APPEAL NO. 001529

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 June 7, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the course and scope of her employment when she had a motor vehicle accident (MVA) on ____________. The claimant appealed, contending that she was in the course and scope of her employment at the time of the MVA. The respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in: (1) failing to consider the distance and direction of claimant's travel and the reason claimant gave for driving on "back roads"; (2) stating that claimant failed to mention in her statement to carrier that she was taking her son to day care, when an addendum to claimant's statement showed it was mentioned; (3) misquoting claimant and stating that claimant said she was going straight to her office; (4) misquoting claimant, because claimant never said her "main" reason for going to (City A) was to see her probation officer; (5) discrediting claimant's testimony because claimant did not correctly state the location of her office; and (6) determining that claimant was "solely" on a personal mission at the time of the MVA, when claimant testified that she had already started her workday by making telephone calls and stopping by on a sales call.

Claimant worked in sales, stopping by customers to see if they needed supplies sold by employer. She said that on ____________, she made some calls from her home, left her home with her son at 8:45 a.m., and made more business calls in the company-supplied van on the cellular phone. Claimant said she also made a sales call on the way, before the MVA took place. At the hearing, claimant said she was on her way to City A to go to the office, make sales calls, drop off her son at daycare, and meet with her probation officer. Claimant said that, earlier that morning, she had called her probation officer and asked if he had any openings between 9:30 and 10:00 a.m. She said he replied that he did. Claimant said she was again talking to her probation officer on the cellular phone at 9:12 a.m. when a car that had been weaving on the road hit her partially "head on" going about 75 miles per hour, causing serious injuries to claimant and injuries to her son. Claimant said she was telling her probation officer that she would be late to her appointment. There was evidence from the probation officer that claimant's appointment was at 9:00 a.m. that morning, that claimant called to say that she would be late, and that he heard the sounds of the MVA on the telephone. Claimant said she would not have been going down that road if she had not been working for employer. She said she would have taken a different route had she been going to see her probation officer. She said she traveled the route she was on to visit a client and that, at the time of the MVA, she was on

her way to take her son to day care. Claimant did not have any evidence documenting the sales call she said she made before the MVA.

The hearing officer determined that claimant was not furthering the affairs of employer at the time of her injury in the MVA “because she was on a solely personal mission to report to her probation officer for a scheduled visit.” The hearing officer stated, “It does not seem probable that [claimant] would be making multiple business trips and dropping off her son at day care prior to reporting for her probation appointment that was scheduled for 9:00 a.m. when she didn’t leave the house until 8:45 a.m.” The hearing officer believed that, at the time of the MVA, claimant was traveling from her home to go to her appointment with her probation officer and that claimant was not furthering employer’s affairs at the time of the MVA.

A claimant has the burden to prove he or she sustained an injury in the course and scope of employment. 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 and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Section 401.011(12). The definition of "course and scope of employment" does not generally include transportation to and from the place of employment except in certain limited circumstances. The term "course and scope of employment," does not include:

(A) transportation to and from the place of employment unless:

(i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;

(ii) the means of the transportation are under the control of the employer; or

(iii) the employee is directed in the employee's employment to proceed from one place to another place; or

(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

(i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and

(ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

The "dual purpose" exception arises where the travel furthers both the employee's personal affairs as well as the employer's business, so long as the travel would have been made even if there had been no personal business and would not have been made in the absence of the employer's business. Section 401.011(12)(B). The Texas Supreme Court construed the dual purpose exception in Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824, 827 (Tex. 1969). The Court stated that the rule can be invoked only when "injury is sustained during the course of travel which furthers both the affairs or business of the employer and the personal or private affairs of the employee." The dual purpose exception does not apply when the injury occurs during the course of travel which is not in furtherance of the affairs or business of the employer. Johnson, *supra*. In applying the dual purpose rule, the hearing officer determined that claimant's travel did not further the affairs of the employer and that it furthered only the personal affairs of claimant. We cannot conclude that the hearing officer erred in considering the dual purpose rule and in applying the law to the facts she found. The hearing officer resolves any conflicts in the evidence. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). We conclude that there was sufficient evidence to support the hearing officer's determinations. Whether an injury is incurred within the course and scope of employment is a question of fact. Texas Employers Insurance Association v. Anderson, 125 S.W.2d 674 (Tex. Civ. App. - Dallas 1939, writ ref'd).

Claimant complains that the hearing officer did not consider the distance and direction of claimant's travel and the reason claimant gave for driving on the road she was driving. Claimant testified that, if she had not been working and if she had been traveling only to see her probation officer, she would have taken "back roads" rather than the route she took the morning of the MVA. The hearing officer did not find this testimony credible. Claimant argues that the testimony was credible because the "back roads" are more safe and have less traffic. However, the hearing officer was the one to hear claimant's testimony at the hearing and she decided what facts were established. We will not substitute our judgment for hers in this regard.

Claimant complains that the hearing officer stated that claimant "failed to mention," in her recorded statement to carrier, that she was taking her son to day care, when an addendum to claimant's statement showed it was mentioned. A reading of claimant's statement of August 9, 1999, reveals that claimant did not mention the day care or the appointment with the probation officer, but said that if the MVA had not happened, she would have "headed out to other sales calls." She also said she was heading to the office. The hearing officer could consider that claimant failed to mention the day care and the probation officer appointment in making her determinations. An addendum to a later statement, given by claimant to another interviewer a few days later, does state that claimant told that interviewer that she was taking her son to day care. However, that addendum did not apply to claimant's earlier statement.

Claimant complains that the hearing officer misquoted claimant and that claimant never said her "main" reason for going to City A was to see her probation officer. However, it is apparent that the hearing officer is the one who determined from the facts that

claimant's main reason for going to City A was to see her probation officer. The hearing officer could have considered the fact that claimant had a pre-established appointment with the probation officer for that morning and determined that claimant was traveling to City A for that reason.

Claimant contends that the hearing officer misquoted her and represented that claimant said she was going straight to her office. However, we have reviewed claimant's August 9, 1999, statement in this regard. The hearing officer could consider the fact that, in her August 9, 1999, statement, claimant said she was going to the office and to make sales calls, and that claimant did not mention that she had an appointment with her probation officer.

Claimant complains that the hearing officer discredited claimant's testimony because the hearing officer believed that claimant did not correctly state the location of her office. The hearing officer said claimant was not credible in stating that her office was in City A and said that the "office" was "simply a post office box." However, claimant said she was on her way to the day care and that the hearing officer found she was on her way to see her probation officer at the time of the MVA. Therefore, the hearing officer found that claimant was not furthering employer's affairs and, apparently, that if she had been, claimant had deviated from any business purpose at the time of the MVA. It is clear that the hearing officer doubted that claimant had an actual office in City A, despite evidence to the contrary that was admitted at the hearing. However, we conclude that any error in this regard did not cause the rendition of an improper decision in this case.

Claimant asserts that the hearing officer erred in determining that claimant was "solely" on a personal mission at the time of the MVA, when claimant testified that she had already started her workday by making telephone calls and stopping by on a sales call. Claimant also complains that the hearing officer believed that claimant was not on business calls at the time of the MVA because claimant said she was "running late." Again, these matters involved fact issues, which the hearing officer determined after viewing claimant and judging her credibility. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge