APPEAL NO. 992479
FILED DECEMBER 20, 1999

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 12, 1999, a contested case hearing (CCH) was held in _____, Texas, with (hearing officer) presiding as hearing officer. The issues concerned whether the respondent, who is the claimant, sustained an injury in the course and scope of employment on [Date of Injury]; whether he had disability from his injury; and whether the employer made a bona fide job offer.

The hearing officer determined that the claimant sustained an injury in the course and scope of employment on [Date of Injury], while furthering the interests of his employer; that he had disability from April 9 through October 12, 1999; and that the offer of employment made to the claimant on April 13th was not a bona fide offer and exceeded the claimant's physical capabilities.

The appellant (carrier) has appealed. It argues that the personal comfort doctrine does not apply because the claimant was off duty and his attendance at breakfast was a personal errand. The carrier argues that at the time of his injury claimant was doing "nothing" to further the employer's business interests. It argues that a bona fide offer of employment was made and rejected by the claimant. The carrier further argues that the chiropractor whom claimant called his treating doctor was not. The carrier raises, as it did at the CCH, the hypothetical theory that the employer should, by the logic of the hearing officer, be liable for off-duty injuries in topless bars that might occur. Disability is appealed as well. The claimant responds that compensability of the injury here is well within the personal comfort doctrine and other reported cases involving workers whose employment involves travel. The claimant points out that he would not have been at the place he was injured were it not for his service for the employer as part of the driving team. The carrier has filed a supplemental response but this has not been considered; it is untimely as an appeal and the 1989 Act makes no provision for considering supplemental responses. *See* Section 410.203.

DECISION

Affirmed.

Although the transcript of the CCH is quite thick, the facts boil down quite simply. The claimant was a long-haul truck driver for (employer), on his way to California from (city 1) with another driver, with whom he alternated in eight-hour shifts. Each driver slept in a special berth compartment in the cab while the other drove. Consequently, there was no need to stay in a hotel. However, there was a need to stop periodically for meals and required shift rest breaks. Accordingly, on [Date of Injury], while in (city 2), California, after claimant had awakened from his time in the berth, the drivers stopped to have breakfast at a truck stop. Claimant and the other driver took showers, the cost of which was charged through to the employer, and then claimant sat down at a booth

and filled out his logbook. Claimant and his co-driver got in line at the buffet, filled their plates, and were headed back to the table when the claimant slipped, injuring himself. A statement from his co-driver corroborated the fall. There was evidence that the claimant's driving shift was not to start until 9:00 and he was "off duty," although he said he was on duty so far as the Texas Department of Transportation was concerned and he remained responsible for the employer's rig during this time.

When the claimant arrived at his California destination, he reported the injury and was directed to go to a local doctor of the employer's choice. He said the clinic was open at night and he was examined for about three minutes by the doctor, Dr. M, who just looked at his elbow. Claimant said he told Dr. M he had a stiff neck and was hurting, and Dr. M told him he could return to light duty but that he should not drive on the way back due to his neck. The claimant said he was flown home by the employer, who had arranged for an appointment for him with a Texas doctor, Dr. S, on April 9th. He was released to return home and given some restrictions which he could not recall at the CCH. Claimant said he had to go to the local hospital emergency room three or four days later due to pain in his back and leg. He was given a shot for pain relief and told to return but said he was unable to do so due to denial of his claim. He said regular health insurance would not pay because of their view that this was work related.

He found a doctor who was still willing to treat him although payment was in question. Dr. G took him off work beginning April 15th. An MRI ordered by Dr. G was noted by him on a September 15, 1999, Specific and Subsequent Medical Report (TWCC-64) as having shown a herniation at L5-S1. (The hearing officer reopened the record after the close of the CCH to admit the actual MRI report.)

Asked on cross-examination if he could have gone to "a topless bar" to eat, and thereby incurred liability for the carrier, claimant responded that truck drivers could not go where liquor was served. The carrier also inquired at some length into whether the claimant had told his employer that he sustained a workers' compensation injury when he worked for another employer. The claimant pointed out that the employer expected the driving teams to "keep rolling" and that if they stopped every two hours, they would probably be written up.

A document entitled BONA FIDE OFFER OF EMPLOYMENT was furnished to claimant on or about April 13, 1999. He said he did not return to work for the employer because he was still in a lot of pain. The form is essentially a "fill in the blanks" preprinted form that offers wages described as "85% AWW [average weekly wage]," for 40 hours a week, and states that the duties of the position(s) are "sedentary, clerical, security" and that he must be able to sit, stand, or walk "within limits." The doctor's restrictions were listed as no lifting more than 25 pounds, no prolonged sitting or standing. The area of the form for stating how long the offer will be open is blank. There is no beginning date listed.

Dr. M testified by telephone. He said he performed a physical examination lasting more than three minutes and that claimant gave a history of slipping in some

water at a restaurant and falling on his back. He agreed that he noted that claimant had neck, back, left shoulder and left elbow pain. He said claimant's neurological and sensory examination was normal. Dr. M observed no swelling, although there was tenderness in the trapezius area and around the elbow. He agreed that he told claimant if he was not better in four or five days he should consider physical therapy. Dr. M's opinion was that claimant had strained his neck, mid-back, and left shoulder; that he had a contused elbow; and that he felt this would resolve in a few days. He said that at 330 pounds and five feet seven inches in height, claimant would be considered obese. Dr. M said that while he was not employed by the employer or carrier, he was likely picked for referral because he was on a registry for treatment of work-related injuries. Dr. M agreed on cross-examination that it would be possible to have severe injuries to neck and back without swelling. He further agreed that when there were spinal injuries, the situation would worsen over time even if not evident immediately. While Dr. M agreed that many adults had bulging discs as a result of aging and degenerative disease, that trauma could cause these to become symptomatic.

Mr. K, the terminal manager for the employer, said that claimant would have been considered in an off-duty berth status at the time he was injured, with his partner being considered as "on duty" driver status. He said these statuses resulted from federal safety regulations. He said that claimant was offered a light-duty job where he would have answered telephones and viewed television monitors for security.

Whether the Injury is One Which Occurred in the Course and Scope of Employment

The continuing and somewhat bizarre arguments by the carrier about injuries in topless bars does not remotely resemble the facts before the hearing officer. What occurred was a breakfast-stop accident to a driver who was required to be on the road as part of a tandem driving team, engaged only in hauling cargo for the employer, a trucking company. The concept that some personal activities which are foreseeable activities for persons on their jobs may result in compensable injuries was set forth in the "personal comfort" doctrine established by the Texas Supreme Court in Yeldell v. Holiday Hill Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). In Yeldell, an employee, while at her duty station, had a telephone cord become entangled with a coffee urn that overturned and spilled hot coffee on her. She had just completed a telephone call to her daughter. In holding that the injury was sustained in the course of her employment, the supreme court said:

> An employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment and are thus compensable.

The court also cited Texas Employers Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.). In the Prasek case, the employee left the drilling rig to which he was assigned and went to a trailer house to eat dinner. He choked on some food and died. His death was held to have been sustained during the course of his employment.

Carrier argues that Yeldell's, *supra*, factual distinctions preclude it from being employed as authority in this case (no similar argument is made for Prasek, *supra*, which is not addressed at all), but as the claimant points out, there is authority rather directly on point. The case of Shelton v. Standard Insurance Company, 389 S.W.2d 290 (Tex. 1965), dealt with a similarly situated truck driver who was required to stay in a hotel. In Shelton, the supreme court was faced with the question of whether the claimant's injury "had to do with and originated in the work" when the claimant was struck by an automobile while crossing the street from the motel he was staying in to go to a café for the purpose of obtaining something to eat. The supreme court, stating that the Texas Workers' Compensation Act "must be given a liberal construction to carry out its evident purpose," found that injury was compensable. (The supreme court has dispelled doubt that this construction is also to be given to the 1989 Act in Albertson's, Inc. v. Sinclair, 984 S. W.2d 958 (Tex. 1999)). The following language from Shelton, *supra*, at 293 is instructive in this case:

> Most courts which have considered the question regard an employee whose work entails travel away from the employer's premises as being in the course of his employment when the injury has its origin in a risk created by the necessity of sleeping or eating away from home, except when a distinct departure on a personal errand is shown.

This is even truer when read in light of the Supreme Court's following comments in Shelton at 293-94:

> An injury has to do with, and arises out of, the work or business of the employer, when it results from risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business. [Citations omitted.] Petitioner was on a trip of several days duration for his employer. Food and sleep were necessary if he was to perform the work for which he was hired, and under the terms of his employment contract he was permitted to stop and satisfy these physical needs and was paid the expenses incident thereto. He was not in _____ by his own choice but was required to be there to do his job. By the very nature of the employment, moreover, the place and circumstances of his eating and sleeping were dictated by contingencies inherent in the work. Petitioner's situation was somewhat analogous, therefore, to that of an employee who is injured while off duty as the result of a risk arising from his occupancy of quarters furnished by the employer and where he is required to live under the terms of his contract. [Citations omitted.]

We accordingly affirm the hearing officer's determination that the injury the claimant sustained while having breakfast is compensable and occurred within the course and scope of employment as a truck driver for the employer. There was no evidence at all that claimant would have been in (city 2) but for the delivery he was making. Plainly, the interests of the employer are furthered by the team-driving arrangement which serves to move the cargo faster and cheaper from one point to another and the resultant need for the drivers to stop to clean up and eat is well within the personal comfort doctrine. Whether claimant was logged on duty or off does not preclude compensability given the nature of the job (*see* Shelton and Prasek, *supra*) and the fact that he is being brought along to serve as relief driver to the other driver and is thus required to go along for the ride when not driving. The arguments that the carrier makes about the defects of these premises may give it some subrogation rights, but do not forestall compensability. Neither would the fact that claimant was obese or may have had some degenerative disease; the employer takes the employee as he finds him.

The hearing officer's determination that claimant's slip and fall occurred in the course and scope of his employment is affirmed. Matters that the carrier asserted about the lack of credibility of the claimant did not change the basic facts and corroborated that claimant slipped and fell as he stated, and were matters, in any case, for the trier of fact to evaluate.

Whether Claimant Had Disability

The severity of the injury and whether it caused inability to work was for the hearing officer to determine. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no

writ). The hearing officer's determination that claimant had disability is sufficiently supported.

Whether a Bona Fide offer of Employment was Made That Would Result in Reduction of Temporary Income Benefits (TIBS)

The carrier argues that a bona fide job offer was made as that term is used in Section 408.103(e). The Texas Workers' Compensation Commission promulgated Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) to assist in analyzing the existence of a bona fide job offer. Rule 129.5(b) provides for situations where a written offer will be presumed to be a bona fide offer. However, the analysis of whether a job is one that the injured worker is reasonably capable of performing is made with reference to restrictions set out by the claimant or by the treating doctor. The hearing officer consequently found that the offer exceeded the claimant's physical capabilities. He could have just as likely found that the terse reference to "sedentary, clerical, security" fell somewhat short of a description of the duties that would be required, duties that Mr. K was able to concisely outline in his testimony at the CCH but were not contained in the offer. Reasonable minds could also differ as to whether "85% AWW" is a reasonably understood "wage" as Rule 129.5(b) requires. There was no dispute over the identity of the treating doctor and we find no basis for finding that the hearing officer's determination that Dr. G (as opposed to Dr. S, who was chosen by the employer) was the treating doctor was in error. We affirm the hearing officer's determination that the employer did not make a bona fide offer of employment such that TIBS could be reduced by imputed wages.

For the reasons set forth above, the decision and order of the hearing officer are affirmed in all respects.

Susan M Kelley
Appeals Judge

CONCUR:

Robert W Potts
Appeals Judge

Judy L Stephens
Appeals Judge