APPEAL NO. 000328

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 January 18, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____; and whether the claimant had disability and, if so, for what periods. The hearing officer determined that the claimant did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, requesting that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The essential facts in this case are undisputed. The claimant was employed as a bus driver on _____, and was scheduled to trade places with a previous driver and assume control of her assigned bus outside of (Hall), a dormitory on the (University) campus. The claimant's boyfriend dropped her off in front of Hall about 6:45 a.m., and she was scheduled to begin her route at 6:56 a.m. While waiting outside Hall, the claimant decided to buy bottled water and went into Hall to a public area, a snack bar, located on the second floor and purchased a bottle of water from a vending machine. On her way back to meet the bus driver, she slipped and fell down several stairs inside of Hall and sustained multiple injuries.

The claimant testified that her employer told her that it would be okay to use the facilities in Hall, and instructed her not to go any higher than the first floor of the building. The claimant presented an excerpt from the employee's manual which identifies the most common new operator errors and states:

> In order to operate quality service we must start on time. For this reason, it is important to understand that one minute late to work is considered late to work. Please get into the habit of aiming to arrive ten to fifteen minutes early so that if the unexpected arises, you are prepared.

The claimant argues that she became engaged in the course and scope of her employment at the time she arrived at the bus stop prior to leaving to obtain water, and that the personal comfort doctrine applies.

The Texas Supreme Court addressed the concept of the "personal comfort" doctrine 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 Appeals Panel affirmed benefits under the personal comfort and convenience doctrine in Texas Workers' Compensation Commission Appeal No. 94559, decided June 10, 1994, where a bus driver, while on a break that was not in violation of any company rule or policy, slipped on the steps of his bus. The Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991, a case applying the doctrine from an approved jury instruction as follows: ". . . an act at the place or area of employment necessary to the health, comfort, and convenience of an employee while within working hours, during a lunch period, or while preparing to begin work or leave the premises, is not a departure from the course of employment."

It is the carrier's position that the claimant had not yet begun performing her duties and was not in the course and scope of employment at the time of the injury, therefore, the personal comfort doctrine does not apply. The carrier argues that even if the claimant were found to be in the course and scope of employment at the time of the injury, the personal comfort doctrine does not apply because the injury did not occur on the employer's premises or in proximity thereto. That the injury did not occur on the employer's premises is not controlling. Texas Workers' Compensation Commission Appeal No. 961539, decided September 19, 1996; Texas Workers' Compensation Commission Appeal No. 972276, decided December 19, 1997 (Unpublished) .

The claimant had the burden to prove that she sustained an injury in the course and scope of her employment on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). He concluded that the claimant did not sustain a compensable injury on _____. In so determining, he found that the claimant had not yet assumed her duties and begun her activities in the course and scope of employment. The hearing officer analogized the case to that of the claimant stopping at a convenience store to buy water prior to work. Based on the hearing officer's finding that the claimant was not in the course and scope of employment at the time of her injury, he correctly determined that the personal comfort doctrine does not apply. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record

of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant did not sustain a compensable injury on _____.

The claimant appealed the hearing officer's finding of no disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge