APPEAL NO. 991158

Following a contested case hearing held on May 11, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) was injured in the course and scope of her employment on _____, and that she had disability from January 16 through January 24, 1999, and from January 29 through March 22, 1999. The appellant (carrier) appeals both the injury determination and the disability determination, asserting that claimant's injury did not occur in the course and scope of her employment and that since she did not sustain a compensable injury, she did not have disability. The file does not contain a response from claimant.

DECISION

Reversed and rendered.

The essential facts in this case are not in dispute. Claimant testified that she is employed as a full-time salesperson in the ladies' shoes department of the local (employer); that her work shifts change from time to time; that on January 14, 1999 (all dates are in 1999 unless otherwise stated), her shift began at 10:00 a.m.; that before her shift ended that day, she was given a paper with shift information but was busy and did not have time to look at it when it was handed to her; that she did not take the document with her when her shift ended and she left for the day; and that the next morning, she went to the store at around 9:15 a.m. to look at the document to ascertain when her shift was to begin that day because it was possible that she was either to start work again at 10:00 a.m. that day or her shift had been changed. She also stated that there was no one she could call that morning to get the information. She was not asked what time the store closed the previous evening. Claimant further testified that if her shift was to commence at 10:00 a.m. that day, _____, she had her hair already fixed and her makeup on and so she would only have to go home, about seven minutes from the store, and change into her work clothes. She said that after going into the store and learning that her shift was to commence at 5:00 p.m., she departed the store by the dock entrance that was customarily used by the employees and that she sprained her ankle descending the steps.

Claimant further testified that after her injury, the employer sent her to Dr. T; that Dr. T treated her ankle with an air cast and crutches and took her off work; that she saw Dr. T again on or about January 19th and he kept her off work; that on January 26th, Dr. T released her to return to work and she worked for three days but that on January 29th at a follow-up visit, Dr T said her ankle was not healing properly and referred her to Dr. S; that Dr. S put a cast on her ankle, obtained a bone scan, and kept her off work for eight weeks; and that she was released by Dr S to return to work as of March 22nd and that since March 23rd she has been working for the employer. Claimant's medical records corroborate the dates to which she testified that Dr. T and Dr. S had her off work.

The carrier does not challenge findings that claimant was on her employer's premises at 9:15 a.m. on _____ to obtain a new work schedule; that she injured her right ankle when she fell on the employer's premises on _____; and that she was unable to work because of this injury from January 16th through 24th and again from January 29th through March 22nd.

The carrier does appeal findings that claimant was not on the employer's premises for personal business; that claimant was on a "special mission" to obtain her new work schedule; that claimant was not prohibited from being on the employer's premises at this time; that claimant was furthering the interest of her employer by obtaining her new work schedule; and that claimant reasonably believed she needed this new work schedule to know which shift she was assigned to work.

Section 406.031(a) provides, in part, that "an insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if the injury arises out of and in the course and scope of employment." Section 401.011(12) defines "course and scope of employment" to mean "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 definition goes on to state that the term includes an activity conducted on the premises of the employer or at other locations but does not include transportation or travel subject to certain exceptions. Claimant had the burden to prove by a preponderance of the evidence that an injury occurred in the course and scope of her employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. Whether an injury occurred in the course and scope of employment is generally a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 91036, decided November 15, 1991.

In ESIS, Inc., Servicing Contractor v. Johnson, 908 S.W. 2d 554 (Tex. App.-Fort Worth 1995, writ denied), a case involving a police officer who was injured at home when his revolver, which he had been cleaning, accidentally discharged, the court noted that the 1989 Act provides a two-part definition of course and scope of employment, namely, 1) "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 2) "an activity performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." The court further stated the following:

> Course and scope of employment is not limited to the exact moment when the employee reports for work, the moment when the employee's labors are completed, nor to the place where the work is done. [Citation omitted.] If the injury is the result of an activity that originates from the employment, and is received while the employee is actually engaged in furthering the employer's business, the injury is deemed to have been sustained within the course and scope of employment. [Citations omitted.] An injury originates from the

employment when it results from a risk or hazard that is reasonably inherent or incident to the work or business. [Citation omitted.]

The parties at the hearing discussed the potential applicability of the "special mission," "personal comfort," and "access" doctrines to the facts of this case. As was stated in Texas Workers' Compensation Commission Appeal No. 971607, decided September 30, 1997, the issue to be determined is whether the claimant was injured in the course and scope of employment and any theory supporting or refuting that proposition could be presented by the parties and considered by the hearing officer. The "special mission" doctrine is an exception to the general rule that an injury occurring in the use of the public streets or highways in going to or returning from work is not compensable, the so-called "coming and going" rule. *See generally*, American General Insurance Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957); Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). The special mission exception is codified in Section 401.011(12)(A)(iii). It seems apparent that claimant was not in the process of being transported on the public streets to or from her place of employment at the time she injured her ankle. *See* Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994. Accordingly, we find the "special mission" doctrine inapplicable and disregard as surplusage Finding of Fact No. 6 that claimant was on a special mission to obtain her new work schedule.

The "personal comfort" doctrine has to do with employee's being injured at work while engaged in acts of a personal nature which are necessary to the employee's health, comfort, and convenience such as quenching thirst or relieving hunger. Such acts are considered incidental to the employee's service and application of the doctrine relieves such an employee from being found to have deviated from the course and scope of employment. *See* Texas Employers Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985); and Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995. It seems apparent that the personal comfort doctrine does not apply to the case.

The "access"doctrine was described, in the majority opinion, as an exception to the general rule that injuries received while going to or coming from work are not compensable although a dissenting opinion took some issue with that description. Appeal No. 971607, *supra*, citing Texas Workers' Compensation Commission Appeal No. 93270, decided May 24, 1993. The Appeals Panel stated that under the access doctrine, "compensability (of injury) has been allowed where the employer has evidenced an intention that the particular access route to [sic] be used by the employee in going to and from work, and where such access route or area is so closely related to the employer's premises as to be fairly treated as part of the premises." *See generally*, Kelty v. Travelers Insurance Company, 391. S.W.2d 558 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.).

As noted, findings that claimant was on the employer's premises when injured are not disputed. In Appeal No. 971607, *supra,* the majority opinion found legal error in the hearing officer's application of the access doctrine where the evidence showed that the employee, during her mid-shift break, went out to the employer's parking lot to check on the condition of her car and was injured when she slipped on ice and fell, because the employee was not in the act of or intending to leave work and thus the case was not one of "accessing" the employer's premises but rather one of activity on the premises. The majority then went on to apply "the traditional dual requirements of the definition of course and scope, "citing Texas Employers Insurance Ass'n. v. Page, 553 S.W.2d 98 (Tex. 1977), and found that while the first prong was met (the injury must be of a kind or character that had to do with or originated in the employer's work), the second prong was not met (the injury must have occurred while the claimant was engaged in or about the furtherance of the employer's affairs or business).

In Texas Workers' Compensation Commission Appeal No. 950021, decided February 16, 1995, the employee drove his car to the employer's premises sometime after his bus driving shift had ended to pick up his paycheck and was injured in a motor vehicle accident in the employer's parking lot. The hearing officer determined that the injured employee was not injured in the course and scope of employment and the Appeals Panel affirmed. While testifying that the employer encouraged him to pick up his paycheck at the time he did, he did not testify that he was required to pick up his pay on the premises. The employee relied on INA of Texas v. Bryant, 686 S.W.2d 614 (Tex. 1985) which concerned an employee who returned to her place of employment to receive pay several days after ceasing employment and fell on the premises. The majority opinion stated that if the employer's practice required the employee to return to pick up her check, or if she reasonably believed that she was required to return to pick up the check, then her injury would be in the course and scope of employment. The decision in Appeal No. 950021 also cited McCoy v. Texas Employers Insurance Association, 791 S.W.2d 347 (Tex. App.-Fort Worth 1990, writ denied) in which decision the appellate court affirmed the district court which ruled that the employee was not in the course and scope of her employment when injured. In that case, the employee was injured at the office of her employer where she had gone for the sole purpose of picking up her paycheck before her shift began and there was evidence that she could have picked up the paycheck in person during her shift, could have called ahead and had someone else pick it up for her, could have had it mailed to her, or could have had it deposited directly into her account. The decision in Appeal No. 950021 stated that "[t]he rationale of Bryant or some similar case that reports an employee on, or within access to, the premises is necessary to recovery because claimant was not on the premises to work"; that the court in Bordwine v. Texas Employers' Insurance Association, 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, pet. denied) ruled as a matter of law that a nurse falling while exiting her car in a hospital parking lot, who arrived for the "purpose of going to work," was injured in the course and scope of employment; and that "cases such as Bordwine acknowledge the access test to be whether the accident occurred within a reasonable margin of time and space to the place where the work is to be done. *See* Turner v. Texas Employers' Insurance Association, 715 S.W.2d 52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.)."

While claimant's purpose in going to the store on the morning of _____ bore some relationship to her work, as distinguished from having merely gone there as a customer, the evidence does not establish that the employer required claimant to go the store, on her off-duty time, to ascertain her work hours nor does it establish that claimant reasonably believed that she was required to do so. Based on the rationale in Appeal No. 950021, *supra*, which is, in turn based on the rationale in Bryant, *supra,* and McCoy, *supra*, we find error in the hearing officer's determination that claimant was injured in the course and scope of her employment. A compensable injury is a prerequisite for disability (Section 401.011(16)).

The decision and order of the hearing officer is reversed and a new decision is rendered that claimant did not sustain an injury in the course and scope of her employment and did not have disability.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge