APPEAL NO. 92537

On August 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that (claimant) was in the course and scope of his employment with (employer) when he was injured, and is entitled to compensation under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). (carrier) appealed, disagreeing with Finding of Fact Nos. 7, 11, 13, and 14 and Conclusions of Law Nos. 2 and 3. Carrier basically believes not enough weight was given to the testimony of its witness. Claimant filed a response requesting the hearing officer's decision be affirmed.

DECISION

The hearing officer's decision is affirmed.

Both the carrier and claimant essentially agree on the background facts stated by the hearing officer in his decision. Some 22 photographs of the area were admitted into evidence as well as an enlarged map of the downtown (city) area involved in this case. The sole issue framed for consideration was whether claimant's injuries of (date of injury), arose out of and in the course and scope of his employment.

The uncontroverted facts found by the hearing officer were that claimant was employed as a parking lot attendant and had worked for the employer for approximately 10 months before (date of injury). Claimant avoided crowds, was inclined to stay home when not at work and took his lunch with him to work. Claimant lived with his brother and mother. At approximately 9:00 a.m. on (date of injury), claimant was given his paycheck by his supervisor. Claimant would usually endorse the checks to his brother to cash or deposit. Three of the 17 checks claimant had received from the employer in the 10 months of employment had been cashed by claimant at an H.E.B. grocery store. Claimant's job included watching and personally checking several of the employer's lots in the immediate area. Shortly after 11:00 a.m. on (date of injury), claimant's nephew stopped by the lot. They spoke briefly about lunch and claimant indicated he was going to check another lot. Claimant then walked to the southeast corner of the intersection of (W. M) and (N. F) where he was waiting on the sidewalk at the intersection at 11:05 a.m. when he was struck and seriously injured by a vehicle which had just been involved in an accident in the intersection. The testimony was that at the time of the accident, claimant was standing immediately adjacent to one of the employer's lots over which he had supervision. Although no specific finding is made by the hearing officer, the uncontroverted evidence is that the claimant was severely injured, suffered head injuries, is unable to communicate, is mentally incompetent and was mentally and physically unable to participate in the proceedings.

The carrier contests the findings of the hearing officer, challenging, among other things, the exact time that claimant's nephew came by the lot, and presenting testimony of claimant's supervisor. It is carrier's contention that the supervisor was working near claimant's lot at about 11:00 a.m. when claimant came to the supervisor and said that he needed to go to the bank as he (claimant) was short of money. According to the carrier,

claimant's supervisor gave claimant permission to take his lunch period and that claimant was on his way to a nearby bank, where claimant had an account, to cash or deposit his pay check. The carrier also presented evidence that claimant had a pair of binoculars with which he could view all of the lots under his watch, and if claimant needed to go to the lot on (N. F), then a quicker, more logical route would be to cut across (W. M) in the middle of the block and go across several vacant lots to the (N. F) parking lot, rather than go to the intersection and cross at the light.

Other evidence discussed by the hearing officer indicated it was uncharacteristic for claimant to cash his check on payday. Claimant usually gave his check to his brother, and on those occasions when claimant cashed his check it would be several days later at an HEB grocery store. Claimant at the time of the accident had $34.00 plus change and his paycheck on his person.

The issue is whether claimant was on his way to check a parking lot on (N. F) at the time of the accident, and therefore would have been in the course and scope of his employment, or whether he was on his way to the bank to cash/deposit his paycheck, and therefore not in the course and scope of his employment. This is strictly a matter of interpretation of the evidence and assessing the weight and credibility of the testimony given by the witnesses. As stated previously, carrier's principal complaint is that the hearing officer failed to give sufficient weight to the supervisor's testimony.

We have consistently held, and Article 8308-6.34(e) provides: "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence . . ." The claimant has the burden to prove, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. *See* Reed. V. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e).

Carrier specifically disagrees with Finding of Fact No. 7, "[t]hat there were no HEB Grocery Stores in the area where claimant was working." Carrier alleges the term "area" as used in the finding to be vague and ambiguous. Claimant was walking at the time of the accident and had only a 30 minute lunch period. The hearing officer's finding was not so vague as to constitute material error and could certainly be interpreted to mean the area depicted in the enlarged map of the downtown area used by both parties at the contested case hearing. The carrier's contention on this point is not well taken.

Carrier further specifically disagrees with Finding of Fact 11 which states:

> **11.** That shortly after 11:00 a.m. Claimant's nephew stopped by the lot, Claimant indicated he was going to check another parking lot and they walked a short distance together, with Claimant separating and heading to the southeast corner of the intersection of (W. M) and (N. F) Streets while the nephew went a different direction.

Carrier challenges the testimony of claimant's nephew who had stated that he spoke with claimant sometime after 11:00 a.m. and thought it was somewhere near 11:15 or 11:20. The police report noted the time of the accident at 11:05. Claimant's supervisor testified he spoke to claimant about going to the bank at about 11:00 a.m. We find that the carrier's objection is not specific and does not raise any material inconsistency. Although there is perhaps some slight inconsistency as to the precise times involved, it is within the purview of the hearing officer to resolve those inconsistencies. The hearing officer's finding that claimant's conversation with his nephew occurred "shortly after 11:00 a.m." is supported by the evidence.

Carrier further specifically disagrees with Finding of Fact Nos. 13 and 14, which state:

13. That claimant has proven by a preponderance of the evidence that at the time of his injury he was in the process of going from his primary work site to a parking lot on (N. F), as a part of his duties for employer.

14. That at the time of his injury claimant was not in the process of going to the bank to cash his check.

Carrier alleges the hearing officer failed to consider the testimony of claimant's supervisor that claimant was going to the bank to cash his paycheck. Without going through all the facts, the discussion of the case by the hearing officer clearly demonstrated that the hearing officer did consider this testimony. The hearing officer apparently felt the greater weight of the evidence to be that claimant was not going to the bank, but rather was going to employer's parking lot on (N. F) to check the cars in performance of his duties. The hearing officer balanced the supervisor's testimony against the testimony of claimant's nephew, where claimant was at the time of the accident and claimant's characteristic procedure in cashing/depositing his paycheck. It is clear that the hearing officer assigned greater weight to the evidence which supports the finding that claimant was not going to the bank, or perhaps the hearing officer did not feel that the supervisor's testimony was totally credible. The hearing officer's findings are supported by the evidence.

The carrier also disagrees with Conclusion of Law Nos. 3 and 4, which are that claimant was in the course and scope of his employment at the time of his injury on (date of injury), and is entitled to compensation for his injuries.

Article 8308-1.03(12) defines course and scope of employment to mean "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes activities conducted on the premises of the employer or at other locations." Whether claimant was in the course and scope of employment in this case depends entirely on whether one

believes claimant was checking cars parked on the employer's lots or was on his way to the bank to cash/deposit his paycheck. Conclusions of Law Nos. 3 and 4 are the natural determinations given the hearing officer's findings of fact that claimant at the time of his injury was in the process of going from his primary work site to a parking lot on (N. F), as part of his duties for the employer and was not in the process of going to the bank to cash his check.

We find the hearing officer's decision is supported by the evidence. The hearing officer as the sole judge of the weight and credibility of the evidence chose not to assign prevailing weight to the supervisor's testimony as to claimant's intention to go to the bank. That determination is not so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) and Texas Workers' Compensation Appeal No. 92447, decided October 5, 1992. We will not substitute our judgement for the hearing officer, as the trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

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Thomas. A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge