APPEAL NO. 961159
FILED JULY 29,1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 decided *et seq.* (1989 Act). On May 20, 1996, a contested case hearing (CCH) was held in [City], Texas with [hearing officer] presiding as hearing officer. With respect to the issues before him, the hearing officer determined the claimant was not injured in the course and scope of her employment and because she did not have a compensable injury claimant does not, by definition, have disability.

Claimant, in her appeal, simply disputes the hearing officer's determinations of an injury in the course and scope and disability. (Apparently claimant is under the impression that the appeal will result in an additional hearing). Respondent, [Employer], a self insured, referred to as employer/carrier as appropriate, cites authority in requesting affirmance.

DECISION

Affirmed.

The salient facts were either stipulated or were not disputed and the case involves strictly a question of law. Claimant was employed by the employer's sheriff's department as a clerk working from 2:00 p.m. to midnight. Claimant applied for a transfer/promotion to become a certified jailer. (In evidence is employer's career development policy.) Claimant was notified that before she could become a certified jailer she would have to pass an agility test. The agility test was given at a facility run by the Sheriff's Department, administered by deputies, but was at a location other than where claimant normally worked as a clerk. Claimant was scheduled to take the agility test in the morning (8:00 a.m.) of [date of injury], was not being paid for taking the test and was "on her own time." While taking the agility test, claimant fell and broke her leg near the knee. Claimant was in the hospital for a period of time and the parties stipulated that this injury caused claimant to be unable to work from [date of injury] through September 13, 1995.

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.

The definition excludes certain travel and transportation situations not involved here. In Deatherage v. International Insurance Company, 615 S.W.2d 181, 182, (Tex. 1981), the court stated that, "[a]s a general rule, a claimant must meet two requirements: (1) the injury must have occurred while the employee was engaged in or about the furtherance of the employer's affairs or business; and (2) the claimant must show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business or profession." In Lumberman's Reciprocal Ass'n v. Behnken, 246 S.W.2d 72, 73 (Tex. 1922), the court stated that "[a]n injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business." The court also noted at page 74 that the workers' compensation law is a remedial statute which should be liberally construed with a view to accomplishing its purpose and to promote justice. In Texas Employers' Ins. Ass'n v. Anderson, 125 S.W.2d 674, 677 (Tex. Civ. App.-Dallas 1939, writ ref'd), the court observed that whether an employee sustained an injury while in the course of his employment must be determined on the peculiar facts of each case and as a question of fact.

At the CCH, claimant contended that this situation was similar to the situation in Biggs v. United States Fire Ins. Co., 611 S.W.2d 624 (Tex. 1981) which found compensability when a law clerk was injured repairing a roof, not an act which furthered the interest of the law firm for which he worked. That case, when reported in the court of civil appeals as United States Fire Ins. Co. v. Biggs, 601 S.W.2d 132 (Tex. Civ. App.-Amarillo 1980, writ granted), shows that the evidence was conflicting, but included evidence that the claimant was told to go to the particular apartment building (to fix the roof). (The question in Biggs was whether the person doing the telling to Biggs had authority to direct him in that way.) We distinguish Biggs from the instant case in that claimant was not directed to take the agility test as part of her clerk duties but rather was told, as any other applicant, that to qualify for the position of certified jailer she would first have to pass the agility test, which was conducted during other than claimant's normal duty hours and for which claimant was not being paid. These were all distinguishing features from Biggs.

In Texas Workers' Compensation Commission Appeal No. 91095, decided January 13, 1992, the Appeals Panel commented:

As a general proposition, an employee injured while he is engaged in an enterprise of his own and something that is not required in the furtherance of his employment is not entitled to workers' compensation. Kimbrough, et al v. Indemnity Insurance Co. of North America, 168 S.W.2d 708 (Tex. Civ. App.-Galveston 1943, writ ref'd) However, unless the proof is such that only one conclusion can be reasonably drawn from it by reasonable minds, deviation from the course and scope of employment which will defeat

a claim for compensation is a question of fact to be determined by the trier of fact. Lesco Transportation Co. Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ).

In Kimbrough, a situation where the employee was making repairs on his personal automobile on the employer's premises, the court held:

In order to recover benefits under Workman's Compensation Act of the State of Texas, an employee must prove not only that his injury occurred while he was engaged in or about the furtherance of the affairs or business of his employer, but also that the injury was of such kind and character as had to do with and originated in the work, trade, business or profession of the master. Not every injury which occurs at or near the place of employment is compensable. The injury must be brought about by a risk which is incidental to and arises out of the task the workman has to do in fulfilling his contract for service, and to which the employee would not be subjected but for the employment contract for service . . . . (Id. at 709).

Consequently we find that the hearing officer's determinations that claimant's undertaking the agility test was not an activity which was in the course and scope of her employment as a clerk, to be supported by the evidence and not an incorrect application of law. We do not believe that cases cited by the carrier involving the "coming and going" rule, (Section 401.011(12)(A)) and injuries during travel by an employee, are applicable.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCUR IN RESULT:

Philip F. O'Neill
Appeals Judge