APPEAL NO. 990634

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, 1999. The issues at the CCH were whether the respondent (claimant) was injured in the course and scope of employment when involved in a motor vehicle accident (MVA) on _____, and had disability. The hearing officer determined that the claimant was injured in the course and scope of his employment in an MVA on _____, and had disability from July 17, 1998, and continuing through November 1, 1998. The appellant (self-insured) appeals urging that the claimant was on a personal errand at the time of the MVA, that the claimant did not sustain an injury, and that the claimant did not have disability. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant was employed as an inspector by the self-insured. The claimant was provided a vehicle and his job required him to travel to different inspection sites in the city. On the morning of _____, the claimant performed inspections and, at noon, the claimant returned to the office and signed in. The claimant testified that he told Mr. N, the acting supervisor, that he was going to the benefits office at city hall during lunch to borrow against his 401K. The claimant testified that he went to city hall and when he finished, he called Mr. N from the benefits office and told Mr. N that he was leaving to do an inspection. After the claimant left city hall, he called the dispatcher on his mobile phone to get the specific address for the inspection. The claimant testified that when he left city hall he knew the street where he was going to do the inspection, but not the specific address. Within two minutes of calling the dispatcher, the claimant was involved in an MVA. The claimant testified that the route he was taking at the time of the MVA was to the inspection site, not the office. The claimant testified that the MVA caused injuries to his left shoulder, neck, mid back and low back.

The claimant testified that following the MVA, he received medical treatment from Dr. E on July 17, 1998. Dr. E diagnosed cervical radiculitis, left shoulder traumatic arthropathy, thoracic myofascitis, and lumbar facet syndrome. The claimant testified that Dr. E took him off work on July 17, 1998, and then released him to light-duty status, four hours per day. The claimant worked light duty, at reduced wages, from August 9 through November 1, 1998. The claimant stated that on November 1, 1998, he resigned his employment. The claimant testified that on November 3, 1998, he began a new career with a different employer.

The self-insured contends that the claimant was on a personal errand at the time of the MVA, and therefore was not in the course and scope of employment at the time of the MVA. In the claimant's recorded statement taken on July 27, 1998, he states that when he left city hall, he was returning to the office. The self-insured presented evidence that the

route the claimant was taking from city hall was a route back to the office, not a route to the inspection site.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Course and scope of employment" means, in pertinent part, "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer. . . ." The definition of "course and scope of employment" contained in Section 401.011(12) includes activities conducted on the premises of an employer or at other locations, but does not generally include transportation to and from the place of employment except in certain limited circumstances.

The general rule is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is not compensable. American General Insurance Co. v. Coleman, 303 S.W.2d 370 (Tex. 1957). The rule is known as the "coming and going" rule. The rationale of that rule is that "in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). However, if the transportation is furnished as a part of the contract of employment or under the employer's control, the transportation to and from work is in the course and scope of the employment. Section 401.011(12)(A)(i) and (ii). If an exception to the coming and going rule applies, an employee must still show that he was engaging in the furtherance of his employment. Additionally, the term "course and scope of employment" does not include "travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee . . . ." Section 401.011(12)(B). Exceptions to this "dual purpose" doctrine apply, and the travel is in the course and scope of employment, when the travel would have been made even if there were no personal affairs of the employee and would not have been made had there been no business of the employer to be furthered. *Id.*

The hearing officer found the claimant credible in his testimony regarding the route and the destination of his trip at the time of the MVA. The hearing officer found that at the time of the MVA the claimant was driving a reasonable route from city hall to do an inspection on Jefferson Street in furtherance of the business affairs of employer. In this case, it is undisputed that claimant's job required him to be in the field to perform inspections and that claimant was not required to follow any particular route to the inspection site. The hearing officer did not find persuasive the self-insured's theory that at the time of the MVA the claimant was returning to the office.

The self-insured argues in the alternative, that even if the claimant were traveling to the inspection site, the "dual purpose" rule applies because the accident occurred due to the personal errand he ran. The carrier asserts "but for the errand, he would not have been at the intersection." We note that the hearing officer did not analyze the instant case under the dual purpose doctrine. For the "dual purpose" doctrine to apply, two prongs must be

met: both the furtherance of the affairs or business of the employer and furtherance of personal or private affairs of the employee. The evidence does not support that the claimant was furthering both the affairs or business of the employer and his personal or private affairs at the time of the MVA. The claimant's testimony was that his personal errand was completed at the time he left city hall. The claimant testified that at the time of the MVA, he was traveling for employer's business purposes only. Whether claimant was on a personal errand, or had completed the personal errand and was in furtherance of the affairs or business of the employer, was a factual determination for the hearing officer to resolve and we will not substitute our judgment for that of the fact finder.

The claimant had the burden to prove that he sustained an injury on _____, and had disability. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992) and that objective medical evidence of disability is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. This is so, even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We find there was sufficient evidence to support the determination of the hearing officer that the claimant was injured in the course and scope of employment in an MVA on _____, and had disability beginning July 17, 1998, and continuing through November 1, 1998.

Despite the hearing officer's conclusion that disability was from July 17 through November 1, 1998, the carrier argues that disability did not continue subsequent to November 1, 1998. The carrier attached a document to its appeal, which was not in evidence, dated March 1, 1999, the date of the CCH. The carrier offers the document as "newly discovered evidence" in support of its contention that disability did not continue after November 1, 1998. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the document attached to the appeal, but not in evidence, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the document attached to the appeal which was not offered at the hearing does not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not

cumulative; and that it is so material it would probably produce a different result upon a new hearing. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

We affirm the decision and order of the hearing officer.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge