

APPEAL NO. 950973
FILED JULY 31, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 25, 1995, a hearing was held in (City), Texas with (hearing officer) presiding; he held the record open until May 18, 1995, after which he determined that respondent (claimant) was in the course and scope of employment on _____, when injured and that claimant had disability through the date of the hearing. Appellant (carrier) asserts that claimant was not in the course of employment because he was traveling after work to eat a meal. Claimant both appeals that disability was not found past the date of the hearing and replies to carrier's appeal saying that the decision should be affirmed.

DECISION

Reversed and rendered.

Claimant had worked for (employer) about one week when the accident of _____, occurred. Claimant testified that he had his own business but would at times work for employer temporarily as a driller's helper, having done so previously. He planned to work for employer into the first week in January 1995.

The facts are not controverted. Claimant lived in (City A), Texas. The job site was near (City B), Texas, and the employer provided accommodations for the crew at a motel in (City B) and paid them per diem. The hearing officer relates that after work on _____, claimant returned to his hotel and was asked if he wanted to go with the driller (supervisor) to (City C) to eat supper. Claimant did not have his car in (City B) and testified that it was too far to return to (City A) each night. Claimant chose to go with the supervisor to eat in (City C), which he said was about 15 miles from (City B). Claimant testified further that he did nothing to further the interest of his employer when he went to (City C). Claimant also testified that there was no food in the motel in which they stayed. He answered affirmatively to a question on cross-examination as to whether there were any restaurants within a mile of his motel. When asked if there was a restaurant within a block of his motel, he answered that he did not know. To go to one of the restaurants in the area of the motel, he said he would have had to walk, and he also said that (City B) was about the size of (City).

Claimant acknowledged that no alcoholic beverages are sold in (City B) whereas (City C) allows such sale. Claimant testified he had two beers with his meal, and he believed his supervisor had three beers. They joined other employees who were also eating at the same restaurant, but business was not discussed. On the way back to (City B), while still about five miles from the motel, the truck, with driller driving, left the highway,

"jumped another highway" and struck an embankment, breaking claimant's arm and cutting his head.

The hearing officer made findings of fact as to injury and also found the following:

FINDINGS OF FACT

6.The claimant was not engaged in any personal recreational activity or any distinct departure on a personal errand at the time of the injury.

7.The claimant had to eat supper on the evening of _____ and had no other reasonable alternative, under the facts of this case, than to accompany his supervisor.

Both claimant and carrier cite Aetna Casualty & Surety Co. v. Orgon, 721 S.W.2d 572 (Tex. App.-Austin 1986, writ ref'd n.r.e.). In that case a claimant was staying overnight in a motel in a city other than his normal residence as part of his work and cut his hand on a glass. That case used the words "continuous coverage principle" after referring to "1A Larson, Workmen's Compensation Law § 25.00 (1985)." The case further said that Larson reported a majority of jurisdictions found employees to be in the course of employment "continuously during the trip, except when a distinct departure on a personal errand is shown." It went on to comment that five Texas cases had "utilized" the principle. We note that no writ was allowed, with the comment "no reversible error" as to the civil appeals court's affirmation of the trial court in the Orgon case.

An often cited Texas case, one of those cited by Orgon, *supra*, is Shelton v. Standard Ins. Co., 389 S.W.2d 290 (Tex. 1965). In that case a claimant stayed overnight in (Dallas) while his truck was being fixed; he stayed in a motel; he crossed the street to eat at a restaurant when he was struck by a car. The trial court had granted a motion for summary judgment against claimant and the court of civil appeals affirmed that decision. The supreme court stated the question before it to be:

whether crossing the street to obtain food was so related to the work he was employed to do that it might properly be concluded that his injuries had to do with and originated in the employer's business.

The Shelton court distinguished its facts from those in Rodriguez v. Great American Indemnity Co., 244 F.2d 484 which it described as a case in which the claimant was killed in a fire in a hotel in a town distant from his home, where he stayed during the work week each week. Shelton made it clear that it was not speaking to fact situations such as those in Rodriguez. The Shelton court went on to say:

Although a number of eating establishments were available to petitioner, he chose a cafe only a short distance from his motel. Neither personal pleasure nor recreation played any part in the choice. In these circumstances we are unable to say as a matter of law that his crossing the street to obtain food was not an incident of the employment . . . [Emphasis added.]

This court also commented that after determining that the trip to (Dallas) was in the employer's interest, "and his only purpose in crossing the street was to obtain food . . . we think it necessarily follows that the trip across the street was also made to further the business of the employer . . ."

Other cases cited by the Orgon case as to "continuous coverage," included Hardware Mutual Casualty Co. v. McDonald, 502 S.W.2d 602 (Tex. Civ. App.-San Antonio 1973, writ re'd n.r.e.) and Walker v. T.E.I.A., 443 S.W.2d 429 (Tex. Civ. App.-Fort Worth 1969, writ refused). Both dealt with circumstances in which the claimant was not found to be covered by "continuous coverage." In McDonald a salesman stayed overnight in (Kerrville) and ate at a cafe approximately five miles from (Kerrville). There was no discussion as to how far the cafe was from the motel or as to other possible eating establishments. Claimant later that night returned to the same cafe and proceeded to the river nearby and drowned. The trial court's determination in favor of the salesman's wife was reversed and rendered. The court ruled that his return was not in the course and scope of employment. While that ruling could be seen as an extension of the Sheldon ruling which only found that crossing a street to eat constituted a fact question, as stated, we are not told what choice claimant had and the court was not compelled to rule on his initial travel to the cafe to eat; with no writ granted because no reversible error was found, we do not conclude that any extension of the Shelton ruling should be inferred by McDonald.

The Walker case, *supra*, affirmed a trial court decision that found an injury not compensable that was incurred while in the room of an acquaintance at the motel where claimant stayed. This case points out that even when in the motel in which housed, "continuous coverage" may not be continuous. The other two cases cited by Orgon were T.E.I.A. v. Harbuck, 73 S.W.2d 113 (Tex. Civ. App. 1934, writ ref'd n.r.e.) and T.E.I.A. v. Cobb, 118 S.W.2d 375 (Tex. Civ. App. 1938, writ refused). Both of these involved death while in the hotel where staying while working for an employer. One employee died from gas asphyxiation and the other died following a fire that engulfed the hotel--he delayed leaving to gather employer's documents. Not one of the five cases cited by Orgon chose to use the phrase, "continuous coverage." Each looked to the question of whether employer's affairs were being furthered at the time of injury/death.

Another case that can be considered along with Shelton is Mapp v. Maryland Casualty Corp., 725 S.W.2d 516 (Tex. App.-Beaumont 1987, reversed, *per curiam*, in

Mapp v. Maryland Casualty Co., 730 S.W.2d 658 (Tex. 1987), which remanded citing Shelton and stating that a fact question was presented. In that case Mapp lived and worked in Beaumont, but at times was required to work in Orange, Texas. She was working in Orange on the day in question and left work at noon to eat (there was no food available on premises) in a "nearby" cafeteria (also referred to by the dissent as "close" to her work). In returning from the cafeteria, she was assaulted. The court of civil appeals affirmed the summary judgment against Mapp, but as stated, the Supreme Court reversed and remanded finding a factual question was presented.

While Shelton had expressly distinguished itself from Rodriguez and did not include the factual scenario found in Rodriguez in making its ruling, North River Ins. Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), states that Rodriguez is "incompatible" with Shelton and Mapp, notwithstanding that Shelton chose not to so rule. Purdy also concludes that Shelton "held that the injury was compensable." The Purdy court dealt with a situation in which a claimant was in a motel "near the worksite" (not stranded as in Shelton) when an intruder sought entry through the window of his room. Purdy cut his hand when repelling the intruder. The Purdy court affirmed that the injury was compensable. It stated that the "test for determining whether an injury was received during the course of employment when the injury was suffered by an employee whose employer requires him to travel is

whether the injury `has its origin in a risk created by the necessity of sleeping or eating away from home . . ."

More recently, a case was reported that does not specifically state whether it involved workers at a job site away from their normal residence. Wausau Underwriters Ins. Co. v. Potter, 807 S.W.2d 419 (Tex. App.-Beaumont 1991, writ denied), reversed and remanded a compensable injury determination. The case stated that Potter was the job superintendent for a company "which was the general contractor on a . . . job project in Baytown, Texas." Potter chose to leave the site for lunch with his project manager, but did not go for the purpose of discussing the project. An accident occurred on the way to "Wendy's" in Baytown, but the distance was not set forth. The court remanded because an instruction had been used which was similar to that in Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), which this court pointed out dealt with injury on premises rather than "while travelling on the public highway . . ." The words "continuous coverage" did not appear in Potter.

While the Appeals Panel has not directly ruled in a similar fact situation to that presented by this case on review, Texas Workers' Compensation Commission Appeal No. 941362, decided November 28, 1994, affirmed a decision of no compensability when a claimant, working on a project in his county of residence, left the worksite at noon and

traveled approximately 10 minutes in a company vehicle to a cafe for lunch. He testified that the nearest place to eat was about 10 minutes away, but that the one he went to was not the closest. On returning from lunch an accident occurred. Appeal No. 941362 distinguished this case from both Shelton and Mapp in upholding the decision that claimant was not furthering the affairs of his employer at the time of injury. Texas Workers' Compensation Commission Appeal No. 93898, decided November 15, 1993, also affirmed a decision of no compensability in which a claimant was killed while driving home for lunch in a company vehicle.

The 1989 Act is substantially the same as the prior law in regard to coverage when an employee is furthering the affairs of his employer. The provisions of Section 410.011(12)(B) would have been applied to this case (dual purpose test), if there had been any indication that the claimant traveled to (City C) to further the affairs of the employer; there was no evidence of this. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991, pointed out that when the 1989 Act is substantially the same as prior law, it will be considered as conveying the same meaning and case law relative to prior law may be considered.

We believe that the rationale in Shelton, Purdy, Potter, and Mapp tells us that an employee, when housed near a job site by employer and away from his city of residence or when away from his hometown temporarily on order of his employer, may, or may not, be covered for injury under the 1989 Act when eating "close" or "nearby" the job site or the housing provided or while occupying the assigned residence. We expressly do not require that food be sought from the geographically nearest source for injury to possibly be compensable in the situation described. In parts of Texas, seeking food "nearby" may result in a need to travel several miles. "Close" or "nearby" does not include driving from a town the size of (City) 15 miles to another town to eat. The finding of fact that claimant was not engaged in personal pleasure (See Shelton) in traveling that distance in the situation described while other food sources were available nearby, even if only available by walking, was against the great weight and preponderance of the evidence. The finding of fact that claimant had no "reasonable alternative" is also in this situation against the great weight and preponderance of the evidence. The remaining findings of fact will not support a decision that the injury was compensable.

Finding that the decision is not sufficiently supported by the evidence, we reverse and render that the claimant was not injured in the course and scope of employment. As a result, no disability can result. See Section 401.011 (16). Carrier is not liable for benefits.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge