APPEAL NO. 990465

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 9, 1999. The issues concerned whether the appellant, who is the claimant, sustained an injury in the course and scope of employment on _____, and had disability from this injury.

The hearing officer found that claimant did not sustain an injury while in the course and scope of employment. He found that her last day of work for the employer was (day before the date of injury), that she was terminated prior to the date she slipped and fell at the employer's premises, and that she was not unable to obtain and retain employment due to a compensable injury.

The claimant appeals all fact determinations of the hearing officer underlying the conclusion that claimant was injured outside the course and scope of her employment. The claimant argues that there must have been a deviation from the course and scope of employment in retrieval of personal items, which was not the case here. The claimant disputes the finding that she was not an employee on the date of injury. The claimant argues that there was no evidence to refute her period of disability. The respondent (carrier) responds that because the claimant was not specifically instructed by the employer to pick up her personal belongings or use the stairs, she was not furthering the employer's business "at the time" the accident occurred. The carrier argues that the decision of the hearing officer is sufficiently supported.

DECISION

Reversed and remanded.

The claimant worked as a supervisor for (employer). It was undisputed that on (2 days before the date of injury), she submitted a letter to the employer saying that she would be resigning effective _____, which was the Friday of that week. She stated that this meant that Friday would be her last day. The note stated: "As of Friday, _____, I will no longer be an [employer's name] employee." The note then said that the claimant had to leave but would be in "tomorrow." A personnel change notice completed by the employer on (day before the date of injury) stated that claimant submitted her resignation effective _____. This notice checked off "termination" as the reason for leaving, but there is no other block in this part that refers to actions that would be taken with respect to leaving the company.

Claimant was paid through March 29, 1998. Her final check included a vacation time balance of slightly over 25 hours. An affidavit from a person in the employer's payroll department said that claimant was a salaried employee, paid on a weekly basis regardless of the actual hours worked. The affiant said that claimant had not performed any work for the employer since (2 days before the date of injury).

Claimant said that she ordinarily would have given two weeks notice, but that she had the opportunity to begin work right away for another employer, which involved working out of her home. She said that although the wage was slightly less, it would be made up in the savings from her expenses of commuting to the city where her employer was located.

It was undisputed that on (day before the date of injury), the date the hearing officer found was the claimant's "last day of work," she was actually out sick, and did not report to the employer's premises on that day. Claimant said that on Friday, she reported for work at her usual time and began activities to wind up her employment for the employer. She said that she turned in her badge and building keys to her supervisor, Mr. R, copied pertinent information for a successor supervisor onto a computer diskette, took attendance roll of the employees she supervised, and handed out assignments for work. She then packed up her personal items in boxes, and, with the assistance of Ms. T, another supervisor, was carrying them out to her car when she fell down the stairs. The extent of her injuries included two sprained ankles, twisted knee, and back strain. Claimant said she had intended to return to work and had asked Ms. T if she had her badge since they would need this to re-enter the building. Claimant said that she was in such pain that she went to a hospital emergency room instead. Ms. T helped her out to her car. The claimant said that no one from the employer had discussed with her, one way or the other, what procedure to follow on her last day of work.

An incident report filed on _____ by Ms. C, a manager, described the incident as happening on claimant's "last day." Ms. T was identified as a witness. Questions were directed to Ms. T, who answered them in writing sometime on or about November 4, 1998 (as indicated by the "fax" receipt date line at the top). Asked if claimant performed any work functions, Ms. T answered that she handed out work assignments. She stated that claimant was planning to return back to her workstation after her personal items were carried out to her car. Ms. T's statement was apparently taken by the adjuster on April 27th, but this was not put into evidence.

In a recorded statement that Mr. R gave to the adjuster on April 27, 1998, Mr. R stated initially that claimant was not performing her regular duties when injured because she was no longer employed. Mr. R said that claimant left work around noon on (2 days before the date of injury). Mr. R also said that he would "presume that the (day before the date of injury) really was her last day," and that as far as he was concerned, she was no longer working because she had resigned. However, as one of the facts he assumed in stating that her last day was "technically" the (day before the date of injury), he stated that he believed she had no vacation time left. He said Ms, C paged him the afternoon of the injury and told him about it, and that claimant was not going to pursue any legal recourse. He pointed out that Ms. C was no longer employed by the employer. Mr. R said that he wrote up a performance improvement plan on March 4th to help her become more effective. However, Mr. R said this did not mean she was "written up." He found it "curious" that she was using the stairs because she usually used the elevator. In describing his suspicions, he noted that she was using the stairs on her "last day of employment." He also summarized the events by characterizing her resignation notice as

one stating that _____ was her last day. The following statement also appears in the interview:

ADJUSTER: And you believe that her last day that she would have been an employee of [Employer], a technical employee, would have been the (day before the date of injury).

Mr. R: Yes we can say that, yes.

Mr. R stated that he told claimant that human resources wanted to meet with her for an exit interview but claimant told him she did not have time for that. He said he offered help, if she needed it, to pack up her personal belongings.

Two days later, the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) disputing the claim on the basis that claimant was no longer an employee of the company on that date. The carrier presented no live witnesses, and all witnesses for the employer appeared by statement.

The claimant said that she was unable to start her new job and her son's girlfriend returned the computer that had been supplied by the new employer. However, she was contacted by the new employer in late July about whether she was able to start work, and she did so on July 28, 1998, working from her home as originally planned. The claimant said she could not have worked at her home job because she could not sit up for long, and she was unable to walk due to two sprained ankles. Claimant's treating doctor was Dr. Q, who took her off work until April 30, 1998. Dr. Q wrote in a May 7, 1998, report that her knee and ankles had full range of motion and no swelling or tenderness. Dr. Q advised that physical therapy should continue for her lumbar spine.

The operative definition for analyzing compensability in this case was whether, at the time of her injury, the claimant was in the "course and scope of employment." The definition is contained in Section 401.011(12), and states that it includes:

> [A]n 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.

Employee is defined in 401.012(a) as:

> In this subtitle, "employee" means each person in the service of another under a contract of hire, whether express or implied, or oral or written.

The hearing officer has a discussion regarding termination in his decision, citing Appeals Panel decisions on this matter. However, as the Appeals Panel stated in Texas

Workers' Compensation Commission Appeal No. 93972, decided December 8, 1993, quoting Professor Larson:

> Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of any employee. He is deemed to be within the course and scope of employment for a reasonable period while he winds up his affairs and leaves the premises.
>
> * * * *
>
> Collecting one's personal effects on leaving employment is logically no different from collecting one's pay, since both are necessary incidents of an orderly termination of the employment relationship.
>
> Larson, The Law of Workmen's Compensation, Volume 1A, 1992, §26.10, page 5-132, and §26.40, page 5-340.

Appeal No. 93972 also cited the "paycheck" case of Bryant v. INA of Texas, 673 S.W.2d 693 (Tex. App.-Waco 1984), aff'd, 686 S.W.2d 614 (Tex. 1985), which distinguished an earlier tort case, Ellison v. Tailite, 580 S.W.2d 614 (Tex. App.-Houston [14th Dist.] 1979, no writ), that had opined that post-termination activities were not within the course and scope of employment. The court in Bryant, *supra*, found a fact issue to be present on course and scope for a laid-off worker injured while picking up her paycheck. The Supreme Court, in affirming, stated that if plant practice required the worker to pick up her paycheck, then the injury occurred in the course and scope of employment. The court went on to say:

> We hold that when an employee is directed or reasonably believes from the circumstances she is required by the employer to return to the place of her employment to pick up her pay after termination and an otherwise compensable injury occurs, then such injury is reasonably incident to her employment and is incurred in furtherance of the employer's affairs.

In this regard, whether, at the time of the injury, she was regarded as a "technical employee" on _____, we believe that the appropriate inquiry was whether she was, at the time of her injury, performing activities in furtherance of the activities of her employer. We cannot interpret this phrase as covering only those employees injured in the middle of the contract of hire, rather than the end of the contract.

As we review the evidence, the claimant was not present the afternoon of the day when she handed in her resignation, nor the following day (although she had intended to be there), and the first time she reported back to work was on the morning of Friday, _____, described by at least two employees of the employer as claimant's "last day." There was no evidence controverting her testimony and Ms. T's statement that she made work assignments for the employer, and turned in her building keys and a secure badge. We

believe the great weight and preponderance of the evidence is against the hearing officer's finding of fact that claimant's "last day of work" for the employer was (day before the date of injury) (a date she was not there). We reverse and remand for findings on whether the claimant was, on _____, acting in the course and scope of employment, in accordance with applicable case law.

We further remand on the second issue of disability because it is clear that the hearing officer ruled against the claimant on the matter of disability because he found no compensable injury. There is no independent finding as to whether claimant had the inability to obtain and retain employment equivalent to her pre-injury average weekly wage. If the hearing officer determines that claimant was injured in the course and scope of employment, he must determine the disability issue with reference to its definition under Section 401.11(16). Claimant's testimony carried this period to the date she actually started working for another employer. On the other hand, medical evidence from Dr. Q indicated that her ankle sprains and her knee, two conditions cited by the claimant as basis for inability, had largely resolved in early May. The hearing officer will have to weigh and sort out the evidence on this matter.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge