APPEAL NO. 990516

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 January 29, 1999. The issues at the CCH were injury and disability. The hearing officer concluded that the respondent (claimant herein) sustained a compensable injury on _____, and had disability from July 29, 1998, through the date of the CCH. The appellant (carrier herein) files a request for review questioning the hearing officer's reliance on the personal comfort doctrine and/or the access doctrine in finding the claimant's injury compensable and points to distinctions between the case under review and other cases in these areas. The claimant responds that there is sufficient evidence to support the decision of the hearing officer and that the claimant was in the course and scope of employment under the personal comfort doctrine.

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.

Most of the relevant facts of the case are not in serious dispute. There were two witnesses at the CCH--the claimant and Ms. L, the employer's human resources and benefits manager. The claimant testified that on _____, she had been employed for two weeks with (the employer). The claimant testified that the building in which she worked had the name of the employer displayed on the building. The claimant stated that she worked as a data entry operator on the second floor of the building. The claimant also said that she did not know who owned the building or if there were other businesses in the building. The claimant testified that her shift began in the mid-morning and she was given one hour for lunch beginning at 3:00 p.m. The claimant further stated that there are approximately 75 employees in her section and that all employees in her section take lunch at the same time. She testified that the employees in her section were not allowed to eat lunch in the work area, but were allowed to eat lunch in other areas of the building or to leave the building for lunch.

The claimant testified that she did not have a car and so on _____, she got lunch from a vending machine and tried to find seating in the employer's break room. The claimant said that there was no available seating in the break room so she went out to an atrium adjoining the break room where there were tables and chairs. The claimant stated employees were allowed to eat lunch in one of the break rooms, in the atriums that adjoined the break rooms, on the stairs of the building and standing in the hallways. She testified that employees were also free to leave the building during lunch. The claimant further testified that when she went to sit down in a chair at a table in the atrium, the chair tipped over and she fell and was injured.

Ms. L testified that the employer leases space in the building from another company that actually owns or manages the building. She said that there are two break rooms on

the first floor and each is next to an atrium. She stated that the employer does not own or control the atriums but does use them. She testified one of the break rooms is sometimes used for training, but that it should not have been in use for training on the day of the claimant's injury. Ms. L said that employees are not paid during the one hour lunch break. She stated that employees may leave the building for lunch or remain in the building. Ms. L testified that there was no advantage to the employer for data entry employees to stay in the building during lunch since the whole section was closed for lunch.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. On _____, the Claimant was injured when she fell in the atrium which was in the immediate vicinity of the work for Employer.

3. The inability of Claimant to obtain and retain employment at wages equivalent to the preinjury wage from July 29, 1998, through the date this hearing was held in January 29, 1999 was the result of the injury Claimant sustained while working for Employer.

CONCLUSIONS OF LAW

3. On _____, Claimant sustained a compensable injury.

4. Claimant had disability from July 29, 1998 through the date this hearing was held on January 28, 1999.

We note a conflict between Finding of Fact No. 3 and Conclusion of Law No. 4. We also note that the record indicates that the CCH was actually held on January 29, 1999. We therefore reform Conclusion of Law No. 4 to reflect "January 29, 1999" rather than "January 28, 1999."

The thrust of the carrier's argument is that since the claimant was injured during an unpaid lunch break while not on the employer's premises her injury is not compensable. The carrier argues that under our decision in Texas Workers' Compensation Commission Appeal No. 950215, decided March 30, 1995, which was cited by the hearing officer in her decision, an unpaid lunch taken off premises is generally not compensable.[1] The carrier does not disagree with the language in Appeal No. 950215 stating that injuries sustained during on-premises lunches are generally compensable under the personal comfort doctrine, which provides that acts done for the employee's personal comfort during the workday, such as eating and using the bathroom, are generally compensable. The carrier

[1]The dissenting opinion in Appeal No. 950215 argued that under the facts presented in the case the lunch in that case was an exception to this general rule and should have been held compensable under Mapp v. Maryland Casualty Co., 730 S.W.2d 658 (Tex. 1987).

simply argues that this doctrine does not apply to lunches taken off the premises and argues that this was the situation in the present case.

The carrier recognized that in Texas Workers' Compensation Commission Appeal No. 970064, decided February 25, 1997, we held that the personal comfort doctrine extended to cover an employee who was injured in a parking lot adjacent to the employer's premises which was neither controlled nor owned by the employer. The carrier seeks to distinguish that case from the present one based upon the fact that in Appeal No. 970064 the injured employee was on a paid break while in the present case the employee was on an unpaid lunch break. In Appeal No. 970064 we stated as follows:

> We also distinguish, and find not applicable, off-premises lunch cases and deviation from the course and scope of employment cases cited by carrier. Neither party raised, nor litigated, the access doctrine at the CCH and, therefore, we omit comment on that line of cases. However, we do somewhat agree with carrier that the personal comfort doctrine is a fairly narrowly drawn exception, is perhaps even more limited when it occurs off premises, and should require some "special or exceptional circumstances" for it to apply. In the instant case, some of those "special or exceptional circumstances" the hearing officer could have considered were the proximity of the parking lot to the employer's (leased) premises, whereby an argument could be made that the lease of the store also gave the employer a right to use the parking lot and, consequently, the parking lot was a part of the premises, the fact that claimant was a seamstress working at a sewing machine desiring to stretch her legs, claimant's testimony that the employer's "cafeteria" (break room) had only room for a table and four chairs, claimant's testimony that Mr. A told her that she would have to go outside to exercise or stretch her legs and the apparent lack of a space inside the store where employees could take a stretch break. The hearing officer apparently considered these factors when he stated in his discussion:
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> > The Claimant was on her break and one of the few places available to her to walk was the parking lot in front of the store. She was taking a recreational stretching of her legs in an area immediately adjacent to the Employer's premises. She would not have been in that parking lot "but for" her employment with the Employer. Her injury arose out of, was incident to, and was in the course and scope of her employment.

In the present case, some of the "special or exceptional circumstances" mentioned in Appeal No. 970064 were present. There was evidence that claimant only went to the atrium for lunch after finding that there was no seating available in employer's break room. There were tables and chairs in the atrium that was immediately adjacent to the break room. The claimant did not testify that she was directed to use the atrium to eat lunch, but did testify that the employer permitted this and it was often done. While there was evidence that the employer was not the sole tenant of the building in which the claimant

worked, it was undisputed that it was the primary tenant. It is also clear that the employer permitted its employees to use the common areas of the building to eat lunch and the atrium was adjacent to the employer's break room. Given these circumstances, we do not find error in the hearing officer's Finding of Fact No. 2 and Conclusion of Law No. 3 quoted above.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge