APPEAL NO. 991909

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 August 3, 1999. With respect to the sole issue before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____. The appellant (self-insured) appeals, urging that the hearing officer erred in failing to find that no compensable injury occurred because the claimant was traveling to an alternate work site, and erred in finding that the claimant's personal deviation was "inconsequential." The claimant replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The essential facts of this case are undisputed. The claimant worked as an operator at waste water treatment plants. The claimant reported for work every morning at headquarters in Town, and participated in required stretching exercises and calisthenics. After the exercises, the claimant drove a company-owned vehicle to the (treatment plant) located west of Town, off of (FM 1). The claimant drove to the treatment plant almost every workday, and had driven to the treatment plant since 1973. The claimant testified that the employer did not prescribe any particular route for travel. The most direct route through Town was west on (Street name 1) to (Highway 1) then (FM 2) to FM 1. Another route through Town was west on Street name 1, north on (Street name 2), and west on (Street name 3) which turns into FM 2.

On _____, the claimant reported to work and performed his exercises at headquarters. The claimant testified that he did not eat breakfast prior to exercising because he said that it made him nauseous. After exercising, the claimant proceeded to the treatment plant. He traveled north on Street name 2 and decided to stop and get an empanada at a bakery at the corner of Street name 2 and (Street name 4). The claimant turned left on Street name 4 and parked the truck. After leaving the bakery, he turned right at the next block onto (Street name 5), which runs parallel to Street name 2 and also intersects Street name 3. At the intersection of Street name 5 and (Street name 6), the claimant ran a stop sign and was involved in a collision. The claimant testified that after leaving the bakery, he did not return back to Street name 2 because it had more traffic and would have required him to drive an extra block. According to the claimant, employees were allowed to stop at convenience stores to get food, as long as it was close to the route they were traveling, but were not allowed to go out of their way to purchase food.

The self-insured appeals the following Findings of Fact:

FINDINGS OF FACT

12. After a momentary stop at the bakery the Claimant turned onto Street name 5 and proceeded directly to the water treatment facility. This stop was a minor, inconsequential deviation that was within the Employer's limitations of brief stops for food and drink.

5. Claimant was in the course and scope of his employment at the time of the accident.

The self-insured argues that the claimant's travel to the treatment plant was travel to an alternate work site, that the claimant was traveling on a public roadway while traveling to work, and therefore the injury is not compensable. In the alternative, the self-insured asserts that the claimant deviated from the first and second most direct routes and was at the point of injury as a result of having deviated from the course and scope of his employment. The claimant argues that the "special mission" exception contained in Section 401.011(12)(A)(iii) applies in this case.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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." Section 401.011(12). 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; one of these, the "special mission" exception, arises where the employee is directed in his employment to proceed from one place to another. Section 401.011(12)(A)(iii).

The self-insured cites Texas Workers' Compensation Commission Appeal No. 941340, decided November 10, 1994, and Texas Workers' Compensation Commission Appeal No. 990949, decided June 17, 1999, in support of its argument that the claimant was traveling to an alternate work site. In Appeal No. 941340, *supra*, the claimant was to take money from her work site to the administrative headquarters of the employer; she took the money home, and was injured in an automobile accident the next morning taking the money from her home to the administrative headquarters of the employer. The hearing officer determined that the claimant was injured on her way from her home to work and was not in the furtherance of the employer's business, and the Appeals Panel affirmed that determination. In Appeal No. 990949, *supra*, the claimant was directed to go into the office

early, he left his home in a company-owned truck, stopped to get gasoline, and was subsequently hit in an intersection on the way to the company office. The Appeals Panel reversed the hearing officer's decision that the claimant was in the course and scope of his employment, stating that at the time of the injury, there was no business being furthered by the claimant's activity and that he was merely going to his place of employment when the injury occurred. The facts of this case are clearly distinguishable from those cited by the self-insured. In this case, the claimant had already reported to work at the employer's headquarters and his employment had commenced prior to the travel to the treatment plant. The claimant was not traveling to his place of employment, rather he was traveling during employment to an assigned location.

The hearing officer found that the claimant's stop at the bakery was a minor, inconsequential deviation that was within the employer's limitations of brief stops for food and drink. In General Ins. Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), the court stated that an injury is not compensable if received during a deviation by the employee from the course and scope of employment, but after the deviation is over, injuries thereafter received are compensable. In Lesco Transportation Company, Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ), the court stated as follows:

> Stated in converse terms, the rule is that when an employee abandons and turns aside from the course and scope of his employment, such deviation defeats a claim for compensation. Such deviation occurs if at that time of the injury the employee is engaged in and pursuing personal work or objectives that do not further the employer's interest. An injury received under such circumstances is not from a hazard that has to do with and originates in the employer's business, work, trade or profession. [Citation omitted.]

The self-insured cites Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995, in support of its argument that the claimant had deviated from employment. In Appeal No. 950057, an employee of a car dealership was instructed to drive a customer home in the customer's vehicle and return the vehicle to the dealership to be serviced. On the way back, the employee decided to stop at a convenience store for lunch and coffee, which required a left turn. As the employee was entering the left turn lane, he was hit by another vehicle. The Appeals Panel reversed the hearing officer and rendered a decision that the injury was not compensable, stating that the fact that the accident occurred before the turn was completed did not alter the undisputed fact that he had left the direct route back to the dealership. The self-insured also cites Texas Workers' Compensation Commission Appeal No. 961565, decided September 25, 1996. In Appeal No. 961565, an employee was directed to make a bank deposit and mail letters while he was on his lunch break. The employee picked up some personal mail of his own while he was at home for lunch and proceeded to the bank where he made the deposit. The employee then proceeded to the post office when he decided to stop at a convenience store to buy some stamps for his personal mail. The employee was proceeding to turn right into the convenience store parking lot when he was involved in a

motor vehicle accident. The Appeals Panel reversed the hearing officer and rendered a decision that the injury was not compensable.

What distinguishes this case from those cited by the self-insured is that the injury did not occur during a deviation from the course and scope of employment. The claimant had obtained his food and was traveling to the treatment plant at the time of the injury. It was undisputed that the claimant's employer allowed him to stop for food that was on the route and the bakery was on the route. The employer did not require the claimant to take any particular route to the treatment plant. The hearing officer found the claimant credible in his testimony regarding his rationale for the route he was taking. The route was parallel to and one block west of Street name 2, where, according to the self-insured, if the claimant had returned to, the deviation would have ended. 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. 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. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

CONCUR IN RESULT:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge