APPEAL NO. 92532

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on July 28, 1992, (hearing officer) presiding. The hearing officer concluded that appellant (claimant) did not suffer an injury within the course and scope of his employment on (date of injury), and that respondent (carrier) did not waive its right to contest its liability for benefits under Article 8308-5.21(a). The claimant appeals from those conclusions. In its response, carrier first asserts our lack of jurisdiction due to claimant's "untimely" request for review, then challenges certain of the factual findings, and urges our affirmance of the conclusions of law.

DECISION

We view the hearing officer's findings that claimant injured his back and aggravated his previous condition in an automobile accident which occurred on the premises of the employer as requiring as a matter of law the conclusion that claimant suffered a compensable injury. We reverse and render a new decision that claimant is entitled to benefits under the 1989 Act.

Claimant testified and a transcript of his telephone interview of January 22, 1992, was introduced by carrier. According to claimant, on (date), he was employed as a senior claims adjustor for employer, a third party administrator for workers' compensation claims. He was an inside adjustor whose work was performed in an office. During the morning, he experienced an episode of dizziness and slight nausea. Before his lunch hour ended, he decided to drive to a drug store to obtain some medication to relieve his dizziness and to replenish his medication for nausea. He left the office building, where employer occupied the fourth floor, walked to an adjacent parking garage and on up to the third floor and over to his personal vehicle. Just prior to entering his car claimant experienced another episode of dizziness. He entered his car and sat there for a few minutes. He then decided that rather than go to a drugstore and return to work, he would instead go home and have his wife drive him to the doctor's office. He backed his car out of the slot and drove down the aisle. As he rounded a turn to proceed on down the exit ramp, he again became dizzy, believes he blacked out, lost control of his car, and hit a concrete pillar resulting in approximately $150.00 worth of damage to the front bumper. He had his seat belt on and did not sustain any blow to the head or cuts or bruises, but said he hurt his back. He did not attribute his blacking out to any work activity.

Claimant said he told the ambulance crew his back was hurting and they loaded him onto a back board and took him to (Center). He said he had a history of prior back problems including three laminectomy operations and several subsequent reinjuries. Claimant testified that two of his prior back injuries were compensable. Claimant had last seen a doctor for his back in December 1989 after a fall at his house. He said he had not worked since the (date of injury) accident. Although his doctor released him to return to work on July 23, 1991, the pain prevented him from doing so. He was laid off by employer a few

weeks before his July 23rd medical release date.

Claimant testified that public parking was a mile from the office building where he worked; that cars parked on the street would be towed away; that employees with parking stickers issued by the management company were free to park in any unreserved slot in the parking garage adjacent to the office building; that he and his fellow employees did not have assigned slots; and that the only persons who parked in the parking garage were the employees of the building's tenants and visitors. (Ms. J), employer's assistant claims manager, testified that employer occupied the fourth floor of one of three office buildings adjacent to the parking garage; that there were no other places for employees to park in that area; that employer had no assigned parking slots in the garage; that employees had stickers on their cars and could park in unreserved slots on any of four levels, though most parked on the third level in an area closest to the office building where employer was located; that parking was open and free to employees; and that there would be no reason for anyone to park in the garage unless they had business in one of the buildings. Notwithstanding this evidence, the hearing officer found that "the public" did not park in the garage. Carrier has challenged that finding in its response to claimant's request for review.

Various records were introduced by carrier pertaining to the ambulance charge, and to imaging exams and medical charges incurred by claimant at (Center) on (date of injury) and later that month. However, none of those records contained any diagnosis, impression, or reference to the (date of injury) accident. Claimant introduced a letter dated March 13, 1992 from (Dr. T), an anesthesiologist, to carrier requesting authorization to admit claimant to (Center) for the implantation of a pump for the delivery of intrathecal opiates to manage his "severe, persistent, intractable pain" which Dr. T said was secondary to post-surgical epidural fibrosis and arachnoiditis involving the cervical and lumbar nerve roots. Dr. T's records indicate that claimant was admitted to (Center) on March 23, 1992, for a trial of intrathecal opiate administration. Claimant's chief complaint was neck, back and leg pain, and Dr. T's impression was "chronic post-cervical laminectomy and lumbar laminectomy-fusion syndrome with lumbar sacral and cervical nerve root irritation and radiculitis with epidural fibrosis; mechanical back and neck pain with zygapophyseal joint syndrome, cervical and lumbar, (post-traumatic and postoperative)." These records contained no reference to the (date of injury) accident. Claimant also introduced a May 27, 1992, letter from Dr. T to claimant's attorney which referred to an injury date of (date of injury), and which stated that the pump implantation discussed in his March 13th letter "was made necessary by the aggravation of his postoperative status caused by the trauma on (date of injury)," referring to "injuries received on (date of injury) in a motor vehicle accident." The hearing officer found that claimant injured his back when his car hit the garage, and that his (date of injury) automobile accident "aggravated his previous condition." Carrier has challenged these findings in its response. One of the disputed issues was, "does medical evidence support an injury or disability." Although the hearing officer made no specific findings or conclusions respecting the medical evidence issue, that issue has not been appealed.

We first consider carrier's assertion that we have no jurisdiction over claimant's request for review because it was not timely filed or served. Article 8308-6.41(a) provides

that such appeal be filed not later than the 15th day after the date on which the hearing officer's decision is received from the Texas Workers' Compensation Commission's division of hearings. The Commission's Hearings & Review Division letter transmitting the decision to the parties was dated September 21, 1992, and was distributed on September 22, 1992. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), claimant is deemed to have received the letter five days after the date it was mailed, that is, on September 27, 1992. Claimant did not state the date he received the decision. Rule 143.3(c) provides that a request for review shall be presumed to be timely filed or timely served if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and received by the Commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision. Since claimant is deemed to have received the decision on September 27th, he had 15 days or until October 12th in which to file and serve his appeal. He forwarded his request by Federal Express to the Commission on October 7th. His certificate of service recited, and claimant acknowledged, that he served carrier by messenger on October 8th. Thus, claimant's filing and service were timely and carrier's jurisdictional challenge is without merit. *See* Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992.

We next point out that while carrier agreed with all of the hearing officer's legal conclusions, it challenged four factual findings. While timely filed as a response to claimant's request for review, carrier's response was filed later than the 15th day after the date on which the hearing officer's decision was received from the Commission's Hearings & Review Division and thus was not a timely appeal. Accordingly, carrier's challenges to certain factual findings will not be considered. *See* Article 8308-6.41 and Texas Workers' Compensation Commission Appeal No. 92490, decided October 28, 1992.

Turning to the issue of whether carrier waived its right to contest the compensability of the claim under Article 8308-5.21, the hearing officer found that carrier first received written notice of the claim for claimant's (date of injury) injury on or about (date), and that carrier mailed a copy of its contest of compensability to the Commission and to claimant within 60 days after (date). Based on these findings, the hearing officer concluded that carrier had not waived its right to contest its liability for benefits under Article 8308-5.21(a). Claimant introduced a Notice of Refused/Disputed Claim (TWCC-21), dated January 20, 1992, which stated that carrier's first written notice of injury was received on (date), and that a copy of the form was mailed to claimant on January 20, 1992. Article 8308-5.21(a) provides that if the insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Here claimant's TWCC-21 was prepared and mailed on January 20th, a date well within 60 days of its (date) receipt of written notice. *Compare* Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992, and Texas Workers' Compensation Commission Appeal No. 92313, decided August 28, 1992.

Claimant did not present argument on this issue at the hearing but asserts on appeal that carrier failed to comply with Rule 124.6 to the effect that a carrier must file the notice described in subsection (a) of the rule (a TWCC-21 form) no later than the seventh day

following receipt of written notice of injury. He seeks reversal asserting carrier waived its right to contest the compensability of claimant's claim under Article 8308-5.21. The portion of Rule 124.6(c) referenced by claimant essentially repeats that portion of Article 8308-5.21(b) which provides that not later than the seventh day after receiving written notice of the injury, the carrier either shall begin the payment of benefits or notify the Commission and the employee of its refusal to pay. While Article 8308-5.21(a) provides that the insurance carrier commits a Class B administrative violation if it fails to either initiate payment or file a notice of refusal in a timely manner as required by Article 8308-5.21(b), it does not shorten the waiver date from 60 days to seven days. We considered this issue in Texas Workers' Compensation Commission Appeal No. 92122, decided May 4, 1992, and there stated that "[w]e do not read Article 8308-5.21 to provide that a carrier's 60-day period to either contest compensability or suffer a waiver of its right to contest is dependent upon its first initiating payment of benefits. However, Class B administrative penalties, not waiver, are provided for by the statute should a carrier fail to either initiate payment or provide notice of refusal to pay not later than seven days after receiving written notice of injury."

Regarding the compensability issue, claimant agreed with all of the hearing officer's findings of fact except for Number 12 which stated:

> When [claimant] entered in his personal automobile he had transversed (sic) and was no longer subject to the hazards of the parking garage and the hazards of going to and from the garage to [employer's] offices.

Claimant also disagreed with the following conclusions of law:

> 5.When [claimant] safely entered his car in the parking garage on (date of injury) he was no longer subject to hazards of employment covered by the access doctrine but was instead subject to the ordinary risks of automobile travel.
>
> 6.[Claimant] was on a personal errand at the time of the injury and was acting outside the scope of activities personal convenience and necessity doctrine (sic).
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> 7.[Claimant] did not suffer an injury in the course and scope of his employment within the meaning of Article 8308-1.03(12) on (date of injury), and therefore did not suffer a compensable injury within the meaning of Article 8308-1.02(10), and the carrier is not liable for benefits under Article 8308-5.21(a).

Appellant asserts that Finding of Fact No. 12 is, in essence, a conclusion of law which, together with the challenged legal conclusions, would have claimant outside the course and scope of his employment because he was traveling in his private auto at the time of the accident, notwithstanding that the accident occurred in the parking garage which claimant urges had become a part of employer's premises under the "access" doctrine, and

which the hearing officer found to constitute "premises."

The definition of "course and scope of employment" in Article 8308-1.03(12) includes activities conducted on the premises of the employer or at other locations, but does not generally include transportation to and from the place of employment with certain exceptions (Article 8308-1.03(12)(A) and (B)) not addressed by the parties. What the hearing officer in the challenged finding and conclusions determined was, in effect, that claimant was not within the ambit of the "access" exception to the "coming and going" rule at the time of his accident, apparently because he had entered his car, pulled out of his parking slot, and had started driving out of the parking garage to leave work. In Aetna Life Insurance Company v. Woods, 449 S.W.2d 86 (Tex. Civ. App.-Fort Worth 1969, writ ref'd n.r.e.), an employee was injured in a rear end automobile collision as she was leaving work at her employer's plant. The collision occurred within an enclosed parking lot on the employer's premises. The appellate court reversed the lower court's judgment and held that as a matter of law the employee was acting within the scope of her employment. The court quoted from 62 Tex. Jur. 2d, "Workmens Compensation," Section 123, as follows:

> Another established exception to the going and coming rule is that all dangers and perils incident to use of customary methods of entrance to and retirement from employer's premises or zone of employment are perils incident to and arising out of employment. When the employee enters the premises he enters what is termed the area or zone of his employment, and he continues therein until, having finished his labors for the day, he can in the customary time and manner return to the street or highway. All dangers and perils incident to the use of such method of entrance and retirement are perils incident to and arising out of the employment.
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> Further, the above section states:
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> For an injury received in entering or retiring from the employer's premises to be compensable, it need not have resulted from some danger necessarily incident to the use of the premises in the manner intended by the employer; nor need it appear that the agencies that caused the injury were under the control of the master. Aetna Life Insurance Company, *supra* at 89.

In Texas Employers' Insurance Association v. Dean, 604 S.W.2d 346 (Tex. Civ. App.-El Paso 1980, no writ), a case involving an employee who was assaulted in employer's parking lot, in the specific area designated for employees, the court succinctly stated the rule and exception as follows:

> Thus, the general rule is to the effect that the benefits of the Workers' Compensation Act do not apply to injuries received while going to and from work. However, the on-premises rule, and its extension into the access doctrine, is the well settled exception to the general rule. Under the exception, the employee is deemed to be in the course of employment if the injury occurs within a reasonable margin of time necessary for passing to and from the place of work

> both before and after the actual working hours of service, and if it occurs at a place intended by the employer for use by the employee in passing to and from the actual place of service on premises owned or controlled by the employer, or so closely related to the employer's premises as to be fairly treated as a part thereof. (Citations omitted, emphasis added.) When the accident occurs on the parking lot owned by the employer, and at the place of employment where the employee is either going to or from work and where the employee is authorized to park, the rule is almost universal that compensation coverage attaches to the same extent as if the injury occurred on the main premises. (Citation omitted.)

In Kelty v. Travelers Insurance Company, 391 S.W.2d 558 (Tex. Civ. App.-Dallas, 1965, writ ref'd n.r.e.), the court discussed the "access" doctrine in the factual context of an employee who slipped on an icy sidewalk some 12 feet from the rear entrance of her employer's premises upon returning from her lunch period. The court stated the longstanding "coming and going" rule in Texas "that an injury received by an employee while using the public streets and highways in going to or returning from the place of employment is not compensable, the rationale of the rule being that in most instances such an injury is suffered as a consequence of risk and hazards to which all members of the traveling public are subject rather than risk and hazards having to do with and originating in the work or business of the employer." After noting certain exceptions to that rule (now embodied in Article 8308-1.03(12)(A)), the court went on to state another exception, which it termed "the `access' exception," found in the "access" cases, as follows:

> In these cases a workman who has been injured at a place intended by the employer for use as a means of ingress and egress to and from the actual place of the employee's work has been held to be in the course of his employment. The courts have said that these access areas are so closely related to the employer's premises as to be fairly treated as a part of the employer's premises. (Emphasis added.)

Compare Texas Compensation Insurance Company v. Matthews, 519 S.W.2d 630, 632 (Tex. 1974), a case involving an employee who fell while crossing a public street on her way to work, a route she was not required to use to reach her work. The court, observing that "no case has extended the `access exception' out into the public streets where other members of the public are subject to the same hazard," held that "the case is controlled by the long line of `going to and from work' cases, and that plaintiff was not within the course of her employment when she was injured."

Compare also Texas Employers Insurance Association v. Clauder, 431 S.W.2d 579 (Tex. Civ. App.-Tyler 1968, writ ref'd n.r.e.), where the employee was killed in an automobile collision while driving his own vehicle home from his employer's plant on an oil field road which provided access to employer's plant. The property upon which the road was located was owned by a party other than the employer, and the road was maintained by the county and used by anyone having business with the several oil companies and ranchers in the area served by the road. The court applied the "coming and going" rule and said the

claimant never attempted to bring the case within any of the transportation exceptions in Section 1b, Article 8309, Vernon's Ann. Tex. Civ. St., the predecessor statute to Article 8308-1.03(12)(A) and (B). Notwithstanding that the claimant urged the application of the "access doctrine," the court viewed the case as a transportation case within the purview of Section 1b, Article 8309. In referring to cases involving the "access" doctrine, the Clauder court observed that in such cases, "a workman who has been injured at a place intended by the employer for use as a means of ingress and egress to and from the actual place of employee's work has been held to have been injured in the course of his employment. The courts have said that these access areas are so closely related to the employer's premises as to be fairly treated as a part thereof." (Emphasis added.) Noting the long line of Texas cases recognizing and applying the "access" doctrine, the court observed that many of the cases involved no automobile or vehicular transportation and went on to state:

> If it can be said that the `access doctrine' would have been applicable to the factual situation here involved, it is clear that the 1957 amendment [Section 1, Article 8309, Vernon's Ann. Tex. Civ. St.] operated to circumscribe and restrict the holdings of the prior cases. It is, therefore, our opinion that this case is not one for the application of the `access exception', but, if it were, we believe that Section 1b precludes the qualification of Clauder's injury as one sustained in the course of his employment.

We had occasion to discuss the "access doctrine" in Texas Workers' Compensation Commission Appeal No. 91036, decided November 15, 1991, where we affirmed the hearing officer's determination that a hospital employee who had an automobile collision on her way to work was not injured in the course and scope of her employment. The hearing officer found that the collision occurred in an area of a shopping mall parking lot close to but not within the area of that lot designated for the hospital employees. We found the hearing officer's determination that the accident occurred outside the hospital's portion of the parking lot to be based on sufficient evidence. We discussed two employer parking lot cases, Turner v. Texas Employers' Insurance Association., 715 S.W.2d 52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.) and Bordwine v. Texas Employers' Insurance Association., 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, writ denied), noting that those cases indicated "that access has to be closely related to the employers premises--such as exercising control over an adjacent sidewalk--for it to overcome the exclusion from course and scope of employment found in Article 8308-1.03(12). We do not find that 194 feet from a designated parking lot, with no showing that the hospital took responsibility for the parking lot at that location, constitutes `access'." The court in Bordwine, *supra* at 54, said it recognized "that coverage may apply to injuries occurring on an employee parking lot even when the employee is going to and from work. (Citations omitted.)"

In Standard Fire Insurance Company v. Rodriguez, 645 S.W.2d 534, 540 (Tex. App.-San Antonio 1982, writ ref'd n.r.e.), the court, in an exhaustive discussion of the "access doctrine," recognized that "whether the injury was received by the employee under circumstances bringing it within the course of employment is usually a question of fact governed and controlled by the particular facts of each case." *And see* Texas Workers' Compensation Commission Appeal No. 92321, decided August 19, 1992. The hearing

officer found that "[t]he parking garage is closely related to the building where [employer] is located such that the garage is fairly treated and is part of [employer's] premises." Because this finding is supported by the evidence, the Texas authorities require the conclusion that claimant's injury, sustained in his automobile accident on the premises, is compensable under the 1989 Act. In view of existing Texas authorities, which are markedly fact specific, we cannot agree with the apparent perception of the hearing officer that once an employee has "safely entered" a personal vehicle, such employee is no longer within the purview of the "access" doctrine, notwithstanding that the vehicle is still on employer's "premises."

The hearing officer also concluded that claimant was outside the scope of the "personal comfort" doctrine at the time of his injury and thus not within the course and scope of his employment. Although claimant's focus in argument, both below and on appeal, was on the applicability of the "access" doctrine, he nonetheless challenged the hearing officer's Conclusion of Law No. 6, stated above. However, we need not determine the correctness of this conclusion given our determination of the "access" doctrine issue.

The hearing officer's decision and order are reversed and rendered that claimant is entitled to workers' compensation benefits under the 1989 Act for his injury of (date of injury).

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge