APPEAL NUMBER 94961
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This case arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 20, 1994, to take evidence on the two disputed issues, namely, whether the respondent (claimant) sustained a compensable injury on or about _____, and whether she provided timely notice thereof to her employer and, if not, whether she had good cause for failing to timely report the injury. The hearing officer's decision made certain findings concerning claimant's being out of town on a business trip for (Employer), eating a burrito for lunch on _____, and getting food poisoning, and concluded that she sustained a compensable injury on that date. Further finding that claimant was unable to work on (day after date of injury and 2 days after date of injury) and that her supervisor had helped her get to a doctor's office on _____, the hearing officer concluded that claimant had notified her employer of an injury not later than 30 days after _____. On appeal, the appellant (carrier) first attacks the adequacy of the findings and conclusions in addressing the disputed compensability issue and then challenges the sufficiency of the evidence to support the hearing officer's determinations. Referring to the two-pronged definition of "course and scope of employment" in the 1989 Act, the carrier contends that even if claimant's eating of the burrito on _____ was an activity performed by claimant while engaged in or about the furtherance of the business of the employer, it was not an activity that had to do with and originated in the business of the employer, and therefore, her alleged food poisoning was not a compensable injury. The carrier additionally urges that the food poisoning "resulted from risks to which the public is subjected generally," and argued below that it was an "ordinary disease of life." The carrier also challenges the sufficiency of the evidence to support the timely notice determination contending that claimant "did not notify the employer of this claim until she had been refused benefits by her group health carrier" more than 30 days after the alleged food poisoning. The carrier seeks reversal and the rendering of a new decision. Claimant's response asserts the correctness of the decision on both the facts and the law.

DECISION

Finding the decision of the hearing officer erroneous as a matter of law, we reverse and render a new decision that claimant did not sustain a compensable injury on _____.

Claimant, an insurance agent, and (Mr. P), a trainee insurance agent who worked with claimant on _____, both testified that employer's regional manager, (Ms. R), and a number of employer's insurance agents convened at a motel in (City A), from which they were assigned to various small towns to sell insurance policy renewals and new policies. Claimant said she had driven there in her car from her residence in (City B), approximately two hundred miles distant. According to Mr. P, who was being trained by claimant, he and claimant were assigned to work approximately five or six days in (City C), which was about 65 miles from City A. On _____, a Tuesday, claimant and Mr. P

drove in her car to City C to perform their sales duties. At around noon, they stopped at a convenience store where Mr. P bought a sandwich and claimant bought a burrito. Both claimant and Mr. P testified that the employer did not pay for their lunch, that there was no employer expense account, and that the employer had nothing to do with whether, when or where they ate lunch. They testified they drove a few blocks from the convenience store, parked under a shade tree, and ate their lunch while counting collected funds and planning their afternoon customer calls and routing. There was no evidence that the employer required the claimant to perform any work-related functions while eating lunch; however, claimant and Mr. P both stated that they customarily reviewed work matters while eating lunch. Claimant stated that while the burrito "tasted good," she became ill about 30 to 45 minutes after eating it and knew it was the burrito that had made her ill. She said she was unable to work much longer that day and that she and Mr. P returned to the motel at around 9:00 p.m. where claimant asked Mr. P to report their activities of that day to Ms. R while she went to bed.

Claimant further testified that she stayed in bed on Wednesday and Thursday sick with vomiting and diarrhea, and that on Friday, Ms. R, who knew how her illness occurred, took her to (Dr. T) who gave her medication. She stated that Dr. T told her the vomiting and diarrhea were from the burrito and that "more than likely it was food poisoning." No records of Dr. T were in evidence nor was there any evidence identifying any particular microorganism claimant may have ingested. She also stated that she now has arthritis which (Dr. IT) and another doctor have said was caused by the vomiting and diarrhea, that she now has problems in all her joints, and that her shoulders and left arm are "frozen." Dr. IT's November 22, 1993, report stated that the most likely diagnosis was a reactive arthritis which he said develops after infectious diarrhea. He reported claimant's history of acute illness on _____, marked by diarrhea, vomiting, and fever, and stated that over the next few days to weeks she developed the arthritis. The carrier's doctor, who apparently examined some medical records, stated an opinion that he could find no causal relationship between the original complaint of food poisoning and the complaint of arthritis. There was no disputed issue at the hearing, however, concerning the extent of claimant's injury.

In his written statement of January 15, 1994, Mr. P stated that after he and claimant returned to City B about 9:00 p.m. on _____, he reported their sales to Ms. R and to (Mr. M), the acting district manager, and told them claimant had become ill and had gone to bed. Mr. P testified that within a week of _____ he also had a conversation with (Ms. M), the district manager, about claimant's illness. Claimant, too, testified that during that week she told not only Ms. R but also Mr. M about getting sick from eating the burrito in City C. In evidence was an employer's form entitled "Employee Accident Report" which referred to the eating of the burrito on _____ and stated the date the injury was reported as "_____."

Claimant had the burden to prove that she sustained an injury in the course and scope of her employment and that she timely reported same to her employer. Section 401.011(12) defines course and scope of employment as "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 an activity conducted on the premises of the employer or at other locations. [Exceptions regarding travel and transportation omitted]." The Texas Supreme Court has held that neither element alone is sufficient and that the two requirements are cumulative. Deatherage v. International Ins. Co., 615 S.W.2d 181 (Tex. 1981). Claimant contended that she had no reason for being in City C other than to work, and that under the "personal comfort" doctrine, her eating lunch was not a deviation from her employment but was incident thereto, and, therefore, that she was exposed to the risk of eating a "poisoned burrito" by working in City C and thus sustained a compensable injury. In contrast, the carrier, citing the two-pronged definition of "course and scope of employment," maintained that even if claimant was furthering the business of her employer while in City C, her eating the burrito was not an activity that had to do with and originated in the employer's business in that she had complete discretion as to whether to eat, when to eat, and where to eat. The carrier further contended that claimant was exposed to no greater risk than any other member of the public in buying and eating a burrito for lunch, and, that claimant's alleged food poisoning was an "ordinary disease of life" which the 1989 Act differentiates from occupational disease and excludes from compensability.

The hearing officer found that claimant bought and ate the burrito on _____ as she testified, and that shortly later she became ill, had to stop working early that day, was unable to work the following two days, and sought medical treatment on (3 days after date of injury). He further found that she "was diagnosed with food poisoning and has experienced health problems since this incident." Notwithstanding that Dr. T's records are not in evidence, we are satisfied the evidence is sufficient to support the finding that claimant was diagnosed with food poisoning. Claimant testified that Dr. T told her that her illness was "more than likely" food poisoning from the burrito.

Both claimant and Mr. P testified to the onset of her symptoms soon after eating the burrito and to her spending the next few days in bed ill with vomiting and diarrhea. The hearing officer concluded that claimant sustained a compensable injury. Although we disagree with the correctness of the hearing officer's determination that claimant's illness was compensable, we view this conclusion and the factual findings upon which it rests as adequately addressing the disputed issue of compensability.

The hearing officer made the following additional findings which appear to provide the basis for his conclusion that claimant sustained a compensable injury on _____.

FINDINGS OF FACT

13. During the special sales event such as was being performed by Claimant during the week of (week the injury occurred), Claimant was assigned an exclusive area to service. Claimant provided her own transportation, meals, and lodging without special reimbursement for these items.

14. During the special sales event, the Employer monitored Claimant's work on a daily basis, but Claimant was allowed to organize her daily schedule as long as she stayed in her assigned area.

15. During the special sales event, it was to the Claimant's and the Employer's mutual benefit for Claimant to work at a fast pace in order to increase sales.

16. Claimant's decision to order carry-out type food and have a working lunch was for the mutual benefit of Claimant and the Employer.

17. Claimant's unique work activities during the special sales event placed Claimant in a greater risk of being exposed to food poisoning than she would have been during her normal work activities.

The "personal comfort" doctrine has been applied by a number of Texas courts to relieve employees in certain instances from being found to have deviated from the course and scope of their employment at the time of their injuries. In Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), the Texas Supreme Court held that the injured charge nurse had not deviated from the course and scope of her employment in making a personal telephone call while at work. When she hung up the phone, the cord became entangled in a coffee urn upsetting it and the employee was burned. In finding the injury to be work related, the court followed the rationale in Texas Employers' Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.), a case where the employee, a tool pusher required to be at an oil field drilling site, choked on a piece of steak while eating in a trailer house provided by the employer for employees to eat and sleep while at the site. The Yeldell decision stated that "[a]n employee need not have been engaged in the discharge of any specific duty incident to his employment; rather, an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment and are thus compensable. [Citation omitted.]" *See also* the following cases where Texas courts held the injuries to have been sustained in the course and scope of employment: Texas Employers' Insurance Association v. Davidson, 295 S.W.2d 482 (Tex. Civ. App.-Fort Worth 1956, writ ref'd n.r.e.) where the employee ate the

lunch she brought from home at her work station and slipped and fell walking towards the trash receptacle; Shelton v. Standard Insurance Company, 389 S.W.2d 290 (Tex. 1965), where the employee, a truck driver, had to stay at a motel to await the truck he was to drive the next day and was struck by an automobile while crossing the highway to go to a cafe for his evening meal; Aetna Casualty & Surety Company v. Orgon, 721 S.W.2d 572 (Tex. App.-Austin 1986, writ ref'd n.r.e.), where the employee, a national sales manager attending an out-of-town business related conference, cut his hand in his hotel room when the drinking glass he picked up shattered; North River Insurance Company v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), where the employee, who was staying at a motel near a distant worksite, was injured while preventing an intruder from entering a window of his room during the early morning hours.

The personal comfort doctrine is not determinative in the case we consider, however, because we find, under the particular circumstances of this case, that claimant's food poisoning was an ordinary disease of life, not an occupational disease. Section 401.011(26) defines "injury" to include occupational diseases. Section 401.011(34) defines "occupational disease" as a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body and further provides that the term does not include "an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease."

In INA of Texas v. Adams, 793 S.W.2d 265, 267 (Tex. App.-Beaumont 1990, no writ), the court said that "[o]rdinary diseases of life to which the general public is exposed outside the employment are not compensable except where incident to an occupational disease or injury. . . . To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's employment and the disease, i.e., the disease is indigenous thereto or present in an increased degree. (Citation omitted.)" In Bewley v. Texas Employers Insurance Association, 568 S.W.2d 208, 210 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.), the court stated that the Texas courts have uniformly held that illnesses such as colds, sore throats, and pneumonia resulting solely from exposure to the elements in the course of employment are ordinary diseases of life and are to be distinguished from pneumonia and other respiratory diseases resulting from sudden, accidental inhalation of gases or other foreign substances which damage the lungs. Under the circumstances of this case, claimant was exposed to no greater risk of contracting food poisoning than was any other member of the public.

The hearing officer also found that claimant's supervisor assisted her in going to the doctor's office on _____ and it is this particular finding that the hearing officer apparently relied on to support his conclusion that claimant notified her employer "of an injury" not later than 30 days after _____ and, thus, provided timely notice of her injury. Claimant contended that both Ms. R and Mr. M had knowledge of her illness from eating the burrito within a week of the incident. The carrier urged that the employer's first

notice was the August 18, 1993, accident/injury report and that claimant did not provide notification until she was turned down by her group health insurance carrier. As the claimant pointed out, however, there was no evidence of the latter assertion but only the argument of counsel. We find the evidence sufficient to support the hearing officer's determination that the employer was timely informed of claimant's food poisoning. *See* Section 409.001. However, resolution of the timely notice issue becomes moot in view of our holding that claimant's illness was an ordinary disease of life and that she did not sustain a compensable injury on _____.

The decision and order of the hearing officer are reversed and a new decision is rendered that claimant did not sustain a compensable injury on _____, as she claimed and that she is therefore not entitled to medical and income benefits.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge