APPEAL NO. 93525

At a contested case hearing held in (city), Texas, on June 3, 1993, the hearing officer, (hearing officer), considered the two disputed issues, namely, whether claimant was injured in the course and scope of his employment on (date of injury), and, if so, the extent of his disability. The hearing officer, after making certain pertinent factual findings, concluded that claimant was not injured in the course and scope of his employment on that date. In his request for review, the appellant (claimant), in essence, disagrees with the hearing officer's determination asserting several reasons why he should be compensated under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The respondent (carrier) in its response seeks our affirmance.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

Claimant testified, as did his immediate supervisor, Mr. G, and the general manager of his division, Mr. H, that at approximately 8:30 a.m. on (date of injury), he was called into Mr. H's office, told that his employment was then terminated due to his unsatisfactory performance, and was instructed to clean out his desk and accompany Mr. G down to the lobby of employer's building. The process of cleaning out his desk took some time and when claimant and Mr. G reached the building lobby at approximately 10:00 a.m., claimant decided to leave the box holding his belongings with the security guard, Mr. F, until he could arrange to have the box picked up. He said he planned to just walk around town before keeping a 2:00 p.m. luncheon engagement. He insisted he then told Mr. G he was going to go up to the second floor to use the restroom since the restroom on the lobby floor was locked and that Mr. G replied "OK" and left the lobby to return to the seventh floor. Mr. G, however, insisted claimant had not indicated why he was going up to the second floor and that he, Mr. G, assumed claimant was going to the second floor either to talk to someone or call someone about picking up his box. Both Mr. G and Mr. F testified that access to the building was unrestricted, no badges were worn, and that anyone could enter the building and take an elevator to another floor without being stopped if they appeared to know where they were going and were not a derelict.

Claimant said that after using the restroom and taking the elevator back down to the first floor, the elevator did not level and that he tripped exiting the elevator, stumbled forward, and fell injuring his back. He also said he felt dizzy at the time. Claimant maintained that he was flat on his back when Mr. F came over to inquire about his condition. Mr. F, however, stated that when he first noticed claimant, he was down on one knee attempting to rise, that when he went over to him claimant stuttered and said he was dizzy, and that claimant never mentioned his back hurting or tripping coming out of the elevator. In his prior written statement, Mr. F stated that claimant said he was dizzy and he told claimant to lay down while he summoned paramedics. Mr. F said he checked the elevators when he came on duty that morning for any problems, including leveling, and found no discrepancies.

He also testified that the elevator company technician had similarly checked the elevators that day. The elevator technician's report for that day reflected no discrepancies.

Claimant saw his doctor, Dr. T, later that day who diagnosed cervical and lumbosacral strain, prescribed medication, nerve stimulation and physical therapy treatments, and took him off work until March 13th. In his report Dr. T stated his "greatest concern was the cause of the attack of vertigo he (sic) which caused him to fall."

Claimant, who did not dispute that he was terminated on January 5th, as testified to by M. H and G, maintained at the hearing, as he does on appeal, that he is entitled to workers' compensation benefits for his injury because he had worked for the employer for 26 years, because he was paid for the full day of January 5th, and because he had told Mr. G he was going to use the restroom and that Mr. G acknowledged such by replying, "OK." Mr. H testified that although it was the employer's policy to pay a full
day's pay for the day on which personnel were terminated, claimant had no option to perform further work for employer after Mr. H terminated him.

The hearing officer made the following factual findings pertinent to his legal conclusion that claimant was not injured in the course and scope of his employment on (date of injury):

FINDINGS OF FACT

3.The Claimant was terminated by the Employer at about 8:30 a.m. on (date of injury).

4.On (date of injury), following his termination and following the returning of all company property to the Employer, but prior to leaving the Employer's premises, the Claimant allegedly injured his back when he tripped while getting off an elevator.

5.The elevator ride during which the Claimant allegedly injured his back was not made in the furtherance of the Employer's business.

6.After the time of termination the Claimant was not permitted by the Employer to perform work for the Employer.

A workers' compensation insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if at the time of the injury the employee is subject to the 1989 Act and if the injury arises out of and in the course and scope of employment. Article 8308-3.01(a). The burden is on the claimant to show that the injury occurred in the course and scope of employment. Director, State Employees

Workers' Compensation Division v. Bush, 667 S.W. 2d 559 (Tex. App.-Dallas 1983, no writ). "Course and scope of employment" is defined 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." Article 8308-1.03(12). We believe that the hearing officer's findings are sufficiently supported by the evidence and that these findings support the legal conclusion that claimant was not injured in the course and scope of his employment. The court in Ellison v. Trailite, 580 S.W.2d 614 (Tex. Civ. App.-Houston [14th Dist.] 1979, no writ), considering a case where an employee was injured by the assault of a fellow employee on the employer's premises immediately after being terminated, held that an injury received after the employment relationship has ended is not in the course and scope of employment. *And see* Texas Workers' Compensation Commission Appeal No. 91077, decided December 19, 1991. The Texas Supreme Court did distinguish Ellison in Bryant v. INA of Texas, 673 S.W.2d 693 (Tex. Civ. App.-Waco 1984, aff'd 686 S.W.2d 614 (Tex. 1985)), a case where the summary judgment evidence was held to have raised a fact issue as to whether an employee who had been terminated and who was injured when she returned to employer's premises to pick up her final paycheck returned to the premises either at the employer's direction or upon the reasonable belief she was required to return for the check. If such were the case, the court reasoned, the employee's injury would be reasonably incident to her employment and incurred in the furtherance of the employer's affairs. In the case under consideration here, however, there was no evidence that the employer instructed claimant to leave the lobby area on his way out of the building after his termination and take an elevator to the second floor to undertake some activity in furtherance of the employer's business. According to the evidence, claimant was terminated at about 8:30 a.m. and escorted down to the lobby to leave employer's premises. When he chose to avail himself of a restroom in the building before departing, as he said he did, he was not undertaking a post-termination activity at the direction of the employer nor upon the reasonable belief that such activity was required by the employer. While injuries sustained by employees using restroom facilities upon employers' premises--typically slip and fall cases--are often found to be compensable under the so-called "personal comfort" doctrine (*see e.g.* Texas Workers Compensation Commission Appeal No. 91021, decided September 25, 1991), claimant has cited us to no authority for the proposition that the "personal comfort" doctrine has been applied by the Texas courts to terminated employees.

The findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 60 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge