APPEAL NO. 950112
FILED MARCH 7, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 6, 1994, a hearing was held. The hearing officer determined that appellant (claimant) was not acting in the course and scope of employment at the time of her injury in a car wreck. Claimant asserts on appeal that her supervisor, (Mr. R) had directed her "to other school business" when the accident occurred. The appeals file contains no reply by the respondent (school district).

DECISION

We affirm.

Claimant is a teacher's assistant at (school). Mr. R is a physical education teacher at that school. Mr. R testified that claimant worked for him and others and that he took part in her evaluation. He agreed that he did not write her evaluation and would not say on cross-examination that she was under his direct supervision. Claimant testified that she was evaluated by the principal, assisted by Mr. R.

Mr. R testified that the principal asked him on _____, to go to a student's home that afternoon. Mr. R indicated that since he was to talk with the child's mother, he wished to take a female teacher with him. With another teacher not available, Mr. R got permission from the principal for claimant to go with him. Claimant recalls Mr. R asking her to come with him, but recalls nothing else about the events until she awoke in a hospital.

Mr. R testified that he drove his car, an old one, to the student's home, where it was discovered that the child did not live there at present. Mr. R further testified that claimant then drove his car back, after he asked if she wanted to drive. They passed the school where both worked and kept driving, at his direction, approximately eight blocks further to another, middle school. Mr. R testified that in teaching at the school for many years he had learned that it helped his elementary children, when they left to go to the middle school, to know something about the athletic program there; as a result, he had encouraged coaches from the middle school to come to his school to explain what was available there. He testified that he decided it was a good time to check with a coach at the middle school about making a presentation to his students. (No evidence was elicited as to whether Mr. R had normally made such contacts in January or whether he usually waited until later in the school year.) Mr. R then indicated that since there was no coach outside on the school grounds, he did not want to stop and go into the school so he and claimant were returning to the school when his car, with claimant driving, and another car collided.

Claimant fractured her skull and jaw. She testified that she still has problems. Mr. R broke some ribs. The police report in evidence indicates that claimant had to be cut from the car. She was cited for speed and having no drivers' license. Claimant testified that she performed a defensive driving course so the ticket was dropped.

Mr. R could not state that he told the principal that he was going to ask a middle school coach to come to school, but he said that he has been doing this for years. Mr. R could not say why it was necessary for claimant to accompany him to the middle school, after the visit to the child was obviously over, and why claimant did not exit the car as it passed directly by school on the way to the middle school. There was also no evidence that claimant had been used in the past by the school district as a driver or that claimant had been instructed by teachers below the principal to perform activities outside the school that were subsequently made known to the principal, who then condoned such practice.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The hearing officer found that "claimant decided to drive around in a corvette after her trip to the student's home." This finding of fact together with another that stated that claimant was not in the course and scope of employment when injured (also stated to be a conclusion of law) are sufficiently supported by the evidence.

In Clingan v. Employers Casualty Co., 576 S.W.2d 896 (Tex. Civ. App.-Amarillo 1979, no writ), a graduate student working as a teaching assistant at a university was shot and killed when he returned to the laboratory at night to move furniture after a floor had been cleaned. The appeals court was reviewing a judgment rendered for carrier by the lower court notwithstanding a jury verdict for the assistant's family. The decision was affirmed stating that Dr. M was "supervising Michael's graduate research," but Dr. T, the department chairman, instructed the deceased as to the employment. "Even if he was moving furniture and equipment solely because Dr. M had instructed him to do so, that fact alone would not enlarge his employment duties to include janitorial work, for Dr. M was not his employer." Subsequent to the Clingan decision, Biggs v. United States Fire Insurance Co., 611 S.W.2d 624 (Tex. 1981), aff'd on remand, 614 S.W.2d 496 (Tex. Civ. App.-Amarillo 1981, no writ), considered a decision by the appeals court which had reversed the decision by the trial court for Biggs; the Supreme Court reversed and remanded. Biggs was a law clerk injured when repairing a roof of an apartment of an associate of the firm. The evidence recited showed that both the senior partner and associates, including the associate who had claimant work on the roof, employed Biggs to do assorted errands both of a business and personal nature and that the senior partner knew of the manner in which Biggs was used. The court looked at past cases and concluded that the temporary direction exception to the requirement that the injury occur in the usual course of business of an employer "applies to work ordered by a supervisor so long as the order is authorized by the employer" even if personal in nature. The court then found apparent authority in the associate, who had claimant work on the roof, in that the associates had provided varied tasks before, for which Biggs was always paid by employer. With "some" evidence that the work on the roof was within the apparent

authority of the associate to order, the Supreme Court returned the case to the appeals court to determine the factual sufficiency point as to course of employment.

The case of Saint Paul Insurance Co. v. Van Hook, 533 S.W.2d 472 (Tex. Civ. App-Beaumont 1976, no writ), occurred prior to Clingan and found that a student and part-time janitor was injured in the scope of employment when he fought students in a boxing ring in the gym after he caught them attempting to break school windows. He had been instructed by his supervisor to "stop them" if he saw anyone trying to break school windows. That case cited Texas General Indemnity Company v. Luce, 491 S.W.2d 767 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.) for finding course and scope of employment when injury occurred as a result of "following the instructions of his employer . . . even though at time of injury he is not performing his usual tasks." In the Luce case, the recitation of facts did not raise a question as to the authority of the person who instructed Luce to come to the worksite to get her check, it merely said the procedure was established by the employer.

The hearing officer made no finding of fact whether Mr. R was the supervisor of claimant. Under the Clingan decision and the rationale of Biggs, in which "everyone was the boss" to Biggs, the hearing officer's decision that the injury was not in the course and scope of employment is supportable in this case even if Mr. R was a supervisor in regard to claimant's teaching duties. There was no evidence that he was a supervisor in regard to defining claimant's duties to include driving or had ever directed claimant as to other activities outside of the school room. Apparent authority was not discussed or argued; the facts do not show that any apparent authority existed. The Biggs case does not provide authority for even a supervisor to direct an operation outside the scope of employment and thereby make it within the scope of employment unless "authorized by the employer" or shown to be ordered with "apparent authority" of the employer.

Finding that the decision and order at the end of the hearing officer's opinion are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge