APPEAL NO. 93270

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). On March 8, 1993, a contested case hearing was held in (city), Texas, before hearing officer. The appellant, hereinafter carrier, appeals the hearing officer's determination that the claimant suffered a compensable injury in the course and scope of his employment. The carrier contends the hearing officer's decision is against the great weight and preponderance of the evidence, and further contends that the place where the injury occurred, which was outside the employer's place of business, renders claimant's injury noncompensable. The claimant in response essentially states that the decision is supported by the evidence and the appropriate law.

DECISION

Because we find that the hearing officer failed to make sufficiently fact-specific findings to support a determination that the claimant came within the "access doctrine" exception to the general rule that injuries suffered while going to and coming from the employer's premises are not compensable, we reverse and remand.

The claimant, who had worked as a fabric inspector for (employer), for 30 years, testified through an interpreter that he was injured on (date of injury). He said he left his house around 6:00 a.m., arrived at work at 6:10, and sat in his car until 6:20. As he was walking toward the entrance of employer's facility, he said he tripped going up onto the sidewalk, fell, and injured his upper arm, forehead, and waist. He was taken inside the building where emergency medical services (EMS) was called, and an ambulance took him to an emergency room (ER). The EMS report states that claimant complained of head and arm pain and that EMS personnel dressed his head and bandaged his arm. An ER report signed by "P. N" states in part that claimant "tripped & fell yesterday presents c c/o pain to L upper arm and L ankle." The report also noted abrasion and contusion to claimant's forehead. The claimant said Dr. N (Dr. N) only said "good morning" to him and that they did not otherwise talk; he denied that he told Dr. N he had been injured at home. He said a Dr. I saw him, ordered x-rays, said his arm was broken in two places, and referred him to Dr. H (Dr. H).

Dr. H's notes of (date) state that claimant's x-rays showed a "comminuted fracture of the mid and proximal half of [claimant's] humerus," and he was placed in a coaptation splint. As of December 23, 1992, Dr. H had not released claimant to work, and he anticipated claimant could return to limited work in two to three months. Dr. H also referred claimant to Dr. D for a second opinion on (date of injury). Because Dr. H had noted claimant's abnormal gait, which claimant attributed to an old ankle injury, he referred claimant to a neurologist, Dr. H, for assessment.

The claimant testified that he had had several previous job-related injuries. He was first injured 15 or 18 years before when he twisted his knee; he said he saw the company

doctor, who put ice on it. He was next injured on a date he could not remember, 10 to 18 years earlier, when he twisted his back and again was treated by the company doctor. He said eight years before he had injured his arm and waist and had been taken to an emergency room and released, and two years earlier had scraped his knee.

Four of claimant's coworkers signed a brief statement saying they had witnessed claimant's fall on (date of injury).

On appeal, the carrier argues that the great weight and preponderance of the evidence establishes that the claimant's injury did not occur in the course and scope of his employment, citing the ER report stating claimant was injured "yesterday." The carrier further argues that claimant's injury is not compensable because, as required by the access doctrine, there was no evidence that the sidewalk where claimant fell was maintained or otherwise under the employer's control. As such, carrier argues, it was analogous to a public street, making the claimant's fall noncompensable. Because such a finding would moot any determination that claimant was injured in the course and scope of his employment, we will address this argument first.

The "access doctrine" has been stated by the Texas Supreme Court as an exception to the general rule that injuries received while going to and from work are not compensable. Texas Compensation Insurance Company v. Matthews, 519 S.W.2d 630 (Tex. 1974). Under the doctrine, compensability has been allowed where the employer has evidenced an intention that the particular access route or area be used by the employee in going to and from work, and where such access route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises. *Id* at 631.

A case cited by carrier, Kelty v. Travelers Insurance Co., 391 S.W.2d 558 (Tex. App.-Dallas 1965, writ ref'd n.r.e.), involved an employee who slipped on an icy sidewalk near the entrance of her place of employment as she was returning from lunch. The evidence showed the sidewalk was used both by the general public and employees, and the lease between the employer and its lessor gave the employer the continuous right to use any rights of way leading to and from the entrances. The lease also required the lessor to maintain the adjoining sidewalks, although the evidence shows the employer had cleaned them on a number of occasions. In reversing the trial court's summary judgment, the court said the evidence presented "issuable facts which could support a jury finding that Mrs. Kelty's injuries were sustained at a place so closely connected with the place of her employment as to be, in effect, a part thereof, especially in providing her rights of access to her employment. The sidewalk where she fell was, indeed, an appurtenance to the premises leased by her employer. . . . [The testimony regarding the lease] is relevant to the issue that Mrs. Kelty's employer assumed the duty of providing a safe means of ingress and egress to and from the premises where her work was to be performed." *Id*. at 564-5.

A case in which a contrary result was reached was Dishman v. Texas Employers' Insurance Association, 440 S.W.2d 727 (Tex. Civ. App.-Fort Worth 1969, writ ref'd n.r.e.). In that case, where the employee was not required to use her car for transportation to and from work, and her employer did not require her to park at a city-owned lot across the street from her place of employment, the court held she was not acting within the course and scope of her employment when she was injured while crossing the street on her way to work. The court found that such injury would be compensable only if the means of ingress and egress exposed the employee to some risk or hazard to which the general public would not be exposed.

Somewhat similar to Dishman was the case of Texas Compensation Insurance Co. v. Matthews, *supra*. There, the employee was injured while crossing the street on her way from her parking lot to her place of employment. On the day of injury, the employee's usual access to her place of employment was obstructed by a construction project undertaken by the employer, and the employer had appropriated the sidewalk and posted signs directing employees and members of the public to cross the street. In so doing, the employee slipped in the street and was injured. In reversing the appellate court's decision in the employee's favor, the Supreme Court stated that Kelty had carried the access doctrine as far as it could reasonably be taken without amendment to the Workers' Compensation Act. Unlike Kelty, the court said, the employer here had not attempted to exercise any control over the street, and the crosswalk formed no part of its premises.

Numerous courts have construed fact situations in which an employee was injured in an employer-owned or -controlled parking area while either coming to or going from work. As the court said in Bordwine v. Texas Employers' Insurance Association, 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, writ denied), "[w]here the injury occurs on a parking lot owned by the employer, and at the place of employment when the employee is either going to or from work and where the employee is authorized to park, the rule is almost universal that workers' compensation coverage attaches to the same extent as if the injury occurred on the main premises." *Id*. at 120. *See also* Texas Employers Insurance Association v. Dean, 604 S.W.2d 346 (Tex. App.-El Paso 1980, no writ); *compare* Turner v. Texas Employers Insurance Association, 715 S.W.2d 52 (Tex. Civ. App.-Dallas 1986, writ ref'd n.r.e.).

This case presents rather sketchy facts in support of a situation which is somewhat of a hybrid of those contained in the cases summarized. The claimant testified that he parked his car on the street and walked toward employer's facility. Apparently he walked between some cars which were parked in a reserved parking area in front of employer's business, and tripped as he was stepping up onto the sidewalk that ran in front of the building. The claimant testified, in response to questions on cross-examination, as follows (the interpreter, it is noted, gave the claimant's responses in the third person):

A:That's the main entrance.[1] That's the sidewalk (indicating). They have reserved parking for inspectors and supervisors. And over here is where the trailers parked. Right next to the trailers is the employees' parking. That's where he parked.

* * *

Q:Now, the street that you park your car on was a public street, wasn't it?

A:Yes.

Q:And the sidewalk which you fell on in front of [employer] was a public sidewalk, wasn't it?

A:He doesn't know, because the place where he fell, it's reserved.

Q:Were there cars parked at the place where you fell?

A:There were some cars there that--he got in between the cars. That's where he fell.

* * *

Q:Were there cars there at the place where you fell?

A:The cars were parked on the street. He got on the sidewalk. That's where he fell.

Q:So let's go back and talk about that sidewalk again. That was a public sidewalk where you fell, wasn't it?

A:He doesn't know. The only thing he knows is that place is reserved for supervisors.

Q:Did you go through a gate to get onto that sidewalk, sir?

A:No.

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[1]The claimant was asked on cross-examination to testify with respect to a map or drawing of the area in question. This document was not offered into evidence.

Q:Does [employer] have a door keeping the public off that sidewalk, sir?

A:There are no doors there, sir.

Q:Is there a fence around [employer's] plant keeping the public off that street?

A:No.

Q:So anyone in the city of El Paso can park where you parked and walk in between the cars that you walked in between and stand on the sidewalk you were on, and there is nothing that keeps them from doing that?

A:The only problem there is the reserved place where only the supervisors can park. That's the only place, because it's reserved.

Q:You're talking about the street that's reserved, aren't you?

A:Yes.

Q:There is nothing reserved on the sidewalk for supervisors, is there?

A:No.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

4.On (date of injury), Claimant fell on the sidewalk as he was approaching his place of employment.

5.Although the sidewalk where Claimant fell was outside his place of employment, the area had curbside parking places reserved by Claimant's Employer for supervisors and visitors.

6.The area where Claimant fell is so closely related to Employer's premises as to be fairly treated as a part thereof.

Determining whether an off-premises injury comes within the access doctrine and is thus compensable is dependent upon the peculiar facts of each case. This case contained limited testimony regarding the public or private natures of the areas involved, as well as very limited testimony regarding control exercised by the employer. To some extent, the evidence was conflicting (e.g., a reserved parking area on a public street). For that reason,

we find that the hearing officer's findings with regard to a single "area" (versus the sidewalk or the street) are sufficiently nonspecific as to prevent review of those findings by this panel. We also note that the hearing officer did not address the other prong of access, namely whether the employer intended the access to be used by the employee. We thus reverse the case and remand to the hearing officer for further findings on this issue, along with the development of any additional evidence as the hearing officer finds necessary for a full and fair record.

With regard to the carrier's second point of error, we find that there is sufficient evidence to support the hearing officer's determination that the claimant's injury occurred as a result of a fall as he was approaching his place of employment. The fact that the ER report says claimant was injured "yesterday" does not make the hearing officer's decision against the great weight and preponderance of the evidence, *see* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer was entitled to believe the claimant's testimony regarding the circumstances of his injury; she was also entitled to believe claimant's statement that he did not tell ER personnel that he had been injured at home the previous day. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). We will not substitute our judgment for that of the fact finder where, as here, her decision is supported by sufficient probative evidence.

The decision and order of the hearing officer is reversed and remanded for further proceedings as detailed herein. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge