APPEAL NO. 950156

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 17, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as the hearing officer, to consider the single issue of whether appellant (claimant) sustained an injury in the course and scope of her employment with the employer/carrier on _____. The hearing officer determined that claimant did not carry her burden of proving that she was in the course and scope of her employment at the time of her _____ fall and as such, she did not sustain a compensable injury within the meaning of the 1989 Act. Claimant appeals arguing that the hearing officer's determination that she was not within the course and scope of her employment at the time of her fall is against the great weight of the evidence, because either the "access doctrine" or the "personal comfort doctrine" bring her injury within the course and scope of her employment. Employer/carrier responds urging affirmance on the basis of the sufficiency of the evidence in support of the hearing officer's decision.

DECISION

We affirm.

The facts in this case are largely undisputed. On _____, claimant was employed as a Senior Financial Representative at employer/carrier's medical facility in (City), Texas. On _____, claimant's supervisor had requested that she work until 5:00 p.m. instead of her usual 4:00 p.m.; therefore, claimant, who generally walks to work, drove her car so that she could pick up her children at daycare by 5:30 p.m.. Claimant testified that she parked on a public street within a block of the building where she worked and that she was permitted to park on the street because of a parking sticker issued by the city. Claimant stated that on _____ she left her building and walked down the sidewalk to the corner of (address). As she stepped into the crosswalk to cross a street, a car ran the stoplight and forced her to step backwards to avoid being hit. As she did so, claimant fell breaking her foot and ankle. Claimant testified that when she fell, she landed on property owned by employer/carrier. CM, the director of workers' compensation for employer/carrier, testified that the intersection where claimant fell was not located on employer/carrier's property and was not maintained by employer/carrier, but was maintained by the city.

Claimant initially argues that she was in the course and scope of her employment under the access doctrine. The access doctrine has long been recognized as an exception to the general rule that workers' compensation benefits do not apply to injuries received going to and from work. Under that doctrine the term employment for purposes of workers' compensation includes:

> not only actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to

> be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect, a part of the employer's premises, the injury is one arising out of and in the course of the employment as though it had happened while the employee was engaged in his work at the place of its performance.

Standard Fire Insurance Co. v. Rodriguez, 645 S.W.2d 534, 538 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) (citations omitted).

Claimant relies on Rodriguez and Texas Workers' Compensation Commission Appeal No. 92532, decided November 13, 1992, in support of her argument that she was in the course and scope of her employment at the time of the fall in this case. However, claimant's reliance on those decisions is misplaced in that they are factually dissimilar to the case at issue. In Rodriguez, the employee was injured when she fell descending stairs attached to the loading dock. The Rodriguez court held that "appellee although not on the employer's premises, was at or near the place of work and on a means of ingress and egress impliedly permitted and recognized by the employer as being a means of access to the work." The court then emphasized that the employer had rights in and to the loading dock area and that it was used to further the employer's business. Finally, the Rodriguez court noted that only the employees of the employer and the other tenant of the building or persons doing business with either company used the loading dock; therefore, the risk incurred by the claimant was recognized as one to which the general public, having no business on or about the premises, would not have been exposed. In Appeal No. 92532, we reversed and rendered a hearing officer's determination that claimant was not injured in the course and scope of his employment when he was involved in an automobile accident in employer's parking lot. The hearing officer had determined that because claimant had entered his personal vehicle, as opposed to approaching it, the employee was no longer within the purview of the access doctrine. We reversed and rendered a decision that claimant was within the course and scope of his employment at the time of his auto accident, emphasizing that the accident occurred on the employer's premises.

Carrier relies heavily on the Texas Supreme Court decision in Texas Compensation Insurance Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974). In Matthews, the plaintiff was injured when she fell in a public street while going to work. The Supreme Court reversed the lower courts' decision in favor of the plaintiff and issued a take nothing judgment. In Matthews, the Supreme Court discussed the decision in Kelty v. Travelers Insurance Co., 391 S.W.2d 558 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.) at some length. In Kelty, the Court of Appeals reversed an entry of summary judgment that the plaintiff was not in the course and scope of her employment when she slipped and fell on an ice-covered sidewalk surrounding the employer's premises used by both employees and the general public. The Kelty court determined that because there was evidence that plaintiff's employer had

assumed responsibility for maintaining the sidewalk by cleaning it and attempting to remove the ice, questions of fact existed as to whether "the [plaintiff'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." In discussing Kelty, the Supreme Court stated:

> that the access exception to the "going to and from" rule had been carried as far as it reasonably could be, without an amendment to the Workmen's Compensation Act, in Kelty . . . .
>
> * * * * *
>
> [N]o case has extended the "access exception" out into the public streets where other members of the public are subject to the same hazard.

Accordingly, in Matthews, the Supreme Court reversed and rendered a decision that the plaintiff was not in the course and scope of her employment when she fell in a public street on the way to work.

In this case, the hearing officer determined that the location where claimant's accident occurred was not part of the employer/carrier's premises, or under its control. Rather, the hearing officer determined that claimant's injury occurred at the intersection of public streets maintained by the city. There was conflicting evidence on this issue, which conflict was for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record indicates that those determinations are against the great weight and preponderance of the evidence and no basis exists for disturbing them on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Thus, the hearing officer correctly determined under the reasoning of Matthews that the access doctrine does not operate in this case to bring claimant's injury within the course and scope of her employment in that the site of the injury was neither located on employer's premises nor in such proximity or relation as to reasonably be considered a part thereof. Rather, her injury occurred on a public street and as such was "a consequence of risk and hazards to which all members of the traveling public are subject rather than hazards having to do with and originating in the work or business of the employer." Kelty, 391 S.W.2d at 562 (citations omitted).

Next we turn to claimant's assertion that the personal comfort doctrine applies in this instance to bring her fall at the intersection of public streets within the course and scope of her employment with employer/carrier. Claimant cites Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985) and Weaver v. Standard Fire Insurance Co., 567 S.W.2d 34 (Tex. Civ. App.-Houston [14th Dist.] 1978, writ ref'd n.r.e.) in support of its argument. In Weaver, the Court of Appeals reversed a jury's determination that the plaintiff did not sustain an injury in the course and scope of her employment when

she slipped and fell in the parking lot provided by her employer. The Weaver court noted that the parking lot was part of the employer's premises, that the parking spaces were provided by the employer as a convenience to its employees, and that the injury occurred while the employee was preparing to leave her employer's premises; thus, it determined that all of the elements of the personal comfort doctrine had been satisfied and it was error for the trial court to have refused to give a personal comfort instruction to the jury. In this instance, as noted above, claimant's injury did not occur on the employer's premises or in a location "in such proximity and relation as to be in practical effect a part of the employer's premises." Rodriguez, *supra*. Thus, the personal comfort doctrine simply does not extend to bring claimant's off-premise injury within the course and scope of her employment.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge