APPEAL NO. 000765

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 March 21, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; and that the claimant had disability. The appellant (carrier) appealed, arguing that the claimant had been terminated before she had performed any activities in furtherance of her employer's business and that the injury did not occur while she performed any such activities. The carrier also argues that there is no disability due to the termination and that the claimant's injury did not prevent her from working. The claimant responded that the evidence shows that her effective date of termination was well after she was injured and that she would not have been at work that day if it was not a regularly scheduled workday.

DECISION

The decision is affirmed.

The claimant was employed by a gas station/convenience store owned by (employer). She said that on _____, a regularly scheduled workday, she reported for work for her 2:00 p.m. to 11:00 p.m. shift. The assistant manager on duty, Ms. B, told her not to check in on the computer "clock-in" system before the manager, Mr. J, spoke to her. Because Mr. J was not at the store, she had to wait until he came back. The claimant said she stood behind the counter talking to Ms. B while she waited. Mr. J told her that she had been short in her cash register on her previous workday and that she had also accepted a counterfeit $100 bill. The claimant said Mr. J did not tell her she was terminated; rather, she asked if he would prefer that she go home that day and he said he thought that would be "best." The claimant said that she knew after talking to Mr. J that she would not be working that day. She went to call her husband to come and get her. She said she had to call his pager as he was on the highway on the way to work. The claimant agreed that she had come up "short" before, but said this was because she was not properly trained to do her final paperwork.

The claimant said she lived about five blocks from the convenience store, but that her husband drove her to and from work because walking would have required crossing a freeway. However, she agreed that a bridge carried her over the freeway although she said that a sign indicated that there were to be no pedestrians. She said that, regardless of the distance, she was not a walker. The claimant estimated she was in the store about 15 or 20 minutes after talking to Mr. J. The claimant said that Mr. J offered once to drive her home but she declined because her husband did not want her riding with other men. She said she also called her mother-in-law but did not discuss any alleged termination with her. She called her husband's pager twice. She called from behind the counter, which was separated from the store by a slight step up and swinging doors. The claimant agreed that the telephone was a cordless phone but she did not ask Ms. B for the phone to use in the store itself.

The claimant tripped over a strip on the step that was loose while on her way to make the second phone call to her husband; this was witnessed by Ms. B and an ice cream delivery man. She said she twisted her back and fell to the floor. The swinging door hit her in the buttocks. When the witnesses asked her if she was okay, she said she was. However, the claimant said she was in pain but did not complain to Ms. B. She said that her husband ended up staying home with her because she was hurt.

The claimant sought medical treatment six days later, on a Monday. Her doctor was Dr. F. She said that she has also been treated by Dr. A. Neither doctor had released her back to work by the time of the CCH.

The claimant said her last working day before the injury was September 25th, but that another worker had finished counting her register. She was emphatic that Mr. J did not tell her on the day she was injured that she was "terminated." She was aware that as of November 1, 1999, her name was officially taken off the employer's payroll. However, she said she knew on September 28th that when she was going home, she was not coming back. The claimant agreed that she was not paid for the day of the injury and never actually "clocked in." However, she said that when she came in on September 28th, her name was still on the schedule that was posted. She said she marked it off after talking to Mr. J.

During the testimony, the claimant was asked to demonstrate the respective locations of Mr. J's area, the counter space, and the step involved. She denied, as suggested by carrier, that she could have simply reached over the counter to use the telephone rather than walking up into the area behind the counter.

Mr. J testified. He said that he had gone into the convenience store Sunday and done the paperwork to terminate the claimant because there had been a large cash shortage. The claimant also had that Monday off; Mr. J said he did not try to contact the claimant because the employer did not have a current telephone number for her. However, he tried to contact her at a "beeper" number she left and there was no response whatsoever. On cross-examination, he said that there was "no service" at this number.

Mr. J said that the claimant came in on September 28th and "reported to work that day." He said he was in his office and told the claimant not to clock in because he needed to talk to her. When he broached the subject of the cash shortage, she said she did not know about it and that is when he told her he had no choice but to let her go. He said that he made it clear from the first that she was being terminated. He said that he left to take a cash deposit to the bank and offered a ride several times. Mr. J said that after she was terminated, there was no reason for her to be behind the counter from that point on and, in fact, would not be allowed. He did, however, conduct an investigation in which he ascertained that she tripped as she was walking behind the counter to use the phone again and fell on all fours, hands and knees.

Mr. J said that before he left the store, he heard the claimant ask to use the telephone and saw Ms. B reach for it and hand it to the claimant over the counter. Although Mr. J denied he left the store, he did agree that he told Ms. B to have the claimant wait until he got back, this meaning that he was briefly in the restroom. While he did not use the word "terminate," he said he did say that she was "let go."

Mr. J was asked about the cash shortage; he said that there were always two people on duty at the store for safety reasons and that the claimant did not do her own closeout paperwork, but would have the other person assist her. However, he said that each cashier was responsible for closing out the register and that the other person on duty with the claimant did not have a problem with shortages. Mr. J said that he considered that the claimant was terminated on September 27th because he thought that the claimant would not be able to give him a good reason for the shortage. He had not gotten around to posting the new work schedule without the claimant's name. Then, he said, the new schedule was not posted because "everyone has the right to defend themselves."

Mr. J identified Ms. L as an employee of the employer's Austin headquarters. The claimant testified that she was informed by her doctor that Ms. L faxed a letter to her doctor in October 1999 to see what her capabilities were about returning to work. Mr. J said he was not aware of this letter.

The documentary evidence includes a "To Whom It May Concern" letter from the employer dated January 11, 2000, that stated that the claimant was terminated effective November 1, 1999. The faxed note from Ms. L asked Dr. F on October 7, 1999, to complete an attached medical release form regarding the claimant's ability to perform her job and return it to Ms. L at a "fax" telephone number for the employer. The claimant's diagnosis was lumbosacral strain, for which she received therapy and chiropractic treatments.

The Appeals Panel has held that a compensable injury can occur after there has been a termination, when the worker is engaged in expected activities such as picking up a paycheck or retrieving personal property. Texas Workers' Compensation Commission Appeal No. 91096, decided January 17, 1992; Texas Workers' Compensation Commission Appeal No. 961497, decided September 13, 1996. Leaving aside for a moment the various dates of termination in the record, compensability was not precluded in this case even if the hearing officer believed the claimant had been terminated by Mr. J prior to her injury. She had reported for work at her regularly scheduled time, she had not yet clocked in pursuant to instruction from a supervisor, and she talked with Mr. J about work-related business. Her wish not to take a ride home with the person who had arguably just terminated her does not remove her from the course and scope of activity. The hearing officer, as sole judge of the weight and credibility of the evidence, evidently believed the claimant fell as she said she did, and was doing so in the course of calling her husband again to take her home. While the evidence could have been developed more on whether the lumbar strain left the claimant with an inability to work, the hearing officer could consider the claimant's testimony that she had not been

released to work by her doctors and could see that she was in frequent therapy. The hearing officer could discount the effect of the purported "termination" on ability to work in light of the contact Ms. L made with Dr. F concerning the claimant's capabilities, written from an arguable desire to consider whether the claimant could return to her job or light duty.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that the evidence against the decision amounts to a great weight and, accordingly, affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge