

APPEAL NO. 960656
FILED MAY 9, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 1, 1996. The issues at the CCH were employment, injury, date of injury and disability. The hearing officer found that the appellant (claimant herein) was injured while taking a pre-employment physical on _____, that the claimant was not an employee of the employer at the time of the injury, and that without a compensable injury there was no disability. The claimant appeals, arguing that her injury is compensable under our prior decisions and is analogous to the application of the access doctrine. The carrier replies that to be eligible for benefits a claimant must be an employee of the employer, must have received some promise of remuneration, and must have performed job duties. Carrier argues that this is a different issue than is addressed in the Appeals Panel decision upon which the claimant relies.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that she was a registered nurse who applied for work at (health center) in August 1995. The claimant testified that the health center called her in on _____, and told her she had a job with them as a nurse. On this date, the claimant and the health center representative who told her she had the job signed an "EMPLOYER'S NOTICE TO NEW EMPLOYEES Regarding Status of Workers' Compensation Insurance," which advised the claimant that she had five days after beginning employment to notify the Health Center if she wished to retain her common-law rights for personal injury rather than the health center's workers' compensation coverage. This document is dated "9/1/95". The claimant testified that she was scheduled to begin employee orientation on September 4, 1995, and was told that prior to orientation she needed to pass a physical examination.

Later on _____, the claimant went to the physical examination which included strength testing using a B200 machine. The claimant failed the B200 test by one point. The claimant testified that she was told that virtually all people who fail the B200 test by one point the first time, pass it on a second try. The claimant scheduled a retest for _____. The claimant was told by the employer not to come to orientation on September 4, 1995, because she needed to pass the physical examination first. The claimant went to the retest on _____. She testified that she was strapped so tightly into the B200 machine by the technician conducting the test that she was injured performing the test. She describes her injury as being primarily to the right side of her body.

The claimant never did any work for the health center. The claimant has undergone some medical treatment, and she placed into evidence records placing her under lifting restriction. The claimant testified that she has requested that the health center provide her work and has looked for other work, but has been unable to find work because of her restrictions due to her injury.

The key to this case is whether the claimant was an employee of the health center at the time of the injury. This is the reason that the decision cited by the claimant--Texas Workers' Compensation Commission Appeal No. 94264, decided April 15, 1994--is not controlling. This case stands for the proposition that if the employer sends an employee for a physical examination and the employee is injured during the course of the physical examination that the claimant is in the course and scope of employment and the injury is compensable. This does not answer the threshold question of whether or not the employer-employee relationship had come into existence. This type of question was addressed in Texas Workers' Compensation Commission Appeal No. 93931, decided November 23, 1993, in which a claimant who had applied for work was injured while being shown what the job entailed. In that case, we affirmed a hearing officer who had found that a contract of employment was not yet in existence. Also in Texas Workers' Compensation Commission Appeal No. 94825, decided August 4, 1994, we upheld a hearing officer who found that the claimant was not in the course and scope of employment when she was injured after the employment relationship had ended. That case involved an apartment manager who was injured cleaning out her employer-provided apartment after she was terminated.

In the present case, looking at the evidence as a whole, we find sufficient evidence to support the finding of the hearing officer that the claimant was not an employee of the health center. The claimant never provided any nursing services for the health center, never received any remuneration, and never did any act in furtherance of the health center's affairs other than undergoing the physical examinations. The passing of the physical examination in this case appears to a condition precedent to claimant's employment rather than a condition for keeping her employment. Since the accident did not take place while the claimant was traveling to her place of employment we fail to appreciate claimant's argument that the access doctrine applies.

We affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Judy L. Stephens
Appeals Judge