APPEAL NO. 990488

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 February 3, 1999. She (hearing officer) determined that the respondent (claimant) was injured in the course and scope of her employment on City 2. The appellant (self-insured) appeals this determination, urging error as a matter of law. The appeals file contains no response from the claimant.

DECISION

We reverse and remand.

The background facts of this case are largely undisputed. The claimant worked as a school bus driver. On Saturday, City 2, the claimant was assigned to drive a track team from a school in City 1, to a track meet at a school in City 2. There was no evidence of the actual distance of the trip, but the claimant testified that it was a 20- to 25-minute drive. The claimant said she was paid for the job and not on an hourly basis. She said she left at about 7:00 a.m. and arrived about 7:45 a.m. She also said that she was not permitted to stop en route for anything. She was not to return to City 1, but was to wait in City 2 until the end of the track meet to bring the team back. She also testified that she was given no directions from her employer about obtaining meals and refreshments.

The claimant testified that she normally has only a cup of coffee for breakfast. She said she did not have her coffee yet that day. After letting the students off the bus, because the concession stands at the track meet had not yet opened, she said, she drove the bus from the track meet to find coffee. In the process, she collided with an overpass and suffered whiplash-type injuries.

The claimant argued in the CCH that, under the personal comfort doctrine, her injury was compensable. The hearing officer agreed and decided this question solely on the basis of this doctrine with the following rationale:

> In this case since the Claimant left the track for a cup of coffee because the concession stands were closed, the personal comfort and convenience doctrine would apply.

In its appeal, the self-insured argues that, if this case were assumed to be analogous to a going to lunch off the premises of the work-site and not simply a "break to relax," the injury was not compensable. It also argues that the personal comfort doctrine applies only to cases on the premises or in close proximity to the premises of the work site, which, in this case, was the track field at the school in City 2.[1]

[1] It was not asserted by the claimant that the work premises were the school bus regardless of where she might drive that school bus, and we do not address that question.

The Supreme Court of Texas has described the personal comfort doctrine in the following terms:

> An employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment . . . .

Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243, 245 (Tex. 1985). Because by their very nature, acts of personal comfort are "incidental" to the job, the doctrine generally applies only to activities, such as meals, on the employer's premises. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 941362, decided November 28, 1994. *Compare* Texas Workers' Compensation Commission Appeal No. 970317, decided April 9, 1997, where the doctrine was found not applicable because the break from work was a three-hour drive from the work site. In Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995, the Appeals Panel indicated that the personal comfort doctrine may apply to an off-premises lunch "in special or exceptional circumstances," but not normally in that case where "the claimant chose to leave the premises and have lunch where he pleased." *See also* Texas Workers' Compensation Commission Appeal No. 962581, decided February 5, 1997, which reiterated that only in special circumstances does the personal comfort doctrine apply to an off-premises meal.

In the case we now consider, there was no evidence presented about where the accident occurred in relation to distance from the track field. Arguably, the only "special circumstance" relied upon by the hearing officer was her comment, without supporting finding of fact, that the "concession stands were closed." We do not necessarily agree that the lack of open snack facilities at the work location at the time the claimant desired a cup of coffee in itself constitutes "special circumstances" that would make the personal comfort doctrine applicable in this case, particularly in the absence of other evidence or findings about the length of the workday or when those concessions would open. Of equal concern to us is the lack of findings of the distance away from the track field that the accident occurred. By definition, personal comfort is incidental to employment. The further one goes to seek personal comfort, the less likely does it became incidental to employment. For these reasons, we reverse the findings of the hearing officer that the claimant's injury was sustained in the course and scope of employment by virtue of the personal comfort doctrine and remand this issue for the further development of the evidence and express findings of fact of the "special circumstances" that support application of the personal comfort doctrine in this case.

We may affirm a decision of a hearing officer on any theory of law reasonably supported by the evidence. *See* Texas Workers' Compensation Commission Appeal No. 982451, decided December 2, 1998. In this case, the undisputed evidence raised the question of whether, under the special mission doctrine, the injury occurred in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 972294, decided December 29, 1997. Although the claimant seemed to primarily rely on the personal comfort doctrine to establish compensability, other evidence about the nature of the claimant's duty on City 2, and whether this case involved "breakfast" or a snack was raised and commented on in the self-insured's appeal. We thus consider the special mission question to have been actually litigated. For this reason, on remand, the hearing officer should make appropriate findings of fact and conclusions of law on the applicability or not of the special mission doctrine to the issue of course and scope.

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 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.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Thomas A. Knapp
Appeals Judge