COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STEVEN PAINTER, Individually; TONYA WRIGHT, Individually and as Representative of the Estate of EARL WRIGHT, III;TABATHA ROSELLO RIOS, as Next Friend of ALBERT A. CARRILLO, JR., a Minor; and VIRGINA WEAVER, Individually,	§	No. 08-19-00226-CV
	§	Appeal from the
	§	83rd District Court
	§	of Pecos County, Texas
Appellants,	§	(TC#P-6666-B-83-CV)
v.	§	
AMERIMEX DRILLING I, LTD.,	§	
Appellee.		

O P I N I O N

This is an appeal from the grant of a traditional motion for summary judgment in a common-law negligence suit. The court below determined the Workers' Compensation Act ("the Act") barred the negligence claims brought against Amerimex Drilling I, Ltd. ("Amerimex"), by Appellants who alleged it was vicariously liable for the deaths of two employees, Earl Wright, III and Albert Carrillo, as well as the serious bodily injuries sustained by a third employee, Steven Painter, (collectively "passengers" or "crew"). The deaths and injuries arose from a 2007 roll-over vehicular collision allegedly caused by a fourth employee, J.C. Burchett ("Burchett" or "the

driver"), who was driving the men in his personal vehicle from a remote worksite to a "bunkhouse" at the end of the crew's workday.

In a previous appeal in this case, the Texas Supreme Court determined a fact issue existed as to whether the *driver* was acting in the course and scope of *his* employment with Amerimex at the time of the collision, overruling our determination that summary judgment was appropriate, and remanded the case to the trial court for further proceedings. *See Painter v. Amerimex Drilling I, Ltd. (Painter I)*, 561 S.W.3d 125, 139 (Tex. 2018). On remand, Amerimex filed a second traditional motion for summary judgment, this time contending the evidence conclusively established its affirmative defense[1] that the Act barred the Appellants' negligence claims because the *passengers* were acting in the course and scope of *their* employment at the time of the collision and Appellants were therefore limited to compensation under the Act. The trial court agreed and granted Amerimex's motion for summary judgment.

In three issues, Appellants contend the trial court erred in granting summary judgment on Amerimex's affirmative defense because the evidence does not conclusively establish the passengers were acting within the course and scope of their employment at the time of the collision. First, Appellants contend the passengers' injuries were not related to, nor did they originate in, the work of Amerimex, as required by the Act's definition of course and scope of employment. Second, even if the injuries related to or originated in Amerimex's business, Appellants contend the injuries were sustained while the crew was using the public streets and highways to come and

[1] The "exclusive remedy" provision found in Section 408.001(a) of the Texas Workers' Compensation Act is an affirmative defense that protects subscribing employers from common-law claims, including negligence, that could otherwise be brought by employees for work-related injuries. *Reveles v. OEP Holdings, Inc*. 574 S.W.3d 34, 37 (Tex.App.—El Paso 2018, no pet.). The affirmative defense does not apply to an employee's negligence suit if the employee was *not* acting within the course and scope of his employment at the time of injury because such injuries are not "compensable" under the Act. TEX.LAB.CODE ANN. § 401.011(10).

go from the jobsite, which is transportation activity expressly excluded from the Act's definition of course and scope. *See* TEX.LAB.CODE ANN. § 401.011(12)(excluding from the Act's definition of course and scope of employment "transportation to and from the place of employment"). Third, Appellants contend Amerimex does not conclusively demonstrate that the transportation in this case meets the requirements of the exceptions to the transportation exclusion upon which Amerimex relies. *See* TEX.LAB.CODE ANN. § 401.011(12)(A)(i) and (ii)(excepting from the transportation exclusion transportation that is "paid for by the employer" or "under the control of the employer").

BACKGROUND

We adopt the background facts stated in *Painter I*:

> Sandridge Energy, Inc., hired Amerimex Drilling I, Ltd., to drill oil-and-gas wells on the Longfellow Ranch in Pecos County. Amerimex provided mobile bunkhouses for its crews and typically located those bunkhouses at the drilling site. However, Sandridge did not allow bunkhouses on the ranch, requiring them to be moved approximately 30 miles away to Fort Stockton. The Sandridge–Amerimex contract accounted for this circumstance by mandating a bonus payment to the crew's driller to drive the crew to the site. Specifically, the contract provided that "[Amerimex] shall invoice [Sandridge] for and pay each Driller to receive [sic] $50/day to drive crew out to well location." Amerimex did not require its crews to stay at the bunkhouse or ride with the driller, although it appears undisputed that they typically did both. Further, Amerimex placed no restrictions on what route they took between the bunkhouse and the drilling site or where they stopped along the way.
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> The Amerimex crews assigned to the Longfellow Ranch project worked twelve-hour shifts on a seven-days-on, seven-days-off schedule. J.C. Burchett was the driller on one of those crews and was paid the daily bonus to drive his crew between the bunkhouse and the ranch in his own truck. Burchett and his crew members—Steven Painter, Earl Wright, and Albert Carillo—all lived significantly farther from the ranch than Fort Stockton, so they generally stayed at the bunkhouse. However, on one or two occasions, Burchett drove with the crew to Big Spring (where Burchett and at least one other crew member lived) after their shift instead of back to the bunkhouse.
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> On February 28, 2007, Burchett was driving the crew from the ranch back to the

> bunkhouse after their shift ended. He struck another vehicle driven by Sarah Pena, resulting in a rollover that killed Wright and Carillo and injured Painter and Burchett. Burchett sought and received workers' compensation benefits following a contested case hearing before the Texas Department of Insurance Workers' Compensation Division. Amerimex argued in that hearing that Burchett was acting in the course and scope of his employment at the time of the accident, and the Division ultimately found Burchett's injury compensable because he was paid to transport the crew between the ranch and the bunkhouse, furthering Amerimex's business interests.
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> Painter and the deceased crew members' representatives and beneficiaries (collectively, Painter) did not seek workers' compensation benefits. However, Amerimex initiated proceedings at the Division to determine whether the injuries suffered by Painter, Wright, and Carillo were covered by its workers' compensation policy. A Division appeals panel concluded that Amerimex lacked standing to do so and that, in any event, the employees were not injured in the course and scope of their employment and thus did not sustain compensable injuries. *In re Tex. Mut. Ins. Co.*, 331 S.W.3d 70, 73 (Tex.App.—Eastland 2010, orig. proceeding).

Painter I, 561 S.W.3d at 128-29 [Footnotes omitted].

STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary judgment *de novo*. *Valley Forge Motor Co. v. Sifuentes*, 595 S.W.3d 871, 876-77 (Tex.App.—El Paso 2020, no pet.). When reviewing a traditional motion for summary judgment, as opposed to a no-evidence motion, the burden is on the movant to show there exists no genuine issue of material fact such that the movant is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). We accept as true all evidence favorable to the non-movant, indulge every reasonable inference, and resolve any doubts in the non-movant's favor. *Sifuentes*, 595 S.W.3d at 876. A defendant moving for summary judgment on an affirmative defense has the burden to establish conclusively that defense. *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003).

The Act's exclusive remedy provision is an affirmative defense that the defendant must plead and prove. *Reveles*, 574 S.W.3d at 37; *Rico v. Judson Lofts, Ltd*., 404 S.W.3d 762, 765

(Tex.App.—San Antonio 2013, pet. denied). To prove the affirmative defense, a defendant must show that the injured worker was: (1) its employee at the time of the work-related injury or death; and (2) the work-related injury or death was compensable by workers' compensation insurance. TEX.LAB.CODE ANN. § 408.001(a), § 401.011(10).

DISCUSSION

I. The Workers' Compensation Act

The Act serves as "a mechanism by which workers [can] recover from subscribing employers without regard to the workers' own negligence while limiting the employers' exposure to uncertain, possibly high damage awards permitted under the common law." *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 642 (Tex. 2015). "The Act ultimately struck a bargain that allows employees to receive a lower, but more certain, recovery than would have been possible under the common law." *Id.* [Internal quotations omitted]. The Act defines a "[c]ompensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." TEX.LAB.CODE ANN. § 401.011(10). "Course and scope of employment" is defined by the Act in relevant part as follows:

> [A]n 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.

TEX.LAB.CODE ANN. § 401.011(12). Thus, the Act's definition of "course and scope" requires "the injury to (1) relate to or originate in, and (2) occur in the furtherance of, the employer's business." *See Lopez*, 465 S.W.3d at 642 (citing *Leordeanu v. Am. Protection Ins. Co.*, 330 S.W.3d 239, 241 (Tex. 2010)) [Internal quotations omitted].

In addition, the Act expressly excludes from the definition of course and scope "transportation to and from the place of employment . . . ." *See* TEX.LAB.CODE ANN. § 401.011(12). Known as the "coming and going" rule, the rationale for the exclusion is that an injury occurring while using the public streets or highways in going to and returning from the place of employment is in most instances "suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." *Janak v. Tex. Employers' Ins. Assoc.*, 381 S.W.2d 176, 178 (Tex. 1964).

Exceptions to this transportation exclusion are set forth in Section 401.011(12), subsections (A)-(B) which claw back *some* forms of coming and going activity that *may* constitute course and scope activity as defined by the Act. *See* TEX.LAB.CODE ANN. § 401.011(12)(A)-(B). Meeting the exception requirements, however, does not necessarily mean the course and scope requirements are also met. *See Lopez*, 465 S.W.3d at 645 ("[b]oth the origination and furtherance elements must be satisfied even if an employee qualifies for one of the exceptions to an exclusion"); *see also Freeman v. Tex. Comp. Ins.*, 603 S.W.2d 186, 192 (Tex. 1980)(exceptions to transportation exclusion do "not enlarge the definition of 'course of employment'"). Consequently, even if Amerimex can show the coming and going in this case satisfies one or more of the exceptions to the transportation exclusion, Amerimex must still also establish that the activity in which the crew members were engaged at the time of the collision falls within the Act's definition of course and scope of employment.

II. Course and Scope of Employment

In its first issue, Appellants contend Amerimex fails to conclusively establish at the time

of the collision the crew was engaged in activity that was "relate[d] to" or that "originate[d] in" Amerimex's business.[2] Specifically, Appellants argue the evidence establishes a genuine issue of material fact about whether the relationship between the crew's travel and their employment was *not* "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." *See Lopez*, 465 S.W.3d at 642.

According to Appellants, the following undisputed facts create a fact issue as to origination: (1) only the driver was paid daily to transport crew members who were not required by Amerimex to travel in the driver's personal vehicle; (2) the crew was not performing any service for Amerimex after leaving the jobsite because, unlike the driver, they were free to do as they pleased once they left the jobsite; (3) the crew was not required to stay at the bunkhouse; (4) the crew was paid an hourly wage, for fixed hours, at a fixed location, and they were not paid for daily travel to and from the jobsite; (5) at the time of the collision, the crew's workday had ended and they were off the clock.

Amerimex on the other hand argues the evidence conclusively establishes the crew's travel was "dictated by Amerimex's business model" and "enabled by Amerimex," and therefore originated in Amerimex's business as a matter of law. *See Lopez*, 465 S.W.3d at 644 (observing that injured worker's travel from temporary housing to remote jobsite were "dictated by [employer's] business model and enabled by [the employer's] provision of the vehicle and payment of per diem and other expenses").

To support its argument, Amerimex points to the following undisputed evidence: (1) as an

[2] Appellants concede the second element of the "course and scope" definition because it is well established travel to and from work furthers an employer's business. *See Leordeanu*, 330 S.W.3d at 242 (recognizing "[a]n employee's travel to and from work makes employment possible and thus furthers the employer's business"); *Lopez*, 465 S.W.3d at 644-45 (same).

oil-well drilling contractor, Amerimex's business required its employees to work at temporary remote worksites; (2) Amerimex made available to the crew free temporary housing which was usually erected at the jobsite, but on this project was placed 30 miles away from the jobsite; and (3) Amerimex was contractually obligated to make available to the crew a free ride to and from the jobsite.

Both parties agree that the Texas Supreme Court's origination analysis in *Lopez* controls the outcome of this case, so, we begin our analysis there.

A. *SeaBright Ins. Co. v. Lopez*

In *Lopez*, an insurance carrier in a workers' compensation case challenged a summary judgment determining the deceased employee, Candelario Lopez ("Lopez"), was acting within the course and scope of his employment while he was driving himself and two other employees in a company vehicle from temporary housing to a remote jobsite. *Lopez,* 465 S.W.3d at 640. When considering the question of whether Lopez was engaged in activity that "originated" in the company's business at the time of his death, the court recognized a distinction between "the risks to which employees are exposed while traveling to and from work [that] are shared by society as a whole and do not arise as a result of the work of employers" and instances where "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." *Id*. at 642 (citing *Shelton v. Standard Ins., Co*. 389 S.W.2d 290, 292 (Tex. 1965)).

The requisite degree of proximity between the travel at issue and employment necessary to meet the origination requirement "is satisfied if the employee's travel was pursuant to express or implied conditions of his employment contract." *Id.* (citing *Meyer v. W. Fire Ins. Co*., 425 S.W.2d

628, 629 (Tex. 1968)) [Internal quotations omitted]. This inquiry is a "fact-intensive" one "focusing on the nature of the employee's job, the circumstances of the travel, and any other relevant facts." *Lopez*, 465 S.W.3d at 642-43.

B. The "Conclusive" Evidence of Origination in *SeaBright Ins. Co. v. Lopez*

When considering whether the evidence conclusively established as a matter of law that the conditions of Lopez's employment included travel, the court considered as its "starting point" evidence of the employer's business. *Lopez*, 465 S.W.3d at 643-44. The court next considered the nature of the injured employee's employment within that business. *Id.* The court emphasized, however, that the focus must be on the latter, as well as "the circumstances of the travel, and any other relevant facts." *Id.* at 643.

Specifically, the court emphasized the following evidence present in that case: (1) the employer, Interstate Treating, Inc., fabricated and installed materials for the oil and gas processing industry, which "called for employing specialized, non-local work crews in constantly changing, remote locations on temporary assignments," and "[a]lthough [the company] could have hired local employees at each temporary, remote job site, its general practice was to hire people who had worked on previous installation jobs," *id*. at 640, 643-44; (2) Lopez's job, as a civil foreman, was to "oversee the installation of all of the plant's concrete foundations and the placement of the plant's equipment," and he was paid a per diem to offset lodging and food expense, and although he could stay at any motel he wished, he was expected to secure temporary lodging, *id.*; (3) in order to perform his job, Lopez requested and was provided a company vehicle, for which the company paid fuel and insurance, and which Lopez used to drive to and from remote job sites, *id.*; (4) on the day of the collision, Lopez was driving himself and two of his coworkers from temporary

housing to the remote jobsite in the company vehicle. *Id*.

After discussing this evidence, the court concluded that the relationship between Lopez's travel and his employment was *so close* it could fairly be said his death had to do with and originated in the company's business because Lopez' travel was "more akin to those employees such as deliverymen, messengers, collectors, and others, who by the very nature of the work they have contracted to do are subjected to the perils and hazards of the streets." *Id*. at 644. Notably, *Lopez* is silent as to whether the employees traveling as passengers in the company car with Lopez were acting in the course and scope of their employment.

C. *Lopez's* Application to This Case

After comparing the evidence in *Lopez* with the evidence in this case, for three reasons we agree with Appellants that a fact issue exists as to whether the relationship between the crew's travel in this case and the conditions of their employment was *so close* it can fairly be said their deaths and injuries originated in the work, business, trade or profession of Amerimex.

First, Amerimex fails to point us in the direction of any evidence describing the nature of the jobs held by Wright, Carrillo, or Painter that would demonstrate the conditions of their employment required them to travel beyond coming and going to work. Instead, Amerimex points to evidence establishing the nature of *Burchett's* job which included a daily obligation to make available to the crew a free ride to and from the jobsite as a condition of *Burchett's* employment. But the conditions of *Burchett's* employment do not speak to whether travel was sufficiently tied to the conditions of Wright, Carrillo, or Painter's employment. *See Lopez*, 465 S.W.3d at 642-43 (origination inquiry focuses on the nature of the injured employee's job).

Amerimex presents no evidence establishing, for example, that the crew shared Burchett's

responsibility of driving fellow crew members to and from the jobsite or that they were compensated for doing so. Rather, it is undisputed that only Burchett was assigned and paid to perform that duty. These facts distinguish this case from *Inge*, a case relied upon by Amerimex, in which the employer expected one of its employees to transport the other workers to and from the drilling site and paid that employee to do so. *Texas Employers' Ins. Ass'n v. Inge*, 208 S.W.2d 867, 867 (Tex. 1948). The employer in that case allowed the workers to determine which employee would drive and they chose Inge. *Id.* at 867-68. Inge later died in a car accident on a return trip from work, and the trial court concluded that Inge was acting in the course and scope of his employment. *Id.* at 869. By contrast, the crew members in this case were neither expected to drive *for* the company, nor were they driving at the time of the collision.

And there is much evidence in this record establishing that the crew's conditions of employment did *not* include driving *for* Amerimex. According to Glen Murphree, Amerimex's CFO, when it came to the crew, Amerimex was only concerned with their activity while they were at the jobsite. When they were off the jobsite, the crew could do as it pleased.[3] Nor is there any evidence establishing that while performing their job at the jobsite, the crew was expected to travel

[3] Murphree testified as follows:

> "A. I don't transport employees. Amerimex Drilling does not transport employees. They can get to work any way they want to get to work. They start work when they get to the rig, and that's when work begins. . . . Outside that, you know, we have no control over them."
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> . . .
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> "A. The employees are hired to work, to get to the rig however they want to get there. They can walk, drive, they can sleep under a bush at night, they don't have to go to the deal. They don't have to go to the bunkhouse. They've just got to show up when their shift begins, or we're going to have to look for another employee."
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> . . .
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> Murphree said it was his "understanding" that when the passengers' shift ended at 6 a.m. on the day of the collision, the crew was completely "off the clock."
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> . . .
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> "A. They could go home. They could go to the bunkhouse. They could go dancing. They could go drinking. They could do whatever. We wouldn't expect to see them until the next morning."

from the rig or between rigs to pick up supplies or transport workers. Indeed, when Murphree was asked whether Amerimex did anything to confirm whether the crew possessed valid driver's licenses, he testified unequivocally:

> [Murphree]. I didn't care whether they had a . . . valid driver's license or not.
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> Q. Even J.C. Burchett?
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> [Murphree]. I didn't know how they was getting to work. They can all come together. They can drive themselves. They could ride a burro. I didn't care. . . . They weren't driving for me—for Amerimex.

By contrast, in *Lopez*, when discussing the nature of Lopez's job with the company the court found it significant that Lopez requested and was provided a company vehicle, presumably because such facts permitted an inference--not present here--that *in addition to* coming and going, an express condition of Lopez's job required him to drive frequently between "constantly changing" jobsites and for significant periods of time. In our view, it was this condition of employment, acknowledged by both Lopez and the company, more than any other, that made Lopez akin to a deliveryman, whose *only* job is to deliver packages on a daily basis from door to door using the public streets while operating transportation furnished or paid by an employer who is in the business of delivering packages.

Here, the $50 bonus paid to *Burchett* to make available a free ride in his personal vehicle after the *completion* of the *crew's* workday, does not sufficiently tether the crew's employment to travel. And this record does not contain the type of evidence this Court and others have found determinative when concluding traveling passengers were in fact acting within the course and scope of their employment for purposes of the Act. For example, there is no evidence that the crew was required to ride with Burchett or that a crew member's refusal to ride with Burchett would

result in termination, *see, e.g., Liberty Mut. Ins. Co. v. Chesnut*, 539 S.W.2d 924, 927 (Tex.App.—El Paso 1976, writ ref'd n.r.e.)(upholding jury verdict finding employee passengers were acting within course and scope of employment while traveling to job site in vehicle driven by driller in part because driller could fire a crew member who refused to ride with him); or that the crew members themselves had insisted on being provided free transportation by the company before agreeing to accept the job, *see, e.g., Chesnut*, 539 S.W.2d at 927 (testimony from driller establishing neither he nor the crew would work without free transportation);[4] or that the crew was paid to travel to and from the jobsite, *see id.* (testimony "place[d] both the driller and the crew in a position of being paid during the time of going to and from the rig site"); or that at the time of the collision, the *crew* had undertaken a special mission at Amerimex's direction for which all of the occupants were responsible, *see Janak*, 381 S.W.2d at 179 (finding passengers traveling in vehicle driven by coworker were in course and scope because "obligation to procure and transport ice and water" was shared by all crew members each day);[5] or that the crew members were furnished a company vehicle and a company credit card to pay for fuel. *See Pesqueda v. Martinez*, No. 04-16-00568-CV, 2017 WL 5759382, at *5 (Tex.App.—San Antonio Nov. 29, 2017, no pet.)(mem. op.). While these examples are by no means exclusive, they illustrate why Amerimex

[4] While there is evidence suggesting that Sandridge and Amerimex discussed the bonus as a necessary part of the contract between them, there is no evidence in this record establishing that the injured crew members themselves insisted on a free ride as a condition of acceptance of employment.

[5] Amerimex cites to *Janak* for the proposition that "the Texas Supreme Court has rejected attempts to draw imaginary lines between the driver and the crew for decades." However, the evidence in *Janak* established that at the time of the collision the workers were on a journey to accomplish a task for the company for which each of them had an obligation to discharge, i.e. pick up and transport water and ice to the jobsite because there was no water at the drillsite. *Janak*, 381 S.W.2d at 178, 179. Here the evidence establishes that only Burchett was assigned the duty, and paid, to make available free transportation to and from the jobsite. Consequently, we do not believe the line between Burchett and the crew in this case is "imaginary."

falls short of establishing *as a matter of law* the crew in this case was acting in the scope and course of their employment.

Second, the evidence does not *conclusively* establish that the assignment of the driving duty to Burchett, or travel to and from the jobsite was part of Amerimex's established business model. Indeed, Murphree testified that the bonus arrangement Amerimex had with Burchett was a one-off because Amerimex normally placed the bunkhouse on the jobsite, making daily coming-and-going travel unnecessary on previous jobs. According to Murphree, on this job, however, the surface owner refused to permit Sandridge to erect bunkhouses at the rig site and instead, required Amerimex to send its bunkhouse "to town," which was the "first time [Murphree] ever [saw] it or witnessed" such a thing and "[i]t was the only situation [Amerimex was] involved in like that."

This testimony suggests that when it came to travel, Amerimex's usual business model was structured so that daily travel was *not* a condition of the crew's employment, which explains why Amerimex was not inclined to provide additional pay for daily travel on this job either. Indeed evidence establishes that while Amerimex cut the check paid to Burchett, it was Sandridge that provided the funding. Moreover, even after Amerimex assigned Burchett the driving task for which the bonus could be earned, Amerimex did nothing to require or encourage the crew members to accept the ride.[6] Murphree's testimony was unequivocal that "Amerimex Drilling does not

[6] At oral argument, Amerimex's counsel suggested that the crew's ability to choose to ride in their own vehicle is not probative of origination. Counsel argued that the "hypothetical" scenario in which the crew members had chosen to drive their own vehicles instead of accepting the ride from Burchett is irrelevant to our inquiry because when the collision occurred the crew had made the choice to ride with Burchett, and according to Amerimex that choice placed the crew within the scope of their employment. We are not persuaded by this argument. Either the conditions of the crew's employment included travel or they did not. In other words, conditions of employment do not normally hinge on a unilateral decision by either the employer or the employee, but on a mutual understanding of expectations. Here, if both Amerimex and the crew had acknowledged in a written contract that travel was in fact a condition of the crew's employment, it would not matter if the crew member was driving his own vehicle or riding as a passenger in a coworker's vehicle, both scenarios would lead to the same conclusion that the crew member was within the scope of his employment. In this case, however, as there is no written contract between Amerimex and the crew members, we

transport employees" and that Amerimex did not concern itself with how the crew arrived at or left the rig as long as the crew showed up for work on time. This testimony further strengthens Appellants' contention that Amerimex's business model did *not* dictate the *crew's* travel and that the crew members' deaths and injuries did not originate in Amerimex's business.

Third, evidence establishes the crew passengers were paid a fixed hourly rate of pay, for fixed hours, which began and ended at a fixed jobsite; they were not paid for travel, and the collision occurred while they were traveling as passengers, off duty, out of hours, off the jobsite, and on the way to a fixed housing location[7] after the completion of their workday. These facts further weigh against a finding that the crew was in the course and scope of their employment at the time of the collision. *See, e.g., Rodriguez v. Great American Indemnity Co*., 244 F.2d 484, 488 (5th Cir. 1957)(employee who died in a fire while sleeping in a hotel near a remote jobsite was not in course and scope of employment because employee's job was one with "regular hours at a regular rate of pay per hour and at a regular place of work").

In the end, we are faced with only three facts that we can confidently say Amerimex conclusively established as a matter of law: (1) the crew was working at a remote jobsite; and (2) Amerimex made available to the crew, a free ride to and from the jobsite and free housing; and (3)

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must gleen what we can from the duties assigned, limitations and/or liberties imposed or not, by the rules set by the employer and understood by the employee. Consequently, in this context, Amerimex's decision to permit the crew to make an unconditional "choice" as to the mode of transportation to and from the jobsite suggests travel was not encompassed within the scope of the *crew's* employment because an employee normally cannot unilaterally establish his conditions of his employment. By contrast, Burchett did not have the "choice" to refuse to drive the crew because he was specifically assigned the task by Amerimex and Burchett understood it was his job to do so, which suggests his activity at the time of the collision was a condition of his employment.

[7] Amerimex's briefing characterizes the rig as a temporary jobsite, but there is no evidence suggesting that these employees were required to travel to more than one jobsite during the relevant timeframe. Nor is there evidence that the bunkhouse location changed while they were working on this job. These facts further distinguish this case from *Lopez*, where the work locations were "constantly changing" requiring the employee to stay in different motels.

the crew was going to the free housing at the time of the collision. In our view, these facts standing alone are insufficient to demonstrate as a matter of law the crew members were acting in the course and scope of their employment for purposes of the Act at the time of the collision. *See, e.g., Am. Gen. Ins. Co. v. Coleman*, 303 S.W.2d 370, 376 (Tex.1957)("the mere gratuitous furnishing of transportation by the employer to the employee as an accommodation . . . does not bring the employee, when injured in the course of traveling on streets and highways, within the protection of the Workmen's Compensation Act"). This is especially true in light of Murphree's testimony in this case that the crew passengers were free to do what they pleased as soon as they left the jobsite. For these reasons, we sustain Appellants' first issue. We do not reach Appellants' remaining issues. TEX.R.APP.P. 47.1. We therefore reverse the grant of summary judgment and remand to the trial court for further proceedings.

April 12, 2021 YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, J., and Ferguson, Judge
Ferguson, Judge, sitting by assignment