.W.2d 210 (Tex. App.—Austin 1990, writ denied), a review of which also shows the Fourth Court got this case right. There, Rose was injured when driving home from the remote jobsite (1.5 hours from his home). *Id.* at 212. Rose's employer paid him $20 for transportation to travel to his home on the day of the injury. *Id.* Since Rose was compensated for his travel, the appellate court held coverage was not barred by the coming and going rule. *Id.* at 213. The appellate court explained: proof that the employee received compensation for the travel did "not entitle [the employee] to compensation but only prevents his injury from being excluded from coverage simply because it was sustained while he was traveling to and from work." *Id.* Since the employer furnished or paid for the employee's transportation, the employee was "permitted to show that his injury is otherwise compensable" – or that it satisfies the two prongs of the general test of §401.011(12) without being excluded by the coming and going rule. *Id.* at 214.

In the case before this Court, Lopez's employer furnished the truck he was driving, (2 CR 795-799, 819-24), and paid for expenses related to transportation, (2 CR 794-95, 825-26, 845-46).

As such, Lopez trip is statutorily excepted from the coming and going rule. *See, e.g.,* TEX. LAB. CODE § 401.011 (A)(i); *McVey,* 339 S.W.3d at 729; *Rose,* 795 S.W.2d at 214.

Seabright also cites to *Tex. Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350 (Tex. 1963), but this case does not support Seabright's argument. In *Bottom*, this Court held that an accident during travel did not occur in the course and scope of employment because even though the vehicle was provided by the employer, "the employment contract did not contemplate or require that he subject himself to road hazards for the purpose of maintaining trucks owned or leased by the company." *Id.* at 354. Because Bottom was not required to "service" the vehicle, the accident did not occur in the course and scope of his employment. *Id.* Contrary to *Bottom,* in the case before this Court, Interstate admitted at the summary judgment hearing that Lopez was staying at the Marlin hotel because he was doing a job in Ridge, and that, as a consequence, he was driving the company vehicle to get to and from the job site. (1 RR at 4-5). Thus, unlike the employee in *Bottom*, Lopez was driving Interstate's vehicle in furtherance of the company's business.

Seabright also, once again, makes much ado about whether

Lopez was required to transport tools and other employees to and from the Ridge job site, and the impact of those facts on the propriety of summary judgment. Br. at 17-18. The overarching problem with Seabright's argument is that the summary judgment issue does not rise and fall on whether he was transporting tools. Instead, courts look to all the surrounding circumstances to determine if travel is in the course and scope of employment *E.g. McVey,* 339 S.W.3d at 729; *Rose,* 795 S.W.2d at 214. As explained above, numerous facts supported the trial court's decision in addition to Lopez's transportation of tools and subordinate employees, including Interstate providing him the company truck, providing him a gas card to pay for gas for the truck, and paying him a per diem to stay in the motel during the temporary work assignment. (2 CR 793-95, 815-16, 825-26, 833-35, 837, 842-43, 845-48).

For that reason alone, this Court's decision in *Agriculture Ins. Co. v. Dryden*, 398 S.W.2d 745, 746 (Tex. 1965) is also distinguishable — the facts in that case related only to the issue of whether Dryden was in the course and scope of his employment because "one of his duties [was] to transport in his personal

automobile from work site to home to work site certain power tools owned by his employer and used by the carpenter crew." This Court held that he was not in the course and scope of his employment. *Id.* at 745-46. *Dryden* is also distinguishable because he used his personal vehicle, thus, as this Court recognized "transportation was not furnished Dryden as a part of his contract of employment . . . the transportation was not paid for by his employer . . . [and] the transportation was not under the control of the employer." *Id.* at 747.

IV.
LOPEZ'S TRAVEL ALSO FELL WITHIN BOTH JUDICIALLY-CREATED TRAVEL EXCEPTIONS

This Court (several courts of appeals) has applied two travel exceptions to the general rule that injuries sustained during an employee's travel is non-compensable under the Act: the continuous coverage rule and the special mission rule. *E.g. Shelton*, 389 S.W.2d at 292 (referring to the rule as applying where the employee is "going to or returning from" work when "[t]he services for which his is employed cannot be performed unless he goes regularly to the place where the work is to be done[.]"); *Orgon*, 721 S.W.2d at 574-75 (reviewing nationwide case law related to

continuous coverage rule); *McVey*, 339 S.W.3d at 730 (explaining the special mission rule). These exceptions provide further reasons to deny Seabright's Petition.

A. *The continuous coverage rule applies because Lopez would not have been traveling but for his employment*

Seabright also argues that the Fourth Court's Opinion was erroneous because the continuous coverage exception does not apply. Br. at 19-20. Once again, Seabright is wrong. Under the continuous coverage exception:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Orgon, 721 S.W.2d at 574-75 (citing 1A A. Larson, Workmen's Compensation Law § 25.00 (1985)). Here, this rule applies because Lopez was required by his employer to be away from his home in Rio Grande City – where he lived with his wife – and, as a necessity of his work, stay in Marlin. (2 CR 790-94).

"But for the business-related necessity of sleeping overnight in an out-of-town hotel room, [Lopez] would have awakened on the day

in question in the comfort and security of familiar surroundings," and would not have been involved in the fatal automobile accident. *See Orgon*, 721 S.W.2d at 575. Thus, under the standard set forth in *Orgon*, Lopez was considered to be "within the course of [his] employment continuously during the trip[.]" *See Orgon*, 721 S.W.2d at 574. Moreover, Seabright does not argue that Lopez was "on a personal errand[.]" *See id.* at 574-75. Likewise, and as more fully set forth above, the continuous coverage rule applies to Lopez's travel under *Shelton* because "his presence at the place of injury is causally related to the employment," therefore his travel necessarily "further[ed] the affairs or business of his employer by making the journey" from the motel in Marlin to the job site. *See Shelton*, 389 S.W.2d at 292.

B. *The special mission rule applies because Lopez was required to work out of town, car pool, used a company gas card, and was given per diem*

Additionally, contrary to Seabright's argument (Br. at 21) the special mission rule, a second exception, applies. "The term special mission eludes precise definition but, in essence, is shorthand for trips made by an employee under the direction and for the benefit of the employer." *McVey*, 339 S.W.3d at 730. Thus, "like travel made

with an employer-provided vehicle" (which also applies to Lopez's travel as explained above), special mission travel "is among the judicially created exceptions to the 'coming and going' rule[.]" *Id.* The *McVey* court explained that evidence of a special mission is probative on the issue of "whether an employee's trip originated in his employer's business." *Id.* (*Accord* 2 CR 769-72). Here, the same summary judgment evidence that established Lopez's travel originated with his employer's work also evinces a special mission: the out of town work requirement, the car pool, the gas card, the required travel, and the per diem. (*Id.*).

CONCLUSION

For the aforementioned reasons, this Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that this Response Brief on the Merits contains 8,307 words. On December 9, 2014, I served a copy of this Response Brief on the Merits on those listed below via this Court's e-filing system or facsimile:

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