APPEAL NO. 992018

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 25, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that appellant (claimant) was not in the course and scope of her employment when she sustained injuries on _____ (all dates are 1999).

Claimant appealed, contending that she had been required to park in an assigned parking garage some four blocks from her office and that under the "access doctrine" a fall that she had on an uneven sidewalk between the parking garage and her office was compensable. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

Although claimant finds some minor fault with some of the hearing officer's factual determinations, the material background facts are not much in dispute. Claimant had been employed by (employer) for about a week. During her orientation, she was assigned a parking space in a parking garage about four blocks from her office. The hearing officer, in his Statement of the Evidence, recites the specific street names of the area involved and Claimant's Exhibit No. 8 has a map of the area which is referred to as the Capitol Complex. Also in evidence are rules regarding parking, including provisions that parking on a public street by a state employee that has a parking permit is prohibited. Claimant testified that on _____, she parked in her assigned parking space in the parking garage and proceeded to walk to her office. Claimant testified that about two blocks (the hearing officer says three blocks) from her office claimant fell on an "uneven edge of a concrete sidewalk" (per the hearing officer) sustaining contusions and abrasions to both knees and right hip and a broken right wrist. The hearing officer made a disputed fact finding that the sidewalk where claimant fell was maintained by the city, not by the employer or the state. Claimant, in her appeal, asserted that the maintenance responsibility "has not been clearly established by fact finding." We disagree. Claimant said she reported the uneven sidewalk to the city, which eventually made some repairs.

Basically, at issue here is whether the going to and from the place of employment rule set out in Section 401.011(12) applies. That section defines course and scope of employment and specifically "does not include: (A) transportation to and from the place of employment" unless an exception applies. The rationale for this transportation to and from work exclusion from course and scope is in the fact that an injury resulting during such transportation is a hazard to which the general public is exposed to on public thoroughfares rather than risks and hazards inherent in or originating in the employment. Texas General

Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). In this case, claimant was walking on a public street and had no greater risk of injury than that to which the general public is exposed. Claimant, in her appeal, argues that the area of the parking garage and route to her office building were "in the Capitol Complex traveled primarily by State Employees." While the garage and route claimant traveled may generally be considered to be in the "Capitol Complex" there was no evidence that it was primarily used by state employees and even if it was, the public street and sidewalk would somehow then become part of the employer's premises.

Claimant asks us to apply the access doctrine. The access doctrine has been recognized as an exception to the going to and coming from work rule. Texas Workers' Compensation Commission Appeal No. 950156, decided March 9, 1995, cited Standard Fire Insurance Co. v. Rodriguez, 645 S.W.2d 534, 538 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) for the proposition that:

> If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect, a part of the employer's premises, the injury is one arising out of and in the course of the employment as though it had happened while the employee was engaged in his work at the place of its performance.

In Appeal No. 950156, the employee was parked on a public street, and had a special sticker allowing her to do so, about a block from the building where she worked. The employee, in that case, sustained an injury in a fall while avoiding a car, and relied on Rodriguez in support of her argument that she was in the course and scope of her employment at the time of her fall. The Appeals Panel held:

> However, claimant's reliance on those decisions is misplaced in that they are factually dissimilar to the case at issue. In Rodriguez, the employee was injured when she fell descending stairs attached to the loading dock. The Rodriguez court held that "appellee although not on the employer's premises, was at or near the place of work and on a means of ingress and egress impliedly permitted and recognized by the employer as being a means of access to the work." The court then emphasized that the employer had rights in and to the loading dock area and that it was used to further the employer's business. Finally, the Rodriguez court noted that only the employees of the employer and the other tenant of the building or persons doing business with either company used the loading dock; therefore, the risk incurred by the claimant was recognized as one to which the general public, having no business on or about the premises, would not have been exposed.

Appeal No. 950156 is cited for the general proposition that an injury going and coming on a public street is not compensable.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 960959, decided July 1, 1996, Kelty v. Travelers Insurance Company, 391 S.W.2d 558 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.) and Texas Workers' Compensation Insurance Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974). Appeal No. 960959 contains some instructive language and deals with a situation where the employee "was proceeding toward her work from a parking garage owned by the employer" when she was hit by a car while crossing a public street. The Appeals Panel approved of the hearing officer's language which stated:

> It has been held that whether an injury comes within the access doctrine is generally a question of fact. It is uncontroverted in this case that the claimant was struck by a private vehicle in a public street. There was no showing by the claimant that the employer maintained or exercised control over this public thoroughfare. The employer did not maintain the sidewalk at this intersection, nor there was [sic] a showing that the employer intended this particular access route to be used by the employees in preference to any other area. [Citations omitted.]

Appeal No. 960959 is also generally cited for the proposition that under the access doctrine an injury on a public street is not compensable. Kelty is a case which found compensable injuries sustained when an employee slipped on an icy sidewalk 10 to 12 feet from the employer's building, which sidewalk was found to be an appurtenance to the premises leased by the employer who was responsible for maintaining it. However, the court in Matthews wrote that Kelty had carried the access exception "as far as it reasonably could be, without an amendment to the Workmen's Compensation Act," stating that "no case has extended the 'access exception' out into the public streets where other members of the public are subject to the same hazard." And even in Kelty it is noted that the courts have said that under the access doctrine the "access areas are so closely related to the employer's premises as to be fairly treated as a part of the employer's premises."

In this case, claimant was injured on a public sidewalk, either two or three blocks from her office building. While the employer may have provided claimant a parking place in the parking garage, the employer did not direct the claimant in what route to take to work. As in Appeal No. 960959, there is no showing here that the employer maintained or exercised any control over the public thoroughfares within the Complex, nor did the employer have control or a maintenance responsibility over the section of the sidewalk where claimant fell. Nor is there any showing that the employer directed this particular access route, whether it was the most direct route or not, to be used by the employees who parked in the parking garage in preference to any other route.

We hold that the hearing officer's decision is not contrary to the law and facts in this case. Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and

preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge