APPEAL NO. 94825

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 13, 1994. The hearing officer determined that the claimant did not sustain a compensable injury on (date of injury), because at the time of the injury she was not performing any act in furtherance of the employer's business and had been terminated. She also held that the claimant did not have disability. The claimant appeals, citing evidence in the record which she says establishes that she was in the course and scope of her employment at the time she was injured. Carrier essentially contends that the hearing officer's decision should be affirmed.

DECISION

We affirm.

The facts of this case were virtually undisputed. Claimant had been employed as a manager by (employer). Claimant and her employer had executed a property management employment agreement, which required, among other things, that the claimant live on the premises in an apartment furnished by the employer. The pertinent clause of the agreement stated as follows:

> 10. Living Quarters. Employee understands and agrees that Employee's occupancy of any living quarters furnished by Company is required as an Employee of Company as a condition of employment and not as a tenant. It is further understood that the apartment is a [sic] integral component of the property and is provided as living quarters to be occupied by the Employee for the convenience of the Company, only during period [sic] of Employee's period of employment. Employee agrees to maintain furnished living quarters in a clean and neat condition and to vacate Company-furnished living quarters within 72 hours of notice by Company that it will no longer provide such living quarters to Employee or upon termination of employment. Any damage to Company-furnished living quarters (beyond normal wear and tear) will be repaired at Employee's expense. Employee understands and agrees to repay Company for the cost of any such repairs immediately upon receipt of a bill from Company.

This clause also provided for employer's remedies if the employee failed to vacate including seeking a temporary injunction and liquidated damages.

On December 7, 1993, the claimant was terminated by her supervisor, (Mr. H), and told she needed to vacate the apartment within 72 hours, pursuant to the agreement. The claimant said she told Mr. H she could not vacate within that amount of time, but that she

would have a house available on the 15th of the month. However, that arrangement fell through, and when Mr. H called claimant again to tell her she had to move she requested, and received, permission to stay past Christmas. The employer in the meantime was housing claimant's replacement, (Ms. J), at a hotel.

On (date of injury) claimant was removing the remainder of her things out of the apartment as Ms. J was moving in. The claimant testified that it was raining that day and as she was mopping water from the floor she slipped and fell, injuring her back and hip. She called to Ms. J for assistance, and later went to a hospital where she said she was examined and told she had no broken bones. She returned a few days later, when she did not improve, and was told she needed to have a myelogram of her neck and hip. As of the date of the hearing the claimant said these tests had not been done and that she had not received further treatment. She also said she has been unable to work due to the pain.

It was claimant's position at the hearing that, despite the fact that she had been terminated, she continued to further the interests of the employer by living in the apartment, thereby providing a security service, and answering questions from tenants and other employees who came looking for her at her apartment. Sometimes while walking her dogs in the evening she said she would help one of the other employees with the gate which would get stuck. She also said that in cleaning out the apartment she was complying with the terms of the agreement.

Claimant's ex-husband, (Mr. B), who was the assistant manager at the time of the injury, testified that he and the claimant had been hired approximately three years before, that they were married at the time, that the employer's policy had been to hire couples to manage its properties, and that they were required to live on the premises for security purposes (although he said they were not on duty 24 hours per day). He said that he had moved elsewhere after their divorce, but that the two continued to work together. After the claimant was terminated, he said, she did not ever come into the facility's office where he was working nor into any of the storage units; claimant agreed, stating that she had had to surrender her keys. He said that between (month) 7th and (date) he had asked her questions several times concerning the employer's office procedures, with which he said she was more familiar than he. He also stated the property had no alarm system, that he believed claimant would have called the police or himself if there had been any problems, and that claimant did not harbor any animosity against Mr. H.

Mr. H, who was employer's district manager over 15 facilities, said that the managers served as caretakers of the property, but that they were not hired as security people, noting that the contract with tenants specifically provided that the facility was not a bailee for the tenants' goods. He said that claimant was required to live in the apartment as a condition of employment, but he characterized the apartment as a job benefit. He said the procedure was to inspect the apartment once or twice a year. He agreed that he had allowed the claimant to stay in the apartment longer than the 72 hours provided in the

agreement and did not invoke any eviction or liquidated damages provisions against her. Ms. J, the current property manager, testified that the manager's work was performed in the office, and that the apartment was a living quarters only. She also stated that she did not believe the agreement required apartment clean-up after an employee's termination, stating that employer had a cleaning crew take care of clean-up. Mr. H also said the agreement did not require cleaning up after a termination, and that under those circumstances the employer wanted the employee out as soon as possible, although he acknowledged that he accommodated claimant in this regard and had similarly accommodated other managers in the past.

In her appeal the claimant objects to the following finding of fact and conclusions of law made by the hearing officer:

FINDING OF FACT

8. At the time of her injury on or about (date of injury), the Claimant was not performing any act in furtherance of the business of [employer] and had been terminated.

CONCLUSIONS OF LAW

2. The Claimant did not sustain a compensable injury on or about (date of injury).

3. The Claimant did not have disability resulting from an injury sustained on or about (date of injury) and is not entitled to any temporary income benefits.

The claimant in her appeal relies on case law and Appeals Panel decisions concerning post termination injuries which have been found to be compensable.

The rule as stated by Texas courts is that once an employment relationship has been terminated, either by the resignation of the employee or by the employee being fired, an injury incurred at the job site or while leaving the job site subsequent to the termination is not an injury sustained in the course of employment, within the meaning of the workers' compensation law. <u>Ellison v. Trailite</u>, Inc., 580 S.W.2d 614 (Tex. Civ. App.-Houston [14th Dist.] 1979, no writ). An exception to this rule occurs, however, when the employee is required, or reasonably believes that he is required, to remain at or to return to the employer's premises for his final paycheck or to take care of some other duty incidental to the termination. <u>INA of Texas v. Bryant</u>, 686 S.W.2d 614 (Tex. 1985).

The <u>Bryant</u> case, relied upon by the claimant, involved a terminated employee's injury after she returned to the workplace, some 15 days after her termination, to pick up

her paycheck. In reversing a summary judgment for the appellee and holding that there was a material issue of fact as to whether the employer's practice required the employee to return in order to receive her final paycheck, the court wrote, "This injury is of a type which originated in the business of the employer. Clearly, being paid for work done is within the employment relationship and contract. The question of coverage, therefore, turns on the character of [the employee's] return to the plant."

Bryant was cited in Texas Workers' Compensation Commission Appeal No. 91096, decided January 17, 1992, which held that the great weight and preponderance of the evidence supported a decision that the claimant, who was terminated and instructed to return to the employer numerous boxes of company materials, merchandise, and equipment, suffered a compensable knee injury resulting from carrying the boxes up and down stairs. *And see* Texas Workers' Compensation Commission Appeal No. 92169, decided June 17, 1992, which affirmed a hearing officer's decision that a terminated employee was compensably injured while moving out a heavy tool box belonging to him, where it had been established that use of personal tools while on the job had benefitted the employer. Two other cases cited by the claimant are not on point. In Texas Workers' Compensation Commission Appeal No. 92361, decided September 9, 1992, there was evidence to support the hearing officer's determination that the terminated employee's injury occurred prior to his termination. And in Texas Workers' Compensation Commission Appeal No. 92536, decided November 16, 1992, which discussed a compensable injury that takes place at the place or immediate vicinity of the employment, while the employee is required to hold himself in readiness for work, and where the employer impliedly or expressly gives permission for the activity, involved an employee who was taking part in a work-sponsored social activity but who had not been fired.

In our opinion, the facts of this case do not bring it within the situations which existed in the Bryant case or in Appeals No. 91096 and 92169, *supra*. There is no question but that the employer-employee relationship had been severed, despite the fact that the employer allowed the claimant to continue to occupy the apartment which had been one of the conditions of employment; unequivocally, she had surrendered her keys and performed no work for employer in the office or on the grounds. To the extent that she answered questions or helped with a gate, or even provided an on-site physical presence, such was done gratuitously and not pursuant to any employment relationship. As the court said in Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.), one who assumes a service of his own free will without an express or implied promise of remuneration is a volunteer, and not an employee.

We also find evidence to support Finding No. 8 in the face of claimant's argument that she was injured while complying with her employer's instructions pursuant to the agreement--a situation claimant analogizes to the requirement of picking up a paycheck or moving or returning tools or materials. The claimant points to the provision that requires

the employee to maintain the living quarters in a "clean and neat condition" and which allows the company to bill the employee for damage in excess of normal wear and tear. Mr. H and Ms. J stated their understanding that the agreement did not require clean-up after a termination; this interpretation which appears to be borne out by the language of the agreement itself, which addresses termination only with regard to vacation of the premises within 72 hours.

We also find no error with regard to the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of a compensable injury as a prerequisite to a finding of disability. Section 410.011(16).

We will not disturb the hearing officer's decision unless we determine it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Upon our review of the record, we decline to make that determination in this case.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge